COMMISSIONER FOR HUMAN RIGHTS

Adam Bodnar

Warsaw, 24.03.2016

VII.603.L2016.MW/AG

Constitutional Tribunal
in Warsaw

Application
of the Commissioner for Human Rights

On the basis of Article 191 para 1 pt. 1 of the Constitution of the Republic of Poland of 2 April 1997 (Journal of Laws No. 78, item 483, as amended) and Article 16 para 2 pt. 2 of the Act of 15 July 1987 on the Commissioner for Human Rights (Journal of Laws of 2015, item 1648, as amended), I request to declare the non-consistence of:

1. Article 1 para 2 item a of the Act of 30 December 2015 amending the Broadcasting Act (Journal of Laws of 2016, item 25; hereinafter referred to as: the Amending Act), in conjunction with Article 2 and Article 4 of the Amending Act, to the extent that it shortens the term of the Board of Management with the principle of the protection of existing interests resulting from Article 2 of the Constitution in conjunction with Article 14 of the Constitution;

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2. Article 1 pt. 2 item b of the Amending Act, to the extent that it recasts Article 27 para 3 of the Broadcasting Act of 29 December 1992 (Journal of Laws of 2015, item 1531 and 1830; hereinafter referred to as: the Amended Act) with Article 213 para 1 in conjunction with Article 14, Article 54 para 1, Article 61 para 1 of the Constitution and Article 31 para 3 of the Constitution, as well as Article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms drawn up in Rome on 4 November 1950 (Journal of Laws of 1993, No. 61, item 284, as amended) and Article 11 of the Charter of Fundamental Rights of the European Union (EU Official Journal C 326 of 26.10.2012, p. 391);
3. Article 1 pt. 3 item c of the Amending Act in so far as it adds Article 28 para 1e to the Amended Act, with Article 213 para 1 in conjunction with Article 14, Article 54 para 1, Article 61 para 1 of the Constitution and Article 31 para 3 of the Constitution, as well as Article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms and Article 11 of the Charter of Fundamental Rights of the European Union;
4. Article 1 pt. 3 item d of the Amending Act, in conjunction with Article 2 and Article 4 of said act, in so far as it shortens the term of the Supervisory Board with the with the principle of the protection of existing interests resulting from Article 2 of the Constitution in conjunction with Article 14 of the Constitution;
5. Article 3 of the Amending Act with the principle of protection of acquired rights and the principle of protection of existing interests resulting from Article 2 of the Constitution;
6. Article 4 of the Amending Act, in so far as it does not provide for a sufficient period of *vacatio legis*, with Article 2 of the Constitution.

Statement of reasons

I.

The Act of 30 December 2015 on the amendment of the Broadcasting Act (Amending Act) challenged by this application entered into force on 8 January 2016, in accordance with Article 4 of said act, which provides that the Act enters into force on the day following its publication (i.e. on 7 January 2016).

The Amending Act (sometimes referred to as the so-called "small amendment") has made changes to the Broadcasting Act of 29 December 1992 (the Amended Act) as regards the

functioning of public service broadcasting companies. According to the explanatory memorandum attached to the draft (Sejm Paper No. 158), the Act "serves as the first stage of the reform of Polish public media, aiming to establish a system of national media".

The draft law indicates that "the act is focused on changing the way of establishing supervisory boards and boards of management of existing public service broadcasting companies and reducing the composition of said boards of management to 3 people. This involves eliminating the engagement of the National Broadcasting Council (*Krajowa Rada Radiofonii i Telewizji* – KRRiT), as an electronic media market regulatory body, in establishing the composition of management boards and supervisory boards of Treasury companies operating on in this market. Pending the implementation of the new organisation of national media, this should be the domain of the Minister competent for matters of the Treasury, who shall bear responsibility before the Sejm". The aim of the Act is "not only to rationalise and lower the cost of managing public service broadcasting companies, but also to restore in them the professional and ethical standards required for performing public service".

II.

In a democratic state of law, the system of public media constitutes an institutional guarantee of fundamental rights and freedoms, including, in particular, the freedom of speech and the right to information, as well as the related freedom and plurality of the media.

Public broadcasting in Poland was established in the period of political transformation, as a result of the transformation of government radio and television, under the amended Broadcasting Act of 29 December 1992. The essence of this change was explained by the Constitutional Tribunal in its resolution of 13 December 1995 (case W 6/95) by indicating that*: One of the fundamental objectives of this act was to transform the position of public service broadcasting in such a way that it would cease to serve as a government agenda, politically and organisationally subordinate to the Council of Ministers, or its President, currently in office. Such was the essence of the position of radio and television in the period of the People's Republic of Poland, back when it was subordinate to the Committee of Radio and Television, which constituted a central body of state administration and included in the system of authorities supervised by the President of the Council of Ministers. The Act of 1992 was designed to break with this system. For this purpose, public radio and television were reformed as sole-shareholder companies of the Treasury, and a multi-level structure for managing the matters of radio and television was created. This structure included the National Broadcasting Council as a constitutional authority of the state. Supervisory and Management Boards were created within*

individual public service broadcasting companies. The division of competencies between these structures was intended to ensure independence (and in any case – exclude unilateral subordination) to individual radio and television stations. This principle of independence mainly concerned the relation of public service broadcasting to the executive power, and especially the Government. (...) Firstly, it was meant to separate radio and television and the parliamentary majority related to it, in order to prevent these mass media from being treated as an instrument of political governance. (...) The imperative to preserve internal pluralism in public service broadcasting can be achieved only if they remain clearly distanced from the current political authority. To this end, the Broadcasting Act has created three levels of decision-making in the matters of public service broadcasting: the National Broadcasting Council, and within public service broadcasting companies – supervisory boards and management boards of these companies. They form a "buffer" of sorts between the political authorities and editorial boards pursuing public service broadcasting activities".

The challenged provisions of the amending act lead to the departure from the above-indicated assumptions of transforming government media into public media in the 1990s, which are to be characterised with internal pluralism and keep a clear distance from the current political authority, in particular from the executive. The remainder of the application will present in detail the reasons of the unconstitutionality of the amending act, however at this point it has to be pointed out that – contrary to the assumptions referred to above – it is the provisions that concern the establishment of the composition of public media's management, the protection of pluralism in public media as NBC's task and the procedure for the entry into force of the act – in particular the period of *vacatio legis* – that need to be considered inconsistent with the Constitution of the Republic of Poland and the aforementioned rules of international law and the European Union. It should be noted that, in place of a complex procedure for appointing supervisory and management boards of public media, with the leading role of an independent body, i.e. the National Broadcasting Council, the amending act deprives the NBC of its competences in this field and entrusts appointing and dismissing supervisory and management boards of public broadcasting companies to the minister competent for matters of the Treasury. The act also abolishes statutory guarantees of independence and stability of management and supervisory boards of public broadcasting companies, including terms of office, a limited and exhaustive list of special circumstances justifying the dismissal of their members, a competitive procedure of their appointment. At the same time, without specifying the reason and without a sufficient *vacatio legis* period, it shortens the term of office of public media's supervisory and management boards established under current regulations. Therefore, in practice, the Amending Act allows the minister to appoint and dismiss the authorities in charge of public service

broadcasting companies freely, and thus abolishes the existing system of "buffers" between the executive and the bodies governing public media, which were referred to in the above-mentioned resolution of the Constitutional Tribunal in case W 6/95.

III.

The first group of legal norms challenged in this application includes provisions indicated in item 1 and 4 of this application (Article 1 pt. 2 item a and Article 1 pt. 3 item d of the Amending Act). The former repeals Article 27 para 2 of the Amended Act. This provision stated that the term of office of a company's Board of Management lasts four years. The second of the challenged provisions of the Amending Act repeals Article 28 para 5 of the Amended Act. This provision stipulated that the term of office of a company's Supervisory Board lasts three years.

