

ARTICLE 19

HR HELSINKI FOUNDATION
for HUMAN RIGHTS

Poland: Independence of public service media

January 2017

Country Report

Executive summary

In this joint report, **ARTICLE 19** and the **Polish Helsinki Foundation for Human Rights** (HFHR) analyse concerns regarding the independence of public service media (PSM) in Poland.

Since December 2015, the Polish Government has initiated a series of actions aimed at placing public service media broadcasters under its close control. A provisional law of December 2015 gave the Ministry of State Treasury the power to appoint and dismiss PSM's senior management and boards of directors. In June 2016, another law transferred these competences to a new regulatory institution, the National Media Council. Throughout 2016, public radio and television personnel have been under considerable pressure to refrain from criticising the evolution of the governance and operation of the PSM.

This report, published one year after these legislative changes, finds that the freedom, independence and pluralism of the media are under severe threat in Poland.

ARTICLE 19 and the HFHR offer recommendations aiming at bringing the legislation in conformity with international standards, which will support the development and reinforcement of a strong, independent media landscape. We also invite all international organisations to seize any opportunity to remind the Polish Government of its duties under international and European standards on freedom of expression, and to exert appropriate pressure on the Government for the implementation of our recommendations.

Key recommendations:

- The Law of 22 June 2016 on the National Media Council should be abolished;
- The Polish Government should implement the decision of the Constitutional Court of 13 December 2016 by swiftly adopting appropriate legislative changes to restore the full competences of the National Broadcasting Council – the regulatory authority recognised by the Constitution;
- The National Broadcasting Council should be able to appoint without delay new management and boards of directors to PSM in accordance with international standards;
- The Sejm - the lower chamber of the Polish Parliament - should cease any attempts to limit the work of the media, particularly by restricting access of journalists to governmental institutions, including Parliament;
- The Polish Government should ensure that the practice of politically-motivated dismissal of journalists and other staff in public service media broadcasters is ended immediately;
- The Polish Government should seize the opportunity of the general review of laws on PSM and the media more broadly to fully implement international standards on media freedom and independence. It should:
 - Reinforce the editorial independence and the financial sustainability of public service media broadcasters;
 - Reinforce the independence of the independent regulator for audiovisual media in accordance with international standards on freedom of expression;

- Ensure full conformity of national law with international standards on freedom of expression, including the protection and promotion of pluralism and diversity;
- The Polish Government must also ensure that the general review of laws on PSM and the media more broadly is carried out in a transparent and consultative manner that will allow all stakeholders to give their views.

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Introduction

Since December 2015, the Polish Government has initiated a series of actions aimed at placing public service media broadcasters – Polskie Radio (Polish Public Radio) and Telewizja Polska (Polish Public Television), jointly, the public service media (PSM) – under its close control. These and other actions¹ by the ruling party Law and Justice (PiS) have triggered unanimous condemnation from the Council of Europe, the OSCE and civil society.² The European Union has taken steps towards the application of Article 7 of the Treaty on the European Union, which could lead to the imposition of sanctions against Poland.³

Following the adoption of the Law amending the Broadcasting Law in December 2015,⁴ the PiS government has replaced the management of the PSM, and a significant number of journalists working in these outlets have been dismissed. While the Law of December 2015 was ruled unconstitutional in December 2016, the decision of the Constitutional Court did not have any corrective impact on the situation of PSM in Poland, as Parliament did not act to follow up on the decision of the Court. In addition, the Law of December 2015 was designed as interim legislation, which has now been replaced by the Law of 22 June 2016 on the National Media Council.⁵ In practice, this process confirmed the decisions implemented under the December 2015 Law.

One year later, **ARTICLE 19** and the **Polish Helsinki Foundation for Human Rights (HFHR)** have reviewed the compliance of these laws with international standards on the right to freedom of expression and freedom of the media.

From the outset, we note that while a democratically-elected government is legitimately able to implement the policies it deems necessary to deal with the challenges of the time, in a democratic society there can be no justification for tearing down the pluralistic and diverse media landscape that allows for free and informed public debates on all matters of general interest. Alongside the right of the media to seek and impart information and ideas, the public enjoys a corresponding right to receive unhindered flows of information. Free media allows an informed citizenry to question and hold public authorities accountable.

