



**Legal Opinion of Professor Egbert Dommering [1] 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**

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**Summary**

*1. This opinion analyses, from the point of view of the freedom of the press, the facts of the chain of court cases initiated by the Polish government in its capacity as a shareholder of Presspublica, and in particular the criminal action it started against the management of the Board of that company. The conclusion is that, from the perspective of an unbiased observer, the facts present the picture of a government that uses all its legal resources (in public and private law) to keep and extend its control over the media in Poland as much as is in its scope of influence. What is particularly troublesome is that the latest criminal actions initiated against the management of the company Presspublica clearly aim to reverse the process, started in 1989, of making the newspaper Rzeczpospolita independent and to bring the editorial content of the paper back into the influence of a ruling political majority in government.*

*2. The history of the Press in the Western European democracies shows the steady withdrawal of the government from the privately owned Press. The freedom of the press has been guaranteed in most countries as a strong constitutional right protecting the Press against any governmental interference. Private (non-state) ownership is the other string of this freedom, because it prevents a ruling government to use its powers as an owner to take control over editorial power.*

*The situation in the post communist countries seem to evolve slowly in the same direction. However, the fragility of public and private institutions and the not wholly completed privatisation still jeopardizes the independent position of the media. The present dispute between the state owner and the private owner of Rzeczpospolita are a striking case in point what are the risks of a not fully completed privatisation.*

*What has been said about the essential function of strong property rights and the possible threats of state owned media is supported by the findings in the World Development Report 2002 of the World Bank which features a special chapter on media*

*3. The history of the freedom of the press is reflected in the European Convention on Human Rights and Fundamental Freedoms, ratified by Poland. From the wordings of article 10 of that Convention, the case law of the European Court and the recommendations of the Council of Europe can be derived some leading principles which can be expressed as followed.*

*The basis of article 10 is that the interference of the state with the dealings of the mass media should be an exception and needs a strong justification. Ownership of a Press company (as it creates the conditions for a permanent control) does not fit well into this scheme, although is not forbidden explicitly. In matters of freedom of expression the Press and the people employed by the press enjoy a privileged position to make the free and*

*independent working of the Press possible. Dominance of ownership should be avoided, which means that the ties of owners with mass media companies should not pertain to dominant positions in the market. When it comes to state monopolies or dominant positions of the state the market situation as a whole should be judged in the light of technical and economical developments. In that light the development of an equivalent market segment next to the services directly or indirectly controlled by the state should be made possible.*

*Although the Council of Europe and the European Court did not yet formulate clear guidelines to be applied to post communist societies, it follows from the principles set out above that the structure of the media markets in these societies which used to be dominated by the state, should be judged in the light of the necessary creation of media companies no longer dependent on or controlled by the state.*

*4. The facts of the case support the conclusion that Poland fails to create the necessary conditions of the free exercise of the freedom of expression which may be considered as a violation of article 10 of the Convention. The arguments may be summarized as follows.*

- 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.*
- The actions brought against the company by the State holding in itself could be considered as actions justified under company law, but by its number and the systematical character show a pattern that supports the conclusion that the motive is to damage the exploitation of a Press company.*
- The latest action over the Warszawa Print dispute in particular has disproportionate aspects. Firstly, because the government acted in its double capacity as share holder 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.*

*5. Poland strives to join the European Union. By doing so it has to meet the constitutional requirements of the Union. In the Charter, adopted recently, the fundamental rights and freedoms (already recognized by the Court of Justice in Luxembourg as fundamental principles of community law) are explicitly defined as rights of community law. It is quite obvious that the requirements of the Charter are part and parcel of the so-called Acquis Communautaire which not only should be fully adopted but also carried out if Poland wants to become a member of the Union. It is hardly conceivable that an action to get control over a newspaper would be acceptable in the light of the Acquis..*

## **I Factual Background**

### **1. The Company and the Newspaper**

Presspublica is a company in which PPW Rzeczpospolita (a state treasury entity enterprise fully owned by the Polish government, hereinafter called PPW) owns 49 % of the shares and

Presspublica Holding Norway (a holding company fully owned by the Norwegian company Orkla, hereinafter called PHN AS) owns 51 % of the shares. Presspublica publishes the Newspaper RZECZPOSPOLITA.

RZECZPOSPOLITA is a newspaper with a long history. The newspaper was first published in 1920. After the Second World War the Polish Workers' Party (communists) taking advantage of the title which was known before the war recommenced publishing the newspaper. However, after 6 years the newspaper was abolished as not fulfilling its role.

In 1982 during the political and economic crisis, the government decided to take advantage of the „RZECZPOSPOLITA” title as a title for a government newspaper. It was published in such form for the whole period of martial law and later until the reforms carried out in 1989. During this period It served the government's interests as an official newspaper, some sort of *Government Gazette*, publishing all the official information from the government and carrying in the title that it was the government newspaper. Tadeusz Mazowiecki, the first non-communist prime Minister, decided in 1989 to launch a newspaper for other political persuasions and to make it independent from the government. The first step was to skip the reference to the government from the title and to appoint a new politically independent chief editor, whose first measure was to make the newspaper financially independent from the State. The next step of the government was to sell 49 % of the shares to the Robert Hersant press group, which was raised in 1995 to 51%. The clear object of these measures was to make the newspaper an independent newspaper.

