The role of competition authorities in protecting freedom of speech: the PKN Orlen/Polska Press case

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ABSTRACT
For more than 30 years, EU institutions and Member States have been engaged in a dialogue on what measures might be considered appropriate to protect media pluralism. With the increasing globalization of digital services, national legislatures have increasingly recognized the need to actively shape the media market by controlling mergers taking place within it. The aim of this article is to discuss the PKN Orlen/Polska Press case and to explain the role of EU competition authorities in protecting media pluralism. The analysis also seeks to determine whether – and based on which competencies – the EU should counter systemic threats to media independence in Member States. The Polish experience may also be helpful in view of work currently underway on the new Media Freedom Act – EU legislation intended to counteract the growing monopolization of media and ensure its protection as a central pillar of democracy.

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Introduction

Competition law is a cornerstone of the European Union’s integration process. There is no doubt that, without common rules on the control of concentrations, the prohibition of agreements limiting competition or rules for granting state aid, the idea of the internal market could not be fully put into effect. In this respect, the competences of the Union and the Member States arising from the treaties, as well as from secondary legislation, have been subordinated to the overriding interest of protecting the market against the behaviour of entities that interfere with the free pursuit of economic interests. In subsequent decades, the objectives
of antitrust policy have changed in line with economic and social changes; the integration approach and then the structural approach have been replaced by an effectiveness approach, in which the objective of the competition authority’s actions is to protect the welfare of consumers, while the power of entrepreneurs is measured not so much by their market share but by an evaluation of their substantial market power. The Commission’s case law, according to which merger control should counteract those concentrations that “would be likely to deprive consumers of the benefits that effective competition brings by significantly increasing the market power of firms”, also seems to be heading in this direction. This protection should be linked to safeguarding the economic interest of individuals rather than to ensuring respect for the fundamental personal rights which are vested in them. As a result, the functioning of competition authorities has traditionally been linked to protecting competition, seen as a public good, the ultimate outcome of which is supposed to benefit consumer welfare.

The fact that the competition regulations came into being as one of the pillars of the European Communities, and now of the economic union, does not mean that their implementation remains unrelated to the area of fundamental rights. The evolution of the European Union from an organization focused on economic cooperation to a union of values is a process that has been ongoing for several decades. In its early case law, the Court of Justice emphasized that it was not its role – nor that of other EC institutions – to uphold fundamental rights, including those arising from the constitutional provisions of the Member States. However, it turned out that continuing to leave the issue of fundamental rights outside Community regulation threatened the development of the internal market, as it allowed the primacy of EU law to be challenged by national constitutional courts. This problem was reinforced by the precedent-setting decision of the German constitutional court in the Solange I case, in which, while not rejecting the concept of the primacy of EU law, the German Federal Constitutional Court (BVerfG) pointed out that “as long as the Community has not developed a catalogue of fundamental rights, EC secondary law will be subject to review from the point

1 Commission Decision of 21 September 2012, Case No COMP/M.6458, Universal Music Group / EMI Music, <https://cli.re/ekQQpk> accessed 8 July 2021, para 241.
2 CJEU 4 February 1959, Case C-1/58, Friedrich Stork & Cie v. High Authority of the European Coal and Steel Community, ECLI:EU:C:1959:4; CJEU 15 July 1960, Joined Cases C-36/59, C-37/59, C-38/59 and C-40/59, Präsident Ruhrkolen-Verkaufsgesellschaft mbH, Geitling Ruhrkohlen-Verkaufsgesellschaft mbH, Mausegatt Ruhrkohlen-Verkaufsgesellschaft mbH and I. Nold KG v High Authority of the European Coal and Steel Community., ECLI:EU:C:1960:36.
of view of its compatibility with the rights set out in the German Basic Law”. The reasoning set out in Solange I has subsequently been repeated many times, both in the case law of BVerfG and in the positions of other constitutional courts. Therefore, when discussing the importance of protecting fundamental rights during the establishment of an EU internal market, it should not be forgotten that the source of this protection can be found in the dialogue held between the European Court of Justice and the constitutional courts as early as the 1970s, i.e. more than twenty years before the adoption of the Charter of Fundamental Rights. In other words: economic cooperation and a union of values are not two separate areas in which the EU operates. The achievement of economic union objectives requires respect for the rights of individuals, otherwise the principle of the primacy of EU law – fundamental to the harmonization of the rules governing the internal market – would be jeopardized. This principle, in the opinion of Member States’ constitutional courts, can only be respected if EU law protects fundamental rights at a level no lower than that arising from the constitutional acquis of Member States.

The development of global digital services has led to many new challenges for competition and consumer protection authorities. As a result, the admissibility of competition authorities’ recourse to regulations not directly related to antitrust is increasingly being debated. An example is the Hipster Antitrust movement, which – irrespective of the controversy it provokes – reflects a broader trend established in recent years, called the New Brandeis School or New Progressive Antitrust Movement. It undermines the criterion of consumer welfare as a measure

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3BVerfG 37, 271 (29 May 1974), 2 BvL 52/71.
4See especially the Lisbon Decision (BVerfG 37, 271, 30 June 2009, 2 BvE 2/08). The judgment was criticised because BVerfGE assessed an issue that was not in dispute and using arguments that did not derive from Basic Law (’sovereignty’). Probably in response to this criticism, BVerfG partially modified its position in the Mangold/Honeywell judgment (BVerfGE 126, 286, 6 July 2010, 2 BvR 2661/06). More in Roland Lhoatta and others (eds), ’Integrationsverantwortung und parlamentarische Repräsentation: Ein Rückzugsgefecht – und ein Rettungsversuch’, Das Lissabon-Urteil Constitutional Ultra Vires Review of European Acts Only Under Exceptional Circumstances; Decision of 6 July 2010, 2 BvR 2661/06, Honeywell (2011) 7 European Constitutional Law Review 161.
5Droit constitutionnel, droit communautaire: vers un respect constitutionnel réciproque? (Presses universitaires d’Aix-Marseille; Économica 2001) See e.g. Corte Costituzionale della Repubblica Italiana 25 April 1989, No. 232, <https://cli.re/5doVxD> accessed on 8 July 2021. In France, the supremacy of the national constitution has been emphasized by O. Dord, ’Ni Absolue, Ni Relative, La Primauté Du Droit Communautaire Procède de La Constitution’ in Hélène Gaudin (ed), Droit constitutionnel, droit communautaire: vers un respect constitutionnel réciproque? (Presses universitaires d’Aix-Marseille; Économica 2001). The Council of State did not recognise the primacy of an earlier international agreement over a later law until the Nicolo judgment of 29 October 1989.
6Maurice E. Stucke and Ariel Ezrachi, ’The Rise, Fall, and Rebirth of the U.S. Antitrust Movement’, Harvard Business Review (15 December 2017), <https://cli.re/A4eaDD> accessed 8 July 2021; David Dayen, ’This
of antitrust law application due to its focus on low prices, supposed to benefit consumers but instead favouring non-economic criteria, such as social equality, i.e. non-market values.7

An example of competition authorities’ new approach can be found in the precedent-setting proceedings conducted by Bundeskartellamt, the German competition authority, against Facebook, in which it found a violation of consumers’ collective interests through the improper design of privacy policies. As a result – for the first time – the competition authority applied requirements laid down in EU data protection law as a benchmark of control in proceedings concerning consumer practices in the digital services market. The case has yet to be finally resolved – in March 2021 the national court decided to refer preliminary questions to the Court of Justice.8 This case clearly illustrates the overlap between the competences of competition authorities and powers traditionally associated with personal data protection authorities.9

The safeguarding of the right to privacy and data protection by a competition authority makes it clear that the object of this interference may just as well be the protection of freedom of expression, embodied by the preservation of media pluralism. In this case, protection of the media market would be achieved through concentration control mechanisms – used in such a way as to prevent ownership changes that threaten freedom of expression. This line of reasoning is supported by the fact that respect for fundamental rights – derived both from EU law and from the constitutional norms of Member States – is not limited to negative obligations (prohibition of unauthorized interference) but extends also to positive obligations – in this case, influencing the media market in order to guarantee pluralism of opinion.10 For this guarantee to exist, however, it is necessary that powers prohibiting any prospective

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7John Kwoka, Mergers, Merger Control, and Remedies: A Retrospective Analysis of U.S. Policy (MIT Press 2018) 12–15.
8Request for a preliminary ruling of 22 April 2021 referred by Oberlandesgericht Düsseldorf (Germany), C-252/21, <https://cli.re/jYQ82V> accessed 8 July 2021.
9A previous decision by the Bundeskartellamt in February 2019 is similar in nature. With this decision, the authority found that making the use of the social network Facebook conditional on consenting to the processing of data generated by user activity on subsidiary sites was an abuse of a dominant position in the social media market and banned it. The competition authority’s decision was upheld by a ruling of the German Federal Court of Justice (KVR 69/19, 23 June 23 2020). See ‘Facebook, Exploitative business terms pursuant to Section 19(1) GWB for inadequate data processing’, <https://cli.re/KaqDrA> accessed 8 July 2021.
10ECtHR 7 June 2012, No. 38433/09, Centro Europa 7 S.r.l. and Di Stefano v. Italy, para. 134: “The Court observes that in such a sensitive sector as the audio-visual media, in addition to its negative duty of non-interference the State has a positive obligation to put in place an appropriate legislative and administrative framework to guarantee effective pluralism.”
concentrations threatening media pluralism be added to competition legislation.\textsuperscript{11}

In December 2020, PKN Orlen – Poland’s largest domestic oil company – notified the competition authority (Prezes Urzędu Ochrony Konkurencji i Konsumentów) of its intention to acquire Polska Press, a leading publisher of local press and provider of electronic media, whose services are used by several million consumers every month. The authority subsequently consented to the intended concentration. The transaction raised serious concerns from the outset, as did the authority’s decision, which sparked controversy regarding its legitimacy. It was alleged that the concentration would have a negative impact on media pluralism and threaten the regional media market, contrary to Article 11 of the Charter of Fundamental Rights. This refers, in particular, to the rights of citizens to access reliable information, publicly scrutinize and, if necessary, criticize the actions of public authorities, and to transparency in public life. It was argued that the protection of freedom of expression in the private media sector had become even more important because the subordination of the public media to the government in 2016 meant they were no longer able to report impartially on the activities of those in power.\textsuperscript{12} The present reality of state media coverage has shown these concerns to have been fully justified.\textsuperscript{13} Hence, such arguments illustrate the limited outcome of concentration assessment by competition authorities; an important legal question is whether one can surpass the concentration assessment scheme typical of competition law to also address fundamental rights rooted in the European constitutional tradition, such as the right to information or media freedom.

