

Propaganda in Polish State-Owned Media:



Why the European Union Must Take Action, and How

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Abstract

Following the 2015 parliamentary elections in Poland, the independence of State-owned media companies (radio and TV) was suppressed. As a result, these companies are now being used by the government to disseminate pervasive political propaganda. Most news and political broadcasts on State-owned TV and radio are devoid of objectivity or pluralism.

The development of massive State-sponsored propaganda, as well as various other reforms being now introduced in Poland (most notably, reforms that suppress the independence of judges) are major steps towards the establishment of a fully-fledged dictatorial regime. To keep the latter from becoming reality, action must be taken. The European Union has the possibility to take action, most notably because of its immense popularity in Poland, which allows EU authorities to take the appropriate steps without getting backlash in Poland, and makes it politically impossible for the Polish government not to respect decisions by EU authorities.

During the last two years, the EU succeeded in blocking two harmful projects to which the Polish government attached great importance: the logging of the Białowieża Forest (*Puszcza Białowieska*, a forest of exceptional ecological value) and the sacking of judges of the Polish Supreme Court (through a manipulation of the retirement age).

This document analyses how EU authorities can take action in response to the massive use of Polish State-owned broadcasters for political propaganda. We consider three procedures: decisions by the European Commission ordering to cease and recover State aid that State-owned broadcasters use to finance propaganda; removal from the European Parliament, through the procedure of verification of credentials, of Polish MEPs elected with massive help of State-sponsored propaganda; and referring the State-sponsored propaganda in Poland to the CJEU. The first two procedures are discussed in depth, the third one is only sketched.

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1 The context

Poland has a large network of State-owned broadcasters. There are 12 national TV channels and 7 national radios. In addition, in each of the 16 Polish regions (*województwa*), 5 hours daily of regional TV broadcasts are aired and at least one regional radio station broadcasts 24/7.

The main national TV news (*Wiadomości* on channel TVP 1, at 19:30 every day) are watched by 2 million viewers on average² (down from 6.6 million in 1999 and 3.5 million in 2015³). Taking into account the audience of *Teleexpress* (another news broadcast on TVP 1, at 17:00) and of the news channel TVP Info, approximately three million viewers daily watch news broadcasts from State-owned TV.

Art. 21 para. 1 of the Polish law on radio and television⁴ mandates the State-owned broadcasters to deliver a “public mission” (*misja publiczna*) by offering

varied broadcasts and other services in the area of information, commentary, culture, entertainment, education and sport, characterized by pluralism, impartiality, balance and independence, and also by innovation, high quality and integrity of the message.

2 Nielsen estimate from September 2018, quoted here: <https://polskatimes.pl/tvp-kontra-nielsen-czyli-ilu-widzow-oglada-telewizje-publiczna/ar/13497429>

3 <https://wiadomosci.wp.pl/telewizja-polska-fatalne-wyniki-ogladalnosci-wiadomosci-6301883355522689a>

4 Ustawa z dnia 29 grudnia 1992 r. o radiofonii i telewizji
<http://isap.sejm.gov.pl/isap.nsf/download.xsp/WDU19930070034/U/D19930034Lj.pdf>

According to Art. 213-215 of the Polish Constitution, State-owned broadcast companies report to an independent authority, the National Broadcasting Council (*Krajowa Rada Radiofonii i Telewizji*). Members of the council are appointed by political authorities (the president of the republic and the parliament). Between 1993 (when the council was established) and 2015, connections existed between political forces and various members of the (ostensibly independent) council. On the other hand, a law-mandated system existed to shield supervisory boards and directors of State-owned broadcasters from political influence. Supervisory boards and directors were appointed for 4-year fixed terms. All directors were appointed after official competitions. In supervisory boards, 5 out of 7 members or, for some broadcasters, 4 out of 5 members, were appointed after official competitions contested by candidates recommended by councils of higher education institutions.

Overall, the public mission described above was delivered fairly well during the whole period 1993-2015.

2 The problem

2.1 The dismantling of the rule of law in Poland

The functioning of the Polish State-owned broadcasters changed dramatically after the October 2015 parliamentary elections, which raised to power the political party PiS (Law and Justice, *Prawo i Sprawiedliwość*): PiS obtained the majority of seats in both houses of the Parliament; additionally, the president of the Republic elected in May 2015 is strongly connected with PiS. The new parliamentary majority introduced multiple legislative reforms that seriously weakened the democracy and the rule of law in Poland (these reforms are well-known internationally; they were assessed as contrary to the rule of law by various European bodies, including the Venice Commission, the European Parliament and the European Commission⁵).

2.2 The dismantling of the independence of State-owned broadcasters

The law of December 30, 2015⁶ gave the government an essentially discretionary power to appoint and revoke the supervisory boards and the directors of State-owned broadcasters (fixed terms,

5 E.g., on March 11, 2016, the Venice Commission produced a strongly negative opinion about the reform of the Polish constitutional court [https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2016\)001-e](https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2016)001-e) . On November 15, 2017, the European Parliament expressed support, *inter alia*, for “the infringement proceedings taken out by [the European Commission] against Poland for breaches of EU law” <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P8-TA-2017-0442&language=EN> . On December 11, 2017, the Venice Commission expressed strong criticism of the judicial reform proposed in Poland [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2017\)031-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2017)031-e) . On December 20, 2017, The European Commission produced a “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” http://ec.europa.eu/newsroom/just/document.cfm?action=display&doc_id=49108 . On September 17, 2018, the ENCJ (European Network of Councils for the Judiciary) suspended the Polish KRS (National Judicial Council – Krajowa Rada Sądownictwa) <https://www.ency.eu/node/495> . On September 24, 2018, the European Commission referred to the Court of Justice of the European Union the reform of the Polish Supreme Court http://europa.eu/rapid/press-release_IP-18-5830_en.htm .

6 Ustawa z dnia 30 grudnia 2015 r. o zmianie ustawy o radiofonii i telewizji <http://isap.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=WDU20160000025>

official competitions and recommendations by higher education institutions – all this was gone, and the National Broadcasting Council was stripped of its power to appoint). This power was used immediately to replace all directors and all members of supervisory boards. Large-scale sacking of journalists followed and, starting in January 2016, news and political broadcasts in State-owned media were rapidly transformed into government propaganda.

