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Media ownership regulation in Europe – a threat or opportunity for freedom of speech?

Abstract: This study analyses regulatory solutions at the level of the European Union, and Poland in particular. This issue is variously regulated in the national laws of many member states of the European Union. The fundamental objective of such restrictions should be the intention to ensure pluralism in the media. It is not the phenomenon of media concentration that poses a threat to freedom of expression but it is its scale.

Key words: media concentration, media ownership, freedom of speech, media freedom

Starting from the 1980s, it has been observed that in the doctrine of the European Union member countries there is an issue of the concentration of capital as a source of potential threat to freedom of expression in the media (Reville, 1991, pp. 78–82; Doyle, 1995, p. 38; Goban-Klas, 2001, p. 411). The formulated view states that one of the prerequisites for freedom of expression, thus freedom of the press, is ensuring mechanisms of fair competition in this market (Pope, 1999, p. 193). There are many reasons for concentration trends: competitive pressure, globalisation, development of expensive technologies, and limited access to resources such as good-quality programmes. Therefore, economic reasons are of the utmost importance in that case. In order to support this thesis, one should refer to a phenomenon called the spiral of circulation which means possessing much greater capital by the press concerns which when trying to increase the audience market offer more attractive products, what, in turn, results in an increase of audience and deprives competitors of audience. In this respect, the printed press market and the electronic media market look slightly different. The process of concentration on the market of newspapers and periodicals is caused by limited state intervention in the process of creating a new press outlet, whereas the process of concession on the television market contributes to that. Normally, state intervention is different on the broadcasting market and the television one in particular, than on the printed press market. In the first case, legal restrictions are introduced in the form of antitrust law, limits in terms of the amount of foreign capital, programme standards and the concession system, while in the second case, interference appears in an indirect form, through subsidies, soft loans and tax exemptions (Mrozowski, 2001, pp. 162–168). In fact, it is completely different in terms of the new media market where state intervention is either entirely eliminated or limited.

This study analyses regulatory solutions at the level of the European Union as well as selected countries, Poland in particular. This issue is variously regulated in the national laws of many member states of the European Union. The fundamental objective of such restrictions should be the intention to ensure pluralism in the media. It is not the

phenomenon of media concentration that poses a threat to freedom of expression but it is its scale.

The process of the concentration of capital in the media undertakings cannot be perceived as an entirely negative phenomenon (Flankowska, 2002, p. 124; Kreft, 2015, p. 74). On the one hand, this phenomenon can limit the tendency for diversifying the media offer also in terms of showing social differences, being open to various points of view on specific issues as well as possibilities of choice of subjects (Mrozowski, 2001, p. 164), and it can lead to limitation or even elimination of media pluralism (Doyle, 1995, p. 39). On the other hand, some positive aspects of the process can be also pointed out, including reduction of operational costs, better investment risk management, access to new capitals, enhancement of work efficiency and expenditure on developmental research, etc. (Miąsik, 2000, p. 92–93; Zielińska-Folcholc, 2003, pp. 52–53). First of all, the essence of the issue comes down to the extent of concentration. Paradoxically, the principles of the free market enable reaching such a position when, consequently, this entity reduces competition of others.

The term *pluralism of mass media* itself is disputable. Speaking of that term, one can mean its internal or external aspects. Generally, it is agreed that „pluralism of mass media consists in access to the media market and freedom of choice between programmes representing various socio-political and economic thoughts” (Miąsik, 2000, p. 94). However, this concept can be understood internally as a situation where the broadcaster (or the publisher) offers a programme or paper open to diverse views, and that is the key to building the content of the programme or paper. It is also possible to focus on the external aspect which is understood as enabling the possibility of the formation and functioning of multiple information channels, or newspapers presenting different options.