The aim of this article is to discuss – based on the PKN Orlen/Polska Press case – the role of competition authorities in protecting media pluralism. The issue is not only important to Poland – it also relates to the effectiveness of mechanisms protecting the rule of law that are built into EU treaties. Therefore, its resolution requires not only reference to

\textsuperscript{11} Although restrictions on media ownership and the process of their acquisition have been introduced in some EU countries, in most cases they are not based on mechanisms used by competition authorities. One example is Germany, where the Commission for Media Concentration (Kommission zur Ermittlung der Konzentration im Medienbereich) has been operating since 1997. See Andrea Czepek and Ulrike Klinger, ‘Media Pluralism Between Market Mechanisms and Control: The German Divide’ (2010) 4 International Journal of Communication 820.

\textsuperscript{12} Paweł Surowiec, Magdalena Kania-Lundholm and Małgorzata Winiarska-Brodowska, ‘Towards Illiberal Conditioning? New Politics of Media Regulations in Poland (2015–2018)’ (2020) 36 East European Politics 27.

\textsuperscript{13} See Abigail Gipson, ‘New report: Poland’s public media serve as propaganda tool’, International Press Institute (8 July 2019) <https://cli.re/4dpmYx> accessed 8 July 2021; ‘The decline of public media in Poland’, Public Media Alliance (1 July 2020) <https://cli.re/YNB4d8> accessed 8 July 2021
EU competence in the field of media regulation, but also an explanation of the current constitutional position of the competition authorities, and an interpretation of the principle of legalism, which, on the one hand, should limit the actions of public authorities and, on the other hand, should not allow these bodies to remain passive in situations where the constitutional foundations of the state may be threatened.

**Methodology for assessment of concentration between undertakings**

Administrative supervision of concentrations of companies, performed by competition authorities, is an intervention in the economic structural transformations of entrepreneurs.\(^{14}\) Such supervision is of a preventive nature,\(^{15}\) namely, entrepreneurs are obliged to notify the appropriate authorities of their intention to undertake concentration, understood as an economic operation fulfilling cumulatively two conditions for notification: the condition of concentration type and the condition of turnover. Polish competition legislation, similarly to EU law, does not provide a definition of concentration. The major feature common to all types of concentration mentioned in law is that, through the merger of hitherto independent assets (generating adequate turnover), the economic power of an entity increases.

Until the competition authority has assessed the market effects of a concentration, or the deadline by which its decision should be issued expires, entrepreneurs are obliged to refrain from concentration (the so-called *standstill obligation*).

Analysis of the effects of intended concentrations is a prospective study, i.e., a study of the potential anti-competitive effects of a concentration after it has been implemented. To this end, the competition authorities compare the situation before the concentration (*pre-merger scenario*) with the situation after the intended concentration (*post-merger scenario*). The analysis also includes a comparison of the situation after the concentration with the state that would be the case if the concentration had not taken place (the so-called *counterfactual*). This type of analysis makes it possible to assess whether there is a causal connection between the intended concentration and any potential negative effects on

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\(^{14}\) Ovidiu Ioan Dumitru, *European Merger Control* (Adjuris – International Academic Publishers 2020) 15

\(^{15}\) *Ibidem*, p. 25.
consumer welfare, which is the ultimate goal of merger control legislation.

Antitrust evaluation of concentration is generally based on two elements – determination of relevant markets in which the applicants operate and assessment of the effects of the intended concentration on these markets.\(^{16}\)

Given the fact that it is a basic tool for identifying competition and competitors, a relevant market should be determined individually in each case. The concept of a relevant market, although based on economic grounds, does not constitute an independent economic category but is a construction developed entirely for the purpose of applying competition law. Relevant market is a concept different to a market in the economic sense, being understood in its broadest sense as a game of supply and demand, with no conceptual overlap between them. The difference lies in the assumption of necessity to precisely define a relevant market in such a way as to be able to indicate the characteristics which distinguish a given market from neighbouring markets, and to unambiguously define the platform on which competition between entrepreneurs to attract buyers for goods or services takes place. Hence, the concept of a relevant market in competition law has a fully autonomous meaning. The purpose of determining a relevant market is thus to be able to precisely identify the competitive relationships (competitors) and their boundaries. In other words, without designating the relevant market (or relevant markets), it is not possible to conduct antitrust proceedings. Determination of a relevant market enables identification of the actual object and actual territorial scope of competition or cooperation between the parties directly involved in antitrust proceedings.\(^{17}\)

A relatively uniform methodology for defining a relevant market has developed through court rulings. This methodology is reflected in various guidelines and notices of competition authorities, usually of soft law nature,\(^{18}\) and is applied by the Polish competition authority,

\(^{16}\)Paul T Denis, ‘Advances of the 1992 Horizontal Merger Guidelines in the Analysis of Competitive Effects’(1993) 38 The Antitrust Bulletin 479, 503–04.

\(^{17}\)An example of this assumption is the case of European Night Services (Court of First Instance 15 September 1998, T-374/94, ECLI:EU:T:1998:198), where the Court annulled the Commission’s decision on the grounds that it was unable to assess whether the alleged practices had substantially restricted competition, since the Commission have failed to define correctly the relevant market.

\(^{18}\)An example is the Horizontal Merger Guidelines, issued jointly by the Department of Justice and the Federal Trade Commission, which contain a comprehensive description of the market definition methodology for proceedings aimed at assessing horizontal mergers (between competitors). In EU law, a similar function is performed by a Commission Notice published in 1997. See Horizontal Merger Guidelines, U.S. Department of Justice and the Federal Trade Commission (19 August 2010), <https://cli.re/8Zvdmy> accessed 8 July 2021; Commission Notice on the definition of relevant market for the purposes of Community competition law, OJ of 1997 C 372/5.
which supports its findings with case law from the European courts or the Commission.

The definition of a relevant market developed by European and national court rulings is an equivalence definition, where a relevant market (definiendum) is defined as the product and geographic market (definiens), distinguished on the basis of economic criteria. In light of this definition, a relevant market is a market for goods which, given their intended use, price and properties, including quality, are regarded by their buyers as substitutes and are offered in an area in which there are similar conditions of competition.19 This definition draws attention to the sequential process of determining a relevant market, based on first determining the product market (the market for goods which, given their intended use, price and properties, including quality, are regarded by their buyers as substitutes), and then the geographic market (the market for goods offered in an area in which, given their type and properties, the existence of barriers to market access, consumer preferences, significant price differences and transport costs, there are similar conditions of competition). This definition, referring to Community jurisprudence, which invokes mainly the criteria of the purpose and nature of a product,20 is supplemented by an analysis of supply substitutability and potential competition, and thus an analysis of the structure of supply and conditions of competition.21 In practice, all three factors – demand substitution, supply substitution and potential competition – are analysed as necessary.22 Determination of a relevant market is of paramount importance in antitrust case law, in the sense that it directly influences any further competition authority findings, which, in the case of erroneous market delineation, will also be subject to error.

Defining a relevant market makes it possible to assess the concentrations notified. A fundamental criterion for assessing the concentration

19 See e.g. CJEU 21 February 1973, Case C-6/72, Europemballage Corporation and Continental Can Company v Commission, ECLI:EU:C:1973:22; CJEU 6 March 1974, Joined Cases C-6/73 and C-7/73, Istituto Chimioterapico italiano S.p.A. and Commercial Solvents Corporation v Commission of the European Communities, ECLI:EU:C:1974:18; Commission Decision of 8 December 1977, Case IV/29.132, Hugin/Liptons, OJ of 1978 L 22/23; CJEU 13 February 1979, Case C-85/76, Hoffmann-La Roche & Co. AG v Commission of the European Communities, ECLI:EU:C:1979:36; CJEU 14 November 1996, Case C-333/94P, Tetra Pak International SA v Commission of the European Communities, ECLI:EU:C:1996:436.

20 See in particular the judgments in Cases C-6/72 and C-85/76, already cited (n 17).

21 Simon Bishop and Mike Walker, The Economics of EC Competition Law: Concepts, Application and Measurement (3rd edn, Sweet & Maxwell 2010); N Haldrup, P Mollgaard and CK Nielsen, ‘Sequential versus Simultaneous Market Delineation: The Relevant Antitrust Market for Salmon’ (2008) 4 Journal of Competition Law and Economics 893.