The new appointment system was judged unconstitutional on December 13, 2016 by the Polish Constitutional Tribunal.⁷ Before that date, however, it had been replaced by yet another system (let's call it the third system),⁸ where the power to appoint belongs to the newly created Council of National Media (*Rada Mediów Narodowych*, distinct from the previously described National Broadcasting Council). In the third system, appointments are made again for fixed terms. Official competitions exist but, in practice, their outcomes are determined by political factors (the new Council of National Media decides alone; there are no recommendations by higher education institutions).

From the judgment of the Constitutional Tribunal of December 13, 2016, it is straightforward to infer that the third appointment system is unconstitutional, in the same way as the previous one – but this was never stated officially, as the independence of the Constitutional Tribunal was destroyed in the meantime. The third system is still in operation today.

Between July 22 and September 12, 2016 all members of the National Broadcasting Council were replaced by newly elected or appointed persons⁹ (this was a routine replacement, resulting from laws enacted before the October 2015 elections). All new members of the National Broadcasting Council were chosen by the governing majority, based on political criteria.

Even after being stripped of its appointing powers, the National Broadcasting Council has retained important competences: it has disciplinary powers over broadcasters (both State-owned and private), and is competent to control the finances of public broadcasters.

2.3 Political propaganda in State-owned media today

From the beginning of 2016 until now, news, commentary and politics-related content in State-owned media have consisted mostly of government propaganda. This is confirmed by multiple studies and reports (each report covers only a small fraction of the relevant content).

In connection with the local elections held in 2018 (first round October 21; second round November 4), the Election Observatory assessed 50 programs of State-owned TV broadcasters, both regional and national.¹⁰ The total time spent during these 50 programs on explaining the points of view of different political forces was, as counted by the Election Observatory: 2h 21min for pro-government forces; 10min for local organizations; 4min for the main national opposition force (Koalicja Obywatelska); 2 min or less for each of the other political forces. The statements of opposition politicians were chosen not to genuinely present their views, but rather so as to support the pro-governmental view, according to which the society wants a change of the local government (“system”). Overall, the Election Observatory found what follows:

7 Case K 13/16 <http://trybunal.gov.pl/postepowanie-i-orzeczenia/wyroki/art/9507-ustawa-o-zmianie-ustawy-o-radiofonii-i-telewizji/>

8 Law of 22 June 2016 – ustawa z dnia 22 czerwca 2016 r. o Radzie Mediów Narodowych <http://isap.sejm.gov.pl/isap.nsf/download.xsp/WDU20160000929/T/D20160929L.pdf>

9 <http://www.krrit.gov.pl/krrit/informacje-o-krrit/sklad/>

10 Marcin Skubiszewski (ed.). Published by Obserwatorium Wyborcze. November 12, 2018. *Wybory samorządowe 2018. Raport główny z obserwacji procesu wyborczego*. <https://ow.org.pl/raport>

During the electoral campaign, news and commentary in State-owned TV and radio functioned as a propaganda tool for pro-government political forces. The principles contained in the law on radio and television were systematically broken. [...] The Election Observatory considers that elections organized in such a context cannot be considered as fully democratic.

To quote another example, Towarzystwo Dziennikarskie (*The Journalists' Society*), after analyzing 12 editions of "Wiadomości" immediately preceding the first round of the local elections in 2018, concluded that 70 to 75% of speaking time was given to pro-government politicians, and, additionally, whenever statements by opposition candidates were quoted, they were followed with opposing statements by TVP journalists, by pro-government politicians or by invited pro-government journalists from other media.¹¹ Towarzystwo Dziennikarskie also observed that "Wiadomości" presented the local elections as a fight between government and national opposition, while in reality many different activists, representing various local organizations, contested these elections. Still according to Towarzystwo Dziennikarskie, "Wiadomości" stressed multiple times that those communities that elect pro-government leaders were going to receive sizeable amounts of government money.

Towarzystwo Dziennikarskie also assessed 12 editions of "Wiadomości" aired between the two rounds, that contained a total of 24 election-related topics. Towarzystwo Dziennikarskie summarized as follows its findings from this second assessment:

Assessing all election-related topics in "Wiadomości", we observe that only one topic, namely a technical instruction how to vote, did not contain propaganda.¹²

The company Newton Media, in a report ordered by the city of Gdańsk, found that the mayor of Gdańsk Paweł Adamowicz was mentioned 1800 times in national programs of State-owned TV broadcasters.¹³ These programs were mostly critical and often contained slander, sometimes they were neutral. Adamowicz was an opposition politician. He was murdered on 14 January 2019 by a person who remained under strong influence of government propaganda.

The National Broadcasting Council found that the State-owned broadcaster TVP broke the law by being one-sided in three programs¹⁴ (to explain why only three programs were criticized in this way: remember that, as explained in Section 2.2, the composition of the Council was changed in 2016; all members sitting in the Council now are politicians connected with the ruling party, and are not willing to find that TVP breaks the law).

11 Andrzej Krajewski *et al.* *Kampania wyborcza w mediach - raport specjalny*. Published by Towarzystwo Dziennikarskie. <http://towarzystwodziennikarskie.pl/kampania-wyborcza-w-mediach-samorzady-2018/>

12 Andrzej Krajewski *et al.* *Wybory samorządowe 2018 - kampania w mediach między turami*. Published by Towarzystwo Dziennikarskie. <http://towarzystwodziennikarskie.pl/wybory-samorzadowe-2018-kampania-w-mediach-miedzy-turami/>

13 The report was summarized by website *oko.press* on February 1st, 2019 <https://oko.press/materialow-oczerniajacych-adamowicza-bylo-w-tvp-ponad-100-pis-to-klamstwo-naprawde-telewizja-zajmowala-sie-adamowiczem-prawie-1800-razy/> and by *Gazeta Wyborcze*, edition Trójmiasto (i.e., Gdańsk) on January 31 <http://trojmiasto.wyborcza.pl/trojmiasto/7,35612,24414416, sprawdzili-ile-razy-tvp-mowila-o-pawle-adamowiczu-ekspert.html>

14 Communication of the National Broadcasting Council of 28.07.2016, *Jednostronność audycji TVP narusza ustawę* bor

3 Why the European Union must take action

3.1 Why action must be taken

It takes several years to transform a democracy (even an imperfect one) into a dictatorial regime. In Poland after World War II, a fully-developed communist totalitarian regime was established in 1949 – that is, four years after the end of the war. Circumstances such as heavy presence of the Red Army in Polish territory, widespread violence by communist authorities or the extreme weakness of the non-communist Polish administration after the war can be thought of as factors that could have accelerated the process of establishing communism in Poland. In spite of these factors, the communism took four years to get fully established.