In 1996 the owner of the majority shareholdings became PHN AS whose owner is Orkla Media AS.

RZECZPOSPOLITA is a very influential newspaper. 60 thousand institutions subscribe to it in a joint print-run in actual subscription of 122 thousand copies. The print-run of RZECZPOSPOLITA is 263,000 copies. According to research the newspaper is read every day by 700,000 readers.

RZECZPOSPOLITA delivers information with a particular emphasis on economic matters and current political events. It is a liberal-conservative newspaper.

The nature of the newspaper is neutral and independent. Its first task is to deliver credible, and objective information.

The publications of the newspaper often disclosed irregularities in the functioning of public bodies and indicated the guilty parties. Often they disclosed scandals. Officials connected with specific political groups or politicians appeared in such situations directly or indirectly with objections against the newspaper and its journalists. [2] The newspaper was also charged that it serves foreign capital and infringes the principles of objectivity. Such charges appeared under the governments of each political persuasion. There was no government which would not hide its disapproval of critical articles.

RZECZPOSPOLITA is the only newspaper in Poland in which the State Treasury has a stake of shares. This is the reason why since the mid-90's certain governments were tempted to influence the newspaper's opinions or lately recover capital control.

Over the last two and a half years the company Presspublica was involved in many procedures initiated by PPW and backed by public authorities under the control of the government, culminating in the most recent, and for the reputation of the company and its management most

damaging, procedure described in paragraph 2.1.

## **2 The procedures against Presspublica.**

### **2.1 Procedure Warszawa Print**

The subject of the proceedings is the alleged damage sustained by Presspublica Sp. z o.o. as a consequence of an agreement concluded by the Management Board of Presspublica Sp. z o.o. and "Warszawa Print" Sp. z o.o. (50,57 % owned by PHN and 49,25 % owned by Presspublica) for the lease of assets of the latter. According to the prosecutor's office and the opinions of court experts the total damage amounts to 7,287,200 PLN (and constitutes so called: damage of a large dimension). In the opinion of the prosecutor's office the evidence collected in the case was sufficient for charges to be submitted against Mr. Gauden, Mr. Fr'tczak and Ms. Ponik<sup>3</sup>o on 20 and 21 of February 2002. Initially, all the suspects pleaded not guilty and exercised their right not to submit any statements in this part of the proceedings, until new legal opinions were prepared. The prosecutor imposed preventive measures such as police surveillance and prohibition to leave the country combined with retention of passports.

The procedure is a criminal procedure based on article 296 par. 1 and 3 of the Polish Criminal Code, which read:

"1. A person having a duty on the basis of a legal act, an administrative decision or an agreement to run a financial affair or conduct a business activity of a natural or a legal person or other organization without a legal personality, causes substantial damage by abuse of authority or default in vested duties, shall be penalized by being deprived of freedom from 3 months to 5 years.

3. If a perpetrator accused of a crime described in par. 1 or 2 causes damage of a large dimension he shall be penalized by being deprived of his freedom from 1 year to 10 years."

Investigation in this case was initiated on the basis of notification of crime filed by Mr. Maciej Ceglowski, a director of PPW. The Prosecutor's office took evidence and on its own initiative, collected some documents concerning the transaction between the Company and Warszawa Print, examined witnesses, took opinions from two court experts from the regional court list. The public prosecutor's office under the Polish criminal system is not an independent institution. It is placed in structures of executive authorities, and the Justice Minister as the General Public Prosecutor is at its head.

PPW's denunciation was directed against Messrs Gauden and Fr'tczak and the investigation was conducted against those people. Charges against Ms. Ponik<sup>3</sup>o were raised at the last moment. These three people were charged with damaging the company to a significant extent, on the basis of the government accountants opinions, which were drawn up subjectively, repeating the denunciations and on the basis of documents chosen subjectively. The counter-opinion prepared bears witness to the quality of the opinions which were presented at the prosecutor's office. Its analysis, based on a careful examination of all the relevant financial data, shows that an indictment that the transaction between Presspublica and Warszawa Print has been 'causing substantial damages' in the sense of the Criminal Code, is not sustainable. The conclusions drawn by the government accountants had no foundation in the facts looked at it according to current accountancy standards. What in orderly bussines should have been treated as a

commercial dispute between two shareholders over the desirable commercial policy of the company in the future, seems to have been drawn by the State into the criminal domain with the sole intention to damage the reputation of the management of the company. What is more: it seems that the government has chosen to go the path of criminal law, because, in case a condemnation would follow, the prosecution would have the right to arrest the management, even if it lodged an appeal, which places the government in the position to appoint a trustee to manage the company in absence of the board. This trustee could act on his own behalf and replace the chief editor in this interregnum for some one supposedly more favourable to the views of the government. Although this scheme is not officially confirmed my informants say they have this from sources close to the government.

