***Independent Media Council (IMC)*** *is a self-regulatory media sector institution, whose 15 members are well-respected journalists and civil society activists with vast experience in the field* [*http://mediarada.org.ua/members/*](http://mediarada.org.ua/members/) *IMC was formed in late 2015 by five media sector organizations: Media Law Institute (now Center for Democracy and the Rule of Law http://cedem.org.ua/en/), Institute of Mass Information (http://imi.org.ua/en/), Internews Ukraine, NGO Telekrytyka (now Detector Media http://detector.media/) and Souspilnist Foundation (http://souspilnist.org/). IMC is positioned as an independent arbitrator with a function of resolving disputes and conflicts in the media sector, and monitoring compliance with professional standards of journalism.*

**IMC Findings**

**Re. Legitimacy of Restricting Transmissions of Dozhd TV in Ukraine**

January 21, 2017

The Independent Media Council (IMC) considers the decision to restrict retransmission of Dozhd TV programs in Ukraine to be in conformity with the three-pronged test for restricting human rights; namely, it is prescribed by law, has a legitimate aim, and is necessary in a democratic society, and therefore, in the context of the current situation in Ukraine (state of occupation of the Autonomous Republic of Crimea and aggression in Eastern Ukraine, both being internationally wrongful acts), is consistent with the principles laid down in Article 10 of the Convention for Protection of Human Rights and Fundamental Freedoms, and Article 19 of the International Covenant on Civil and Political Rights.

**I. Background Information**

On January 13, 2017, IMC member Kostyantyn Kvurt proposed that the Council should consider some issues in relation to the recent decision by the National Council on Television and Radio Broadcasting to remove the programming of Dozhd TV from the list of those foreign programs, whose content meets the requirements of the European Convention on Transfrontier Television and laws of Ukraine, (Decision #3 of January 12, 2017, Amending the List of Foreign Programs, Whose Content Meets the Requirements of the European Convention on Transfrontier Television and Laws of Ukraine) [1].

In view of the recent heated public debate of the topic, to which some foreign colleagues also contributed, and importance of the issues related to overall restrictions placed on operational freedom of broadcasters based in the aggressor country, IMC decided to consider the case on its own initiative, in accordance with Paragraphs 4 and 12 of its Regulations.

In its decision, the National Council (“the regulator”) notes that monitoring of Dozhd TV’s foreign programming aired on August 1-5, 11-12, and 19, November 4, and on December 29, 2016 through January 1, 2017) has shown lack of compliance with requirements of the European Convention on Transfrontier Television and laws of Ukraine; e.g., during the monitoring period of August 1-5, 2016, it was established that the foreign Dozhd TV program falling within the jurisdiction of the Russian Federation, contained commercial messages that were in violation of Article 13, Paragraph 9 of the Law of Ukraine *On Advertising* (“Transmission (retransmission) of advertising contained in programs and shows of a foreign broadcaster that are transmitted (retransmitted) to the territory of Ukraine, where the foreign broadcaster is not under the jurisdiction of an EU Member State or a State which has ratified the European Convention on Transfrontier Television, is prohibited”).

Furthermore, information contained in the programming showed evidence of a violation under Article 6, Law of Ukraine *On Television and Radio* ("It is prohibited to use a broadcasting organization to call for unleashing war or aggressive actions, or to advocate for such"), and Paragraph 1 of Article 28, Law of Ukraine *On Information* ("No information may be used to call for overthrowing the constitutional system, violating territorial integrity of Ukraine, or for propaganda of war, violence, cruelty, incitement of ethnic, racial or religious hatred, acts of terrorism, attacks on human rights and freedoms").

**II. Regulation**

**Constitution of Ukraine**

Article 34: Everyone is guaranteed the right to freedom of thought and speech, and to the free expression of his or her views and beliefs.

Everyone has the right to freely collect, store, use and disseminate information by oral, written or other means of his or her choice.

The exercise of these rights may be restricted by law in the interests of national security, territorial indivisibility or public order, with the purpose of preventing disturbances or crimes, protecting the health of the population, the reputation or rights of other persons, preventing the publication of information received confidentially, or supporting the authority and impartiality of justice.

**Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights)**

Article 10: Freedom of Expression

1. Everyone has the right to freedom of expression. This right includes freedom to hold opinions, and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of confidential information or for maintaining the authority and impartiality of the judiciary.

**Law of Ukraine *On Television and Radio*:**

Article 6: Unacceptability of Abuse of Freedom by Broadcasters

2. It is prohibited to use a broadcasting organization to –

call for dismantlement of the constitutional government of Ukraine; call for unleashing an aggressive war or advocate for such, and/or incite national, racial or religious enmity and hatred.