22 Commission Notice of 9 December 1997 on the definition of a relevant market within the scope of Community competition law (see n 16) finally introduced all three of these elements as prerequisites for defining a relevant market, as well as making the criteria for their application more specific.
is the “substantial lessening of competition” test, the essence of which is to determine whether, as a result of the intended concentration, competition in the relevant market will be substantially impeded, in particular through the creation or strengthening of a dominant position. In EU law, this test is called the SIEC (Significant Impediment of Effective Competition) test. This assessment is made from the point of view of the market relationships that the parties to the concentration have had and will have in the foreseeable future; these relationships may be horizontal, vertical or conglomerate.

Horizontal concentrations, i.e. mergers involving competitors, may lead directly to the creation of the market power of a single trader (the so-called non-coordinated effects) or to the creation of collective market power (the so-called coordinated effects). Such concentrations always lead to a restriction of competition by the elimination of market players and may therefore substantially reduce the competitive constraints that incumbent firms exert on each other. In extreme cases, it may lead to the creation of an entity whose market position enables it to significantly restrict competition in the relevant market.

Mergers with vertical effect are those where the participants are entrepreneurs at different levels of trade yet linked by supplier-customer relationships. Concentrations with vertical effect do not directly eliminate competitors from the market, and therefore do not reduce competitive pressure present in the market. The competitive concerns arising from concentrations with vertical effect are indirect in nature and depend mainly on closing parts of the market to entrepreneurs operating at other levels of trade. This means that such concentrations do not have per se restrictive effects on competition; moreover, they bring benefits to competition by eliminating the double margin and transaction costs that existed between parties to the concentration before it was carried out (double marginalization). They may also lead to mergers between complementary economic entities. As a consequence, even if a concentration generates anti-competitive effects, they are likely to be mitigated or even outweighed by the positive effects on competition generated by the

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23 See Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation), OJ of 2004 L 24/1. The revision of the concentration test was accompanied by the issuance of Commission clarifications, first on the assessment of horizontal concentrations (OJ of 2004, C 31/03) and, a few years later, on non-horizontal concentrations (OJ of 2008, C 265/07).

24 Frank Maier-Rigaud and Kay Parplies, ‘EU Merger Control Five Years After The Introduction Of The SIEC Test: What Explains the Drop in Enforcement Activity?’ (2009) 30 European Competition Law Review 565.
concentration. Therefore, in practice, the European Commission assumes there will be no concerns relating to a concentration if, after the concentration, the market share of the new entity is less than 30%.

In a situation where no horizontal or vertical relationship exists or will arise between parties to a concentration, the merger is called a conglomerate; this applies to entrepreneurs that manufacture complementary products, products in adjacent markets or completely different products. Concentrations with conglomerate effects have, as a rule, pro-competitive effects due to their achieving economies of scale or strengthening pro-competitive coordination between entrepreneurs (e.g. producing complementary products, possessing complementary technologies or production tools, etc.) or jointly selling products (tying or bundling) with a positive effect on consumers. Therefore, decisions prohibiting concentrations with conglomerate effects are very rare.

**Decision on PKN Orlen/Polska Press**

The merger assessment methodology outlined above was applied by the Polish competition authority. PKN Orlen (the active participant in the concentration) is a public company whose shares are listed on the Warsaw Stock Exchange, and in which the State Treasury – with almost 30% of shares – is a key shareholder. PKN Orlen heads a group of companies active mainly in the refinery and petrochemical production sector, as well as wholesale and retail sales of fuels: gasoline, diesel oil, jet fuel and related products. The PKN Orlen capital group includes 111 businesses, 74 of which are based in Poland, conducting activities focused on the group’s core business. Together with PZU (Poland’s largest state-controlled insurance company), PKN Orlen holds Sigma BIS, which, as a media house, conducts activities such as planning and purchasing advertising time and space in the advertising media, including media buying for its shareholders and for external clients, and

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25Ulrich Schwalbe and Daniel Zimmer, *Law and Economics in European Merger Control* (Oxford University Press 2009) 375.
26Richard Burnley, ‘Who’s Afraid of Conglomerate Mergers? A Comparison of the US and EC Approaches’ (2005) 28 World Competition 43.
27The State Treasury is a legal concept applied in Polish law, inextricably linked to state property. Although this term is commonly used in legislation, there is no strict definition of it, and the rights and obligations relating to the management of State Treasury property arise from a number of detailed provisions. As a rule, property owned by the State Treasury is under government control; property belonging to other state legal persons (e.g. banks, funds, etc.) does not form part of the State Treasury. It should be noted that the State Treasury is not treated as an entrepreneur with regard to domestic competition laws, and therefore does not form a capital group together with companies belonging to it – a fact of great importance when discussing merger control procedures.
providing consulting and strategic advisory services. In addition, PKN Orlen also owns the RUCH group, whose activities include press distribution at both wholesale and retail level. RUCH’s retail network consists of approximately 2400 newsagent kiosks.

Polska Press (a passive participant in the concentration) is a media company concerned mainly with newspaper publishing, online news portals, selling press and internet advertising space, and printing services. Amongst other publications, the group owns 20 regional dailies and 120 local weeklies. It sells its newspapers in both hard copy form and as online subscription editions via three of Poland’s biggest wholesale distributors: Kolporter, RUCH and Garmond. Regardin printing services, especially that of press and advertising materials, Polska Press offers comprehensive services covering the whole production cycle from printing to transport. The previous parent company of Polska Press, holding 100% of shares in its share capital, was HKM GmbH, based in Austria.

During the merger procedure, no relevant markets were identified on which the concentration would have a horizontal impact. According to the definition applied by the European Commission, a relevant market affected by a concentration in a horizontal manner is any product market in which at least two entrepreneurs participating in the concentration are engaged (common markets), and where the concentration leads to the gaining of a total geographical market share of more than 20%. According to this definition, there were no common markets for the participants of the concentration.

The competition authority also analysed the wholesale press distribution market and concluded that PKN Orlen’s share in this market did not exceed 30%. Therefore, this was not a market affected by a concentration in a vertical relationship. The share of RUCH in the wholesale distribution of press in Poland did not exceed 30%, and the share of press published by the Polska Press group in purchases of its distributors in Poland did not exceed 10%. Due to the controversial nature of this market, the competition authority asked the two other largest press distributors in Poland to evaluate the prospective concentration. Both of them pointed out that that such a concentration would make it possible to distribute local press exclusively through RUCH, controlled by PKN Orlen – which “would have unprecedented effects on the wholesale press distribution market”, as it would create a single entity that would

28Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, OJ of 2004 C 31, pp. 5–18.
together be a publisher, distributor and significant retailer of press with its own network of outlets. However, in the opinion of the competition authority this did not constitute a significant threat as using only a single distributor and therefore limiting its press sales would not only deprive PKN Orlen of profit, but more importantly, such action would limit opinion-forming in local and regional society, which would be the opposite of what Polska Press’s acquisition by a subsidiary of the State Treasury was trying to achieve.

The competition analysis also showed that relevant markets affected by the concentration in a conglomerate configuration (product markets covering the territory of Poland or a part thereof, in which participants to the concentration have a market share exceeding 40%) would include the sale of aviation fuel (in the case of PKN Orlen) and regional press (in the case of Polska Press). However, the competition authority stated that, as a result of the merger, the market power of PKN Orlen in such markets would not be transferred to the markets in which the Polska Press group operates because the former markets are in no way related to the markets in which Polska Press is present. Conversely, following the concentration, PKN Orlen would take over the market position of the Polska Press group in these markets. Neither the market position of the Polska Press group as a press publisher nor its share in the regional daily newspaper publishing markets would change as a result of the proposed concentration.

Consequently, the competition authority’s analysis of the effects of the concentration stated that it would not result in a significant restriction of competition in any of the markets in which the participants are active. Therefore, in the competition authority’s view, there were no grounds under competition law that could justify prohibiting the PKN Orlen/Polska Press concentration.29

**Opinions of human rights organizations**

In the course of the merger control proceedings, the Helsinki Foundation for Human Rights (HFHR) and the Polish Commissioner for Human Rights (RPO) also presented their positions on the intended concentration between PKN Orlen and Polska Press.

In the view of the HFHR, the purchase of Polska Press by a state-controlled company would not allow the newly-monopolized media to fulfil

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29Decision of 5 February 2021 No. DKK-34/2021 of the President of the Office of Competition and Consumer Protection, [https://cli.re/wr9Qaa](https://cli.re/wr9Qaa) accessed on 8 July 2021.
their obligations, in particular the public scrutiny of authority, at a local, regional or national level. The merger would therefore harm consumers by depriving them of diverse sources of information. The principle of freedom of the media, including the press, excludes the legal subordination of the media to political power. The HFHR stated that a PKN Orlen/Polska Press concentration would threaten the independence of the regional press and the pluralism of the media market. Moreover, the HFHR pointed out that State Treasury companies often consciously buy advertising space in pro-government newspapers, to the exclusion of other titles that may be neutral or not support the government, with a concomitant and adverse effect on the ability of independent regional newspapers to stay in the market. In the Foundation’s opinion, the acquisition of Polska Press by PKN Orlen would therefore limit the advertising market available to independent publishers, which might in turn deprive citizens of reliable, independent information and the exercise of public scrutiny over the authorities by an independent press, fulfilling the function of a “public watchdog”.

