

2021 Rule of Law Report – targeted stakeholder consultation

I am giving my contribution as: Civil society organisation/NGO

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Main Areas of Work: Media Pluralism

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Questions on developments in Member States

Member States covered in contribution: Poland

III. Media pluralism

A. Media authorities and bodies

29. Independence, enforcement powers and adequacy of resources of media regulatory authorities and bodies

While Poland currently maintains a high level of media pluralism, the media landscape has been under threat since 2015. Reporters Sans Frontiers 2020 Annual World Press Freedom Index ranks Poland at 62; in 2015, Poland ranked 18.

In addition to its successful campaign since 2015 to gain editorial and financial control of public media, the Government of Poland and its political allies continue to take actions to intimidate and weaken independent media:

- Public attacks against independent media, eg. during the 2020 Presidential campaign;
- Frivolous litigation to intimidate/retaliate, including 50+ lawsuits against opposition media;
- Denial of access to independent journalists to government press conferences, state institutions and officials for interviews, including revocation of some press passes;
- Withholding of government-paid advertising from independent media platforms.

Reporting by public broadcasters over the past several years has increasingly supported the ruling party and attacked individuals critical of the government. The government over the same period significantly increased funding to public broadcasters, from PLN 980 million in 2017 to PLN 1.95 billion in 2020. Jan Petersen, head of the OSCE election observer mission that monitored the Polish vote said that while voters “had numerous options available to them, their ability to make an informed choice was undermined by a lack of impartiality in the media, especially the public broadcaster. The recently amended Act on Radio and Television Broadcasting ensures public broadcasters will continue to receive additional funding above advertising and subscription fees it collects.

Reports by reputable groups focused on Rule of Law and Human Rights corroborate these experiences, including a 2020 Freedom House Report, a 2020 Council of Europe report and a 2020 Organization for Security and Co-operation in Europe report.

30. Conditions and procedures for the appointment and dismissal of the head / members of the collegiate body of media regulatory authorities and bodies

In December 2015, PiS passed a temporary “Small Media Law” which gave the government direct control over public broadcasting and resulted in the resignation or firing of over 200 journalists working in public media. This resulted in a purge of editorial leadership of the public broadcasting entity TVP which has severely impacted its impartiality.

In 2016, the PiS government enacted a “bridge law” which set up the National Media Council to be the entity responsible for appointment of the management and supervisory boards of the public media going forward. The National Media Council consists of five members, two members appointed by the President and three from the Sejm. According to a 2017 Special Report by Freedom House, this arrangement effectively guarantees the ruling party a majority, and unlike at the KRRiT, there is no provision forbidding the new council’s members from belonging to a political party.

31. Existence and functions of media councils or other self-regulatory bodies

The Polish National Media Council (created in 2016) is a collective body appointing and dismissing the management boards and supervisory boards of Polish Television, Polish Radio and Polish Press Agency. The Council consists of three persons elected by the Sejm and two appointed by the President and recommended by the opposition parties. With three Sejm appointed members (all from the ruling party) PiS has full control of the National Media Council and Management Board of TVP. Pursuant to the ruling of the Constitutional Tribunal the current setup is unconstitutional.

The National Broadcasting Council (KRRiT) is envisaged by the Constitution as the safeguard of free speech and public interest. According to the 2020 OSCE Election Report, while KRRiT is vested with a mandate to monitor campaign coverage, it chose not to use it. In the 2020 election, KRRiT took no proactive responsibility, and only reacted to complaints brought to its attention.

B. Transparency of media ownership and government interference

32. The transparent allocation of state advertising (including any rules regulating the matter); other safeguards against state / political interference

Independent news outlets have experienced a decline in government ad buys since 2015.

We are not aware of any formal government directive in the matter of advertising spending, as such a formal notice might risk a potential complaint with competition authorities, but the below trends are telling.

