Centre for Antitrust and Regulatory Studies

Telecommunications Regulation in Poland

Edited by
Stanisław Piątek

Warsaw 2013

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Preface

It has been almost a decade since Poland joined the European Union. Therefore it is the right time to write and publish a book on the evolution of national law regulating one of the most important infrastructure sectors – the telecommunications industry. The last decade has seen exceptionally fast rates of change in this industry, and not only due to technological developments. The Telecommunications Law Act was promulgated in 2004 with the intention of finally harmonizing the institutional and substantive laws regulating the Polish telecommunications industry with the 2002 EU Regulatory Framework for electronic communications. Many varied, mostly positive, regulatory experiences have been gathered since then, although some disappointing moments must also be noted. At the outset, the Polish telecommunications market differed significantly from the markets of the 15 older EU member States. Thus the implementation of EU rules required both standard EU procedures and measures embedded in EU policies, as well as special solutions adjusted to competition barriers that occurred specifically in Poland. The analysis of the compliance with, adaptations to and deviations from the standard rules of the EU regulatory framework is an important part of this book.

The contributions cover selected elements of Poland's regulatory practice that were of special importance for the development of the national telecommunications market and proved relevant, at the same time, for the implementation of EU rules. A significant part of this book is devoted to the identification and description of measures that were adopted by national legislative and regulatory authorities in order to take into consideration justified national circumstances while implementing the EU regulatory framework. European rules leave a number of significant issues that have to be resolved at the national level. The boundary conditions, resulting from the electronic communications directives, became even broader at

the current development stage of new generation access networks. The contributions aim to address both the theoretical and practical problems encountered in the practice of the national regulatory authority – the President of the Electronic Communications Office.

The book was prepared within the publishing programme of the Centre for Antitrust and Regulatory Studies (CARS), which since 2006 has been conducting cross- and interdisciplinary research concerning competition protection and sector-specific regulation in network industries.

The three parts of this book contain eleven chapters written by experts in the relevant areas. Authors were selected from among academics and practitioners specializing in electronic communications law, with long-term experience in regulatory administration and the telecommunications business. The opinions set out in particular articles are those of the authors, and do not necessarily reflect the position of their respective institutions.

Stanisław Piątek

Warsaw, December 2013

I.

REGULATORY ENVIRONMENT

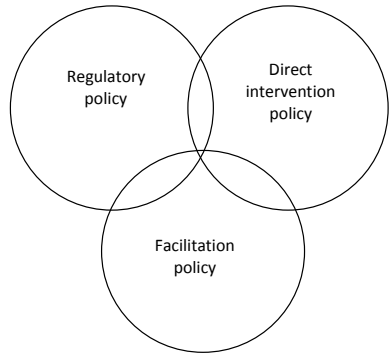
Stanisław Piątek*

The evolution of telecommunications policy

1. The structure of telecommunications policy

The focus of this paper is the goals and instruments of telecommunications policy. Special attention is paid to the role of regulatory policy in the telecommunications sector. The period covered by this analysis starts with Poland's accession to the European Union in 2004. The conceptual structure of telecommunications policy (Fig. 1) also includes, besides regulation, the policy of direct intervention as well as facilitation policy[1]. Regulatory policy is considered a key part of the national telecommunications policy.

Figure 1.



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1 Falch M., *Penetration of broadband services – The role of policies,* Telematics and Informatics, 24/2007, p. 246.

The three types of policies differ on the issue of instruments used by public authorities while pursuing public goals in the telecommunications sector. Regulation is defined in a relatively narrow manner as an activity of a public authority that has an executive, future-oriented (*ex-ante*) and sectoral character, aimed at the promotion of competition. The concept of "regulation" differs in legal and administrative sciences mainly as regards legislative measures[2]. In this contribution, the concept of regulation does not include legislative measures. The main focus of further remarks is on the activity of the Polish regulatory authority responsible for the telecommunications sector – the President of the Office of Electronic Communications (UKE) – in the regulator's pursuit of the goals of national telecommunications policy. However, one of the features of the overall activity of the President of UKE is the regulator's involvement in the legislative process of drafting statutory acts. Among the many public authorities, the President of UKE has a unique knowledge and experience with regard to the needs of the telecommunications market. The engagement of the National Regulatory Authority (hereafter: NRA) in the policy of direct intervention and in facilitation measures results from the growing conviction that the achievement of key goals of the national telecommunications policy is practically impossible with recourse to market forces and regulatory measures alone.

Direct intervention measures apply when public goals in the telecoms sector cannot be attained solely with market forces and regulatory measures. Direct intervention manifests itself in the engagement of public entities (mainly local self-governments) in the provision of networks and services; such involvement is usually pre-conditioned upon the public funding of infrastructure construction or service provision. Broadband telecommunications in rural and remote areas could hardly develop without direct public intervention. Direct intervention policy seems necessary to reach the quantitative targets set in the Digital Agenda for Europe (hereafter: DAE) as regards the speeding up of the roll-out of high-speed Internet. Direct intervention measures are mainly based on EU funds provided within its cohesion policy. Poland had the largest financial

[2] Skoczny T., *Ochrona konkurencji a prokonkurencyjna regulacja sektorowa (Competition protection and pro-competitive sectoral regulation)*, Problemy Zarządzania 3/2004, Stasikowski R., *Funkcja regulacyjna administracji publicznej (Regulatory function of public administration)*, Bydgoszcz–Katowice 2009, Szydło M., *Regulacja sektorów infrastrukturalnych jako rodzaj funkcji państwa wobec gospodarki (Regulation of infrastructure sectors as a state economic function)*, Warszawa 2005, Hoff W., *Prawny model regulacji sektorowej (Legal model of sectoral regulation)*, Warszawa 2008.

allocation for broadband among EU Member States (ca. 1 bn EUR) in the 2007–2013 financial framework. It is expected that the financial framework for 2014–2020 will once again provide substantial funds to support the goals of the DAE.

The policy of facilitation is addressed to undertakings in the telecommunications sector. It consists of measures which support operators mainly by providing them with information that facilitates the roll-out of telecoms and improves the market environment by reducing uncertainty and transaction costs that must be borne by operators when developing their networks. Facilitation derives from the practical experience that external conditions imposed on telecommunications operators by binding laws (such as building formalities, procedural requirements and costs related to the acquisition of the right of way) create significant barriers that slow down the roll-out of telecoms networks. Although the facilitation policy brings benefits to telecoms operators, it may induce costs and restrictions on other parties including property owners or other network industries. Facilitation reduces the nuisance of town planning and construction procedures for new infrastructure; restricts the discretionary powers of local administrations; shortens time limits for issuing decisions; and sometimes even reduces the legal protection normally granted to public and private property as well as natural resources, such as arable and forested land for instance. The policy of facilitation is the symptom of finding a new balance between the value of common accessibility to modern communications, and the protection granted to the environment, to property or even to moral rights[3].

2. The framework of national telecommunications policy

National telecommunications policy is largely determined by the electronic communications policy of the European Union. Poland's EU accession on 1 May 2004 was accompanied by the adoption of the Telecommunications Law Act of 16 July 2004 (TL). The TL Act was intended to fully transpose the 2002 EU directives on electronic communications. The initial belief of its full compatibility with EU rules was, however, undermined on several occasions by annual reports delivered by the European Commission on the implementation of the EU electronic communications framework. The application of the TL Act was subject to serious disputes between the

[3] For a broader discussion on the concept of telecommunications policy see: Piątek S., *Sieci szerokopasmowe w polityce telekomunikacyjnej (Braodband networks in telecommunications policy)*, Warszawa 2011, p. 19.

Commission and Polish authorities, which were in extreme cases settled by the European Court of Justice[4]. Some preliminary rulings of the ECJ were of crucial importance for the clarification of Polish telecoms legislation[5]. A significant part of the over thirty amending laws promulgated in the past nine years were partly, or fully, devoted to the removal of divergences between Polish and European law. The extensive amendment of 16 November 2012 transposed into the TL Act the EU reform package of November 2009. Numerous national policy documents prepared both by the government and by the NRA follow the recommendations of consecutive EU initiatives – starting from the Europe+ Action Plan, through eEurope 2005 and the i2010 initiatives, up to the Digital Agenda for Europe.

The shaping of Poland's regulatory policy in the telecommunications field falls within the competences of the President of UKE. There is, however, no legal obligation for the NRA to declare in advance its regulatory policy goals and the methods of their implementation within the limits of the law. The TL Act determines in Article 1 its general purpose; Article 189(2) TL stipulates that communications administration bodies shall carry out a regulatory policy aimed at the achievement of the goals listed in accordance with the policy objectives determined in Article 8 of the Framework Directive. Both TL provisions leave a lot of discretionary powers to the President of UKE, a fact referred to in the literature as regulatory discretion[6]. The regulator is obliged to publish annual reports on the state of the Polish telecoms market in the preceding year. Aside from the description of the condition of the sector, it is possible to deduce from these reports some elements of the NRA's intended policy aims and its related actions. Indeed, despite the absence of such a statutory obligation, it is a lasting tradition in Poland that the NRA announces periodically its major goals and intended actions. It is a form of communication with market players that has particular value during periods of political change or personal shifts within the government or the regulatory authority itself.

The first regulatory program covering the period of 2006–2007 was formally adopted by the Council of Ministers, officially submitted by

4 C-545/08 – Commission v Poland, Judgment of the Court (Third Chamber) of 6 May 2010, RoC 2010 I-00053, Case C 227/07 Commission v Poland, Judgment of the Court (Second Chamber) of 13 November 2008, RoC 2008 I-08403.

5 C-522/08, Judgment of the Court (Third Chamber) of 11 March 2010, *Telekomunikacja Polska v Prezes* UKE, RoC 2010 I-02079.

6 Hoff W., *Prawny model regulacji sektorowej(Legal model of sectoral regulation)*, Warszawa 2008.

the minister competent for communications, but drafted by the NRA[7]. Subsequent strategies for the periods of 2008–2010 and 2012–2015 were published by the President of UKE as informative documents on the UKE website[8]. Separate strategic documents were devoted to frequency management. These published regulatory strategies do not cover the entire period of Poland's EU membership. They largely illustrate, however, shifts in key goals pursued by the NRA over time and the turning points in Poland's regulatory policy. A period of drift is noticeable at the end of a given regulator's term in office and a necessary period for the preparation of a new strategy by the newly appointed head.

Telecommunications policy is loosely coupled with programme documents devoted to the central government's general development policy. Governmental documents identify social and economic goals related to communications technologies. Importantly also, they name the financing sources for development programs initiated at the governmental or regional level. Governmental policy documents focus solely on broadband communications, leaving narrowband networks and services to the regulatory authority. The National Development Strategy for 2007–2015[9] indicated general development priorities only. The National Strategic Reference Framework was prepared pursuant to the requirements of Article 27 of Council Regulation 1083/2006[10]. It defined support directions based on the funding available from the EU budget within the European Regional Development Fund. It had a significant influence on the shape of Poland's direct intervention policy in broadband telecommunications. Some governmental policy documents have set quantitative goals related to broadband infrastructure development[11] and determined the application of information technology in central administration. Still, it is the regional

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7 *Strategia Regulacyjna 2006–2007 na rynku telekomunikacyjnym (Regulatory strategy for 2006–2007 in telecommunications market)*, Announcement of the Prime Minister (M.P. 2006, Nr 65, poz. 674).

8 Regulatory Strategy of the President of the Office of Electronic Communications for 2008–2010, published in April 2008, Regulatory Strategy until 2015, published in November 2012.

9 National Development Strategy 2007–2015, adopted by the Council of Ministers on 29 November 2006.

10 Council Regulation No. 1083/2006 of 11 July 2006 which set up general provisions concerning the European Regional Development Fund, the European Social Fund and the Cohesion Fund and repealing the Regulation (CE) No. 1260/1999 (EU O.J. L 210, 31.7.2006).

11 Action plan for the development of broadband access infrastructure to information society services in Poland for 2007–2013, Ministry of Transportation, June 2007.

operational programs which had a real impact on telecoms investments because provisions on investments in broadband development were a standard part of the programs prepared for all voivodeships (administrative districts).

The analysis of governmental policy documents for 2007–2013 shows that they have mostly descriptive features. They note Poland's obligations resulting from the EU electronic communications policy, they confirm the realization of regional operational programs, and the statutory obligations of the telecom regulator. A significant part of these policy documents is filled with information on the technical aspects of varied possible solutions and with comparative information on the situation in other EU Member States. The general impact of the development policy of the government on the telecommunications policy, and in particular on regulatory strategy, has proven relatively weak. Regulatory strategy for 2006–2010 focused on supporting effective service competition and ensuring that users derive maximum benefits in terms of choice, price, and quality of telecommunications services.

The preparation of governmental policy for the period of the new EU financial framework for 2014–2020, and a shift of regulatory goals towards infrastructure development following the formulation of the DAE's quantitative goals, caused a deeper and stronger connection between governmental policy documents concerning electronic communications and the regulatory strategy of the President of UKE. The National Broadband Plan[12], prepared for the period up to 2020 in accordance with the Law of 6 December 2006 on the principles of development policy[13], determines the quantitative goals of Poland's broadband policy (fully conforming to DAE targets). It also indicates what instruments are to be used to implement the Plan including: administrative support for investors; promotion of co-investments; access to information on infrastructure; development projects; provision of public funding; adjustment of legislation to an accelerated investment program. The Plan states additionally which indicators will be used to measure implementation and estimates the necessary funding. The type of measures listed in the Plan point towards the governmental policy of facilitation and direct intervention, rather than to typical instruments applied by the NRA. The funding of broadband infrastructure, as well as other projects accelerating the roll-out of broadband networks and services,

12 *Narodowy Plan Szerokopasmowy* (*National Broadband Plan*), Ministry of Administration and Digitization, 3 October 2013.

13 Polish Journal of Laws [Dz.U.] of 2009 No 84, item 712, as amended.

shall be provided within the framework of the priority axis "Universal access to fast Internet" identified by the Operational Program Digital Poland 2014–2020, which is drafted within the EU cohesion policy.

The shaping of telecommunications policy is a primarily bureaucratic, rather than political, process. The principal goal of developing broadband communications infrastructure was never identified as a key public goal at the government's political level. Instead, it was processed in the rhythm of EU initiatives on information society, following the influx of EU funds for broadband development. Regulatory policy was developed in parallel to the programming documents of the government. It primarily focused on pro-competitive aspects of the market. The inclusion of the NRA in the development of new facilitation and intervention policy instruments was mainly the result of the fact that the regulator has accumulated considerable experience and knowledge in this field. It reflected also the growing conviction that regulatory instruments developed in order to dismantle the monopolization of telecoms are no longer well fitting in a period of fast development of fiber-based and wireless broadband communications.

3. The goals of regulatory policy

3.1. Enhancing competition

The assessment of selected regulatory goals has to have an outline of the telecommunication market as its starting point. At the time of Poland's EU accession, the penetration rate of the fixed telephony network remained at a low level of 34%. The share of the incumbent Telekomunikacja Polska (TP) in the fixed telephone market (total of 12 million lines) was 83%. The incumbent was followed by Tele2 with 9% and Netia with 3%. TP's share of the revenues was even higher and reached 86%. Alternative Operators (AOs) had a significantly higher share in long-distance and international call minutes reaching respectively 25% and 37%; their shares in revenues remained significantly lower, however. The mobile market was divided between three competitors: *Polkomtel* (controlled by major Polish infrastructure companies), *PTK Centertel* (TP group controlled by France Telecom) and *Polska Telefonia Cyfrowa* (at present T-Mobile Polska). Each operator controlled about 1/3 of the mobile market. There were no MVNOs (Mobile Virtual Network Operators) on the Polish market at that time. The mobile penetration rate only reached 51% in 2004, the lowest level among the EU 25, mostly because of high retail prices for mobile services. The Internet access market (almost 1.6 million lines) was primarily based

on DSL and CATV technologies – TP was once again dominant here with a 63% market share. The total share of cable operators represented about 28% of the market. Broadband penetration was among the lowest in the EU 25[14].

The initial diagnosis made by the regulatory authority indicated a dominant market position of TP. This situation was attributed to the result of a natural monopoly; ineffective licensing policy towards AOs (high license fees); TP's vertical integration resulting in the closure of the wholesale market; and the incumbent's delaying tactics. The oligopoly of mobile operators was maintained thanks to the delay in market entry of MVNOs and a restrictive frequency assignment policy. The abolition of licensing barriers did not contribute to an increase in competition due to an insufficient wholesale offering of the three dominant market players. Regulatory policy was thus focused at that time on the promotion of service competition based on mandated access to the existing infrastructure and services of the dominant operators.

The crucial instrument in facilitating a change in the fixed telephony market was TP's reference interconnection offer (RIO). The President of UKE has the power to require that a RIO complies with the "needs of the market indicated in a decision" and may oblige the operator to amend its RIO when "changes in demand for services or in market conditions occur". The regulatory body may modify the submitted draft RIO before approving it. Using these powerful regulatory instruments, the President of UKE successfully promoted competition on the market for telephone calls by modifying TP's RIO so as to reduce the level of interconnection rates and access fees to TP's infrastructure. The incumbent's RIO accelerated the process of concluding interconnection agreements – 16 new contracts were concluded between TP and AOs in 2006–2007 and 7 existing agreements were significantly amended by means of resolving interconnection disputes[15]. Another important amendment of TP's RIO consisted of the introduction of a new wholesale termination service, which was based on a flat rate. This shift made it possible to purchase termination capacity at a fixed price, irrespective of the volume of traffic delivered within the bundled service. Flat rate interconnection made profitable exchange of traffic possible for AOs. In light of the delaying tactics of the incumbent, the implementation of flat rate settlements required a number of decisions resolving interconnections

[14] European Electronic Communications Regulation and Markets 2004 (10th Report), *Annex,* Com(2004)759 Final, p. 192.

[15] Analysis of the enforcement of the regulatory strategy, Office of Electronic Communications, 1 February 2008.

disputes. The amendments of TP's RIO resulted in greater differentiation of commercial calling plans and allowed AOs to lower their retail prices, a fact that contributed to increased competition.

The regulatory decision of 2006 was another significant step on the road to the opening to competition of the fixed telephony market. It imposed on the incumbent the obligation to grant access to wholesale line rental (WLR). This made it possible for TP's subscribers to change their service provider, without changing the supplier of the phone line. The unbundling of subscriber loops and sub-loops (LLU) at the beginning of 2007 was a further step in the same direction, albeit requiring more investment efforts from AOs.

The main regulatory task on the mobile market in the middle of the last decade was to pave the way for MVNOs. First, established operators refused to conclude resale agreements with MVNOs to later decline to deliver a national roaming service to P4, the 4th infrastructural mobile operator. Moreover, in 2005, a draft regulatory decision on market 15 (access and call origination on public mobile telephone networks) was initially used as an instrument of regulatory pressure. The President of UKE declared in the draft the existence of collective significant market position (hereafter: SMP) of the established mobile operators and 'threatened' to impose on them regulatory access obligations. The draft decision was ultimately withdrawn by the NRA following its criticism by the European Commission. Nevertheless, the ongoing regulatory procedure, and the risk of a repeated attempt to regulate market 15, facilitated the conclusion of commercial agreements with MVNOs and the first national roaming agreement between *Polkomtel* and P4. A new mobile infrastructure operator was thus brought onto the market. This first breach in the anticompetitive strategy of the three established mobile operators facilitated the quick growth of a number of MVNOs from 2006 onwards without any actual regulatory intervention. Nevertheless, the market share of MVNOs did not grow respectively and remains on a low level. Importantly however, the mere threat of regulatory intervention caused a reduction in retail prices on the mobile market.

Mobile termination rates (MTRs) on the market of voice call termination on individual mobile networks (initially market 16) proved to be another regulatory issue of significant relevance both for competition on the mobile market and for the reduction of retail prices. The amount of the MTRs is considered an important, albeit indirect, price-affecting factor on the retail market. Rates asymmetry is, on the other hand, a recognized instrument of competition promotion. Asymmetric termination rates were granted both on fixed and mobile markets as a form of entry assistance in order to

benefit later newcomers. The intensity of this assistance was significant seeing as the level of the asymmetry on the mobile market periodically exceeded 200%. MTRs asymmetry on the mobile market in general ended by July 2013, with some exceptions for entrants with a market presence of less than four years before July 2014. Asymmetry in fixed termination rates (FTRs) will last even longer but its duration is difficult to predict, because the NRA has not yet taken any practical measures in this area. TP's proposals to eliminate asymmetry on the fixed market by way of voluntary arrangements between fixed operators may not be sufficient to change the existing situation. The level of asymmetry and the period of its application in Poland show just how deeply involved the NRA is in assisting market entry.

Competition on the mobile service market was strongly promoted with frequency management policy. Entities to which frequency licenses were granted were appointed by means of a tender. In all cases, tender documentation contained a strong preference for those just starting their telecommunications activity or late entrants with smaller frequency resources. The license fee declared by tender participants was of secondary importance in practice. Spectrum policy facilitated first of all the emergence of a strong 4th infrastructure operator. Although frequency licenses acquired by other market newcomers were intended to bring a lot of competition onto the mobile market, they were later consolidated within broader capital groups. The first auction for frequencies in the 800 MHz and 2.6 GHz range is scheduled for early 2014. The amount declared by auction participants is to be the decisive criterion here. However, the President of UKE may indicate frequency resources the possession of which shall exclude a given entity or capital group from participation in the auction. Another important factor supporting the effects of pro-competitive frequency assignments was the NRA's very liberal policy towards shared use of allocated resources and the transfer of frequency rights to investors. The idea behind this approach was to assist tender winners in the utilization of their newly acquired resources.

Some pro-competitive obligations of the incumbent were set out directly in the TL Act – it was the task of the NRA to enforce the implementation of those measures. The carrier selection and carrier pre-selection obligation was imposed on the incumbent in 2004. Yet the significance of this obligation for retail competition was limited due to unfavorable tax provisions on issuing bills for telecommunications services. Similarly, number portability in fixed networks was originally introduced into the TL Act even before 2004. It was however not practically implemented until 2006 when TP's

remaining analogue exchanges were substituted with digital ones. Number portability for mobile users was initially introduced for post-paid customers only; it was extended to pre-paid subscribers only after an amendment of the TL Act. An acceleration in number porting was brought about by the statutory abolition of direct subscriber charges for the porting services in 2010.

Regulatory pressure on the incumbent intensified with the emergence of the concept of functional separation during the 2007–2009 review of the regulatory framework for electronic communications. The President of UKE undertook preparatory actions aimed at the imposition of the functional separation obligation onto TP. Functional separation was considered to be an effective measure to prevent the incumbent from anticompetitive, discriminatory practices that could not be eliminated with standard regulatory obligations or financial penalties. The two-year period of pressure and negotiations ended in October 2009 with the conclusion of an agreement between TP and the President of UKE covering the period of time between 2009–2012[16]. In order to avoid a functional separation, TP obliged itself to properly fulfill all imposed regulatory obligations, strictly adhere to its reference offers while concluding individual contracts, and to apply the non-discrimination principle as determined in the agreement. Moreover, TP obliged itself to introduce some internal measures required in the course of a functional separation. TP's "wholesale part" (in charge of the provision of its wholesale services and managed by one member of its management board) was isolated from its remaining structure both physically, and as far as information flow is concerned between itself and the retail part of TP. Incentive schemes for individual employees engaged in the provision of wholesale services were introduced. TP implemented an application making it possible for AOs to have access to information systems supporting the sale of regulated services. TP undertook to measure, monitor and publish key performance indicators (KPI), as agreed with the regulator, which were directed at the quality of TP's business processes and the non-discrimination of AOs. The KPI system was gradually expanded alongside market needs and finally contained 64 indices. TP implemented a set of best practice rules in order to separate its wholesale part from its retail departments concerning access to information systems, separation of information systems, physical locations, separation of employment contracts and the identification of employees. Both sides, the President of UKE and TP, agreed to terminate almost all mutual judicial and administrative

[16] http://en.uke.gov.pl/files/?id_plik=101

proceedings that followed their earlier regulatory disputes. TP undertook to terminate judicial disputes with AOs concerning the execution of past regulatory decisions, which generated a lot of uncertainty in interconnection financial settlements. The expiration of the agreement at the end of 2012 combined with the successful implementation of TP's obligations mark a turning point in Polish regulatory policy in the fixed telecommunications market.