A similar position was taken by the RPO, who acted not only ex officio, but also in response to complaints from individual citizens who had approached him concerning the case, requesting that the concentration be examined from the perspective of protecting fundamental rights. They underlined the need to protect media freedom and the right to information. The Commissioner stated that press published by companies controlled by the State Treasury would and could not be independent sources of information since politicians “under whose authority the companies controlled by the State Treasury are not interested in disclosing to the public the facts – often inconvenient for them – concerning their public and private activity. They are also certainly not interested in their activities being subject to public scrutiny and criticism in press titles published by companies controlled by the State Treasury”.

The Commissioner also pointed out that the duty of the competition authority, within the framework of its competence in the area of
merger control, is to ensure that “after the concentration, the activity of newspapers and magazines diversified in terms of their programme, thematic scope and attitudes presented will be guaranteed”. In the RPO’s opinion, it was particularly important for the competition authority to ensure media pluralism, given that media merger has not been separately regulated under Polish law.

Finally, as the competition authority did not take into account the argumentation presented, the Commissioner for Human Rights challenged the decision in court and asked that enforcement of the decision be suspended indefinitely. In its response to the application for suspension, the competition authority argued that the issues outlined could not be taken into account during the merger control proceeding. It stated that the competition authority’s decisions in concentration cases were based solely on whether prospective concentrations would preserve market competition, as this was the only power granted to it by the law. This meant that – in the competition authority’s view – it could not assess other aspects of the proposed transaction, including the impact of the concentration on media pluralism.

This position – in principle – seems obvious if assessing the economic effects of concentration. However, the Polish antitrust doctrine points out that “the protection of the public interest against excessive concentration in the media market is enshrined in other values (…), primarily the preservation of pluralism in its broadest sense, encompassing various areas of social life”. Bearing this in mind, it is clear that the competition authority should have assumed that the concentration would result in the monopolization of media coverage by companies controlled by the State Treasury. From a formal and legal point of view, these companies are separate entities, and thus have a competitive relationship, whereas the State Treasury itself is not an entrepreneur as defined by law and therefore does not form a capital group with its companies. When considering the actual effects on competition, however, a far-reaching coordination of these companies’ activities should be expected which would undoubtedly have an impact on competition, in this case on the “development of the

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34 Statement of the President of the Office of Competition and Consumer Protection of 7 April 2021, No DKK- 2.421.74.2020.Al.
35 Zbigniew Jurczyk, ‘Processes of Concentration and Monopolization on the Regional Press Market in Poland’. [2015] Prace Naukowe Uniwersytetu Ekonomicznego we Wrocławiu 127.
36 See e.g. Commission Decision of 24 April 1996, Case No IV/M.619, Gencor / Lonrho, <https://cli.re/7dVwmv> accessed 8 July 2021; Commission Decision of 23 September 2008, Case No COMP/M.4980, ABF / GBI Business, <https://cli.re/2XMo1o> accessed 8 July 2021; Commission Decision of 22 July 1992, Case No IV/M.190, Nestlé / Perrier, OJ of 1992 L 356/1; Commission Decision of 24 October 2007, Case No COMP/M.4753, Antalis / MAP, <https://cli.re/9DyMRe> accessed 8 July 2021.
pluralism of opinions”, mentioned in previous decisions of the competition authority.\textsuperscript{37} A diversity of ownership should ensure access to a variety of information, making it possible to form opinions without being unduly influenced by a “dominant source”.

\textbf{Sources and significance of media pluralism in EU law}

Media pluralism is a concept intrinsically linked to the Western model of democracy. The diversity of available information sources is a guarantee of freedom of expression, understood not only as the freedom to express one’s own opinions but also as the right of others to seek out and access content that interests them. In the opinion of the ECHR, pluralism, tolerance and openness to the views of others are key elements for the proper development of a democratic society.\textsuperscript{38} Freedom of the media is also seen as an essential condition for the proper functioning of democracy.\textsuperscript{39} Freedom of expression cannot be defined solely, however, as the freedom to express opinions that are favourable or considered harmless or indifferent, but also extends to those views that may shock or disturb the state or a particular group in society.\textsuperscript{40}

A media market in which there are a variety of players who can convey different views and opinions in an unhindered manner also supports the exercise of public scrutiny over the government. However, the problem of ensuring media freedom should not be limited solely to ownership aspects.

Pluralism can be ensured only in the context of an overall legal model supporting the creation and functioning of an independent media. It therefore includes concepts such as journalistic independence and the protection of editorial staff from external pressure. In this way, it is also possible to link to pluralism the so-called “chilling effect” – a phenomenon resulting from overly restrictive national regulations that govern the financial responsibility of journalists and publishers for the content provided. In the methodology used in a periodic report by the Centre for Media Pluralism and Media Freedom, evaluation of the rules applied to protect media pluralism in individual countries is carried out at four levels: (i) the existence of basic legal safeguards, (ii)
market plurality, (iii) political independence and (iv) social inclusiveness. From this perspective, media concentration rules are important but not the only factor influencing the protection of pluralism and thus guarantees of freedom of expression. This view is also shared by the European Commission.42

When the human rights systems were first established, media freedom was not defined as a separate category requiring legal protection. The first legal regulations created in post-war Europe focussed on strengthening the rights of individuals against unauthorized interference by the state. Hence, both the Universal Declaration of Human Rights and the European Convention on Human Rights include freedom of expression within the catalogue of fundamental rights. Although this right has been defined very broadly and includes not only the freedom to express opinions but also the right to sources of information, it does not explicitly imply an obligation on the state to counteract potentially adverse ownership changes in the media market. Of course, such a requirement can be derived from the implementation of the so-called positive obligations, i.e. shaping of the national law so as to most fully ensure the protection of the individual not only against vertical but also horizontal violations.43

The positive duties of the state in respecting human rights should in principle serve to ensure respect for fundamental rights in the relationship between the state and the individual, as well as in relationships between individuals. The international human rights system has been built on the premise that the appropriate means to curb unauthorized action by public authorities is to prohibit unlawful interference with individual rights (negative duties). This is a reasonable assumption: in a democracy, the powers of the state derive from the law; public authorities exercise only such powers as have been granted to them and only to the extent necessary to achieve legitimate aims. Therefore, in view of constitutional and international legal norms, the introduction of statutory regulations aimed explicitly at protecting media pluralism (e.g. by introducing additional restrictions in the acquisition process) should also be

41European University Institute. Robert Schuman Centre for Advanced Studies., Monitoring Media Pluralism in the Digital Era: Application of the Media Pluralism Monitor in the European Union, Albania and Turkey in the Years 2018 2019: Report 2020.(Publications Office 2020) <https://data.europa.eu/doi/10.2870/21728> accessed 9 July 2021.
42‘Pluralism and media concentration in the internal market’, Commission of the European Communities (23 December 1992), COM(92)480 final, <https://cli.re/8Z8NWp> accessed on 8 July 2021.
43See e.g. ECtHR 16 March 2000, No. 23144/93, Özgür Gündem v. Turkey, para. 43: “effective exercise of [freedom of expression] does not depend merely on the State’s duty not to interfere, but may require positive measures of protection, even in the sphere of relations between individuals.”
examined with respect to the proper implementation of the state’s positive obligations. Therefore, such provisions should be examined in terms of whether it is permissible to restrict the freedom to conduct business activities as well as the right to property; in such an approach, an analysis of proportionality would include determining whether it was permissible to restrict the ownership right of an entrepreneur (prohibition of selling a media company) in order to safeguard another protected good (the right to information).

At the same time, the adoption of this type of regulation is not necessary in order to prohibit state authorities acquiring private media in a manner that threatens media pluralism. This is because such action would directly violate the prohibition of unlawful interference, and therefore would raise justifiable doubts regarding its compliance with the standards of human rights protection.

A ban on institutional censorship is also a measure that needs to be applied in order to guarantee freedom of expression. Institutional censorship can be said to exist when the admissibility of a given publication is conditional upon approval by a public body established for this purpose, including self-censorship directed by the state. It is therefore preventive censorship, which aims to prevent the spread of a particular type of information. For this reason alone, this measure cannot be reconciled with the obligation to respect freedom of expression and the requirement for the state to intervene only in a way that is necessary and proportionate to achieve overriding and legitimate aims in a democratic state. In non-democratic states, censorship is a well-known mechanism used to control the dissemination of information and ideas. Therefore, in the case of many European countries – including post-socialist ones – a ban on censorship has acquired the dimension of a separate constitutional norm. The prohibition of preventive censorship covers not only actions aimed at its introduction but also omissions, including those on the part of public authorities. Examples of such omissions include the failure to introduce regulations ensuring independence and pluralism in the media market, as well as the failure by state authorities to take action in cases where such pluralism is threatened as a result of economic transformation. It must therefore be accepted that every activity of the state (including that connected with failure to appropriately use its powers) which contributes to the creation of a system of preventive censorship is incompatible with the Basic Law and consequently unlawful.

For many years, the European discussion on appropriate measures to protect media pluralism centred mainly around non-legally binding
instruments. Thus, the Committee of Ministers of the Council of Europe stressed as early as 1982 that member states “should adopt policies to foster as much as possible a variety of media and a plurality of information sources, thereby allowing a plurality of ideas and opinions.”

