



Report of Egbert Dommering and Andrew Nicol of December 2003 on the case of Rzeczpospolita, commissioned by the World Association of Newspapers (WAN)

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1. *Fact finding*

This report is based on the following findings.

- The Legal Opinion of Professor Egbert Dommering concerning the Freedom of the Press in relation to the numerous conflicts in and around the Company Presspublica between the government and the other shareholder, the management and the editors of 9 May 2002 (attachment).
- Expert Auditor's Opinion of Agnieszka Czarnecka for the District Public Prosecutor's office of September 2003 (confidential).
- Report on the analysis of Agnieszka Czarnecka's opinion regarding charges against three members of the Management Board of Presspublica Sp. z.o.o. of 31 October 2003 (confidential, but delivered to the District Public Prosecutor's Office as well).
- Comments on the Opinion of Agnieszka Czarnecka, chartered accountant, on the level of Loss in Presspublica Sp. z.o.o. as a result of the contracts dated 30th June 1999 and 15th May 2000 concluded with Warsaw Print (confidential but delivered to the Public Prosecutor's Office as well).
- Written reports and oral information by the law office Wardynski & Partners and the members of the Management Board of Presspublica.
- Talks with the deputy editor in chief and journalists of Rzeczpospolita and an English translation of the article 'Media Hunt' which appeared in the same newspaper on 12 November 2003 (attached).
- An English translation of an official statement of the Ministry of Treasury concerning the Rzeczpospolita case. It was sent to WAN on 11th September 2003.
- The letter of Mr. Karol Napierski, National Prosecutor, of 29 March 2002 to the Director of the International Press Institute.
- Meeting with the National Prosecutor Mr. Karol Napierski and Mrs. Barbara Sznajder, at the Ministry of Justice on the 20th November 2003.
- Meeting with Mr. Andrzej Krajewski, director of the Polish Journalist Association.
- The Comprehensive monitoring report of Poland's preparations for membership of the European Union of the fall 2003.
- Recommendation 1589 (2003) 1 on the Freedom of Expression in the media in Europe of the Council of Europe.
- The report of the Committee on Culture, Science and Education of the Council of Europe of 14 January 2003.
- Recommendations by the International Press Institute of 23 November 2002 and 13 September 2003 on the Rzeczpospolita case (attached).

On the press conference held at the office of Presspublica on 20 November 2003 the authors of this report made statements to the press and were questioned by the press. A representative of the minority shareholder PPW Rzeczpospolita State Publishers was present. On that occasion Mr. Dommering invited PPW to give comments to us, but neither of us has received any submissions from or on behalf of PPW.

2. *Abbreviations*

In this report the following abbreviations will be used:

ECHR :	European Court of Human Rights
IPI :	International Press Institute
RZP :	the Rzeczpospolita daily
PP :	Presspublica Sp. z.o.o., the RZP daily publisher
PHN :	Presspublica Holding Norway AS, holder of 51 % stake in PP
PPW :	PPW Rzeczpospolita State Publishers, owned by the State Treasury, holder of 49% stake in PP
RZH :	Rzeka Holding SA in organisation, a company set up by the PP employees
WAN :	World Association of Newspapers

3. *The structure of this report*

In this report we will proceed as follows. First we will look at the factual developments since 9 May 2002 until 20 November 2003. Then we will discuss the meeting with the National Prosecutor and the outcome of it. Next we will give our legal assessment of the facts divided into the following questions (in accordance with the decision three of Article 10 of the Convention)

- Is there (still) an interference by the government in the freedom of expression of the newspaper Rzeczpospolita, and, if so, is this based on a foreseeable and accessible law and is any such interference necessary in a democratic society?
- Is Poland under an obligation under article 10 of the Convention to fully privatise the newspapers in the country, in particular Rzeczpospolita?

4. *Developments since 9 May 2002*

The opinion of 9th May 2002 contained three major conclusions (quoted below in main points):

1. “The co-ownership of the State of Presspublica which publishes Rzeczpospolita is an inheritance of the communist period and in itself a situation that requires close examination under article 10 of the Convention (see chapter II 3 and 4). As far as I know

there were not put mechanisms in place to prevent the government from having direct control over the newspaper or to safeguard its independency.”