3.2. Infrastructure development

According to Articles 1 and 189 TL, the development of modern telecommunications infrastructure is one of the goals of the TL Act. Regulatory policy should thus aim to ensure efficient investments in infrastructure. However, pursuit of regulatory goals shows some tension between its various objectives, in particular between an intensive policy of facilitating stronger service competition and investment related goals. It is recognized that the regulatory goal of granting full access to an incumbent's existing infrastructure, in order to broaden retail offerings and lower prices, may reduce its readiness to invest and the inclination of AOs to engage in infrastructure competition with the incumbent. The Polish regulator has deliberately chosen to pursue pro-competitive and consumer-oriented goals since they promised a fast and notable reduction in key market development problems. However, this approach had chilling effects on the investments of the incumbent, which clearly showed the signs of a so called "investment strike". The chosen policy approach also lowered the investment incentives of AOs which focused on maximizing the benefits of broad access to TP's existing infrastructure under favorable conditions.

The initial position of the regulatory authority was that it is not the task of the regulator to stimulate investments in telecommunications. According to the views of the NRA, increased competition on the market, in particular market pressure exerted by cable operators, should force the incumbent to develop its own network. However, increased regulatory promotion of competition on retail and wholesale markets in 2006–2008 did not improve investment data, especially so in fixed broadband networks. International comparisons and telecoms investment data showed a considerable backwardness of broadband communications in Poland, in particular at the access level, as well as the lack of coverage for even basic broadband services. It became increasingly apparent from 2008 onwards that market forces, "optimized" by the regulatory activity of the President of UKE, are unable to bring about a quantitative change in national broadband statistics.

As a result, the document containing the 2008–2010 Strategy is the first to pay more attention to investment aspects of regulatory policy. It shows examples of governmental support for telecoms investments in other countries and declares that Poland should take advantage of their experiences. Poland, unlike other countries, did not have at that time a clear telecommunications development strategy. According the President of UKE, a strategy of that type should be developed jointly by the regulator and the government. Central budgetary funds should then follow in its footsteps – a large-scale public intervention is a necessary base of such a strategy. The President of UKE also claimed that the regulator has neither the legal instruments, nor financial resources, to stimulate telecoms investment. Still, the NRA's strategy formulated at that time failed to assess how the regulatory priorities it pursued in practice influenced the readiness of the market to undertake the risks inherent to investments. The NRA's initial approach, whereby the incumbent should be compelled to invest following increased competition induced by regulatory measures, was supplemented by proposals seeking investment stimulus in co-operation with the government.

The above investment stimulation strategy was based on the utilization of EU structural funds in the co-financing of telecoms infrastructure, on the involvement of local governments in the conduct of telecoms activity and on attracting foreign investment. The EU financial framework for 2007–2013 provided over 1.2 billion EUR for broadband projects. It was directed at local governments which were entrusted with the construction of regional broadband backbone infrastructure. Significantly smaller funds were dedicated to the roll-out of access networks by small and medium telecoms undertakings. However, the statutory tasks of Polish local governments did not, at that time, include telecommunications activity. The 2010 Law on the promotion of the development of telecommunications services and networks (hereafter: Telecoms Support Act) extended therefore the tasks of local governments at a commune (town), county and regional level to the building and management of telecommunications infrastructure and the provision of telecoms services. The legal conditions for this activity vary depending on the type of its recipients (public, private) and on its influence on market conditions. The provision of networks and services to public sector entities is not subject to any restrictions. The provision of services to others is allowed only if the supply of such services on the local market is insufficient. The provision of Internet access services without remuneration, or at prices below market level, requires the consent of the President of UKE issued following a public consultation – free services can distort the local market and have an anti-competitive effect. Consent

decisions require from the local government that the maximum download and upload speed of the free service does not exceed 512 kbps. A single Internet session may also not exceed 60 minutes for the same terminal or registered user.

Local governments that engage in a telecommunications activity and thus, as a rule, benefit from public funds for that purpose, are subject to access obligations. Local government units are treated in this regard as if they were an operator with a SMP – they have 30 days to conclude telecoms access agreements with access seekers. Local governments are further burdened with a non-discrimination obligation in relation to that access. These obligations result directly from statutory provisions.

The engagement of local government in telecommunications was meant to create a new group of market players that would increase competition, make use of the large scale of available public funds and intensify investments. These expectations were met only partially. The number of local governments involved in telecommunications remains small (see Table 1). Still, the level of investment related to the roll-out of regional backbone and distribution networks increases in areas with higher telecoms engagement by local governments.

Local government level	Total number of local governments	Local governments engaged in telecommunications activity September 2013
Commune/Town	2497	191
County	314	8
Voivodeship (Region)	16	6

Lack of experience in the telecommunications business and the risk of long term financial commitments related to the maintenance of broadband infrastructure prevented local authorities from a more wide-spread involvement in telecommunications. It also emerged that the utilization of EU structural funds requires the assistance of experienced operators. Such help can be provided on the basis of various forms of public-private partnerships and management contracts. Local government involvement in telecoms activity is an adequate form of public aid absorption. It is also an instrument supporting basic broadband coverage for underserved, rural and remote areas, as well as a method of providing Internet access for social groups of special needs. Ultimately, local governments did not emerge from this development as a new market competitor but rather, as a public partner for new investment projects.

On the other hand, the attempts of the President of UKE to attract new foreign investors were doomed to failure. Intensive service competition induced by regulatory decisions on the fixed telecommunications market reduced profit margins not only of the incumbent, but of AOs as well. Foreign seekers of regulatory rent were more inclined to exit the Polish market and sell their newly acquired market shares to established operators, than to enter a new business. The regulatory opening for foreign investors, as a measure for increasing infrastructure competition, soon turned out to be unrealistic during the worldwide economic crisis.

The policy of regulatory stimulation of telecoms investments did not follow the main track indicated in EU directives on electronic communications. EU rules on imposing regulatory obligations on operators with a SMP name price control and cost accounting as investment stimulating methods. NRAs should thus allow SMP operators a reasonable rate of return on adequate capital employed, taking into account risks specific to a particular new network investment project. Yet in practice, repeated attempts to set prices according to TP's annual regulatory accounting statements and cost calculation results were unsuccessful. According to the TL Act, the course of regulatory activities includes: the imposition of regulatory accounting and cost calculation obligations; the determination of weighted average cost of capital to be applied in cost calculation; approval of accounting instruction and cost calculation description submitted by the incumbent (subject to necessary modifications by the NRA); submission of annual regulatory accounting statements and cost calculation results by the incumbent and; final audit by an independent auditor. The audited calculation of the costs of service provision should normally be the basis for the setting of prices of regulated services.

Unfortunately, the results of the cost calculation of the regulated services presented by TP, with positive audit reports carried out by an auditor nominated by the regulator, were for various reasons rejected by the President of UKE in 2006–2009. The main ground for the rejection was that the results were significantly above the expectations of the NRA and could discourage AOs from using the wholesale offer of the incumbent. The wholesale prices were thus set by the President of UKE on the basis of various estimates, rather than with reference to the audited outcome of the cost calculation. The rejection of the results of the regulatory accounting and cost calculation obligation caused a lot of uncertainty on the market because the prices of basic wholesale services were questioned in court and the compliance of the whole process with the EU regulatory framework contested. The regulatory process, based on the concept of an efficient

operator, regulatory accounting and cost calculation, was definitely derailed seeing as the President of UKE refused to recognize its results.

A way out of this stalemate was found in a non-standard solution, unforeseen by the EU framework – the aforementioned 2009 agreement between TP and the President of UKE. The agreement provided that prices for regulated wholesale services (interconnections and associated facilities, wholesale line rental (WLR), local loop unbundling (LLU), bit stream access (BSA), leased lines (LL), access to cable ducts) shall remain unchanged until 31 December 2012. Although the performance of the regulatory accounting and price calculation obligations was not suspended, the incumbent was granted a period of price stability, albeit at a level that was initially said to be insufficient. Abandoning wholesale discounts based on the "retail minus" principle for the BSA service and the application, from the date of the conclusion of the agreement, of wholesale price levels was key during a time of a fast growing Internet market. Still, TP's new retail offers, based on regulated wholesale services included in existing reference offers, would have to pass the NRA's margin squeeze test in order for the application of frozen wholesale prices to take place. The price test will be conducted for regulated services not covered by the reference offers (as of the date of the conclusion of the agreement).

The settlement between TP and the President of UKE was later gradually transformed into provisions of binding regulatory instruments such as reference offers and was finally approved by the European Commission. The ultimate result of the settlement was that the NRA gave up on regulation based on the concept of an efficient operator and price setting rules based on audited cost calculation reports. The cost calculation duty based on the concept of an efficient operator was withdrawn from all markets and replaced with a more flexible obligation to set cost-based fees for telecoms access. The President of UKE retains the right to modify these fees via regulatory decisions on the basis of one of the possible price setting methods: price caps, retail minus or benchmarking. In practice therefore, the information asymmetry between the incumbent and the NRA concerning audited service costs turned out to be an overwhelming obstacle for the implementation of standard regulatory measures in Poland.

Another key result of the agreement between TP and the President of UKE was the acceleration of investment in basic broadband infrastructure. TP committed itself to build or modernize fixed line infrastructure, undertaking to connect at least 1.2 million new broadband lines, including 1 million lines of a bit rate of at least 6 Mbps. This obligation was later extended in order to include at least 220,000 lines allowing a bandwidth of

30 Mbps. The investment commitment, resulting from regulatory pressure related to the threat of functional separation, played a significant role in upgrading basic broadband services in some Polish areas. However, it was also unlike the standard pro-investment instruments set out in the EU regulatory framework.

These positive experiences of utilizing a regulatory threat to induce infrastructure investments were later transformed into a new statutory instrument – so called "detailed regulatory conditions" (Article 43a TL). A telecommunications undertaking with an SMP and subject to regulatory obligations, may submit to the President of UKE a request for the approval of "detailed conditions" for the performance of already imposed regulatory obligations and other commitments. These detailed conditions may contribute, *inter alia*, to the development of competition or development of modern telecoms infrastructure. The essence of this instrument is to induce undertakings to propose commitments that cannot be mandated by the regulator, but are nevertheless desirable for the attainment of telecommunications policy goals. In order to persuade an undertaking to make such a commitment, the NRA uses its regulatory discretion to put forward two regulatory options – one more onerous and one less so. The less burdensome version of regulatory obligations is contingent however upon the undertaking making a "voluntary" commitment concerning investments. This instrument was used in 2011 to set mobile termination rates (MTRs). Instead of the initial proposal of 0,0966 zł/min, the President of UKE ultimately set higher MTRs of 0,152 zł/min, accompanied by a mild timetable of termination rates reductions for 2011–2012. In return for this advantageous decision, mobile operators committed themselves to complete investment projects covering Poland's "white areas" with insufficient 2G and 3G mobile network coverage. Regulatory decisions determining "detailed conditions" were taken by the President of UKE despite objections raised by the European Commission concerning their compatibility with the nature of the problem identified and the requirement of proportionality.

No other specific regulatory measures could be identified in the Polish regulatory practice meant to stimulate investment. Differentiating the permitted rate of return on capital employed, depending on the risk associated with the specific new investment projects, did not take place. The NRA failed to induce operators of fixed networks to undertake common investments in passive or active telecommunications infrastructure. On the other hand, the joint use of mobile infrastructure is widely employed without any regulatory support. The attempts to reduce regulatory burdens and stimulate investments in fiber networks within the third review of the market

for wholesale broadband access (market 5) were unsuccessful. The President of UKE proposed to not impose the obligation of cost-orientation on FTTH in selected towns (characterized by a higher level of competition) in order to avoid investment barriers. The proposal was however contested by the European Commission supported by an opinion delivered by BEREC[17].

4. Facilitation policy

An unquestionable merit of the President of UKE was the early identification of external investment barriers and the formulation of a proposal for facilitation measures in this regard. Although the implementation of the facilitation policy was beyond the bounds of the NRA's legal powers, its proposals on new rules reducing external investment obstacles founded the basis of Poland's facilitation policy in the telecommunications sector.

A package of new solutions was introduced in 2010 following the adoption of the Law on promotion of the development of telecommunications services and networks (Telecoms Support Act). The Act restricts the ownership rights of various entities in order to facilitate broadband communications. Due to new statutory solutions, investment can be accelerated by allowing a more intensive usage of existing physical infrastructures. The new instruments require however the extension of the regulatory powers of the President of UKE beyond the borders of the telecoms industry – to other infrastructure or property sectors. Telecoms undertakings are granted easier access to the network infrastructure of other public utilities. Entities performing public utility tasks (power engineering companies, water supply and sewage companies) are obliged to provide telecoms undertakings with the possibility of joint use of, or access to, technical infrastructure used to conduct their basic activity in accordance with the rules of equal treatment, as well as fair and free competition. Public utilities are obliged to conduct negotiations concerning access when requested by telecoms undertakings. When access to technical infrastructure is denied, or the agreement is not concluded within the statutory deadline of 90 days, each of the parties may apply to the President of UKE for a decision mandating access. The decision replaces the agreement and grants infrastructure access. The President of UKE entered into an agreement with the regulatory body of the energy

[17] BEREC Opinion on Phase II investigation pursuant to Article 7a of Directive 2002/21/EC as amended by Directive 2009/140/EC: Case PL/2012/1311, Wholesale broadband access (Market 5) in Poland, 7 June 2012.

sector on the co-ordinated execution of statutory obligations of energy operators in relations with the telecommunications industry.

Telecommunications infrastructure duties are also placed on owners and administrators of real estate whereby they are obliged to provide access to buildings or premises where all cables converge to a telecoms undertaking that supplies a public network to that property. The access obligation also concerns owners of an existing cable duct system situated in a property as well as owners of a telecoms cable supplied to the building or a building cable system. An appropriate access agreement should be concluded within 30 days. In the case of a dispute, each party may apply for a decision to the President of UKE mandating access. Telecoms undertakings claim that housing cooperatives, property managers and other possessors of real estate often hinder access to their properties from competing service providers. This new regulatory instrument helps resolve this problem. Surprisingly, only 3 such decisions were issued by the President of UKE in 2012. A large number of pending cases in 2013 indicate however the significance of this instrument and the need to work-out a homogenous decision-making policy involving real estate owners in this regard.

The acquisition of the right of way by telecoms companies from administrators of public roads was strongly supported. Entities executing road investments are obliged to publish information on their plans to initiate a road construction or reconstruction project as well as information on the possibility to state an interest in making the technological channel available for telecommunications purposes. Such information is submitted to the President of UKE and published on the UKE website. 435 such announcements were published in 2012. They create a unique basis for the coordination of road construction works with the investment plans of telecoms undertakings. Technological channels make it possible to install telecommunications lines, along with power supply and energy lines, not related to the needs of road management.

Another comprehensive information facility managed by the President of UKE is the electronic inventory, started in 2010, which covers existing telecommunications infrastructure and public telecommunications networks that allow for the provision of broadband access to the Internet, in particular optical fibres, wireless networks and buildings allowing for a collocation. All telecoms undertakings, public utilities and local governments possessing such infrastructure are obliged to provide the President of UKE with such information. The inventory is being verified and kept up to date at least on a yearly basis, and is publicly available. Everyone has the right to access the inventory and receive map extracts. The inventory is processing information

that the President of UKE receives from telecoms undertakings on areas which were covered with a telecommunications network created in the previous year, as well as on plans to cover new areas in the current year. The inventory is a powerful instrument supporting private investment in broadband infrastructure as well as direct intervention plans in areas of weak coverage.

It is expected that more symmetric regulatory instruments, introduced in 2012, will allow the President of UKE to facilitate access to all buildings and premises utilised by telecommunications undertakings for the provision of their services. The new Article 139 TL mandates access for all telecoms undertakings to property, including access to buildings, connections and building installations utilized by any telecoms undertaking regardless of its market power. Access should be granted with the access seeker on the basis of an agreement concluded within 30 days. The purpose of access is the establishment, operation, supervision and maintenance of telecommunications equipment, the use of an existing telecommunications connection or the deployment of a new connection or installation in the building. The President of UKE may require a telecoms undertaking to present information on the conditions of ensuring access. The NRA may also issue a decision specifying the conditions of ensuring access. In case of a dispute between undertakings, the regulatory authority shall specify in a decision detailed conditions for the provision of access. The policy of implementing this new instrument of symmetric regulation was formulated and published by the President of UKE following a public consultation on the merits and demerits of new access obligations.

Developing the facilitation policy is not a one way process, however. Improvements for the telecoms industry are resisted by the entities and administration bodies burdened with new obligations. For over two years, all Polish city communes were obliged to consult their draft spatial development plans with the President of UKE in order to rid them of provisions that hindered the development of telecoms infrastructure. This obligation was of special importance for mobile network infrastructure, which is subject to various bans and restrictions in local spatial plans. Over 11,000 opinions were issued and a lot of restrictions eliminated that had originally been proposed by local authorities regarding the admissible locations of wireless communications. The requirement to obtain NRA approval was eventually withdrawn in 2013, following objections from local authorities. Still, the worst of such restrictions had already been removed by then.

A recent development of the facilitation policy is the statutory obligation imposed in 2013 on the construction and housing industry. The obligation

concerns the provision, in all multi-residential houses, of an in-house optical fiber network that allows broadband access, and the installation of reception infrastructure necessary for terrestrial and satellite digital broadcasting services. New rules require investors to provide rooms equipped with a power supply that would allow telecommunications operators to install their devices in the building.

5. Policy of direct intervention

The regulatory authority was never provided with dedicated funds allocated to investment purposes. The utilization of public funds, including EU structural funds for broadband network development, has nevertheless benefited from the support of the regulatory authority. The President of UKE assisted local governments in acquiring EU funds by identifying white, grey and black zones in accordance with EU aid rules. The NRA also put a lot of effort into formulating legal and organizational forms of cooperation between local governments, as disposers of public funds, and telecommunications undertakings, holding the necessary experience and know-how. The regulator initiated the drafting of model agreements, reference offers and other templates facilitating the cooperation between local governments and operators in managing new passive telecommunications infrastructure. The search for the optimal utilization of infrastructure, developed with the use of public funds, was recognized as an urgent task for both the NRA, taking care of effective competition, and for governmental agencies responsible for the observance of state aid rules.

The provision of telecommunications networks and services is entrusted mainly to private undertakings. However, the availability and quality of telecommunications is of primary importance for social welfare and economic growth. Public authorities engage therefore in the direct provision of telecommunications infrastructure and services. The recent broadening of the scope of public intervention in this area results from the strong conviction that the provision of broadband services outside densely populated areas will not take place without a direct intervention by the public hand into the telecoms investment process. Economic conditions of broadband investment in rural areas make it impossible to achieve a satisfactory rate of return. Direct intervention is based mainly on EU funds provided within its cohesion policy. The 2007–2013 financial framework provided Poland with the largest financial allocation for broadband of all EU Member States (ca. 1 bn EUR). The utilization of these resources faces various organizational and

procedural barriers resulting from spatial regulations, construction law, state aid procedures and public procurement rules. Investment projects within the present financial framework should be finalized by the end of 2015. The construction of almost 27,000 kilometers of broadband networks within the remaining 2 years is uncertain – the majority of backbone and distribution network projects remain in their early stages of preparation. Local investment projects based on state aid are conducted on a commune level and mostly regard access networks for public purposes. They are far more advanced, but they are also of far lesser importance for meeting the targets of the Digital Agenda for Europe.

The National Broadband Plan for 2014–2020 draws lessons from the experiences of the former period. Public funds for the development of broadband networks will be focused on the central level, seeing as strict coordination of state aid utilization is of primary importance here. Rather than the regulatory authority, it is the Ministry for Administration and Digitization that will act as the coordinating body. Direct involvement of experienced telecommunications operators in developing the infrastructure will replace the leading role played in the past by regional self-governing bodies. Investment will concentrate on the access level.

Moreover, the Plan intends to estimate the necessary funding. The expectations concerning capital investments necessary to meet DAE targets reach 17.2 billion zlotys (ca. 4.2 billion EUR). The allocation of EU funds for broadband development within the cohesion policy will remain at the same level as in the present financial framework (5.3%). The scope of public funding available for broadband development will thus not largely differ from the current model. The engagement of private funding sources is crucial for the accomplishment of the Plan. The range of the proposed solutions for the provision of necessary long-term public funding for the broadband development program is diverse. Projects that are discussed are based on the accumulation of the telecommunications assets of public undertakings in order to develop the provision of wholesale broadband services. Financial solutions range from the creation of a dedicated infrastructure fund supplied by state-owned companies, to the utilization of the resources of pension funds[18]. The attainment of DAE targets requires a much stronger involvement of private investors in areas where support from public funds is not admissible, or where general facilitation policy creates a favorable investment environment.

[18] National Broadband Plan, p. 38.

Inga Kawka*

National regulatory authority in telecommunications

1. Introduction

The gradual deregulation of the electronic communications sector in the European Union began in the 1980s and has led to the reform of national authorities competent for communications issues in individual Member States. In the past, public administration authorities in European countries managed telecommunications policy at the same time providing access to electronic communication networks and offering telecommunications services. Once free competition was enabled on telecommunication markets, it became necessary to separate the regulatory and operator functions[1].

Assigning regulatory functions to specialised independent authorities is characteristic for the Anglo-Saxon administrative system[2]. The first country in which the task of regulating the telecoms sector was assigned to a special regulatory authority was the United States[3]. In the economic law of the European Union, the problem of regulatory authorities is associated with

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1 H. Intven, J. Oliver, E. Sepúlveda, *Overview of Telecommunications Regulation*, in: *Telecommunications Regulation Handbook,* H. Intven, M. Tétrault (eds), Washington 2000, p. 5 ff., http://www.infodev.org/content/library/detail/842

2 T. Woś, *Niezależne organy regulacyjne w Stanach Zjednoczonych. Zagadnienia prawne (Independent regulatory authorities in the United States. Legal aspects)*, Kraków 1980.

3 M. Gentot, *Autorités administratives indépendantes*, Paris 1994, p. 19; M. Szydło, *Regulacja sektorów infrastrukturalnych jako funkcja państwa wobec gospodarki (The regulation of infrastructure sectors as a function of the State with regard to the economy)*, Warsaw 2005, p. 289.

deregulating certain sectors, particularly infrastructure industries. The provision of services in this area requires the existence of a permanent network (infrastructure) allowing producers to be connected to end users. The establishment of national regulatory authorities (NRAs) is required not just by telecommunications directives, but also by postal[4]and energy[5] ones. The obligation, expressed in these directives, to establish NRAs and give them a high degree of independence represents one of the most important areas of EU regulatory law[6].

2. National regulatory authorities in EU electronic communications law

The definition of NRAs is found in Article 2(g) of the Framework Directive[7]. Accordingly, an NRA is the body or bodies charged by a Member

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4 Article 22 of Directive 97/67/EC of the European Parliament and of the Council of 15 December 1997 on common rules for the development of the internal market of Community postal services and the improvement of quality of service, OJ 1998, L 015/14, amended by Directive 2008/6/EC of the European Parliament and of the Council of 20 February 2008 amending Directive 97/67/EC with regard to the full accomplishment of the internal market of Community postal services, OJ 2008, L 052/3.

5 Article 39 of Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC, OJ 2009, L 9/112; Article 35 of Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC, OJ 2009, L 211/55.

6 T. Skoczny, *Wspólnotowe prawo regulacji in statu nascendi (Community regulatory law in statu nascendi)*, in: *Prawo gospodarcze Wspólnoty Europejskiej na progu XXI wieku (The economic law of the European Community on the eve of the Twenty-First Century)*, C. Mik (ed.), pp. 244–245; with regard to the bodies of Polish regulators in telecoms, postal services, energy and railway transport sectors, see: by the same author *Stan i tendencje rozwojowe prawa administracji regulacyjnej w Polsce (The state and trends in the development of regulatory administration law in Poland)*, in: *Ius Publicum Europeum*, H. Bauer, P.M. Huber, Z. Niewiadomski (eds), Warsaw 2003, p. 130 ff.; M. Przybylska, *Specyfika niezależnych organów regulacyjnych – wyzwanie dla nauki administracji i polskiego prawodawcy (The specifics of independent regulatory authorities: a challenge for the administration science and the Polish legislator)*, Problemy Zarządzania 2008, no. 1(19), 187–204.