Under international standards on freedom of expression, public service media play an important role in the promotion of pluralism and diversity in the media landscape. In order to fulfil their role, public service media need to be independent from government and political forces: they cannot be reduced to being the megaphone of the political majority and must instead serve the interests of the general public. International law also requires solid legal guarantees of independence for the public bodies in charge of regulating the broadcast media sector.

¹ See the concerns of ARTICLE 19 about threats on the right to protest, [Poland: President Must Reject Proposed Restrictions on Protests](#), 15 December 2016.

² Council of Europe Commissioner for Human Rights, [Call on Polish President not to sign new Media Law](#), 5 January 2016; OSCE, [OSCE media freedom representative urges Poland's government to withdraw proposed changes to the selection of management in public service broadcasters](#), 30 December 2015; Council of Europe, [Polish Law on Public Service Broadcasting Removes Guarantees of Independence](#), 4 January 2016.

³ EU Commission, [Recommendation on the rule of law in Poland](#), C(2016) 5703 final, 27 July 2016.

⁴ Law of 30 December 2015 amending the Broadcasting Law, Official Journal 2016, poz. 25.

⁵ [Law of 22 June 2016 on the National Media Council](#), Official Journal 2016, poz. 929.

We offer recommendations aiming at bringing Polish legislation in conformity with international standards, which will support the development and reinforcement of a strong, independent media landscape.

We also invite all international organisations to seize any opportunity to remind the Polish government of their duties under international law on freedom of expression, and to exert appropriate pressure on the Polish government for the implementation of the recommendations contained in this report.

Applicable international standards

Under international law, media policy lies at the heart of two distinct duties of public authorities. On the one hand, freedom of expression requires that the government refrain from interference in the media; on the other, states are obliged to adopt positive measures that give effect to the right to freedom of expression and ensure that it is fully respected and promoted.⁶ States are thus under an obligation to create an environment in which a diverse, independent media can flourish, thereby satisfying the public's right to know. A crucial aspect of this positive obligation is the need to promote pluralism.⁷ A number of international instruments stress the importance of PSM in promoting diversity and pluralism, and in fostering equal access of all to the media.

Public service media

Public service media – an independent media company which is funded by the public, with a board appointed by public bodies, in order to broadcast public interest content – contribute to pluralism and diversity in the media landscape. In combination with commercial media and community media, it is an essential component of a balanced media landscape. Its remit should include the provision of quality, independent programming that contributes to the plurality of opinions and information available to the public. Indeed, a core element of the remit of any PSM is to present accessible news and current affairs programming which is impartial, accurate and balanced.

As part of its remit, the PSM should encourage and essentially act as a forum for democratic debate as a contributor to social cohesion and the integration of all individuals and communities. PSM also ensure the availability of programming in areas that are unprofitable and therefore ignored by commercial channels, such as programmes for children, regional, rural or minority groups. As part of its mission, the PSM has an important role to play in explaining political, social, economic or cultural developments in society to the public.

In order to fulfil its complex function, the PSM requires an appropriate governance structure that is independent of the government and political interests and is publicly accountable. It also requires a stable and adequate funding mechanism protected from arbitrary interference. In particular, the following principles apply to the legal framework of public service media:⁸

- Public broadcasters should be overseen by an independent governing body such as a Board of Governors. In particular, independence should be guaranteed and protected by law in the following ways:
 - Specifically and explicitly in the legislation which establishes the independent body and, if possible, also in the constitution;
 - By a clear legislative statement of goals, powers and responsibilities;
 - Through the rules relating to appointment of members;
 - Through formal accountability to the public through a multi-party body;
 - Through respect for editorial independence; and

⁶ C.f. Article 2 of the International Covenant on Civil and Political Rights (ICCPR).

⁷ European Court, *Informationsverein Lentia and Others v. Austria*, 24 November 1993, para. 38. The respect for freedom and pluralism of the media is also required under Article 11 of the EU Charter of Fundamental Rights.

⁸ ARTICLE 19, [Access to Airwaves: Principles on Freedom of Expression and Broadcast Regulation](#), 2002.

