The Lex TVN and the End of Free Media in Poland

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15.08.2021 doi: 10.17176/20210815-232804-0

Law & Justice, the ruling party in Poland, plans to reform the media by introducing restrictions on ownership of TV and radio broadcast companies. Entities from outside the European Economic Area ("EEA") may not, under the proposed law, control more than 49% of shares in such companies. This pertains both to holding shares directly and indirectly, via companies established in the EEA. If the law will ultimately enter into force is still uncertain. If it does, though, it will deliver a serious blow to, already weakened, free media in Poland.

The ostensible purpose of the proposed law is to protect the state interest in the age of information wars; *Law & Justice* politicians stress the risk of a takeover of a TV station by a company from a hostile country. However, the law is commonly interpreted as a barely disguised measure to get rid of TVN: a major independent TV network, perceived by the government as preferring the opposition. TVN is indirectly controlled by Discovery, an US company that would be forced to sell its majority stake as a result of the reform. Hence, the law is known in common parlance as *Lex TVN*.

This wouldn't be the first time the Government is using private-law instruments to silence the media. Recently, the state-owned (and tightly controlled) oil company Orlen bought (from previous German owners) a majority of outlets issuing local newspapers. The effects of the merger were, on the motion of the Polish Ombudsman, blocked by a court as an interim measure while the court is investigating whether the merger infringed competition law. However, the interim ruling was ignored by Orlen. The results of this are already visible: In four newspapers the editors in chief were sacked and replaced by journalists associated with *Law & Justice*. Several other editors and ordinary journalists were either made redundant or left voluntarily.

There are serious doubts about whether the Lex TVN is compatible with the EU freedom of establishment as well as with the Poland-US bilateral investment treaty. This, however, did not stop the Sejm from enacting the law on 11 August. Now the Senate has 30 days to agree on the law, propose amendments, or reject in entirely. If, as expected, the law is rejected by the opposition-held Senate, *Law & Justice* will need an absolute majority in the Sejm to overcome the Senate decision. If it succeeds in doing so, the President of the Republic must also agree on the law (there is, currently, absolutely no chance for overriding a presidential veto). Only then Lex TVN will become law.

This, otherwise mundane, details of the Polish legislative process are suddenly more interesting because of the changing power dynamics. Shortly before the voting of 11 August, Deputy Prime Minister Jarosław Gowin was removed from the government and consequently his party left the coalition (consisting of *Law & Justice* of Jarosław Kaczyński, *Solidarity Poland* of Zbigniew Ziobro and *Agreement* of Gowin). This left *Law & Justice* without a majority in the Sejm; however, they are trying to draw in MPs from minor right-wing parties. The voting on Lex TVN was a prime example of this struggle: before the voting the opposition was successful, by majority vote, to postpone the session of the Sejm till September. *Law & Justice* struggled to reverse this decision and finally succeeded in swaying some votes and ordering a revote. The opposition cried foul as the revote was, first, done after the session had formally ended and, second, on a dubious procedural basis (Law & Justice claimed that the date of a new session was included in the vote, which is, however, not a proper reason for a revote and also spurious, as everybody knew what the date was).

The numbers will be even tighter when the Lex TVN comes back from the Senate. In the Sejm, *Law & Justice* had 228 votes for the law, with two of its MPs

taking holiday (without party's permission). Assuming these MPs will vote with the rest of the party, this gives *Law & Justice* 230 votes. If (and this is a big if) the opposition mobilizes fully including even the MPs from the far-right *Confederacy* party who abstained in the original vote, Lex TVN would fail – by one vote in the 460-seat Sejm.

It is well within the realm of possibility that *Law & Justice* will secure more votes. It was accused of political bribery when winning new votes for the revote, and surely it has much to offer to the non-aligned MPs. Even in this case the fate of Lex TVN in the hands of President Duda is uncertain and depends on the US diplomacy. It is not a secret that the United States are pressuring Poland to abandon the law. The three unknowns are: how much the Biden administrations cares (both about Discovery's investment and the situation in Poland), how far the Biden administration is willing to go, and how much Law & Justice is unified and stubborn. The US alliance was *the* backbone of Polish foreign relations since 1989. In fact, at times Poland was accused of being closer to the US than to Europe, as with the 2003 invasion of Iraq. *Law & Justice*, rightly or not, felt ideological kinship with the Trump presidency, not unlike the one they feel with Orban's Hungary. They are likely to perceive Biden as more of an adversary, but at the same time both weaker and unlikely to seriously engage in Poland. Time will tell whether they are right.

Meanwhile, free media are the next victim in the Polish drift away from liberal democracy.

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SUGGESTED CITATION
Marcisz, Pawel: The Lex TVN and the End of Free Media in Poland, Verfassungsblog, 15.08.2021, doi: 10.17176/20210815-232804-0.

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Langzeitarchiviert bei IntRechtDok unter: doi.org/10.17176/20210815-232804-0.