More recently, the suppression of (immature and weak) democracy in Russia and Belarus spanned over periods of several years, during which civil liberties and the rule of law were restricted progressively. Most notably, Vladimir Putin became the president of the Russian Federation in 2000, and until 2014 major opposition media existed in Russia (in 2014, the TV channel Dozhd was removed from Russian cable networks).

Should Poland or any other EU Member State turn into a dictatorial regime, this may only happen progressively, over many years. The replacement of pluralistic media (including nonpartisan State-owned broadcasters) with media that unanimously support the government is a key step in such a dreadful transformation. By stopping the expansion of government propaganda in State-owned media, it is possible and almost effortless to stop the whole process, and to prevent the unthinkable, namely the establishment of a fully-fledged dictatorship within the European Union.

3.2 Why it is the job of the European Union to take action

The European Union is immensely popular in Poland and is (rightly) viewed by an overwhelming majority of Poles as extremely powerful. In order not to lose its own popularity, the Polish government cannot afford to appear as acting against the European Union or – even worse – as pushing the country towards any form of *polexit*.

For these reasons, we can expect that all binding decisions of EU authorities will be implemented fully in Poland. This already happened in two key areas: the logging of the Białowieża Forest (*Puszcza Białowieska*, a forest of exceptional ecological value), and the destruction of the independence of the judiciary. In both cases, all decisions of EU authorities were implemented fully by the Polish government. The government took the backlash for the disagreement with the EU in these two areas, and was humiliated by the necessity to implement decisions contrary to its policies; almost no criticism of EU authorities appeared in Poland on these two occasions, not even from pro-government media.

Decisions or judgments that restrain the Polish government from using State-owned media for propaganda will therefore almost certainly be well accepted by ordinary citizens of Poland (and welcomed with enthusiasm by a large fraction of them), and will be fully implemented by the government – regardless of how costly their implementation may appear to the government in terms of humiliation or loss of chance to establish a dictatorial regime.

4 How the European Union can take action

This section contains a preliminary description of three routes that EU authorities may take, either on their own motion or on complaint, to act against propaganda in Polish State-owned media. All three routes are untested, both legally and politically: action and decisions that this section proposes to take appear not to be either supported or contradicted by existing case law or established practice. In short, this section invites EU authorities for a journey in uncharted territories.

The three routes can be summarised as follows:

- State money and resources used to subsidise propaganda in State-owned media are, according to EU law (Art. 106-108 TFEU), State aid incompatible with internal market. The European Commission has the power to put an end to such State aid, and to order sums of money and other advantages already received by broadcasters to be recovered (reimbursed to the Polish State) (Section 4.1).
- Each election to the European Parliament is followed by the *verification of credentials*, a procedure through which the Parliament verifies whether its members (MEPs) were elected lawfully and can sit in the Parliament. This procedure can possibly be used after the May 2019 election to declare that some Polish MEPs owe their election to large-scale State-sponsored propaganda, and therefore that their election is invalid as incompatible with democracy, one of the values upon which the European Union is founded (Section 4.2, page 14).
- The European Commission can bring the issue of State-sponsored propaganda in Poland before the Court of Justice of the European Union (Art. 258 TFEU) (this possibility is only sketched; Section 4.3, page 18).

4.1 Procedures related to State aid

Summary of this subsection: Under the law of the European Union, it is prohibited in principle to grant *State aid*, i.e., to provide to certain undertakings advantages that are obtained from State resources, and are selective (i.e., not provided to all similar undertakings). Many exceptions to this prohibition exist. Specifically, a Member State can, under certain conditions, offer compensation to broadcasters who produce and air public service radio or TV programs (Section 4.1.1). We explain why political propaganda on radio or TV cannot be considered as being part of public service, and under EU law cannot be subsidized by a Member State (Section 4.1.2). Additionally, it is not permitted under EU law to use the mechanism of public service compensation to cover financial losses of a mismanaged undertaking – for this reasons, the public service compensation received by TVP can be put into question in its entirety, and its recovery ordered (Section 4.1.3).

Procedural rules exist according to which the European Commission can order Poland to cease to finance political propaganda in State-owned media through State aid, and to recover from broadcasters State aid already received (Sections 4.1.4-4.1.5). We discuss beneficial practical consequences in Poland that will likely result from such proceedings being merely initiated (Section 4.1.6).

4.1.1 Substantive rules concerning State aid to broadcasters

The prohibition: State aid is prohibited by default. This results from the following provision:

Art. 107(1) TFEU: *Save as otherwise provided in the Treaties, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market.*

There is no doubt that aid granted to a broadcaster “affects trade between Member States”, because broadcasters operate in an environment where international competition (real or potential) is present; potential competition is enough to say that in a given set of circumstances State aid “affects trade between Member States.”

Exceptions to the prohibition: There are multiple exceptions to the prohibition in Art. 107(1) TFEU. Two such exceptions can be used to justify the financing of public service radio and TV from State resources. The first exception:

Art. 106(2) TFEU: *Undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly shall be subject to the rules contained in the Treaties, in particular to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. The development of trade must not be affected to such an extent as would be contrary to the interests of the Union.*

According to the 2003 judgment *Altmark*¹⁵ of the CJEC para. 105, the above provision should be interpreted as going beyond the mere establishment of an exception to the prohibition against State aid: it implies that public service compensation (or compensation for SGEI – services of general economic interest) is not considered at all as State aid and, as a result, not only it is permitted under EU law to pay such a compensation, but in addition rules concerning State aid (procedural or otherwise) are not applicable to it. Most notably, Member States do not need to notify the European Commission before creating a public service compensation scheme (State aid is subject to obligatory notification).

