



The politicisation of the Polish National Broadcasting Council (KRRiT): a new front in Poland's rule-of-law conflict with the European Union?

Commentary

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A new issue could soon be added to the growing list of ways in which Poland is accused of violating EU law: the media market and the country's National Broadcasting Council (KRRiT). The EU's new Audiovisual Media Services Directive (AVMSD), which all the member states were supposed to implement by September 2020, places a new obligation on them. They must guarantee that all national bodies responsible for regulating the media market are fully independent of political authority and business influence. Poland's broadcasting council does not meet these obligations. The country is yet to adopt a law implementing the provisions of the directive. Bills regulating

the KRRiT – including the latest one, which is meant to lead to the sale of private broadcaster TVN – do not secure its independence. If Poland does not abide by the requirements of EU law, it could face another procedure at the Court of Justice of the European Union (CJEU).

The directive (Article 30) stipulates that member states should ensure that domestic regulatory authorities are legally separate from the government and functionally independent from it and all other public or private entities. National regulatory authorities are supposed to exercise their powers impartially and transparently, in keeping with principles like media pluralism, cultural

and linguistic diversity, non-discrimination and fair competition. They may not take instructions from another entity, including the government. Furthermore, states are obliged to ensure that these institutions have the requisite enforcement powers to carry out their duties. The procedures for appointing these bodies' heads and members should be transparent, non-discriminatory and guarantee their independence. Their decisions should be subject to effective appeal mechanisms.¹

KRRiT: a government conveyor belt

Poland's KRRiT does not satisfy these requirements at a legal or practical level. Its fundamental defect is the lack of constitutional competences regarding the regulation of the public media sector. This is because the law forced through by the Law and Justice (PiS) government in 2015 removed the council's influence on appointments to the executive and supervisory boards of the public television and radio broadcasters (TVP and Polish Radio), as well as the content of their statute. This significantly limits the council's capacity to carry out its constitutional mission of safeguarding the freedom of speech, the right to information and public interest in radio and television broadcasting. This restricted the powers that the constitution granted the council, meaning that it has little or no independence in going about its duties.

At the same time, the KRRiT's major powers were transferred to the National Media Council (NMC), which is directly dependent on the parliamentary majority. The lower house of parliament, the Sejm, appoints and dismisses three of the NMC's five members with a simple majority vote (the other two members, nominated by the opposition,

¹ For an extensive study on this subject, see: K. Klafkowska-Waśniowska, *Wpływ nowelizacji dyrektywy Unii Europejskiej o audiowizualnych usługach medialnych na regulacje w krajach członkowskich*, Fundacja im. Stefana Batorego, 2021, <https://www.batory.org.pl/wp-content/uploads/2021/07/Ekspertyza-wplyw.nowelizacji.dyrektywy.audiowizualnej.pdf>.

are appointed by the president). As a result, politicians from the ruling party currently have full power in the NMC: Krzysztof Czabański (a former PiS MP), Joanna Lichocka (a current PiS MP) – both authors of the NMC law – and Elżbieta Kruk (a PiS MEP). They are able to interfere in the programming decisions of the public media by freely influencing the composition of TVP, Polish Radio and the Polish Press Agency's boards and supervisory boards at any moment, without justification. The internal procedures and practices are extremely opaque and fluid, which also makes it easier to steer and entirely marginalise the members of these bodies nominated by the opposition. In short: the NMC is a tool for controlling TVP and Polish Radio in the hands of the government.

In December 2016, the Constitutional Tribunal ruled that PiS's removal of public media competences from the KRRiT violates the constitution and ordered a return to the *status quo ante*. However, the ruling was not implemented. The explanation provided was that the challenged law ceased to be binding when it was replaced by the new NMC act in June 2016. This legal dodge (staunchly opposed by constitutional experts) made no difference to the council's operations.² It is difficult to determine whether the Audiovisual Media Services Directive applies to the NMC when it was illegal to transfer regulatory tasks that are the KRRiT's constitutional prerogative to it. It is therefore unclear whether it has the status of a regulatory body. There is no doubt, however, that the current position is incompatible with the spirit and objective of the Polish constitution and EU law.