The repealed provisions of the Amended Act established the terms of office of management and supervisory bodies of public broadcasting companies, selected by way of a competitive procedure by the National Broadcasting Council. It should be noted that the function of regulations stipulating the tenure of a given body is to ensure their stability during the period provided for by law, thus securing a certain independence from the appointing entity, as well as other entities. An inherent feature of legislation providing for terms of office of a given body is the possibility to shorten said term of office only in cases enumerated in the act. In the case of the Amended Act, the conditions for dismissing a member of the Board of Management before expiry of their term of office were identified in Article 27 para 6, and in the case of a member of the Supervisory Board – Article 28 para 1d. Both of these provisions have been repealed by the Amending Act.

The challenged provisions provide for, respectively, the repeal of Article 27 para 2 and Article 28 para 5 of the Amended Act. Therefore, the effect of the entry into force of the Amending Act in this respect is the reduction of the tenure of members of management and supervisory boards of public service broadcasting companies at the moment of the entry into force of this act. As stated by Article 2 para 1 of the Amending Act, on the date the Act enters into force, i.e. on 8 January 2016 "the terms shall be shortened and mandates shall expire for the current members of the Management and Supervisory Boards of "Telewizja Polska – Spółka Akcyjna" and „Polskie Radio – Spółka Akcyjna", subject to paragraph 2 of said article. Paragraph 2 stipulates, in particular, that the boards of management shall operate with their current membership until a new Board of Management has been appointed on the basis of the regulations of the Amended Act as amended by the Amending Act.

Reducing the ongoing tenure of management and supervisory boards, in conjunction with the repeal of provisions governing the possibility to dismiss the members of these bodies before the end of their term of office has to be considered inconsistent with the principle of the protection of existing interests resulting from Article 2 of the Constitution. Of course, the principle of the protection of existing interests cannot be treated as equivalent to a guarantee of immutability of the law. It is obvious that the legislature has the power to restrict rights and abolish privileges, and rights not limited by any time horizon by the legislature can be modified. However, the principle of the protection of existing interests *"provides protection for individuals who have commenced specific undertakings on the basis of existing regulations. Existing interests are subject to more intensive protection if the legislature has laid down regulations for specific types of undertakings"* (cf. Constitutional Tribunal's judgement of 25 June 2002, case K 45/01; cf. also Constitutional Tribunal's judgement of 8 January 2009, case P 6/07). In this case, the role of independent public media, regulated in the Amended Act, has been highlighted by the Constitutional Tribunal in its judgement of 23 March 2006 in case K 4/06, but also in recommendation R(96)10 of the Committee of Ministers of the Council of Europe *on the need to safeguard editorial independence of public service broadcasters.* Thus, existing interests infringed by the Amending Act should be subject to stricter protection, due to the role of the public media system in a democratic state of law (Article 14 of the Constitution).

The regulations of the Broadcasting Act concerning the tenures of companies' management and supervisory boards were to provide a safeguarding function, providing continuity of authority in the company, and also constituting an important guarantor of the stability of staff. The repeal of the provisions of the Amended Act concerning the determination of the tenure of management and supervisory boards, in conjunction with the reduction (in practice – curtailment) of the ongoing tenure must therefore be found as infringing the existing interests of „Telewizja Polska – Spółka Akcyjna" and „Polskie Radio - Spółka Akcyjna" (as means of social communication within the meaning of Article 14 of the Constitution), consisting in an uninterrupted performance of public service, as well as offering diverse programmes and other services in the field of information, journalism, culture, entertainment, education, and sports, as well as the existing interests of persons sitting in the supervisory and management boards of given companies up until that moment. Public radio and television companies, in accordance with Article 21 para 1a of the Amended Act, have specific tasks. The supervisory and management boards are responsible for their implementation, and their proper functioning is ensured by the boards' tenures. The introduction of terms of office of management and supervisory boards, in conjunction with the guarantees of stability of office of these bodies, was aimed at granting specific competences to these bodies for a predetermined time frame. The

introduction of tenures does not preclude the introduction of legislation allowing for their reduction. However, they should be introduced into legal affairs only after the end of the initiated term of a given body and not during the existing term.

The Constitutional Tribunal, on the basis of the evaluation of the tenures of regional and local authorities, in its judgement of 26 May 1998 in case K 17/98, in relation to Article 2 of the Constitution, has clearly indicated that *"the principle of term limits consists primarily of three basic elements. Firstly, the principle under consideration implies the necessity of granting authority to the body concerned for a predetermined time frame. Secondly, the said time frames may not exceed certain reasonable limits. Thirdly, term limits imply the necessity of establishing legal regulations that will ensure the establishment of the newly elected authority in such a way, so that it may begin to perform its duties without undue delay after the end of the previous term",* The Tribunal further added that *"any changes to the length of the term of office should have pro futuro* effects in respect of the bodies, which will be chosen in the future" and that it is acceptable to *"introduce legislation that allows to shorten the term of office of the authority concerned. Regulations for shortening the term of office should also be laid down before the start of the tenure of a given body and, in principle, should not be amended in relation to a body currently in office. However, in specific situations one can allow changing the existing regulations and shorten the tenure of a body in office, despite the fact that originally the law did not provide for or specified the reasons for shortening the term in a more restrictive manner. Such a solution is acceptable only if a specific constitutional provision does not prohibit this, and provided that it is warranted by particular circumstances".*

Therefore, it follows from the Constitutional Tribunal's case-law that shortening the term of office of a body, which operates on the basis of universally binding provisions on term limits is possible. However, a term of office may be shortened only in special situations. No such circumstances arise from the explanatory memorandum to the draft of the Amending Act. One can point out, however, the constitutional principles and values, which argue that breaking the principle of term limits should be scrupulously established by the legislature, and may not be based on the belief that the tenure of a body can be shortened only because the legislature decides to give up on it, and considers that a different way of functioning of said body is better.

In view of the above, Article 1 pt. 2 item a and Article 1 pt. 3 item d of the Amending Act, in conjunction with Article 2 and Article 4, in so far as they shorten the term of the Board of Management and the Supervisory Board (respectively), are non consistent with the principle of the protection of existing interests resulting from Article 2 of the Constitution and Article 14 of the Constitution. The second group of challenged regulations is composed of provisions referred

to in items 2 and 3 of the *petitum* of this application (Article 1 pt. 2 item b of the Amending Act, to the extent that it recasts Article 27 para 3 of the Amended Act and Article 1 pt. 3 item c of the Amending Act, in so far as it adds Article 28 para 1e to the Amended Act.

Article 1 pt. 2 item b of the Amending Act amends Article 27 para 3 of the Amended Act in such a way, that it receives the following wording: "The Minister of the Treasury shall appoint and dismiss members of the Board of Management, including the President of the Board of Management."

Article 1 pt. 3 item 3 of the Amending Act adds Article 28 para 1e with the following wording: "The Minister of the Treasury shall appoint and dismiss members of the Supervisory Board".

In accordance with the legislation in force before the adoption of the Amending Act, the members of the Board of Management, including the Chairman of the Board, were appointed by way of the National Broadcasting Council's resolution at the request of the Supervisory Board and dismissed by way of resolution requested by the Supervisory Board or the General Assembly. In turn, in the case of supervisory boards, the Amending Act also repeals the provisions of Article 28 para 1a-1d and amends Article 28 para 1, which provide for the competitive procedure of appointing the members of supervisory boards, in particular the specific standards of competence required in the case of candidates for said members, as well as a list conditions limiting the possibility of revoking their members.