7 Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive), OJ 2002, L 108/33 (amended by Regulation 717/2007/EC of the European Parliament and of the Council of 27 June 2007,OJ 2007, L 171/32; Regulation (EC) No 544/2009 of the European Parliament and of the Council of 18 June 2009, OJ 2009, L 167/12; Directive 2009/140/EC of the European Parliament and of the Council of 25 November 2009, OJ 2009, L 337/37).

State with any of the regulatory tasks[8]. In accordance with the Framework Directive or specific directives[9], these functions concern regulating access to the telecommunication market, imposing regulatory measures, protecting end users and consumers, conducting controls, imposing sanctions (supervision) and settling disputes between telecoms operators.

EU directives do not define the legal form, the system position or the composition of NRAs[10]. Hence, Member States can establish their regulatory authorities in the form of private or public entities[11], a single person or a collegial body, as well as to entrust regulatory functions to more than one entity[12]. NRAs in the telecommunications sector should, however, fulfil certain conditions, a fact that will motivate Member States to apply certain legal and organisational solutions. First of all, the Framework Directive establishes the requirement of independence for NRAs. This independence has two aspects. It can be understood as separating regulatory activities from operator's ones[13] – introducing such independence was the purpose of actions taken by the Commission as early as in 1980. Alternatively, the concept relates to the independence from the policy of the current

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8 Article 2(g) of the Framework Directive.

9 Specific directives mean: Directive 2002/20/EC (Authorisation Directive), Directive 2002/19/EC (Access Directive), Directive 2002/22/EC (Universal Service Directive) and Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications).

10 J. Kolasa, *Krajowe organy regulacyjne (National Regulatory Authorities)*, in: *Europejskie i polskie prawo telekomunikacyjne (European and Polish telecommunications law)*, W. Gromski, J. Kolasa, A. Kozłowski, K. Wójtowicz (eds), Warsaw 2004, p. 243.

11 As regulators' rights provided for by the electronic communications directives are mainly of a governing nature and consist of taking general decisions or settling individual cases by administrative decision, EU countries grant the rights to regulate the telecoms sector to state bodies. However, independent NRAs very often commission certain activities to private entities: independent experts or teams of consultants (referred to as *outsourcing*). Assessments and reports drawn up by independent experts are advisory in nature as these experts cannot take binding decisions.

12 If a Member State was to assign regulatory functions to more than one authority, the said State is obliged to publicly announce the scope of the activities performed by these authorities and to ensure their cooperation (Article 3(4) of the Framework Directive).

13 Article 3(2) of the Framework Directive; the Court of Justice confirmed in its judgements that it is against EU law to combine regulatory and operator competences in one authority; ECJ judgement of 19 March 1991C-202/88 France v. Commission, ECR I-1223, items 51-52; ECJ judgement of 13 December 1991 C 18/88*GB-Inno-BM*, ECR I-5941; ECJ judgement of 27 October 1993 C-46/90 and C-93/91 *M. le Procureur du Roivs.J.-M. Lagauche et autres*, ECR I-05267.

government[14]. In order to avoid the capture (*capture theory of regulation*)[15] of the regulator by politicians (*political capture*), or by telecoms operators (*industry capture*), Member States ensure the independence of NRAs using solutions concerning, for instance, the composition of such authorities and the method of appointing and dismissing their members[16].

The Member States were also charged with ensuring that NRAs exercise their power "impartially, transparently and in a timely manner" and "have adequate financial and human resources to carry out the task assigned to them."[17] In particular, the Framework Directive[18] establishes the requirement that NRAs must have separate annual budgets which are made public. They must also be provided with adequate financial and human resources to enable them to actively participate in the Body of European Regulators for Electronic Communications (BEREC)[19].

In Poland, the regulatory authority is the President of the Office of Electronic Communications (UKE).

3. System position of the President of UKE

3.1. President of UKE as a public administration authority

Regulatory authorities established by Polish legislation are either explicitly referred to in the acts as regulatory authorities or they are not

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14 Article 3(3)(a) of the Framework Directive added by the Directive 2009/140/EC of the European Parliament and of the Council of 25 November 2009, OJ 2009, L 337/37, ensures independence of NRAs responsible for the analysis of markets and dispute resolution, by prohibiting binding instructions or directions related to the exercise of their powers; M. Swora, *Niezależne organy admnistracji (Independent administration bodies)*, Warsaw 2012, p. 63; R. Stasikowski, *Funkcja regulacyjna administracji publicznej. Studium z zakresu nauki prawa administracyjnego oraz nauki administracji (The regulatory function of public administration. A study in the science of administrative law and administration)*, Bydgoszcz–Katowice 2009, p. 209.

15 A. Szablewski, *Regulacyjny paradoks pierwszej fazy liberalizacji sektorów sieciowych – perspektywa historyczna (The regulatory paradox of the first stage of the liberalisation of the network sectors)*, in: Problemy Zarządzania 2004, No. 3, p. 144.

16 M. Zdrojewski, *Urząd regulacyjny w sektorze telekomunikacji (An office of the regulatory authority in the telecommunications sector)*, Kwartalnik Prawa Publicznego 2003, No. 2, p. 90.

17 Article 3(3) of the Framework Directive.

18 Article 3(3)(a) of the Framework Directive.

19 Regulation 1211/2009/EC of the European Parliament and of the Council of 25 November 2009establishing the Body of European Regulators for Electronic Communications (BEREC) and the Office, OJ 2009, L 337/1.

called regulatory authorities, but play this function[20]. According to Article 190(1) of the Telecommunications Law ("TL"), the President of UKE is the regulatory authority of the telecommunications and postal services market, falling therefore into the first category. The President of the Office of Rail Transportation and the President of the Energy Regulatory Office[21] fall into the second group.

There is no doubt that NRAs belong to the group of state bodies. However, the specific nature of some of their rights, such as imposing fines and settling disputes, could be an argument speaking for their judiciary nature, or for placing them outside the three branches of government. Still, it should be assumed that in order for a given body to be considered an administrative authority, its activities need not exclusively take forms typical for administrative law. It is enough if it is determined by administrative law[22] or it leads to the implementation of administrative law[23]. An analysis of the activities of the President of UKE justifies the statement that the functions fulfilled by this authority are of a typically administrative nature. They consist of organising the implementation of State tasks in the area of telecoms policy and are primarily discharged by way of individual decisions typical for public administration[24].

In addition, the provisions under which this authority is established explicitly classify it as an administrative authority. Article 109(2) of the Act of 21 July 2000 – Telecommunications Law[25] established the national authority responsible for regulating the Polish telecommunications market (the President of the Office of Telecommunications Regulation, URT, *Polish original abbreviation*) and, since 1 April 2001, also the national postal market (the President of the Office of Telecommunications and Post Regulation,

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20 T. Skoczny, *Stan i tendencje rozwojowe prawa administracji regulacyjnej w Polsce (The state and trends in the development of regulatory administration law in Poland)*, in: *Ius Publicum Europeum*, H. Bauer, P.M. Huber, Z. Niewiadomski (eds), Warsaw 2003, p. 148.

21 Article 21(1) of the Act of 10 April 1997 the Energy Law (Journal of Laws of 2012, item 1959 as amended) provides that "The tasks of the regulation of the fuel and energy sector and the tasks aimed at the promotion of competition shall rest upon the President of the Energy Regulatory Office".

22 J. Filipek, *Prawo administracyjne. Instytucje ogólne (Administrative law. General institutions)*, Kraków 1995, p. 201.

23 J. Boć, *Struktury (Structures)*, in: *Administracja publiczna (Public administration)*, J. Boć. (ed.), Wrocław 2003, p. 156.

24 I. Kawka, *Telekomunikacyjne organy regulacyjne w Unii Europejskiej. Problematyka prawna (Regulatory authorities of the telecommunications sector in the European Union. Legal aspects)*, Kraków 2006, p. 169.

25 Act of 21 July 2000 – Telecommunications Law, Journal of Laws No. 73, item 852 as amended.

URTiP, *Polish original abbreviation*)[26]. According to this provision, the President of the Office of Telecommunication and Post Regulation is a central-level government authority. The current TL Act[27], which replaced the Telecommunication Law Act of 2000, retains the same definition of the place of the President of the Office of Electronic Communication[28] in the organisational structure of Poland's public administration. Similarly, the remaining regulatory authorities – the President of the Office of Rail Transportation and the President of the Energy Regulatory Office – are also classified as central-level government authorities[29].

3.2. President of UKE as a central-level government authority

The President of UKE is a government authority of the central level, unlike regional government administration. The doctrine of administrative law[30] divides authorities whose competence to act covers the entire territory

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[26] This change was introduced by Article 6 of the Act of 1 March 2002 on changes to the organisation and operation of central-level government authorities and their subordinate units as well as amending certain acts, Journal of Laws of 2002, No. 25, item 253.

[27] Act of 16 July 2004 – Telecommunications Law, Journal of Laws No. 171, item 1800 as amended.

[28] The change of the name of the President of URTIP to the President of UKE took place on 14 January 2006 under the Act of 29 December 2005 on transformations and modifications to the division of tasks and powers of state bodies competent for communications and broadcasting. Accordingly, a new central-level government administration authority – the President of the Office of Electronic Communications (President of UKE) – was established in place of the central-level government administration authority, the President of the Office of Telecommunications and Post Regulation (President of the URTiP) which ceased to exist on 13 January 2006.

[29] The basic split of public administration in Poland is into government administration and local self-government administration, based on the criterion of the nature of the administrative authority. What distinguishes government administration from local self-government is its direct (hierarchical) subordination to the Council of Ministers, the Prime Minister and individual ministers. Pursuant to Article 146(3) of the Polish Constitution, the Council of Ministers leads the entire government administration, i.e. the ministers and central authorities as well as regional authorities (e.g. voivodes). Local self-government, in contrast, is subordinated to the local community and represents its interests. It is supervised only with regard to legality, by the Prime Minister (Article 171 of the Polish Constitution) and by the voivode; L Garlicki, *Polskie prawo konstytucyjne (Polish constitutional law)*, Warsaw 2002, p. 317; P. Sarnecki, *Zakres działania i funkcje Rady Ministrów (The operational scope and functions of the Council of Ministers)*, in: *Rada Ministrów: organizacja i funkcjonowanie (The Council of Ministers: Organisation and operation)*, A. Bałaban (ed.), Kraków 2002, p. 181 ff.

[30] J. Boć, *Struktury... (Structures…)*, p. 161; W. Dawidowicz, *Zagadnienia ustroju administracji państwowej w Polsce (Aspects of the state administration system in Poland)*, Warsaw 1977,

of the State into supreme and central ones. The main feature distinguishing central-level government authorities from supreme ones is that their heads do not belong to the Council of Ministers. Additionally, their establishment is not foreseen in the Constitution but in legislation.

There are very different reasons for establishing central-level government authorities in Poland, including a delay in modernising the structure of ministries. Thus, without changing the traditional split of authorities between ministries, new organisational structures were established for newly arising, politically significant tasks. Another reason was sometimes the intention to guarantee fixed funds to the distinguished authorities, regardless of governmental policy and budgetary discussions[31] and to create specialised, independent organisational units dealing with a given area[32]. In certain situations, one of the many reasons to establish a given authority was an EU law requirement, as in the case of the President of UKE.

Central-level authorities are of a varied nature. However, several features are characteristic and common such as the fact they are usually single person entities established under an act of Parliament. Every central-level authority is supervised by some supreme authority, usually the Prime Minister or the most competent minister[33]. The competencies of central-level authorities defined in legislative acts are not general but restricted to a specific area. These competencies do not include the right to promulgate acts of law (regulations)[34].

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p. 55; E. Ochendowski, *Centralne organy administracji (Central administration bodies)*, in: *System prawa administracyjnego (The System of administrative law), Vol. II*, T. Rabska, J. Jendrośka, J. Łętowski (eds), Wrocław–Warszawa–Kraków–Gdańsk 1977, p. 6 ff.; I. Lipowicz, *Ustrój administracji rządowej (The system of governmental administration)*, in: *Prawo administracyjne. Część ustrojowa*. *(Administrative law. The system)*, Z. Niewiadomski (ed.), Warsaw 2002, p. 219 ff.; E. Ura, E. Ura, *Prawo administracyjne (Administrative law)*, Warsaw 2001, p. 114.

31 I. Lipowicz, *Ustrój... (The system…)*, p. 220.

32 The establishment of central-level government authorities was mainly due to the principle of the separation of administration whereby establishing separate divisions of special administration assures their high level of professionalism, and focus on the specific purpose of their activity...; J. Filipek, *Prawo administracyjne… (Administrative law...)*, p. 70.

33 Pursuant to Article 16 of the Act on divisions of government administration, the President of UKE is supervised by the minister competent for communications issues; E. Zieliński, *Administracja rządowa w Polsce (Governmental administration in Poland)*, Warsaw 2001, p. 75.

34 J. Zimmermann, *Prawo administracyjne (Administrative law)*, Kraków 2005, pp. 185–186; C. Martysz, *Centralne organy administracji: pojęcie struktura i pozycja w postępowaniu administracyjnym (Central administrative bodies: the notion, structure and position*

3.2.1. Monocratic nature of the Polish regulator

Poland adopted the model of a single person regulatory authority in the form of the President of UKE supported by the structure of that very office (Office of Electronic Communications). In accordance with Article 2(2) of the UKE Statute[35], the President discharges his statutory tasks with the help of a Deputy President, a director general and unit managers. The Deputy President helps the President of UKE and can issue administrative decisions only under an authorisation issued by the President and in the latter's name[36]. The form of single person authorities supported by the employees of their subordinate offices is also true of other Polish NRAs (President of the Energy Regulatory Authority, the President of the Office of Rail Transportation). The existence of monocratic authorities is a characteristic feature of Polish sector specific regulation[37]. The Polish legislature has chosen a solution that prefers the speed, flexibility and cohesion of the decision-making process – features of the monocratic authority operation – at the cost of a lower susceptibility to influence, and a greater stability of the regulatory process (members of a collegial body can be replaced gradually, not all at once) guaranteed by collegial bodies[38]. This does not seem like a correct solution for regulatory authorities which should be characterised by independence in their constitution. In addition, in regulatory operations there is a need to account for various, frequently conflicting interests of individual economic operators. It is thus necessary to take balanced decisions, which requires the consideration of different views. This can only be ensured by a collegial body.

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in administratve proceedings), in: *Między tradycją a przyszłością w nauce prawa administracyjnego. Księga jubileuszowa dedykowana Profesorowi Janowi Bociowi (Between tradition and the future in the science of administrative law. The Jubilee Book dedicated to Professor Jan Boć)*, J. Supernat (ed.), Wrocław 2009, p. 468 ff.

35 Regulation No. 7 of the Minister of Transport of 11 May 2007 to grant a statute to the Office of Electronic Communications, Official Journal of the Ministry of Transport of 21 May 2007 as amended.

36 M. Zdrojewski, *Urząd… (An Office…)*, p. 96; Authorisations are issued under Article 268(a) of the Act of 14 June 1960 – Administrative Procedure Code (i.e. Journal of Laws of 2000, No. 98, item 1071 as amended) and Article 2(2) of the UKE Statute.

37 W. Hoff, *Polski model regulacji na tle porównawczym (The Polish regulatory model in a comparative perspective)*, Problemy Zarządzania 2004, No. 3, p. 137.

38 J. Boć, *Administracja publiczna… (Public administration…)*, pp. 158–160; E. Zieliński, *Administracja rządowa… (Governmental administration…)*, pp. 33–36; H. Intven, J. Oliver, E. Sepúlveda, *Overview…*, op. cit., p. 8; T. Schwarz, D. Salota, *Telecommunications Legislation in Transitional and Developing Economies*, World Bank Technical Paper No. 489, 2000, p. 26, www.worldbank.org

3.2.2. Supervision of the President of UKE

At the time when the Telecommunications Law Act of 21 July 2000 established the regulatory authority for the telecommunications market, the President of the then URT was supervised by the Prime Minister[39]. This meant that the tasks of the President of URT were excluded from the communications sector and only the Prime Minister could issue orders and guidelines to the President of URT[40]. Currently, pursuant to Article 16(2) of the Act on divisions of government administration, the President of UKE is supervised by the minister competent for communications matters – the Minister of Administration and Digitalisation.

The general rules of the relationship between a minister and a central-level government authority supervised by this minister, applicable to the President of UKE, are laid down in the Act on the Council of Ministers[41]. Supervision takes the form of influencing the staffing of executive positions, defining the organisational structure of the central-level authority and determining the directions of its activity[42].

Article 34(a)(1) of this Act on the Council of Ministers provides that a minister may issue binding guidelines and orders to the heads of central-level authorities in order to adjust the rules and directions of operation of their subordinate or supervised central-level government authorities to the policy defined by the Council of Ministers. The right to issue such guidelines means the entitlement to define general rules of executing administrative tasks[43]. Neither guidelines nor orders may concern decisions on the substance of a case resolved by an individual

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39 Pursuant to the then effective Article 33(a)(1)(9) of the Act on divisions of government administration, central authorities are subordinated to the Prime Minister (extra-ministerial authorities) and not to ministers (ministerial authorities) due to various reasons: the intention to avoid excessive expansion of ministries, the strength of links between the tasks of the authorities and the implementation of governmental policies, the intention to raise the importance of an authority by subordinating it directly to the Prime Minister. E. Zieliński, *Administracja rządowa w Polsce (Governmental administration in Poland)*, Warsaw 2001, p. 75.

40 S. Piątek, *Prawo telekomunikacyjne. Komentarz* (*Telecommunications Law. Commentary)*, Warsaw 2001, p. 746.

41 Act of 8 August 1996 on the Council of Ministers, Journal of Laws of 1996 No. 106, item 492 as amended.

42 M. Cherka, M. Wierzbowski, *Centralne organy administracji państwowej (The central bodies of State administration)*, in: *System prawa administracyjnego. Podmioty administrujące (The system of administrative law. The administrators)*, R. Hauser, Z. Niewiadomski, A. Wróbel (eds), Warsaw 2011, p. 280 ff.

43 S. Piątek, *Prawo telekomunikacyjne. Komentarz (Telecommunications Law. Commentary)*, Warsaw 2013, Legalis/el.

regulatory decision. So far there have been no reports of the exercise of the competence to issue guidelines and orders to the President of UKE. It seems that if such were issued, they would breach the prohibition, laid down by Article 3(3)(a) of the Framework Directive, of taking instructions from any other body in relation to matters governed by EU Directives. In other matters, guidelines and orders issued by the Minister in relation to the President of UKE arecompatible with EU law[44].

Neither can the Minister repeal a decision issued by the President of UKE in the course of the instance. In accordance with Article 206 of the TL the decisions: 1) which ascertain an entity's or entities' significant market power, 2) on the imposition, withdrawal, amendment or cancellation of regulatory obligations, 3) on the imposition of penalties, 4) referred to in Article 43a of the TL (detailed conditions and commitments for the performance of regulatory obligations) and in Article 201 (3) of the TL (decision concerning, inter alia, the imposition offinancial penalties on inspected entity which does not remove indicated irregularities), 5) issued in disputes, excluding decisions on a general exclusive frequency licence following a tender, an auction or a contest and the decision finding the tender, auction or contest unresolved,6) referred to in the Act of 7 May 2010 on supporting the development of telecommunications networks and services- are subject to appeal to the District Court in Warsaw – the Court for Competition and Consumer Protection. In the case of other decisions the parties may submit a request for reconsideration by the President of UKE, and then a complaint to an administrative court. This is because decisions of the President of UKE cannot be appealed to the minister as its supervising authority. In the case of the Polish regulatory authority, this forms the essence of its independence from political power, that is, from the government or the Minister competent for communications matters[45]. Seeing as Poland's telecommunications policy is determined by the competent minister, this is the only aspect in which the minister can influence the activities of the President of UKE. The President of UKE actively regulates the market (Article 190(1) of the TL explicitly defines the President of UKE as the regulatory authority)[46], while the minister

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44 Ibidem.

45 T. Skoczny, *Ochrona konkurencji a prokonkurencyjna regulacja sektorowa (Competition protection and sectoral regulation supporting competition)*, Problemy Zarządzania 2004, No. 3, p. 19.

46 The scope of activities of the President of UKE shall include, *inter alia*: the performance of tasks within the scope of telecommunications services markets regulation and control, the management of frequency, orbital and numbering resources and monitoring the

only indirectly affects the functioning of the market for instance by issuing normative acts (regulations)[47].

The President of UKE is also independent of other administrative authorities. It should be noted, however, that the tasks of the President of UKE are not: the application of competition law in the telecommunications sector (competence of the President of the Office of Competition and Consumer Protection, UOKiK)[48]and the regulation of content transmitted by signals on electronic communications networks(competence of the National Broadcasting Council, KRRiT)[49].The necessity of cooperation with these authorities affects the independence of the President of UKE.

The TL adds details to the provisions of the Act on the Council of Ministers concerning the relations between the minister competent for communications and the President of UKE[50]. It states that "the President of UKE provides the minister competent for communications matters with an annual report of his/her regulatory activities and the implementation of the government's policy and the Community telecommunications policy for the previous year by 30 April". The minister competent for communications matters issues an opinion on this report within one month of its presentation by the President of UKE and forwards it together with the report to the Prime Minister. Upon demand, the President of UKE is also obliged to provide the minister competent for communications matters with information about the President's activities[51].

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compliance with electromagnetic compatibility requirements; the preparation of draft legal acts with regard to communications indicated by the Minister competent for communications; the analysis and assessment of telecommunications and postal services markets functioning; resolving disputes between telecommunications undertakings (Article 192 of the TL).

47 A. Monarcha-Matlak, *Obowiązki administracji w komunikacji elektronicznej (The responsibilities of administration in electronic communications)*, Warsaw 2008, p. 90.

48 The President of the Office of Competition and Consumer Protection is a central government administration authority competent for competition and consumer protection; Act of 16 February 2007 on competition and consumer protection, Journal of Laws of 2007 No. 50, item 331 as amended.

49 The main task of the Council is to protect: freedom of speech and broadcaster independence, interests of viewers and listeners, open and pluralistic character of radio and television; Article 213 of the Constitution of the Republic of Poland of 2 April 1997, Journal of Laws of 1997 No. 50, item 331 as amended; Broadcasting Act of December 29 1992, Journal of Laws of 2004 No. 253, item 2531 as amended.

50 Article 198 of the TL.

51 Article 190(2) and 190(2)(a) of the TL.

Neither the breaching of the government's telecommunications policy nor a negative opinion of the minister about the report may constitute the grounds for dismissing the President of UKE. The provisions of Article 190 2(a) of the TL entitles the minister to demand information about the NRA's operations from the President of UKE. This provision does not rule out the presentation of information on the status of individual cases, including cases settled by way of an administrative decision[52].

Some solutions concerning the system position of the President of UKE have been regulated separately in the TL Act. This concerns, in particular, the influence of the minister competent for communications on staffing executive positions. According to Article 190(4)TL: "The President of UKE shall be appointed by the Sejm (the lower chamber of the Polish parliament) with the Senate's (its upper chamber) consent at the request of the Prime Minister". Taking into account the significant level of independence of the President of UKE from current governmental policy, choosing this solution significantly strengthens the democratic mandate of the Polish telecoms regulator. In order to ensure that the function of the President of UKE is performed in a stable way by a specific individual, the legislature has decided that this office should be staffed for a given term of office and defined the premises for dismissing its holder. The term of office of the President of UKE is 5 years. After its expiry, the President of UKE continues in his/her function until a successor is appointed. The TL Act enumerates the situations where the President of UKE may be dismissed before the end of his/her term. These are as follows:

1) a gross violation of the law;
2) a final court sentence for committing an intentional offence or a fiscal offence;
3) a sentence barring them from managerial positions or functions of special responsibility in the state administration being pronounced against them;
4) an illness permanently preventing them from performing their duties;
5) their resignation. (Article 190(4) of the TL).