## 2.2. Tax Office proceedings on the payment of stamp duty on the acquisition of shares by PHN AS and specifying its amount in December 2001

The inspection of the Company continued from September 2000 to December 2001 although it was officially instituted only by an order of October 2001. The inspection was instigated on the application of Mr Maciej Ceg³owski, director of PPW, representing the State Treasury in the company and being the Chairman of the company's Supervisory Council until 9 October 2001.

The nature of the inspection and the activities conducted were not coherent with the officially given purpose and scope, and the officials carrying it out did not hide at least their reluctant attitude to the foreign shareholder. The activities were clearly aimed at leading to a situation in which the shares of PHN AS would be seized by the State Treasury or another tax inspection chamber. The proceedings have currently finished positively for PHN AS. The decision on assessing the stamp duty has been overruled and the proceedings discontinued due to them being time barred.

## 2.3 The Polish shareholder - PPW- has been submitting statements of claim before the Polish courts or motions aimed at destabilising the Company's activities.

Among others PPW led to (unjustified in the Company's opinion and shareholder PHN AS) a suspension in the registration proceedings of the company according to the new provisions on the commercial register. PPW is abusing its authorisations, manipulating with facts or presenting the facts of the case selectively and is endeavouring to paralyse the Company (statements of claim on invalidating resolutions of the shareholders' meetings – simultaneously attempting to paralyse such meetings, motions to secure suits, motions to appoint an administrator and so on). In such cases, there have been positive judgments for the Company which are being appealed against by PPW which is prolonging the proceedings. Below is a list of such actions:

### COURT ACTIONS

Instituted against the Company by PPW or former member of the Board – Piotr M. Mikosz, supported by PPW

DATE ACTION WAS BROUGHT	PLAINTIFF	COURT	REFERENCE	CASE

**2001:**

<b>1.</b>	November 2001	PPW	Regional Court in Warsaw	XVI GC 1589/01	<p>Declaration of invalidity of the extraordinary shareholders' meeting of 9 October 2001 to dismiss Maciej Ceg³owski from the Supervisory Council (the court has refused to establish an interim injunction and in the grounds stated that the dismissal complied with the Company's deed and the law)</p> <p>Declaration of invalidity of the resolution to appoint a chartered accountant for 2001; (as above)</p> <p>A motion to appoint an administrator for the Company was attached to the statement of claim which would mean the exclusion of the Management Board; (the court refused, not finding grounds for appointing an administrator.)</p> <p>Case pending</p>
<b>2.</b>	September 2001	PPW	Regional Court in Warsaw	XVI GC 1361/01	<p>Declaration of invalidity of the resolution of the extraordinary meeting of shareholders of 31 August 2001 appointing Adam Wojdy³o to the Board;</p> <p>Case pending</p>
<b>3.</b>	September 2001	PPW	Arbitration Court (ad hoc) in	-----	<p>To pay the profits for 1999; PPW misled the Court on the formal circumstances connected with the</p>

			Warsaw		appointment of arbitrators which meant that the Company was excluded from the procedure of appointing the arbitrators to the Arbitration Court. On appeal the Court overruled its own decision. In March of this year the Company consented to conclude a settlement and appointed an arbitrator.
4.	September 2001	Piotr M.Mikosz (former member of the board)	Regional Court in Warsaw	XVI GC 1110/01	To dissolve the Company; PPW's director publicly supported this motion. Possible dissolution of the Company in the State Treasury's representative's belief should indicate a return of the right to the RZECZPOSPOLITA press title to the State Treasury  Case pending
5.	August 2001	PPW	Regional Court in Warsaw	XVI GC 1132/01	Declaration of invalidity of the resolution of the extraordinary shareholders' meeting of 9 July 2001 to dismiss Piotra M.Mikosz from the position of a member of the Management Board together with the motion to secure the suit; the court also refused to issue such an order in this case;  Case is pending
6.	July 2001	PPW	Regional Court in Warsaw	XVI GC 1034/01	Declaration of invalidity of the resolution of the ordinary shareholders' meeting of 19 June 2001

					<p>ratifying the Board's motion on the purchase of printing machines;</p> <p>In practice the resolution is not being implemented, against the threat of the Director of PPW to send the next denunciation to the prosecutor's office in case this resolution comes into force.</p> <p>Case pending</p>
<b>YEAR 2000:</b>					
7.	September 2000	PPW	Regional Court in Warsaw	XVI GC 1078/00	<p>Declaration of invalidity of the resolution of the extraordinary shareholders' meeting transferring the matter of selecting a candidate for the position of Chief Editor of the newspaper to the editorial board.</p> <p>Case is pending</p>
8.	September 2000	Piotr M.Mikosz  (former member of the board)	Regional Court in Warsaw	XVI GC 1047/00	<p>Declaration of invalidity of the Board's resolutions no 92/2000 and 93/2000 concerning the dismissal of P. Aleksandrowicz from the position of Chief Editor and entrusting such position to M. Lukasiewicz;</p> <p>Case is pending</p>
9.	February 2000	PPW	Regional Court in Warsaw	XVI GC 170/00	<p>Declaration of invalidity of the resolution of the extraordinary shareholders' meeting of 20 January 2000 awarding a member of the Board, Elżbieta Ponikło, a special prize (one month's</p>

					pay) for excellent work regarding the opening of the new printers;  Case is pending
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#### 2.4. Registration obligations

From 1 January 2001 the new Commercial Companies' Code is in force in Poland which together with other laws imposes on companies an obligation to re-register to the newly established enterprises register. PPW submitted to the registration court motions to suspend such registration proceedings of a company, until other courts resolve the statements of claim submitted by PPW. As a result of PPW's motion the court suspended the registration proceedings. This situation hinders the company's commercial activity which the state shareholder knows about and which it does not hide.