1. The National Broadcasting Council has been established by the legislature as a public inspection and law protection authority (chapter IX of the Constitution). In accordance with Article 213 para 1 of the Constitution, indicated as the basic standard of control in this application in relation to the regulations challenged in items 2 and 3, the National Broadcasting Council shall safeguard the freedom of speech, the right to information as well as safeguard the public interest regarding radio broadcasting and television. The constitutional position and tasks assigned to the regulatory authority in the field of electronic media are a confirmation of the rights and freedoms enshrined in Article 14, Article 54 para 1 and Article 61 para 1 of the Constitution. In the commentary to the Broadcasting Act, it is stated that "the constitutional determinants of the public media are mainly designated by the provisions of the Constitution on freedom to express opinions (Article 54 para 1), freedom of the press and other means of social communication (Article 14), as well as an exceptional constitutional value to be safeguarded by the NBC, i.e. the public interest regarding radio broadcasting and television, listed next to the freedom of speech and the right to information (Article 213 para 1) (cf. K. Wojciechowski, in: S. Piątek, W.

Dziomdziora, K. Wojciechowski, *Ustawa o radiofonii i telewizji. Komentarz,* Warsaw 2014, p. 269).

These tasks are closely related to the constitutional position of the NBC. The Constitutional Tribunal specified its role by stating that "*the NBC is a constitutional authority, placed outside the model of separation of powers. Its internal structure ensures, regarding the implementation of constitutionally defined tasks, a balance between the legislative and executive authority (Article 10 of the Constitution). Although its tasks are largely related to administrative and executive activities, it is established somewhat between the executive and legislative power, while maintaining a clear distance from the government"* (judgement of the Constitutional Tribunal of 23 March 2006 in case K 4/06).

The Constitutional Tribunal has also explained that the tasks of the NBC referred to in Article 213 para 1 of the Constitution include the responsibility for the performance of public service by the public media. In its judgement of 9 September 2004 in case K 2/03, the Constitutional Tribunal pointed out that "*according to Article 213(1) of the Constitution, the National Broadcasting Council shall safeguard the freedom of speech and independence of the media. Furthermore, it is responsible for realisation of a public mission of the radio and television, encompassed in the "public interest" reference in the aforementioned constitutional provision*". The Tribunal has also added that *"the choice of organisational structures for performing the public service of radio and television belongs to the legislature, provided, however, that a constitutionally-established state authority – the National Broadcasting Council – is responsible for it.*

Similarly, in its judgement of 4 November 2009 in case Kp 1/08, the Constitutional Tribunal stated that *"Article 213 para 1 of the Constitution specifies the institutional position of the NBC. NBC's position allows it to bear responsibility for the freedom of expression, the right to information, and the public interest regarding radio and television referred to in the aforementioned provision of the Constitution (...) It should be noted that the contents of Article 213 para 1 of the Constitution, in particular the indicated values such as the freedom of expression or the right to information, are important for the performance of public service. In its judgement in case K 2/03, The Constitutional Tribunal stated outright that this service lies in "the public interest regarding radio and television", referred to in Article 213 para 1 of the Constitution".*

Therefore, the NBC is – in the light of Article 213 para 1 of the Constitution – responsible for the performance of public service of the public media, and at the same time the NBC itself – as a constitutional authority – was placed outside the model of separation of powers, in order to ensure the balance between the legislative and executive power, which is closely connected with

the constitutional principle of the freedom to express opinions (Article 54 para 1 of the Constitution) and the freedom of the media (Article 14 of the Constitution), as well as the right expressed in Article 61 para 1 of the Constitution, providing for the citizens' right to obtain information on the activities of bodies of public authority and persons discharging public functions, as well as organizational units relating to the field in which they perform the duties of public authorities and manage communal assets or property of the Treasury. On the basis of Article 61 of the Constitution it is indicated in the doctrine that "*the Constitution does not prohibit the operation of several state bodies "in the matters of radio and television", but they all must be subject to the NBC, and to such an extent that this subordination would allow to safeguard the three indicated goods from any harm (i.e. the freedom to express opinions, the right to information, and the public interest regarding radio broadcasting and television"* (cf. H. Zięba - Załucka, *Krajowa Rada Radiofonii i Telewizji a regulatory mediów w państwach współczesnych,* Rzeszow 2007, p. 119. Cf. also B. Banaszak, *Konstytucja Rzeczypospolitej Polskiej. Komentarz, ed. 2,* Warsaw 2012, Legalis).

The freedom to express opinions, guaranteed in Article 54 para 1 of the Constitution, is of fundamental importance in public life. Related to Article 14 of the Constitution, it ceases to be just a freedom of individuals (or a collective), but becomes a constitutional principle as well (cf. the judgement of the Constitutional Tribunal of 20 July 2011 in case K 9/11). Therefore, since the freedom of speech, and the related freedom of the media, is a constitutional principle, it means that – according to the legislature's will – the media, both private and public, are to be free, i.e. not directly subordinated to the authority, and especially to the executive power. The public media may not be embedded in the segment of any of the powers, and in particular they may not be subordinated to the executive authorities through such provisions that establish a direct dependence of public media's authorities on the government – or its members.

There is no doubt that the freedom of expression and the freedom of the media, as expressed in Article 14 and Article 54 para 1 of the Constitution, relate both to the private media and public service broadcasting. Public media should be the institutional guarantee of freedom of expression and pluralism of social means of communication. To perform this function, however, they must be independent from both political and economic interests, which allows to retain internal pluralism in editorial content. When establishing the public media, the state must therefore ensure their independent and pluralistic functioning by shaping the legal and institutional frameworks serving to this end.

3. The full reconstruction of control standards requires to also take into account Article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter

referred to as: ECHR) and Article 11 of the Charter of Fundamental Rights of the European Union (hereinafter referred to as: CFR), which were granted legal force equal to treaties by Article 6 of the Treaty on European Union (Journal of Laws of 2009, No. 203, item 1569). The correct determination of the contents of the indicated evaluation patterns also requires the analysis of the case-law of the European Court of Human Rights (hereinafter referred to as: ECtHR) and the European Court of Justice of the European Union (hereinafter referred to as: CJEU). The independence of public media and their pluralism, associated with the freedom of speech and the freedom of the media, are therefore the standards set out in international agreements to which Poland is a party, as well in other acts adopted in the Council of Europe and the European Union.

Article 10 para 1 of the Convention for the Protection of Human Rights and Fundamental Freedoms provides for the right to freedom of expression, which includes freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. Against the background of this provision it is indicated in the doctrine that *"since the Convention requires the state to respect the principle of pluralism, it has to find proper reassurance in the activity of the public media, especially taking the form of "internal pluralism", oriented towards the manner of operation and programming of the public broadcaster. In no event can the public media remain in full control and at the disposal of the current government cabinet or parliamentary majority"* (cf. L. Garlicki, P. Hofmański, A. Wróbel, *Konwencja o Ochronie Praw Człowieka i Podstawowych Wolności. Komentarz do artykułów 1-18, Vol I. Komentarz,* Warsaw 2010, Legalis).

In its rich case-law concerning this provision of the Convention, the ECtHR has recognised the freedom laid down by it as an essential foundation of democratic society and an important condition for the development of each individual (cf. basic decision of 1976 on *Handyside v. United Kingdom*, application no. 5493/72). The ECtHR has also stressed the role of the press and of the media in transmitting information and the right of the public to their receiving (judgement of 1979, *Sunday Times v. United Kingdom*, application no. 6548/74). While stressing the principle of pluralism, the ECtHR has assigned the state with the role of the supreme guarantor, especially in relation to audio-visual media, which – however – does not justify a monopoly of public service broadcasting (see judgement of 24 November 1993, *Informationsverein Lentia and others v. Austria*, application no. 13914/88).