The second exception (of lesser importance to broadcasters) reads as follows:

Art. 107(3) TFEU: *The following may be considered to be compatible with the internal market:*

[...] (d) aid to promote culture and heritage conservation where such aid does not affect trading conditions and competition in the Union to an extent that is contrary to the common interest; [...]

The expression “may be considered” above means that the European Commission will decide on a case-by-case basis whether a given State aid scheme is compatible with the internal market.

15 CJEC, *Altmark Trans GmbH and Regierungspräsidium Magdeburg v Nahverkehrsgesellschaft Altmark GmbH*, 24 July 2003, C-280/00 <http://curia.europa.eu/juris/showPdf.jsf?docid=48533&doclang=EN&mode=lst&occ=first&cid=6501338>

The lawfulness of subsidies to TV broadcasters who are entrusted with public service is stressed by the Amsterdam Protocol,¹⁶ which reads as follows:

THE HIGH CONTRACTING PARTIES,

CONSIDERING that the system of public broadcasting in the Member States is directly related to the democratic, social and cultural needs of each society and to the need to preserve media pluralism,

HAVE AGREED UPON the following interpretive provisions, which shall be annexed to the Treaty on European Union and to the Treaty on the Functioning of the European Union:

The provisions of the Treaties shall be without prejudice to the competence of Member States to provide for the funding of public service broadcasting and in so far as such funding is granted to broadcasting organisations for the fulfilment of the public service remit as conferred, defined and organised by each Member State, and in so far as such funding does not affect trading conditions and competition in the Union to an extent which would be contrary to the common interest, while the realisation of the remit of that public service shall be taken into account.

Conditions under which a public service compensation can be granted to broadcasters are further described in the aforementioned judgment *Altmark* and in the 2009 *Broadcasting Communication*¹⁷ of the European Commission. From the point of view of substantive law, the following conditions, imposed by *Altmark* on public service compensation, seem most relevant to the situation of Polish State-owned broadcasters:

- *third, the compensation does not exceed what is necessary to cover all or part of the costs incurred in discharging the public service obligations, taking into account the relevant receipts and a reasonable profit for discharging those obligations;*
- *fourth, where the undertaking which is to discharge public service obligations is not chosen in a public procurement procedure, the level of compensation needed has been determined on the basis of an analysis of the costs which a typical undertaking, well run [...] would have incurred in discharging those obligations, taking into account the relevant receipts and a reasonable profit for discharging the obligations.*

The European Commission decision C(2005) 2673 of 29.11.2005¹⁸ exempts *inter alia* public service compensation of up to 30 million euro per year, paid to undertakings with up to 100 million annual turnover, from compulsory notification to the European Commission. This implies that in the Commission's view, public service compensation should be considered as State aid (only State aid

16 Protocol (No 29) on the system of public broadcasting in the Member States of 26.10.2012 <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A12012E%2FPRO%2F29>

17 Communication from the Commission on the application of State aid rules to public service broadcasting 2009/C 257/01 [https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52009XC1027\(01\)#ntr2-C_2009257EN.01000101-E0002](https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52009XC1027(01)#ntr2-C_2009257EN.01000101-E0002)

18 COMMISSION DECISION of 28 November 2005 on the application of Article 86(2) of the EC Treaty to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest (2005/842/EC) https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2005.312.01.0067.01.ENG&toc=OJ:L:2005:312:TOC

needs to be notified). Paragraph 14 of the recital says that in certain circumstances, *the Commission considers that the compensation should be deemed to constitute State aid compatible with Article 86(2) of the Treaty*. This is confusing and seems to contradict *Altmark* para. 105.

4.1.2 Finding that political propaganda is not public service: competence rules

Each Member State is competent to define the public service remit in the area of radio and TV. The role of the European Commission is to *check for manifest errors*¹⁹ in such a definition. The Polish statutory definition of the public service remit (called “public mission” in Poland), quoted in Section 1 of this document, leaves no room for partisan or unbalanced broadcasts, let alone political propaganda, to be included. This, together with the fact that political propaganda in Polish State-owned media is overwhelming, evident and conducted on large scale (see Section 2.3 above), implies that there should be no doubt that said propaganda lies outside the public service remit – and therefore State resources used to finance it are not public service compensation; they are State aid incompatible with the internal market.

The competence to find that specific broadcasts lie outside the public service remit is described in the *Broadcasting Communication* as follows:

54. In line with the Amsterdam Protocol, it is within the competence of the Member State to choose the mechanism to ensure effective supervision of the fulfilment of the public service obligations, therefore enabling the Commission to carry out its tasks under Article 86(2).²⁰ Such supervision would only seem effective if carried out by a body effectively independent from the management of the public service broadcaster, which has the powers and the necessary capacity and resources to carry out supervision regularly, and which leads to the imposition of appropriate remedies insofar it is necessary to ensure respect of the public service obligations.

55. In the absence of sufficient and reliable indications that the public service is actually supplied as mandated, the Commission would not be able to carry out its tasks under Article 86(2) and, therefore, could not grant any exemption under that provision.

In 2016, the Polish National Broadcasting Council ceased to monitor the news and political programs by public broadcasters. Currently, no Polish authority independently verifies whether these programs satisfy the Polish statutory conditions of the public mission, i.e., are “characterized by pluralism, impartiality, balance and independence, and also by innovation, high quality and integrity of the message”. On 25 January 2019, the Election Observatory sent to the National Broadcasting Council a letter stating that quarterly financial reports by State-owned broadcasters that quote the amounts of State aid money spent on public mission are likely untrue, because a significant part of the money in question was in reality spent on political propaganda rather than on the public mission. The National Broadcasting Council did not respond to this letter and, to our knowledge, did not act upon it until now.