**Law of Ukraine *On Information*:**

Article 28: Unacceptability of Abuse of the Right to Information

Information may not be used to call for overthrow of the constitutional system, for violation of territorial integrity of Ukraine, for propaganda of war, violence, cruelty, incitement of ethnic, racial or religious hatred, acts of terrorism, and attacks on human rights and freedoms.

**Law of Ukraine *On Advertising*:**

Article 13: Advertising on Television and Radio

9. Transmission (retransmission) of advertising contained in programs and shows of a foreign broadcaster that are transmitted (retransmitted) to the territory of Ukraine, where the foreign broadcaster is not under the jurisdiction of an EU Member State or a State which has ratified the European Convention on Transfrontier Television, is prohibited.

Transmission (retransmission) of advertising contained in the programs and shows of a foreign broadcaster who is under the jurisdiction of an EU Member State or a State which has ratified the European Convention on Transfrontier Television that are transmitted (retransmitted) to the territory of Ukraine is allowed only if a Ukrainian legal person has been paid for transmission (retransmission) of such advertising, regardless of the method of such transmission (retransmission).

**Assessment of compliance with the legislation of Ukraine**

Starting 2014, as a result of occupation of the Crimea by the Russian Federation, which was officially recognized by a UN General Assembly resolution [2] and by the International Criminal Court in its preliminary examination [3], and of further aggression of the Russian Federation in the territory of several individual areas (raions) of Donetsk and Luhansk oblasts of Ukraine, a need arose to take appropriate measures in order to protect the informational environment of Ukraine against the content that promotes war, contains hate speech, and denies territorial integrity of the state.

To that end, a number of amendments were made to Ukrainian legislation, limiting transmission of Russian broadcasters’ programming in Ukraine. One of those was amending legislation (the Law of Ukraine amending some laws of Ukraine on specific features of transmission (retransmission) of advertising contained in programs and shows of foreign broadcasters), which came into effect on August 5, 2015. It was that Law that introduced a number of restrictions on retransmission of those programs, whose content was not in compliance with the European Convention on Transfrontier Television. Another restriction introduced by the law was prohibition to retransmit commercial messages contained in the programs and shows of foreign broadcasters that are transmitted (retransmitted) to the territory of Ukraine, if such foreign broadcasters are not under the jurisdiction of EU Member States or the States that have ratified the European Convention on Transfrontier Television.

It should be noted that the general prohibition for providers to place commercial messages in the programs and shows of foreign broadcasters has existed since 2008, and it has been the subject matter of National Council Resolutions #1738 of October 1, 2008 [4], and #2347 of December 23, 2008 [5], whereby programming service providers were ordered to cease and desist from retransmission of those foreign programs, whose content had to be adapted to the requirements of Ukrainian legislation (including the majority of Russian channels) [6].

In order to be placed on the list of foreign programs, whose content meets the requirements of the European Convention on Transfrontier Television and laws of Ukraine, the content broadcast within the relevant programs must be in compliance with laws of Ukraine and the Convention. It is, therefore, subject to provisions of Article 28, Law of Ukraine *On Information*, prohibiting dissemination of information that calls for violation of Ukraine’s territorial integrity.

Moreover, there exists an unambiguous practice of the National Council of Ukraine on Television and Radio, which, by a number of its decisions of July 7, 2016 (re. TV channels Ulybka Rebyonka, Psychologia 21, Okhota I Rybalka) [7], August 31, 2016 (re. Mir Seriala and Teleradioset Blagikh Novostey), and September 29, 2016 (re. TV channels Karusel and Nash Futbol) [8], removed foreign programs from the relevant list for violation of advertising rules. It should also be noted that in the latter case, TV Karusel was also removed from the relevant list for having broadcast a virtual map of the Russian Federation extending to the territory of the temporarily occupied Crimea.

It should be remembered that close to 10,000 people were killed, and about 1.7 million were forced to leave their places of residence because of the occupation of the Crimea and Russian military aggression in the Donbas. In addition to experiencing destructive material consequences of the conflict, those Ukrainian citizens, who have to live under occupation, often feel spiritually depressed, abandoned and forgotten by their homeland that failed to provide them with adequate protection against the occupation. The very least that the government and the society can do for these citizens, until the temporary occupation is brought to its end, is to show respect and protect their dignity as citizens of Ukraine, their official right to belong to the Ukrainian state and be referred to as such in all sources of communication and information, both foreign and domestic.

As already mentioned in the narrative section of these Findings, the National Council stated that it had noted, as part of its own monitoring activities, the broadcasting of maps, on which the Crimea was designated as part of the Russian Federation, as well as of certain messages testifying to de facto recognition of the administrative division line between the Autonomous Republic of the Crimea and Ukraine as national border between the Crimea and Ukraine and, consequently, failing to recognize territorial integrity of the Ukrainian state. These facts, according to the regulator, were in violation of Article 28 of the Law of Ukraine *On Information* (Information may not be used to call for […] violating the territorial integrity of Ukraine”).