Information on the dismissal of the President of UKE, including the reasons for their dismissal, is publicly announced by publishing its contents on the website of the Public Information Bulletin of the minister competent for communications (Article 190(4)(b) of the TL).

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[52] S. Piątek, *Prawo telekomunikacyjne. Komentarz (Telecommunications Law. Commentary)*, Warsaw 2013, Legalis/el.

The minister competent for communications, at the request of the President of UKE, shall appoint the Deputy President of UKE from amongst persons selected by means of an open and competitive recruitment process (Article 190(8) of the TL). The minister may also dismiss them, but only in situations strictly defined in the TL Act. The premises for dismissal are listed in Article 190(4) of the TL – they are the same as for dismissing the President of UKE. The Deputy President can also be dismissed from his post, should he fail to meet the requirements set out in the TL[53].

In addition, the Minister competent for communications confers, by means of an order, a statue upon UKE, specifying its organisational units. The statute of UKE may provide for the establishment of regional organisational units by the President of UKE. The latter, while establishing a regional organisational unit, shall specify its seat, material and territorial jurisdiction, taking account of the basic territorial division of the country (Article 193(3) of the TL).

3.2.3. Lack of competence of the President of UKE to issue general legal acts

As a central-level government authority, the President of UKE has no legislative competences nor has he/she the right to put forward a legislative initiative. Literature on this subject rightly considers this to be a weakness of the Polish telecoms regulator[54]. Regulations issued by the Minister competent for communications frequently very meticulously regulate the rights and duties of organisations operating in the telecommunications market and lay down procedural and substantive-law conditions for the activities of the President of UKE[55]. The scope of the activities of the President of UKE includes only the preparation of draft legal acts with regard to communications indicated by the Minister competent for communications (Article 192(1)(3) of the TL).

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[53] Pursuant to Article 190(8)(a) of the TL: "The post of the Deputy President of UKE may be held by a person who: 1) has a master's degree or its equivalent; 2) is a Polish citizen 3) enjoys full public rights; 4) has not been sentenced by a valid court sentence for an intentional offence or an intentional fiscal offence; 5) has managerial competences; 6) has at least 6 years of employment, including at least 3 years in a managerial position; 7) has education and knowledge of issues within the competence of the President of UKE."

[54] K. Jaroszyński, M. Wierzbowski, *Organy regulacyjne* (*Regulatory Authorities*), in: *System prawa administracyjnego. Podmioty administrujące (The system of administrative law. The administrators)*, R. Hauser, Z. Niewiadomski, A. Wróbel, Warsaw 2011, p. 343.

[55] K. Jaroszyński, M. Wierzbowski, *Organy regulacyjne… (Regulatory authorities…)*, p. 343.

4. Organisational guarantees of the independence of the President of UKE

The organisational and financial autonomy of NRAs (providing them with resources, staff, specialised knowledge and funds) is considered to provide the fundamental guarantee of their independence[56].

4.1. Human resources

The President of UKE performs his/her tasks through the Office of Electronic Communications. Under Article 3(2) of the Statute of UKE, the President of UKE grants organisational by-laws to the Office at the request of the director general. These by-laws define the internal organisation of the Office, the detailed scope of the tasks of its organisational units and the method of their operation. UKE's organisational units are as follows: the Office of the President, bureaus, departments and regional organisational units (branch offices)[57].

Regardless of establishing regional organisational units, UKE has a single-step structure. This does not mean that the statutory competences of the President of UKE are transferred to a lower level[58]. In accordance with Article 5(2) of the UKE Statute, directors of regional branches may issue administrative decisions on behalf of the President of UKE only after receiving separate authorisation. Currently, there are 16 regional branches of UKE in operation. They mainly receive applications for entry in the register of entrepreneurs, for issuing, amending and withdrawing selected radio licences. They also audit compliance with regulations, decisions and resolutions on postal activities, telecommunications, meeting electromagnetic compatibility requirements, managing frequencies and numbering resources as well as the fulfilment of fundamental requirements by apparatuses, including telecommunications terminals and radio devices on the market[59].

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56 F. Gilardi, *Policy Credibility, Interdependence, and Delegation of Regulatory Competencies to Independent Agencies: A Comparative Empirical Consideration*, an article presented at the conference: *National Regulatory Reform in an Internationalised Environment*, Grenoble 2001, p. 9, available on-line at http://www.essex.ac.uk/ECPR/events/jointsessions/paperarchive/grenoble/ws20/gilardi.pdf.

57 Order No. 14 of the President of the Office of Electronic Communications of 16 July 2010 granting the organisational bylaws to the Office of Electronic Communications.

58 W. Hoff, *Polski model... (The Polish model…)*, op. cit., p. 132.

59 Order No. 14 of the President of the Office of Electronic Communications of 16 July 2010 granting the organisational bylaws to the Office of Electronic Communications, Article 43.

Apart from the President of UKE and his/her deputy, the management of UKE also includes the Director General. The position of the Director General is a higher post of civil service, just as the positions of directors of particular departments and their deputies at UKE[60]. The idea which formed the basis for establishing the civil service corps is laid down in Article 153 of the Polish Constitution of 1997. It states that in order to ensure the professional, diligent and politically neutral performance of State tasks, work at government administration offices is provided by the civil service corps. This was to ensure the permanent work of highly qualified clerical staff and to prevent constant changes in public positions following changes in the governing parties[61].

According to the Civil Service Act, the competencies of the Director General include, *inter alia*, ensuring the operation and the continuous work of the authority, the conditions for its activity, as well as the organisation of work, particularly by exercising direct supervision of its organisational units with regard to the correct performance of tasks defined by the government administrative body[62], namely the President of UKE. The Director's competences also include executing labour law actions for persons employed at the authority and the discharge of the tasks of the head of the authority if this is provided for by separate regulations, as well as other tasks authorised by the head of the authority. Pursuant to Article 25(3) of the Civil Service Act, the Director General of UKE is directly subordinated to the head of the authority, namely the President of UKE.

However, the basic problem of not just UKE, but of other regulatory authorities also operating in individual Member States, is to recruit and retain highly qualified staff. This is mainly due to the fact that private telecommunications companies pay very well. Low salaries make it difficult to hire competent staff and subsequently cause them to move to private companies[63].

When the Act of 2000 first came into force, it provided for the tying of URT salaries with the average pay in the telecommunications sector. Article 112(4) of this Act stipulated[64] that the amount of funds for the salaries of the President of URT, its vice-presidents and its employees would

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60 UKE, as a government administration office, is subject to the Act of 18 December 1998 on civil service, Journal of Laws of 1999 No. 49, item 483 as amended.

61 J. Boć, *Kadry (Human resources)*, in: *Administracja publiczna... (Public administration…)*, p. 266.

62 Civil Service Act... Article 20(1)(a).

63 M. Zdrojewski, *Urząd... (An office…)*, p. 101.

64 This provision was amended by the Act of 21 Dec. 2001 amending the Acts: ... Telecommunications Law..., Journal of Laws No. 154, item 1802.

be calculated in relation to the salaries paid in the telecommunications sector. Under current laws, the President of UKE and the staff of UKE are all paid under general rules. The only alternative to creating a specialised, permanently employed staff at the regulatory authority is to use external specialists as consultants[65].

4.2. Financing

Recruiting highly qualified staff and external consultancy requires appropriate funds to be provided to the NRA. Two models of NRA financing can currently be distinguished. According to the first, NRAs' expenses are paid from telecommunications fees the authorities collect. Alternatively, the NRAs are financed from the state budget. The first system ensures greater independence of NRAs from ministries. In addition, telecommunications fees are a sufficient source of revenue for regulators allowing them to carry out effective regulatory activities. By contrast, the state budget frequently fails to guarantee such funds. This realisation is obvious from the example of the Polish regulatory authority. UKE manages its financial activities in accordance with the principles applicable to state budget-funded units (Article 193 of the TL). These principles are laid down by the Act on public finance[66]. Its Article 18 states that budget-funded units pay their expenses directly from the state budget and transfer revenue collected to the account of the state budget. The financial activities of UKE are carried out based on an income and expenses plan, the amount of which is annually defined by the Budget Act. Under the 2012 Budget, the budgetary income of UKE was PLN 549,602,000 (130,938,676 EUR) and the expenditure was PLN 88,192,000 (21,011,102 EUR)[67].

5. Operational principles governing the post of the President of UKE

5.1. Impartiality

There are two aspects related to the impartiality of NRAs. The first refers to organisational guarantees concerning their independence from

65 H. Intven, J. Oliver, E. Sepúlveda, *Overview…*, pp. 1–11.

66 Act of 26 November 1998 on public finance, Journal of Laws of 2003 No. 15, item148 as amended.

67 The plan for 2012 budgetary income and expenditure for part 76 – UKE in accordance with the 2012 Budget Act (Journal of Laws No. 54, item 273), on-line: http://www.uke.gov.pl/files/?id_plik=10161.

both political influence and that exerted by business operators active on the market. The other aspect concerns legal guarantees that ensure the issue of impartial verdicts in individual administrative cases in relation to specific persons fulfilling the function of administrative bodies.

Polish administrative law provides for full impartiality in case settlement to be ensured by the institution of exclusion. It substantiates the two general principles expressed in the Code of Administrative Procedure[68] (CAP): the objective truth and deepening the public's trust towards state bodies[69]. Article 24 of the CAP provides for the possible exclusion of: employees of public administration bodies, public administration bodies and members of collegial bodies, should the circumstances suggest that their impartially cannot be ensured e.g. the employee is too familiar with a party to the proceedings.

5.2. Transparency

5.2.1. Consultation with interested parties

In EU law, the consultation mechanism has been specified in Article 6 of the Framework Directive. Pursuant to its provisions, Member States are obliged to ensure that where NRAs intend to take measures which can have a significant impact on the relevant market, they give interested parties the opportunity to comment on the draft measure within a reasonable period[70].

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[68] The Code of Administrative Procedure Act of 14 June 1960, Journal of Laws 2000 No 98, item 1071 as amended.

[69] W. Chróścielewski, *Organ administracji publicznej w postępowaniu administracyjnym (Public administration bodies in administrative proceedings)*, Warsaw 2002, p. 82 ff.; on the institution of exclusion in administrative proceedings see also: W. Dawidowicz, *Zarys procesu administracyjnego (Outline of administrative proceedings)*, Warsaw 1989, p. 22 ff.; B. Adamiak, J. Borkowski, *Postępowanie administracyjne i sądowoadministracyjne (Administrative and administrative judicial proceedings)*, Warsaw 2003, p. 132 ff.

[70] Moreover, apart from the general obligation to hold consultations, EU telecommunications law provides for the following circumstances where NRAs must seek comments from interested parties before issuing decisions:

- before imposing on an undertaking the sharing of facilities or property (including physical co-location) or taking measures to facilitate the coordination of public works (Article 12 (2) of the Framework Directive),
- before limiting the scope of the rights to use radio frequencies (Article 7 of the Spectrum Decision),
- before deciding not to impose obligations in order to ensure that public pay phones are provided (Article 6 of the Universal Service Directive),
- before amending the rights, conditions and procedures concerning general authorisations and rights of use or rights to install facilities (Article 14 of the Authorisation Directive).

In such matters, NRAs are obliged to hold consultations which are primarily meant to determine the views and preferences of those interested in the settlement delivered by the given NRA.

Except for situations explicitly mentioned in EU law, the assessment of the impact a given regulatory measure has on the market may be entrusted to a regulator. The Polish legislator has, however, not adopted this solution. The TL Act enumerates cases subject to consultations. The failure of the President of UKE to hold consultations despite a statutory obligation results in the courts repealing the decision when appealed[71] seeing as this is a procedural defect which cannot be remedied at the stage of court proceedings.

The Framework Directive does not specify the date by which the interested parties should express their views. Under its Article 6, that time period should be reasonable[72]. Article 16 (2) of the TL Act reads that unless the competent authority sets a longer deadline, the consultative process lasts 30 days.

In order to implement Article 6 of the Framework Directive as regards its provisions on a single information point guaranteeing access to all on going consultations, Article 17(a) was added to the TL Act in an amendment of 2012[73]. This point is specified as the website of UKE's Public Information Bulletin (BIP UKE) where the unrestricted positions of the participants are published, as well as any other information related to the consultative process, including public notifications concerning its launch, projects consulted, and additional information documents. Data related to consultations already completed can also be made available on this website[74].

5.2.2. Making information available

Another tool aimed at ensuring the transparency of the actions taken by NRAs is the provisions of the electronic communications directives

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71 The judgement of the Appellate Court of Warsaw – Sixth Civil Division of 30 January 2012 VI ACa 1004/11.

72 The duration of the consultation is in turn specified in the Authorisation Directive when it comes to decisions under its Article 14 concerning the amendment of rights, conditions and procedures concerning general authorisations and rights of use or rights to install facilities. The period of time specified therein is no less than four weeks.

73 Article 17a was added by the Act of 16/11/2012 amending the Telecommunications Law Act and certain other acts (Journal of Laws of 2012 item 1445), which entered into force on 21.01.2013.

74 S. Piątek, *Prawo telekomunikacyjne. Komentarz (Telecommunications Law. Commentary)*, Warsaw 2013, Legalis/el.

as regards making information available to the public[75]. Access to public information is regulated in Poland by the Act of 6 September 2001 on access to public information[76]. It obliges public administration bodies, including the President of UKE, to make available all information concerning public matters[77].

The obligation to provide information expressed in the Act on access to public information is supplemented by the TL Act. The latter obliges the President of UKE to publish BIP UKE which must contain, *inter alia*, the following information: information on consultations, annual reports on the state of the telecommunications market and the protection of the interests of telecommunications users, or a list of telecommunications operators holding a significant market position as well as decisions imposing regulatory obligations upon them.

The publication of information concerning the operations of the President of UKE, including both annual general reports and those focusing on specific issues, is one of the tools designed to ensure transparency in the regulator's actions, common to all NRAs[78]. This limits legal uncertainty on the part of economic operators, allows them to expect regulatory decisions consistent with a given strategy and to prepare for them accordingly.

5.2.3. Decision justification

The transparency of the regulatory process also requires the NRA to make its decisions available and, in particular, to justify them. The obligation to justify administrative decisions is nothing new for Polish law. Article 107(1) of the Code of Administrative Procedure states that a decision should contain its legal and factual justification. This requirement can be ignored only if the decision fully accommodates a party's request (this,

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75 Article 5(4) of the Framework Directive requires that NRAs publish such information as would contribute to an open and competitive market. Regulatory authorities shall also publish the terms of public access to information. The obligations related to making information available are also provided for in specific telecoms directives: the Authorisation Directive (Article 15), the Access Directive (Article 15), and the Universal Service Directive (Article 21).

76 Journal of Laws No112, item 1198, as amended.

77 The types of public information subject to disclosure are listed in Article 6 of the Polish Public Information Act.

78 A. Laget-Annamayer, *La régulation des services publics en réseaux. Télécommunications et électricité, Bruxelles*, Paris 2002, p. 384; I Kawka, *Zasady dobrego rządzenia w prawie Unii Europejskiej. Sektory infrastrukturalne (The good governance principles in EU law. The infrastructure sectors)*, Kraków 2011, p. 184.

however, does not apply to decisions which settle conflicting interests of multiple parties or those issued as a result of an appeal)[79].

5.3. Liability

The independence of NRAs does not mean that they do not carry legal responsibility for their actions. This is primarily manifested by the possibility of challenging the decision delivered by NRAs before independent bodies, most commonly a court of law[80].

Pursuant to Article 206 (2) of the TL Act, decisions in cases related to the determination of significant market position, imposition of regulatory obligations and penalties as well as those issued in cases of disputes can be appealed to the Regional Court in Warsaw — the Court for Competition and Consumer Protection[81]. Other decisions issued by the President of UKE can be contested before administrative courts.

Administrative courts will examine the actions taken by public administration bodies only in terms of their legality. Should they find that an act or action of such a body was in breach of the law, they will declare it null and void or repeal it[82]. In principle, they then have cassation authority[83].

By contrast, the Court for Competition and Consumer Protection has at its disposal the very same tools for settling cases as civil courts of first instance pursuant to the Code of Civil Procedure (CCP)[84]. As such, it can deliver a judgement on the merits of the case as well as change the appealed decision in full or in part. Its verdicts can be contested just like any other judgement in civil cases (appeal and complaint as well as cassation in the case of second-instance courts)[85]. The proceedings before this court follow

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79 Article 107(4) of the CAP.

80 Article 4 of the Framework Directive obliges Member States to ensure that effective mechanisms exist for lodging such an appeal.

81 In the Polish legal system control over administrative operations (including the operation of the President of UKE), pursuant to Article 184 of the Constitution is exercised by the Supreme Administrative Court and other administrative courts. Common courts of law may exercise such control only to a limited scope in cases specified in acts of law.

82 Article 145(1) of the Act on proceedings before administrative courts of 30 August 2002, Journal of Laws 2002, No 153, item 1270.

83 T. Woś, *Wstęp (An Introduction)*, in: *Postępowanie sądowoadministracyjne (Administrative judicial proceedings)*, T. Woś (ed.), Warsaw 2004, p. 25.

84 The Code of Civil Procedure Act of 17 November 1964, Journal of Law 1964, No 43, item 296.

85 The amendment of the CCP in this regard was necessitated by the verdict expressed by the Constitutional Court concerning the incompatibility of Article 479^{31} with the

the provisions of the CCP in commercial cases. Aside from complaints against decisions taken by the President of UKE which are specified in Article 206(2) of the TL Act, the Court for Competition and Consumer Protection also examines appeals against decisions issued by the President of the Office of Competition and Consumer Protection as well as those against decisions by other Polish regulators[86].

6. Conclusion

In accordance with the requirements of EU law, the President of UKE is legally separate and functionally independent from operators providing services and networks in the Polish telecommunications market. Primarily, the regulator has no links to the ex-national monopoly operator – the incumbent Telekomunikacja Polska S.A.[87] Objections in this regard against Poland were formulated by the European Commission in its complaint of 2008[88]. The European Commission's accusations concerned a period of time when the list of premises justifying the dismissal of the President of UKE was removed from Polish legislation[89]. The Commission believed that the then applicable legal provisions did not provide sufficient guarantees of separating the NRA from the operators because the Polish State held shares in telecoms operators[90], and the Prime Minister, having the freedom

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Constitution, see judgement of 12 June 2002, Journal of Law No 84, item 764; T. Woś, *Wstęp… (An introduction…)*, p. 23.

86 T. Skoczny, *Ochrona konkurencji… (Competition protection…)*, p. 26.

87 The Ministry of Treasury sold 4.15% of shares in Telekomunikacja Polska S.A. on the Warsaw Stock Exchange, thus finally completing its privatisation. The sale was effected at 44 sessions, from 17 January 2010 to 5 August 2010. http://www.msp.gov.pl/portal/pl/29/11509/Prywatyzacja_TP_SA_zakonczona.html. Before the complete privatisation, the President of UKE was an authority independent of the Minister of State Treasury who supervised the company as one of its shareholder. Now the brand name of the company is Orange. M. Zdrojewski, *Urząd… (An office…)*, p. 91.

88 Complaint of 11 July 2008 Commission vs. the Republic of Poland (case C-309/08), OJ 2008, C 247/7.

89 Article 190(6) defining the premises for dismissing the President of UKE was repealed by the Act of 24 August 2006 (Journal of Laws No. 170, item 1217) on the state personnel resource and high offices of the state which came into effect on 27 October 2006. The premises were reinstated in Article 190(4)(a) added under the Act of 24 April 2009 (Journal of Laws No. 85, item 716) amending the Telecommunications Law Act and selected other Acts, which came into effect on 6 July 2009.

90 At that time, the State Treasury still held TP S.A. shares.

to dismiss the President of UKE at any time without a reason, could thus influence the NRA's decisions.

Polish law also contains guarantees which are to ensure the political independence of the President of UKE. The authority cannot be said to be apolitical, seeing as it is appointed by the lower house of Parliament (Sejm) with the consent of the Senate at the request of the Prime Minister. Still, it enjoys significant autonomy thanks to statutory provisions ensuring appointment for a specific term of office and the restriction of the causes for dismissal to a strictly defined set of cases, which do not contain political reasons. The independence of the President of UKE is also the result of the lack of measures that would allow another authority to question the individual decisions taken by an NRA (repeal them, declare them null and void). This leads to a limitation of the constitutional rights of the government[91] because, under Article 146 of the Polish Constitution, it is the Council of Ministers that directs government administration. However, the political independence of the Polish telecoms regulator is not absolute[92] seeing as such a principle could not be introduced in the Polish legal system due to constitutional obstacles. The Polish telecoms regulator does not define the policy in this area, but enforces applicable laws as a central-level government authority. Moreover, the consequences of its activity are borne by the supreme authority supervising it – the Minister competent for communications. Under Polish law, all administrative government bodies are subordinated to one of the supreme authorities – the Council of Ministers, the Prime Minister, or individual ministers. This is because it is the supreme authority that is politically responsible for the activity of those bodies to the democratically elected Sejm. As a result, the supreme authority must be able to influence the bodies it is responsible for[93]. The supervision of the President of UKE was thus entrusted to the Minister competent for communications.

It should be noted at the same time that the requirements for independence from the respective Member States governments are increasingly detailed

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91 K. Jaroszyński, M. Wierzbowski, *Organy regulacyjne… (Regulatory authorities…)*, p. 342.

92 A. Pakuła, *Dylematy niezależności centralnych organów administracji rządowej (Dilmmas related to the independence of central bodies of governmental administration)*, in: *Między tradycją a przyszłością w nauce prawa administracyjnego. Księga jubileuszowa dedykowana Profesorowi Janowi Bociowi (Between tradition and the future in the science of administrative law. The Jubilee Book dedicated to Professor Jan Boć)*, J. Supernat (ed.), Wrocław 2009, p. 551 ff.

93 J. Filipek, *Prawo administracyjne... (Administrative law…)*, p. 190.

in the Framework Directive[94]. However, the NRAs, including the President of UKE, are simultaneously more and more obviously subordinated to the European Commission, particularly as part of the consolidation procedure provided for by Article 7 of the Framework Directive, because the NRAs must follow the guidelines and recommendations issued by the Commission[95]. The independence of the President of UKE is also restricted by their cooperation with the telecoms regulators of other Member States (including as part of BEREC), with the Polish competition authority – the President of the Office of Competition and Consumer Protection, and with authorities in charge of the protection of the freedom of speech, right to information and public interests in radio and television broadcasting (National Broadcasting Council, KRRiT).

As the independence formula can, paradoxically, make the regulator less credible[96], it should be emphasised that the activity of the President of UKE meets the requirements set out in the electronic communications directives concerning transparent and unbiased procedures, activity methods and the legal liability for activities undertaken.

Polish NRAs have a relatively short history – the telecoms regulator was established in Poland in 2000. It is likely therefore that the current Polish model of the regulatory authority for electronic communications is not final. Following a period of institutional experimentation and of mutual learning, it will still be changing in the future.

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94 The requirement for NRAs to be independent of government policy was introduced by Directive 2009/140/EC of the European Parliament and of the Council of 25 November 2009 amending Directives 2002/21/EC on a common regulatory framework for electronic communications networks and services, 2002/19/EC on access to, and interconnection of, electronic communications networks and associated facilities, and 2002/20/EC on the authorisation of electronic communications networks and services, OJ 2009, L 337/37 and concerns "national regulatory authorities responsible for *ex-ante* market regulation or for the resolution of disputes between undertakings".

95 M. Szydło, *Regulacja sektorów… (The regulation of the infrastructure…)*, p. 316 ff.; 7.; I. Kawka, *Rola administracji europejskiej w regulowaniu sektorów infrastrukturalnych (The role of European administration in regulating the infrastructure sectors)*, Problemy Zarządzania 2008, No. 1, pp. 108–124.

96 I. Kawka, *Telekomunikacyjne organy regulacyjne… (Regulatory authorities of the telecommunications sector…)*, Kraków 2006, p. 170 ff.