### 3. The proposed law on cross ownership

In March of this year the Polish government proposed to Parliament a law on cross ownership that introduces restrictions on ownership in the electronic media. Although the proposal looks like a law combatting media concentrations, its apparent object is, by exempting the State and State controlled media organisations from its effects, to strengthen and enlarge existing state dominance in this field. By all means, this was the way the Western Press reported about it. [3] And from an open letter to the Polish government from the International Press Institute I take the following quotations [4] :

'Worryingly, comments made in public by government officials indicate that the draft law may have been specifically designed to weaken Agora, the owner of *Gazeta Wyborcza*. [5] On 13 March, Lech Nikolski, the Prime Minister's Chief of Staff, while speaking on public television, said that, since *Gazeta Wyborcza* had said "Stop SLD", "SLD will now stop Agora". Responding to the protests about the draft law from all of the Polish media, the Undersecretary for Culture, Aleksandra Jakubowska, said, "It is just a protest of a few companies whose interest it is to monopolise the market" IPI notes that the Deputy Prime Minister Marek Pol has spoken vaguely in the press about the need to combat the "threat of excessive monopolisation around a certain group of views, certain editorial". However, this view fails to take into account the considerable strength of the state media inside Poland. (...)

With regard to the lack of transparency on this issue, IPI believes that it reveals the government's true intentions, namely that it has devised a law to protect its own media and to disadvantage the independent media.'

### 4. Conclusion

From the perspective of an unbiased observer the facts present the picture of a government that uses all its legal resources (in public and private law) to keep and extend its control over the media in Poland as much as is in its scope of influence. What is particularly troublesome is that the latest criminal actions initiated against the management of the company Presspublica clearly aim to reverse the process, started in 1989, of making the newspaper Rzeczpospolita independent and to bring the editorial content of the paper back into the influence of a ruling political majority in government.

## II Some Brief Historical Notes on the Freedom of the Press

### 1. The Press

#### 1.1 The Press: the combat against governmental influence

The origins of the Freedom of the Press can be traced back to England and France in the end of the 17th century. Until then, ruling governments tried to control the free circulation of information by a mixture of public and private law instruments. An individual or a company who wanted to issue a book or a newspaper needed a license (privilege) which gave him the exclusive right to publish on a prescribed range of subjects in a circumscribed territory in the country of the licensing authority. Parallel to the protection of exclusivity by the Licensing Authority all material to be published had to be approved beforehand. [6] The control before publishing (censorship) focused on subjects of religion and politics and the due respect to be paid by publisher and writer to religious and worldly powers.

The historical rupture with this system of governmental control on the flow of information, came about with the abolishment of the Licensing Act in England in 1695, which meant that no longer a license was required to publish information. In France the growing criticism on the absolutist regimes of the subsequent kings Louis XIII-XV led to the break down of the privilege and censorship system. The Revolution of 1789 was the calibration point of the small fires of dissent which had sparked up everywhere in the country in the preceding decades. The *Déclaration de droits de l'homme et de citoyen* broke with the government controlled systems of property rights (the privileges) and gave a firm basis to the formulation of the right of freedom of expression, to be followed soon by the first amendment added to the American Constitution. The prohibition of *prior consent* (in the American positive wording of the principle often called 'prior constraint') became the leading principle of all the West European constitutions and still figures in the Dutch Constitution. Article 7 of this Constitution which lays down the requirements for the right of freedom of expression, opens with the phrase; 'No one needs a governmental permit to convey his thoughts and feelings to the printing press' and this phrase is still construed by the Dutch Courts as an absolute prohibition of any license system whatsoever for any press related company or organisation (Printing press companies, publishers, libraries etc).

It should be noted that the abolishment of a license system did not stop governmental interference with the press. The Napoléon empire and the Restauration that followed can be considered as one of the most repressive era 's in the history of the press. However, the emphasis was no longer on prior consent, but on restrictive measures that intended to impede the free circulation of newspapers (such as stamp laws on paper, criminal offences hampering free distribution and the like) and draconic defamation laws that encouraged self censorship of the editors to avoid criminal procedures. It was not until after the liberal revolutions of 1848 that the

freedom of the press to publish and distribute freely information without prior consent of the government and without undue restrictions in public law became an established notion in European constitutional thinking. It is this common notion that is reflected in article 10 of the European Convention on Human Rights and Fundamental Freedoms (ECHR). The European Court of Human Rights (as shall be explained in more detail in Chapter III of this opinion) considers the freedom of the press and the functional part an independent Political Press as an institution plays in it, the cornerstone of a parliamentary democracy.