- Through its funding arrangements.
- The independent governing body of the PSM should be responsible for appointing the senior management of public broadcasters. The senior management should be accountable only to this body which, in turn, should be accountable to an elected multi-party body. The appointments' process for the management should be open and fair; individuals should be required to have appropriate qualifications and/or experience, and a clearly defined list of exclusions for appointments to the regulatory bodies (the 'rules of incompatibility') should also apply to senior management. Individual members of management should have a right to written reasons for any serious disciplinary action against them, including dismissal, and to a judicial review of such actions.
- The role of the governing body should be clearly defined in law. Its role should include ensuring that the public broadcaster fulfils its public mandate in an efficient manner, and protecting the PSM against interference. The governing body should respect the principle of editorial independence and should never impose prior censorship. The senior management should be responsible for running the broadcaster on a day-to-day basis, including in relation to programming matters.
- PSM should be adequately funded, taking into account their remit, through a mechanism that protects them from arbitrary interference with their budgets.

Broadcast regulatory bodies

An additional necessary component of media policy under international law is the establishment of an independent regulatory body charged with monitoring the activity of the PSM. The regulatory body should be empowered to examine complaints against the PSM and impose sanctions, as provided by law, when necessary.

All broadcast regulatory bodies should be protected against interference, particularly interference of a political or commercial nature. The legal status of these bodies should be clearly defined in law. Their institutional autonomy and independence should be guaranteed and protected by law, including in the following ways:⁹

- Specifically and explicitly in the legislation which establishes the body and, if possible, also in the constitution;
- By a clear legislative statement of overall broadcast policy, as well as of the powers and responsibilities of the regulatory body;
- Through the rules relating to membership;
- By formal accountability to the public through an elected multi-party body; and
- Through its funding arrangements.

Moreover, the following principles apply to the legal framework of regulatory authorities for broadcast media:¹⁰

- Legislation establishing regulatory bodies should clearly set out the policy objectives underpinning broadcast regulation, which should include promoting respect for freedom of expression, diversity, accuracy and impartiality, and the free flow of information and ideas.

⁹ See ARTICLE 19, *Access to Airwaves*, *op. cit.*, 2002.

¹⁰ For a complete presentation, see ARTICLE 19, *Access to Airwaves*, *op.cit.*, 2002.

- Members of the regulators' boards should be appointed in a manner which minimises the risk of political or commercial interference. Members of boards should serve in their individual capacity and should at all times exercise their functions in the public interest.
- The process for appointing members to the regulatory body should be open and democratic, should not be dominated by any particular political party or commercial interest, and should allow for public participation and consultation. Membership overall should be required to be reasonably representative of society as a whole.
- Clearly defined list of exclusions for appointments to the regulatory bodies (the 'rules of incompatibility') should be set out.¹¹
- Members should be appointed for a fixed term and be protected against dismissal prior to the end of this term.¹² Only the appointing body should have the power to dismiss members and this power should be subject to judicial review.
- The law should provide explicitly for clear, transparent and fair processes in relation to all powers exercised by regulatory bodies that affect individual broadcasters or media companies. All decisions of regulatory bodies should be subject to the principles of administrative justice, be accompanied by written justification, and be subject to judicial review.
- Regulatory bodies should be formally accountable to the public through a multi-party body, such as the legislature or a committee thereof, rather than a minister or other partisan individual or body. They should be required by law to produce a detailed annual report on their activities and budgets, including audited accounts (which should be published and widely disseminated).
- Regulatory bodies should be adequately funded; their funding mechanism should never be used to influence their decision-making.

Accreditation

Journalists should have access to public and government buildings for the purposes of newsgathering, unless said buildings lack capacity or there is legitimate concern that a large media presence could hinder effective decision-making processes. To prevent overcrowding, accreditation schemes may be in place, but these must respect the test of necessity; accreditation schemes must not be susceptible to political interference and should impair newsgathering as little as possible. In their 2003 joint Declaration, the UN, OSCE and OAS Special Mandates on Freedom of Expression further explained:

¹¹ In particular, No one should be appointed who a) is employed in the civil service or other branches of government; b) holds an official office in, or is an employee of a political party, or holds an elected or appointed position in government; c) holds a position in, receives payment from or has, directly or indirectly, significant financial interests in telecommunications or broadcasting; or d) has been convicted, after due process in accordance with internationally accepted legal principles, of a violent crime, and/or a crime of dishonesty unless five years has passed since the sentence was discharged.

¹² In particular, A member should not be subject to dismissal unless he or she a) no longer meets the rules of incompatibility, as set out above; b) commits a serious violation of his or her responsibilities, as set out in law, including through a failure to discharge those responsibilities; or c) is clearly unable to perform his or her duties effectively.