Since 9 May 2002 the Ministry of State Treasury has failed to take any legal steps to withdraw as an owner of shares in the company which publishes the newspaper. This is despite the fact that there have been statutory opportunities to do so and notwithstanding that a consortium is interested in acquiring the shares from the State.

At the beginning of June 2002 PHN sent a letter to Wieslaw Kaczmarek, the then Minister of State Treasury. In its letter it proposed to commence talks on the privatisation of the State Treasury stake. To date the Minister office has failed to provide any answer to this letter.

On 27th March 2003 a consortium consisting of RZH and PHN (a subsidiary of ORKLA PRESS AS) submitted an offer to buy the 49 per cent stake owned by PPW in PP, publisher of the Rzeczpospolita daily. Each member of the consortium declared its desire to acquire for its own account half of the shares remaining in the hands of the State Treasury. The offer was submitted to the PPW, the Minister of State Treasury, and the Prime Minister.

The move to establish the consortium and make the offer to acquire the State Treasury's stake was initiated by the employee-owned company RZH established by eight members of the management.

In a letter dated 16 April 2003 sent by the director of PPW of PHN (the Norwegian shareholder), the director stated he reserved the right to make an offer to buy shares in PP from the majority shareholder, PHN. Such a declaration made by the director of a state enterprise in practice caused concern. It was seen as reflecting an intention to renationalise the RZP daily. It is clear that the money required for such an acquisition would have to have been provided by the government with the help of the resources in other companies in which the government has a stake.

Until the end of May 2003 the consortium received no official reply to its offer. Meanwhile, Mr Maciej Ceglowski has said in the media that PPW has rejected the offer and is preparing its own.

On 30 May 2003 the members of the consortium decided to extend the period of validity of their offer until 31 December 2003, of which they notified PPW, the Prime Minister and the Minister of the State Treasury.

Piotr Czyżewski, the Minister of State Treasury and Barbara Misterska-Dragan, former Deputy Minister met with the representatives of the consortium consisting of PHN and RZH in May and in August 2003. During the meetings they claimed that their intention was to implement appropriate procedures leading to the privatisation of PPW. In November there were signals coming from the circles close to the Ministry of State Treasury that the commercialisation process, which is the first and indispensable privatisation phase will not be launched legally until „corporate order” has been restored in PP. This implies the completion of proceedings run by the prosecutor's office or in the court of law against the members of Presspublica Management Board and ending of other pending disputes in the courts of law.

In this context it should be stressed that in one of the actions brought against Presspublica PPW made a claim that the resolution of the Shareholders Meeting is repealed. Under the resolution in question the current editor-in-chief had been appointed.

Another threat for the majority stakeholder of PP is yet another proceeding of the prosecutor's office. Following the motion of PPW the prosecutor's office is running a proceeding that a civil court declares the share acquisition contract concluded in 1996 under which PHN acquired shares in PP and Warszawa Print invalid.

2. “The actions brought against the company by the State holding in itself could be considered as actions justified under company law, but by their number and the systematical character they show a pattern that supports the conclusion that the motive is to damage the exploitation of a Press company.”

We refer to the table presented in the attached report of 9 May 2002. Many of the cases under company law referred to in that table are still pending and still causing a threat to the stability of the Company.

3. “The latest action over the Warszawa Print dispute in particular has disproportionate aspects. Firstly, because the government acted in its double capacity as shareholder and chief of the public prosecution, which gave the action the threatening feature of a direct interference in the actions of the company by the powers of the state. Secondly, because the withholding of the passports and survey by the police of the management of the company constitutes a direct infringement of article 2 of the fourth Protocol of the Convention (ratified as well by Poland) which protects the right of everyone to free movement including the right to leave the country. This right may only be restricted in the interest of legitimate aims prescribed by law and proportionate to those aims pursued. I can hardly see in the facts that were brought to my attention any necessity for the imposition of these measures. Thirdly, a criminal conviction of the members of the managing board, even if contested in an appeal, could be used as a pretext to appoint a state trustee to get control over the management and the editorial board. If the government would go that far that, in my opinion constitutes a direct unjustifiable interference”.

The developments since 9th May 2002 were the following.