The term *concentration* can be also ambiguous. Therefore, it should be noted that there is a distinction between the so-called monomedia concentration also referred to as horizontal and multimedia concentration (inter-media or vertical). The first term describes the phenomenon of merging the media from the same sector. Whereas the latter one refers to a situation when media companies that operate in different sectors (dailies, magazines, terrestrial, satellite, cable television, Internet service providers, video service providers, film producers) are being merged. Sometimes, the term vertical concentration is understood as the process of combining media companies with entities cooperating with that market, e.g. distribution, advertising. There are also cases of cross-media (diagonal, conglomerate) concentration where media companies and institutions from other sectors of the economy (e.g. financial institutions) are merged. In that last case, one should also consider what type of concentration may be a threat to the freedom of expression in the digital age (Zielińska-Folcholc, 2003, p. 163; Doktorowicz, 2002, pp. 57–58).

In Europe, the issue of media concentration appeared at the beginning of the 1980s. At that time, as a result of deregulatory processes, especially visible in the broadcasting sector, public broadcasters lost their monopoly and commercial entities emerged (Hrvatín, Petković, 2005, p. 15; Pampanin, 1997, p. 44). The process has intensified over the last decades, especially when the so-called new media were being introduced to the market (Mik, 2007, pp. 39–51). Deregulation of the audiovisual sector paradoxically helps to achieve such a position by market players that they start to threaten the principles of

freedom of competition and the existence of other entities of this sector (Feintuck, Varney, 2006, pp. 20–30). The task of countries is to develop mechanisms to protect against limiting competition, and ensure pluralism in the media (Gibbons, 1992, pp. 220–229; Dragomir, Thompson, 2008, pp. 44–51).

In terms of the European regulations, special attention should be paid to the recommendation of the Committee of Ministers to the Member States of the Council of Europe on media pluralism and diversity of media content adopted on 31 January 2007,¹ as threats from new content distribution platforms and practices by operators of EPG, CAS and API were identified. The phenomenon described above had aroused the EU's interest even during the 'pre-digital' era² (Mik, 1999, p. 323; Skoczny, 2010, pp. 693–702; Papatthanassopoulos, 2004, p. 110–124; Thoth, 2008, pp. 143–183, 234–235; Klimkiewicz, 2005, pp. 4–8). Here, the European Parliament resolution of 15 February 1990 on media takeovers and mergers³ (Paraschos, 1998, pp. 181–183) is also worth mentioning. There was a demand directed to the European Commission to devise a *sui generis* regulation addressed to media undertakings. It was argued that applying general control principles of the concentration of capital is insufficient bearing in mind the specificity, role and tasks of the media in democratic European societies. As a result, on 23 December 1992, the Commission adopted the Green Paper entitled 'Pluralism and media concentration in the internal market – an assessment of the need for community action'⁴ (Doyle, 1995, p. 39; Mik, 1999, pp. 486–488), where a very conservative and irresolute position was presented. It resulted from various reasons. It was observed that adopting a *sui generis* regulation at the European level had been hindered due to legislative differences in particular countries. Secondly, the EU was often accused of lack of competence in this respect. Then, on 20 January 1994, the European Parliament adopted the resolution on pluralism and media concentration in which a thesis was included emphasising the necessity of establishing independent authorities for media-related matters and issuing a document harmonizing national law in this respect Ainsworth. The consultation process ended with the opinion of the Economic and Social Committee of 1995 including the report from the mentioned debates. It can be concluded from the document that it is necessary to set the upper limit at the level of 30% of the market share in terms of monomedia concentration and 10% for multimedia concentration. Therefore, the restriction would be based on the criterion of channel audience. The geographical market of reference would be an area where channels of given stations are received. Such a premise would stem from the conviction that in order to ensure pluralism, it is necessary to create conditions for the functioning of at least 4 entities in a given market sector, and in the case of the general market – 10 broadcasters. In 1997, reservations were expressed that these limits should

¹ Recommendation CM/Rec(2007)2 of the Committee of Ministers to member states *on media pluralism and diversity of media content, adopted by Committee of Ministers on 31 January 2007 at the 985th meeting of the Ministers' Deputies*, <https://wcd.coe.int/ViewDoc.jsp?id=1089699>.

² The institution of control of concentration of undertakings is one of several institutions (such as prohibition of collusion, of abuse of a dominant position, of state support) making up EU competition law.

³ OJ 1990, C 068 19.03.1990, pp. 137–138.