In turn, in its judgement of 16 July 2009 on *Wojtas-Kaleta v. Poland* (application no. 20436/02), the ECtHR, while stressing that the state's role as the guarantor of pluralism relates to the public media, has stated: *where a State decides to create a public broadcasting system, the domestic law and practice must guarantee that the system provides a pluralistic audio-visual service"* (§ 47). The ECtHR has subsequently developed this reasoning in its judgement of 18

September 2009 on *Manole and others v. Moldova* (application no. 13936/02), by stating that (§ 107): *"the State, as the ultimate guarantor of pluralism, must ensure, through its law and practice, that the public has access through television and radio to impartial and accurate information and a range of opinion and comment, reflecting inter alia the diversity of political outlook within the country and that journalists and other professionals working in the audio-visual media are not prevented from imparting this information and comment. Where the State decides to create a public broadcasting system, the domestic law and practice must guarantee that the system provides a pluralistic audio-visual service. In this connection, the standards relating to public service broadcasting which have been agreed by the Contracting States through the Committee of Ministers of the Council of Europe provide guidance as to the approach which should be taken to interpreting Article 10 in this field.* The ECtHR also added that *"The Court notes that in "Resolution No. 1 on The Future of Public Service Broadcasting" (1994), the participating States undertook "to guarantee the independence of public service broadcasters against political and economic interference". Furthermore, in the Appendix to Recommendation no. R(96)10 on "The Guarantee of the Independence of Public Service Broadcasting" (1996), the Committee of Ministers adopted a number of detailed guidelines aimed at ensuring the independence of public service broadcasters. These included the recommendation that "the legal framework governing public service broadcasting organisations should clearly stipulate their editorial independence and institutional autonomy", with reference in particular to a number of key areas of activity, including the editing and presentation of news and current affairs programmes and the recruitment, employment and management of staff. The Guidelines also emphasised that the rules governing the status and appointment of the members of the boards of management and the supervisory bodies of public service broadcasters should be defined in a way which avoids any risk of political or other interference*" (§ 102 of the judgement).

Therefore, on the basis of Article 10 of the ECHR, if a state such as Poland decided to establish a system of public service broadcasting, it must ensure, by law and practice, that this system will provide pluralistic audio-visual services, and therefore access to independent and reliable information and to the widest possible range of opinions and comments. At the same time, when interpreting Article 10 of the ECHR in this respect, one has to take into account the standards agreed upon by the Member States of the Council of Europe, referred to in the guidelines of the Committee of Ministers, in particular. It should be recalled that in the Recommendation No. R(96)10 of the Committee of Ministers of the Council of Europe to Member States on The Guarantee of the Independence of Public Service Broadcasting *"the rules governing the status of the boards of management of public service broadcasting organisations,*

especially their membership, should be defined in a manner which avoids placing the boards at risk of any political or other interference". The need to ensure editorial and organisational independence of the public media by the Member States of the Council of Europe as a condition for performing their service in relation to the freedom of expression is also indicated by the declaration of the Committee of Ministers of the Council of Europe of 15 February 2012 on public service media governance and the recommendation of the Council of Ministers CM/Rec(2012) 1 on the same issue.

Both the ECHR, as well as the indicated recommendations, require the provision of editorial independence and institutional autonomy of public service broadcasters, and the determination of the status and manner of appointing their governing bodies in a way counteracting political influences.

Freedom of expression, referred to in Article 10 para 1 of the ECHR may be subject to restrictions while maintaining the requirement of proportionality set out in Article 10 para 2 of the ECHR. The state's task when introducing such restrictions is to justify their proportionality and adequacy. Arbitrary and disproportionate interference is prohibited on the grounds of Article 10 of the ECHR.

The law of the European also acknowledges the importance of the independence of the media. In particular, Article 11 para 1 of the CFR sets out the right to freedom of expression, which includes freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. In turn, Article 11 para 2 of the CFR states that the freedom and pluralism of the media shall be respected. It should be noted that Article 11 para 2 of the CFR lays down a law (not a principle), and therefore the Member States are obliged to respect this law. According to the commentary to the Charter of Fundamental Rights of the EU, "*the obligation to respect human rights is the obligation of the Member States not to interfere in the content and exercise of human rights by the right holder, with this kind of obligation (negative) results from the essence of human rights and does not require additional rationale and conditions"* (A. Wróbel (ed.), *Karta Praw Podstawowych Unii Europejskiej. Komentarz,* Warsaw 2013, p. 1331). According to the commentary, "*the obligation to respect rights and freedoms is a classic (negative) duty of public authorities not to interfere in the contents and exercise of the rights and freedoms laid down by the Charter"* (idem, p. 1332).

In accordance with Article 51 para 1 of the CFR, the provisions of this Charter are addressed *"to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers".* We are dealing with implementing Union law in

situations indicated by the CJEU, among others, in its judgement of 26 February 2013 in *Aklagaren v. Hans Akerberg-Fransson* (§ 19).

In the case of the challenged provisions of the Amending Act, it should be pointed out that the provisions remain in close connection with the regulations of the Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audio-visual media services (Audiovisual Media Services Directive; UE Journal of Laws L 95 of 15.04.2010, p. 1).

Since the provisions of the contested act remain in connection with the independence of the media and their pluralism, in this context, recitals 5 and 8 of the preamble to the directive should be pointed out, which stress the importance of audio-visual media services to societies and democracy, as well as the need to prevent any acts which may lead to restrictions on pluralism and freedom of televised information and of the information sector as a whole. Finally, Article 30 of Directive 2010/13/EU states that *"Member States shall take appropriate measures to provide each other and the Commission with the information necessary for the application of this Directive, in particular Articles 2, 3 and 4, in particular through their competent independent regulatory bodies"*. Therefore, the EU directive imposes obligations related to the establishment of independent regulatory authorities on the Member States. The scope of this obligation is explained by recital 94 of the preamble, which indicates that *"in accordance with the duties imposed on Member States by the Treaty on the Functioning of the European Union, they are responsible for the effective implementation of this Directive. They are free to choose the appropriate instruments according to their legal traditions and established structures, and, in particular, the form of their competent independent regulatory bodies, in order to be able to carry out their work in implementing this Directive impartially and transparently. More specifically, the instruments chosen by Member States should contribute to the promotion of media pluralism"*.

The interpretation of Article 11 of the CFR, as the fundamental control standard, requires to take into account the provisions of the above-indicated directive, because the Explanations to Article 11 of the CFR, attached to the Charter, indicate that it is needed to take into account the so-called "Television without Frontiers" directive, that is, Council Directive 89/552/EC of 3 October 1989 on the coordination of certain provisions laid down by Law, Regulation or Administrative Action in Member States concerning the pursuit of television broadcasting activities (OJ L 298 of 17.10.1989, pp. 23-30, as amended) to interpret this provision. However, since this directive was annulled by directive 2010/13/EU indicated above, therefore it is the

provisions of this act that apply in relation to the contested provisions of the act, and thus lead to the fulfilment of the premise referred to in Article 51 para 1 of the CFR.

