

IN THE REGIONAL COURT IN WARSAW – COURT OF COMPETITION AND
CONSUMER PROTECTION

Case No. XVII AmA 43/21

**Appeal of the Commissioner for Human Rights
against decision no. DKK-34/2021 of 5 February 2021
of the President of the Office for Competition and Consumer
Protection**

AMICUS BRIEF

BY ARTICLE 19

ARTICLE 19
Free Word Centre
60 Farringdon Road
London EC1R 3GA, UK
Tel: +44 207 324 2500
Fax: +44 207 490 0566
Web: www.article19.org

1 June 2021

INTRODUCTION

1. In this *amicus curiae* brief, ARTICLE 19, an international freedom of expression organisation, urges the Regional Court in Warsaw – the Court of Competition and Consumer Protection (the Regional Court), to consider the provisions of the EU Treaties, EU law and the regional human rights standards when deciding the present case.
2. The case concerns the appeal of the Commissioner for Human Rights against the decision of the President of the Office for Competition and Consumer Protection (Competition Authority), consenting to the concentration consisting in the acquisition of control, by Polski Koncern Naftowy ORLEN S. A. (Orlen) with its registered office in Płock, of Polska Press sp. z o.o. (Polska) with its registered office in Warsaw. We believe it is an opportunity for the Regional Court in Warsaw to clarify the compatibility of the decision with Poland's obligations with regards to EU law, as interpreted by the EU Courts, and the standards under the European Convention of Human Rights (the European Convention)¹ which Poland is bound to respect. In particular, the decision of the Court in this case should comply with the EU rules on mergers, as well as with Poland's obligations with regards to the European standards on media pluralism.
3. The brief first outlines Poland's general legal obligations to implement EU law, as well as European human rights law. Second, it identifies the failure, in the Decision of the Competition Authority (the Decision), to examine the control of the State over Orlen. Third, it highlights the failure, in the Decision, to take into due account the merger's impact on media pluralism in the country and it explains why this constitutes a violation of both EU law and the European Convention.

ABOUT ARTICLE 19

4. ARTICLE 19 is an independent human rights organisation that works around the world to protect and promote the right to freedom of expression and the right to freedom of information. With an international focus since its foundation in 1987, ARTICLE 19 currently has offices in the United Kingdom, the Netherlands, Bangladesh, Brazil, Kenya, Mexico, Myanmar, Senegal, and Tunisia. It takes its name from Article 19 of the Universal Declaration on Human Rights. ARTICLE 19 monitors threats to freedom of expression in different regions of the world, as well as national and global trends and develops long-term strategies to address them and advocates for the implementation of the highest standards of freedom of expression, nationally and globally.
5. ARTICLE 19 has extensive expertise on and experience of advocating for the protection of the right to freedom of expression in accordance with international and European human rights standards, including in issues that are being reviewed in the present case. In case of Poland, we have intervened in several cases before the European Court of Human Rights (the European Court), such as *Rabczewska v. Poland*,² *Gesina-Torres v. Poland*³ or *Pietrzak v. Poland*,⁴ as well as in cases before the Polish courts.⁵

¹ Convention for the Protection of Human Rights and Fundamental Freedoms, 1953.

² ARTICLE 19, Third Party Intervention in *Rabczewska v. Poland*, App. No. 8257/13, 4 June 2018, available at <https://www.article19.org/wp-content/uploads/2018/04/O6.04.18-ARTICLE-19-Amicus-Brief-on-Religious-Insult.pdf>

³ ARTICLE 19, Third Party Intervention in *Gesina-Torres v. Poland*, App. No. 11915/15, 29 March 2017, available at <https://www.article19.org/data/files/medialibrary/38721/GesinaTorres-A19-Amicus.pdf>.

⁴ ARTICLE 19, Electronic Frontier Foundation and Privacy International, Third Party Intervention in *Pietrzak v. Poland*, App. No. 72038/17, 14 October 2022, available at <https://www.article19.org/wp-content/uploads/2020/11/2020.10.14-PI-submission-Pietrzak-ao-ECHR-FINAL.pdf>.

⁵ See e.g. ARTICLE 19, Submission to the High Court of Warsaw, Case II C 21/19, *Law and Justice vs. Prof. Wojciech Sadurski*, 22 November 2019, available at <https://www.article19.org/wp-content/uploads/2019/11/Poland-v-Sadurski.pdf>; ARTICLE 19, Submission to the District Court of Warsaw, Case XXIV C 276/19, *Telewizja Polska SA in Warsaw vs. Prof. Wojciech Sadurski*, 16 December 2019, available at <https://www.article19.org/wp-content/uploads/2020/01/TVP-v-Sadurski>.

