



**Organization for Security and Co-operation in Europe
The Representative on Freedom of the Media
Miklós Haraszti**

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Assessment Visit to Ukraine
Observations and Recommendations

The OSCE Representative on Freedom of the Media Miklos Haraszti, accompanied by Adviser Alexander Ivanko, visited Kyiv, Ukraine, from 6 to 8 April 2004. This was the Representative's first assessment visit since taking over his post. The trip was made at the invitation of the Government of Ukraine and was organised by the Ministry for Foreign Affairs. The purpose of the trip was to assess the current state of media freedom in the country and to provide the authorities with recommendations. The Representative appreciates the co-operative approach of Ukraine, and he has prepared this Report in the same spirit.

Miklos Haraszti met with government officials, parliamentarians, journalists, and representatives of non-governmental organisations. Among those he had talks with were, in order of the meetings:

Ivan Chizsh, Chairman of the State Committee for TV and Radio Broadcasting;
Victor Krizhanivskii, Deputy Head of the Department for Foreign Policy of the Administration of the President;
Deputy Foreign Minister Oleg Shamshur;
Members of the Verhovna Rada (Parliament) Committee for Freedom of Expression (including its Chairman, Mikola Tomenko);
Vice Speaker of the Verhovna Rada Olexander Zinchenko;
Members of the National Broadcasting Council, including Chairman Borys Kholod.

The Representative also met newspaper editors (*Zerkalo Nedeli, Silski Visti*), print and television journalists, publishers, media owners, experts, and non-governmental organizations (NGO) activists.

Positive developments - pluralism and good legislation

There are a number of commendable developments in the situation of the Ukrainian media.

Overall, media pluralism is present in Ukraine. The mere quantity of media outlets is impressive. Different views are represented; politicians of all ranks are regularly

criticised in the media. A lively discussion of public issues – alas, not exactly a dialogue – is taking place.

The general legal framework in the media field is considered satisfactory by independent experts from both inside and outside the country. In some instances, recent media-related lawmaking in Ukraine was even more forward-looking than relevant legislation in older democracies:

- Ukraine is one of the few OSCE participating States that has taken the bold move to decriminalise libel. The current OSCE Representative and his predecessor have been advocating libel decriminalisation in the OSCE region for over three years.
- Amendments to the Law on Television and Radio, passed in 2003, lifted limits on advertising revenues. The advertising market has been growing at 40-60 percent each year, thus allowing the media to become more independent of different “sponsors;”
- A law that defined and banned censorship was signed in 2003. This law makes it a crime to "deliberately intervene in the professional work of journalists," while also limiting the amount of damages sought in defamation cases;
- In a move that is beneficial for vigorous public discussion in any country, the law also prohibits state and local government agencies from filing for defamation claiming "moral damages;"
- Although repeated complaints are made about harassment or incapacitation of independent media outlets in this pre-election year – among them the possible political utilization of the tax authorities – a welcome step on the part of the President of Ukraine was his support for the proposal of an election-year moratorium on tax inspections of media companies, and its approval by Parliament.

However, several serious concerns still exist in the legal field, especially in relation to the new Civil Code. These concerns have been made public by *Article 19*, a highly regarded expert NGO that has provided legal support to the Representative for several years. The Representative would be happy to forward these concerns to the relevant authorities.

The Representative is ready to provide support in drafting other relevant media legislation. Several officials noted during the trip that they welcomed such assistance.