"While people may think whatever they want, they may not always say and write whatever they want. In contrast to the freedom of thought, freedom of expression is not an absolute right " [9]. Freedom of expression may, and in certain cases should, be limited by the state to protect rights and/or legitimate interests of others. The grounds for such restriction are laid down in the second paragraph of Article 10 of the Convention for Protection of Human Rights and Fundamental Freedoms, and in the third paragraph of Article 19 of the International Covenant on Civil and Political Rights.

To determine whether restriction on freedom of expression in each particular case is legitimate, the international and national practice applies the so-called three-pronged test, as set out in Article 29 of the Universal Declaration of Human Rights, Article 10 of the Convention for Protection of Human Rights and Fundamental Freedoms, and Article 19 the International Covenant on Civil and Political Rights.

According to that test, the restriction imposed must be prescribed by law, pursue a legitimate aim, and be necessary in a democratic society (meet a pressing social need and be proportionate).

As stated earlier in these Findings, the restriction in question is established by Ukrainian legislation. The provisions of applicable laws are properly formulated, clear and accessible, **making them consistent with the first criterion of the three-pronged test for introducing restrictions on the right to freedom of expression in accordance with the law**.

Undoubtedly, given the state of an international armed conflict (which de facto exists between Ukraine and the Russian Federation), protection of national security and territorial integrity together with protection of the rights of others, constitute a legitimate goal for imposition of the restrictions, primarily meant to ensure protection against the aggressor state. **Hence, the second criterion of the three-pronged test is equally satisfied.**

As for the need for a restriction in a democratic society, namely, the option to remove programming from the list of foreign programs whose content meets the requirements of the European Convention on Transfrontier Television and laws of Ukraine, we find that the restriction imposed also **meets this third criterion for restricting the right to freedom of expression, since it pursues an urgent social need and, at the same time, is proportionate**.

The position taken by the European Court of Human Rights in VgT Verein gegen Tierfabriken v Switzerland was that “…such a margin of appreciation is particularly essential in commercial matters, especially in an area as complex and fluctuating as that of advertising” [10 ]. Also, according to ECHR case law (judgment in Zana v Turkey) [11], the necessity and pressing social need to impose certain restrictions on freedom of expression must be reviewed according to the content and context of certain statements or actions. The need for restrictions in Ukraine has been caused by considerable social tension in the state resulting from foreign aggression and the conditions of constant informational confrontation, powerful propaganda and incitement to hatred on the part of the aggressor state, and Russia’s failure to recognize the internationally recognized borders of Ukraine.

Encroachments on the right of Ukrainian citizens in the occupied territories (and, indirectly, of internally displaced persons from these areas) to belong officially to the Ukrainian state must also be adequately brought to an end.

As regards proportionality of the restriction, removing a foreign program from the List of foreign programs, whose content meets the requirements of the European Convention on Transfrontier Television and laws of Ukraine may be deemed the least restrictive of all possible measures, since it is not accompanied with imposition of any financial penalties on the offenders. Moreover, the state does not restrict access to the programs outside the list by other means of transmission, including the Internet and satellite broadcasting.

The measures initiated by the National Council apply only to multichannel broadcasting, which is regulated inside its jurisdiction, namely IPTV and cable network broadcasting. Meanwhile, watching the program directly on Dozhd TV’s website, as well as on OTT platforms is neither limited nor blocked. The regulator has, therefore, resorted to a reasonable restriction, whose aim is to ensure compliance with the laws of Ukraine and international law. The regulator has not, nor could it have, imposed any individually targeted sanctions on the channel in view of the determination of jurisdiction in the information space.

Thus, IMC considers the restrictions applied by the National Council in the case of Dozhd TV to be in conformity with the three-pronged test for limiting freedom of expression. It should be noted, however, that for technical reasons, IMC does not review or evaluate the National Council’s procedures leading to its adoption of the relevant decision, and only reviews the channel’s content, the regulator’s decision and related statements of the parties to the conflict.

Finally, it is worth noting that occupation of the Crimea is a violation of basic precepts of modern international law that are designed to ensure peaceful coexistence of states and nations, namely Article 2 (4) of the UN Charter and norms of customary international law (prohibition of the use of force against territorial integrity or political independence of another State). In addition to putting Ukraine’s interests at risk, “normalizing” occupation, also through use of media and advertising, erodes the very foundations of the world order. Unlimited freedom of expression in respect of such ‘normalization’ jeopardizes this very freedom, since proponents of ‘radical pluralism’ [12] do not appear to realize that human rights in general and freedom of expression in particular do not exist in a void, but rather in a paradigm of state and its relationship to the individual person. They reflect the important obligations borne by the state in respect to persons under its jurisdiction. Similarly, exercise, protection and restriction of those rights occur in the paradigm of the state. It is both absurd and impossible to consider exercising freedom of expression in Ukraine if one should assume that Ukraine as a state with sovereignty and territorial integrity would no longer exist.