6. ARTICLE 19 has also extensive expertise and experience of advocating for the protection of media freedom, media pluralism and diversity as fundamental pillars of a democratic system, in accordance with international and regional standards. For instance, ARTICLE 19 published a policies on freedom of expression and broadcasting regulation, which included specific provisions aimed to promote diversity and pluralism.⁶ In 2016-2017, we were member of the Council of Europe Committee of experts on media pluralism and transparency of media ownership (MSI-MED) which drafted the Recommendation to member States on media pluralism and the transparency of media ownership.⁷ Since 2020, we are member of a multi-stakeholder working group organised by the Canadian Heritage which aims to elaborate guiding principles on media diversity online.

POLAND'S OBLIGATIONS UNDER THE EU LAW AND THE EUROPEAN CONVENTION

General legal obligation to implement EU law domestically and principle of fidelity

7. The Polish state's authorities, including courts, are legally obliged to implement EU law and, when a conflict is identified between EU law and national law, they should give primacy to EU law.
8. The authority of EU law was defined by the Court of Justice of the European Union (Court of Justice) in the 1960s, with the two milestone judgments *Van Gend and Loos*⁸ and *Costa v ENEL*.⁹ According to those judgments, EU law is to take precedence over national law and give rise to rights that can be directly invoked in national courts. In addition, the fidelity principle, set out in Article 4(3) of the Treaty of the European Union¹⁰ (TEU), imposes institutional duties on both EU and national authorities to ensure that the EU legal system functions effectively.

General legal obligation to implement the European Convention domestically

9. The Polish state authorities, including the independent authorities, are legally obliged to implement the State's obligations deriving from the European Convention into Poland's domestic law and policy.
10. The European Convention provides the regional framework for the rights engaged in this case. Indeed, media freedom and pluralism are crucial corollaries of the right to freedom of expression, as guaranteed by Article 10 of the European Convention.¹¹ When Poland signed and ratified the European Convention, it accepted the obligation to implement its provisions into domestic law and practice.

FAILURE TO EXAMINE THE STATE'S CONTROL OVER ORLEN

11. In its Decision, the Competition Authority indicates that Orlen is a public company whose shares are listed on the Warsaw Stock Exchange. In addition, it reports that, at the date of the notification, the Treasury of State of the Republic of Poland holds 27.52% votes at the General Assembly and is the main stakeholder in the company.

[English.pdf](#); or ARTICLE 19, Submission to the Constitutional Tribunal of Poland, Case No. SK 54/13, 5 July 2015, available at https://www.article19.org/data/files/medialibrary/38074/ENPolishSupremeCourt_AMICUS-BRIEF-1.pdf.

⁶ ARTICLE 19, Access to the Airwaves. Principles on Freedom of Expression and Broadcasting Regulation, 2012, available at <https://www.article19.org/wp-content/uploads/2018/02/11-08-08-STANDARDS-access-to-airwaves-EN-2.pdf>.

⁷ Recommendation CM/Rec(2018)1[1] of the Committee of Ministers to member States on media pluralism and transparency of media ownership (Adopted by the Committee of Ministers on 7 March 2018 at the 1309th meeting of the Ministers' Deputies).

⁸ Court of Justice, Judgment of 5 March 1963, C-26/62, *Van Gend en Loos v. Nederland Administratie der Belastingen*.

⁹ Court of Justice, Judgment of 15 July 1964, C-6/64, *Costa v. Enel*.

¹⁰ Treaty on European Union (Consolidated version 2016) OJ C 202, 7.6.2016.

¹¹ Recommendation CM/Rec(2018)1[1], *op.cit.*, Preamble 1.