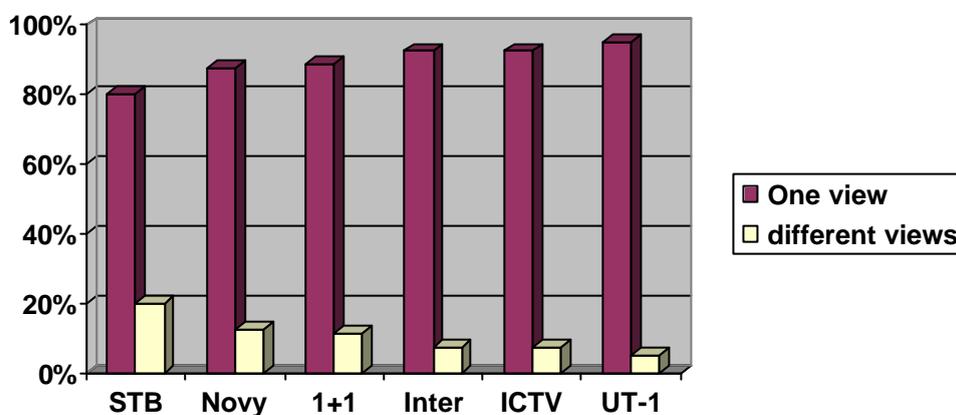
The Representative is also evaluating the project proposals provided to him by officials during his visit.

One senior official underlined that the authorities had tried to be “transparent” in their relationship with the media. Nevertheless, certain recent developments are of a worrying nature and question the authorities’ full commitment to, or at least their readiness to do everything they could to ensure, equal chances for everyone to exercise freedom of expression.

Monopolisation of television broadcasting

Although, in general, political pluralism does exist in the media in Ukraine, where it seems to be least developed is in the broadcast media, specifically on television. So even as private television broadcasting exists at the national and local level, the Government's position is prevalent on the most popular channels that also have the largest area reach.

The Deputy Speaker of the Rada, Olexander Zinchenko described the situation in the electronic media as “highly monopolised.” He added that: “Society develops only when there is a discussion, when public institutions debate, but there is no spirit of discussion on our tele vision.”



According to a report issued in 2003 by the Ukrainian Press Academy, the accompanying graph shows how the six main TV channels – the largest in terms of area reach – report on political events:

The one view dominating the airwaves is that of the Government.

The problem seems to stem from three main causes:

- an ownership structure that is closely connected to, or influenced by, the current Government;
- *temniki* (guidelines) which play an important role in homogenizing the coverage of public issues (see the chapter about *temniki*);
- an institutional framework of frequency allocation and licensing that allows for favouritism (see the chapter about the licensing authority).

This situation could be resolved quite quickly with respect to all these three main components if the political will to do so were present on the part of the Administration, the Rada majority, and the licensing authorities. In the short term, much depends on the broadcasters themselves. There is the possibility to enhance pluralism, objectivity and

balance; to offer more air-time to events and views that are not in line with the Government or the Rada majority.

Temniki – homogenization of coverage of public issues

For a long time Temniki have operated as internal guidelines, issued from above on a daily basis, as to how the media should cover current events.

During the trip, several officials confirmed that *temniki* do exist. One senior government official referred to them as “press releases,” or “public relations efforts.” “*Temniki* express the view of one side on certain themes in a pluralistic situation where there are many sides; it is welcomed if *temniki* catch the attention of the editors, but, just like public relations efforts anywhere, they are without any coercive power,” noted State Broadcasting Committee Chairman Chizsh.

The Chairman of the Rada Committee on Freedom of Expression, Mikola Tomenko, on the other hand, called them “a form of censorship.” The OSCE Representative was shown several of these *temniki*. There are five reasons why the Representative considers the *temniki* an illegitimate tool of governmental influence on the press.

1. They are not press releases but instructions on how to cover political developments in the country;
2. They are anonymous and do not refer to the author/authority that sends them out, which excludes the notion of a legitimate PR effort;
3. They are meant to be read not by the public but by editors of seemingly independent media outlets, which can only be seen as a means of exerting pressure on the editors; reportedly they are followed in the editorial work at the main television networks;
4. They float in cyberspace, in other words they are not disseminated to those editors who are prepared to use them; the editors have previously received the right internet mail addresses and passwords, thus they can access the *temniki* seemingly at their own initiative;
5. They in fact originate from inside the Presidential Administration.

In the end, the effect is that of a new form of governmental guidance, although the methods used to produce and disseminate the *temniki* are in no way illegal.