Tadeusz Skoczny*

The application of competition law in the Polish telecommunications sector

1. Introduction

The Telecommunications sector remained monopolised in Poland for longer than in other European countries. In the 1990ties and the beginning of the 2000nds, counteracting the monopolistic practices of Telekomunikacja Polska S.A. (hereafter, TP) was undertaken primarily by the National Competition Authority (hereafter NCA) – the President of the Office of Competition and Consumer Protection (UOKiK) on the basis of the Antimonopoly Act of 1990[1] and the Competition Law Act of 2000 (CL Act 2000).[2]

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1 Act of 24 February 1990 on Counteracting Monopolistic Practices (consolidated version published in *Journal of Laws* 1999 No. 52 item 547). See in more detail T. Skoczny, *Poland: Chapter 3 – Competition law*, in: S. Breidenbach/Ch. Campbell (eds.) *Business Transactions in Eastern Europe*, vol. 2, § 2; T. Skoczny, *Polish Competition Law in the 1990s – on the Way to Higher Effectiveness and Deeper Conformity with EC Competition Rules*, European Business Organization Law Review 2:3 & 2:4 2001, 777; J. Fingelton, E. Fox, D. Neven, P. Seabright, *Competition Policy and the Transformation of Central Europe*, CEPR, 1996.

2 Act of 15 December 2000 on Competition and Consumers Protection (*Journal of Laws* 2000 No. 122, item 1319) as amended in 2004 (consolidated version published in *Journal of Laws* 2005 No. 244 item 2080). See in detail T. Skoczny, *Die Angleichung der Wettbewerbsregeln in den neuen und zukünftigen Mitgliedstaaten an das Gemeinschaftsrecht (I). Polen*, Behrens P. (Hrsg.), Nomos 2006.

TP's monopoly was however only broken with Poland's EU accession.[3] This occurred mainly thanks to the implementation of the European Telecoms Package of 2002, which took place through a fundamental re-shaping of the Polish Telecommunications Law Act (TL Act).[4] Crucial were also the following activities of the National Regulatory Authority (NRA) responsible for telecoms – the Presided of the Electronic Communications Office (UKE). The CL Act and the TL Act, together with the respective enforcement activities of the NCA and the NRA, have largely co-contributed to a notable development, and effective protection of competition on Polish telecommunications markets.

Pro-competitive telecoms regulation and the enforcement of competition protection rules constituted, and continue to constitute the two main methods of public intervention meant to create, and retain competitive markets in Polish telecoms. They are now based on the TL Act of 2004 and the CL Act of 2007.[5] There can be no doubt that both acts will coexist in the future. Unsurprisingly, therefore, the legal essence of these two methods of pro-competitive public intervention has been subject to debates and disputes for over 10 years now, both in jurisprudence and in doctrine, both in the EU and in Poland. Part II of this paper will outline how these disputes developed over time and present the current standpoint. Considered in particular will be the possibility of parallel application of regulatory instruments and competition law in Poland.

Other papers in this book focus on selected problems of telecoms regulation. By contrast, part III of this contribution will focus on the problems and practice of counteracting anti-competitive practices in the telecoms sector in the light of general (horizontal) competition rules contained in the CL Act 2000 and the CL Act 2007. The exceptionally few instances of concentration control involving telecoms undertakings will be analysed first, followed by the many more cases on restrictive practices. The latter will primarily relate to infringements of the Polish ban on anticompetitive agreements (Articles 5–7 CL 2000 and/or Articles 6–8 CL

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3 From 01.05.2004 as far as the grounds of the EU internal telecoms markets are created but from 01.05.2002 (10 years after the Interim Agreement part of the Europe Agreement entered in force) as far as the freedom of international telecommunications services provision is concerned.

4 Act of 21 July 2000 – Telecommunications Law (*Journal of Laws* No. 73 item 852 with changes). Act of 16 July 2004 – Telecommunications Law (*Journal of Laws* No. 171 item 2800 with subsequent changes).

5 Act of 16 February 2007 on Competition and Consumers Protection (*Journal of Laws* No. 50 item 331 with changes).

2007) and on the abuse of dominance (Article 9 CL 2000 and/or Article 9 CL 2007), which were assessed by the UOKiK President and the Polish judiciary responsible for the control of the decisions of the NCA: the 1st instance Court of Competition and Consumers Protection (SOKiK), the 2nd instance Court of Appeals in Warsaw and finally, the Polish Supreme Court that rules on cassation complaints.

The UOKiK President has repeatedly assessed whether the actions of the alleged offender – mainly TP – have also, at the same time, infringed the prohibitions of EU competition law, primarily the abuse ban (Article 82 TEC or Article 102 TFUE), to which the NCA is entitled on the basis of Regulation 1/2003.[6] It is probably not a coincidence that it was a case of an alleged restrictive practice in telecoms that become subject to a binding preliminary assessment of the competences of NCAs in EU law proceedings. However, this contribution will not attempt to assess private enforcement of competition law seeing as it does not yet exist in Poland.

A short evaluation of the scope and effectiveness of competition law enforcement towards anticompetitive practices of telecoms undertakings will be presented in the final section of this paper (part IV).

2. Competition law and pro-competitive regulation in telecommunications

Even in Poland, there is no longer any major dispute on the legal essence of the two key methods (functions) of pro-competitive public intervention into the economy – *ex ante*, pro-competitive sector-specific regulation which is meant to create competition, and *ex post*, reactive competition law, the use of which implies the existence of at least some competition.[7] This is so despite the fact that sector specific regulation also intervenes on an *ex post* basis in practice (instruments meant to ensure the effectiveness of regulatory decisions). Similarly, there are important instances where competition law also acts in an *ex ante* manner (pre-emptive merger control as well as

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6 Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (*Official Journal of the European Communities* 2003 L 1/11; *Polish Special Edition* 2008 , Bd. 2, 205 with changes).

7 The author's views in general see T. Skoczny, *Competition Protection and Pro-competitive Sector-Specific Regulation*, in: *Business Administration in Central Europe: Challenges, Problems and Opportunities*, A.Z. Nowak, B. Glinka, P. Hensel (eds.) Warsaw University School of Management Press, Warsaw 2006, 181; T. Skoczny, *Stand und Entwicklungstendenzen eines Regulierungsverwaltungsrechts in Polen*, in: *Ius Publicum Europeum*, H. Bauer, P.M. Huber, Z. Niewiadomski (Hrsgs.), Bloobberg 2002, 113ff.

commitments decisions).[8] These issues will however not be analysed in this paper.

The co-existence of pro-competitive regulation and competition protection (primarily the prohibitions of competition restricting practices) in infrastructure sectors is a fact also in the telecoms sector. This includes those entities providing services of general economic interests (SGEI) covered by Article 106 TFEU. Despite the already visible trend to move away from sector specific regulation and towards competition protection,[9] it will be long until telecoms regulation disappears all together. Strong market position of incumbent infrastructure operators – telecoms' structural deficit[10] – used to act, and continues to do so even now, as the primary basis for the abuse of dominance on markets related to infrastructure access. On the other hand, emerging telecoms services markets, such as mobile communications, with their more or less competitive structure, create the temptation to engage in anticompetitive multilateral practices. It is without a doubt the role of a competition authority to counteract both of these types of practices in the telecoms sector.

As a result, especially in the last decade, telecoms network operators and service provides alike became subject to intensive public intervention by the NRA as well as the NCA, which is responsible for the protection of competition in the entire economy. Enforcement practice showed that the same market practice, especially when it comes to incumbents, could easily become subject to a parallel assessment under regulatory and completion rules. This fact resulted in competence disputes and created considerable legal uncertainty for market players. Clarifying the relationship between regulation and competition law (setting the boundaries between regulation and the enforcement of antitrust prohibitions) became one of the key problems to be tackled by jurisprudence and doctrine. Despite its relevance to all infrastructure sectors, the focus of this dispute was firmly on telecoms.

The key aspect of the dispute concerned the question whether the competition authority can intervene, on an *ex post* basis, against market

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8 See M. Szydło, *Prawo konkurencji a regulacja sektorowa (Competition law and sector-specific regulation)*, Warszawa 2010; M. Szydło, *Sector-Specific Regulation and Competition Law: Between Convergence and Divergence*, European Public Law, vol. 15 (2009), 2, p. 257ff.

9 Zob. J.C. Laguna de Paz, *Regulation and Competition Law*, European Competition Law Review 2012, 33(2), p. 77.

10 See e.g. I. Henseler-Unger (Vice-President of the German Network Regulator) speaking at the International Competition Law Forum in Warsaw, 15–16 April 2009 www.uokik.gov.pl/.

practices which have already been assessed by a regulator if the latter has determined, on an *ex ante* basis, how the scrutinised undertaking is to act on the relevant market.

The applicable EU standard derives from the *Deutsche Telekom*[11] and the *Telefónica*[12] cases. The Commission established therein that an abuse took place in the form of margin squeeze on the German and the Spanish broadband market, respectively. This approach was later confirmed by the EU judiciary in the *Sonora*[13] ruling and re-confirmed, specifically in the Polish context, in the still not final Commission decision on the abuse of dominance by TP.[14] In a nutshell, both the Commission and the EU judiciary are of the opinion that a parallel application of national regulation and EU competition law is generally possible for the assessment of the same market practices on the same relevant markets. Moreover, incumbents should be aware of the fact that their activities might be subject to an assessment by multiple authorities, both in the context of regulation and competition law enforcement.[15] This means that EU institutions can evaluate a given practice under Article 101 or 102 TFEU irrespective of the fact whether the same practice was, or was not (because if does not fall under the scope of that country's sector specific regulation) already subject to an intervention by an NRA.[16] Even if the contested market behaviour was in fact already regulated, Article 101 or 102 TFEU can still be enforced provided the

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11 See Decision of the Commission of the European Communities of 21 May 2003 (COMP/C-1/37.451, 37.578, 37.579) in case *Deutsche Telekom* (*Official Journal of the European Communities* 2003 L 263/9), declaring that Deutsche Telekom has abused its dominant position by *margin squeeze.* See also the judgment of the Court of First Instance of 10 April 2008 in case T-271/03 *Deutsche Telecom AG v Commission of the European Communities,* E.C.R. [2008], II-477, confirming the original decision of the Commission, as well as the judgment of the Court of Justice of the European Union of 14 October 2010 in case C-280/08 (E.C.R. 2010, I-9555), confirming the judgment of the Court.

12 Decision of the Commission of the European Communities of 4 July 2007 (COMP/38.784) in case *Wanadoo España v Telefónica http://ec.europa.eu/competition/antitrust/cases/dec_docs/38784/38784_311_10.pdf).*

13 Judgment of the Court (First Chamber) of 17 February 2011 in case Case C-52/09 *Konkurrensverket v TeliaSonera Sverige AB*, E.C.R. 2011, I-527.

14 Commission Decision of 22 June 2011(COMP/39.525 in case – *Telekomunikacja Polska* (Summary in *Official Journal of the European Union* 2011 C 324/7).

15 Ibidem.

16 Judgment of the Court of Justice of the European Union of 17 February 2011 in case C-52/09 *Konkurrensverket v TeliaSonera Sverige AB* (E.C.R. 2011, I-527). Case comment by D. Kostecka-Jurczyk to this judgmenet see by internetowy Kwartalnik Antymonopolowy i Regulacyjny [iKAR] 2012, vol. 5(1), p. 95–102.

undertaking is left with some decisional freedom, that is, if it can chose to either comply with competition law, or to act in an anti-competitive manner. This can take place if wholesale prices were regulated *ex ante*, but retail prices were subject to a *price cap*.

If there is no freedom because the operator's actions were imposed upon it, be it by legislation or an NRA, in other words, its actions do not result from its free will,[17] the existence of a regulatory decision will protect that undertaking from an allegation of a competition law breach even if its actions have anticompetitive results.[18]

This interpretation seems dominant in Poland also. Still, it is worth noting here two early judgments of the Supreme Court: an energy-related ruling from 2004[19] and a 2005 judgment concerning telecoms specifically.[20] It was stated therein that Polish telecommunications law is considered *lex specialis* to the CL Act 2000, which acts as *lex generalis* here, provided the subject matter of its provisions concerns competition protection. The Supreme Court supported therefore at that time one of the doctrinal views which argued for the treatment of sector specific regulation as a type of *lex specialis* to competition law.[21]

The Supreme Court changed its mind however a mere year later in a telecoms-related judgment bringing, at the same time, its interpretative line far closer to the aforementioned EU standard.[22] Three aspect of its analysis are noteworthy. First, the Supreme Court has sustained its earlier view that the provisions of the TL Act 2000, the TL Act 2004 and the CL Act 2000 are to a certain extent overlapping. It stated also that the TL Act is an instrument which State institutions can use to create conditions which will allow fair and effective market competition to emerge. In other words,

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17 See judgment of the Court of Justice of the European Union of 14 October 2010 in case C-280/08 *Deutsche Telekom*, E.C.R. 2010, I-9555.

18 Analysis of European cases mentioned above in Polish literature see e.g. I. Różyk-Rozbicka, *Możliwości kwestionowania decyzji regulacyjnych Prezesa UKE na gruncie prawa ochrony konkurencji* [*Possibilities to contest the regulatory decisions of the UKE President under competition protection law*], internetowy Kwartalnik Antymonopolowy i Regulacyjny [iKAR] 2012, vol. 5(1) 7ff.

19 See judgments of the Supreme Court of 7 April 2004, III SK 27/04, and of 25 April 2004, III SK 48/04.

20 See resolution of the Supreme Court of 7 December 2005, III SZP 3/05.

21 See confirming A. Stawicki, *The Autonomy of Sector-Specific Regulation – Is Still Worth Protecting? Further Thoughts on the Parallel Application of Competition Law and Regulatory Instruments*, Yearbook of Antitrust and Regulatory Studies (YARS) 20011, vol. 4(4), 115f.

22 Judgment of the Supreme Court of 19 October 2006, III SK 15/06.

the TL Act is meant to be used to create competition. By contrast, the purpose of competition law is to protect competition against its distortions brought about by the actions of market participants.

This means that the provisions of the TL Act and those of the CL Act, as well as the institutions responsible for their enforcement, deal with market competition from two different perspectives. The Supreme Court came to the conclusion therefore that the actions of the NRA do not infringe the provisions of the CL Act, and do not preclude the application of competition rules to the market practices of telecoms undertakings. In other words, the telecommunications law does not constitute *lex specialis* to competition law. Justifying its view, the Supreme Court declared, among other things, that the TL Act allows the regulator to deliver decisions that 'shape' the telecoms market. The regulator acts *ex ante*, while the NCA acts *ex post*. It is one of the fundamentals of telecommunications law worldwide that *ex ante* regulation will result in the creation of competition on telecoms market.[23] The Supreme Court was those explicit in denying that a potential clash between the TL Act and the CL Act can be resolved by the application of the *lex speciali derogat legi generali* rule. According to the Court, this rule does not exist in this case in its classic form.

Second, the Supreme Court identified Article 3 CL 2000[24] and Article 1(3) TL 2004 (this provision did not exist in the TL Act 2000[25]) as the basis for the solution of the potential conflict. Article 1(3) TL 2004 states that the provisions of the TL Act do not infringe the CL Act. According to the Court, it was the intention of the legislator to eliminate doubts as to the relationship between sector specific regulation and competition law in telecommunications. According to Article 3(1) CL 2000, the provisions of the CL Act are not applicable to competition restrictions committed on the basis of other legislation. The Supreme Court stated therefore that a general rule derives from the above provision whereby competition law is applicable to all markets, including telecoms, unless a specific statute generally excludes its applicability or imposes an obligation to commit acts which would have to be considered anti-competitive from the point of view of the CL Act.

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23 This position was confirmed in the SOKiK judgment of 2 February 2008, XVII Ama 52/07 http://pdfy.polbi.pl/Dz_Urz_UOKiK/2008/0018/pierwotny.pdf.

24 It states: "The provisions of the Act shall not apply to restrictions of competition allowed by virtue of separate provisions". In English in: M. Błachucki, *Polish Competition Law – Commentary, Case Law and Textes*, UOKiK, Warsaw 2013. See www.uokik.gov.pl.

25 It states: "3. The provisions of the Act shall be without prejudice to the provisions on competition and consumer protection…". See http://www.en.uke.gov.pl/files/?id_plik=41.

When no explicit statutory provisions exist to that effect, the applicability of competition law is not excluded if the provisions of another statute regulate market behaviour or create specific dispute resolution procedures. In other words, according to Article 3(1) CL, the UOKiK President cannot decisively find that a market practices prescribed by the TL Act is a competition restricting practice.

Three, the change in the Supreme Court's approach was also affected by the Commission decision in *Deutsche Telekom*, to which it referred to in explicit terms. The Court fully agreed that antitrust provisions are applicable to the market practices of regulated undertakings provided they are left with a margin of decisional discretion (independence). The application of competition law will be excluded only if, as a result of an intervention by the State (represented by an NRA), the undertaking has no freedom to act on a given relevant market, but must instead act according to the rules prescribed by the regulator.

It is fair to say that the 2006 judgment of the Supreme Court was the first step in shaping current Polish jurisprudence on this issue. The Supreme Court delivered its next important judgment in this context in 2010.[26] The ruling concerned a decision of the President of UOKiK establishing that TP has engaged in a restrictive practice (counteracting the formation of conditions necessary for the creation and development of competition) on the national telecoms services market for the fixed network. TP was found to have made it difficult for individual end users to use the telecoms services of other providers, because it only offered phone plans with a price that also covered telephone calls. Sustaining the antitrust decision, the Supreme Court stated that prior actions by the NRA exclude the possibility of an intervention by the competition authority as far that intervention would related to issues dealt with by the regulator. As a result, the UOKiK President cannot qualify prices (tariffs) approved by the UKE President as a restrictive practice (analogue to the situation applicable to tariffs in the energy sector). When it is only up to the undertaking, however, to propose its own internal regulations and a price list, the NRA cannot (within the price approval procedure) demand from it to propose an offer, which the company did not provide in the price list submitted for approval. The regulator's approval of such price list does not, therefore, preclude the NCA from being able to intervene.[27]

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[26] Judgment of the Supreme Court of 17 March 2010, III SK 41/09.

[27] Judgment of the SOKiK of 2 February 2008, XVII Ama 52/07.

Admittedly, in the case at hand, the NRA did not have the competence to regulate, or even only verify, the contested market behaviour which made the Supreme Court state that the contested market practice could indeed be subject to *ex post* control by the NCA. The logic of the judicial analysis, as well as references made therein to earlier judgments, forces the assumption that leaving an undertaking with a sufficient margin of discretion, in an area generally falling within the competences of the NRA, does not preclude an intervention by the President of UOKiK.

It is fair to say in conclusion that in light of current legislation (Article 1(3) TL 2004 and Article 3(1) CL 20007) and jurisprudence (Supreme Court judgments of 2006 and 2010), *ex ante* intervention by the UKE President and *ex post* intervention by the UOKiK President do not exclude each other and thus can be used to the same factual circumstances.

The above interpretative line of the judiciary is reflected in doctrinal views. The latter are correct to note that the opening of administrative proceedings on the basis of one legal act, does not preclude the opening of parallel proceedings on the basis of another statute, even if both concern the very same issue. In fact, the imposition of sanctions provided by the TL Act does not preclude the UOKiK President from imposing sanctions based on the CL Act either.[28] Still, there are some authors that continue to view sectorial law, especially energy law, as *lex specialis* to competition law. They thus reject the applicability of competition law to situations which fall under, according to sectorial statutes, the competences of regulators whether, or not, the latter have actually dealt with a given case or not.[29]

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[28] See S. Piątek, *Prawo telekomunikacyjne. Komentarz (Telecommunications law. Commentary)*, Warszawa 2013, p. 22; A. Krasucki, *Prawo telekomunikacyjne – komentarz (Telecommunications law. Commentary)*, Warszawa 2005, p. 22.

[29] See J. Baehr, A. Stawicki, *Rozważania wokół równoległego stosowania prawa konkurencji i instrumentów regulacyjnych (Some comments on the parallel application of competititon law and regulatory instruments)*, in: *Ochrona konkurencji i konsumentów w Polsce i Unii Europejskiej (Competition and consumers protection in Poland)*, C. Banasiński (ed.), Warszawa 2005; P. Lissoń, *Kompetencje organu antymonopolowego a kompetencje organów regulacyjnych w Polsce* (*Powers of the anti-monopoly authority and regulators in Poland)*, in: Aktualne problemy polskiego i europejskiego prawa ochrony konkurencji *(Contemporary problems of the Polish and European Competititon protection law)*, C. Banasiński (ed.), Warszawa 2006; C. Banasiński, *Równoległe stosowania instrumentów prawa konkurencji i instrumentów regulacyjnych w Polsce (na przykładzie telekomunikacji i energetyki) [Paralell application of instruments of competition law and regulatory instruments in Poland (case energy and telecommunications)]*, w: Prawo konkurencji – stan obecny oraz przewidywane kierunki zmian *(Competititon law – present state and future development)*, C. Banasiński (ed.), Warszawa 2006.

Some commentators are supportive, albeit with reservations, of the views of the Commission and EU judiciary permitting *ex post* control over practices that comply with regulatory decisions by national or European competition authorities.[30] These reservations, especially when they relate to jurisdictional rather than procedural issues, are not justified particularly so in light of the arguments presented in the Supreme Court judgment of 2010.

3. Competition protection in telecommunications by competition law

3.1. Pre-emptive concentration control

General rules on pre-emptive control of concentrations (Articles 13–23 CL 2007) are fully applicable in Poland to the telecommunications sector. Still, telecoms concentrations are not common because the sector is already both well developed and largely concentrated (TP's dominance in fixed telephony, narrow oligopoly on the mobile market). All concentrations notified to the UOKiK Presided so far under the CL Act 2007 were cleared as they were unlikely to cause a significant impediment of effective competitor, in particular through the creation or strengthening of a dominant position (Article 18 CL 2007). Most of the concentrations were of a vertical character – taking over a distributor of fixed or mobile telephone services and fixed or mobile broadband Internet access or distributors of mobile telephone as well as phone sets and accessories[31] or supplier of integrators of information systems.[32]

The UOKiK President approved also 2 concentrations with a horizontal effect, the direct participants of which were foreign companies – three French companies (including Orange Participations, which controls both TP and the Polish operators of the Orange network), creating a joint venture intended to engage in a variety of activities related to cloud computing[33]

[30] See M. Szydło, *Prawo konkurencji a regulacja sektorowa (Competition Law nad Sector-Specific Regulation)*, Wolters Kluwer Polska, Warszawa 2010, pp. 221–224 and 229–230. See also K. Kohutek in his partly critical *Comment to the judgment of the Court of First Instance of 10 April 2008 in case T-271/03 Deutsche Telekom AG*, Lex/el.2008.

[31] See decision of the UOKiK President of 7 July 2008, No. DKK-53/08, *Polkomtel Liberty Poland*; decision of the UOKiK President of 7 April 2009, *TP SA/Ramsat SA*; decision of the UOKiK President of 17.02.2010, No. DKK-12/10, *Cyfrowy Polsat SA/M. Punkt Holdings Ltd (Cyprus).*

[32] Decision of the UOKiK President of 3 November 2009, No. DKK-78/09, *TP SA/ATM Systemy informatyczne*.

[33] Decision of the UOKiK President of 27 April 2013, No. DKK-72/2012, *Orange Participations, Thales and Caisse des Dépóts.*

and two major European telecoms operators creating a joint venture meant to supply them with a number of related products and services.[34]

The competitor authority cleared also a concentration between 4 major Polish MNO: P4, Polkomtel, PTC (T-Mibile Poland at present) and PTK Centertel. The operation was intended to create a joint company (later named Mobile TV)[35] with a 25% stake for each of the participants. The purpose of the new company was to provide, on non-discriminatory and open terms, audiovisual media services primarily with respect to mobile TV broadcasting on the wholesale level in the territory of Poland, provided that the new company gains a frequency reservation in the 470–790 MHz band (which in the end did not occur).