- a. On the 4th of June 2002 the prosecutor returned the passports to the members of the Management Board of PP. This took place on the eve of the visit of the Prime Minister of Poland (Mr. Miller)'s to Norway and his meeting with the Norwegian Prime Minister.
- b. In September 2002 the prosecutor gave information about a new investigation against the Management Board of PP. This concerned an alleged operation to the detriment of the Company. The detriment was supposed to be payment in 2000 of financial compensation to the former editor in chief of RZP after his dismissal. After the hearing of witnesses and the President of the Management Board of PP and on the basis of the legal opinions, which have

been known also to PPW since 2000, on 20th November, 2002 the prosecutor closed the investigation “due to the lack of legal signs of a criminal act”.

On 5 June 2003, the members of the Management Board of PP, Elżbieta Ponikło and Grzegorz Gauden, received summons to appear at the District Police Headquarters in Warsaw on 16 June 2003. The public prosecutor announced that he had decided to reopen the investigation in this case. On 16th June 2003 Grzegorz Gauden and Elżbieta Ponikło were interrogated at the Warsaw-Ochota District Police Station.

The proceedings carried out by the prosecutor’s office are still pending. It was reinitiated due to a decision taken by a higher supervisory level in the prosecutor’s office. Following the prosecutor’s order the police announced the interrogation in this particular case of the citizens of Norway, members of the PP Supervisory Board appointed by PHN: Jan Lindh, Director of Orkla Media AS, Terje Bertheussen, President of the Management Board of PHN and Bjorn Cato Funnemark. The purpose of their interrogation is only to confirm their votes during Supervisory Board meetings. Full and complete minutes from the Supervisory Board meetings in question are at the prosecutor’s office and police disposal, so the announced actions did not seem to have any appropriate purpose.

- c. By a decision dated 26 March 2003, the public prosecutor cancelled the obligation to report to the police that had been imposed on three members of the Management Board of PP more than a year before. The cancellation took place after numerous protests, addressed to the Polish government, by international organisations concerned with media freedom.
- d. On 10th July 2003 the Prosecutor’s Office of the „Ochota” District in Warsaw charged Maciej Łukasiewicz, the RZP daily editor-in-chief, under Art. 46, par. 1 of the Act called Press Law (“Whoever fails to fulfil his statutory obligation to publish an adjustment to a text or an answer (...) is subject to a financial penalty or the penalty of limitation of freedom.”). – According to the prosecutor in charge of the proceedings, the RZP daily editor-in-chief failed to publish appropriate replies to earlier published texts. The RZP daily editor-in-chief did not plead guilty and refused to provide any explanations on this matter.

On 20th October 2003 the prosecutor brought into the court of law a charge sheet against M. Łukasiewicz but withdrew it after a couple of days after press publications and the intervention of the Minister of Justice.

- e. By November 2003 34 months had passed since the prosecutor’s office opened the case against the members of PP’s Management Board in the so called Warszawa Print Case. 18 months have passed since the prosecutor’s office received four expert opinions (PriceWaterhouseCoopers, Deloitte and Touche, Kancelaria Porad Finansowo-Księgowych dr. Piotr Rojek Sp. z o.o. (Financial and Accounting Counselling Office of Piotr Rojek, Ph.D. Ltd. - Dr Rojek is the President of the Polish National Chamber of Statutory Auditors and is an unquestioned authority on the matter and Tax Studies Institute), which abundantly have shown that there is no factual ground for the criminal charges.

In October 2003 the prosecutor's office presented another expert opinion of Agnieszka Czarnecka, commissioned by itself. The conclusions of this expert opinion are completely remote from the charges put forward against PP Management Board members in February 2002, but do not in an unambiguous way exclude that some loss might have occurred. However, the report says that it is not possible to determine the size of such loss. Thus, the expert formulated her conclusions in a very vague manner: on the one hand she stated that she was not able to determine the loss, but on the other hand, she states that perhaps the loss may be identified and proved, if a very detailed study was carried out. The only figure that was estimated by the expert and recognised as hypothetical loss is the amount equal to the depreciation of equipment made by the Management Board. Professional accountancy standards establish that this approach is totally groundless.

The opinions drawn up by Deloitte and Touche and Kancelaria Porad Finansowo-Księgowych dr. Piotr Rojek Sp. z.o.o. (Financial and Accounting Counselling Office of Piotr Rojek, Ph.D. Ltd) reject the content of the Agnieszka Czarnecka's opinion. They pinpoint fundamental errors in factual findings and professional errors in the conclusions drawn. It should be noted that both institutions audited the books and verified the whole financial demonstration of PP and Warszawa Print in person in their corporate seats. The experts appointed by the prosecutor's office did not do this. The prosecutor's office itself has not requested additional documentation.