Accreditation schemes for journalists are appropriate only where necessary to provide them with privileged access to certain places and/or events; such schemes should be overseen by an independent body and accreditation decisions should be taken pursuant to a fair and transparent process, based on clear and non-discriminatory criteria published in advance.

As a matter of principle, journalists should have access to court proceedings, as part of the right to a fair trial and the principle of open justice.

Restrictions on foreign ownership

Restrictions on the extent of foreign ownership and control over national or local broadcasters may be imposed if they prove to be necessary to ensure that the broadcast media retain a certain local character, and that the public has access to programmes, information and ideas emanating from their own society. The imposition of such restrictions should take into account the need for the broadcast sector to develop, as well as for broadcasting services to be economically viable.¹³

Freedom of expression of PSM employees

In its decisions in *Fuentes Bobo v. Spain*¹⁴ and *Wojtas-Kaleta v. Poland*¹⁵, the European Court of Human Rights confirmed that the dismissal of PSM employees after they publicly criticised certain decisions of their employers, amounted to a violation of the right to freedom of expression. PSM personnel should remain free to contribute to public debates on topics of general interest, such as the operation and management of PSM companies.

¹³ See, ARTICLE 19, *Access to Airwaves*, op. cit.

¹⁴ European Court, *Fuentes Bobo v. Spain*, 39293/98, 29 February 2000.

¹⁵ European Court, *Wojtas-Kaleta v. Poland*, no. 20436/02, 16 July 2009.

One year of threats to public service media in Poland

According to the 2015 edition of the European Media Pluralism Monitor,¹⁶ the media market in Poland is highly concentrated, with insufficient transparency of ownership and no rules on cross-ownership. In such a context, the contribution of independent public service media to the diversity of information and ideas is all the more important. The report noted that improvement would be needed in the appointment processes of the National Broadcasting Council, whose membership should represent the whole of society and include representatives from civil society. It also expressed concern regarding the distributions and commissions of public advertising in the media.

The report further noted that the appointment procedures for the management and supervisory boards of public service media “do not guarantee the independence of the PSM boards from the governing political groups. The political culture in Poland has repeatedly proven that there has been a big appetite for the political control of [both National Broadcasting Council] and PSM’s Supervisory as well as Management Boards.”¹⁷

The Law of 30 December 2015 amending the Broadcasting Law

As noted above, on 29 December 2015, the Polish Sejm (the lower chamber of Parliament) adopted the Law amending the Broadcasting Act of 29 December 1992 (the 2015 Law). The amendments gave the Ministry of State Treasury competence to appoint the management and boards of directors in public service media, thus substantially narrowing the role of the National Broadcasting Council, which was previously responsible for these appointments. The 2015 Law also eliminated transparent and public competition for positions of authority in PSM, and removed fixed terms of office. The 2015 Law was provisional, and remained in force until the end of June 2016.

The 2015 Law changed the rules governing appointments and dismissals of PSM board members. In particular, the 2015 Law introduced the following regulations:

- The Minister of the State Treasury was granted the power to appoint and dismiss members of the PSM’s management and supervisory boards;
- Senior officials in the PSM were no longer to be selected through transparent and public competition procedures;
- Members of the governing bodies of PSM were no longer to serve a fixed term of office;
- The role of the National Broadcasting Council was limited;
- Upon the 2015 Law’s entry into force, the incumbent senior management of the Polish Public Television and the Polish Public Radio would be dismissed from their posts;
- Provisions that protected the tenure of high-level staff positions in PSM broadcasters were removed.¹⁸

The 2015 Law assigned a deadline for the Sejm to adopt comprehensive legislation in order to reform the PSM. On 22 June 2016, when it was obvious the reform would not be ready

¹⁶ Centre for Media Pluralism and Media Freedom, [Media Pluralism Monitor](#), Monitoring Risks for Media Pluralism in EU Countries, 2015. The study was realised before the adoption of the media laws discussed in this report.

¹⁷ [Media Pluralism Monitor 2015 – Results](#), Poland, October 2015.

¹⁸ [Opinion of the Helsinki Foundation for Human Rights](#), 14 June 2016.

according to the timetable set out in the 2015 Law, Sejm adopted new legislation (the 2016 Law)¹⁹ that was supposed to bridge the gap left by the 2015 Law, which was due to expire in June 2016, and initiate the series of legal reforms of the PSM.