⁴ *Pluralism And Media Concentration In The Internal Market – An assessment of the need for Community action*, COM (1992) 480 final, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=C:OM:1992:0480:FIN:NL:PDF>. See more G. Doyle, 1995, p. 39; Mik, 1999, pp. 486–488.

not be applicable to broadcasters exceeding limits in just one country. However, it has not been decided yet to adopt a separate regulation on the discussed issue. (Zielińska-Folcholc, p. 57).

On 18 November 2002, the European Parliament adopted the resolution on media concentration obliging the European Commission to take action with regard to media capital concentration in the digital era. It was emphasised there that “the development of new technology and of new communications and information services should respect and guarantee the maintenance of media pluralism, cultural diversity and democratic values” (Waniek, p. 208). Whereas, in the Communication on the future of European regulatory audiovisual policy⁵ adopted in December 2003, it was stated again that, on the one hand, protection of pluralism is a task that the member states are responsible for, but, on the other hand, it is possible to apply European regulations on preventing the concentration of capital. The thesis was deemed legitimate, although the Community’s standards mainly refer to ensuring prerequisites for competition on the economic markets (Waniek, p. 209). On 16 January 2007, the European Commission adopted a working document entitled “Media pluralism in the Member States of the European Union.”⁶ Thus, this way it was informed that the plan to be executed in three stages was adopted. Firstly, the intention was to devise a report concerning the media market in the EU, secondly, to verify media pluralism and, thirdly, to develop guidelines for states, which according to the above criteria, would not comply with the standards (Waniek, p. 218–219). It should be noted that the general declaration of media pluralism was included in Article 11.2 of the Charter of Fundamental Rights of the European Union⁷ (Hrvatín, Petković, p. 14). Due to no detailed regulations regarding the media sector, the legal basis for its control was Articles 101 and 102 of the Treaty on the Functioning of the European Union⁸ and, in particular, the Regulation of the Council of the European Communities No 4064/89 of 21 December 1989 on the control of concentrations between undertakings⁹ (Skoczny, p. 747–763; Goldberg, Prosser, Verhulst, p 89; Mik, pp. 476–488). In the doctrine of the European Union competition law, the view is formulated that “the operation of the concentration of capital is incompatible with the common market when it creates or enhances a dominant position leading to a considerable obstacle to effective competition on the common market or its significant part” (Mik, p. 476). From the

⁵ *The future of European Regulatory Audiovisual Policy*, COM (2003) 784. See more S. Gorini, *European Commission: Communication on the Future of European Regulatory Audiovisual Policy*, IRIS Merlin, <http://merlin.obs.coe.int/iris/2004/1/article10.en.html>.

⁶ Commission staff working document, *Media pluralism in the Member States of the European Union* (SEC/2007/32).

⁷ The Charter of Fundamental Rights of the European Union 2012/C 326/02.

⁸ Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union – Consolidated version of the Treaty on the Functioning of the European Union – Protocols – Annexes – Declarations annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon, signed on 13 December 2007 – Tables of equivalences, Official Journal C 326, 26/10/2012 P. 0001-0390 art. 101 (to dawny 81 TWE) i art. 102 (dawny 82 TWE).

⁹ Council Regulation (EEC) No 4064/89 of 21 December 1989 *on the control of concentrations between undertakings*, OJ 1990 C 2003/10; Council Regulation (EC) No 1310/97 of 30 June 1997 amending Regulation (EEC) No 4064/89 *on the control of concentrations between undertakings*, OJ L 180, 9.7.1997, pp. 1–6.

point of view of the EU law, such a threat can be considered only when the phenomenon of the concentration of undertakings reaches the level and scale of the Community. Currently, the issue is regulated by the European Council Regulation No 139/2004 of 20 January 2004 on the control of concentrations between undertakings.¹⁰ The document defines that concentration occurs when there is a lasting change in the control of a given entity arising from merging two or more previously independent undertakings or parts of undertakings. An activity that will be also deemed such a change is taking direct or indirect, full or partial control of other undertakings by a person controlling at least one undertaking. Furthermore, the conditions for concentration are also met when a common undertaking that permanently serves all functions of an independent business entity is established.