In these circumstances, the way is open for the European Commission to act in accordance with para. 55 of the *Broadcasting Communication* (quoted above) and consider all recent news and political broadcasts by Polish State-owned broadcasters as lying outside the public service remit.

¹⁹ *Broadcasting Communication* (see note 17), para. 39.

²⁰ Now Art. 106(2) TFEU – note by Skubiszewski.

Additionally, the European Commission itself can find that a large part (or maybe the totality) of news and political programs aired by Polish State-owned broadcasters is propaganda, rather than public service. There is an apparent competence-related obstacle to the Commission making such a finding, but the obstacle is likely surmountable.

To be specific about the obstacle: the Court of First Instance stated in 2008 what follows²¹:

212. However, only the Member State is able to assess the public service broadcaster's compliance with the quality standards defined in the public service remit. As the Commission points out in its communication COM(1999) 657 final to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions of 14 December 1999 on the principles and guidelines for the Community's audiovisual policy in the digital age, 'content issues are essentially national in nature, being directly and closely connected to the cultural, social and democratic needs of a particular society' and 'in line with the principle of subsidiarity, therefore, content regulation is primarily the responsibility of Member States'. It is thus not for the Commission to assess compliance with quality standards; that institution must be able to rely on appropriate monitoring by the Member States (recital 41 of the Communication on broadcasting).

At first sight, the wording “not for the Commission to assess compliance with quality standards” seems absolute, and seems to preclude the Commission from finding that specific programs are outside the public service remit. This wording is, however, based on the fact that “content issues are essentially national in nature” and that “content regulation is primarily the responsibility of Member States”. These formulations do not recognize an absolute or total competence of Member States: this competence is qualified with words “essentially” or “primarily”. Some room is therefore left for the competence of the Commission – and this should be enough for the Commission to find that programs lie outside the public service remit when this fact is manifest.

4.1.3 Why the public service compensation to TVP can be put into question in its entirety

The number of viewers of TVP has decreased sharply since the beginning of 2016 (e.g., as stated in Section 1 above, the audience of *Wiadomości* decreased from 3.5 million in 2015 to 2 million today). The advertisement revenue in 2017 was 799 million PLN (roughly 190 million euro), amount described as “13% less than in 2015”²² or as “smallest in the history of TVP”. At the same time, operating costs increased between 2015 and 2017 by 13 %, to attain 1,8 billion PLN (approx. 420 million euro).²³

At the same time, public service compensation to TVP increased sharply (absent the increases, TVP would already be bankrupt): in addition to the already existing *opłata abonamentowa* (equivalent to *redevance audiovisuelle* or to the British TV license fee), on 30 November 2017 the National Broadcasting Council, after being authorized by law, distributed 980 million PLN of budget money to State-owned broadcasters. Out of this money, TVP received 860 million (approx. 200 million

21 Court of first instance, fifth chamber, 26 June 2008, T-442/03, SIC – Sociedade Independente de Comunicação, SA, v Commission of the European Communities <http://curia.europa.eu/juris/document/document.jsf?text=&docid=66879&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=7382353>

22 Łukasz Brzezicki. wirtualnemedial.pl. 24.04.2018. <https://www.wirtualnemedial.pl/artykul/2017-rok-w-tvp-zysk-500-tys-zl-nizsze-przychody-reklamowe-wiecej-dyrektorow-i-doradcow>

23 Izabedla Trzaska. money.pl. 24.04.2018. <https://www.money.pl/gospodarka/wiadomosci/artykul/tvp-jacek-kurski-juliusz-braun-przychody,238,0,2404078.html>

euro).²⁴ The law of 22 February 2019²⁵ provides for a similar distribution amounting to 1,26 billion PLN (approx. 294 million euro).

It results clearly from these facts that TVP is severely mismanaged (we may guess that the mismanagement is intimately connected with TVP being used primarily as a political propaganda tool, and with supervisory council members, directors and journalists being selected based on their political views and willingness to participate in the propaganda, rather than on their professional skills).

The fourth condition in *Altmark* (quoted in Section 4.1.1, page 9 above) implies in the case of TVP the requirement that *the level of compensation [for public service obligations] needed has been determined on the basis of an analysis of the costs which a typical undertaking, well run [...] would have incurred in discharging those obligations*. Polish authorities do not analyze how much a well-run undertaking would spend to deliver the public service that TVP delivers. Instead, they pay a public service compensation based on the actual financial performance of TVP – that is, on the performance of a company that has not been well-run since the beginning of 2016 – and they increase the compensation as the financial needs of TVP increase due to mismanagement.

To summarize: since the beginning of 2016, the *Altmark* conditions have not been met, and therefore advantages offered to TVP from State resources cannot be regarded as public service compensation offered according to the law of the European Union. These advantages should be recovered in their entirety, and the European Commission has the power to order this recovery. The amount to recover includes the subsidies and the free use of spectrum (commercial broadcasters are required to pay for spectrum in Poland, State-owned broadcasters are not).

4.1.4 The possible role of domestic courts in procedures concerning State aid

For the sake of completeness, let us note that according to EU law, domestic courts are vested with significant powers concerning *illegal State aid*, i.e., State aid that was not notified to the European Commission beforehand, despite of such a notification being compulsory under EU law. Domestic courts can order illegal State aid to cease or even to be recovered.

Domestic courts do not have the power to evaluate whether a State aid scheme is *compatible with the internal market* (i.e., falls into one of the exceptions to the prohibition against State aid). In other words, they cannot judge the substance, they can only judge procedural issues (the absence of notification).

I do not suggest to conduct proceedings against Polish State-owned broadcasters in Polish domestic courts.