- f. After the publications in the „Rzeczpospolita” daily about abuses made by the authorities Leszek Miller, the Prime Minister, demanded in November 2003 that „leaks should be discontinued” and he required the Minister of Justice to undertake appropriate actions to that extent. More than a half of a few dozen proceedings against journalists carried out recently only by Warsaw-based prosecutors' offices pertains to the „Rzeczpospolita” publications.
 - g. PPW is taking actions which have the effect of destabilising the managing authorities of PP. PPW voted against candidates for the positions on PP Supervisory Board, proposed by PHN. For this reason the Supervisory Board was not appointed. Since August 2003 until December 2003 it has not been able to take advantage in unequivocal manner of its right to propose a candidate for the position on the Management Board. If PPW had succeeded in making the company unworkable, it would have sufficient grounds to file a motion to appoint a trustee, and then most probably to file a petition to dissolve the company. This in practice would imply another attempt of taking over full control of the Rzeczpospolita daily by the State.
5. *The meeting with the National Prosecutor on the 20th November 2003.*

A representative of the WAN, both the authors and an interpreter were received by the Prosecutor to ask questions and give comments. Also present at the meeting was Mrs. B. Sznajder.

The first part of the meeting concentrated on the case of Warszawa Print. We expressed our concern about the length of the investigation and that during all this time the charges made in public against the three members of the board of PP were hanging over their heads. We also expressed doubts whether an offence 'acting at the detriment of the commercial interests of the company' could meet the standards of 'accessibility and foreseeability' as understood by the ECHR in the Convention, especially in Article 10 (restrictions on the freedom of expression should be prescribed by 'law') and 7 (the legal requirements for a criminal offence should be laid down before hand in national 'law').

Mr. Napierski started by saying that according to his personal opinion the initial seizure of the passports, although justified in many investigations, was unnecessary in this case and disproportionate. As to the length of the investigations the Prosecutor shared our concerns and apologized for the delay, stating that it was partly due to a protracted illness of the expert appointed by the Prosecution. He added that with the receipt of the report of the expert of September 2003 and the comments made by the other experts at the end of October all the relevant information had been collected. He expected that a decision on the merits of the case would be taken 'within weeks'. This decision would either be to submit the case to the Court or to drop the case all together. Although in theory the decision could be different in relation to each of the three members of the board, he did not expect this to be the case. He also explained that the decision to start an investigation and, eventually, whether to bring criminal charges before the Court or not, was the responsibility of the District Prosecutor. Moreover, the principle of legality which applies in Polish criminal law puts an obligation on the shoulders of the District Prosecutor to investigate any suspicion of a criminal offence which is brought to his or her attention.

The National Prosecutor emphasized that he had no legal right to interfere with the acts of a District Prosecutor, although he sometimes gave 'opinions' on cases handled by the District Offices. Those opinions were considered as 'authoritative', and in most of the cases were complied with by the District Office although they did not have a legal duty to do so. In the Warszawa Print case, however, he had not delivered an opinion.

In the course of the discussion about the length of the Warszawa print investigations Mrs. B. Sznajder stressed that the Warszawa Print case was sensitive and had special complications because the interests of the State Treasury were involved. Upon our questions about the nature of the involvement of the Treasury, both Mrs. Sznajder and Mr. Napierski remained vague. The latter stressed that the case was treated as any other case. He did not deny however that this case was a case with special complications. We questioned why only three out of four members of the board of PP were the subject of a criminal investigation when the offence in question related to a commercial transaction which had been approved by the board as a whole. Mr. Napierski and Mrs. Sznajder, assumed that the reason was that the contracts which were the subject of the investigations, only carried the signatures of those three members (We asked PP whether this was correct, we were told by them that it was not – since two members Grzegorz Gauden and Piotr Fraczak had signed the relative contract).

