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Honourable Member of Parliament,
Mr. Marek Kuchciński,
Speaker of the Sejm
of the Republic of Poland

Comments by the Helsinki Foundation for Human Rights to the Private Members' Bill on Amending the Broadcasting Law (Sejm Paper No. 158)

I. General Remarks

The Broadcasting Law Amendment Bill is "the first step of the public media reform aimed at creating national media", as outlined in the notes to the draft. The Bill amends the terms and conditions of appointing and dismissing members of management boards and supervisory councils in public media and limits the powers of the National Broadcasting Council, a body established under the Polish Constitution. The reform will significantly affect the exercise of the constitutionally guaranteed freedom of speech, including the right to information. This has a bearing on the quality of democracy in Poland. The reform carries enormous political weight yet it has not been subject to any public consultation even though there has been a wide public debate in Poland for many years about the need to reform public media. The Helsinki Foundation for Human Rights (hereinafter referred to as "HFHR") has long been involved in the debate¹.

While a government officer (plenipotentiary) for public media reform has been appointed and the Ministry of Culture and National Heritage has apparently been working on the reform the current draft legislation has been formally submitted to Parliament as a Private Members' Bill. HFHR strongly believes the choice of this procedure is inadequate and ungrounded. Note that this procedure allows to bypass public consultations. Meanwhile, we wish to point out that a number of international human rights organisations (e.g. Committee of Ministers of the Council of Europe², the Council of Europe Commissioner for Human Rights³ or the OSCE Special Rapporteur on Freedom of Expression⁴) have voiced the need for public consultations in any public media reforms. These institutions have often expressed criticism of instances of hasty implementation of such reforms in other countries, where a thorough review of the proposed reform dossier was not possible and stakeholders were not able to provide comments.

¹ Open letter of the Helsinki Foundation for Human Rights regarding staffing policies in public media, [LINK]
Appeal for the strengthening of international desks in public media, [LINK]; See D. Głowacka, A. Bodnar, *Niezależność redakcyjna w mediach publicznych* [Editorial Independence in Public Media], [LINK]; HFHR position paper on pressure exerted on RDC journalists, [LINK]

² Committee of Ministers of the Council of Europe, Recommendation on pluralism and diversity in media, No. CM/Rec(2007)2, [LINK].

³ Commissioner on Human Rights of the Council of Europe, Opinion on the Hungarian media law in the light of Council of Europe standards on media freedom, [LINK]

⁴ Report of the OSCE Special Rapporteur on the Freedom of Speech from 28 November, 2013 to 18 June 2014, [LINK]

It should also be stressed that it is relatively hard to make an informed assessment of the proposed amendments as "the first step of the reform" ultimately leading to what the proponents call "the creation of national media via institutions that are not joint-stock companies and have stable funding sources". In the light of such a general language and further detailed plans for the public media reform being unknown today it is hard to assess whether or not the current amendment is an adequate policy towards this goal.

II. **Specific Remarks**

The sheer legislative procedure aside, there are serious concerns regarding the proposed new rules of appointing managers in public media. HFHR believes the proposed change may lead to a much deeper political bias of public media. Below are our detailed remarks in three areas: (1) appointment of public media managers; (2) the National Broadcasting Council's mandate to protect pluralism in public media; and (3) the length of *vacatio legis*.

1. Appointment of Public Media Managers

The Bill stipulates that members of Supervisory Councils and Management Boards in public media will be appointed and dismissed by the Minister of the State Treasury. This system would tighten the government control of public media and may result in government pressures to make the coverage reflect the opinions of the majority in power. The proposed policy violates one of the core European standards of public media, i.e. ensuring that public media are as free of political pressure as possible to maintain independence and pluralism⁵.

Imperfect as it may be, the existing rules of appointing managers in public media ensure the involvement of various stakeholders in the selection of members of Management Boards and Supervisory Councils. For example, candidates for the National Broadcasting Council-led competitive selection of supervisory council members are nominated by collegial bodies of academic institutions, under Article 28 of the Broadcasting Law. This system limits the direct political influence on managerial positions. Meanwhile, the proposed Bill exclusively mandates the Minister of the State Treasury to select and appoint supervisory board members, thus increasing the risk of political nominations. Furthermore, the Minister of the State Treasury would have much discretion, especially to dismiss members of Management Boards and Supervisory Councils: the Bill revokes the provisions that define the tenure of the positions at hand as well as the provisions that list the acceptable grounds for such dismissals. Thus, the planned amendment removes the guarantee of stable employment for public media officers as the Minister of the State Treasury, i.e. a government official would be allowed to dismiss such officers at any time and without stating the reasons.

Further, the Bill revokes provisions on the mandatory open and transparent competitive process of appointing members of Supervisory Councils and Management Boards in public broadcasting organisations. Again, no specific rules governing the appointment, no quality criteria and the sole discretion exercised by the Minister of the State Treasury may lead to political rather than competence-based selection. The transparency of public media governance would clearly be jeopardised, thus reducing the level of public scrutiny. The proposed legislation would terminate the mandates of all current members of Supervisory Councils and Management Boards of national broadcasting companies, i.e. the Polish Radio SA and TVP SA, on the day the Bill becomes law. This approach raises concerns as it entails removal of individuals from their current positions regardless of their individual performance or with no stated grounds for termination.