Most governments try to influence media coverage of their activities. However, whatever authority issues the *temniki*, the Representative recommends it should refrain from doing so in the future. Any governmental public relations efforts employed should be transparent, even accountable; clear in where the message comes from, and who is its intended audience. In their current form, *temniki* only remind journalists and the public alike of instructions that used to be issued by the Communist authorities to the media. Thus they reinforce an old fear that coverage of public issues in the press, and as a consequence, public opinion itself, are the products of a government-sponsored conspiracy.

National Broadcasting Council – licensing without achieving pluralism

The monopoly situation in Ukraine is facilitated, even perhaps caused by an artificially maintained bureaucratic duality in the licensing of the broadcasting outlets that allows for possible political favouritism in frequency allocation.

According to Article 22 of the Law on the National Television and Broadcasting Council of Ukraine [*N.B. English as is in the original*]:

“The National Council shall issue the licences for broadcasting, cable broadcasting, retransmission and wired (cable) radio broadcasting, as well as for the time of broadcasting.

...

A licence of the National Council shall be the sole and sufficient document, which grants the television/radio organization the right to broadcast according to the conditions specified in the licence. Television/radio organizations shall not be subject to other special registrations...”.

However, according to Article 28, the actual frequency allocation is a matter supervised by a non-independent government agency, on the decisions of which the National Council can be “dependent” if it so wishes:

“The National Council shall co-ordinate the distribution of frequency bands allocated for the television and radio broadcasting, installation and use of the radio frequency broadcasting facilities with the General Radio Frequencies Department under the Cabinet of Ministers of Ukraine.”

Borys Kholod, Head of the National Broadcasting Council, defended this decision-making duality as a “technical necessity.” However, when it comes to adherence to technicalities, still according to Article 28, it is the National Council again which can withdraw licences based on technical non-compliance:

“Within the distributed radio frequency bands, the National Council shall supervise the adherence to the established procedure of the radio frequency spectrum utilization, radio-electronic facilities and cable television systems, radio emission norms and allowed industrial interference with the radio reception.”

During the Representative’s fact-finding trip, members of the National Council acknowledged that two separate agencies – the Council itself and the General Radio Frequencies Department – were involved in providing the necessary framework for broadcasters to become operational. In many cases where licensing was rejected by the Council, the reason cited was the decision of the Frequencies Department of the

Government. It also became clear, for example, in the legal dispute between *Channel 5* and the Council, that not even the country's court system could clarify the disputed decisions taken under the present, two-headed structure.

Splitting the licensing authority between two bodies – one politically fairly independent in its design, the other a purely government body – leads to decision-making that cannot exclude arbitrariness and favouritism, thus threatening the political pluralism of the broadcasting industry.

Even if not utilised politically by the government, this duality of unclear responsibilities leads to confusion, and results in unresolved cases. This duality also contradicts the constitutionally required legal security of licensing. It creates uncertainty about the rule of law, and forces the licensees to seek political favours instead of complete compliance with the law.

The case of *Channel 5* shows that the artificial duality in the licensing procedure, and the finger-pointing of the two involved authorities, could be used to maintain a quasi-monopoly situation favourable for the government.

Channel 5 has been described to this Office as the most objective in its coverage of political events; but even if that is disputable, nobody questioned the fact that in terms of coverage of public issues, it aims at a difference compared to that of the three dominant channels. But while the competitors have near total area reach, *Channel 5* can only broadcast over approximately 25- 30 percent of the territory. The station failed to receive additional regional frequencies. The management at *Channel 5* had complained to this Office that there were political reasons behind the denial of local licences. For its part, the Council, when explaining the denial of regional licences to *Channel 5*, and thereby its failure to come up with a truly pluralistic broadcasting landscape, referred to the decisions of the General Radio Frequencies Department.

To avoid such a situation in the future, whether it be intended or unintended, a unified licensing procedure should be established. It should be both more flexible and transparent, and should concentrate the responsibilities under one body, for example, the National Council. (It should certainly be a body that is established with guarantees of political independence and plurality.) Only with the help of a clear structure of responsibility/accountability in licensing could the Government and the legislation fulfil its obligation to take a pro-active approach towards all-dimensional media plurality, which is one of the most important aspects of media freedom.