Yet doubts about the KRRiT's independence go beyond the transfer of its prerogatives to the NMC. The procedure for appointing KRRiT members is entirely politicised. Since 2005, the deciding vote in appointments to the institution has belonged to the ruling majority. The conditions

² For more on the work of the National Media Council, see: J. Braun, *Rynek i katedra. Polskie spory o media publiczne*, Warszawa 2019, pp. 104 et seq., pp. 243 et seq.

that candidates must fulfil are outlined only in general terms, which means that loyalty to the government can trump qualifications – as a glance at the KRRiT's current makeup shows. Its chairman, Witold Kołodziejcki, was recommended for the post by PiS, which he was a member of (he was also formerly associated with the Agreement Centre party and left the party while serving as a council member). He was previously a secretary of state at the Ministry of Digitisation during the PiS government and twice ran for the Sejm on PiS's list. While serving as the KRRiT's chairman, he was also a PiS councillor and ran for re-election. All the other council members received their posts thanks to a recommendation from PiS or from President Andrzej Duda: Teresa Bochwic previously served as a member of the PiS chairman's presidential election support committee; Elżbieta Więclawska-Sauk was an MP from PiS's list, before seeking re-election to the Sejm and the upper chamber of parliament, the Senate, several times from the same party's list; Janusz Kawecki has for decades been associated with PiS ally Radio Maryja (including as a member of the programme committee and Radio Maryja support team), TV Trwam and Tadeusz Rydzyk's college in Toruń (and was appointed to the council by President Duda); according to media reports, Andrzej Sabatowski knows President Duda socially.³

This personal politicisation leads to bias when making decisions. During the current term, the KRRiT has consistently shirked responsibility for monitoring elections. It did not conduct an analysis of the media coverage of the election campaigns for the European Parliament and national parliament in 2019 or the presidential election in 2020. The reason is obvious: it would have had to review the government propaganda spread by the public media every day, which becomes even stronger during election campaigns. The KRRiT spends a time considering complaints submitted

³ *Prezydenckiemu członkowi KRRiT wypomina się współpracę z Grzegorzem Hajdarowiczem i nie tylko*, Press.pl, 20 września 2016, <https://www.press.pl/tresc/45708,prezydenckiemu-czlonkowi-krrit-wypomina-sie-wspolprace-z-hajdarowiczem-i-nie-tylko>.

to it about the public television broadcaster's bias, including from Poland's commissioner for human rights. Some go unanswered.

The council is extremely lenient towards TVP's propaganda and shows much greater resolve towards broadcasters that portray the government less favourably. For example, in 2017, the KRRiT fined TVN almost 1.5 million złoty for a report on how the opposition occupied the Sejm plenary chamber and the session was moved to another room, where the budget was adopted in an unlawful manner (the council later rescinded this penalty). In October 2020, the KRRiT called on TVN to desist from using the phrase "Julia Przyłębska's Constitutional Tribunal", arguing that the reference to the Tribunal's PiS-appointed chief justice is an "untrue term that could constitute an element of harassment, intimidation and even hate speech". However, the KRRiT's reactions to complaints about the public media's bias, including the tickers and on-screen headlines on TVP's news channels (TVP Info) and programmes ("Wiadomości"), have been more restrained. For example, following a complaint by Civic Platform (PO) MP Agnieszka Pomaska about TVP Info's headlines during the protests against the Constitutional Tribunal abortion ruling (e.g. "The opposition wants to paralyse the state", "The opposition wants anarchy during the epidemic", "Left-wing fascism is destroying Poland", and so on), the KRRiT retorted that the news tickers, although "slightly exaggerated", may have been dictated by the ongoing drama of the events and that they "are always characterised by a certain emotional load". The council has shown no interest in the enormous disproportion in airtime and unequal representation of politicians from the ruling camp and opposition. None of the complaints have reduced the intensity of the propaganda in the public media.

Similarly, the decision on renewing TVN24's broadcasting licence raises questions about the KRRiT's independence. The radio and television broadcasting act states that the procedure awarding licences for the next period should last

up to 12 months. In the past, renewing a licence was a mere formality, as the procedure is simple and the KRRiT is obliged to award a licence except in two kinds of exceptional circumstances: if there is legally-binding ruling prohibiting a broadcaster from conducting the business covered by the licence or if the broadcaster violates the conditions in the act or the licence. Neither of these applies to TVN24, yet almost a year and a half has passed since TVN's owners submitted the application to prolong its licence (the current one expires in September 2021). Why, then, has the KRRiT not fulfilled its statutory obligation on time?