Domestic regulations in the EU member states on the control of concentration focus on the economic aspect of the issue. The main element is the **market position** (the market share) of participants of concentration before and after the transaction as well as the possibility of a negative influence on remaining market participants and the state of competition. Generally, a premise that makes accepting concentration impossible is deemed to be a significant restriction of effective competition, what, in particular, can mean obtaining or strengthening a **dominant position** in the market. A dominant position in specific jurisdictions is variously defined, but, as a rule, it is understood as a capacity to prevent effective competition on the market and the possibility of operating regardless of competitors, contracting parties and consumers. Then, it is deemed that a formal indicator of a dominant position is a market share of over 40%. A crucial issue is to establish what elements should be decisive in defining the position of legal entities on the market (the market of content providers, audience, advertising, distribution platforms).

Nevertheless, the question of the „nationality” of the capital of media companies is a completely separate issue. As with the analysis of media concentration, today there is no reliable research, thus evidence, that this factor directly or indirectly influences the transmitted content, and certainly not the freedom and pluralism of the media. In this situation, this issue should be subject to in-depth research, however, it should be immediately recognized that, from the point of view of European Union law, measures restricting the investment rights of legal entities from EU member states would infringe one of the foundations of the Union, in particular, Article 63 of the Treaty on the Functioning of the European Union – which states that „within the framework of the provisions set out in this Chapter, all restrictions on the movement of capital between Member States and between Member States and third countries shall be prohibited”. Such solutions could be possibly applicable to investors coming from non-EU countries (Piątek, Dziomdziora, Wojciechowski, 2014, pp. 375–376).

In Poland (Kowalski, 2002, p. 28; Szynol, 2008, p. 44; Jurczyk, 2015, pp. 139–140), Article 36.2.2 of the Broadcasting Act (however, ‘Polish press law’ completely omits the issue of concentration) (Klimkiewicz, 2005, p. 53) states that concession is not granted if broadcasting by a petitioner could result in his achieving a dominant position with respect to means of mass communication in a given area. On the other hand, pursuant to Article 38 of this Act, concession may be revoked if broadcasting causes a broadcaster to

¹⁰ See Council Regulation (EC) No 139/2004 of 20 January 2004 *on the control of concentrations between undertakings (the EC Merger Regulation)*, O.J. 29.01.2004, L 24, pp. 1–61.

achieve a dominant position in a given area (Sobczak 2001, pp. 443–444 and 456–458; Nowińska, du Vall, 1997, pp. 47–53).

The term ‘dominant position’ is defined in Article 4.10 of the Act of 16 February 2007 on Competition and Consumer Protection¹¹ (Skoczny, 2010, pp. 15–20; Banasiński, 2009, p. 9). According to this provision, it is a position of an undertaking which allows it to prevent effective competition in a relevant market by creating possibilities to act in a considerable way regardless of competitors, contracting parties and consumers. It is assumed that an undertaking has a dominant position if its market share exceeds 40%. As it results from the above, existing regulations relate only to monomedia and multimedia concentration and completely omit the possibility of controlling the phenomenon of vertical and multi-sector concentration (Klimkiewicz, 2005, p. 52). From the point of view of new technologies on the Polish market, it is worth mentioning the decision of the President of the Office of Competition and Consumer Protection approving the establishment of the company *Polski Operator Telewizyjny* [Polish Television Operator] by TVN and Polsat stations which should offer services of digital transmission of programmes (Waniek, pp. 215–216.)

Technological progress brings about new challenges in this field. Media convergence, digitalisation and globalisation are phenomena creating favourable conditions for the concentration of capital and media management (Gruszecki, 2007, p. 58; Beliczyński, 2004, p. 38). It happens, for instance, because the adopted marketing models more frequently aim at offering services of various sectors, e.g. in triple play service (Tassel, pp. 484–503).

Concentration in the discussed sector can mean: concluding obligatory adhesion agreements for a long period, further bundling of programme offers, that is combining many services (e.g. telephone, television, radio, the Internet), using electronic programme guides to promote just one’s own offer (Popa, 2004, pp. 4–5; Nikoltchev, p. 15).