Radio Free Europe/Radio Liberty and other western stations, and their discontinued re-broadcasting on Radio Dovira and on Radio Kontynent

During the last year, practically all privately-owned radio stations that helped to re-transmit the programmes of Western-owned public-service networks in Ukraine, have encountered broadcasting problems, or were even removed from the air. These

stations have traditionally helped to lend a seasoned quality, and add pluralism, to the coverage of public issues in Ukraine.

The state representatives attributed each case to internal problems or legal violations by the media outlets in question. But in this election year, their removal is a serious loss to media pluralism in the country.

The largest loss was suffered by *Radio Free Europe/Radio Liberty (RFE/RL)*: it was removed from the nationwide FM network of *Radio Dovira* by its new management.

BBC, Voice of America, Deutsche Welle, and Radio Polonia were also taken off the air within weeks after their own re-transmitter, *Radio Kontynent*, decided to take over the re-transmission of the abandoned *RFE/RL*. *Radio Kontynent* was totally closed down by the authorities, citing licence violations.

RFE/RL was re-broadcast nationwide in Ukraine (in 11 cities) for five years through Radio Dovira on an FM frequency. However, after the station was sold in January this year to Ukrainian Media Holding (Address: 104, Frunze st., 04080, Kiev, Ukraine; tel: +380 (44) 205-43-00; Boris Lozhkin, President & CEO; Valentin Reznichenko, Vice President) the owners installed new management who decided to change the format of the station and cancel future re-broadcasting of RFE/RL programmes.

They informed RFE/RL of their intention (letter from 11 February 2004 addressed to the Director of the Ukrainian RFE/RL Service, Olexander Narodetsky and signed by V. Reznichenko. This Office has a copy of the letter. Mr. Reznichenko did not return calls.) RFE/RL went off the air on 17 February. Mr. Narodetsky informed this Office (contacted in May) that he tried to get hold of someone at the management level at Radio Dovira so as to receive a further explanation but was unable to do so. Although several interlocutors argued that Radio Dovira based its decision on economic reasons, Mr. Narodetsky disagrees. "We would have found common ground if this was strictly an economic dispute," he told this Office.

Nevertheless, RFE/RL made an agreement with Radio Kontynent, a Kyiv based radio station, that it would as of 1 March re-broadcast RFE/RL programmes. "I made a deal with Sergei Sholokh [owner of Radio Kontynent] when I was in Kyiv. Although he said he was under pressure, threatened, he went along," said Mr. Narodetsky. RFE/RL programming went on air on 1 March 2004 and two days later Radio Kontynent was raided, its equipment confiscated. According to Mr. Narodetsky, since then RFE/RL has not been able to find a partner who would re-broadcast their programmes. "I had some talks with radio owners in Lviv, but they told me that they were threatened that their licences would be withdrawn if they put RFE/RL on air," said Mr. Narodetsky.

The raid on Radio Kontyent led to several critical statements by the NGO community and some governments, especially in light of the fact that Radio Kontyent had been re-broadcasting foreign stations for several years.

According to the National Television and Broadcasting Council (Open letter of 5 March 2004 to US Secretary of State Colin Powell and Chairman of the Federal Communications Commission Michael K. Powell from Borys Kholod, Chairman of the Council, whose tenure expires on 9 June 2004), Radio Kontyent was taken off the air for the following reasons:

In the early 1990s, according to Mr. Kholod, one of the first companies to get a 12-hour broadcasting licence on channel 100.9 MHz (Kyiv) for the duration of five years was a company called Media-centre Ltd, the owner of Radio Kontyent. Later, it applied for an extension of broadcasting time to 24 hours, was granted the right but did not in the end pay the required fee.