12. ARTICLE 19 notes that the European Commission (the Commission), in its *PKN Orlen/Energa* decision,¹² established that a further 4.9% of the voting rights are indirectly held by the State Treasury through PERN Spółka Akcyjna, which is a company 100% owned by the State Treasury. As a consequence, the State Treasury holds a total of 32.42% of the voting rights in Orlen.¹³
13. We also highlight that, on those grounds, in *PKN Orlen/Lotos*,¹⁴ Orlen itself claimed that “while the Polish State does not have de jure control over PKN Orlen, it has de facto control.”¹⁵ The Commission left that point open, though, finding that “even if some of the arguments put forward by [PKN Orlen] may point towards the Polish State having de facto control over Orlen, the question of Orlen’s control can be left open” due to the specific facts of the transaction.¹⁶
14. Since the question of the control of the State over Orlen was not decided by the Commission, it therefore had to be assessed by the Competition Authority in its Decision. In fact, this element plays a key role in the substantive assessment of the merger to be carried out by the Authority.
15. Indeed, the acquisition at stake appears similar to the situation analysed by the Commission in the *Telia Company/Bonnier Broadcasting Holding* case¹⁷ where Telia, in which the Swedish State held a minority stake, was acquiring the media company Bonnier Broadcasting. In that case, the Commission insisted that a fundamental element in its assessment was to ascertain whether Telia and the Swedish public broadcasting company, SVT, were independent from the Swedish State or whether the State would have been able, after the acquisition, to “coordinate the commercial conduct of SVT and Telia.” The Commission clearly stated that “in principle, the outcome of that assessment might indeed affect the scope of the substantive assessment of the Transaction.”¹⁸
16. Similarly, ARTICLE 19 argues that in the present case, the Competition Authority had an obligation to ascertain whether Orlen on the one hand, and the State medias (notably Telewizja Polska - Spółka Akcyjna and its local branches, and Polskie Radio - Spółka Akcyjna) on the other hand, are independent from the State, or whether the State could in practice coordinate their behaviours. In fact, although the Competition Authority assessed the merger under Polish merger control rules, the substantive test in the Polish Anti-Monopoly Act, *i.e.* the existence of a “significant impediment to competition on the market, in particular by the creation or strengthening of a dominant position on the market” is the same, exactly, as the EU test.¹⁹ Mergers must therefore be analysed in a similar way under EU and Polish rules.
17. ARTICLE 19 further notes that, based on the information available to the public, there are several elements which could point in the direction of the State being able to control the behaviour of Orlen with regards to the company’s activities in the media sector, and to coordinate these behaviours with the State medias:
 - Orlen itself has recently claimed before the Commission that it is *de facto* controlled by the Polish State;²⁰

¹² European Commission, Decision of 31 March 2020, Case COMP/M.9626, *op. cit.*

¹³ *Ibid.*, § 4.

¹⁴ European Commission, Decision of 14 July 2020, Case COMP/M.9014.

¹⁵ *Ibid.*, § 7.

¹⁶ *Ibid.*, § 30.

¹⁷ European Commission, decision of 12 November 2019, Case COMP/M.9064.

¹⁸ *Ibid.*, § 9.

¹⁹ *C.f.* the wording of Article 18 of the Polish Anti-Monopoly Act (“significant impediment to competition on the market, in particular by the creation or strengthening of a dominant position”) with the wording of Article 2(3) of EMUR (“significantly impede effective competition, [...], in particular as a result of the creation or strengthening of a dominant position.”)

²⁰ Case COMP/M.9014, *op.cit.* In particular: “**The Notifying Party claims that, while the Polish State does not have de jure control over Orlen, it has de facto control.** According to the Notifying Party, the State Treasury exercises decisive influence over the composition of Orlen’s supervisory board, which in turn appoints and dismisses Orlen’s management board

- Orlen is an oil company that has only recently started to invest in the media sector and is doing so, at least in some instances, in cooperation with other State-controlled companies (see, for example, the creation of the joint venture Sigma BIS with the State-owned insurance company PZU S.A.). These behaviours point to investments required, or at least supported, by the State;
 - Orlen has already started replacing journalists from Polska with journalists coming from Telewizja Polska.²¹
18. At the very least, ARTICLE 19 believes that the Competition Authority was under the obligation to assess the effective control of the State over Orlen and Telewizja Polska as part of its substantive analysis. Indeed, this element has a key role in the identification of the relevant markets affected by the concentration, and on the assessment of the impact on competition therein. Nevertheless, the Competition Authority failed to examine this fundamental element. ARTICLE 19 suggests that this failure vitiates the entire assessment and it constitutes sufficient ground for annulment of the entire Decision.