The 2020 Media Freedom Rapid Response report found that liberal outlets such as Polityka and Newsweek Polska have experienced a drop of 98-100% in revenue from state advertising since 2015. Meanwhile, state-owned ad spend has increased on public broadcasters and previously fringe media outlets Media expert Professor Tadeusz Kowalski of the University of Warsaw research found that advertising spending by state-owned companies on TVP increased substantially from PLN 98,989,000 in 2015 to PLN 308,417,000 in 2019 (more than 3 times) while TVP

share declined by 2,21% across the same period. The increase of state linked spending corresponds with a decrease in the independence of these outlets. Findings of his latest report show that between 2015-2020, state-owned companies spent over PLN 5.4 billion on advertising. The right-wing media are clearly favoured, i.e.: TVP received 53 % of funds (over 2.7 bln PLN), the right-wing media of the Karnowski brothers and of Tomasz Sakiewicz (Sieci - 20 mln PLN, Do Rzeczy - 14 mln PLN and Gazeta Polska - over 8 mln PLN. It means that the right-wing media received 44% of funds. State-owned companies avoided media which criticise the authorities such as “Gazeta Wyborcza” (74 thous. PLN), “Newsweek” - RASP (0% of funds), “Polityka” (0% of funds), and TVN (6.4% of funds).

In 2020, the Polish Government introduced amendments to the Broadcasting Act. Many of the amendments do not include a mechanism for due process or to appeal decisions by authorities.

Additionally, on 2 February 2021, the Polish Government proposed a new advertising levy on media. The reason given was to raise money for a health fund and a Polish cultural fund amid the pandemic.

Several business organizations condemned the levy, with the Association of Private Media Employers saying it would impose an additional burden on the industry, which has already suffered a 10% drop in the market due to the pandemic.

The cross-media application is a farce as public media is subsidized and this charge would have a disproportionate impact on foreign investors who have contributed so greatly to Poland's economy. State-owned or friendly-to-the-government companies can make up for the charges through advertisements from state-owned companies and subsidies from the Fund Supporting Culture and National Heritage, which should receive a boost of PLN 220 million through this legislation.

The advertising fee is to be calculated according to different rates (in the range from 2 to 15%). depending on the type of advertised goods and medium type (Internet, press, TV, cinemas, outdoor media, etc.) A higher fee rate will be paid by businesses providing advertising services in TV, radio and outdoor advertising media: they will pay 7.5% on up to PLN 50 million of the revenues from advertisement, 10% when this threshold is exceeded. Yet other rates will apply to advertising of “qualified goods”. The fees on the revenues from conventional advertising is progressive – there are two rates applicable to a given type of advertising of non-qualified goods, depending on the amount of advertising revenues. The fee rate for internet advertising amounts to 5% and is linear.

Although the declaration of Prime Minister - "The construction of this digital fee must be fair, so it must be progressive and must be structured in such a way that the bigger and the biggest ones contribute more to society, because someone has to build the roads, someone has to look after the nurseries, the hospitals, the salaries for nurses and for teachers. This does not come out of nowhere" (Prime Minister's press conference in Gdańsk, 15 February 2020), such a situation will lead to the creation of diversified conditions of competition for companies fighting for the same advertising budgets and operating on the same mass media markets. Such action is contrary to the non-discrimination rule arising from Art. 32 Sec. 2 of the Constitution of the Republic of Poland. "Discrimination means the unacceptable creation of various legal norms for legal entities that should be included in the same class (category)" - see the judgment of the Constitutional Tribunal of 15 July 2010, K 63/07.

On 10 February 2021, multiple media outlets protested the ad levy by not reporting and instead sharing the message "find out what the world will look like without independent media." _The Polish government has since announced that it will "redraw" the proposed levy to make it "fairer." Global press attention and strong statements from government officials stressing the importance of free press to democracy definitely helped influence the revision. Continuing to be vocal about this issue is critical to the future of independent media in Poland.

33. Rules governing transparency of media ownership and public availability of media ownership information

Poland's Deputy Prime Minister Jaroslaw Kaczynski has continuously argued that "the media in Poland should be Polish."

In December 2020, Poland's state-controlled PKN Orlen announced it was buying local media group Polska Press from German Verlagsgruppe Passau. The deal gives Orlen control over 20 of Poland's 24 regional newspapers and almost 120 local weeklies under Orlen's control. The MFRR cited this deal as "unprecedented" in the EU and quoted Polska Times editor Witold Głowacki that the acquisition would influence editorial changes at the 15 regional subcompanies ahead of the 2023 election, contributing to further pro-government bias.