On the matter of the vagueness of a criminal offence, defined in the law as ‘acting to the commercial detriment of the company’, Mr. Napierski explained that this offence was introduced in the law in 1991 and was meant to protect inter alia the interests of society against the unjustified private advantages individuals could take from the many privatizations which occurred during this period. He further more explained that it was also incumbent on the prosecution to show that the defendant had directly acted for fraudulent motives. This placed a heavy burden of proof on the prosecution. He agreed that in a case where contradicting expert reports were available, and in which the last opinion of the expert instructed by the Prosecutor stated that it was not possible to make an assessment of the losses incurred, it would be extremely difficult for the prosecution to fulfil that burden.

In the second part of the meeting we discussed issues of freedom of the press in Poland in general and concerning Rzeczpospolita in particular. We asked whether it was true that more than half of the criminal cases brought before the Court were against RPZ. In his reply the Prosecutor underlined that yearly an avalanche of complaints in relation to statements in the media were brought to the attention of the Prosecution (he mentioned the figure of 400.000 over the last year). Most of these complaints of a different criminal nature were treated as so called *actions in rem*: the investigations took place on the basis of the subject (publications) and did not yet amount to charges brought against particular suspects. Only few out of these complaints became *actions in personam*, brought before the Court.

Taking the period of the last three years together, he stated that only ten cases were brought to Court as actions in personam. Four of these 10 had concluded with a conviction, whilst the six others were still pending. None of these 10 cases had concerned Rzeczpospolita. We tried to get confirmation of these figures later on, but did not succeed in doing so. Whether or not charges were brought, RZP stated that they had the impression that the newspaper’s investigative reporters were picked out, one of them having five investigations carried out against her in the last year only. They stuck to the publication under the heading ‘Media Hunt’.

Questioned about the events of the 10th July 2003 (see par. 4 sub 3c of this report), Mr. Napierski contended that it was due to this personal intervention (‘opinion’) that this matter was immediately dropped by the District Office. The reference made in the article ‘Media Hunt’ to the utterance of the Prime Minister that ‘leaks should be discontinued’, in his opinion, did not concern, the Press, but actions against ‘sources’ within the government not respecting their duty of confidentiality. He did not deny that such actions could have a chilling side effect on the Press, because it could discourage sources to give information.

6. *Is there still an interference by the government in the freedom of information of the newspaper Rzeczpospolita?*

6.1 The ECHR uses a very broad notion of the concept of ‘interference’: any act or measure causing a restriction may constitute this. In this respect, however, the ECHR has made it

absolutely clear that criminal and/or semi-criminal (such as disciplinary) charges with respect to published speech, have a potential chilling effect on the freedom of expression, especially when it concerns speech which contributes towards social and political debate, criticism and information (the so called 'public debate'). Even if the sanction imposed was not very high (such as a fine, a disciplinary warning, a reprimand or an official finding of a violation of a norm), a restriction in the sense of Article 10 was the case (see for example cases *Schöpfer v. Switzerland*, ECHR 20 May 1998; (2001) 33 EHRR 845, *Steur v Netherlands*, ECHR 28 October 2003 not yet reported.) The publicity around criminal charges should also be considered from the angle of the presumption of innocence of Article 6 § 2 of the Convention. When high officials make public criminal charges against individuals, before a Court has spoken in the matter, this may constitute a violation (see for example *Allenet de Ribermont v France*, ECHR 10 February 1995, Series A, nr. 308).

An interference does not have to be aimed directly against the content of the incriminated publication. Indirect restrictions such as hindering or obstruction distribution may also constitute an interference (see for example *VOS ö and Gabi vs Austria*, ECHR 19 December 1994, Series A nr. 302). Restrictions imposed in relationships governed by private law may be considered an interference as well (see for example *Fuentes Bobo* (2001) 31 EHRR 50).

6.2 Taking the facts together and looking at the matter as a whole we find that there is a systematic interference in the freedom of expression of PP and RZP:

(a) The kind and number of disputes within PP amount to a systematic obstruction of the commercial decision-making. This damages the long term development of the company.

It has been argued that PPW acts on its own account, independently from the government. We are not convinced that this is the case. The State Treasury and PPW are in constant contact. Nothing which PPW does goes unnoticed in the Treasury. As we will point out under § 8, the Treasury has the ultimate powers to privatize the 49% stake in the shares of PP, held by PPW, but apparently uses the commercial disputes in the company as a pretext to postpone that decision. Although the Prosecutor was not quite clear about the nature of the involvement of the Treasury in the criminal case about Warszawa Print, in our opinion there can be no doubt that the case attracts special attention of the Prosecutor because of the interests of the Ministry. Finally, but not least, we could not find sufficient grounds that the actions inaugurated by PPW served either its own commercial interest or that of the company. They rather give the impression of being actions directed against the majority share holder as such.