Despite its importance in a democratic society, the planned overhaul of PSM was not subject to any public consultation, and stakeholders were prevented from thoroughly reviewing the 2015 Law and submitting their comments.²⁰ Subsequently, the adoption of this Law was met with a slew of criticism from Polish civil society and international organizations.²¹

Constitutional review

On 24 March 2016, the Polish Ombudsman and a group of MPs filed a constitutional challenge against the 2015 Law to the Constitutional Court.²² In the complaint, they claimed that:

- The 2015 Law bypassed the constitutional competences attributed to the National Broadcasting Council and transferred them to the Ministry of State Treasury;
- The manner in which the 2015 Law had been adopted (haste and lack of consultation) was contrary to the rule of law principles guaranteed in Article 2 of the Constitution;
- The way in which supervisory boards and management boards were selected, and the dismissal of the management boards following the entry into force of the 2015 Law, violated Articles 14 and 54 of the Constitution, which protect freedom of expression and freedom of the media.

In its decision of 13 December 2016,²³ the Constitutional Court rejected the claim of unconstitutionality with regards to the manner in which the 2015 Law had been adopted. However, the Court found that the exclusion of a constitutional body, the National Broadcasting Council, from the decision-making process in the appointment of PSM management and supervisory board, was contrary to the freedom of expression guarantees of the Constitution and to the provisions regulating the PSM in the country (Article 213, para 1 of the Constitution). The Court stated that although the legislature has the right to design the public service media system of the country, it does not have the right to bypass the constitutional provisions in that sphere, namely the competences attributed to the National Broadcasting Council by the Constitution. Therefore, only an independent and autonomous body, such as the National Broadcasting Council, should have the authority to nominate and dismiss management and supervisory boards of PSM.

Disregarding the Constitutional Court decision, the newly elected National Media Council (see below), composed in its majority of active politicians, continues to appoint management boards of PSM. In January 2017, a competition was announced for the appointment of the President of the Polish Public Radio.²⁴

The Law of 22 June 2016 on the National Media Council

On 21 April 2016 three draft bills were introduced to the Sejm to implement the complex revision of regulation of public media,²⁵ including revision of the television fee and the

¹⁹ *Op.cit.*

²⁰ *Ibid.*

²¹ [Opinion of the Helsinki Foundation for Human Rights](#), 30 December 2015.

²² The Polish Ombudsman, [Request to the Constitutional Court on the media law](#), 24 March 2016.

²³ [Judgment of 13 December 2016](#), case file K 13/16,

²⁴ [Sejm, Competition announcement](#).

²⁵ Draft No. 442, 443 and 444.

financing of PSM. However, as a result of protests by Polish NGOs²⁶ and international organizations²⁷ the Sejm did not process the bills. The Sejm acknowledged that such complex amendments to the financing structure of the PSM would necessitate a lengthy notification process before the EU Commission; the bills could not be adopted prior to the June 2016 expiration of the 2015 Law.

The 2016 Law on the National Media Council introduced a new institution, the National Media Council (the Council),²⁸ which exists outside of the framework of the Polish Constitution.²⁹ The Council's competences in many respects mirror the competences of the National Broadcasting Council. The major task of the Council is to appoint and dismiss members of PSM bodies and the Polish Press Agency (Article 2), over which it has supervisory powers. It also has competence to control public broadcasters.

The 2016 Law on the National Media Council provides that:

- The five members of the Council must fulfil their functions independently and in the public interest (Article 9);
- The Sejm appoints three members of the Council and the President appoints two; those appointed by the President are chosen from candidates nominated by the largest opposition clubs³⁰ in the Lower House, as specified at Article 6;
- All Council members must be Polish citizens who “[stand] out for his/her expertise and experience in matters relating to tasks and operation of the media” (Article 5).

The 2016 Law on the National Media Council also stipulates that Council members cannot be anyone who:

- Holds a function in a body endowed with executive power, membership in local government, employment or membership of the national government or local government, employment in the Chancellery of the President;
- Is a member or employee of the National Broadcasting Council;
- Is a holder of shares or interests in the Company or a person participating in a different way in an entity which is a media service provider or a radio or television producer.³¹

The President of the Council is elected from its members. The Council must present a yearly report to the Sejm, Senate and President, and the report is also publicly accessible. The Sejm, Senate and President and President of the Council can submit comments to the report. The Council is obliged to address these comments within 30 days.