This concentration did have a vertical effect on the national wholesale media services market in the DVB-H standard and on the retail services market concerning public mobile telephone networks. It is worth noting that the operation also had conglomerate effects on 8 national markets on which the 4 participants of the operation are active. The concentration was said, however, to not significantly affect completion on any of those markets. Still, the TV Mobile cooperation, which took place directly via the jointly owned company on the retail level, was later found to constitute a cartel.[36]

3.2. Prohibition of anticompetitive agreements

Polish law (Articles 5–7 CL 2000 and Articles 6–8 CL 2007) and EU law (Article 81 TWE and Article 101 TFUE) contain a nearly identical prohibition of agreements that have an anti-competitive object or effect, in other words, competition restricting multilateral practices, which are listed on an exemplary basis in the above provisions. The prohibition is applicable in a general manner, that is, also to the telecommunication sector. Yet since Poland's EU accession in 2004, the UOKiK President has only conducted three such proceedings in the telecommunications industry. The first was discontinued.[37] The scrutinised agreements between TP and a mobile phone operator it controlled (PTK Centertel) was not found to be a restrictive agreement in the meaning of Article 5(1) CL 2000. The mobile network operator did not have a sufficient degree of freedom

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34 Decision of the UOKiK President of 31 August 2011, No. DKK-97/11, *France Telecom/Deutsche Telekom.*

35 Decision of the UOKiK President of 5 December 2008, *P4/Polkomtel/PTC/PTK.*

36 Decision of the UOKiK President of z 23 November 2011, No. DOK-8/2011 *Polkomtel, PTC, PTK, P4*; see below point II.2.

37 Decision of the UOKiK President of 14 March 2007, No. DOK-34/07, *TP/PTK Centertel.*

as far as the formulation of its own business client offers is concerned. The use of favourable conditions was conditioned upon the conclusion of a telecommunications services contract with TP (fixed) and PTK Centertel (mobile).

The second investigation concerned a national roaming agreement concluded in 2006 between Polkomtel and P4. The contract gave Polkomtel exclusivity on the acquisition of national roaming and the pre-emption right to provide national roaming before other operators of public mobile telecoms networks. The competition authority managed to prove that the contested clauses were likely to cause market foreclosure covered by Article 6(1) CL 2007. According to Article 12(1) and (2) CL 2007, the President of UOKiK accepted from the parties, and imposed upon them, the commitment to remove the contested clauses from their contract and to refrain from using them in their future cooperation on the national wholesale market for access services and call origination in mobile phone networks.[38]

The UOKiK President established at the end of 2011 for the first time the existence of a true telecommunications conspiracy – an information exchange cartel of mobile phone operators.[39] The cartel involved the four major mobile operators in Poland (Polkomtel, PTC, PTK Centertel, P4) which together hold a 99% market share on the national retail mobile phone market. In order to cooperate with respect to the introduction onto the Polish market of mobile television, the participants created a new jointly owned company (Mobile TV), which was cleared[40] by the NCA. Mobile TV was created, among other things, to participate in a frequency reservation competition announced by the UKE President for the 470-490 MHz band designated for the provision of audiovisual media services via the DVB-H technology. The competition was ultimately won by Info-TV-FM (ITF), upon which the winner contacted the above mobile operators in order to establish a form of cooperation on the provision of mobile television via the DVB-H technology in Poland. The competition authority conducted explanatory proceedings, which included, with court's (SOKiK's) approval, dawn raids[41] in the premises of the mobile operators. After full antimonopoly proceedings, the NCA established that the four operators agreed on how

38 Decision of the UOKiK President of 13 November 2009, No. DOK-6/2009, *Polkomtel*/ *P4.*

39 Decision of the UOKiK President of 23 November 2011, No. DOK-8/2011 *Polkomtel, PTC, PTK, P4.*

40 Decision of the UOKiK President of 5 December 2008, No. *P4*/*Polkomtel*/*PTC*/*PTK*; see above point II.1.

41 See below point IV.

to shape their relations with ITF, exchanged information on the evaluation of ITF's wholesale offer concerning audiovisual media services (including the distribution of radio and television channels via DVB-H) as well as agreed on publicly contesting that offer. The UOKiK President ultimately concluded that the above behaviours (conducted largely during company meetings of Mobile TV) constituted a competition restricting practice on the national retail mobile phone market and on the national wholesale mobile television services market provided via the DVB-H technology. They were said to have infringed both the prohibition contained in Article 6(1) CL 2007 as well as that of Article 101(1) TFEU. The practices had to be ceased and the parties were fined over 110 mil PLN (25 mil EUR) on the basis of Article 106(1) CL 2007.

According to the UOKiK President, eliminating, or at least largely limiting, competitive pressure on the supply side of the national retail mobile market was both the object and the effect of the agreement. This was done by eliminating uncertainty between the four operators concerning the introduction into their offer of DHB-H television services (or other potential market practices relating to these services) – services with respect to which they could compete. The cartel was also meant to, and succeeded, in limiting competition on the demand side of the wholesale market for mobile television via the DVB-H technology. This occurred by limiting negotiating pressure through the elimination of uncertainty as to the criteria and manner of evaluation of offers between the four mobile operators (demand-side) and ITF (supply-side of the market).

3.3. Abuse prohibition

Polish law (Article 8 CL 2000 and Article 9 CL 2007) and EU law (Article 82 TWE and Article 102 TFUE) contain an unusually uniform wording of the prohibition of an abuse of a dominant position held on a relevant market by one or more undertakings. Both provisions also contain an exemplary list of unilateral practices caught by this prohibition. The ban is generally applicable and so it also covers the telecommunications sector. Considering that Poland's ex-monopolist, TP, not only held a dominant position during Poland's EU accession in 2004 but continues to do so still on many telecoms markets, it is not surprising that TP's unilateral practices have repeatedly been subject to an assessment as far as the infringement of the abuse prohibition is concerned. Moreover, most of these allegations have been confirmed during antitrust proceedings conducted by the UOKiK President and recently, also in a case before the European Commission.

Since Poland's EU accession on 1 May 2004, albeit the cases were often commenced way before that date, the UOKiK President issued 4 decisions establishing that TP had abused its dominant position. As a result, the incumbent was ordered to discontinue the following of its unilateral practices, primarily on the national fixed telephony market:

a) offering subscribers of TP's Social Plan lower phone subscriber charges than those using TP's other plans, in return for a signed commitment on the part of the subscriber to only use the services of TP (an infringement of Article 8(1) and 8(2)(5) CL 2000 as well as Article 82 TEC[42]);
b) linking standard tariff plans with additional services which made consumers – aside from subscribers – obliged to use and pay for other telecoms services (for instance, 'cheap weekends and evenings') as well as offering broadband Internet access services (Neostrada) only to those clients, who also subscribed to TP's phone services;[43]
c) introducing, on 1 October 2005, a nearly 100% price increase for international calls starting with the 0-708-1 number. The price rise had negative effects both on consumers as well as on alternative operators (such as Netia and Telefonia Dialog that owned the 0-708-1 number). The price rise occurred at the exact same time when consumer demand for the use of services based on the 0-708-1 number sharply increased. It resulted in a sharp fall in demand for the above services – service which belonging to alternative operators that competed with TP – even more so, seeing as TP nearly simultaneously dropped some of its own international calls prices and introduced new advantageous free minute plans for international calls;[44]
d) blocking Polish consumers from using automatic connections to foreign audiotex operators (such possibility existed for connections with the numbers of Polish operators). Foreign suppliers, such as 2 companies from Antillepone and Altelcom (which provided over the phone information, horoscopes, game results and *party line services*), were thus excluded from the Polish market for audiotex services, while consumers lost their free choice[45].

The same tendency remained after the entry into force of the CL Act 2007. The judiciary has not confirmed the NCA's original findings against TP in one case only – the over 4 years long proceedings concerning *Tele 2/TP SA*, where the incumbent was said to have hindered the provision of

42 See UOKiK Press Release of 14 July 2005.
43 See UOKiK Press Release of 4 August 2005.
44 See UOKiK Press Releases of 11 October 2005 and 5 June 2006.
45 See UOKiK Press Release of 4 July 2006.

long distance and international call services by other telecoms operators used on the basis of pre-selection, and thus hindering consumers from using them[46].

The UOKiK President was successful on two occasions in condemning TP for an abuse of dominance, ordering the incumbent to cease the condemned unilateral practice:

a) taking steps (insertion of special filters into routers meant to limit data flow) resulting in the lowering of the quality or hindering data transmissions (an action discriminatory towards cheaper, foreign operators) on the national market for access services to Internet end users connected to public telecoms networks, where TP has a dominant position in the meaning of Article 4(pt9) CL 2000, infringing Article 8(1) in relation to Article 8(2)(5) CL 2000 and Article 82 TEC (currently Article 102 TFUE).[47] SOKiK changed this decision by halving the original fine, because it found that TP has already ceased the condemned practice[48]. SOKiK confirmed nevertheless the NCA's findings that TP limited the ability to use Internet access services of foreign operators (France Telecom and Telia) by domestic operators listed as "Polish--rejected-prefixes" and "Polish-limited-prefixes", which forced them to cooperate with TP on the incumbent's terms. The case has not yet been closed by a final judgment of the Court of Appeals in Warsaw[49].
b) TP's persisted and prolonged (8 years) avoidance of concluding cooperation agreements with operators entitled to provide Internet access services (IP), which would create equal conditions of service provision for ISP and TP. The said practice infringed Article 8(2)(5) CL 2000, that is, abuse, by way of hindering the creation of conditions necessary for the creation and development of competition, of a dominant position (93%) held on the national market for interconnections exchange as far

46 Decision of the UOKiK President of 20 April 2007, No. DOK-50/07; judgment of SOKiK of 31 March 2008, XVII AmA 84/07 (annulling the decision); judgment of the Court of Appeals in Warsaw of 16 October 2008, VI A Ca 842/08 (annulling the judgment of SOKiK and referring the case to the lower instance); judgment of SOKiK of 17 June 2009, XVII AmA 102/08 (declaring TP SA has not abused its position); judgment of the Court of Appeal in Warsaw of 16 June 2010, A CA 1343/09 (dismissing the appeal from the judgment of SOKiK of 2009).

47 Decision of the UOKiK President of 20 December 2007, No. DOK-98/2007.

48 Judgment of SOKiK of 11 April 2011, XVII AmA 62/08.

49 Judgment of Court of Appeal in Warsaw of 20 June 2012, VI ACa 1203/11. See also order of the Supreme Court of 13 December 2012, III SZ 4/12 (annulling the judgment of the Court of Appeals in Warsaw and referring the case to the lower instance). The new judgment has not been spoken yet.

as dial-up access to the Internet is concerned[50]. This decision is final, despite the fact that is went through a nearly 3 years long judicial review process reaching the courts of all instances.[51]

The UOKiK President has recently opened its first abuse proceedings again telecoms operators other than TP. The NCA is investigating Poland's three main mobile operators – Polkomtel (owner of the Plus brand), PTK Centertel (owner of the Orange brand) and PTC (owner of a.o. Heyah brand) – for charging over twice as much for calls to the Play network than to each other's networks.[52] It was discovered during the explanatory proceedings that actual costs might not justify such a large price difference. It can be expected, therefore, that the UOKiK President will establish that the aforementioned operators have committed a restrictive practice – provided of course that the NCA can prove that they hold a collective dominant position. The case will also be based on EU provisions.

4. Parallel applicability of Polish and EU competition rules

According to the *one-stop-shop* principle, control of concentrations cases take place either before the UOKiK President (protecting competition in the national territory) or the European Commission (protecting competition in the internal market)[53]. By contrast, EU rules on restrictive practices can be enforced by NCAs and the national judiciary as well as EU institutions. The competences of NCAs such as the UOKiK President of are defined in Article 5 Regulation 1/2003. Accordingly, the UOKiK President of has "the power to apply Articles 81 and 82 of the Treaty in individual cases". In order to do so, the NCA can, among other things, issue decisions "requiring that an infringement be brought to an end".

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50 Decision of the UOKiK President of 5 January 2004, No. DPI-1/2004.

51 Judgment of SOKiK z 21 March 2005, XVII AmA 16/04 (dismissing the appeal); judgment of the Court of Appeal in Warsaw of 14 March 2006, VI ACa 769/05 (annulling the decision and referring the case to the lower instance court); judgment of the Supreme Court of 19 October 2006, III SK 15/06 (annulling the judgment of the Court of Appeal in Warsaw and referring the case to the lower instance); judgment of the Court of Appeal of 17 October 2007, VI ACa 156/07 (dismissing the appeal from the judgment of SOKiK).

52 See Notice of the President of UOKiK of 18 March 2013 published at www.uokik.gov.pl/.

53 See Article 21 of the Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (official Journal of the European Communities 2004 L 24/1).

It was the telecoms sector were the above rule was applied in Poland for the first time. In the *Netia/TP SA* decision of 2006, the UOKiK President came to the conclusion that the scrutinised practice (competition restriction by way of a price increase for international calls starting with the number 0-708-1) infringed not just Article 8 CL 2000, but also Article 82 TEC.[54]

An infringement of Article 82 TEC (currently 102 TFUE) was also established in another two of the aforementioned cases:

a) where a lower than elsewhere charge was offered to subscribers of TP's Social Plan provided they committed themselves to only use TP's services (violation of Article 8(1) and (2)(Pt5)) CL 2000 as well as Article 82 TEC);[55]
b) causing a quality drop or even hindering data transmissions on the national market for access services to Internet end users connected to public telecoms networks (violation of Article 8(1) in relation to Article 8(2)(Pt5) CL 2000 as well as Article 82 TEC[56]).

Furthermore, the UOKiK President found the aforementioned information exchange cartel involving Poland's four major mobile operators to have infringed Article 101 TFEU.[57]

However, the application of Article 5 Regulation 1/2003 in Article 82 TEC cases concerning the telecoms sector took place on a number of other occasions. Here, the Polish NCA discontinued its proceedings[58], because that was the only power (competence) it had at its disposal in situations where it failed to establish an infringement. Yet according to Article 5 Regulation 1/2003 'Where on the basis of the information in their possession the conditions for prohibition are not met they may likewise decide that there are no grounds for action on their part.' The UOKiK President decided to discontinue – on the basis of Article 105 Code of Administrative Procedure in relation to Article 80 CL 2000 (currently Article 83 CL 2007) – the proceedings as redundant. TP was investigated for a unilateral practice that took the form of using an exclusivity clause concerning the use of its publicly available telephone services on the national market for access to telephone calls services in the public fixed telecoms network, provided on the basis of an access number and pre-selection. However, when the proceedings were discontinued because the scrutinised clause was found to not constitute

54 See UOKiK Press Releases of 5 June 2006.
55 See UOKiK Press Release of 14 July 2005.
56 Decision of the UOKiK President of 20 December 2007, No. DOK-98/07.
57 Decision of the UOKiK President of 23 November 2011, No. DOK-8/2011 *Polkomtel, PTC, PTK, P4.*
58 Decision of the UOKiK President of 21 December 2009, No. DOK-8/09 *TP SA/Netia*.

an anti-competitive practice in the meaning of Article 82 TEC[59], a doubt emerged whether that was in fact in compliance with the aforementioned fragment of Article 5 Regulation 1/2003. Reviewing the appeal[60], SOKiK agreed with the complaint that the UOKiK President breached its obligations defined in Article 5 Regulation 1/2003 by discontinuing the proceedings. Although the 1st instance judgment was confirmed by the Court of Appeals in Warsaw[61], the Supreme Court subsequently admitted the cassation request submitted by Tele 2.[62] It concluded that the case needed a definite resolution as far as the interpretation of the contested part of Article 5 Regulation 1/2003 is concerned. As a result, it submitted two preliminary questions to the Court of Justice.

The Court of Justice confirmed, with respect to the first question, that Article 5 Regulation 1/2003 excludes the possibility for an NCA to deliver a decision type other than those listed in that very EU provision. Concerning the second question, the Court of Justice agreed that in cases were a EU competition law violation was not established, Article 5 Regulation 1/2003 – being a directly applicable EU rule – confers upon NCAs only the competence to issue a decision that 'it has no grounds to proceed'.[63] Therefore, the Supreme Court annulled the judgment of the Court of Appeals in Warsaw and returned the case for renewed assessment[64]. The 2nd instance court assessed the case once more and ultimately changed the appealed SOKiK judgment of 29 October 2007. Point 1 of the original decision, issued on 28 June 2006 by the UOKiK President, was ultimately given the following wording:[65] "On the basis of art.5 Regulation […] 1/2003 […] it is established that there are no grounds to proceed in the matter of an infringement of […] art. 82 [TEC] by way of the use of an exclusivity clause […]". The Supreme Court closed the dispute by rejecting the cassation request submitted by the President of UOKiK with respect to the second judgment of the Court of Appeals in Warsaw[66]. The Supreme Court was of the opinion that the legal aspects that were subject to the

59 Decision of the President of UOKiK of 28 September 2006, No DOK 11/06.
60 Judgment of SOKiK of 9 October 2007, XVII AmA 122/06.
61 Judgment of the Court of Appeal in Warsaw of 10 July 2008, VI ACa 8/08.
62 Order of the Supreme Court of 29 April 2009, III 2/09.
63 Judgment of the Court of Justice of the European Union of 3 May 2011 in case C-375/09 *Prezes UOKiK v Tele 2 (now Netia)*, E.C.R. 2011, I-3055.
64 Judgment of the Supreme Court of 8 June 2011, III SK 2/09.
65 Judgment of the Court of Appeal in Warsaw of 22 February 2012, VI ACa 1304/11.
66 Order of the Supreme Court of 12 April 2013, III SK 44/12.

dispute have since been resolved by the Court of Justice[67] and the Supreme Court.[68]

5. Final remarks

It should be stressed in conclusion that also in Poland it was the telecoms sector that provided the background for the resolution of the debate on parallel intervention by competition authorities and sector specific regulators. Both Polish jurisprudence and the majority of the doctrine agree now with the Deutsche Telekom standard. Accordingly, public intervention based on the CL Act, aimed at competition protection and undertaken on an *ex post* basis by the UOKiK President, is permitted even if the very same practice has already been subject to an *ex ante* intervention based on the TL Act by the UKE President. This is so provided regulatory intervention has left the undertaking with a margin of freedom sufficient to support the view that its actions were not imposed upon it by the regulator.

There can also be no doubts that the Polish CL Act is fully applicable to counteracting anti-competitive concentrations and other restrictive market practices in the telecoms sector. The UOKiK President has unconditionally cleared all of the very few concentration notifications received so far. A more critical approach was applied to the rare instances of anti-competitive multilateral agreements, albeit only once was a cartel ultimately established and sanctioned (information cartel between mobile operators). However, the competition authority has been nothing but firm in its actions against TP's abuses of dominance – the most common form of anti-competitive practices in Polish telecoms. The UOKiK President delivered decisions imposing an obligation to cease the condemned practice in most of such cases on the basis of Article 9 CL 2000 or Article 10 CL 2007, unless of course the infringement has ceased already (Article 10 CL 2000 or Article 11 CL 2007)[69].

The UOKiK President imposed on TP a fine, not exceeding the statutory level of 10% (Article 106(1)(pt 1)(pt 2) CL 2007), in every decision finding that the incumbent had infringed one of the antirust prohibitions (Article

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67 See lately judgment of the Court of Justice of the European Union of 9 March 2010 in case C-378/08 *ERG i in.*, E.C.R. 2010, I-1919, point 26.

68 See similar orders of the Supreme Court of 9 August 2012, III SK 6/12, and of 28 April 2010, III CZP 3/10.

69 Decision of the UOKiK President of 20 December 2007, No. DOK-98/2007. See also judgment of SOKiK of 11 April 2011, XVII AmA 62/08.

5 and 8 CL 2000 or Article 6 and 9 CL 2007 or Article 101–102 TFUE). These fines were of notable amounts: 1 mil PLN (ca EUR 0,3 mil) in *TP SA/Antillepone i Altelcom*;[70] 11 mil PLN (ca EUR 3 mil) in the Internet access restriction case[71]; 12 mil PLN (ca EUR 3 mil) concerning the price increase related to international 0-708-1 numbers[72]; 20 mil PLN (ca EUR 5 mil) for the persistent refusal to enter into Internet access contracts[73]; and finally 75 mil PLN (ca EUR 18 mil) for the discrimination of consumers on Internet markets[74].

It is worth stressing that the President of UOKiK can also impose procedural fines (Article 102 CL 2000 or Article 107 CL 2007) meant to ensure compliance with existing antitrust decisions[75]. Another important instrument supporting the effectiveness of competition law enforcement in Poland are fines for the failure to cooperate with an inspection (Article 106(2(pt3)) CL 2007). The latter was imposed on two mobile operators – Polkomtel, which was fined 130 mil zł (EUR 33 mil)[76] and PTC with a fine of 123 mil zł (EUR 30 mil)[77]. Both penalties were imposed within the explanatory proceedings to the information exchange cartel mentioned above.

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70 See UOKiK Press Release of 4 July 2006.

71 Decision of the UOKiK President of 5 January 2004, No. DPI-1/2004. See also judgment of SOKiK z 21 March 2005, XVII AmA 16/04 (dismissing the appeal); judgment of the Court of Appeal in Warsaw of 14 March 2006, VI ACa 769/05 (annulling the decision and referring the case to the lower instance); judgment of the Supreme Court of 19 October 2006, III SK 15/06 (annulling the judgment of the Court of Appeal in Warsaw and referring the case to the lower instance); judgment of the Court of Appeal of 17 October 2007, VI ACa 156/07 (dismissing the appeal from the judgment of SOKiK); judgment of the Supreme Court of 5 November 2008 (confirming the amount of the fine – 11 mil PLN).

72 See UOKiK Press Releases of 5 June 2006.

73 Decision of the UOKiK President of 5 January 2004. No. DPI-1/2004.

74 Decision of the UOKiK President of 20 December 2007, No. DOK-98/2007. See also judgment of SOKiK of 11 April 2011, XVII AmA 62/08.

75 See UOKiK Press Release of 19 April 2006.

76 Decision of the UOKiK President of 24 February 2011, No. DOK-1/2011.

77 Decision of the UOKiK President of 4 November 2010, No. DOK-9/2010.

II.

REGULATION OF TELECOMMUNICATIONS

Dariusz Adamski*

Regulatory support for the development of broadband access networks NGA

The deployment of Next Generation Access networks (NGAs) is still in its nascent phase in Poland. This fact remains in stark contrast to the goals of the Digital Agenda for Europe (DAE), adopted in May 2010. The DAE – the first of seven flagships initiatives under Europe 2020, the EU's strategy to deliver smart, sustainable and inclusive growth[1] – sets three High Speed Broadband targets:

1) basic broadband for all EU citizens by 2013;
2) Next Generation Networks (NGN) (30 Mbps or more) for all by 2020;
3) 100 Mbps subscriptions or higher for 50% of households.

This paper first explains where exactly Poland stands in achieving these targets. It then proceeds to explain why reaching the above targets will be very difficult for Poland and how the current European regulatory system interacts with the underlying market dynamics. This general argument is illustrated by last year's clash of the regulatory approach to NGAs as espoused by the Polish NRA (President of UKE) and opposed to that of the European Commission. The paper will end with concluding remarks on a broader regulatory message stemming from this conflict.

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1 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: A Digital Agenda for Europe, COM (2010/245).

1. Broadband coverage in Poland

According to the most recent Digital Agenda Scoreboard 2013 (hereinafter: The 2013 Scoreboard)[2], published in mid-2013, Poland has the lowest standard total fixed coverage (less than 70%) of all EU Member States.[3] This picture differs from the much more optimistic picture painted by the 2013 Scoreboard with respect to Poland's NGA coverage. Accordingly, approximately 45% of the country was covered by high speed access technologies by the end of 2012.[4] Five other EU member states (Italy, Croatia, Greece, France and Ireland) fared worse (*Id.*). In fact, NGA coverage in Poland was – according to the same estimations – three times higher than in Italy and twice as high as in France.