4.1.5 Procedural details

The European Commission has the power to investigate State aid and to determine, as the case may be, that it is incompatible with the internal market or illegal (for definitions, see previous subsection). Procedural details are regulated by the Council regulation of 13 July 2015.²⁶

24 <http://www.krrit.gov.pl/krrit/aktualnosci/news.2577,krrit-podzielila-980-000-tys-zl-miedzy-jednostki-publicznej-radiofonii-i-telewizji.html>

25 Ustawa z dnia 22 lutego 2019 r. o zmianie ustawy o opłatach abonamentowych
<http://isap.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=WDU20190000572>

26 Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union <https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:32015R1589>

The European Commission can act on complaint or on its own motion. The right to file a complaint belongs to interested parties, i.e., to “any Member State and any person, undertaking or association of undertakings whose interests might be affected by the granting of aid, in particular the beneficiary of the aid, competing undertakings and trade associations” (Council regulation, Art. 1(h)). Neither this definition or case law built around it are clear. Consider the example of a candidate in an election whose chances of winning are diminished by State aid to political propaganda. Is such a candidate an “interested party”? We do not know. Is a non-professional citizen journalist who covers politics-related news (and therefore competes with State-owned broadcasters, albeit on a small scale) an interested party? Most likely yes.

Kelyn Bacon²⁷ writes (para. 18.45): “[...] while in some cases the Commission may send a complainant the comments submitted by the Member State concerned, it is not bound to do so by any principle of ‘transparency’. Nor is it, in negotiating appropriate measures in respect of existing aid, required to discuss with a complainant the appropriateness and scope of proposed commitments by the Member State.”

The proceedings conducted by the European Commission last typically for one year in cases that the Commission judges urgent. The decision of the Commission ordering State aid to cease and/or to be recovered is not compulsory for the Member State concerned: if the State does not obey the decision voluntarily, the Commission needs to refer the case to the Court of Justice of the European Union, and only the Court has the power to render a judgment that the State will be obliged to obey (see Art. 108(2) TFEU).

The procedural elements explained here (doubts as to who is an “interested party”, limited rights of the complainant, long duration of proceedings) imply that it will be difficult for a group of Polish citizens to initiate and prosecute a complaint before the Commission. The problem of State-sponsored political propaganda is, however, of essential importance to the European Union: as it was discussed in Section 3.1, page 6 above, bringing a proper response to this problem is essential to prevent a dictatorial regime from being established within the Union. We may hope that the European Commission will recognize the seriousness of the problem, and bring to it special attention, going beyond what is usually done concerning distortions of competition that State aid typically causes. Specifically, we may hope that the Commission will be able to conduct proceedings in a time shorter than one year, act on its own motion if there is no complaint filed by an interested party, and rapidly refer the case to the Court of Justice if Poland does not comply voluntarily with the Commission’s decision.

4.1.6 Likely indirect effects of proceedings concerning State aid

Should the European Commission open proceedings that may lead to a decision ordering Poland to recover State aid, this mere fact will likely have immediate beneficial effects in Poland – even if the decision following these proceedings is only taken by the Commission much later.

The likely beneficial effects can be described as follows.

First, given the high esteem that Poles have for European institutions (see Section 3.2, page 6 above), the fact that the Commission conducts proceedings will give extra credibility to those in Poland who stress the fact that political propaganda in State-owned media is overwhelming and unacceptable.

²⁷ *European Union Law of State Aid*. Oxford University Press. Third edition, 2017.

Second, we may hope for a freezing effect on propaganda, through the following mechanism.

In many cases it will likely be possible to hold individuals financially responsible for the monetary loss that a future recovery decision may represent to a state-owned broadcaster. The individuals who may be held financially responsible include at least directors and employees of the broadcaster in question, assuming that they contributed by their wrongdoings to the recovery decision being issued. (The responsibility of employees results from the Polish code of labour,²⁸ Art. 114-122; most importantly, Art. 122 of the code says: *If the employee causes damage voluntarily, he is obliged to repair the damage in its entirety.*)

Producing or airing political propaganda as part of the activity of a State-owned broadcaster is illegal, and can be considered as voluntary wrongdoing that contributes to a recovery decision being later issued – and therefore can trigger the financial responsibility of those engaged in propaganda.

Of course, once the recovery of State aid is ordered, it will take considerable time and political resolve by a future Polish government to actually engage the financial responsibility of individuals engaged in propaganda that caused the recovery. The amounts at stake can, however, be huge (much above the revenue that individuals receive for engaging in propaganda; enough to bankrupt a broadcaster), and therefore we may expect a freezing effect on propaganda to be triggered well in advance by the perspective of the financial responsibility being engaged in the future.

I suggest that, once European Commission opens proceedings, Polish activists (including the Election Observatory) conduct an information campaign to explain to those engaged in propaganda what financial risks they incur.

4.2 The verification of credentials

The verification of credentials of Members of the European Parliament (MEP) is regulated by the Act concerning the election of the Members of the European Parliament by direct universal suffrage of 20 September 1976 (as amended),²⁹ commonly called “the 1976 Act”. The Act includes the following language:

Art. 12: The European Parliament shall verify the credentials of members of the European Parliament. For this purpose it shall take note of the results declared officially by the Member States and shall rule on any disputes which may arise out of the provisions of this Act other than those arising out of the national provisions to which the Act refers.

Is it possible to use this provision to invalidate the election of a MEP based on the fact that he benefited from massive State-sponsored propaganda during the election campaign? We try to answer this question below. The principles according to which the 1976 Act should be construed are examined in Section 4.2.1. Existing practice concerning the verification of credentials is described in Section 4.2.2. Section 4.2.3 explains that the Polish courts are incompetent to invalidate the election of a Polish MEP because of propaganda. Section 4.2.4 summarises our findings and suggests a course of action.

28 Kodeks pracy <http://isap.sejm.gov.pl/isap.nsf/download.xsp/WDU20180000917/T/D20180917L.pdf>

29 Available here: [https://eur-lex.europa.eu/legal-content/GA/TXT/?uri=CELEX:01976X1008\(01\)-20020923](https://eur-lex.europa.eu/legal-content/GA/TXT/?uri=CELEX:01976X1008(01)-20020923)

4.2.1 Does the 1976 Act mandate fair, democratic elections?

State-sponsored propaganda favouring certain candidates during the electoral campaign runs against the fundamental democratic principle according to which elections need to be fair: following this principle, one candidate cannot be favoured over another by a State. Therefore, when a candidate to the European Parliament gets elected with massive help of State-sponsored propaganda, his election is in breach of Art. 2 TEU, according to which “*the Union is founded on the values of respect for [...] democracy [...]*”.