## 1.2 The Press: ownership structures

The first period in Press History focusses on the forcing back of state influence on the press. Private ownership was and is part of that freedom. The press developed as a free enterprise in a competing market. The tremendous growth of the popular mass papers in the early twenty century was also the growth and expansion of large press companies. In Western Europe ownership of press companies by the State was not entirely unknown but the exception. Moreover the papers owned by the government evolved into *Governmental Gazettes*, official information channels for the publication of texts of legislation, official decrees, policy papers. Although these papers have independent editorial staffs that publish comments on governmental policies they are not considered to be part of the independent political press.

At the end of the twentieth century the dominant positions of certain media tycoons (such as Berlusconi in Italy) became a worrying reality which more and more drew the attention of democratic governments. Departing from general principles of competition law sector specific regulations putting certain restrictions on (cross) ownership in the media were devised and applied. Private ownership as a protection against governmental interference could, in its more dominant forms, as well become a threat to the independence of the media.

It should be stressed that the concerns over dominant ownership were indeed concerns over *dominance*. The essential function of private ownership as such was never questioned. Rules about ownership should be seen and understood against the background of the development of markets and the part the state plays in these markets. Markets that are not fully developed or privatised need strong ownership.

## 2. Broadcasting

Let me be brief on the history of broadcasting, so rich and complicated, that it is impossible to treat it fully in a paper which main topic is the Press. From the outset the regulation of broadcasting was different from that of the Press, because the government had an important role to play in regulating the access of the market which in the beginning had tremendous technical and economical entry barriers. In most Western European countries, this led to the establishment of a government funded public service, which until the eighties enjoyed a near monopoly, today countered by a fully commercial market. The idea behind a public service (conceived and brought to full stature by the British BBC) was that, taking into account that the supply of information for technical and economical reasons was monopolistic, the monopolist was put under heavy legal constraints to serve the interests of the public at large. To this core idea were added ingredients of educational and cultural policy: the public service should not only be the forum for public democratic debate but ought also to educate and cultivate the masses.

The so-called 'public' broadcasting organisations found their legal status in a variety of rules of

public law in the different Western countries, the common denominator of which is how to cope with the problem of, on the one hand a fully by the state dominated organisation, and, on the other hand the requirements of independence of a media organisation. These opposing forces were conciliated in organisation forms that safeguarded the independence of the editorial management of the public broadcasters and created representative structures to reflect all the political and societal movements in society. This could not prevent that from time to time disputes arose over political oriented appointments of the board of the public broadcasters by the ruling political coalition and the influence this ruling coalition exercised over the programming of the public service. These conflicts were often the case in Spain, France and Italy, but did occur in other Western democracies as well.

When in the early eighties, due to technical (satellite and cable technology), economical (the booming advertising market) and social (the pop culture of the post war generation) changes, Western governments were forced to open the commercial market for commercial companies, the broadcasting systems became 'dual' in the sense that next to a public service developed a commercial market. In many countries the financing of the public service became 'mixed' which meant that public broadcasters were allowed to take part of their income from the advertising market, while still profiting from the income of the license fee. This put the public service in the ambiguous position to fulfill public services obligations on behalf of the public at large (including minorities) and to compete at the same time for large audiences in the advertising market. Discussion over the proper mission of a public broadcasting organisation in a changing commercial environment became therefore part of the political agenda in all Western democracies in the early nineties, and it still is. If the majority of the public watches shows and soap on commercial tv, why should they pay a license fee for high brow programming on the public tv, watched by the already educated and well to do? On the other hand, and more pressing each year, the commercial broadcasters were complaining that the conditions of competition between the public and private broadcasters were unfair and unequal, in terms of the technical and financial means granted for free to the public broadcasters.

### **3. Post authoritarian and post communist countries. [7]**

Already in the twilight of the ruling authoritarian and totalitarian regimes, signs of press freedom and independent media showed up. In former authoritarian dictatorships, like Spain, the liberalisation took a different shape from those in former communist countries. Although not the only decisive factor, one of the main differences seem to be that in post communist countries the issue of state ownership remained to be solved.

Spain had known the franquist rule which, while recognising private ownership, had woven a web of public law rules regarding appointments and content around the press organisations. The turning point for the press is the year of 1976, the year of generalissimo Franco's death. In this period of interregnum which knew extreme political tensions, the government maintained its control over the electronic media, but the press enjoyed much more freedom. New magazines and newspapers were founded, the most important of which became *El País*.

'From its very first issue, it was clear that *El País* represented an important change in Spanish journalism. It functioned as if there were restrictions on freedom of the press. (...) It appeared at a key moment in Spain's political development'. [8]

When *El País* became to much the newspaper of the socialist government of Felipe González,

the establishment of the more centre oriented Madrid newspaper *El Mundo*, rebalanced the political spectre of the press.