Today, it is clear that this delay is part of the government's plan to eliminate TVN Group from the Polish media market or for capital linked to PiS to take over a stake in TVN from its American owner, Discovery. This is being done via a bill submitted by a group of PiS MPs, which would prohibit media companies based in Poland from being controlled by entities from outside the European Economic Area. In practice, this would mean that TVN's owner would have to sell a majority stake to an entity from within the EEA. Marek Suski, the MP behind the bill, has made no secret of the fact that PiS would want this to be Polish companies controlled by the state treasury.⁴ The KRRiT, it seems, is meant to play a role in this plan by dragging out the decision on granting the licence. Witold Kołodziejski stated that the delay was caused by the council examining TVN's ownership situation, although it had had no reservations of this kind about the broadcaster in previous years.⁵ The question is therefore whether the charge that TVN has an unauthorised ownership structure results from genuine legal doubts or current political expediency. In another statement,

4 *Marek Suski o efektach zmiany ustawy medialnej: będziemy mieli jakiś wpływ na to, co się dzieje w TVN*, Wirtualnemedial.pl, 12 July 2021, <https://www.wirtualnemedial.pl/artykul/tvn-koncesja-nowelizacja-ustawy-o-radiofonii-marek-suski>.

5 *Przewodniczący KRRiT: badamy wątek koncesji dla wszystkich stacji TVN*, Rzeczpospolita, 7 July 2021, <https://www.rp.pl/Media-i-internet/210709574-Przewodniczący-KRRiT-badamy-watek-koncesji-dla-wszystkich-stacji-TVN.html>.

Kołodziejski said that "the interpretation of the current laws supports the tightening of provision 35 of the National Broadcasting Council act", which specifies which entities can apply for a licence.⁶ It therefore seems that the council held off making a decision because the current laws make it impossible to refuse to grant a licence. With the KRRiT's support, the government gained time and a kind of substantive alibi to change the law and carry out its plan to take over TVN. In addition, drawing out the renewal of TVN24's licence means that, if it is refused, the broadcaster will find it difficult to appeal in court.

Why does the EU need an independent KRRiT?

Katarzyna Klafkowska-Waśniowska's analysis of the impact of the AVMSD on the independence of regulatory bodies, published by the Batory Foundation, shows that at least three factors make the requirement that the national authorities regulating the media market be independent important for the EU.⁷ Firstly, it is a condition for guaranteeing the freedom of expression and information, as well as media freedom and pluralism. These values are included in the European Charter of Fundamental Rights and are therefore fundamental values and principles of the EU. In the EU, the question of media freedom is also increasingly being presented as an inextricable part of the rule of law. It was thereby one of the four fundamental criteria for assessing the rule of law in the European Commission's annual report launched last year. One of the main elements of media pluralism and freedom that the Commission focused on in its first report is the independence of media bodies. It emphasises the key role of these bodies and the fundamental importance of economic independence and the independence of the media from political influence, which translates directly into the pluralism

6 *Szef KRRiT o koncesji dla TVN 24: Jest szereg wątpliwości*, Wyborcza.pl, 8 July 2021, <https://wyborcza.pl/7,82983,27306826,szef-krrit-o-koncesji-dla-tvn24-jest-szereg-watpliwosci.html?disableRedirects=true>.

7 K. Klafkowska-Waśniowska, *Wpływ nowelizacji dyrektywy Unii Europejskiej...*, op. cit.

of the market and the political independence of the journalist community.⁸ This should be unsurprising: democracy and the rule of law do not exist without scrutiny of the government by the free media. The latter are essential for citizens to have access to the information needed to assess the government's actions and making appropriate decisions, in the election process and on a daily basis. However, for the media market to function correctly, it requires a fair ecosystem based on law and customs, protected by independent bodies and capable of resisting pressure from politicians and interest groups.

Secondly, from the EU's perspective, the independence of regulators is important for the common European market to function properly. The audiovisual services market is developing rapidly and, alongside traditional television and radio, we now have a number of new services broadcast via terrestrial, satellite and Internet networks, such as coded digital packages, VOD services and online platforms. These services are increasingly provided internationally. This means greater responsibility for national regulatory bodies, which must oversee the flow of services in the EU market in a transparent and unbiased way. This increases their role in the protection of the free movement of services – one of the fundamental freedoms of the internal market and one of the most carefully-guarded principles of European law.