Chairman Kholod states in his letter: “this violation of Ukrainian legislation requirements was ignored by Radio Kontyent and it began to broadcast 24hours a day illegally. In view of [the]ending of [the] 5-year term of licence of Radio Kontyent on December 23, 2000 the National Council announced [an] open contest for 100.9 MHz frequency.” [N.B. English as in the original.]

Media-centre Ltd took part in the tender but lost. However, according to Mr. Kholod, Radio Kontyent continued to broadcast on the same frequency illegally. He also stated that the radio-station did not repay a loan taken out in 1996. For these reasons the plug was finally pulled on Radio Kontyent.

The owner of Radio Kontyent Sergei Sholokh, an intimate participant in the so-called Gongadze case (see further down) told this Office back in 2001 when his station was under a re-licensing procedure, that he believed that Radio Kontyent was targeted because of his statements related to Gongadze and because of the re-broadcasting of foreign radio stations. Mr. Sholokh fled the country in March 2004 after he alleged that he was being threatened. He first made such allegations to this Office back in 2001 (interviews held with him in 2001-2002).

Ivan Chizsh, Chairman of the State Broadcasting Committee, described RFE/RL as “biased” and acknowledged that he had refused to take part in its programmes. In his view, the whole Radio Kontyent saga was a “commercial conflict.” Nevertheless, he accused foreign broadcasters of “occupying the information territory of Ukraine” without any reciprocity. In a letter addressed to Rada Speaker Volodymyr Lytvyn on 22 April 2004, Chizsh described the, in his view disproportionate, presence of foreign broadcasters as a “real threat to the information security of our country.” (This Office has obtained a copy of the letter).

Selective action, mostly directed at independent media, while perhaps not unlawful in itself, would violate standards for evaluating freedom of the media. Whatever “commercial” or “bureaucratic” reasons are cited for taking *RFE/RL* off the air and for the closure of *Radio Kontynent* which had re-broadcast many independent foreign stations, the fact that all this was done during an election year, when a multiplicity of views and their open debate are essential for a democracy, makes one question if the supervising authorities were really interested in pluralism in the media.

These cases, just like the ownership structure of the television scene, or the licensing procedure, should be dealt with by the relevant authorities in the spirit of a pro-active concern for media pluralism. If media pluralism becomes a real concern for them, then the legal solution to providing pluralism in all respects could be found just as easily as the excuse is offered today of “letting the regulations do their work,” that is, to the detriment of pluralism.

Silski Visti – an overly harsh measure against a newspaper

The case of *Silski Visti* shows that the judicial system of Ukraine is not yet imbued with the spirit of pro-actively safeguarding freedom of expression. This mass-circulation paper was ordered to close down by a low-level court before anything had been proven against the paper. But under democratic standards of freedom of the press, even if criminal instigation of hatred were proven, the total closure of a newspaper should not figure among possible punishments.

Silski Visti, a nationwide newspaper affiliated with the opposition Socialist Party and popular in rural areas, has a circulation of 500,000.

Early this year a legal case was brought against it by the *Anti-Fascism Committee* because of two, page-length book excerpts, by an outside author, Vasil’ Yeremenko, published in the newspaper in 2002-2003. The two excerpts discussed the history of Ukraine in the light of alleged Jewish conspiracies.

For the record, the Representative has read the two excerpts in question, and his own – cultural, not legal – assessment is that these pieces *are* grossly anti-Semitic. But it is up to the court to decide if their content was criminal. And even if it were, and a conviction were officially punishable with total closure of the newspaper, what we are discussing here are the implications of such overly harsh judicial moves for the general legal security of Ukraine’s press freedom.

On 28 January, the Kyiv Shevchenkivksy district court ordered the closure of the newspaper. *Silski Visti* is still being published only because of a pending appeal to the Kyiv Appellate Court.

This Office has spoken to senior editors at *Silski Visti* as well as with other experts well-versed in this case. As this Office understands the merits of the case, the closure of the newspaper could only take place after a criminal action (anti-Semitism) was proven in a

court of law, that this action could lead to incitement, and that the newspaper had been used as a tool for such criminal action. Only if these facts were proven in criminal proceedings, could the court take action against the newspaper.