Such curious results are not easy to explain. This is so particularly when confronted with other UKE estimations published annually in Poland's Telecoms Infrastructure Coverage Reports (Pol. "*Raport pokrycia terytorium Rzeczypospolitej Polskiej istniejącą infrastrukturą telekomunikacyjną*"). According to the 2013 edition of the Coverage Report (data as of end-2012)[5] the number of towns with one fibre access operator reached almost 33% in one Polish region (*Małopolskie*) only. It hovered at 26–29% in further four regions (*Dolnośląskie*, *Opolskie*, *Podkarpackie*, *Śląskie*) (p. 35) and did not exceed 20% of towns in any of the remaining eleven regions but one (*Lubuskie* – 20.65%). In three regions (*Łódzkie*, *Podlaskie*, *Świętokrzyskie*) the penetration did not even reach double digit figures (7%, 8% and 9%, respectively) (*Id.*). At the same time, infrastructure competition in NGAs was essentially non-existent. Only in three regions (*Podkarpackie*, *Śląskie*, *Małopolskie*) did more than 1% of the towns have NGAs of at least three providers (2.91%, 2.65% and 2.10%, respectively) (*Id.*).

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2 Commission Staff Working Document, SWD (2013) 217 final, Brussels, 12 June 2013, available from https://ec.europa.eu. The 2013 Scoreboard is based on data as of end 2012.

3 The 2013 Scoreboard, p. 46. Quite surprisingly, Poland nonetheless fulfils the first of DAE'd goals – basic broadband for all by 2013 – because it belongs to the 24 EU member States entirely covered by satellite technology which may potentially deliver high-speed broadband (downstream). Potential ability is, however, clearly different from actual deployment. As the Commission admits in this context, "despite the high coverage, satellite take-up is still marginal, as it represents less than 1% of all EU broadband lines" (The 2013 Scoreboard, p. 44).

4 The 2013 Scoreboard, p. 47.

5 President of UKE, "*Raport pokrycia terytorium Rzeczypospolitej Polskiej istniejącą infrastrukturą telekomunikacyjną*" (hereinafter: "2013 Coverage Report"), August 2013, available from http://www.uke.gov.pl.

In 2012 operators invested approximately 160,000,000 PLN in XDSL access networks, about 100,000,000 PLN less than in 2G/3G access networks, while investments in FTTX were statistically non-significant (p. 70). In 2013 operators planned to reduce the financial outlays for XDSL access networks seriously (to 50,000,000 PLN), while they intended to spend almost twice as much on FTTHs. Investments in 2G/3G were estimated at almost 400,000,000 PLN during the same year (*Id.*).

The FTTH technology accounted for just 1% of all investments in access infrastructure in 2012. At the same time, 2G/3G technology absorbed 53%, and XDSL 33% of all access investments.[6] Plans for 2013 suggest that the picture may be (slightly) changing. While the relative investments in XDSL were to decelerate approx. threefold, FTTH outlays were estimated to grow by more than ten times (p. 75). 2G/3G investments were again to engage more than half of all planned investments (*Id.*). To understand the proportion correctly, though: the alterations do not mean that copper technology would be gradually ousted by fibre or cable. It merely shows that the investments in XDSL would not dwarf fibre investments as much as they did in previous years. The wire-line access would keep losing to the wireless access infrastructure.

The statistics thus make it quite clear that Poland will find achieving the DAE's High Speed Broadband targets virtually impossible. This conclusion, however, translates into two important questions provoked by the title of this paper. First, how should the regulator support those goals most effectively, considering the relatively low ARPU potential even in quite densely populated areas of Poland? And second, what does this say about the regulatory landscape of the European Union?

2. General dilemmas of regulatory support for NGA

Possible options available for NRAs to support NGA stem from three documents: the Commission Recommendation of 20 September 2010 on regulated access to Next Generation Access Networks (hereafter: 2010 NGA Recommendation)[7], the 2007 ERG Opinion on Regulatory Principles of NGA (hereafter: 2007 ERG Opinion)[8] and the 2012 Revised BEREC

6 P. 54. Quite inevitably, an additional share (unspecified) of access fibre networks was built individually by specific business clients in order for them to be connected to the network of a telecommunication operator.

7 O.J. [2010] L 251/35.

8 ERG (07) 16rev2, available from http://www.irg.eu.

Common Position on best practice in remedies on the market for wholesale (physical) network infrastructure access (including shared or fully unbundled access) at a fixed location imposed as a consequence of a position of significant market power in the relevant market (hereafter: 2012 BEREC Position).[9] Quite naturally, each of these documents is largely general and requires balancing between conflicting goals which may in individual cases lead to fairly different outcomes.

On the one hand, the principle of technological neutrality – as enshrined in Article 8 of the Framework Directive – suggests that the gradual replacement of copper lines by fibre should not largely change the regulatory approach towards access infrastructure. The standard three criteria test for establishing markets susceptible to *ex ante* regulation could even lead to the conclusion that NGAs are more predisposed to regulation than copper access markets (hence the more the access infrastructure is "fibre based", the more it should be susceptible to regulation).

The three criteria test comprises the following elements: presence of high and non-transitory entry barriers, lack of tendency toward effective competition and inadequacy of competition law to address market failures.[10] It could be argued, first, that due to higher outlays necessary to deploy fibre access infrastructure (in comparison to the copper alternative), entry barriers are even higher and more permanent in NGAs than in copper. Second, and for the very same reason, infrastructure is even less replaceable and so the tendency towards effective competition is more diluted. Third, if competition law is not considered a viable source of remedies in the case of copper access infrastructure, it should be even less capable of addressing regulatory challenges posed by the more expensive technology, raising even higher entry barriers. Logically, therefore, it could be argued that the regulatory assumptions guiding the determination of markets susceptible to *ex ante* obligations should press for an even tighter grip over NGAs on the two most relevant markets: wholesale (physical) network infrastructure access (including shared or fully unbundled access) at a fixed location (Market 4) and wholesale broadband access (Market 5). This argument corresponds with the NGA Recommendation which states that

[9] BoR (12) 127, approved by the Board of Regulators on 26/11/2012.

[10] Sec. 2 of Commission Recommendation of 17 December 2007 on relevant product and service markets within the electronic communications sector susceptible to ex ante regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services (2007/879/EC), O.J. [2007] L 344/69 (hereinafter: Commission Recommendation on relevant markets).

"Obligations imposed under Article 16 of Directive 2002/21/EC are based on the nature of the problem identified, without regard to the technology or the architecture implemented by an SMP operator" (preamble, § 21). The imposition of regulatory obligations should – according to the 2010 NGA Recommendation – cover all of these aspects: access to civil engineering infrastructure of the SMP operator; access to the terminating segment in the case of FTTH; unbundled access to the fibre loop in the case of FTTH; access obligations in the case of FTTN; and wholesale broadband access (Sec. 13-41). The imposition of regulatory obligations could thus be considered from this perspective as a method of boosting service competition where infrastructure-based competition is particularly hard to attain.[11]

Nonetheless, such an argument, no matter how closely it follows the logic of the current regulatory system, begets a fundamental dilemma important from the perspective of this paper. If – as it is universally accepted – fibre investments should be expected primarily from incumbent operators, then how could they be encouraged if regulatory obligations restrain the "breathing space" of those incumbents? The ERG alluded to this problem in its 2007 Opinion by stating that "NGA investments are likely to reinforce the importance of scale and scope economies .... Scale economies may lead to a natural monopoly in certain areas of the electronic communications value chain" (p. 19). In other words, costs related to NGA deployment suggest that new investments could be expected almost exclusively from the incumbents (and the Polish case clearly corroborates that this expectation is backed by facts). This finding undermines – at least with regard to NGAs – the idea of employing regulatory obligations in order to invite new players into the market and to induce their gradual progress up the investment ladder (i.e. to encourage them to gradually intensify investments in their own infrastructure).[12] They may be invited and they may profit from the invitation, but they will find it extremely difficult to climb the "NGA infrastructure deployment" rungs of the investments ladder due to "the importance of scale and scope economies", as the ERG framed it. At the same time, their profits are foregone for the incumbent, that is,

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[11] As the ERG framed it in its 2007 Opinion on Regulatory Principles of NGA (p. 23): "In those instances where replication of access is not considered feasible, promoting service competition is an important goal for the NRA as it is only through vigorous competition in services that consumers can enjoy the maximum benefits possible. Service competition increases consumer choice, which is an important end in itself."

[12] For a broader discussion on the concept of the investment ladder in FTTX scenarios see in particular: BEREC, "Next Generation Access – Implementation Issues and Wholesale Products", BoR (10) 08, March 2010, pp. 11–18.

the entity that could actually climb the "NGA infrastructure deployment" rungs of the investments ladder. All in all, regulatory obligations imposed on operators with SMP could hardly induce non-SMP operators to climb the investment ladder, while rendering the same process more difficult for the regulated incumbent.

Of course, regulation is also to ensure that the incumbent is efficient. Conceptually, it is the alleged inefficiencies of incumbents which create the space necessary for competitors to develop. But such an argument, too, does not really advocate for the extending of regulatory obligations to the incumbent's NGA networks. This point is easier to understand when major costs and revenue factors of NGAs are mentioned first.

To use the standard typology, the *costs* of NGA deployment depend on:
- (horizontal) trenching/ducting cost (civil engineering), constituting the most significant cost factor;
- (horizontal) fibre cabling deployments;
- (vertical) costs of in-house wiring and
- equipment cost per node.[13]

On the other hand, *profitability* is contingent particularly on:
- population density;
- customers reachable per node;
- penetration rate;
- market share;
- ability to increase ARPU.[14]

An efficient operator is clearly one which can limit deployment costs and improve profitability. In the NGA environment, practical problems follow, however, just as soon as this statement is made. They all boil down to the fact that no regulator can be in a position to ascertain accurately and authoritatively whether an incumbent's given NGAs costs are brought down to the level of an efficient operator, nor whether a given profitability level corresponds to that of an efficient operator. Granted, mandated access to civil engineering of the incumbent, or 3rd parties, is an important factor for bringing costs down, considering that they usually account for 50–80% of all deployment costs. From the market perspective, it could only be commended that such access has been recently sought by the EU[15] as well

13 The 2007 Opinion of the ERG on Regulatory Principles of NGA, p. VII.

14 *Id.*, p.19.

15 See Proposal for a Regulation of the European Parliament and of the Council on measures to reduce the cost of deploying high-speed electronic communications networks, COM(2013)147, 26 March 2013, building on more general provisions of the 2010 NGA Recommendation (Sec. 13–17).

as mandated in Poland. More specifically, pursuant to Article 17 of the Act of 2010 on supporting the development of telecommunications services and networks (hereafter: Telecoms Support Act)[16], public utility providers are obliged to enable, "if technical conditions and safety requirements allow for it", access to, or sharing of, their technical infrastructure "for the purposes of a public telecommunications network, based on equal treatment as well as fair and free competition."[17] The Telecoms Support Act restricts, in similar fashion, the rights of property owners. Articles 30–36, in particular, facilitate access to properties and their technical infrastructure, including telecommunications cables and facilities,[18] to limit the costs of network deployment in closest proximity to the user (where the costs are highest). The Telecoms Support Act also allows for separate ownership of optic fibres in telecommunications cables (Articles 37–44) and similar elements of telecommunications (Article 45).

Furthermore, according to Article 139 TL, public telecoms network operators shall enable other operators "access to properties, including buildings and telecommunications infrastructure". In this case, access is conditional and may easily lead to legal disputes between operators on whether it is legitimate or not, which in turn would trigger decision-making powers of the President of UKE (under Article 139(1b) and (4) TL). Nonetheless, the basic requirement of providing access to technical infrastructure by telecoms operators, laid down as a symmetric obligation imposed independently of market power, is clear and unquestionable.

Yet even if the costs are brought down by facilitated access to, and sharing of, infrastructure necessary for broadband deployment, the investment gap can still remain significant. In this case, a rational operator should avoid investments in advanced fibre networks in order to avoid inefficiencies. Incumbents might be motivated to do so even more than others when regulation further enhances the concomitant costs of investment.

The ERG pointed towards a possible solution to this dilemma already in 2007: "NRA will form a view on the mode of competition to be promoted that will depend on the individual circumstances for each deployment and location" (p. 21). The Commission followed suit in its 2010

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16 Ustawa z dnia 7 maja 2010 r. o wspieraniu rozwoju usług i sieci telekomunikacyjnych, Dz.U. 2010 Nr 106, poz. 675, ze zm.

17 Details of the obligations and procedures involved, including dispute resolution powers of the President of UKE, are established in Art. 18–26 Telecoms Support Act.

18 Additionally, new buildings should be equipped with telecommunication installations enabling – among others – broadband access, according to Art. 30(6) Telecoms Support Act.

Recommendation, by stating that "in situations where it cannot be concluded that the different competition conditions would justify the definition of sub-national geographic markets, it could nevertheless be appropriate for NRAs to respond to diverging competitive conditions between different areas within a geographically defined market, for instance due to the presence of several alternative infrastructures or infrastructure-based operators, by imposing differentiated remedies and access products" (preamble, § 9).

The very nature of *ex ante* obligations, however, inevitably renders such a nuanced approach very difficult to attain. On the one hand, it would be difficult to achieve it in the reality of access which is based on a country-wide framework offer (which – from its very definition – is to establish uniform terms). This point is important because, according to the 2010 NGA Recommendation, "where unbundled access to the fibre loop is mandated, the existing LLU reference offer should be amended to include all relevant access conditions including financial conditions relative to the unbundling of the fibre loop" (preamble, § 22). On the other hand, the same is true if the NRA decides to avoid the imposition of uniform and detailed terms prescribed by framework offers and replaces them with general obligations only (for instance, the obligation to provide access, self-standing or supplemented by a general obligation of transparency). General obligations are difficult to police, especially when – as in sectorial regulation and contrary to the consequences of abusing market power according to competition law – breaching them does not automatically lead to a financial sanction. While the regulatory result may thus be too uniform to allow for a nuanced approach in the first of the two scenarios (framework offer), in the other model (general obligations) it is too general to be enforced effectively.

Furthermore, the cost-profitability considerations hindering NGA deployment also influence the rate of return from the investment, which – once again – remains in a problematic relationship to the logic of supporting service-based competition. As the 2010 NGA Recommendation puts it: "the deployment of FTTH will normally entail considerable risks, given its high deployment costs per household and the currently still limited number of retail services requiring enhanced characteristics (such as higher throughput) which can only be delivered via fibre. Investments into fibre depend for their amortisation on the take-up of new services provided over NGA networks in the short and medium terms. The costs of capital of the SMP operator for the purpose of setting access prices should reflect the higher risk of investment relative to investment into current networks based on copper" (preamble, § 23). Very few geographical markets in

Poland make a clear business case for NGA deployment, primarily due to generally low population density[19] and/or generally low ability to increase ARPU. This obviously has serious – yet hard to quantify precisely (which in turn influences the risk factor) – implications for the appropriate rate of return from the investment.[20] The problem might only get exacerbated by mandated access to the incumbent's infrastructure. New entrants will face the necessity of reimbursing the incumbent for its share of the NGA investment *and* will additionally have to retain a profit for themselves, which may be difficult if the general profitability of the investment is low. This leads the argument back to "the importance of scale and scope economies", to once again use this term. The following statement of the 2012 BEREC Position is thus rational in respect to copper infrastructure: "NRAs should ensure that with reasonable certainty the price of access will permit an efficient entrant to compete with the SMP player" (p. 20). Yet, it may simply be untenable with respect to NGAs. If a regulatory authority tries to achieve it in NGAs by artificially limiting reimbursement paid by new entrants to the incumbent[21] – for instance by skewing, purposefully or not, the risk adjusted rate of return – it will discourage the incumbent from NGA roll-out in the first place.

Theoretically, the most optimal solution could be to alleviate the regulatory grip on standard (copper) access products on Markets 4 and 5 in exchange for the incumbent's commitment to quantified – and accepted by the NRA – investments in NGAs. This would limit the necessary rate of return from the NGA investment (it would be offset by the return on XDSL networks), which in turn would make a much clearer market case for new

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19 Various research makes a clear case for the – otherwise intuitively obvious – realisation that the profitability of (ultra-fast) broadband upgrades depends on population density. See e.g. Feijóo, Gómez-Barroso, Ramos, *An Analysis of Next Generation Access Networks Deployment in Rural Areas*, available from http://oa.upm.es.

20 The 2012 BEREC Position corroborates this finding. Accordingly, "where NRAs decide that it is appropriate to regulate the prices of NGA-based services on the basis of cost orientation they should consider whether to differentiate the risks borne by the SMP player in operating its NGA access network from other risks of its business. The investment risk should be assessed by taking account of various factors of uncertainties for the time period considered relevant. This includes an assessment of the likely demand for NGA-based services (penetration) and the willingness to pay a pricing premium (ARPU) and how this develops through time. In case this assessment has identified an NGA-specific risk, it should be factored into the cost of capital" (p. 24).

21 In fact such an approach would be contrary to regulatory principles, as "NRAs need to ensure that access prices reflect the costs effectively borne by the SMP operator, including due consideration of the level of investment risk" (2010 NGA Recommendation, preamble, § 18, and Annex I).

entrants to deliver their products via the incumbent's network (as the rate of return to be compensated for would be lower). Such an approach would allow both the incumbent and the new entrants to step up the investment ladder as well as to move from static to dynamic efficiency gains. It would also hold to the basic logic of the current regulatory landscape, provided it retains an enforceable principle of non-discriminatory access to all of the incumbent's infrastructure. As a downside though such an approach – just like any other advanced regulatory approach – might easily raise cost-related problems of establishing neutral cross-subsidies.

Overall, however, it would be more proportionate to the goals of deploying NGAs than its alternative, that is, pressing for more service-based competition even when this ultimately hinders the development of a sustainable competition. According to ECJ's well-established interpretation: "by virtue of the principle of proportionality, which is one of the general principles of Community law, the lawfulness of the prohibition of an economic activity is subject to the condition that the prohibitory measures should be appropriate and necessary in order to achieve the objectives legitimately pursued by the legislation in question; when there is a choice between several appropriate measures recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued".[22] Article 8(1) of the Framework Directive corroborates that the principle of proportionality should always guide NRAs when they decide on what regulatory tools to use on markets susceptible to ex-ante regulation. Understood in this manner, the principle of proportionality certainly advocates for a very cautious approach to regulating NGAs. Or, to be more precise, this definition of proportionality suggests that the regulator should facilitate NGA take-up by a bifurcated approach. On the one hand, it should refrain from micro-management whereby it determines wholesale access pricing to NGAs (preferably supplementing this approach by gradually moving towards the same goal on copper-based Markets 4 and 5).[23] On the other hand, it should maintain basic obligations of providing non-discriminatory access to physical infrastructure, both available

[22] Joined cases T-246/08 and T-332/08, *Melli Bank plc v Council of the European Union*, ECR [2009] II-2629, § 100.

[23] The latter could also be supported by the (otherwise rather undisputable) idea that "in case of imposing obligations on a SMP operator rolling-out NGA, the overall "package" of existing and additional (or amended) remedies must be born in mind in order to avoid overregulation": The 2007 Opinion of the ERG on Regulatory Principles of NGA, p. 27.

and planned, in order to improve market transparency and allow for the disclosure of any abuses of market power.[24]

Up to some point in time, it could have seemed that a similar approach would ultimately prevail on the European level. It could be inferred, for instance, from a statement Neelie Kroes, Vice-President of the European Commission responsible for the Digital Agenda, made on 12 July 2012. She invoked – as one of three key elements of her broadband investment package – the principle of "More flexibility for "next generation" wholesale products: national regulators *will no longer be required to apply cost-oriented price regulation in almost all circumstances*. But the flexibility on "next generation" pricing will depend on application of the non-discrimination rules to ensure genuine equal treatment of competitors, and on a competitive counterweight from copper-based services or other infrastructures like cable and 4th generation wireless".[25] Similarly, the 2012 BEREC Position supplemented the previous doctrine, whereby "to avoid competitive distortions access should be mandated regardless of the technical solution", with the following important qualifications: "insofar as it is proportionate, possible and efficient. Different treatment of copper and fibre access should be justified and non-discriminatory, and should be motivated by differences in identified competition problems between copper and fibre" (p. 4). As the President of UKE learned the hard way, however, relaxing the regulatory grip over NGAs is still a long way ahead. This might easily become irreconcilable with the goal of supporting NGA deployment through regulatory intervention in a country such as Poland, where potential revenues are not particularly promising.

3. The story of the Third Review of the Polish Market 5

In early 2012, the Polish NRA completed its third review of the market for wholesale broadband access (WBA). Its basic approach to NGAs was essentially meant to solve the paradoxes indicated above in the Polish reality of a very slow uptake of FTTx based-access. More specifically, the draft decision[26] proposed – in accordance with the arguments laid

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[24] The abuse would primarily manifest itself in denying access by, either, charging excessive prices and/or delaying development/implementation of feasible and reasonable products and services of alternative operators.

[25] "Enhancing the broadband investment environment", available from http://europa.eu. Emphasis added.

[26] Available at http://www.uke.gov.pl/files/?id_plik=9895.

down above – that the incumbent (TP) be subject to the obligation of non-discriminatory access to the FTTH throughout the entire territory of Poland. Still, TP would not be obliged to comply with the more intrusive obligations of transparency, cost-orientation and accounting separation. This draft measure – a fact which should be reiterated – was limited to the most advanced (and expensive) type of the NGA technology: FTTH, where all infrastructure is made out of fibre – up to end-users' premises. By the same token, therefore, the proposed approach was not meant to cover FTTC networks. In particular, it did not question the necessity of unbundling them, of providing backhaul and collocation services, as well as access to ducts and to the dark fibre within FTTC networks, all on a cost oriented basis.

There was one main reason for shunning the imposition of a full set of obligations on FTTH: this technology has not yet gained traction in Poland, so lack of investment was the main identified competition problem. The President of UKE thus considered that a regulatory strait-jacket would be contrary to the principles of adequacy and proportionality of the remedies to the identified problems. The NRA emphasized that its approach was necessary to avoid investment barriers, which do not stem from inefficiencies produced by insufficient competition within an existing network, but instead from insufficient incentives to build a network. As the NRA indicated in this context, "one of the basic means of supporting investments of the incumbent may be an exemption from certain regulatory obligations, especially referring to new services or network resources, which must be subject to modernisation and investments to allow for services which are newer and more favourable for end users. Due to such encouragements, TP, when making its decisions on fully fibre FTTH networks, will not have to take into account an unfavourable regulatory environment and this should streamline and facilitate the implementation of the investment process" (p. 141).

In order to set this approach against a broader picture, the President of UKE also invoked the results of two relevant surveys. In the first (p. 71), telecoms operators were asked about what were, in their opinion, the main barriers hindering the development of NGAs in Poland. As much as 26% of them pointed towards the lack of services and content that would require investments in high speed broadband. A further 21% mentioned the economic situation and the ensuing investment risks; 13% emphasized insufficient demand for NGAs; a further 7% noted insufficient demand for any services. Regulatory burdens (3%) were considered as less important even than insufficiencies in spatial planning (10%). These results might

corroborate the otherwise intuitively plausible finding: that the main reason for the lack of NGA uptake in Poland is insufficient demand, and the current regulatory system can neither improve nor worsen this situation. While these results may indeed suggest that regulatory actions supporting NGA deployment should be embraced with caution, they allow for more telling conclusions only when considered together with the results of the second aforementioned survey. Operators were asked therein about those regulatory actions which primarily stimulate them to invest in telecoms networks. The market participants weighed the Agreement between TP-UKE (hereinafter: TP-UKE Agreement)[27] twice as important a stimulation (40%) as the combined regulatory obligations on Market 5 (14%) and Market 4 (7%) (p. 72). Taken together, the two surveys suggest that *ex ante* obligations on Markets 4 and 5 can neither hinder NGA deployment (the first survey) nor support it (the second survey). Having thus as an alternative the option of solidifying the irrelevance of the existing system of *ex ante* obligations, the UKE decided to use the capacity it has (limited as it is), to nudge the incumbent into heavier NGA investments.