Current regulations, especially lack of separate regulations taking account of the specificity of the media and new media markets, are insufficient when faced with dramatic transformations arising from the development of digital technologies. Competition between the market participants in a new environment can lead to a situation where, if there are no applicable legal regulations, each operator of a given platform ensures completely different technical equipment standards (EPG, API and CA in particular). It will enable the reception of their offers but make free migration of audience through various contents impossible.

In 2017, the Polish ruling party Law and Justice proposed a public debate about that and announced a new regulation on that issue. However, there is a risk that it is just the pretext for re-polonization of the media in Poland, which could mean eliminating foreign media concerns from the Polish market. The presentation will also focus on details of new legislative proposals and their possible consequences as well as threats to freedom of expression.

It follows from the above that appropriate separate provisions on the regulation of capital concentration in the mass media seem necessary as the current general antitrust laws prove to be insufficient. Such solutions are available in many EU countries. It

¹¹ The Law on Competition and Consumer Protection of 16 February 2007 (Dz. U. No. 50, poz. 331).

should be stressed out, however, that the primary and only objective of such restrictions should be the willingness to ensure pluralism in the media. Therefore, despite lobbying of some interest groups, we should reiterate the thesis resulting from the debate that took place almost in the whole Europe stating that a defined scale of capital concentration in media companies can be a threat to the freedom of expression. The most problematic part of this issue is balancing and establishing an appropriate ratio between the intervention of legislators that restricts the possibility of merging business entities and the possibility of free development, especially of national broadcasters. Hence, any further draft law on this issue is so complex and delicate that it should be preceded by a broad debate on this subject, and preferably by reaching a consensus among major media market institutions and entities. There are different models and solutions available. However, the most important thing is that, by acting within an open social dialogue, not to lose the chance of reaching a consensus among all concerned parties. It is important to trust that the compromise, in the name of the constitutionally guaranteed principle of the freedom of expression, is still possible for all major media market entities.

What turns out to be problematic is specifying and determining the relevant markets on which the concentration scale assessment is being conducted. It is possible to analyse such elements as turnover, sales (circulation, audience, recipients, advertisers). From the point of view of media pluralism, the indicator of market for transferred ideas, and thus the impact on the audience, could be more important. However, there is a fundamental concern about how to measure this phenomenon.

Nevertheless, the question of the „nationality” of the capital of media companies is a completely separate issue. First of all, it is difficult to determine, in the international investment market, what the „nationality” of capital is as investors usually have international funds with a complex, and certainly multi-national, ownership structure. Moreover, it should be noted that from the point of view of European Union law, solutions that would restrict the investment rights of legal entities established in the EU would undermine one of the foundations of the Union, in particular, Article 63 of the Treaty on the Functioning of the European Union,¹² according to which all restrictions on the movement of capital between Member States and between Member States and third countries are prohibited. Possibly, such solutions could apply to investors coming from non-EU countries, what has already functioned in the current act on radio and television in Poland (Piątek, Dziomdziora, Wojciechowski, 2014, pp. 375–376). If similar solutions (for non-EU investors) were extended to other media markets (e.g. the press, the Internet), a question would arise as to what authority would be entitled to it and what measures it would be authorized to use. In the case of online transmissions, the introduction of such regulations and mechanisms would be a far more challenging task, given the global nature of the Internet and the current position of global players. According to the latest announcements from October 2017, the ruling party has suspended work on these regulations. But it did not cancel their work on them. Therefore, the issue will come back soon.

¹² Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union – Consolidated version of the Treaty on the Functioning of the European Union – Protocols – Annexes – Declarations annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon, signed on 13 December 2007 – Tables of equivalences, O.J. C 326, 26/10/2012 P. 0001-0390.

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Regulacja własności mediów w Europie – zagrożenie czy szansa na wolność słowa?

Streszczenie

Opracowanie dotyczy kwestii pluralizmu, własności medialnej, koncentracji i struktury kapitałowej mediów, prezentując uregulowania dotyczące tego zagadnienia w UE.

Słowa kluczowe: pluralizm mediów, własność przedsiębiorstw medialnych, koncentracja kapitału medialnego, wolność mediów