The importance of editorial independence of public broadcasting service for the sake of freedom of expression is also emphasized in the case-law of the General Court (formerly the Court of First Instance), which, referring to Article 11 of the CFR and Article 10 of the ECHR, states that it involves "the freedom to hold opinions and to receive and impart information and ideas without interference by public authority" *(see judgement of the Court of First Instance of 22 October 2008 in joined cases T-309/04 , T-317/04, T-329/04 i T-336/04* TV 2/DanmarkA/S, *§ 118).*

The role of independent media is also emphasized in the soft-law documents of European Union's institutions. Communication of the European Commission on the application of State aid rules to public service broadcasting (2009/C 257/1) specifies in § 10 that "*broadcasting is generally perceived as a very reliable source of information and represents, for a not inconsiderable proportion of the population, the main source of information. It thus enriches public debate and ultimately can ensure that all citizens participate to a fair degree in public life. In this connection, safeguards for the independence of broadcasting are of key importance, in line with the general principle of freedom of expression as embodied in Article 11 of the Charter of Fundamental Rights of the European Union and Article 10 of the European Convention of Human Rights, a general principle of law the respect of which is ensured by the European Courts".*

Finally, Protocol No. 29 on the System of Public Broadcasting in the Member States, added by the Lisbon Treaty to the Treaty on the Functioning of the European Union and the Treaty on European Union, stresses that " the system of public broadcasting in the Member States is directly related to the democratic, social and cultural needs of each society and to the need to preserve media pluralism". Thus, one can indicate the relationship between free, pluralistic media at the national level and democracy at the level of the European Union – restrictions at the national level affect the level of democracy in the EU, for example, in the execution of the right to vote in the elections to the European Parliament, which will take place in 2019.

4. The provisions indicated in item 2 and 3 of the *petitum* of this application, providing for the appointment and dismissal of the members of boards of management and supervisory boards by the minister competent for matters of the Treasury constitute a violation of the Constitution and the ratified international agreements referred to above as control standards.

The Amending Act, through granting the government (the Minister competent for matters of the Treasury) the competence to directly shape the personal staffing of boards of management and supervisory boards of the company and determine their statutes without the participation of

the NBC, while at the same time shortening the term of office of the existing authorities of these media, abolishes the statutory, multi-level guarantees of independence and pluralism in the management and structure of public media. It replaces them with the mechanism of a direct and constant influence of the government on this area. The act not only entrusts the appointment and dismissal of the supervisory boards to the Minister competent for matters of the Treasury, but also introduces the direct appointment and dismissal of the boards of management by this Minister, without including the supervisory board in any role. In such a situation, its existence is devoid of any basic legal justification.

Article 21 para 1 of the Amended Act states that the public service specified in it is performed by public broadcasting services. The statutory duty to perform public service has not been entrusted to private broadcasters. The tasks of public service listed in Article 21 para 1 of the act include, among others, pluralism, impartiality, balance and independence. An independent and transparent manner of appointing public media bodies and their stability, manifesting itself in term limitations and the lack of arbitrary dismissals is also the premise for the performance of public service. Hence, the Broadcasting Act, in its wording prior to the amendment of 30 December 2015, provided for a complex, competitive and participative mechanism for appointing the members of management and supervisory boards of the public media, the terms of office of these authorities, and an exclusive list of conditions for dismissing their members, and at the same time – a key role in this process was entrusted to the NBC. This remained in close connection to the constitutional position and role of the NBC, set out in Article 213 para 1 of the Constitution.

It should be noted that, in the opinion of the Constitutional Tribunal, equipping the NBC with competences related to the personal staffing of the management and supervisory boards was caused by the desire to make public television companies, as joint-stock companies, independent from the state, as their owner. In its resolution of 13 December 1995 in case W 6/95, the Constitutional Tribunal clearly emphasised that "*the reason for the existence of the National Broadcasting Council is not only to establish a new state body, bud the desire to safeguard the independence of public radio and television. In a way, this independence is the starting point, because only through its existence and observance is it actually possible to ensure freedom of expression and the right to information".* When referring to the possibility of the Minister of Finance dismissing the members of supervisory boards, the Tribunal has then ruled that "*it would threaten with a complete personal dependence of the supervisory boards from the Minister of Finance. It would be completely contrary to the constitutional understanding of the principle of the independence of public service broadcasting, and it would violate the constitutionally established responsibility of the National Broadcasting Council for the proper functioning of these means of mass communication".*

The constitutional empowerment of the NBC in terms of participation in the creation of public media's authorities was completely ignored in the act of 30 December 2015. The explanatory memorandum accompanying draft law explains that "no specific powers of the National Broadcasting Council in relation to the public media" incur from the Constitution. The Council, according to the explanatory memorandum to the draft amendment, as an independent regulatory body exercising public authority (*imperium*) over non-subordinated broadcasters, should not hold any competences in relation to the public media, which typical for corporate rights and corporate governance (*dominium*), such as deciding on the composition of their authorities and the contents of statutes. The draft's explanatory memorandum also invokes recital 94 and Article 30 of directive 2010/13/EU on audio-visual media services, concerning independent regulatory bodies, which are to operate independently and impartially, suggesting that the competences of the National Broadcasting Council in relation to public media authorities and the contents of their statutes raise "*far-reaching reservations*" in the light of these requirements. Finally, the explanatory memorandum accompanying the amendment's draft indicates that the required changes bring statutory regulations closer to "*the standard for other companies controlled by the Treasury" in terms of corporate governance and corporate rights of public media companies.*

The assertion that no competences of the NBC in relation to the public media incur from the Constitution completely ignores the contents of Article 213 para 1 of the Constitution, in particular the concept of "*public interest regarding radio broadcasting and television*" contained in this constitutional provision, whose normative contend was determined in the case-law of the Constitutional Tribunal referred to above.

The statement of reasons of the amendment's draft also completely skipped the nature of the NBC, specified by the Constitutional Tribunal in the above-mentioned judgements, as an independent body located outside of the system of separation of powers. The independence of the NBC from the government and its legal nature is the primary reason, and not the obstacle, to entrust it with powers in respect of the appointment of public media authorities. This is not in contradiction with qualifying NBC as an independent regulatory authority on the basis of Directive 2013/13/UE. Having the competence for the appointment and dismissal of public media authorities and co-deciding on the contents of their statutes did not deprive the NBC of its independence, impartiality and transparency.

The argument invoking bringing public media companies closer to "*the standard for other companies controlled by the Treasury*" in terms of corporate governance and corporate rights of public media companies completely omits the essence and specificity of public media and the public service performed by them, associated with the freedom of expression, the right to

information and public interest regarding radio broadcasting and television, and objecting to their control by the government. The European Commission states in *item 9 of the above-mentioned Communication on the application of State aid rules to public service broadcasting* of 2009 that "*public service broadcasting, although having a clear economic relevance, is not comparable to a public service in any other economic sector. There is no other service that at the same time has access to such a wide sector of the population, provides it with so much information and content, and by doing so conveys and influences both individual and public opinion*".

Since the NBC, as guarding the public interest regarding radio broadcasting and television, is constitutionally responsible for performing the public service entrusted to the public media (Article 21 para 1 of the Amended Act), it may not bear this responsibility without having an influence over the composition of the authorities and the contents of statutes of public media companies establish to perform this public service under the Act.

Direct appointment and dismissal, without specifying the term of office, without any limitation of conditions and with no specific procedure, of the management and supervisory boards of public media by the Minister competent for matters of the Treasury is impossible to reconcile with the principle of the independence of public media resulting from the constitutional guarantees of freedom of expression (Article 54 para 1 of the Constitution) in conjunction with the freedom of the media (Article 14 of the Constitution). Free appointment and dismissal of public media authorities by the Minister is equal to their constant dependence on the government - at any time, the members of management and supervisory boards have to reckon with the possibility of their dismissal, without having to demonstrate, or even give any reason.

This specificity of the public media causes that, in the face of the existence of the NBC, as an independent constitutional authority safeguarding freedom of speech, the right to information and public interest regarding radio broadcasting and television (Article 213 para 1 of the Constitution), and therefore responsible for the performance of the public service of radio and television, the grant of exclusive powers to appoint and dismiss management and supervisory boards of public media authorities and determine the contents of their statutes to the Minister competent for matters of the Treasury, while omitting the role of the NBC, is inconsistent with Article 213 para 1 of the Constitution.