⁵ Commissioner on Human Rights of the Council of Europe, Public Media and Human Rights, [LINK]

In the light of international standards, the proposed rules violate the core requirement for national legislation to ensure independence of political influence⁶. In particular, the Recommendation of the Committee of Ministers of the Council of Europe on public service media governance⁷. It states that in principle a certain degree of government participation in appointing governing or executive bodies in public media is legitimate. However, the terms and conditions of appointment must be sufficiently transparent and defined in a manner which prevents any application thereof in order to exert political influence on the operation of public media. The Recommendation also underlines that individuals must be appointed to the said positions for a definite term and that the period may be shortened only in specific circumstances.

2. The National Broadcasting Council's mandate to protect pluralism in public media

The proposed Bill largely limits the powers of the National Broadcasting Council (hereinafter referred to as NBC) by removing its power to hold open and transparent contests for the positions of members of Supervisory Councils and Management Boards in public radio and television organisations. These provisions raise concerns with regard to their constitutionality.

The provisions regarding NBC are part of Chapter IX of the Polish Constitution (*Governance and Compliance Bodies*), which strongly positions the NBC as a steward of media in Poland. Furthermore, Article 213 of the Constitution states that *the National Broadcasting Council shall be the steward of the freedom of expression, the right to information and public interest in radio and television*.

According to legal doctrine, "Article 213 Paragraph 1 *in fine* of the Constitution of the Republic of Poland defines another crucial responsibility of the NBC as *a steward of public interest in radio and television*. In principle, this is a stewardship of the common interest of all citizens and each and every person. To this extent, it which makes a reference to another value that is constitutionally protected, i.e. the common good."⁸ Needless to say, the commitment to pluralism and political independence of public media reflects the imperative to protect public interest. Conversely, measures aiming at limiting the role of the NBC in appointing members of Supervisory Councils and Management Boards of public media organisations may legitimately be viewed as possibly unconstitutional.

3. The Length of *vacatio legis*

Finally, there are concerns over Article 4 of the said Bill that makes the legislation effective on the day of its publication. According to the Law of 20 July 2000 on the publication of normative acts and certain other regulations (Journal of Laws of 2015, Section 1484, uniform text), normative acts (legislation) containing generally applicable provisions must be published

⁶ Committee of Ministers of the Council of Europe: Recommendation on public service media governance, No. CM/Rec (2012)1, [\[LINK\]](#);
Recommendation on the guarantee of the independence of public service broadcasting, No. R(96) 10, [\[LINK\]](#)

⁷ Ibidem

⁸ M. Baczkowska, Commentary to Article 213 of the Constitution of the Republic of Poland [in:] M. Baczkowska (edit.) *The Constitution of the Republic of Poland. Commentary* (in Polish), Warsaw 2014, LEX

in official journals and they come into force 14 days after publication, unless a longer period is defined in the said act. Pursuant to Paragraph 2 of the Article, legislation may come into force sooner than after 14 days in justifiable cases. Whenever an important national interest necessitates an immediate enforcement of a given piece of legislation, and provided it is not against the principles of a democratic state, legislation may become effective on the day of its publication in the official journal. The Bill at hand fails to make the case for the extraordinary reduction of *vacatio legis*.

Conclusions

The Venice Commission of the Council of Europe has stressed on multiple occasions that government involvement in public media control may turn into a quasi-monopoly of the ruling party. Moreover, wherever a political group has a significant influence on political decisions strong safeguards should be put in place to protect the pluralism and independence of public media.⁹

HFHR wishes to emphasise that contrary to the government's communication, the proposed Bill does not lead to improvements to public media. What it may lead to, however, will be the deepening of an existing pathology in these organisations. One cannot resist the impression that the proposed legislation first and foremost seeks to strengthen government control over public media and the political message. As a result, the legislation supports the concept of public media as a political tool in policy debates.

As such, the Bill may threaten the constitutional freedom of expression that is one of the pillars and constituents of a democratic society. In its rulings, the European Court of Human Rights (ECHR) has often indicated that the freedom of expression is essential for two reasons. First, it is a public good and it is a pre-condition of the advancement of democratic society as a whole. Secondly, it is an individual good and it serves the advancement of each individual, which may be called the principle of individual expression and autonomy. ECHR has also stressed that given the need for pluralism, tolerance and openness, the freedom of expression is not confined, in both its collective or individual aspects, to noncontroversial information and views but also includes those that offend, outrage or disturb¹⁰.

It must also be remembered that the underlying function of the media, both private and public, is to monitor and be a public watchdog of the government. In this respect, by monitoring and presenting both positive and critical opinions and inconvenient news about government and its officials the media fulfill their primary role. The government has an obligation to ensure a framework in which media can freely perform their function.

⁹ The Venice Commission of the Council of Europe, Opinion on the Hungarian media law [LINK] Opinion on the Italian media law [LINK]

¹⁰ I.C. Kamiński, Ograniczenia swobody wypowiedzi dopuszczalne w Europejskiej Konwencji Praw Człowieka [Admissible Constraints on the Freedom of Expression in the European Convention on Human Rights], Analiza Krytyczna, 2010, LEX