Restrictions to foreign ownership in the media space to the extent currently being discussed in Poland are very unusual in Europe - among major markets, only France and Spain have such provisions (legacy rules from when the public monopoly was abolished in the late 1980s). Markets, such as UK, Czech Republic, Norway, and Germany also create a level playing field for all stakeholders, ensuring commercial freedom as well as preserving pluralism and freedom of speech.

Currently Poland, like many European countries, grants 10-year broadcasts licenses for radio and TV channels, giving media investors a fair planning horizon and market stability. However, recently consulted amendments to the Broadcasting Act would change the license term to “up to 10 years,” allowing licensing authorities to grant shorter, arbitrary terms. If passed, this amendment would destroy market stability and transparency, and increase companies’ dependence on government favor.

C. Framework for journalists' protection

34. Rules and practices guaranteeing journalist's independence and safety

There is growing evidence that an increasingly politicized judiciary is infringing on fundamental rights in Poland and violating Polish citizens' right to a free press. The launch of the Commission’s infringement proceeding in April 2020 further underscores the question of regulatory and judicial impudence as it relates to the free press.

Lawsuits against independent media, used as an instrument of harassment, have markedly increased in recent years. While the vast majority of these are frivolous and are ultimately dismissed, they use resources that the independent media could better use elsewhere and place a chill over independent reporting.

In October 2020, Gazeta Wyborcza journalists Magda Koziol and Joanna Ubranska-Jaworska were assaulted and injured by black-clad hooligans, and in another instance, video footage shows police using truncheons to hit photojournalists who were pinned against a flight of stairs. Journalist Renata Kim was beaten even though she was wearing a bright PRESS vest. Polish Ombudsman Adam Bodnar rejected the argument that the attacks were accidental.

The OSCE Office for Democratic Institutions and Human Rights in 2019 wrote that “an increased number of criminal defamation cases initiated against journalists in recent years undermines freedom of expression.”

We expect restrictions on journalists to increase. In late 2019 the ruling party proposed a new law to regulate journalists as part of its party manifesto. The law as described would create a “self-government” body to ensure journalists abide by certain ethical and professional standards. Third party groups have raised their concerns, including the Polish Society of Journalists which claimed the “initiative is designed to bring journalism under control.” The European Federation of Journalists also raised concerns with the plans and has called on the government to refrain “from any initiative to regulate the profession.”

35. Law enforcement capacity to ensure journalists' safety and to investigate attacks on journalists

N/A

36. Access to information and public documents

Free access to public information is protected by Poland's Constitution and by the Act on Access to Public Information. However, it is increasingly difficult for independent journalists to access public officials and information. The MFRR 2020 report also found that public officials connected to the ruling party now "routinely refuse communication or interviews with certain media often denied access to legally guaranteed and public held information without explanation."

The OSCE Office for Democratic Institutions and Human Rights corroborated after its mission to monitor the 2019 parliamentary election: "in practice information requests are often left without response from public officials, forcing media to undergo lengthy court procedures, undermining the accessibility of public information."

At the beginning of this year a provision regarding diplomatic secret was included in the bill on Foreign Service. It would introduce restrictions in accessing public information. Lawyers argue that it may hit not only the openness of foreign policy, but also restrict journalists' access to information about activities of the Polish government on the international scene.

37. Lawsuits and convictions against journalists (incl. defamation cases) and safeguards against abuse

The MFRR 2020 Report found that PiS has continued to legally harass independent media in Poland with "expensive and time-consuming court battles." ONET, an investigative news outlet, is facing at least eight different vexatious lawsuits over its reporting, and its editor-in-chief Bartosz Węglarczyk said that either he or his deputy were in court at least three times a week.

While one in ten of defamation cases is estimated to be successful, the lawsuits are used more as a tool to harass government critics than achieve justice.

The OSCE Special Election Assessment 2020 notes that while freedom of expression is enshrined in the Polish constitution, defamation remains a criminal

offence with which journalists are often charged, as is public insult of the President which was actively used during the 2020 presidential campaign.

Other – please specify

N/A