The problem of ensuring such broadly defined media freedom and independence has been the subject of several recommendations published by the Committee of Ministers over the years.45 It is worth mentioning Recommendation CM/Rec(2007) of 31 January 2007, which indicated the need to establish more far-reaching principles of market protection, going beyond the general rules of competition law, applicable to situations where the pluralistic expression of ideas and opinions might be endangered as a result of economic transformation.46 In turn, Recommendation CM/Rec(2018) formulated a set of recommendations for states, including those relating to the so-called institutional framework for media pluralism.47 The Committee of Ministers emphasized the importance of applying competition law, not only in order to protect entrepreneurs operating in the media market but, more significantly, to secure the right to information.48 It was pointed out that, given the role of the media in exercising scrutiny over the activities of the authorities, it was necessary to pay special attention to the cases involving monopolization of the media by political parties and persons actively involved in politics.49

The issue of media freedom and independence has also been addressed by the European Parliament. In a resolution adopted on 16 September 1992, the Parliament pointed out that monopoly or state control of the media is a practice that runs counter to freedom and pluralism, “if not the very nature of democracy itself”.50 In view of the fact that domestic

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44‘Declaration on the freedom of expression and information’, Committee of Ministers (29 April 1982), Decl(29/04/82), <https://cli.re/XeZ5b8> accessed on 8 July 2021.
45See generally ‘Recommendations and declarations of the Committee of Ministers of the Council of Europe in the field of media and information society’, Council of Europe (July 2015), <https://cli.re/EoBoDo> accessed on 8 July 2021.
46Recommendation CM/Rec(2007)2 of the Committee of Ministers to member states on media pluralism and diversity of media content (Adopted by the Committee of Ministers on 31 January 2007 at the 985th meeting of the Ministers’ Deputies), <https://cli.re/aD9NR7> accessed on 8 July 2021.
47Recommendation CM/Rec(2018)1 of the Committee of Ministers to member States on media pluralism and transparency of media ownership (Adopted by the Committee of Ministers on 7 March 2018 at the 1309th meeting of the Ministers’ Deputies), <https://cli.re/yr1934> accessed on 8 July 2021.
48Takis Tridimas, The General Principles of EU Law Constitutional Law of the European Union (Sweet & Maxwell 1999) 711–739. See e.g. Takis Tridimas, The General Principles of EU Law (3rd ed, Oxford Univ Press 2021) 335–390; Koenraad Lenaerts, Piet Van Nuffel and Robert Bray, Constitutional Law of the European Union (Sweet & Maxwell 1999) 711–739.
49See n 35, para. 3.6.
50European Parliament resolution of 16 September 1992 on media concentration and diversity of opinions, OJ of 1992 C 284, p. 46, para. 2.
media merger policy might adversely affect the functioning of the internal market, the Parliament also called on the Commission to present draft legislation that ensured harmonization of the rules applicable in this area. This position was reiterated in a resolution on concentration and pluralism in the media in the European Union adopted on 25 September 2008, in which the Parliament called for, inter alia, the consistent application of competition and press law in order to strengthen media pluralism.

However, despite such proactivity amongst EU institutions, ensuring media pluralism has not been a distinct regulatory policy objective of the EU legislature over the years. This has been mainly due to the assumption that the issue lay within the competence of Member States. The European Commission pointed to the primary importance of national regulations, stressing that “European competition law cannot replace – nor does it intend to do so – national media concentration controls and measures to ensure media pluralism.” This competence was also recognized in Regulation 4064/89, Article 21(3) of which stated that Member States “may take appropriate measures to protect legitimate interests other than those taken into consideration by this Regulation”, such interests including media pluralism. This was confirmed by the Commission’s decision in the Newspaper Publishing case, in which the merger was approved with the proviso that a Member State’s authorities take steps to protect media pluralism only if the application of the principles of necessity and proportionality was limited to what was necessary to protect the legitimate interest concerned. “The Member States must therefore choose, where alternatives exist, the measure which is objectively the least restrictive to achieve the end pursued”.

An identical provision is also contained in existing Council Regulation 139/2004.

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51 See n 37, para. 27(a).
52 European Parliament resolution of 25 September 2008 on concentration and pluralism in the media in the European Union, P6_TA(2008)0459, OJ of 2010 CE 8, p. 85.
53 For a broader discussion of the discourse among EU institutions in the 1980s and 1990s regarding the definition of media pluralism and the relevance of EU concentration rules for the protection of pluralism, see: ibid.
54 Commission Staff Working Paper: Media pluralism in the Member States of the European Union, Commission of the European Communities (16 January 2007), <https://cli.re/r9VQXP> accessed on 8 July 2021, p. 7.
55 Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings, OJ of 1989 L 395/1.
56 Commission Decision of 14 March 1994, Case No IV/M.423, Newspaper Publishing, <https://cli.re/ yrmbbb> accessed 8 July 2021.
57 See n 54, para 23.
58 See n 21.
However, the former provision cannot affect the obligation to apply EU law in a manner that fully respects fundamental rights. Indeed, also under the legal model prevailing before the Lisbon Treaty, the protection of fundamental rights was part of Union law as a general principle of law. In *Nold KG v Commission*, the Court of Justice had already indicated that the obligation to respect constitutional traditions common to Member States precluded measures that infringed fundamental rights and prevented them from being considered compatible with EU law.59 Furthermore, in *Stichting Collectieve Antennevoorziening Gouda*, it explained that freedom of expression, as derived from the European Convention on Human Rights, was a fundamental right protected by the EU legal order. Pointing out the link between the right to information and ensuring media pluralism, the Court also confirmed that the protection of media freedom was a legitimate public policy objective that justified, if necessary, the introduction of restrictions on the freedom to provide services.60

It was only with the entry into force of the Lisbon Reform and granting the Charter of Fundamental Rights legal effect equal to the Treaties that a direct reference to media pluralism was introduced into EU primary law. According to Article 11(2) of the Charter, “the freedom and pluralism of the media shall be respected”. In this respect, this norm is a natural complement to Article 11(1), which introduces guarantees of freedom of expression. However, the actual wording of Article 11(2) – especially with regard to media concentration cases – does contain some ambiguity. Firstly, it follows from a purposive interpretation of the provision that, in the EU legislature’s view, freedom of expression and media pluralism are two, at least partly independent concepts, which thus require separate protection. This means, in particular, that respect for the right to information is not the only reason to ensure media freedom (pluralism). If not, the provision of Article 11(2) would be unnecessary, since it would *de facto* repeat the objectives already defined in Article 11(1) of the Charter. This leads to the conclusion that the principle of media pluralism is not so much a component of freedom of expression but rather a separate object of protection.61 In this respect, Article 11(2) can be seen as confirmation of the need to take into account regulatory aspects in the functioning of the media market and, separately, as a basis for introducing restrictions on the exercise of

59CJEU 14 May 1974, Case C-4/73, *Nold KG v Commission*, ECLI:EU:C:1974:51, p. 13.
60CJEU 25 July 1991, Case C-288/89, *Stichting Collectieve Antennevoorziening Gouda and Others v. Commissariaat voor de Media*, ECLI:EU:C:1991:323, p. 23.
61Paolo Cavaliere, ‘An Easter Egg in the Charter of Fundamental Rights: the European Union and the Rising Right to Pluralism’ (2012) 2 International Journal of Public Law and Policy 357.
other rights – such as, for example, economic freedom and the right of property.

The Charter distinguishes between rights, freedoms and principles. Since the drafters deliberately did not make a precise distinction between rights and principles, it was left to the Court of Justice to decide which provisions of the Charter should relate to one or the other, right or principal. Some guidance is provided by Article 51(1), which requires that respect for rights and the observance of principles be ensured. There is no doubt, however, that media pluralism is a principle which, pursuant to Article 52(5), provides a framework for the implementation of Union law and of specific regulations.

The provisions of the Charter are applicable to the extent that EU law is applicable. As a rule, they are binding not only on the institutions of the Union, but also on Member States, including, in accordance with the principle of loyal cooperation, all public authorities. It is clear that merger control should be classified as a shared power, i.e. a power under which Member States may only act in a way that does not prevent the full implementation of EU law. Moreover, due to the legal standing of the Charter, its provisions take precedence over regulations set forth in secondary law, including regulations concerning principles governing the exercise of power by competition authorities. Therefore, although it is the position of the EU institutions that Member States remain responsible for ensuring media pluralism, the implementation of this obligation does not take place outside the space of application of EU law. One tool to ensure implementation is competition law, which provides protection against the emergence of dominant market positions.62

The establishment of media pluralism as a separate subjective right allows the CJEU to assess state action taken in regulating the media market. Although the Court has not yet directly interpreted Article 11(2) of the Charter, including the relevance of this norm to applicable national laws of Member States, it is clearly within the exclusive competence of the Court to provide an interpretation in this regard. Given that the constitutional provisions of Member States generally do not refer explicitly to the concept of “media pluralism” but focus instead on protection of freedom of expression and prohibition of censorship, the role of the Court appears to be especially important in the development

62It is worth remembering, however, that this should not be the only tool. Indeed, as the Commission has rightly pointed out, “the Merger Control Regulation (…) can prevent mergers which adversely affect pluralism only in so far as they also affect competition, which is not always the case.” See n 33, p. 8.
of a common European standard for the application of the principles of media concentration. This is even more the case when one considers that references to the Charter in secondary competition law are unsatisfactory.63

Though Regulation 139/2004 states in Recital 36 that the Union respects fundamental rights and observes the principles recognized in particular by the Charter of Fundamental Rights, and that the Regulation should be interpreted and applied with those rights and principles in mind, Recitals 37–42 narrow this reference to the procedural rights of the parties to the proceedings. Similarly, Directive 2019/1 (ECN+ Directive)64 stipulates that the EU legislature affirms the importance of ensuring that proceedings comply with the Charter of Fundamental Rights. In this respect, however, Article 3(1) of the directive indicates that the exercise of antitrust powers is limited only by respect for fundamental rights. Moreover, the purpose of the provision was to ensure respect for the rights of the parties to the proceedings, in particular their right to a fair trial and the proportionality of any sanctions applied. The ECN+ Directive does not apply to merger control, but is nevertheless important, in that it strengthens the power and independence of national competition authorities, a not insignificant matter when assessing concentrations.