According to lawyers from the reputable NGO, IREX ProMedia, and the Institute of Mass Information, the procedure under which the decision was made to close down Silski Visti had actually been unlawful. In addition, IREX ProMedia argues that the organization that filed the case had no right to do so because their rights as a legal entity were not violated. Court. The appeal is still pending and according to legal experts from the Institute of Mass Information the higher court is expected to invalidate the decision of the lower court.

On the other hand, the abrupt closure of a whole newspaper, especially a publication with one of the highest circulation in the nation, is an overly harsh measure in itself. Its mere existence in the legal codex has an overall intimidating effect on all editors. In fact, such harshness could blocking the free debate of public issues and the scrutiny of the Government, especially sensitive in an election year. The harshness of this action is as harmful to press freedom as the imprisonment of journalists for libel used to be before Ukraine decriminalized libel.

Ukraine's judicial system needs to rid itself of *all* harsh sanctions available to the Government, the prosecution, or the courts, to remove their "chilling" punitive effect on freedom of expression. Closure of one of the most important dailies, even for an offence committed against minorities, is certainly one of those sanctions that should be abandoned.

The Gongadze Case - still unresolved

The murder of the journalist Georgiy Gongadze has still not been resolved. This remains a serious source of mistrust in the rule of law and the security of journalists.

The previous Representative has dealt with the Gongadze case since the beginning. The initial disappearance and subsequent murder of Ukrainian journalist, Georgiy Gongadze, has received substantial publicity around the world. Numerous experts, both domestic and international, have been involved in trying to solve this case.

However, although Prosecutors-General have changed three times since Gongadze was killed, there is still no light at the end of the tunnel. The Representative expects the relevant authorities to continue to vigilantly pursue this case and hopes that in the end those who have murdered Gongadze will be brought to justice.

Recommendations

- The broadcasting media is heavily tilted towards the Government, often providing air-time only for one view out of several prevalent in the country. This situation could be resolved quite quickly with respect to all its three main components (ownership, coverage, and licensing) if the political will to do so were present on the part of the Administration, the Rada majority, and the licensing authorities. In the short term, much depends on the broadcasters themselves. There is the possibility to enhance pluralism, objectivity and balance; to offer more air-time to events and views that are not in line with the Government or the Rada majority.
- The practice of sending out the so-called *temniki*, basically coverage guidelines for editors, should be abolished and replaced by a transparent public relations strategy with clearly defined goals and objectives. In their current form, *temniki* only remind journalists and the public alike of instructions that used to be issued by the Communist authorities to the media. Thus they re-enforce an old fear that coverage of public issues in the press, and as a consequence, public opinion itself, are the products of a government-sponsored conspiracy.
- A unified licensing procedure should be established. It should be both more flexible and transparent, and should concentrate the responsibilities under one body, for example, the National Council. (It should certainly be a body that is established with guarantees of political independence and plurality.) Only with the help of a clear structure of responsibility/accountability in licensing could the Government and the legislation fulfil its obligation to take a pro-active approach towards all-dimensional media plurality, which is one of the most important aspects of media freedom.
- The closure of *RFE/RL* and other foreign stations re-broadcasting in Ukraine and the raid against *Radio Kontynent* are cases which, just like the ownership structure of the television scene or the licensing procedure, should be dealt with by the relevant authorities in the spirit of a pro-active concern for media pluralism. If this became their concern, then the legal solutions to providing full pluralism could be found just as easily as the excuse is offered today of “letting the regulations do their work,” that is, at the detriment of pluralism.
- Ukraine’s judicial system needs to rid itself of all harsh sanctions available to the Government, the prosecution, or the courts, to remove their “chilling” punitive effect on freedom of expression. Closure of one of the most important dailies like *Silski Visti*, even for an offence committed against minorities, is certainly one of those sanctions that should be abandoned.
- The Gongadze case, often raised in OSCE fora, is still under investigation. The authorities are encouraged to continue to pursue it until the perpetrators are finally brought to justice.