In broadcasting the two channels of TVE were identified with the government as they were under direct control of the Ministry of Information. Although legal reforms in 1980 brought important changes in this respect, the 1988 law opening the commercial market for new players such as Antena 3 and Canal Plus formed an essential addition to pluralism.

The changes in Russia began under Gorbachev's *perestroika* program, which, increasingly, gave editors the opportunity to follow a direction independent from the Polit bureau . What draws, however, most of our attention, is the privatisation of television, because it is a case in point to show how in post communist countries the issue of the independence of the media became intertwined with the issue of property rights. In 1993 the wholly private owned TV stations TV 6 and NTV started their emissions, but many stations remained in whole or in part in the ownership of the State. I here quote at length from Ellen Mickiewicz [\[9\]](#) who, in my view, hits the hammer on the nail, when she writes:

'In addition to pluralism, a democratic media system requires editorial autonomy, or protection from interference with editorial news decisions. In the United States, the autonomy has been defined as freedom from government control or censorship. A broader definition might also include making editorial decisions independently of owners' interests. With regard to government, freedom from interference in post-Soviet Russia has been lodged in very fragile institutions. Over 100 television stations are owned by a state that is also the major shareholder in the country's largest station, Channel One (ORT), and the direct owner of the second largest, Channel Two (RTR). No effective mechanisms were put in place to protect the stations from the state (...). In addition to government-owned stations, there were fully commercial ones (...). The market structure did enable these commercial stations to be reasonably independent of government interference, but the autonomy that they enjoyed depended not on the legal protection that private property afforded, but rather on the political clout of the very rich and powerful owners.'

It may be added that the subsequent conflicts between the Putin government and media tycoons such as Berezovsky were over political control of TV stations, but were fought in the disguise of conflicts over issues of company and property law.

The turning point in Central Europe in countries like Poland, Hungary and Czechoslovakia was in the late seventies. After 1989 the ownership structure of media was privatised, but , the ruling government to a different degree in the different countries still holds some private strongholds in the media in order to keep political control. Like the present conflicts in Poland show, the issue of political control and private ownership in these countries are different faces of the same coin. The ruling Poland government in 2002 uses its capacity of state power and private owner in the same direction to recover control over a newspaper that was made independent from the then ruling government in 1989.

#### **4. Conclusion**

The history of the Press in the Western European democracies shows the steady withdrawal of the government from the privately owned Press. The freedom of the press has been guaranteed in most countries as a strong constitutional right protecting the Press against any governmental

interference. Private ( non- state) ownership is the other string of this freedom, because it prevents a ruling government to use its powers as an owner to take control over editorial power.

The position of broadcasting is different. Although the constitutional guarantees extend to broadcasting as well, the role the state has assumed in the electronic media to organise a public service gave it much more influence than is the case with the press. Commercial broadcasting and the creation of a balanced dual system offered an important correction on that influence.

The dominant positions in the media market became a concern and gave rise to the development of on competition law based cross ownership rules, not to combat ownership as such but as a correction of abusive dominance.

The situation in the post communist countries seem to evolve slowly in the same direction. However, the fragility of public and private institutions and the not wholly completed privatisation still jeopardizes the independent position of the media. The present dispute between the state owner and the private owner of Rzeczpospolita are a striking case in point what are the risks of a not fully completed privatisation.

What has been said about the essential function of strong property rights and the possible threats of state owned media is supported by the findings in the *World Development Report 2002* of the World Bank which features a special chapter on media from which I quote the following: [\[10\]](#)

'What determines independence? Ownership is a central factor because it's the owners who control information flows and thus influence economical, political, and social outcomes. (...) A project for this report gathered new evidence on the ownership structures the largest five newspapers and five television stations in each 97 countries. (...) The evidence indicates that monopoly control over information or high levels of state ownership reduce the effectiveness of the media in providing checks and balances on public behaviour. Analysis of the 97 countries in the same study established that media in countries with high levels of state ownership are much less free, measured by the media freedom indexes; they also transmit much less information to people in economic and political markets. In addition, state ownership of the media is found to be negatively correlated with economic, political, and social outcomes. Generally speaking, this translates into more corruption, inferior economic governance, less developed financial markets, fewer political rights for citizens, and poorer social outcomes in education and health. For all regions in the world, these associations between ownership and outcomes hold even after accounting for different levels of income, general state ownership in the economy, and a measure of political freedoms. This is important because poorer countries - and those with high state ownership in the economy and more autocratic governments - were more likely to have high state ownership of the media. (...)

The negative consequences of state control of information through ownership highlighted by the experience in several countries underscores the importance of media ownership in pressing for better governance. In Mexico, for example, the privatisation of broadcasting in 1989 substantially increased the coverage of government corruption scandals and other stories previously unreported by the state station. (...)

The privatisation of state-owned media in transition countries, for example - supported by broader market liberalisation and knowledge transfers from foreign owners with experience in journalism - has generated dramatic increases in coverage of economic and financial news as well. But private ownership can also restrict media freedom. For example, private owners associated with the state or political parties - or protecting their business interests - can control

flows of information. In Ukraine, for example, privately owned television stations with links to the state provided more favourable coverage of the incumbent party during elections than did more independent privately owned stations. (...)