The 2016 Law envisages that the administrative and organizational needs of the Council are serviced by the Chancellery of the Sejm.

Under the 2016 Law, powers that were previously given to the Ministry of State Treasury were transferred to the Council, thereby transferring direct control over PSM from the government to the Council (Articles 17 – 19 include amendments to other laws to that effect).

²⁶ HFHR's opinion of [the Law on the national media - still no separation of media from the world of politics](#), 27 April 2016.

²⁷ [Council of Europe experts opinion](#), 6 June 2016.

²⁸ [Law of 22 June 2016](#), Official Journal 2016, pos. 929.

²⁹ Under Article 213 para 1 of the Constitution, the body with control over public media and freedom of expression in Poland is the National Broadcasting Council.

³⁰ Opposition clubs gather MPs from parties that are not part of the ruling coalition.

³¹ Law of 22 June 2016, *op.cit.*, Article 5.

The Council has broad powers over the Public Media Fund. This fund, as yet to be established, will be resourced through subscription fee income and public support of the media; it will become a major source of income for PSM broadcasters. It will have unrestricted insight into the administrative, financial and programming affairs of PSM broadcasters.

The Council was appointed in July 2016. Three appointees were active politicians of the ruling party PiS. In the first month of its operation, the Council adopted its internal rules of proceedings, conducted a competition for the President of the Polish Public Television, decided that the management boards of PSM would be composed of one person and changed some of the PSM companies' statutes. All of these decisions are available on the Sejm website.

Further restrictions on the media

The legislative changes have been accompanied with further restrictions on the media in the country. In particular:

- On 14 December 2016, the Speaker of the Sejm (a member of the ruling party PiS) announced new rules that limited journalists' access to parliament buildings – the plenary room and hallways of the Sejm – on the basis that, allegedly, “their presence created a chaotic work environment.”³² The text of the rules has not yet been made available to the public. It was announced that a special media centre would be created where journalists could wait for MPs. Further, the number of accreditations granting access to the special media centre would be limited; as a rule, media outlets would be able to appoint only two correspondents to report on the activities of the Sejm.³³

This represents a significant change from the existing practice whereby Polish journalists enjoyed unfettered access to the Sejm, and were able to interact with MPs. This meant that they were able to expose some negative practices in Parliament, such as, for example, MPs appearing drunk or sleeping in the debating chamber. The announcement of the new rules was met with criticism by the press and the opposition. Opposition MPs blocked access to the podium in the main debating chamber of parliament for several weeks.

On 8 January 2017, the Senate spokesperson announced that there would be no change to the rules governing media access to the parliament buildings, and that journalists would be permitted to enter hallways and the main plenary room without restrictions. However, a special media centre has already been built in the Sejm and its status remains unclear.

- On 30 November 2016, the Parliamentary Committee of Culture and Media organized a session devoted to the alleged need to “re-polonize” (establish a stronger Polish nature of) commercial media. The Ministry of Culture announced the drafting of a new law that will limit foreign ownership of commercial media.³⁴ The text of the draft law has not yet been made public and no further reasons for the introduction of such a law have been provided. It is expected that the law will impact on regional media companies, which are funded by German investment.

³² See, HFHR, [Opinion on the Restrictions for the work of the media in the Polish Parliament](#), 10 January 2017.

³³ *Ibid.*

³⁴ The minutes from the session are available [here](#).

- We also observe that there has been considerable pressure on PSM personnel to abstain from protesting, or even criticising, the evolution of media laws and the governance of the PSM. These pressures have been exerted through labour law, taking the form of suspensions, dismissals, non-renewal of freelance contracts, and substantial changes to their professional duties.³⁵

It is estimated that since December 2015 more than 188 of PSM employees have either left their posts or been dismissed on the basis of political motivation. This includes for instance the well-respected journalist Kamil Dąbrowa, editor-in-chief of Polish Radio Channel One, and Piotr Kraśko, Chief and Presenter of “Wiadomości” TVP.³⁶ Tomasz Zimoch, a sports journalist at Polish Radio was suspended in May 2016 after he gave an interview in which he criticised the situation in PSM.³⁷

Lack of financial resources and the difficulties in bringing evidence of the political motivation for dismissal explains why few such cases have been brought to court. However, with the support of HFHR, some of those affected have challenged their dismissal in court. Most cases were still pending at the time of writing.