While verifying credentials, the European Parliament rules “on any disputes which may arise out of the provisions of this Act [...]”. The Act says, *inter alia*, that the elections shall be “free and secret” (Art. 1). It does not, however, explicitly say that they shall be fair or democratic (the latter implying the former). As a result, the literal interpretation of the 1976 Act does not necessarily imply that the verification of credentials can be denied based on State-sponsored propaganda or, more generally, on the elections being unfair.³⁰

But the literal interpretation of law is often not the one to be retained. The obvious intention of the 1976 Act is to establish democratic elections to the European Parliament. This intention results, *inter alia*, from the fact that the name *Parliament* is used, and from the fact that the Act is a legal instrument of the European Union, which is founded on democracy: democracy is considered as a necessary and obvious foundation of the European Union, and an instrument mandating general elections must be construed as necessarily implying that said elections need to be democratic.

To conclude, the 1976 Act should be construed as implicitly requiring that elections to the European Parliament be democratic, and therefore fair. As a result, disputes concerning interference with the electoral campaign by large-scale State-sponsored propaganda should be considered as arising out of the provisions of the 1976 Act. MEPs elected with the help of such propaganda should not have their credentials verified.

4.2.2 Existing practice

Proceedings that lead to the verification of credentials take place in the JURI committee (Committee on Legal Affairs) of the European Parliament. They are closed with a plenary vote in the Parliament, and are further subject to judicial review by the CJEU.

The JURI report of 26 November 2004³¹ (Annex II) summarizes six disputes referred to the committee after the 2004 elections to the European Parliament. According to the report, three disputes were based exclusively on purported breaches of national provisions, and the corresponding complaints were therefore declared inadmissible (according to Art. 12 of the 1976 Act, the verification of credentials involves settling disputes “other than those arising out of the national provisions to which the Act refers”). One further complaint was declared inadmissible

30 The CJEU declared on 30 April 2009 that “it is clear from the wording itself of Article 12 of the 1976 Act that that article does not confer on the Parliament the power to settle disputes which arise out of Community law as a whole.” Para. 54 in joined Cases C-393/07 and C-9/08, Italian Republic, Republic of Latvia and Donnici v. European Parliament and Occhetto.

<http://curia.europa.eu/juris/document/document.jsf?jsessionid=9ea7d0f130de310a9acca0e143d39d1cbf7ea1dd0d4d.e34KaxiLc3eQc40LaxqMbN4Ob3qKe0?text=&docid=73334&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=207588>

31 REPORT PE 347.264 A6-0043/2004 on the verification of credentials 2004/2140(REG)) Committee on Legal Affairs Rapporteur: Giuseppe Gargani <http://www.europarl.europa.eu/sides/getDoc.do?type=REPORT&mode=XML&reference=A6-2004-43&language=EN>

because “the facts of the case in no way concern the provisions of the 1976 Act,” and the report does not explain what these facts were.

The remaining two complaints were declared unfounded, which seems to imply that they were admissible, although there is no explicit declaration to that effect in the report.

One of the complaints declared inadmissible (*Sciberras*) concerned in particular

[...] the difference in the treatment [in Malta] accorded to small and large parties as regards provision of information on amendments to legislation on the ceilings for election expenses for individual candidates and the impossibility of securing access on equal terms to radio and television broadcasting slots.

These issues were declared to be “matters relating to breaches of national provisions.” These issues concern the equal treatment of candidates by State authorities, and therefore bear some similitude to the key problem discussed in this document, namely favouring certain candidates by State-sponsored propaganda. We can therefore fear that, by analogy, the latter problem may also be classified as “breaches of national provisions” by the European Parliament, and the corresponding complaints rejected.

Another complaint, however, (*Merck*) was declared unfounded (and not inadmissible) based on the following reasoning:

[...] the measures actually taken to secure a balance between the sexes on the electoral list are fully in line with the principle of equal opportunities widely accepted by the Member States and set forth in Article 23 of the Charter of Fundamental Rights of the European Union. Far from being a merely formal provision, this principle authorises and indeed seeks to promote the adoption of measures to accord specific advantages to the under-represented sex. There is no doubt that, as the European Parliament has repeatedly pointed out, the percentage of female Members of Parliament is still well below half of the total number.

This fragment of the report demonstrates that while evaluating a complaint on its merits, JURI verifies whether the Charter of Fundamental Rights of the European Union was breached. In other words, JURI goes beyond the text (taken literally) of the 1976 Act, and this leads us to believe that the Parliament is ready to verify whether the elections of MEPs were fair.

For the sake of completeness, the JURI report of 22 May 2007³² (*Donnici*) may be mentioned, where multiple references are made to “the letter and the spirit of the Act of 1976” and dispositions of the Act are applied by analogy. The Parliament decision taken on this report was annulled and the legal reasoning in the report was found erroneous by the CJEU.³³

The JURI report of 1st December 1999³⁴ mentions no complaints or disputes following the 1999 elections to the European Parliament. The reports of 17 November 2009³⁵ and of 27 January 2015³⁶

32 REPORT of PE 388.584v02-00 A6-0198/2007 on the verification of the credentials of Mr Beniamino Donnici (2007/2121(REG)), Committee on Legal Affairs. Rapporteur: Giuseppe Gargani.
<http://www.europarl.europa.eu/sides/getDoc.do?type=REPORT&reference=A6-2007-0198&language=EN>

33 Judgment mentioned in note 30.

34 Report of 30 November 1999 PE 231.613/DEF A5-0084/1999. Decision on the verification of credentials of Members following the fifth direct election to the European Parliament on 10 to 13 June 1999. Committee on Legal Affairs and the Internal Market (1999/2142(REG)). Rapporteur: Ana Palacio Vallelersundi.
<http://www.europarl.europa.eu/sides/getDoc.do?type=REPORT&reference=A5-1999-0084&language=EN>

state that, at the respective dates of these reports, there are no disputes concerning the validity of credentials following the elections of, respectively, 2009 and 2014.

JURI sessions concerning the verification of credentials are held *in camera*. As a result, the reports mentioned above are the only information publicly available about how JURI proceeds in this matter.

