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Briefing note

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Can changes in the Polish media sector affect foreign investors?

On 31 December 2015, the Polish Parliament ignored a letter of concern from the European Commission and passed an amendment to Poland's media law that sacks the management of the public television and radio broadcasters, TVP and Polskie Radio, and empowers the Minister of the State Treasury to appoint their successors. The new law is just the start, according to its authors. The next step is to turn the public media into "national media".

Given the above, many questions may arise. Can the current tendency to "nationalize" media also have an impact on private media owned by foreign companies in Poland? Could it result in a reduction of the share of foreign companies in the media market? Which legal tools might be used by the current government?

Polish foreign media market?

Over the last 15 years, most EU countries have entirely given up limiting the share of foreign capital in the media[1].

In 2014, the Organisation for Economic Co-operation and Development (OECD) set up a special index that measures how easy it is to make a foreign investment in a number of sectors of the economy, including media. In the case of the media industry, the index is composed of four elements: (i) freedom to buy shares, (ii) requirement to be subject to the supervision of national regulatory authorities, (iii) restrictions on foreigners being members of management boards and (iv) other factors.

Each component was assigned from 0 to 0.25 points. The value of the index is obtained by summing up these points. An index value of 0 means absolute investment freedom and an index value of 1 means a total lack of freedom. According to the OECD, the most difficult countries to invest in media are the following Asian countries: China, Indonesia and Malaysia. With 0.298, Poland is ranked 18. **However, among European Union countries, only Italy is more restrictive with regard to investments in the media**.

[1] http://biqdata.pl/polskie-media-sa-niepolskie.

However, it is very difficult to provide reliable data concerning the share in the Polish media market of entities linked to foreign capital. According to some sources, entities with foreign capital control approx. 76% of the press market, including nearly 90% of the regional market, approx. 48% of the radio market and approx. 40% of the TV market[2].

The table below lists the main foreign companies active on the Polish media market.

Owner	Country of origin	Most popular media outlets owned
Ringier Axel Springer Group	Germany/Switzerland	*Newsweek*, *Fakt*, Onet.pl
Bauer Group	Germany	radio *RMF FM*, Interia.pl
Verlagsgruppe Passau	Germany	*Polska The Times*, most regional dailies, such as *Dziennik Zachodni*, *Dziennik Łódzki*, *Gazeta Krakowska*
Groupe Lagardère	France	*Radio ZET*
Scripps Networks Interactive	USA	TVN Group

Source: Polityka Insight

Which legal tools might potentially be used to reduce this share?

Limiting market shares?

One of the most radical proposals would be to introduce a ban on a single entity holding more than, let's say, 20% or 25% of the media market. **A regulation of this type, however, might potentially violate European Union law and bilateral investment treaties**. In the case of entities that already hold over a 20 or 25% share in a given market, this would mean that they would have to sell some of their assets. This could raise doubts, at least, as to the compatibility of such measure with the general rules of EU law – the right of ownership, the principle of legal certainty or the principle of retroactivity. Furthermore, if this was to result in limitating the purchase of shares by foreign entities, there might be a risk of violation of EU freedoms relating to the internal market, i.e. the freedom of establishment and the free movement of capital. According to established case-law of the Court of Justice of the European Union, measures which are likely to prevent or limit the acquisition of shares in business entities or to deter investors of other Member States from investing in their capital must be

[2] http://jagiellonski24.pl/2015/09/14/czy-musimy-repolonizowac-media-analiza-zagranicznego-kapitalu-w-polsce/

regarded as ‘restrictions’ within the meaning of the Treaty on the Functioning of the European Union. In principle, the introduction of such restrictions is prohibited under EU law.

Introducing a ban on state entities' advertising in media with foreign capital?

Recently, there have also been demands that in order to "weaken" media with foreign capital, elements of the state, state controlled companies and public authorities should from prohibited to advertise through them. Considering that advertisements would then probably be published in other media enterprises with Polish capital, a **regulation of this type might infringe EU rules on State aid.** This is because, as a result of such statutory regulations, such enterprises with Polish capital would receive benefits unavailable to foreign-controlled undertakings.

More active role for the market regulator?

On 21 January 2016, the President of the Office of Competition and Consumer Protection (OCCP), Adam Jasser, was dismissed. It is not yet known who his successor will be. However, it is expected that the new president will pursue a more active policy with regard to the media market. This may be manifested by, among other things, a consideration of not only how a given transaction impacts, for example, the unit price of newspapers and advertisers' costs, but also pluralism within the media to an even greater degree that in the past. Naturally, given that such criteria are less measurable, compared to purely economic tests, decisions of the OCCP may become more discretionary.

Decrease in licence fees?

Another legal solution could be to "fragment" the media market. In the case of radio and television, this would consist in significantly lowering the barriers to the entry into the market by decreasing licence fees and frequency fees. Such measure would mainly be to the advantage of smaller domestic investors. However, it should be remembered that **a decrease in fees only for Polish undertakings would be illegal under EU law as it would be discriminatory**.

Authors

Marcin Ciemiński
Partner

T: +48 22 627 11 77
E: marcin.cieminski@cliffordchance.com

Marcin Bartnicki
Counsel

T: +48 22 627 11 77
E: marcin.bartnicki@cliffordchance.com

Piotr Bogdanowicz
Senior Associate

T: +48 22 627 11 77
E: piotr.bogdanowicz@cliffordchance.com

Norway House, ul. Lwowska 19, 00-660 Warsaw, Poland

Clifford Chance, Janicka, Krużewski, Namiotkiewicz i wspólnicy spółka komandytowa