The independence of public media consists of their editorial independence (programming authority) and institutional autonomy (organisational independence), where the second conditions the first. The Broadcasting Act, also after the amendments made by the Act of 30 December 2015, includes several safeguards of editorial independence of the public media.

They include all broadcasters' full independence in determining the content of the programme (Article 13 para 1 of the Amended Act), and the impermissibility of obligating or

barring a broadcaster from transmitting a particular broadcast by virtue other than a statute (Article 14 para 1 of the Amended Act). In addition, in accordance with Article 22 para 1 of the Amended Act, state authorities may take decisions concerning the functioning of public radio and television broadcasting organisations only in circumstances specified in the existing legislation. In accordance with Article 29 para 2 of the Amended Act, the directions and prohibitions imposed by the general meeting of shareholders in respect of the contents of a programme service shall not be binding upon the Board of Management. The programme councils, mainly composed of representatives of parliamentary groups, do not have any competences over the programming, but only evaluate their level of quality shall, and their resolutions are considered by the relevant supervisory board (Article 28a para 3 of the Act). The whole system of legal safeguards against the influence of the state, and especially the executive power, on the programming of public broadcasters loses its meaning if the Minister competent for matters of the Treasury, who is a member of the government, has been equipped with the competence to freely appoint and dismiss the members of management and supervisory boards of these broadcasters, while repealing the guarantee of stability and independence of these bodies. It is the government who received a decisive and direct impact on the organisation of the public media and their authorities.

In addition, the Board of Management, directing the public broadcaster and employing people responsible for creating programming and other services, is placed under potential or actual pressure to gravitate towards shaping editorial content in such a way to satisfy the government and avoid their discontent. This may manifest itself in avoiding or minimizing the areas and topics that show the government in a negative light.

Freedom of expression and the associated freedom of the media are not absolute. Article 54 para 1 sentence 2 of the Constitution allows for statutory imposition of a requirement to obtain a permit for the operation of a radio or television station. Any limitations upon the exercise of freedoms must comply with the requirement referred to in Article 31 para 3 of the Constitution, i.e. they may be imposed only by statute, and only when necessary in a democratic state for the protection of its security or public order, or to protect the natural environment, health or public morals, or the freedoms and rights of other persons. Such limitations shall not violate the essence of freedoms and rights. Similarly, restrictions are permitted by Article 10 para 2 of the ECHR and Article 52 para 1 of the CFR. However, the need for an amendment by way of the Amending Act has not been explained in the explanatory memorandum to the draft law in any way. These changes cannot be regarded as necessary in a democratic state of law and in the existence of many other, more proportional and adequate, measures for the proper management of public media, in a way that guarantees their pluralism and proper functioning. The solutions adopted in the Act, providing for an on-going, direct and unlimited influence of the government constitute a

manifestation of extreme interference in the independence of the public media, in terms of shaping the composition of their authorities and statutes.

The principle of the independence of the public media, with its basis in the freedom of speech (freedom of expression and the right to information) and the freedom of the media, is a well-established principle in European democratic culture. In this situation, taking away the NBC's competences with respect to the participation in the appointment and dismissal of the authorities of the public media, which perform public service, and entrusting the Minister competent for matters of the Treasury, combined with shortening the term of office of the existing public media authorities appointed with the participation of the NBC, and the repeal of fundamental guarantees of the independence and stability of these medias' authorities, is inconsistent with Article 213 para 1 of the Constitution, in conjunction with Article 14, Article 54 para 1 and Article 61 para 1 of the Constitution in conjunction with Article 31 para 3 of the Constitution and in conjunction with Article 10 of the ECHR and Article 11 of the CFR.

V.

Article 3 of the Amending Act needs to be considered inconsistent with the principle protection of acquired rights and the principle of protection of existing interests resulting from Article 2 of the Constitution. This provision regulates the expiry of the legal forming the basis for employment of the current members of the Board of Management on the day of appointment, in accordance with the provisions of the Amended Act as amended by the Amending Act, of the new Board of Management. The former member of the Board of Management shall be entitled to severance pay, equivalent to three times the amount of his or her remuneration for October 2015 (Article 3 para 2 of the Amending Act), decreased by the amount of remuneration earned from this employment for the period until 31 March 2016, should a person entitled to severance pay take a management position at a public radio and television entity before said date (Article 3 para 3 of the Amending Act). In addition, a public broadcaster may terminate, with a 14-day notice period, the non-competition agreement concluded with the former member of its Board of Management (Article 3 para 4 of the Amending Act). In the matters referred to in paragraphs 1–4, the provisions of agreements concluded before the entry into force of the Act of 30 December 2015 shall not apply (Article 3 para 5 of the Amending Act).

There is no doubt that these solutions, as indicated clearly by the last of the indicated regulations, interfere with the concluded contracts and the resulting continuous legal relationships. In this way, the infringe the existing interests of the parties to these contracts and deprive them of some of the rights acquired on their basis. This provision clearly shows that the

purpose of the Act of 30 December 2015 amending the Broadcasting Act was to make personal changes in broadcasting companies, as evidenced by the fact that the Amending Act does not provide for a restructuring of the company, nor does it apply to any other issues related to the organisation, structure, manner of functioning or a change of the legal form of the company. It only regulates issues related to ending the term and expiration of mandates and legal relationships of the members of the board.

In accordance with the legislation in force prior to the adoption of the Amending Act, the Chairman of the Board could be dismissed by the NBC only at the request of the Supervisory Board or the General Assembly of a given company. Such a dismissal could only take place in exceptional cases exhaustively listed in the Broadcasting Act. The amendment of the Act, in respect of the appointment and dismissal of the members of the board of management, introduced by the Amending Act, allowed to repeal the current members of the Board of Management. In accordance with Article 4 of the Amending Act, it expires on 30 June 2016, which means that its purpose was primarily to dismiss the existing members of the company's Board of Management.

This objective of the Act is contrary to the fundamental principles of the democratic state ruled by law, which establish the rationality of the legislature (Article 2 of the Constitution). It also infringes the principle protection of acquired rights and the principle of protection of existing interests resulting from Article 2 of the Constitution. Although the judgements of the Constitutional Tribunal adopt that the protection of acquired rights does not apply to holding a function in a representative body (e.g. holding the office of a member of parliament), or to occupying an office or position in bodies of public authority – holding the function of a member of a public broadcaster's board of management, however, does not belong to such situations. This is not, in fact, a representative body, nor a body of public authority, but a body performing management functions in a joint-stock company of the Treasury. Persons appointed as members of media's management boards are people required by the prior statutory provisions to have competences in the field of management and public broadcasting (Article 27 para 3 of the Amended Act). They were appointed from among candidates selected by way of a contest, subject to specific requirements of the law. The act provided for a four-year term of the Board of Management (Article 27 para 2 of the Amended Act), and the possibility to dismiss it only in the fulfilment of special conditions (set out in Article 27 para 6 of the Act. Under these conditions, the conclusion of a contract by the member of the board of management constituting the basis for their employment in a public service broadcasting company has created acquired rights, without prejudice to the occurrence of special circumstances justifying the dismissal. The arbitrary reduction of the tenure and expiration of the mandate of the board member, due to circumstanced independent of the people occupying these functions can not be considered a sufficient basis for

depriving them of the rights acquired. It should be pointed out that Article 3 of the Act of 30 December 2015, by interfering with the acquired rights, does not respect even such basic rights of employees, as for example the protection of the permanence of employment relations in the pre-retirement period.

The exceptional mechanism of expiry of the employment relationship is therefore used as a consequence of significant reorganisation and transformation. The principle of protection of acquired rights prohibits arbitrary abolition or limitation of subjective rights held by individuals or other private actors. In its judgements, the Constitutional Tribunal has pointed out that, when interfering with the acquired rights, the legislature should introduce legal arrangements, which reduce the negative effects for those concerned to a minimum, and allow them to adapt to the new regulations. These restrictions on part of the legislature stem from the principle of the democratic rule of law (Article 2 of the Constitution).