To summarize: It is not possible to determine with certitude, based on existing practice, whether the European Parliament is ready to invalidate the election of MEPs who benefited from large-scale State-sponsored propaganda during the electoral campaign: while the response to the *Sciberras* complaint tends to imply that such an invalidation is impossible, the response to *Merck* suggests otherwise. The limited number of disputes resolved so far and the scarcity of information about how JURI works on such cases further imply that, as stated in the introduction to Section 4, page 7, we are in uncharted territories.

4.2.3 The absence of remedies for State-sponsored propaganda under Polish law

The Polish electoral code³⁷ says:

Art. 82 para. 1: A challenge (protest) can be lodged against the validity of elections, the validity of elections in a constituency or the validity of the election of a specified person, based on:

- 1) the existence of a crime against elections, defined in chapter XXXI of the criminal code, having an incidence on the course of the vote or on the determination of the results of the vote or of the elections; or*
- 2) a breach of the provisions of the electoral code that concern the vote or the determination of the results of the vote or of the results of the elections, having an incidence on the result of the elections.*

This provision leaves no room for challenging in Polish courts the validity of elections, based on anomalies that occurred during the electoral campaign.

An attempt at having Art. 82 para. 1 of the Polish electoral code declared incompatible with the Polish constitution and with the European Convention on Human Rights was made, but failed. While challenging the validity of an election, a complainant requested the Polish Supreme Court to refer this provision to the Constitutional Tribunal. The request was denied on 14 April 2016³⁸ because the Supreme Court found it unrealistic to refer the issue to the Constitutional Tribunal within the time frame imposed by law on the election challenge procedure (90 days); the Supreme Court added that it found the request unjustified because, in its opinion, said provision was compatible with the Constitution.

35 REPORT PE 428.210v03-00 A7-0073/2009 on the verification of credentials (2009/2091(REG))
<http://www.europarl.europa.eu/sides/getDoc.do?type=REPORT&mode=XML&reference=A7-2009-0073&language=EN>

36 REPORT of 27.1.2015 PE 541.585v03-00 A8-0013/2015 on the verification of credentials (2014/2165(REG)).
Committee on Legal Affairs. Rapporteur: Pavel Svoboda. http://www.europarl.europa.eu/doceo/document/A-8-2015-0013_EN.html

37 Ustawa z dnia 5 stycznia 2011 r. - Kodeks wyborczy.
<http://isap.sejm.gov.pl/isap.nsf/download.xsp/WDU20110210112/U/D20110112Lj.pdf>

38 Complainant name Murawko. File number III SW 4/16 <https://www.saos.org.pl/judgments/245099>

Then, the complainant lodged a constitutional complaint directly with the Polish Constitutional Tribunal, challenging the constitutionality of the provision. The complaint was found inadmissible³⁹ by a 5-person panel, composed of three judges of the Constitutional Tribunal and of two persons (Mariusz Muszyński and Justyn Piskorski) whose status as judges is controversial, because they were elected to be judges of the Tribunal in replacement of other judges whose 9-year terms are not terminated. The Polish political power recognises Muszyński and Piskorski as judges, but the Venice Commission⁴⁰ and a vast majority of Polish lawyers⁴¹ disagree.

In this situation, it is practically impossible to challenge the validity of Art. 82 para. 1 of the Polish electoral code in Polish courts. As a result, Polish courts will not accept challenges to the validity of an election based on causes other than those enumerated in this provision. Specifically, State-sponsored propaganda that takes place during campaign cannot be used in Poland to challenge the validity of an election. Therefore, in the case of elections to the European Parliament, the verification of credentials by the Parliament remains the only procedure available to challenge the election of a Polish MEP for this cause.

4.2.4 Conclusion on the verification of credentials

From the considerations above, it results that the verification of credentials by the European Parliament can result in the invalidation of the elections of MEPs who benefited from large-scale State-sponsored propaganda during the electoral campaign. The existing practice of the European Parliament is not conclusive on the existence of such a possibility, but a careful analysis of the 1976 Act and, even more importantly, the necessity to stop the establishment of dictatorial regimes within the European Union, imply that we can expect the European Parliament to admit this possibility when the case is presented before it.

In the case of Polish MEPs, the impossibility to have their election invalidated by Polish domestic courts based on anomalies during the electoral campaign is a supplementary argument in favour of recognising the power of the European Parliament in this matter.

4.3 Can State-sponsored propaganda in Poland be referred to the CJEU according to Art. 258 TFEU?

Art. 258 TFEU reads as follows:

If the Commission considers that a Member State has failed to fulfil an obligation under the Treaties, it shall deliver a reasoned opinion on the matter after giving the State concerned the opportunity to submit its observations.

If the State concerned does not comply with the opinion within the period laid down by the Commission, the latter may bring the matter before the Court of Justice of the European Union.

The European Commission is already using this procedure to refer to the Court reforms of the Polish judicial system, considered by the Commission as detrimental to the rule of law. Similarly,

39 Complainant name Murawko. File number SK 8/17. <https://ipo.trybunal.gov.pl/ipo/view/sprawa.xhtml?&pokaz=dokumenty&sygnatura=SK%208/17>

40 First document cited in note .

41 See, e.g., judgment of Wojewódzki Sąd Administracyjny w Warszawie (Regional Administrative Court in Warsaw) of 20 June 2018, file number V SA/Wa 459/18 <http://orzeczenia.nsa.gov.pl/doc/08FAE4F7D5>

the issue of massive State-sponsored propaganda, and the effects of such propaganda on democracy in Poland and on elections (both European and domestic), can possibly be referred to the Court.

Kelyn Bacon²⁷ writes about State aid cases:

Most such cases will be brought by the Commission under the specific procedure set out in Article 108(2) TFEU. In some cases, however, the Commission may use the infringement procedure under Article 258 TFEU.

Given that political propaganda in Polish State-owned media is a fundamental problem that goes beyond the economic issues for which the procedure in Art. 108(2) TFEU was designed, the use of Art. 258 TFEU may indeed be appropriate in this case.

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