The intention expressed in April 2003 by PPW to buy out the majority shareholder supports the presumption that the strategy is to harass PHN out of the company, with the backing of the Treasury. Such a buy out could only be effected with the profits of the companies in which the State Treasury had a majority stake.

- (b) Special attention must be paid to the dispute about the appointment of the editor in chief, because PPW still challenges the resolution by the Shareholders Meeting in which the appointment was dealt with. The professional qualities and political views of the editor in chief indeed directly affect the editorial content of the newspaper. In our talks with the Managing Board and the editors of the newspaper the view was expressed that, if it had been up to PPW, an editor in chief would have been appointed who would have held views that were more favourable to the ruling government.
- (c) The Warszawa Print case concerned a commercial dispute but, on the initiative of PPW was brought to the attention of the District Prosecutor, who started criminal investigations because of a commercial crime had allegedly been committed (article 296 § 1 and 3 of the Polish Criminal Code). Both the vagueness of the norm ('acting to the detriment of the commercial interest of the company') and the burden of proof of a fraudulent intention require the availability of sufficient prima facie evidence, which in the face of the clearly understandable commercial motives of the board of PP, in our view, was not there. Nonetheless an investigation was started and after 34 months is still not closed, although the now available expert opinions do not support any allegation of a crime in the sense of article 296 of the Polish Criminal Code. During the investigation policing measures were taken against the incriminated members of the board, initially by taking in their passports, later on by imposing a duty to report regularly at the police station in the district of their domicile. In public the government treated the members as criminal suspects. These pending criminal investigation and policing measures were particularly damaging to the reputation of the company. There were several signs of the apparent involvement of the State Treasury in these criminal investigations. The District Prosecutor who handled the case made it clear from the outset that she did not have much room to manoeuvre because she received instructions from a higher level in the hierarchy. She confirmed this in November 2003 when she told to the representatives of the 'suspects', that she could not decide herself what to do with the case. The meeting with the National Prosecutor 20 November 2003 did not remove our concerns about the involvement of the Treasury.
- (d) The investigation of criminal defamation cases '*in rem*' in relation to publications in RZP, resulting in some (we were unable to establish the precise figure) cases *in personam* caused a permanent threat. Public statements of the Prime Minister that the sources of RZP should be silenced, and the initiating of criminal investigations to that effect did the same.

In general the persistent use of the instrument of criminal law if some one makes a complaint about a publication in the media he or she dislikes, in our opinion, creates a climate which is not favourable for a free public debate to be conducted by the media in Poland.

7. *Is the interference prescribed by law, justified by a legitimate aim and proportionate?*

7.1 It was difficult to determine whether there was a legitimate aim for the interference described in §6. The commercial conflicts in the company could be brought under the heading of the protection of the rights of third parties, but the concern is that the existing private company laws in the Commercial Code were not used for that purpose alone. The same holds true for the criminal investigations that are launched quite often against the media in general and RPZ in particular.

7.2 We were not in a position to do a thorough investigation into the existing Press legislation in force in Poland, especially where criminal laws are concerned. Given the substantial amount of yearly complaints which lead to a criminal investigation ‘in rem’ against media publications and their authors, we have our serious doubts, whether these provisions are sufficient precise and accessible in the sense that they can only be applied in clear injury cases. It seems that any publication that ‘offends, shocks or disturbs’ (to use the wording the ECHR used for the first time in the Handyside case, ECHR 7 December 1976, Series A nr. 24) may cause a chain of criminal actions with the predictable danger of causing a ‘chilling effect’ on public speech in Poland in general and RZP publications in particular.

In the case of Warszawa Print we found that Article 296 of the Criminal Code, if not construed sufficiently narrowly on the basis of a proof of a fraudulent intention, could not meet that test, both in the sense of Article 10 and Article 7 of the Convention. We understood from our talks with the Wardynski Law Office that there are now cases pending at the Polish Supreme Court in which the legality of Article 296 is challenged.