**Media pluralism in Polish law**

The Polish Constitution, like the constitutional acts of other post-communist states, was drafted under the strong influence of both the international human rights systems (in particular, the ECHR and the ICCPR) and the legal acquis of the Council of Europe and European Union. All the same, it is a modern act that takes into account other European countries’ experience of applying constitutional provisions. As far as the protection of fundamental rights is concerned, it was built on the principle of inviolability of human dignity. It defines dignity as a source of human rights, which also include freedom of speech (Article 54(1)) and the prohibition of preventive censorship (Article 54 (2)). In this respect, the wording and systemic significance of both norms are similar to those arising from the acquis of the ECHR, although

63 The Palgrave Handbook of European Media Policy (Palgrave Macmillan UK 2014) <http://link.springer.com/10.1057/9781137032195_25> accessed 11 July 2021. See generally ibid.

64 Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings, OJ of 1989 L 395/1.
the Polish Constitutional Tribunal has pointed out that the provisions of the Convention have a broader scope.65

The issue of freedom of the press is also protected by Article 14, according to which “the Republic of Poland shall ensure freedom of the press and other means of social communication”. This norm is included in the first chapter of the Basic Law, which contains the most important constitutional principles. It is addressed to the state, which is obliged, above all, to refrain from actions leading to the restriction of media freedom. Undoubtedly, an example of such a violation would be an attempt by the authorities to inhibit the development of opinion pluralism and to shape opinion by a dominant source. However, the mere fact that the state owns or controls media companies does not violate the principle if its ownership or control does not lead to excessive restriction of pluralism in the media sphere.66

Furthermore, it is the duty of the state under Article 14 to adopt domestic regulations that will lead to the media market being shaped in a way that protects the principle of pluralism (positive duties). It is with this in mind that Jacek Sadomski highlights the relationship between the norm arising from Article 14 and competition law regulations.67

The Polish Constitution also established a body responsible for safeguarding freedom of speech and the right to information. This is the National Broadcasting Council (Krajowa Rada Radiofonii i Telewizji), which has both legislative and licensing powers, as well as exercising supervision over entities operating in the radio and television market. Although the Council is not part of the executive power structure, the Constitution makes no reference to its independence or specific powers to counteract cases where freedom of speech would be threatened by action taken by other state authorities. The statutory powers of the Council focus on the execution of licensing tasks and responding to irregularities in the functioning of specific broadcasters. The press and electronic media market, not being subject to the licensing process, is outside the direct influence of the Council’s authoritative powers. This also applies to the media concentration control procedure, which is executed wholly by the competition authority.68

65 Polish Constitutional Tribunal 18 February 2014, Case K 29/12, https://ipo.trybunal.gov.pl/.
66 Jacek Sadomski, ‘Commentary on Art. 14’ in Marek Sajfan and Leszek Bosek (eds), Konstytucja RP. Volume I. Commentary on Articles 1-86 [Constitution of the Republic of Poland. Volume I. Commentary on Articles 1-86] (C H Beck 2016) para. 19.
67 See n 52, para. 20.
68 The Council’s powers in the area of concentrations concern only the licensing process and cover entrepreneurs operating in the radio and television market. The Council does not, however, participate in the merger control procedure carried out by the competition authority.
Concern arises about the relationship between the constitutional norm, whereby the Council guards freedom of speech and the right to information, and the provisions of the Broadcasting Act, whose function is, *de facto*, restricted exclusively to the role of regulating part of the media market. In the case of public authorities, direct application of the Constitution may not lead to the creation of a power not already provided for by law. Such an outcome would result from the jurisprudence of administrative courts, which indicate the inadmissibility of deriving detailed competence norms from general provisions defining the tasks of the Council.69

In turn, the Competition and Consumer Protection Act, which defines the competences of the national competition authority (the President of the Office of Competition and Consumer Protection), does not mention any threat to media pluralism as a premise justifying the prohibition of a concentration. Such a decision may be issued only if, as a result of the concentration, “competition in the market is significantly restricted, in particular by the creation or strengthening of a dominant position in the market”. The legislature has therefore implemented the classic definition used in competition law, referring exclusively to the economic significance of the concentration under review – without analysing its wider effects, related in particular to respect for fundamental rights.

From the literal wording of the Competition and Consumer Protection Act provisions, the competition authority is under no obligation (and thus has no authority) to refuse to consent to a concentration if it does not lead to the strengthening of a dominant market position. In turn, the authority guarding media freedom (the National Broadcasting Council) has no role in the merger control procedure with respect to publishers of press and electronic media.

As a result, in the procedure conducted by the competition authority, the acquisition of a significant share in the local press market by a state-controlled oil company was not subject to assessment in terms of its impact on fundamental rights (in particular – the right to information) and on fundamental political principles, which include media pluralism, arising from Article 14 of the Constitution and Article 11(2) of the Charter.

69Polish Voivodship Administrative Court in Warsaw 9 July 2004., Case II SA 3543/02, https://orzeczenia.nsa.gov.pl/.
The principle of legalism in the operation of administrative authorities and the obligation to respect other constitutional principles

Resolving any doubts about the correctness of the competition authority’s conduct in the Orlen/Polska Press case initially requires answers to two key questions:

(1) are the existing legal standards (national and EU) laid down for the protection of media pluralism sufficiently precise to constitute a standard of assessment of decisions taken by public authorities?

(2) how should the meaning of the principle of legalism be interpreted in a situation where the actions of a public authority (within the limits of its competence, arising from statute law) risk breaching fundamental constitutional norms?

In the current legal order, media pluralism is a separate fundamental right (and also a principle of law), included in both EU law (Art. 11(2) of the Charter) and national law (Art 14 of the Polish Constitution). Freedom of the media, as a component of freedom of expression, is also protected by Article 11 of the European Convention on Human Rights. The acquis of the Convention directly influences both EU law (Article 52(3) of the Charter) and the interpretation of Member States’ constitutions. Since ensuring media pluralism is a legitimate public policy objective, interference with other fundamental rights (such as the right to property or freedom to conduct a business) in order to comply with the principles of necessity and proportionality, respect freedom of the press and thus secure the right to information cannot be regarded a priori as unacceptable.

Despite a wealth of recommendations from EU/CoE institutions pointing to the importance and role of media freedom, the issue has not yet been subject to detailed regulation in either human rights systems or EU law. The entry into force of the Treaty of Lisbon resulted in the inclusion of the protection of media pluralism into the catalogue of fundamental rights. At the same time, however, the lack of CJEU and ECtHR jurisprudence on this issue has effectively hindered the establishment of a standard that should be applied to the assessment of cases of concentration in the media market. The PKN Orlen/Polska Press case is a perfect example of the weakness of existing Polish legislation; even if the protection of media freedom has been accepted as a vital principle
of democratic states, the current lack of detailed regulations that public authorities can apply in merger procedures creates, from the perspective of market participants, a serious risk of violating the principle of legal certainty and accessibility.\(^{70}\)

This observation mirrors the findings of the Committee of Ministers of the Council of Europe, especially those assumptions relating to the implementation of recommendations on how to ensure media pluralism and transparency of media ownership structure. These recommendations – addressed to states – should be subject to careful analysis and lead to appropriate legislative initiatives. Waiting for the legislature to respond, however, hardly seems an adequate solution to ensuring sufficient protection of the rights of individuals. In the cases of Poland and Hungary – countries in relation to which procedures concerning systemic threats to the rule of law have been initiated\(^{71}\) – the actions of those in power are often directed towards introducing mechanisms that weaken the institutions of a democratic state, rather than strengthening them.\(^{72}\)

Hence, the answer to the last question posed – which boils down to whether the competition authority should take into account the impact of its decisions on the protection of the state constitutional principles – assumes particular importance. It is thus a question about the possibility of the direct application of the constitution and EU law.

One of the foundations of democratic states is the principle of legalism, according to which public authorities act on the basis of and within the limits of the law.\(^{73}\) Both national and international courts have repeatedly pointed out that public authorities may not create their own powers.\(^{74}\)

\(^{70}\)Accessibility and legal certainty are two concepts closely linked to the rule of law and firmly embedded in the EU legal order. See e.g. CJEU 13 February 1996, Case C-143/93, Gebroeders van Es Douane Agenten v Inspecteur der Invoerrechten en Accijnzen, ECLI:EU:C:1996:45, p. 27; CJEU 15 February 1996, Case C-63/93, Duff and Others, ECLI:EU:C:1996:51, p. 20; CJEU 29 October 2009, Case C-29/08, Skatteverket v AB SKF, ECLI:EU:C:2009:665, p. 77.