The Amending Act interferes with the already ongoing civil relations (Article 3, para 2-5). From this point of view, the act violates the constitutional principle of protection of acquired rights and the principle of protection of existing interests. Although, as a rule, the legislature may shape future civil relations, then it is mode difficult to justify such action with regard to already ongoing legal relations.

It must therefore be concluded that Article 3 of the Amending Act is incompatible with the principle of protection of acquired rights and the principle of protection of existing interests, resulting from Article 2 of the Constitution.

VI.

Under Article 4 of the Act of 30 December, said act entered into force on the day following the day of publication, and will expire on 30 June 2016. Therefore, the Act provides for an extremely short (in practice – only a few hours) period of *vacatio legis.*

The period of *vacatio legis* of the Act determined in such a way does not meet the requirement to introduce an appropriate adjustment period, resulting from Article 2 of the Constitution. From the principle of the rule of law the Constitutional Tribunal derived the principle of of inviolability of citizens' trust in the state, and from it, in turn, the principle of non-retroactivity of law, the order of appropriate adaptation period (*vacatio legis*) and the protection of properly acquired rights (Cf. *Komentarz do art. 2 Konstytucji,* ed. L. Garlicki, Warsaw 2003, p. 17). The necessity to establish an adjustment period applies to all regulations addressed to citizens. A period is considered appropriate if the recipients of the new regulation are able to adapt their activities and interests, as well as manage their affairs in accordance with the

new requirements. The lack of a real opportunity to adapt to the new legal conditions proves the inadequacy of *vacatio legis.*

In the opinion of the Constitutional Tribunal, expressed in the judgement of 31 January 2006 in case K 23/03, "when assessing the compatibility of normative acts with the obligation to maintain an adequate vacatio legis, one should also take into account the possibility to familiarize oneself with the contents of the drafted legal regulation in the course of legislative proceedings. *Legal arrangements subject to consultation with the stakeholders and introduced into the draft legislation from the beginning, with an intensive information campaign on part of the actor bringing the proposal, and the adopted by the Sejm and the Senate unchanged should be treated differently than regulations introduced in the final stages of the legislative process, without prior consultation with the interested social groups. In the first case, the interested parties learn about the intentions of the legislature in advance and can feasibly begin to adapt to the new regulation immediately after its adoption by the parliament, and thus before it is signed by the President and announced in the Official Gazette".*

In its judgement of 23 March 2006 in case K 4/06, the Constitutional Tribunal clearly indicated that *"such a practice of introducing normative acts, which through determining proper dates of entry into force would create a real guarantee to prepare for the implementation of the provisions of such acts to all its recipients should deserve praise. It is obvious that if there are no emergencies, then a normative act's "resting period" should be long enough in the case of regulating new legal matter (see judgement of the Constitutional Tribunal of 3 October 2001 in case K 27/01, OTK ZU no. 7/2001, item 209)".*

The Constitutional Tribunal commented widely on the obligation to provide an adequate period of *vacatio legis* in its judgement of 22 September 2005 in case Kp 1/05, in which it stated that "*the imperative for a proper vacatio legis is one of the standards that makes up the contents of the principle of the democratic rule of law, and stems directly from the principle of trust in the state. The discussed constitutional norm dictates the new regulations to be entered into force with an appropriate vacatio legis. The Constitutional Tribunal has repeatedly stated that the recipient of a legal norm must have the time to adapt to the amended regulations, and to safely take appropriate decisions concerning their future course of action (cf. judgements of the Constitutional Tribunal: of 15 December 1997, ref. K 13/97, OTK ZU No. 5-6/1997, item 69, and of 4 January 2000, ref. K 18/99, OTK ZU No. 1/2000, item 1). Secondly, the examination of the constitutionality of the implementation of new regulations must always rely on a material determination of the precise "adequacy" of the adjustment period. The "adequacy" of vacatio legis must be examined in connection with the ability to manage one's affairs – after the announcement of the new provisions – in a manner that takes into account the contents of the new*

regulations. The requirement to maintain vacatio legis should, in fact, refer not only to the protection of the recipient of a legal norm against the deterioration of their situation, but also the opportunity to review the new law and possible adaptability (cf. judgement of the Constitutional Tribunal of 11 September 1995 in case P 1/95, OTK of 1995, part II, item 26). The assessment of whether the vacatio legis is adequate in a particular case, depends on all the circumstances, in particular on the subject matter and content of the regulations provided for in the new provisions, and how much do they differ from the current regulations (cf. judgement of the Constitutional Tribunal of 20 December 1999 in case 4/99, OTK ZU no. 7/1999, item 165). Thirdly – while examining vacatio legis as an element of the general principle of democratic state of law, the Tribunal, still before the enactment of the Act on the Promulgation of Normative Acts, has repeatedly drawn attention to the "adequacy" of the length of vacatio legis, conditioned by the contents and nature of the provisions coming into force, and their wider political and socio-economic context. Therefore, the Constitutional Tribunal assumed the need of changing the existing law, in a manner entailing negative consequences for the legal position of the addressees of the law to be changed, using the transitional provisions, and at least - an appropriate vacatio legis. The Tribunal emphasized that the advantage of such solutions is the creation of a possibility to adapt to the new legal situation for the recipients (cf. judgement of the Constitutional Tribunal of 2 March 1993 in case K 9/92, OTK of 1993, part I, item 6)".

An exceptional reduction of the *vacatio legis* period, or even its complete omission can be justified by an important public interest. By using the concept of "important public interest", which the legislator also used in Article 22 of the Constitution for the limitations imposed upon the freedom of economic activity, the Constitutional Tribunal pointed out the uniqueness of the derogation from the general rule (see L. Garlicki, *Komentarz do art. 2 Konstytucji*, Warsaw 2007, p. 46. See also judgements of the Constitutional Tribunal, ref K 45/01 of 25 June 2002 and ref. P 1/95 of 11 September 1995).

The expression of the principles arising from the Constitution and the Constitutional Tribunal's case-law are the provisions of the Act of 20 July 2000 on the Promulgation of Normative Acts and Some Other Legal Acts (Journal of Laws of 2015, item 1484, as amended). In accordance with Article 4 para 1 and 2 of said Act, normative acts that include generally applicable provisions, published in the official gazettes, enter into force after fourteen days following their publication, unless a given normative act provides for a longer period. In justified cases, normative acts, subject to paragraph 3, may enter into force in less than fourteen days if important public interest requires the immediate entry into force of a normative act, and if the principles of the democratic rule of law do not preclude it, the day of entry into force may be the same as the day of the publication of this act in the Official Gazette.

In relation to the challenged Article 4 of the Amending Act, it should be noted that at no stage of the legislative process or in the explanatory memorandum to the draft was the important public interest demanding its immediate entry into force indicated. The contested Article 4 of the Amending Act does not meet the requirements set out in the judgements of the Constitutional Tribunal cited above. The explanatory memorandum of the bill does not provide the reasons for such a drastic shortening, and *de facto* – the lack of *vacatio legis*. The act changes the basic and established assumptions of the public media system adopted during the period of political transformation, i.e. it departs from their independence from the executive power. Such an important systemic change, regardless of whether it is constitutionally permissible at all, requires a sufficiently long period of *vacatio legis.* It would not only allow the recipients of the new provisions to adapt to their application, but would also serve the function allowing to reconsider the amendments and possibly correct any errors. In the case of the Amending Act, that chance was not created. The explanatory memorandum of the draft law does not indicate the cause for reducing *vacatio legis* below the period of 14 days. It neither indicates the important public interest that requires the act to enter into force immediately, nor why the principles of the democratic state of law do not preclude this solution. A several-hours-long *vacatio legis* does not meet any of the objectives of this legal mechanism.