³⁵ For example, in November 2016 Małgorzata Spór and Anna Zaleśna, journalists working for the newsroom of Radio “Trójka” were transferred to archiving positions, for preparing information for broadcast against instructions of the management of the radio. Their treatment prompted protests by listeners and journalists. A petition was delivered to the radio station’s management board, signed by 120 employees; see, [Onet Wiadomości, Protests of Polish Journalists](#), 17 November 2016.

³⁶ Journalist Kamil Dobrowa was dismissed in January 2016 after he had organised a protest action against the new legislation by playing the Polish anthem and the anthem of the European Union on air every hour. On 24 January 2016, the District Court found this to be a wrongful dismissal and granted him compensation. The case was pending on appeal at the time of writing. Case file no. VII P 164/16; see also see Helsinki Foundation for Human Rights, [The court dismissal of the Radio One Chief was unlawful](#), VII P 164/16. The monitoring of dismissals in PSM is conducted by [Towarzystwo Dziennikarskie](#).

³⁷ In June 2016 his case was examined by the Ethics Committee of Polish Radio, which found that he had violated journalistic ethics and had damaged the reputation of Polish Radio. Three days later, Zimoch resigned as a result of harassment and requested compensation for constructive dismissal. Polish Radio, however, brought a case against him for unfounded resignation without notice, as well as for damaging the reputation of Polish Radio. The case was pending at the time of writing.

Comments on the legislation

The Law of 30 December 2015 amending the Broadcasting Act

ARTICLE 19 and HFHR consider that the 2015 Law is incompatible with the above outlined international law on freedom of expression. In particular, we wish to highlight the following problems:

- **Control over the membership and the management of the PSM:** The 2015 Law gave the Minister for State Treasury the power to directly appoint the management and board of directors of the PSM broadcasters, thus placing them under the direct control of the government. Owing their appointment to the Minister, and with their dismissal determined by the Minister, persons appointed to management positions and the board of directors would be likely to relay governmental pressure on editorial freedom. This is a blatant violation of the principle of the independence of the media and, in particular, of PSM. It also amounts to a severe threat for media pluralism and diversity, as the PSM broadcasters are reduced to being the mouthpiece of the government. It may also lead to the boosting of the executive's influence on the content presented by PSM, which will enable the ruling majority to align the content broadcast with the party line.³⁸ As outlined in the previous section, under international standards on freedom of expression, the independence of PSM must be protected in legislation as well as in practice.
- **Failure to comply with the Polish Constitution:** As affirmed by the Constitutional Court in December 2016, the 2015 Law does not respect the powers conferred by the Constitution to the National Broadcasting Council, which raises additional concerns under international law. The rule of law demands that national legislation in the field of media (and generally in all sectors) should respect the constitutional order, including the protection of fundamental freedoms.
- **Lack of consultation:** the 2015 Law was adopted without consultation of relevant stakeholders. Important modifications in the governance of PSM should be debated widely and publicly in a manner that allows all stakeholders to provide their views.

The Law of 22 June 2016 on the National Media Council

As outlined above, a new supervisory body for the PSM – the National Media Council – was established by the 2016 Law on the National Media Council.

ARTICLE 19 and HFHR note that while similar institutions exist in some countries where the regulatory bodies for public and private media are distinct entities, the context for the creation of the Council in Poland is in itself sufficient to amount to a violation of international law on freedom of expression. A constitutionally recognised regulatory authority for audiovisual media – the National Broadcasting Council – already existed and operated in Poland. Even if there had been a corresponding modification to the Constitution to replace the National Broadcasting Council with the National Media Council, no justification for this replacement has been forthcoming. This should have been a topic for in-depth public consultation and public debate both in and outside Parliament. In these circumstances, the creation of the new

³⁸ [Opinion of the Helsinki Foundation for Human Rights](#), 31 December 2015.

Council appears to be an attempt to pay only lip service to the principles of regulatory bodies' independence.