**Conclusions**

IMC deems the restriction of Dozhd TV retransmission in Ukraine to be in conformity with the three-pronged test for limitation of rights, since it is (i) prescribed by law, (ii) pursues a legitimate aim and (iii) is necessary in a democratic society; in the current context of the situation in Ukraine (the state of occupation in the Autonomous Republic of Crimea and aggression in Eastern Ukraine, which are internationally wrongful acts), it is consistent, therefore, with the principles laid down in Article 10 of the Convention for Protection of Human Rights and Fundamental Freedoms, and Article 19 of the International Covenant on Civil and Political Rights.

Appendix: Dissenting opinion of Natalia Humenyuk, a member of the Independent Media Council, in the case of legitimacy of restricting Dozhd TV retransmission in Ukraine (total of one page).

**Voting results:**

"For": 11;

"Against": 2;

"Abstained": 1.

**Signed by:**

**Natalia Ligachova,** Chair of the Board,

**Ihor Rozkladai,** Secretary

**Roman Holovenko,** Secretary

**Dissenting opinion**

**of Natalia Humenyuk, IMC member**

**in the case of legitimacy of restricting Dozhd TV retransmission in Ukraine**

While we should definitely be mindful of the need to assure respect of the letter of the law, it is the civil society that will be the first to feel when reality runs ahead of legislation. It is important that journalistic organizations be not only the media arm of government agencies, but offer professional solutions or, at least, a discussion in those situations, when answers cannot easily be found; they should be tools for seeking solutions, not a surrogate for regulatory and law enforcement agencies.

For instance, modern journalism is facing the challenge of media professionals staying in the territory of those countries, which give no access to independent media. Western media operate without formal documents in Syria, and this does not give rise to condemnation. Ukrainian journalists visit Nagornyi Karabakh despite objections by Azerbaijan; such visits do not cause, however, an outrage amidst Ukrainian media organizations. These challenges call for a good quality discussion and understanding of whether a compromise is possible, and where its limits should lie for media outlets operating in authoritarian countries. During the Cold War, it was as easy as that: democratic media outlets operated outside of the Soviet Union, since that was the only way. Hybrid regimes of today cannot limit the presence of opposition media in their territory; moreover, with all the information “white noise” and generous support that is given to propaganda, independent media cannot afford to stay in exile, as they would lose the audiences they are trying to reach. The example of Dozhd TV is also a part of the discussion. If Ukrainian media find themselves in a dictatorial environment, should they migrate, or stay together with their audience? This is the sort of questions that the Independent Media Council and the media community could broach. Where is the limit to compromise? What works best: prohibition, or attempting to clarify fundamental issues?

Professionals can tell propaganda from information, but in the times of war we are tempted to adopt the enemy’s logic and way of thinking, which are prone to generalizations, such as ‘Ukrainian means fascist’, or ‘Russian means propaganda’. In this case, (I believe) that IMC’s review of the Dozhd case, and its de facto endorsement of the decision made by a government agency are both opportunistic and redundant.

**References:**

[1] http://nrada.gov.ua/ua/rishennya/34026/34212/34232.html

[2] https://documents-dds-ny.un.org/doc/UNDOC/GEN/N16/352/55/PDF/N1635255.pdf

[3] https://www.icc-cpi.int/iccdocs/otp/161114-otp-rep-pe\_eng.pdf; para 158

[4] http://nrada.gov.ua/ua/rishennya/1272013598/1272437210.html

[5] http://nrada.gov.ua/ua/rishennya/1272013598/1272274749.html

[6] http://nrada.gov.ua/ua/rishennya/1272013598/1273577867.html; for current list of adapted programs, see the link in Decision #652

[7] http://nrada.gov.ua/ua/rishennya/26297/31471/31705.html

[8] http://nrada.gov.ua/ua/rishennya/26297/32521/32645.html

[9] Moeckli D., Shah S., and Sivakumaran S., ‘International Human Rights Law’ (2014) OUP 228

[10] http://hudoc.echr.coe.int/eng?i=001-59535

[11] http://hudoc.echr.coe.int/eng?i=001-58115

[12] Plattner M., ‘Populism, Pluralism, and Liberal Democracy’ (2010) 21.1 Journal of Democracy 87

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