As a result, Article 4 of the Amending Act, in the section defining the entry into force of the Act on the day following the day of its publication, is incompatible with Article 2 of the Constitution.

VII.

Finally, the problem that may occur in practice in the course of evaluating the constitutionality of the provisions of the Amending Act by the Constitutional Tribunal should be referred to. As already mentioned, Article 4 of this Act provides that it loses its effect on 30 June 2016.

The Commissioner for Human Rights directs his request during the effective period of the Amending Act. However, it has to be reckoned that the challenged statute – at the time of the Constitutional Tribunal's ruling – will formally lose its force.

Due to the need to protect the rights and freedoms, it must be assessed whether – under the legislation applicable after the loss of binding force by the challenged act – the condition of discontinuance, referred to in Article 104 para 1 pt. 4 of the Act of 25 June 2015 on the Constitutional Tribunal (Journal of Laws item 1064, as amended) occurs.

In accordance with Article 104 para 1 pt. 4 of the Act on the Constitutional Tribunal, the Tribunal shall, at a sitting in camera, issue a decision on the discontinuance of proceedings, if a normative act within the challenged scope has ceased to have effect before a ruling is issued by the Tribunal. As indicated by the Constitutional Tribunal itself in its judgement of 16 March 2011 in case K 35/08, the concept of loss of binding force of a normative act or norm is vague, and despite many statements of the representatives of the doctrine of law, and the Constitutional Tribunal, still remains questionable. It should be noted that the Tribunal has held, that the repeal of a provision does not always lead to the loss of its binding force – this can only happen if the provision in question cannot be used at all. A repealed provision should be regarded as valid if it is still possible to apply it to any situation from the past, present and future (cf. case-law and literature cited in the judgement in case K 35/08).

The essence of the problem of a possible discontinuance of proceedings pursuant to Article 104 para 1 pt. 4 of the Act on the Constitutional Tribunal, therefore, lies in the assessment whether, in fact, the unconstitutional provision is really excluded from the legal system. According to the Constitutional Tribunal, only after finding that the repealed provision can not be applied, in particular, it does not impose certain consequences on the citizens, can the proceedings be discontinued (cf. decisions issued on the basis of similar provisions of the Constitutional Tribunal Act of 1997, of 13 October 1998, ref. SK 3/98, OTK ZU o. 5/1998, item 69 and of 3 February 2004, ref. SK 12/02, and judgement of 24 April 2007, ref. SK 49/05, OTK ZU no. 4/A/2007, item 39). The Constitutional Court decides on the doubts as to the validity of a specific normative act *a casu ad casum* against specific legislation and their legal and factual context.

In the judgement cited above in case K 35/08, the Constitutional Tribunal has introduced a clear distinction between the binding nature of the act in situation, when the tested normative act, despite formal exemption, determines injunctions or prohibitions on certain behaviour, and cases in which the applicable legal norms prescribe to qualify behaviour or events from the past in accordance with the derogated legal act. According to the Tribunal, in the first case, the normative act remains in force and is subject to the Constitutional Tribunal's control. In the second case, the normative act ceased to have effect, and its control is is admissible only to the extent specified currently in Article 104 para 3 of the Constitutional Tribunal Act of 2015 (previously in Article 39 para 3 of the Constitutional Tribunal Act of 1997)

When referring to the specific case of the challenged provisions of the Act, it should be noted that – as far as the Constitutional Tribunal will adjudicate on the matter after 30 June 2016 – the tested normative act under this legislation will issue orders or prohibitions on specific behaviour no more, and therefore – it will not comprise an applicable normative act. Its control, however, is permissible in the light of Article 104 para 3 of the Constitutional Tribunal Act, as

adjudicating on the compatibility of a statute with the Constitution and ratified international agreements is necessary for the protection of constitutional freedoms and rights, and therefore the Constitutional Tribunal, despite ruling in relation to an act which may lose its validity before the publication of the judgement by the Tribunal, should not discontinue the proceedings, but assess the compatibility of the challenged statute with the Constitution and ratified international agreements.

According to the Constitutional Tribunal's case-law, cited in the judgement in case K 35/08, together with the views of the doctrine of law invoked there, the condition justifying a control of constitutionality of a provision is the establishment that there is a relationship between a given regulation and the protection of constitutional rights and freedoms.

In this case, it should be noted that the contested provisions of the Amending Act contain normative content relating to constitutionally protected rights and freedoms. The introduction of changes concerning the influence over casting management and supervisory boards of the public media is – as shown above – related with the observance of the freedom of speech and the right to information, as well as the freedom and pluralism of media associated with them.

0 The adoption of an act, which made a single-time change, has also had consequences on the time, when the act will no longer apply. We are dealing with the "necessity" to issue a judgement, in order to ensure the effective protection of constitutional freedoms and rights *de lege lata* when – against the inaction of the legislature – it is not possible to protect them without adjudicating. This refers to every situation, in which constitutional freedoms and rights have been violated in result of the publication or application of the tested normative act, and at the moment of issuing a judgement they are not protected, and in particular when the legislature has not eliminated the consequences of their violations, whereas the issuance of a judgement on the unconstitutionality of a given normative act by the Constitutional Tribunal ensures the protection of these rights and freedoms.

In addition, at the moment there is no alternative legal instrument (except for the possible recognition of a provision to be unconstitutional), which could change the legislation shaped definitely, before said provision ceased to have effect. The elimination of the challenged provisions from the legal system will thus be the only effective means of restoring the protection of the rights infringed by the application of the challenged legal regulation.

The statement of reasons of the bill shows that its temporary nature is connected with the fact that it represents only the first phase of changes in the Polish public media, aiming to establish a national media system and presented in this form, because the creation of a new

system of organization and financing of national media requires several months of intensive work and will be the next stage of change.

In principle, the use of derogatory clauses in normative acts is not excluded. It can not, however, lead to undermining the stability of the legal system and enabling the introduction of ad hoc solutions to institutions, such as public media, which are essential for the realization of the constitutional rights and freedoms. The legislature may not freely suspend those rights and freedoms, or the constitutional principles, such as freedom of speech and freedom of the media, from which the principle of the independence of public media arises. One cannot introduce a permanent or temporary dependence of the public media from the government by way of statute. The justification for ad hoc solutions of this nature with the fact that a wider reform of the system will be developed in the future, therefore, to allow the project originators (e.g. the government) to prepare it at their convenience, is completely inadequate. In its judgement of 12 December 2015 in case K 32/04, the Constitutional Tribunal stated that "*it is not enough for the appropriate measures to facilitate the achievement of their objectives, or to be comfortable for the authority, which aims to use them to achieve those objectives. These measures should be worthy of a state referred to as democratic and legal. It should be remembered that the indicated measures can only be considered to be justified so far, as their goal is to protect the values of the democratic state of law. The minimum constitutional requirement is for them to pass the test of "necessity in a democratic state of law". The desirability, usefulness, cheapness or the ease of use by the authority is not enough in respect to the used measure".*

It should also be noted that the Constitutional Tribunal has also made a rule that if in a specific case there is doubt as to the fulfilment of the above conditions, then it should be explained to the merits of the substantive hearing the case (see judgement of 21 May 2001 in case SK 15/00).

In the light of the foregoing, it must be concluded that, in the event of adjudicating in this case by the Constitutional Tribunal after the day of expiration of the Amending Act, which – in accordance with Article 4 of said Act – falls on 30 June 2016, the condition of the necessity of issuing a ruling, referred to in Article 104 para 3 of the Act on the Constitutional Tribunal, will be met.

Taking into account the above, therefore I submit as at the beginning.