According to the European Commission, regulators need to be independent of politicians and business to be able to oversee the media market objectively. Susceptibility to influences can result in the unfair treatment of individual entities, including those from other EU member states. From service providers' perspective, national authorities' lack of independence can lead to unpredictability in the application of regulations in the audiovisual sector and the reduce chances of transborder disputes being resolved fairly. Research by the European Commission shows that this influences service providers' decisions to operate and offer services in a given member state.

⁸ Ibidem, p. 11.

In terms of the interests of consumers using audiovisual services, regulators' independence is needed to ensure a uniform level of protection of minors, protection of human dignity from discrimination, prevention of incitement to hatred and even to protect health. This is also important when it comes to ensuring that fundamental standards regarding advertising and other audiovisual forms of promotion are applied equally.

Furthermore, the new directive foresees granting the European Regulators Group for Audiovisual Media Services (ERGA), which is made up of national regulators, an opinion-forming role in the EU media market administration system. The Commission must seek ERGA's opinion on matters of conflict when the measures may threaten the freedom of provision of services or the freedom of expression. The regulators are meant to act as impartial experts, not political state representatives. Their independence from the government is therefore crucial.

A new anti-violation procedure?

Guaranteeing the KRRiT's independence is an important condition for maintaining media pluralism and freedom. As well as being important for broadcasters and citizens, it is crucial for the quality of democracy in Poland. It is also a significant issue from the EU's perspective, both in terms of guarantees of democratic values and the rule of law and the operation of the internal market. The duty to ensure the KRRiT's independence rests above all with the Polish legislator. In September 2020, an amendment to the radio broadcasting and television law was presented with the intention of meeting the EU audiovisual directive's objectives. Yet this bill does not foresee any changes to how the KRRiT operates.

In this situation, given the lack of domestic action, responsibility for implementing the resolutions of the directive is *de facto* transferred to the European Commission. It has the means to execute EU law, including the power to initiate anti-violation proceedings at the CJEU. The Commission is yet

to be actively involved in defending media independence in member states. Pluralism in the EU was considered a given; when there were doubts, it was assumed that the member states would ensure that standards were adhered to. The EU's reactions to infringements of the freedom of the press did not go beyond routinely making a note of the violations and expressing its concern. This optimism and lack of vigilance in the EU helped Viktor Orbán's administration to take almost complete control of the Hungarian media market, which contributed greatly to the country's transformation into one where democratic procedures such as elections are essentially a façade for oligarchical authoritarianism. The EU's resistance to the transformation of the public media in Poland into a mouthpiece for government propaganda has also been minimal.

Yet awareness of the threat is growing. In a report on the rule of law in Poland in 2020, the Commission voiced its reservations about the KRRiT's political dependence and proposed corrective actions – primarily the complete implementation of the audiovisual directive. It cited Media Pluralism Monitor data from 2020 stating that the sphere of the political dependence of the Polish media and regulatory bodies is a high-risk area.⁹ In the report on the rule of law published

9 Ibidem, p. 12.

on 20 July, the Commission stated again that it expects the directive to be implemented. It also noted the threat to media independence and pluralism, citing the failure to renew the TVN24 channel's licence, the purchase of Polska Press by the state-owned company PKN Orlen, and how most of advertising paid for by state-owned entities is broadcast in media outlets viewed as favourable towards the ruling coalition, among other things.¹⁰

In February 2021, Klubradio in Hungary was forced to stop broadcasting after the politicised regulator refused to extend its licence. This was perhaps the last Hungarian station where views critical of the government could still be heard. To avoid a repeat of the gloomy Hungarian scenario in Poland, the opposition, the NGO community, the media and EU institutions should take action to protect the KRRiT's independence immediately. European law could play a role here.

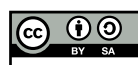
10 Commission Staff Working Document: 2021 Rule of Law Report Country Chapter on the rule of law situation in Poland, 20.07.2021, https://ec.europa.eu/info/sites/default/files/2021_rolr_country_chapter_poland_en.pdf.

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