FAILURE TO CONSIDER THE IMPACT ON MEDIA PLURALISM

Failure to consider media pluralism under EU mergers rules

19. In practice, in mergers affecting the media sector, the Commission considers “*cultural diversity*” when assessing the impact of the concentration on consumers’ choices. Furthermore, as explained in its Guidelines on the assessment of horizontal mergers,²² the Commission considers a reduction in the choices available to consumers as one of the various ways in which a merger may result in competitive harm.²³ Within that framework, in the assessment of a merger in the media sector, the Commission ascertained that “the notified operation will not have any significant impact on the diversity of books made available to consumers and is therefore unlikely to threaten consumer choice and cultural diversity.”²⁴ Thus, the impact on cultural diversity and on consumer choices are two elements in the Commission assessment of mergers in the sector. We argue that a similar approach should have been followed by the Competition Authority.
20. ARTICLE 19 further notes that, as emphasized and recalled recently by the Council of the European Union, media pluralism is an important part of the “*cultural diversity*” in a country.²⁵ Based on these premises, we argue that the Commission’s practice has shown that media pluralism is one of the factors to be considered when assessing a merger under EUMR rules. As the substantive test in the Polish Anti-Monopoly Act reflects the EUMR substantive test at the EU level, the Competition Authority should therefore, as part of its assessment, have taken into account the risk that the transaction may have a negative impact on media pluralism in Poland. Once more, its failure to do so constitutes sufficient ground for annulment of the Decision.

and approves the strategic decisions of the management board before they are formally adopted.” (§ 7, emphasis added); as well as: “In any event, **even if some of the arguments put forward by the Notifying Party may point towards the Polish State having de facto control over Orlen**, the question of Orlen’s control can be left open, because, as explained below, Orlen and Lotos constitute different economic units having an independent power of decision, in spite of the Polish State being their main or major shareholder. Therefore, even if the Polish State controls Orlen on a de facto basis, for the reasons explained in the following paragraphs, the Proposed Transaction constitutes a notifiable concentration under Article 3 of the Merger Regulation.” (§ 30, emphasis added).

²¹ Cf. Reporters Without Borders, *With firing of four editors, “repolonisation” under way in Poland*, 10 May 2021, available at <https://rsf.org/en/news/firing-four-editors-repolonisation-under-way-poland> (last access: 27 May 2021).

²² Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, OJ C 31, 5.2.2004, p. 5–18.

²³ *Ibid.*, § 8.

²⁴ European Commission, decision of 5 July 2010, Case COMP/M.5838 – Bertelsmann / Planeta / Circulo, § 16.

²⁵ Council of the European Union, Conclusions on safeguarding a free and pluralistic media system, 7 December 2020, OJ C 422/08, §§ 14-15.

Failure to consider media pluralism under other EU law and violation of the fidelity principle

21. In the European Union, media pluralism is further reaffirmed by Article 11(2) of the EU Charter of Fundamental Rights (the EU Charter) which provides that “the freedom and pluralism of the media shall be respected”²⁶ in the European Union.
22. The Court of Justice has stressed on several occasions the importance of media pluralism, declaring that “the safeguarding of the freedoms protected under Article 11 of the Charter of Fundamental Rights, which in paragraph 2 thereof refers to the freedom and pluralism of the media, unquestionably constitutes a legitimate aim in the general interest, the importance of which in a democratic and pluralistic society must be stressed in particular.”²⁷
23. Hence, media pluralism is an established objective of EU law, enshrined *inter alia* in both the TFEU and the EU Charter. This is relevant because, as mentioned earlier, Article 4(3) TEU creates the obligation for the Member States and the EU to act in sincere cooperation and the obligation for Member States to refrain from adopting any measure that could jeopardize the Union’s objectives.²⁸ The Grand Chamber of the Court of Justice recently recalled that “it follows from the principle of sincere cooperation laid down in Article 4(3) TEU that the Member States are obliged to take all the measures necessary to guarantee the application and effectiveness of EU law,” and that this obligation applies not only to the acts adopted by the Member States’ central governments but also to independent local authorities.²⁹
24. Therefore, ARTICLE 19 argues that in the context of its merger control assessment, the Competition Authority, as an independent authority of the Polish State, is bound by the principle of sincere cooperation and therefore should not be allowed to take any decision that would violate provisions of the EU Charter, including Article 11(2).
25. By failing to assess whether the proposed concentration led to an infringement of Article 11(2) of the EU Charter, the Competition Authority violated Article 4(3) TEU and Poland’s obligation of sincere cooperation with the European Union. We believe this violation constitutes a sufficient ground for annulment of the Decision.