\(^{71}\)European Parliament resolution of 12 September 2018 on a proposal calling on the Council to determine, pursuant to Article 7(1) of the Treaty on European Union, the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded, P8_TA(2018)0340, <https://cli.re/zry5J1> accessed on 8 July 2021; European Parliament resolution of 17 September 2020 on the proposal for a Council decision on the determination of a clear risk of a serious breach by the Republic of Poland of the rule of law, P9_TA(2020)0225, <https://cli.re/YNPrZW> accessed on 8 July 2021; Commission Recommendation (EU) 2018/103 of 20 December 2017 regarding the rule of law in Poland complementary to Recommendations (EU) 2018/103 of 20 December 2017 regarding the rule of law in Poland complementary to Recommendations (EU) 2016/1374, (EU) 2017/146 and (EU) 2017/1520, OJ of 2018 L 17/50.

\(^{72}\)Wojciech Sadurski, Poland’s Constitutional Breakdown (Oxford University Press 2019); Marcin Rojszczak, ‘Surveillance, Legal Restraints and Dismantling Democracy: Lessons from Poland’ (2021) 17 Democracy and Security 1.

\(^{73}\)In the Polish legal model, the principle of legalism is closely related to the principle of the rule of law, de facto constituting a component. The principle of legalism is also studied in other legal models: Jason NE Varuhas, ‘The Principle of Legality’ (2020) 79 Cambridge Law Journal 578.

\(^{74}\)Le principe de séparation des pouvoirs dans la jurisprudence de la Cour européenne des droits de l’homme (Éditions A Pedone 2019).Which, of course, would also directly violate another constitutional norm – the
Moreover, sovereign powers – when they affect the area of fundamental rights – cannot be interpreted broadly. It would therefore appear that respect for the principle of legalism precludes a competition authority from refusing a concentration on the basis of a negative premise that is not included in the relevant act (that on which the case is decided). The role of a public authority does not include undertaking tasks for which it was not appointed. Confirmation of this argumentation may be found in the jurisprudence of the Constitutional Tribunal, according to which the obligation of public authorities to act on the basis of and within the limits of the law means, inter alia, that:

the competences of public authorities should be unequivocally and precisely defined in legal regulations, all actions of these authorities should have a basis in such regulations, and – in the case of doubts as to interpretation – the competences of public authorities may not be presumed. 75

However, the above reasoning – consistent with the position of the competition authority itself76 – must arouse justifiable controversy. Accepting it uncritically could lead to a distortion of the meaning of the legalism principle, which is intended to protect the rights of individuals and to ensure that the actions of state authorities are limited by law. In this respect, the principle of legalism serves to implement the idea of the rule of law. However, interpretation of the law – especially that concerning fundamental rights – cannot be carried out in a disjointed manner, in a way that disregards other legal norms. In particular, it is unacceptable to disregard the superior provisions of constitutional and EU law. Public authorities may not be “relieved” by a domestic? legislative decision of their obligation to observe the norms and values contained therein that underlie constitutional regulations and EU law. Any action of a state body which, though complying with relevant competence provisions, infringes constitutional and EU values should not be approved. It is worth remembering that this kind of erroneous understanding of legal positivism was one of the reasons why work on human rights systems was initiated in post-war Europe.

In accordance with Article 8(2) of the Constitution, the provisions of the Polish Constitution shall be applied directly, unless its provisions

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75 Polish Constitutional Tribunal 14 July 2006, Case K 53/05, https://ipo.trybunal.gov.pl/.
76 ‘Respondent’s reply to the request to suspend the execution of the court’s decision’, President of the Office of Competition and Consumer Protection (7 April 2021), DKK-2.421.74.2020. Al., p. 5.
provide otherwise. This norm does not contain any exceptions or limitations – in particular, it does not deprive public administration bodies of the possibility to resolve a case on the basis of directly applicable provisions of the Constitution. However, as indicated in the jurisprudence of national courts, it is unacceptable to issue an administrative decision relying exclusively on a constitutional norm. An additional obstacle to the direct application of the Constitution is the requirement that the provisions applied need to be “characterised (...) by a sufficient degree of concreteness and precision”. This requirement is met by very few norms of the Basic Law, and Article 14, which is the source of the principle of media freedom, certainly cannot be included in this group.

In fact, in the PKN Orlen/Polska Press case, the source of concern is not so much the collision of statutory and supra-statutory (constitutional or EU) provisions, it is more the introduction of statutory provisions in too narrow a manner that precludes the possibility of providing adequate protection to superior norms. In such a case – in line with the position expressed by the Polish Constitutional Tribunal – one may identify a so-called legislative omission. The Tribunal defines this concept as “a situation when the legislature has standardised an area of social relations, but has done so in an incomplete manner, regulating it only fragmentarily.” A legislative omission may be the subject of a constitutional complaint, as “a plea of unconstitutionality may concern both what the legislature has regulated in a given act and what it has omitted in this act, although, acting in accordance with the Constitution, it should have regulated”.

Therefore, given the doubts as to whether national competition law contains an exhaustive list of grounds justifying a negative decision on a concentration, this issue should be interpreted by the constitutional court. Its aim should be to determine whether, and to what extent, the

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77 Polish Voivodship Administrative Court in Poznań 26 January 2018, Case I SA/Po 1003/17, https://orzeczenia.nsa.gov.pl/. The court stated that, although the Constitution does not limit the circle of bodies appointed to directly apply the Constitution, public administration bodies cannot be considered independent and the principle of subjection only to the law does not apply to them. “These organs do not have the possibility to bypass particular levels of the hierarchical system of sources of law or to ask legal questions to the Constitutional Tribunal. Public administration bodies are obliged to act in accordance with the provisions of administrative law and are bound by the interpretation coming from their superior bodies. They may not, therefore, issue an administrative decision based only on a constitutional norm”.

78 Polish Constitutional Tribunal 28 November 2001, Case K 36/01, https://ipo.trybunal.gov.pl/. The Supreme Administrative Court has also indicated in its jurisprudence that direct application of the Constitution’s provisions is possible only when the requirement of unambiguity is met, to an extent that allows their application without the need to refer to statutory provisions – see Supreme Administrative Court 3 February 2015, Case II FSK 178/13, https://orzeczenia.nsa.gov.pl/.

79 Polish Constitutional Tribunal 22 July 2008, Case K 24/07, https://ipo.trybunal.gov.pl/.
competition authority should take into account the impact of the concentration notified on media pluralism – so as not to create a threat to respect for rights arising both from national constitutional norms and EU law.

In the case of Poland, however, this possibility has now been, de facto, blocked due to the ongoing crisis surrounding the Constitutional Tribunal, the origins of which can be found in reforms introduced by the present governing majority. As a result of the changes introduced, the ECtHR stated in a recent judgment that the Tribunal does not currently meet the conditions allowing it to be recognized as a court of law.

An alternative to resolving doubts by means of a constitutional complaint is to seek an interpretation of the Charter of Fundamental Rights from the Court of Justice. Such an objective may be achieved by means of preliminary questions from a national court, deciding the validity of a decision taken by a competition authority. As a general rule, competition authorities, acting under national law, examine cases that are not classified as concentrations with an EU dimension. This does not mean, however, that in such cases the provisions of EU law – other than those directly applicable to concentrations – may be disregarded. A distinction must be made between a situation where the Union (as an international organization) does not have competence in a given area and a state in which Union law does not exercise such competence, as is the case with control of concentrations that do not meet EU thresholds. It should be remembered that the actual wording of Art. 3(1) of the ECN+ Directive requires competition authorities to take the provisions of the Charter of Fundamental Rights into account in their decisions. Therefore, it in the case under discussion, the

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80Wojciech Sadurski, ‘Polish Constitutional Tribunal Under PiS: From an Activist Court, to a Paralysed Tribunal, to a Governmental Enabler’ (2019) 11 Hague Journal on the Rule of Law 63.
81Marcin Szwed, ‘What Should and What Will Happen After Xero Flor’ [2021] VerfBlog <https://verfassungsblog.de/what-should-and-what-will-happen-after-xero-flor/> accessed 20 May 2021. ECtHR 7 May 2021, No. 4907/18, Xero Flor v Poland; ibid.
82In the case under examination, doubt arises as to which entity should file the complaint. The parties to the proceedings – Orlen and Polska Press – have no interest in challenging the validity and correctness of the decision authorising the concentration. Regardless of the legal possibility to take such action, in view of the controversy concerning the correctness of the composition of the Polish Constitutional Tribunal, such action would seem pointless.
83This is the case when the Union has not had certain powers conferred upon it. Under the principle of conferral, competences not explicitly conferred upon the Union are exercised by Member States.
84Such a situation can occur when the Union has not regulated an area of shared competence, as well as when it has ceased to exercise its competence. In such a case, Member States exercise their own competence, though this should not in any way limit the effectiveness of other EU provisions that apply in the given situation. Marcus Klamert, The Principle of Loyalty in EU Law (First edition, Oxford University Press 2014).
85Although it is apparent from Recital 42 of the ECN+ Directive that the intention behind the introduction of Article 3(1) of the Directive was to safeguard the rights of participants in antitrust proceedings, it seems appropriate to expect that interpretation of this standard should allow all the Charter’s provisions to be fulfilled, including those regarding media pluralism.
Court of Competition and Consumer Protection – which is currently examining the Commissioner for Human Rights’ challenge to the decision authorizing the takeover of Polska Press by PKN Orlen – should ask for a preliminary ruling from the Court of Justice to determine whether domestic laws regarding concentration control that do not take into account the impact of mergers on media pluralism do comply with Art. 11 (1) and Art. 11 (2) of the Charter of Fundamental Rights.