Competition among media outlets promotes the supply of alternative views to voters and consumers – and helps prevent one firm from distorting too heavily the information it supplies. (...) One potential downside of public-private competition is that governments can give advantages to the media firms that they own. (...) The data also show that dominance of state media, even if some private media exist, can effect the relationship between information flows and outcomes. For example, 75 percent state ownership of the media still leads to outcomes comparable to those when there is 100 percent state ownership. For newspapers, state ownership, on average, is detrimental whether there is a state monopoly or not.'

### **III Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)**

#### **1. Introduction**

Poland has ratified in 1993 the ECHR and the Protocols belonging to it. The Convention contains rights which are directly enforceable in the member states. In the following I will examine what might be the impact of article 10 for the disputes of Presspublica with the Polish government/shareholder. The ECHR establishes a European Court on Human Rights which gives binding interpretations of the Convention (ECtHR).

The text of article 10 reads as follows:

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

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

#### **2. General considerations about the mass media**

##### **2.1 The role of the Mass Media**

In the Sunday Times case of 1979 [11], repeatedly quoted by the ECtHR afterwards as an important precedent, the Court gave its vision of the function of the Press in a democratic society. It held that the principles of freedom of expression 'are of particular importance to the press. (...) Whilst the mass media must not overstep the bounds imposed in the interest of the proper administration of justice, it is incumbent to them to impart information and ideas concerning matters that come before the courts just as other areas of public interest. Not only do

the media have the task of imparting such information and ideas: the public also has the right to receive them.' In many cases the Court has emphasized the essential function of the Press and the particular importance it attributes to the fact that journalists have the right to do their job without any interference by the State or third parties. In the Goodwin case (in which the court recognized the journalist privilege to keep his sources secret) [12] the Court said: 'Protection of journalistic sources is one of the basic conditions for press freedom. (...) Without such protection, sources may be deterred from assisting the press in informing the public on matters of public interest. As a result the vital public-watch dog role of the press may be undermined and the ability of the press to provide accurate and reliable information may be adversely affected.' Furthermore the Court speaks of the potentially 'chilling effect' of the obligation to disclose its sources.

Until so far the Court was not in a position to say what this meant for the independency of the editorial board or the management of a Press enterprise. However, in a conflict over the employee contract between a Spanish journalist and the Spanish public broadcaster it ruled that the principles of article 10 fully applied. [13] This could be held true for conflicts over management issues between the management of the board and a shareholder, especially when such a conflict could have a potential chilling effect on the independent exploitation of the newspaper.

The Council of Europe, whose opinions are of particular interest to the Court, on several occasions expressed concerns over the independency of media in a democratic society. I recall the Recommendation R (96) 4 on the protection of journalists, Recommendation R (99) I on Media pluralism and Recommendation REC (2000) 23 on the Independence of Regulatory Authorities in the Broadcasting Sector, all of which stress the importance of independency and the interest that the Press has to fulfill its watch-dog role unhindered by other parties.

## 2.2 State monopolies and state ownership

In 1993 the Court had to decide whether the monopoly of the public broadcaster in Austria could still be justified in the light of article 10. The decision, which became known as the Lentia case, reveals the approach the Court takes in matters of a state monopoly. [14] The Court decided that a public monopoly was no longer justified and it gave the following reasons:

'Of all means of ensuring that these values (democratic pluralism) are respected, a public monopoly is the one which imposes the greatest restrictions on the freedom of expression, namely the total impossibility of broadcasting otherwise than through a national station and, in some cases, to a very limited extent through a local cable station. The far reaching character of such restrictions means that they can only be justified where they correspond to a pressing social need. As a result of the technical progress made over the last decades, justification can no longer be found today in considerations relating to the number of frequencies (...) The Government finally adduced an economic argument, namely that the Austrian market was too small to sustain a sufficient number of stations to avoid regroupings and the constitution of private monopolies. In the applicant's opinion, this is a pretext for a policy which, by eliminating all competition, seeks above all to guarantee to the public broadcaster advertising revenue at the expense of free enterprise. The Court is not persuaded by the argument of the government. Their assertions are contradicted by the experience of several European States, of a comparable size of Austria, in which the coexistence of private and public stations (...) shows the fears expressed to be groundless.'

## 2.3 Conclusion

From the wordings of article 10, the aforementioned case law and the recommendations of the Council of Europe can be derived some leading principles which can be expressed as followed.

The basis of article 10 is that the interference of the state with the dealings of the mass media should be an exception and needs a strong justification. Ownership of a Press company (as it creates the conditions for a permanent control) does not fit well into this scheme, although is not forbidden explicitly. In matters of freedom of expression the Press and the people employed by the press enjoy a privileged position to make the free and independent working of the Press possible. Dominance of ownership should be avoided, which means that the ties of owners with mass media companies should not pertain to dominant positions in the market . When it comes to state monopolies or dominant positions of the state the market situation as a whole should be judged in the light of technical and economical developments. In that light the development of a equivalent market segment next to the services directly or indirectly controlled by the state should be made possible.