Failure to consider media pluralism under the European Convention of Human Rights

26. The Council of Europe has repeatedly stressed the importance, for member States, to respect and guarantee media pluralism. For instance:
 - Already in 1999, the Committee of Ministers recommended States to “evaluate on a regular basis the effectiveness of their existing measures to promote pluralism and/or anti-concentration mechanisms and examine the possible need to revise them in the light of economic and technological developments in the media field.”³⁰
 - In 2007, the Council of Europe established, as a general principle, that “Member States should seek to ensure that a sufficient variety of media outlets provided by a range of different owners, both private and public, is available to the public, taking into account the

²⁶ Charter of Fundamental Rights of the European Union, OJ C 326, 26.10.2012, p. 391–407.

²⁷ The Court of Justice has used this or similar wording on numerous occasions. See *inter alia* Judgment of 3 September 2018, C-719/18, Vivendi, § 57; Judgment of 22 January 2013, C-283/11, Sky Österreich, § 52; Judgment of 13 December 2007, C-250/06, United Pan-Europe Communications Belgium e.a., § 42; Judgment of 22 December 2008, C-336/07, Kabel Deutschland Vertrieb und Service, § 33; or Judgment of 6 September 2011, C-163/10, Patriciello, § 31.

²⁸ See, e.g. Court of Justice, Judgment of 4 February 2016, C-336/14, Ince, §§ 63-64.

²⁹ Court of Justice, Judgment of 31 October 2019, C-395/17, *Commission v. The Netherlands*, §§ 95-97.

³⁰ Recommendation No. R (99) 1 of the Committee of Ministers to Member States on measures to promote media pluralism (adopted by the Committee of Ministers on 19 January 1999 at the 656th meeting of the Ministers’ Deputies).

characteristics of the media market, notably the specific commercial and competition aspects.”³¹

- In 2018, the Council of Europe added that “the enforcement of competition law, including merger controls applicable to media, should aim to ensure effective competition and prevent individual actors from acquiring significant market power in the overall national media sector or in a specific media market/sector at the national level or sub-national levels, to the extent that such significant market power adversely impacts media pluralism.”³²

27. The European Court clarified that to ensure true pluralism in the audiovisual sector in a democratic society it is not sufficient to provide for the existence of several channels or the theoretical possibility for potential operators to access the audiovisual market. Rather, it is necessary for providers to have effective access to that market so as to guarantee diversity of the overall programmed content, reflecting as far as possible the different opinions in society.³³
28. The European Court further argued that a situation whereby a powerful economic or political group in a society is permitted to obtain a position of dominance over the audiovisual media and thereby exercise pressure on broadcasters and eventually curtail their editorial freedom undermines the fundamental role of freedom of expression in a democratic society as enshrined in Article 10 of the Convention, in particular where it serves to impart information and ideas of general interest, which the public is moreover entitled to receive.³⁴
29. Moreover, according to the European Court, the effective exercise of freedom of expression does not depend merely on the State's duty not to interfere, but may require it to take positive measures of protection through its law or practice.³⁵ In other words, in addition to its negative duty of non-interference the State therefore has a positive obligation to put in place an appropriate legislative and administrative framework to guarantee effective pluralism.³⁶
30. In the case at stake, by authorising a merger that would negatively impact media pluralism, or at the very minimum by authorising a merger without duly scrutinising the impact it could have on media pluralism, the State, through the Competition Authority, infringed its duties under Article 10 of the Convention.

CONCLUSION

31. Based on foregoing, ARTICLE 19 urges the Regional Court in Warsaw to consider aforementioned standards in its review of the Decision. We respectfully submit that it should repeal the Decision. Finding otherwise would violate EU merger rules and the Polish Anti-Monopoly Act. It would also violate Article 11 of the EU Charter and the duty of loyalty as established in Article 4(3) TEU. Finally, it would also breach the standards on media pluralism under the European Convention.

Maria Luisa Stasi
Senior Legal Officer
ARTICLE 19

³¹ Recommendation CM/Rec(2007)2 of the Committee of Ministers to Member States on media pluralism and diversity of media content (Adopted by the Committee of Ministers on 31 January 2007), § 1.1.

³² Recommendation CM/Rec(2018)1[1] of the Committee of Ministers to Member States on media pluralism and transparency of media ownership (Adopted by the Committee of Ministers on 7 March 2018, § 3.3.

³³ European Court, *Centro Europa 7 S.r.l. and Di Stefano v. Italy*, App. No. 38433/09, 7 June 2012, § 130.

³⁴ European Court, *anole and Others v. Moldova*, App. No. 13936/02, 17 September 2009, § 98.

³⁵ *Ibid.*, § 99.

³⁶ *Centro Europa 7, op.cit.*, § 134.