The PKN Orlen/Polska Press case should also be an impetus for other Member States to review their national legislation in order to properly consider the specifics of media market concentration in antitrust legislation. This also applies to countries which already have established media concentration laws. In the latter case, it may be necessary to introduce additional restrictions on media acquisitions by entities even indirectly controlled by the authorities or political parties. It should be borne in mind that the PKN Orlen/Polska Press case does not actually concern the problem of positive obligations of the state. This would only be relevant if the concentration involved entities free from state influence, which is not the case here.

Basing the protection of rights under the Charter of Fundamental Rights on the actions of national governments who are currently being proceeded against regarding systemic threats to the rule of law would seem pointless. Viktor Orbán, during the last ten years of his rule, has de facto monopolized the media market in Hungary. The same path is now being followed by the current Polish government. Recognition that the Charter is intended to protect the rights of EU citizens independently of the will of national governments requires the introduction of provisions that effectively protect media pluralism. A means of achieving this may be to extend the definition of a concentration with an EU dimension to include cases of acquisitions of entities which have a significant share of the media market in at least one Member State, even if, as in the case of the media, the relevant geographic markets are national in nature. Such a solution would truly minimize the threat of introducing a state monopoly in the area of access to information – a threat which clearly stands in the way of not only the proper functioning of a democratic state but also the achievement of objectives the European Union was created to achieve. This, in turn, proves that in the ongoing European

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86 Viktória Serdült, ‘What next for Viktor Orbán’s Hungary? Looking at What Happens Now That Hungary’s Prime Minister Is Pressurising the Judiciary, Press, Parliament and Electoral System’ (2019) 48 Index on Censorship 34; Central European University, Budapest and András Bozóki, ‘Broken Democracy, Predatory State and Nationalist Populism’ (2015) 48 Athenaeum Polskie Studia Politologiczne 247.
discussion concerning amendments to competition law, it is essential to consider a change to criteria that recognises concentrations as having a Union dimension.

**Summary**

In the European legal model, respect for fundamental rights constitutes an absolute obligation underpinning state action. However, this obligation should not be identified solely with the prohibition of unlawful interference. It also includes the shaping of not only law but also the practice of public administration bodies, which should not violate these rights. Undoubtedly, freedom of speech is a core value on which modern democracies have been built. In recent years, however, a completely new threat to freedom of speech has emerged. It is the limiting of pluralistic debate through the monopolization of both private and state media, engendered by populist governments attempting to gain more influence in shaping public opinions and views.

At the time the decision by the Polish competition authority was issued – January 2021 – PKN Orlen stressed that the purchase of Polska Press was aimed solely at diversifying the company’s business, as well as creating synergy with the previously acquired Ruch SA (a leading press distributor).\(^{87}\) Concerns expressed by NGOs – which said that a state-controlled oil company, whose president was a former politician and active member of the ruling party, should not be involved in the implementation of one of the party’s leading initiatives, i.e. the so-called “repolonisation of the media”\(^{88}\) – were downplayed.

In March 2021, as a result of a complaint filed by the Commissioner for Human Rights,\(^{89}\) the Court of Competition and Consumer Protection ordered that enforcement of the decision permitting the concentration be suspended until the merits of the case had been examined.\(^{90}\) Its decision was ignored by PKN Orlen, which not only introduced changes to the

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87Po co Orlen kupił Polska Press? Obajtek komentuje [‘Why did Orlen buy Polska Press? Obajtek comments’], Dziennik.pl (1 February 2021), <https://cli.re/ekdQzw> accessed on 8 July 2021.

88Annabelle Chapman, ‘Repolonization’: Poland again hints at limiting foreign media ownership’, International Press Institute (5 October 2020), <https://cli.re/pZxkm5> accessed on 8 July 2021; Poland about to censor privately-owned media, like its Hungarian ally’, Reporters Without Borders (31 July 2020), <https://cli.re/4dx1y8> accessed 8 July 2021.

89Appeal of 5 March 2021 of the Commissioner for Human Rights against the decision of the President of the Office of Competition and Consumer Protection No. DKK-34/2021, <https://cli.re/Rw5jYZ> accessed on 8 July 2021.

90District Court in Warsaw (Competition and Consumer Protection Court) 8 April 2021, XVII Amo 1/21, <https://cli.re/ndQPqM> accessed on 8 July 2021.
management board of the recently acquired company, but also explicitly stated – as if it were necessary – that it did not feel bound by the court’s decision.91 In the following weeks, the new management board of Polska Press, composed of nominees connected to media organizations favourable to the ruling party,92 conducted a purge of chief editors in a significant number of Polska Press editorial offices.93 The dismissals also extended to journalists who had previously published articles unfavourable to the government,94 while strictures – effectively preventive censorship – were introduced that outlawed publication of any content either criticizing the government or casting it in an unfavourable light.95 All such changes were introduced within a month of changes to the Polska Press management board and in defiance of the court order suspending enforcement of the concentration decision.

Therefore, the question of what role competition law and public administration bodies should play in a situation where there are no distinct regulations governing concentrations involving the media is, in fact, a question about the model of governance. If it is correct to say that a state without a pluralistic media is not fully democratic, then it is clear that one of the objectives of public policy should be the protection of media freedom. If, however, neither the legislature nor the executive branch – not even the National Broadcasting Council (dominated by the government majority) – respond to disturbing changes in the local and regional media market, and especially the press, this would seem to indicate that the real issue requiring clarification is not whether the competition authority should respond to an apparent breach of constitutional principles, but how it can effectively counteract such a situation, given the legal tools at its disposal.

In his PKN Orlen/Polska Press decision, the President of the Office for Competition and Consumer Protection resembles the protagonist of an

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91 ‘Orlen o Polska Press: Postanowienie sądu jest bezprzedmiotowe’ [‘Orlen on Polska Press: The court’s decision is irrelevant’], Rzeczpospolita (30 April 2021), <https://cli.re/B3BNoZ> accessed on 8 July 2021.
92 Tomasz Cyłka, ‘W zarządzie Polska Press są już tylko ludzie PiS. Ciąg dalszy zmian w spółce Orlenu’ [‘Only PiS people are on the board of Polska Press. Continuation of changes in the Orlen company’], Gazeta Wyborcza (28 April 2021), <https://cli.re/3oZdeA> accessed on 8 July 2021.
93 ‘With firing of four editors, “repolonisation” under way in Poland’, Reporters Without Borders (10 May 2021), <https://cli.re/jYnNwx> accessed on 8 July 2021.
94 One of them was Marek Kęskrawiec, a two-time winner of the Grand Press award, who was forced to leave Gazeta Krakowska, one of the leading titles of Polska Press, shortly after the change in the position of chief editor. See Marek Kęskrawiec odchodzi z Polska Press’ [‘Marek Kęskrawiec leaves Polska Press’], Wirtualne Media (), <https://cli.re/xmRd7j> accessed on 8 July 2021.
95 ‘Naczelny ”Dziennika Polskiego” usuwa opublikowany wywiad po tweecie szefowej Polska Press’ [‘The editor-in-chief of “Dziennik Polski” removes a published interview after a tweet of the head of Polska Press.’], Gazeta Wyborcza (21 May 2021), <https://cli.re/D3jAmE> accessed on 8 July 2021.
ancient Greek tragedy: despite understanding the negative consequences of the situation to which his decision leads, he argues that he cannot issue a different one. Leaving aside statutory competence, such a position cannot be accepted. The overriding aim of public authorities is to protect the constitutional order, and thus the rights of citizens. Any other interpretation – amounting to “legal impossibilism” of public authorities – must be rejected.

It is difficult to imagine that the European Union can continue to develop as a democratic and free space if it consists of undemocratic states. The problem of media pluralism is not just a domestic issue. There seems little point in holding European Parliament elections in a situation where, in some Member States, voters’ access to objective and unbiased information is restricted.

At present, EU institutions are paying a great deal of attention to the question of judicial independence in individual Member States (including, mainly, Poland). This is obviously a vital issue. However, it should be remembered that freedom of speech and the right of access to diverse sources of information are no less important in the European dimension. At a time when online services are becoming globalized, but also when populist movements are growing, the question of developing common principles to guarantee the independent functioning of the media is an equally important task that should be taken up urgently by the EU legislature.

Jonathan Becker, discussing the principles of the media market, distinguished, besides authoritarianism and democracy, the rise of so-called “neo-authoritarianism”, a phenomenon characterized by an increasing and strong presence of the state in the scope of transmitted content. As he notes,

under a neo-authoritarian system (…) private ownership may be tolerated, but other mechanisms are used to control messages. Subsidies, targeted tax advantages, government advertising and other forms of assistance are used to promote support. To silence critics, the state does not resort to pre-publication censorship so much as economic pressure through selectively applied legal and quasilegal actions against owners. The neo-authoritarian media system also has a weak judiciary that may be pliant to the interests of the political leadership, or which may have difficulty in ensuring that its mandates are enforced.96

What is worrying is not the mere fact that Becker’s description fits the media market in Poland or Hungary, but the fact that the analysis he

96Jonathan Becker, 'Lessons from Russia: A Neo-Authoritarian Media System' (2004) 19 European Journal of Communication 139.
presented was about Putin’s Russia. Since this description, first presented 17 years ago, so accurately characterizes the contemporary media market in two EU countries, it has now become necessary, if not vital, to reflect deeply on the effectiveness of the EU legal mechanisms established to protect media pluralism.

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