7.3 We have general arguments to make that the interferences summed up in §6, taken as a whole, are disproportionate. We restrict ourselves to PP and RZP. The amount of pressure that PPW puts on the commercial decision making within PP, without apparent commercial aim, and with the apparent backing of the Public Treasury, in our view, surpasses what is needed to protect the commercial rights and interests of a minority. The allegation of a criminal offence in this context, and, consequently the threat of a criminal investigation, which is particularly damaging to the reputation of the company and the members of the board, adds to that picture. The policing measures taken during those investigations were disproportionate, as already has been outlined in the opinion of 9 May 2002. This has now been acknowledged by the National Prosecutor. The fact that one of the disputes between PPW and PHN is about the appointment of the editor in chief, shows that the conflicts within the company should be seen against the background of a different view between the two (one of them closely linked to the State Treasury) on the editorial content of the newspaper. Combined with the public comments of the Prime Minister on articles which had appeared in RZP, and numerous criminal investigations in rem (and/or personam) against journalists and suspected

'sources' of the same, this shows that the ruling government clearly wants more control over the newspaper in which the Treasury through PPW still holds an interest of 49%.

What adds to the restrictive practises is, in our view, that criminal law sanctions and excessive measures based on criminal law are used in disputes between private individuals and corporations which usually in western democracies would be solved by civil law. That these conflicts became 'verticalized' by making the State with its powers an active participant in them, seems particularly burdensome especially in matters where the freedom of expressions is at stake.

- 7.4 All in all the combination of legal actions of PPW with the backing of the State Treasury and the criminal investigations of the prosecuting authorities against the commercial management of the company in relation to articles which have appeared in Rzeczpospolita, in our opinion, constitute an unjustified interference with freedom of expression.
8. *Has Poland an obligation under Article 10 of the Convention to fully privatise the newspapers in the country, in particular RZP?*

We refer to the opinion of 9 May 2002 of Egbert Dommering, to the conclusions of which we still endorse. We consider that the continuing stake of a state owned body in a newspaper company is an anachronism in a liberal democracy. It is a relic of the communist era and should be brought to an end. Private ownership, as long as it does not lead to an abusive dominant market position, is the best guarantee for a fully independent Press. The ECHR has repeatedly held that Article 10 constitutes one of the essential foundations of a democratic society and that an independent Press has a major role in making that foundation a reality in political life. The Court has also held that it is the role of the Press to scrutinize the acts of politicians and other powers in society. In that perspective it is hardly conceivable that the State (the ruling majority thought the intermediary of the State Treasury) should have a substantial interest in one of the major political newspapers in the country.

Article 10 imposes a positive duty on the State to do everything to create the conditions for the full development of the freedom of expression. In our view, the full privatization of companies which own the important political newspapers is a necessary response to fulfil that positive duty.

As has been explained to us by the Wardynski Law Office, under Polish law the Treasury has the full powers to dispose of the stake in PPW and make the way free for a full privatisation of the company.

The comprehensive monitoring report on Poland's preparations for membership of the European Union of September 2003 makes several interesting statements. On privatization in general it says that the privatisation was stalled and that the Polish authorities need to take decisive action to accelerate privatization. It also states that Poland has signed the Convention of Human Rights and Fundamental Freedoms and adheres to the contents of the same. The general

conclusion is that Poland 'has reached a high level of alignment with the 'acquis' in most policy areas'.

It is our feeling that the postponement of the full privatisation of PP because of the disputes in the company initiated by PPW, combined with the numerous criminal actions towards the company, both concerning the normal exploitation of the company and the content of the newspaper cast serious doubt on the positive conclusion of 'the alignment with the acquis'. This ought to be a serious point of attention on the agenda for the preparations for Poland's membership.

9. *Conclusions*

In the foregoing we have looked into the present situation of PP and RZP from the angle of Article 10 of the Convention. On the basis of the facts brought to our attention in November 2003, we found that the combination of legal actions of PPW with the backing of the State Treasury and the criminal investigations of the Prosecution authorities against the commercial management of the company and in relation to articles which have appeared in Rzeczpospolita, constitute an unjustified interference with the freedom of expression. We further found that the postponement of the full privatisation of PP complies neither with the positive duty of the Polish State to create the conditions for the development of a fully independent Press nor with Poland's ambition to reach a high level alignment with the acquis of the European Community in most policy areas.

December 2003

Egbert Dommering

Andrew Nicol QC