In addition, whilst the 2016 Law provides certain formal safeguards for the independence of the new Council, these guarantees remain insufficient under international standards on freedom of expression. In particular:

- **Political control over the Council:** It is possible for the Council members to hold political mandates in Parliament. Indeed, upon the creation of the Council three MPs were appointed as its members. We reiterate that under international standards on freedom of expression, the regulatory authority as well as the board of directors of public service media broadcasters should represent the whole of society, and the appointment processes should be open and transparent and include the participation of civil society;
- **Financial control:** The financial affairs of the Council are managed by the Chief Officer of the Chancellery of Sjem. An independent regulatory authority should have legal personality and have the capacity to manage its own operations, including its own staff and financial operations;
- The Council holds discretionary competence to suppress or create high-level managerial positions in the PSM, which makes it an effective instrument to control broadcasters and further undermine their independence. The PSM and the regulatory authority should both work in the interest of, and be accountable to, the public – and not the government. Under international standards on freedom of expression, the independence of both the regulatory body and the PSM must be protected in law and in practice.

Further restrictions on media freedom

Other initiatives by the government raise concerns under international law on freedom of expression:

- The restrictions on journalists' access to Parliament would hinder the news-gathering work of journalists and, as detailed above, can only be justified under international law where such restrictions are absolutely necessary, operated in a non-discriminatory manner and are overseen by an independent body;
- Restrictions on foreign ownership of, and investment in, private media, especially at the regional level, would have a negative impact on media pluralism. Limits on foreign ownership should take into consideration the need for the broadcast sector to be able to develop and be economically viable;
- Employees of PSM organisations have the right to take part in public debates about the governance and management of the PSM. All forms of labour-related pressures to prevent them from bringing forth legitimate contributions to public debates are a violation of freedom of expression.

Recommendations

- We believe that the existing problems of the PSM law cannot be rectified by amending the law: the Law of 22 June 2016 on the National Media Council should simply be abolished;

- The Polish Government should implement the decision of the Constitutional Court of 13 December 2016 by swiftly adopting appropriate legislative changes to restore the full competences of the National Broadcasting Council – the regulatory authority recognised by the Constitution. The National Broadcasting Council should be able to appoint without delay the new PSM management and boards of directors in accordance with international standards;
- The Polish Sejm should cease any attempts to limit the work of the media, particularly stop restricting access to governmental institutions, such as Parliament;
- The Polish Government should ensure that an end is swiftly brought to the practices of politically-motivated dismissal of journalists and other staff in public service media broadcasters;
- The Polish Government should seize the opportunity of the general review of laws on PSM and the media more broadly to fully implement international standards on media freedom and independence. It should:
 - Reinforce the editorial independence and the financial sustainability of public service media broadcasters;
 - Reinforce the independence of the independent regulatory body for audiovisual media in accordance with international standards on freedom of expression;
 - Ensure full conformity of national law with international standards on freedom of expression, including the protection and promotion of pluralism and diversity.
- The Polish Government must also ensure that the general review of laws on media is carried out in a transparent and consultative manner that will allow all stakeholders to give their views.

About ARTICLE 19 and HFHR

ARTICLE 19 advocates for the development of progressive standards on freedom of expression and freedom of information at the international and regional levels, and their implementation in domestic legal systems. The Law Programme has produced a number of standard-setting publications which outline international and comparative law and best practice in areas such as defamation law, access to information and broadcast regulation.

On the basis of these publications and ARTICLE 19's overall legal expertise, the organisation publishes a number of legal analyses each year, comments on legislative proposals as well as existing laws that affect the right to freedom of expression. This analytical work, carried out since 1998 as a means of supporting positive law reform efforts worldwide, frequently leads to substantial improvements in proposed or existing domestic legislation. All of our analyses are available at <http://www.article19.org/resources.php/legal>.

If you would like to discuss this analysis further, or if you have a matter you would like to bring to the attention of the ARTICLE 19 Law Programme, you can contact us by e-mail at legal@article19.org. For more information about the ARTICLE 19's work in Europe, please contact Katie Morris, Head of Europe and Central Asia, at katie@article19.org.

Helsinki Foundation for Human Rights is the oldest non-governmental organization dealing with human rights in Poland and in the post-soviet region. Since 2008 the HFHR runs a project Observatory of Media Freedom in Poland, preparing legal analysis of media situation in Poland and providing legal aid to journalists and bloggers facing criminal and civil defamation cases, censorship or any other interferences with the right to freedom of expression. Article 19 and Human Rights House Foundation were initial partners of the project. The HFHR is engaged in a number of proceedings initiated by journalists dismissed from public media. All our analyses are available at: www.hfhr.pl/en/publications/

If you would like to discuss this analysis further, or if you have a matter you would like to bring to the attention of the HFHR Observatory of Media Freedom in Poland legal team, you can contact us by e-mail at hfhr@hfhr.pl