Although the Council of Europe and the European Court did not yet formulate clear guidelines to be applied to post communist societies, it follows from the principles set out above that the structure the media markets in these societies which used to be dominated by the state, should be judged in the light of the necessary creation of media companies no longer dependent on or controlled by the state.

### **3. The facts of the case; has there been a violation of article 10 ECHR?**

#### 3.1 Positive and negative obligations of the State

The Court looks at the obligations of the member states from a positive and a negative perspective. From the positive perspective (also called the positive obligations of member states) it judges whether a member state has done everything to create the necessary conditions for the unhindered exercise and unfolding of the rights guaranteed in the Convention. This means that the State has an obligation to create in law and in fact safeguards for the protection of the rights and should in general refrain from actions that impede the free exercise of the freedom rights. In this respect article 1 of the Convention is of primordial interest. It imposes a duty on the Convention Parties to secure to every one within their jurisdiction the equal protection of the rights and freedoms defined in the convention.

From the negative perspective the Court looks whether there has been an unjustified interference by the State in the sense of article 10 paragraph 2 of the Convention in the individual exercise of a right of a legal or natural person. For example, in matters of public debate over matters of public concern, it scrutinizes whether there has been an interference, whether the interference can be based on an legitimate aim prescribed by law and whether the interference is proportionate to the aim pursued.

#### 3.2 Positive obligations

In this case in which there is a pattern of actions that have a negative impact on the working of the privately owned media, I would opt for the approach to look at the violation of positive obligations. Two decisions of the European Court have relevance here.

In the Turkish Case *Özgür* [15] a newspaper was subject of serious attacks and harassment

which forced its eventual closure and for which the Turkish authorities were directly or indirectly responsible. The assaults were numerous but accounted, i.e., for intimidation of journalists and distributors, detention of journalists, several criminal prosecutions brought against the newspaper. The Court expressed the general principle as follows:

'The Court recalls the key importance of freedom of expression as one of the preconditions for a functioning democracy. Genuine, effective exercise of this freedom does not depend merely on the State's duty not to interfere, but require positive measures of protection, even in the sphere of relations between individuals.'

It concluded that in the circumstances of the case it failed to comply with its positive obligation to protect the exercise of the freedom of expression.

The other case I would like to mention is the case *Vereinigung demokratischer Soldaten Österreichs/Austria*. [16] The case concerned the prohibition of the circulation of a paper in the army, whereas the army allowed to circulate other papers for free. Although the case was finally tried on the basis of an unjustified interference, I quote this case because it shows that the Court took as its point of departure that a State has the duty to guarantee without discrimination the exercise of the freedoms of the Convention:

'As the Court has consistently held, the responsibility of a Contracting State is engaged if a violation of one of the rights and freedoms defined in the Convention is the result of non-observance by that State of its obligation under article 1.

In the present case the authorities effected themselves and at their own expense the distribution on a regular basis of military periodicals published by various associations, by sending them out with official publications.(...) The Court further notes that of all the periodicals for servicemen, only the periodical of the applicant was not allowed access to this type of distribution. The applicant could therefore reasonably claim that this situation should be remedied.'

### 3.3 The facts of the case

If we apply the foregoing to the facts as described in chapter I my assessment is the following:

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.

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

The latest action over the *Warsawa Print* dispute in particular has disproportionate aspects. Firstly, because the government acted in its double capacity as share holder 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 proposal for new legislation on cross ownership should be reviewed in the light of article 10 (see chapter II 3 and 4, and this chapter 2.3). The point has been raised that one of the objects of the legislation is to weaken the position of the newspaper *Gazeta Wyborcza*. Further more it has been stated that the legislation does not apply to the state broadcasting stations and will enforce the dominant position of the State in the electronic media.

These points, taken together, support the conclusion that there are strong indications that the Polish government fails to fulfill its positive obligations under article 10 ECHR to create the necessary conditions for the free exercise of the freedom of expression.

#### **IV The Charter of the European Union**

Poland strives to join the European Union. By doing so it has to meet the constitutional requirements of the Union. In the Charter, adopted recently, the fundamental rights and freedoms (already recognized by the Court of Justice in Luxembourg as fundamental principles of community law) are explicitly defined as rights of community law. Article 11 of the Charter reads:

*Everyone has the right of freedom of expression. This right shall include the freedom to hold opinions and to receive and impart opinions and information, without interference by a public authority and regardless frontiers.*

*The freedom and plurality of the media shall be respected.*

The first paragraph is identical to article 10 of the Convention. The Court of Justice in its case law follows the development of the case law of the ECtHR and the recommendations of the Council of Europe. The second paragraph expresses more strongly than article 10 the essential role of the media and the positive obligation of the state to guarantee the unhindered exercise of the freedoms.

It is quite obvious that the requirements of the Charter are part and parcel of the so-called *Acquis Communautaire* which not only should be fully adopted but also carried out if Poland wants to become a member of the Union. It is hardly conceivable that an action to get control over a newspaper would be acceptable in the light of the *Acquis*.