Finally, the draft decision highlights that, according to the TP-UKE Agreement, the incumbent is to ensure the equivalence of access for alternative operators also to fibre access products. The President of UKE emphasized that pursuant to the Agreement, TP is bound to publish Key Performance Indicators and is subject to the margin squeeze test. The draft decision thus argued that sufficient transparency of the SMP operator's actions was guaranteed and that the NRA was able to effectively monitor the development of prices for access to NGA networks on Market 5. As a result, the regulator considered the TP-UKE Agreement as essentially equivalent to functional separation. This point mattered, as, pursuant to the 2010 NGA Recommendation, "NRAs should analyse whether an obligation of cost orientation on mandated wholesale broadband access is *necessary* to achieve effective competition in case functional separation or other forms of separation have proved effectively to guarantee equivalence of access" (Sec. 36, emphasis added). The President of UKE was thus essentially of the opinion that the obligation of cost orientation was unnecessary.

None of those arguments satisfied the Commission, nor were they convincing to BEREC (also asked for its opinion on the case).[28] The Commission first notified the Polish NRA of its serious doubts on the draft

[27] Signed on 22 November 2009, available at: http://www.uke.gov.pl/uke/index.jsp?news_cat_id=19&news_id=4750&layout=3&page=tex.

[28] BEREC Opinion on Phase II investigation pursuant to Article 7a of Directive 2002/21/EC as amended by Directive 2009/140/EC: Case PL/2012/1311, Wholesale broadband

measure's compatibility with EU law[29] on 26 April 2012. Four months later it issued a recommendation requiring that the draft measure be amended or withdrawn (hereinafter: Article 7a Recommendation).[30] In its recommendation, the Commission insisted that the regulatory approach of the Polish NRA towards the FTTH be modified in two points, particularly important from the perspective of this paper. First, "UKE should … either mandate cost orientation for access to FTTH or impose competition safeguards instead. In the latter case, UKE should at least implement the following:

a) An improved transparency obligation regarding FTTH, comprising a number of clearly specified KPIs and an effective enforcement and monitoring mechanism (such as internal or external regular audits) and publication of the KPIs;
b) A replicability requirement also for FTTH-based retail products, based on a TTM test;[31]
c) An accounting separation obligation covering also FTTH products".

Second, "UKE should introduce the appropriate amendment in the subsequent market 4 review: an unconditional cost-oriented access obligation to fibre in market 4, unless UKE provided evidence of a significant competitive constraint at retail level, attributable (i) to the absence of high and non-transitory structural barriers to entry and expansion, signified by the presence of well developed alternative infrastructures with comparable reach and/or (ii) to cost-oriented and non-discriminatory access to copper wholesale products."

When reasoning its disagreement with the President of UKE on the necessity to relax the regulatory grip on future technology, the Commission first emphasised that "the principle of cost orientation does not exclude incentivising the incumbent operator for potentially risky investments in future NGA networks … such as for example allowing for an appropriate risk premium while setting the cost oriented price" (Article 7a Recommendation, Section 30). Second, it disagreed with the NRA on whether the TP-UKE Agreement was "sufficient to ensure equivalence of access for all operators

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access (Market 5) in Poland, BoR (12) 66, 7 June 2012, available from http://berec.europa.eu.

29 C(2012)2967, available from https://circabc.europa.eu.

30 Commission Recommendation of 27 August 2012 in accordance with Article 7a of Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services ("Framework Directive") in Case PL/2012/1311: Wholesale broadband access market in Poland, C(2012)5913, available from https://circabc.europa.eu.

31 The Test Traffic Measurement determines key parameters of connectivity between a given site and other points on the Internet.

to fibre based bitstream products offered by TP" (Section 31), because the Agreement "can only be considered as TP's voluntary commitments" and expires in March 2013, that is, at the very beginning of the market review period covered by the draft measure (Section 32). Noted third, were the differences between the draft decision and the TP-UKE Agreement. The Commission emphasised here that these differences debilitated the achievability of the non-discrimination obligations – "the draft decision provides for only a very general obligation to use and apply Key Performance Indicators (KPIs), which are yet to be defined by TP, whereas the implementation of the Agreement resulted in a detailed list of very specific KPIs" (Section 36). The Commission also considered that the draft decision "does not provide any more for the transposition of the provisions of the Agreement concerning the audits of TP's compliance with its obligations" (*Id.*). Fourth, "the Commission noted that TP will not be obliged to publish, or provide at the request of alternative operators, the results of KPI measurements for FTTH in the entire territory of Poland. TP will also not be obliged to provide any information on the prices and conditions of access to its FTTH network. This will considerably limit the ability of third parties to monitor and establish potential discrimination with regard to the provision of wholesale services" (*Id.*). According to the fifth and final objection, the Commission stated that the "non-imposition of accounting separation with regard to FTTH networks will seriously limit UKEs' ability to conduct a margin squeeze test between TP wholesale and retail offers. UKE will not possess any reliable (audited) information with regard to TP's wholesale and retail costs" (Section 37).

The Commission therefore concluded that "in cases where UKE does not impose price regulation for FTTH it should guarantee the monitoring (by UKE itself and by the market participants) of the market conduct of the SMP operator through a specific set of KPIs" (Section 63). It should also reinforce its monitoring activities in case of TP's failure to comply with the TP-UKE Agreement (Section 65), while maintaining the already imposed replicability requirements based on the TTM test (Section 69).

4. Between more and less regulation

The obvious question stemming from the backlash on the idea of withdrawing some of the regulatory obligations from the (not yet existing) Polish FTTH (sub) market is: how should the NGA roll-out be properly supported by the regulator?

When commenting on the (very rare instance of) issuing a recommendation based on Article 7a(5)(a) of the Framework Directive,[32] which essentially ended the story of the 2012 Market 5 Review in Poland,[33] Neelie Kroes said: "Regulators throughout Europe, including Poland, must find the right balance between giving operators the incentive to invest in very fast internet and safeguarding competition. As a precondition for pricing flexibility, UKE should secure equivalent access for all operators to TP's network, so that competition can be sustained on existing and new networks."[34] The Commission's recommendation may be read in this context as a manifestation of its attachment to the basic logic of the regulatory framework established in the EU ten years earlier. Thus "the right balance between giving operators the incentive to invest in very fast internet and safeguarding competition", as Commissionaire Kroes has put it, should translate into taking into account enhanced risk premiums when establishing cost orientation. That is, however, without removing the cost orientation obligation as such.[35] It may even be read as accepting the withdrawal of the requirement of establishing cost oriented access prices (obligations

[32] According to this provision: "Where … the national regulatory authority … maintains its draft measure … the Commission may, … taking utmost account of the opinion of BEREC if any issue a recommendation requiring the national regulatory authority concerned to amend or withdraw the draft measure, including specific proposals to that end and providing reasons justifying its recommendation…".

[33] As the NRA accepted the Recommendation and neither intended to go forward with the draft decision as it originally was, nor amend it without repeating the review process. While the NRA has announced its willingness to re-launch the Third Review of Market 5, there is no reason for the President of UKE to act hastily. The Second Review was completed in 2011 and so the NRA would comply with its duty to undertake market reviews every three years (as required by Art.16(6)(a) FD and Art. 21(2) PTL)), even if it was to wait until the beginning of 2014.

[34] Press release: "Digital Agenda – Commission calls on Polish telecoms regulator to improve access to fibre network", IP/12/914, 27 August 2012, available from http://europa.eu.

[35] This approach corresponds with the increased pricing flexibility as provided by the Commission Recommendation of 11 September 2013 on consistent non-discrimination obligations and costing methodologies to promote competition and enhance the broadband investment environment, C(2013)5761. See also BEREC Opinion on Commission draft Recommendation on non-discrimination and costing methodologies, BoR (13) 41, 26 March 2013, available from http://berec.europa.eu/. It is also in line with the rejection of price cuts for access to copper networks, which – according to some – could encourage incumbents to precipitate the transition from copper networks (relatively less profitable if access prices go down) to (relatively more profitable in this scenario) NGAs. See Wishart, *Kroes rules out price cuts for access to copper networks*, European Voice, 12 July 2012, available from http://www.europeanvoice.com.

under Article 13 of the Framework Directive and Article 40 TL), but only if other obligations are sufficiently robust (and thus intrusive) to safeguard equality of treatment. The underlying message is clear: all telecoms markets (including future ones) must be competitive. If infrastructure competition is impossible to achieve, NRAs should do what they can to make sure that service-based competition will take hold. In other words, the Commission wants to address the investment gap by giving incumbents more financial freedom. This goal, however, cannot be pursued at the expense of the general suspiciousness towards their actions and retaining the policy of holding incumbents on a "tight leash".

This logic is not substantially different under the Proposal for a Regulation of the European Parliament and of the Council laying down measures concerning the European single market for electronic communications and to achieve a Connected Continent, and amending Directives 2002/20/EC, 2002/21/EC and 2002/22/EC and Regulations.[36] Its Art. 18(7) states that "where a national regulatory authority is considering … whether or not to impose or maintain price controls … for wholesale access to next-generation networks … it shall consider the state of competition in respect of the prices, choice and quality of products offered at retail level. It shall have regard to the effectiveness of protection against discrimination at wholesale level and to the state of infrastructure-based competition from other fixed line or wireless networks, giving due weight to the role of existing infrastructure based competition between next-generation networks in driving further improvements in quality for end users, in order to determine whether price controls for wholesale access would not be necessary or proportionate in the specific case." On the one hand, therefore, price controls for wholesale access to NGA networks may be lifted. Furthermore, the text emphasises "due weight to the role of existing infrastructure based competition between next-generation networks in driving further improvements in quality for end users", which in the Polish context may suggest that the price control could end to more effectively incentivise the incumbent to upgrade the infrastructure. This conclusion may also be corroborated by the fact that the quoted provision refers to the infrastructure-based competition only, leaving the service-based competition unmentioned. But, on the other hand, the premises of necessity and proportionality used as guiding principles in the same sentence cuts – as the discrepancy between the Polish NRA and the Commission makes it clear – both ways. The Commission is very unlikely to understand them differently than it does under the current system.

[36] Of 11 September 2013, COM(2013)627.

This pattern may easily prove problematic in practice, because the slow NGA uptake demonstrates that the current approach of the Commission – no matter how well entrenched in the regulatory philosophy prevailing in Europe for at least a decade now – has already started to kick-in. First, an incumbent should consider the perspective of service-based competition as another risk factor for its investment. In other words, and in accordance with the Commission's logic endorsed in the Article 7a Recommendation, cost-oriented fees for NGA access should logically be higher than they would be otherwise. This, however, would make a business case for alternative operators to access the network even weaker. Second, service-based competition always assumes that the incumbent is inefficient, at least to some extent. In the ideal scenario, an alternative operator would use the underused resources more efficiently, profiting from them (or even gaining a competitive advantage). It would at the same time also appropriately reimburse the incumbent for the network access. But the surveys quoted in the Polish draft Market 5 decision suggest that the incumbent is hesitant to invest in the NGAs precisely to avoid a situation where its resources would be underused. This is not really a situation which could be remedied by spurring service-based competition. Similarly, third, whenever an alternative operator offers more competitive services to end-users connected through the incumbent's network, the latter will lose them and the revenues they generate. This, too, will hardly act as an encouragement to invest in new, expensive technology.

As a result, this regulatory approach should render operators in countries such as Poland particularly cautious when they consider investments in NGAs. Of course, no copper connection can give speeds comparable to those enabled by the FTTH. But for the vast majority of end-users, the added value of speeds higher than the (growing) average provided through copper will not approximate the additional costs they would need to incur in order to reimburse the operator for the fibre deployment.[37] Additionally, as already mentioned, those costs could easily be higher in an environment of services-based competition in NGAs, due to the elevated risk factor. This

[37] Relying on the Cisco VNI data, experts from the German WIK-Consult GmbH estimated that "average global bandwidth demand per household in 2020 (the target data for achieving the DAE's objectives for ultra-fast broadband) is less than 2 Mbps": Marcus, Elixmann, *Re-thinking the Digital Agenda for Europe (DAE): A richer choice of technologies*. *Independent analysis conducted by WIK-Consult GmbH on behalf of Liberty Global*, Sept. 2012, p. 2, available from http://www.libertyglobal.com. Even assuming that the Polish demand may be above the global average, it should not exceed it by more than two-three times (max. 5 Mbps) and that is much less than the DAE targets.

finding leads back to the "natural monopoly problem". Europe's regulatory system was devised to deal with natural monopolies, but they were of a different kind and produced by a different set of factors: legacy assets used inefficiently thanks to governmental protection. The differences in the natural monopoly problem as epitomised by the slow uptake of NGAs is different.

One could question whether this point is important at all, as the aforementioned surveys demonstrated that insufficient demand for high speed broadband is a bigger deterrent for growth in the most advanced fibre technologies than regulatory hurdles. Seen from this perspective, the EU's High Speed Broadband targets may be ignored as sheer figments of a bureaucratic imagination disentangled from actual market demands. If realised, i.e. if every Polish household was to be connected to the Internet at speeds of 30 Mbps or more by 2020, the policy of "high broadband for all" would lead to an enormous underutilisation of resources and hence to serious inefficiencies.[38] After all, almost all Internet users can entirely satisfy their needs with much slower connection speeds. Accordingly, even if a bit perversely, a tighter regulatory approach on NGAs may encourage operators to stand by copper networks for longer and continue to provide services for which the demand is much higher.

While Europe still tries to adapt the regulatory approach devised for "old-fashioned", clumsy incumbents to the new type of natural monopoly, the world demonstrates that alternative approaches are more promising. As the New York Times has recently stated, "more than 80 percent of American households live in areas that offer access to broadband networks capable of delivering data with speeds in excess of 100 megabits per second. Almost everyone in the country has several competitive choices for high-speed broadband service (with wireline, satellite and wireless options). Verizon offers 14.7 million consumers, in parts of 12 states and the District of Columbia, speeds up to 300 megabits per second via our FiOS network, which is poised to provide even greater speeds in the future. Companies like AT&T, Comcast and Time Warner Cable are also investing in their infrastructure. … Contrast this with the European Union, where innovation and investment in advanced networks have stagnated under an onerous regulatory regime that limits investment and innovation, and where today

[38] As Marcus and Elixmann, cited *id.*, p. 64, put it: "30 Mbps of guaranteed symmetric bandwidth seems to be enormously in excess of the average busy hour of residential consumers, even in 2020 and well beyond… Thus, we are of the view that the Maximum scenario represents a very considerable "overkill" relative to realistic needs of European consumers and even well beyond the time horizon envisaged by the DAE".

only about 2 percent of households have access to broadband networks with 100-megabit-plus speeds."[39]

Regulation may thus indeed matter in fostering NGA deployment, yet in a way opposite to the logic of the service-based competition championed in Europe. The New York Times is again worth quoting in this context: "Michael K. Powell, the F.C.C. chairman during President George W. Bush's first term, presided over the decision to exempt new fibre-optic networks from the old regime of price controls and rate-of-return regulation. The fast deployment of 4G LTE mobile broadband networks across the country might not have happened had Julius Genachowski, the most recent F.C.C. chairman, imposed a heavy-handed regulatory approach toward the technology" (*Id.*). The "regulatory holidays" for fibre in the US, as well as lighter regulatory control of the remaining broadband markets, have led to higher concentration on each American telecoms market, but also to more stable footing for infrastructure competition, understood as competition between markets of various platforms (telecom fibre, cable networks, satellite, wireless).[40] This, in turn, is a logical consequence of a recognition that markets with high entry barriers (like high-speed broadband markets) will find it extremely hard to develop if excessive service competition prevents economies of scale from reaching critical mass.

The approach proposed by the Polish NRA in its Third Review of Market 5 was inspired by a similar logic. It was, however, still linked to the obligation of non-discrimination underpinned not only by the policing powers of the President of UKE, but also by the intrusiveness of sanctions provided by European competition law[41]. Hence the Commission's argument that the approach championed by the President of UKE could lead to

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[39] Lowell C. McAdam, *How the U.S. Got Broadband Right*, NYTimes, 20 June, 2013, available from http://www.nytimes.com.

[40] As Marcus and Elixmann, cited *supra* note 37, p. 11, add in this context: "Cable can and does serve as (1) an alternative to making FTTx upgrades, especially in areas where the cost of fibre upgrades would be particularly uneconomic, providing cost savings; or (2) as a second fixed network in a given area, providing a facilities-based fixed network alternative to an FTTx network, thus enhancing competition. Wireless also functions in a useful complementary role (1) to provide coverage in low density and/or high cost areas, (2) as a competitive alternative to fixed network solutions, and (3) wherever mobility is needed".

[41] In 2011, the Polish incumbent learnt it the hard way, when it was fined with more than € 127 million in an antitrust case: See press release, Antitrust: Commission fines Telekomunikacja Polska S.A € 127 million for abuse of dominant position, 22 June 2011, IP/11/771, available from http://europa.eu. To see how active the European Commission is in the field it may suffice to mention that only in July 2013 three major European operators (Deutsche Telekom, Orange and Telefonica) were raided by the EC during

"regulatory holidays" (Article 7a Recommendation, Section 30) was at least imprecise. By foiling this argument, and sticking to regulatory paradigms developed at some other point in time and essentially for other purposes[42], the European Commission may easily discourage future NGA deployment in Poland rather than support it.

antitrust proceedings: Reuters, "Deutsche Telekom, Orange, Telefonica in EU antitrust raids", 11 July 2013, available from http://www.reuters.com.

42 Pursuant to the very basic assumption behind *ex-ante* regulation, the inefficiencies of the SMP operator are exploitable by others. While supporting service-based competition on well established markets this assumption inevitably hinders dynamic competition – and thus the emergence of new markets – as it presumes that any incumbent's profits exceeding costs lead to inefficiencies to be taken over by competitors. On the other hand, the asymmetry of regulation does not allow the incumbent to exploit inefficiencies – either static or dynamic – of alternative operators.

Arwid Mednis*

The concept and future of universal service in telecommunications

1. Introductory remarks

There is no operator subject to the universal service obligation in Poland since 9 May 2011 – the day of the expiry of the decisions of the President of the Office of Electronic Communications (hereinafter the "President of UKE") imposing on Telekomunikacja Polska S.A. (hereinafter "TP") the obligation to provide universal service and specifying the conditions of its provision. As a result, TP has not been providing universal service for over two years now.

Before the expiry of the above decision, both telecoms undertakings and specialists raised objections to the universal service model that was in force at that time[1]. The President of UKE acceded to these objections and stated in a communication of 17 May 2011 that "*the existing model of the universal service obligation is ineffective and inadequate to the current needs of the users and the state of the telecommunications market in Poland. It is also not fully correct in implementing the provisions of community law (lack of flexibility)*". The Polish regulator has therefore refrained from initializing new proceedings in the matter of designating an undertaking obliged to provide universal service.

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1 See T. Piątek, *Usługa powszechna – czas na przemyślenie modelu (Universal Service – time to consider its model)*, in: Prawo i regulacje świata telekomunikacji i mediów, No. 1/2010, p. 17 and W. Krupa, R. Duczek, *Model finansowania usługi powszechnej (Model of financing universal service)*, in: Prawo i regulacje świata telekomunikacji i mediów, No. 1/2010, p. 19.

Initially, the provisions of the Telecommunications Law Act of 2004 (hereinafter "TL")[2] that governed the issue of universal service provision did not raise any concerns. With time, however, more and more problems emerged relating mostly to the verification of the net cost of the provision of the specific telecoms services falling within the scope of universal service and the manner of their financing. These, and other concerns, caused a heated debate over the model of universal service provision that continues up to the present day and the current lack of an undertaking designated to provide universal service in Poland.

In the meantime, relevant legal provisions of the TL Act have changed. This shift was primarily caused by the need to implement EU law changes brought about by the 2009 Amendment of Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services (hereinafter "Directive 2002/22/EC" or "Universal Service Directive"). Amendments to Directive 2002/22/EC and the resulting amendment to the TL Act of 16 November 2012 have introduced a number of new legal solutions relevant to universal service. Yet, the discussion over its model still continues. Its main areas of interest include:

– the scope of universal service;
– the financing model of universal service; and
– the role of the regulatory authority.

All of the above issues will be discussed below.

2. Concept of universal service

The source of the concept of universal service in telecommunications lays in the institution of 'Services of a General Economic Interest' (SGEI)[3]. The latter is neither defined in European nor in the Polish legal system, but there are numerous references to SGEI in EU law, which recognizes the existence of this type of services and, at the same time, specifies the fundamental conditions of their provision.

Article 36 of the Charter of Fundamental Rights of the European Union states that "*The Union recognises and respects access to services of general economic interest as provided for in national laws and practices, in accordance*

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2 Act of 16 November 2004 – Telecommunications Law (Journal of Laws No. 171, item 1800, as amended)

3 See S. Piątek, Prawo telekomunikacyjne. Komentarz *(Telecommunications Law. Commentary)*, Warsaw 2013, p. 557.

with the Treaty establishing the European Community, in order to promote the social and territorial cohesion of the Union." On the other hand, however, it follows from the Treaty that EU competition rules should be applied to SGEI unless, that is, their application would prevent the performance of the objectives of such services.

This relationship is best shown by Article 106(2) TFEU which says that undertakings entrusted with the provision of SGEI are 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._

EU rules on competition are specified in Article 101, 102 and 107 TFEU. They ban activities violating effective competition within the internal market, *inter alia*, by concluding agreements on:

– fixing purchase or selling prices;
– limiting or controlling production, markets, technical development, or investment;
– sharing markets or sources of supply;
– applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
– making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

Competition rules also ban any abuse of a dominant position held within the internal market, which takes the form of:

– directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
– limiting production, markets or technical development to the prejudice of consumers;
– applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
– making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts (see art. 102 of the TFEU).

The rescission of competition rules in the name of SGEI is not, however, unconditional. Although, as mentioned, EU law does not contain a definition of SGEI, they must nevertheless meet certain conditions. Their first group is connected to the purpose, or rather purposes, of the provision of such services. General economic interest is a term which is associated with

economic and social growth, improvement of the life and work quality of citizens, equality, and support of social and territorial cohesion as well as other shared values of the EU, to which TFEU provisions refer (Article 14 and 36 TFEU). The second group of criteria includes more detailed conditions of the provision of SGEI. They result from the fact that the realization of the above objectives causes the public authorities' obligation to provide them in the first place. They include conditions such as, *inter alia*, continuity of service provision, its availability, affordability, and specified quality of services.

It is a widely recognised fact that the concept of SGEI covers basic services related to: electricity supply, provision of telecommunications, postal and transport services, water and sewage as well as waste management. The level of service quality should, at the same time, reflect a certain condition of civilizational development[4], a fact particularly well illustrated by discussions on the scope of universal service in telecommunications. It is important though that the actual Member States' obligation to ensure the provision of a certain set of telecoms services does not raise any reservations *per se*.

It is worth noting at this point that the concept of universal service in telecommunications is not exclusive to EU law. Legal solutions meant to ensure the availability of a certain set of telecoms services at an affordable price and service quality either already function, or are considered, in 69 countries[5].

3. Universal service in Directive 2002/22/EC

In its current wording, Directive 2002/22/EC specifies in its Articles 4–6 a minimum set of telecoms services covered by universal service. On their basis, it is mandatory to ensure:

– the connection at a fixed location to a public telecommunications network allowing for voice, facsimile communications and data communications, at data rates that are sufficient to permit functional Internet access, "taking into account prevailing technologies used by the majority of subscribers and technological feasibility";

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4 See point (1) of the preamble to Directive 2002/22/EC: "The concept of universal service should evolve to reflect advances in technology, market developments and changes in user demand (…)".

5 ITU Report "Universal Service Fund And Digital Inclusion For All Study", June 2013, http://www.itu.int/en/ITU-D/Conferences/GSR/Documents/ITU%20USF%20Final%20Report.pdf ("ITU Report").

– publicly available telephone service allowing the ability to make and receive local, national and international telephone calls;
– directory enquiry services and directories;
– provision of public pay telephones or other public voice communications access points to meet the reasonable needs of end-users in terms of the geographical coverage, the number of telephones, or other access points;
– free of charge access to make emergency calls, including using the single European emergency call number 112.

At the same time, Directive 2002/22/EC requires the provision of equivalent access to certain services for disabled end-users.

Being a SGEI, universal service should be provided at an affordable price. Directive 2002/22/EC additionally indicates that Member States may require that designated undertakings provide consumers with tariff options, or packages, that depart from those that would be provided under normal commercial conditions. The purpose of this rule is to ensure that those on low income or with special social needs are not prevented from accessing or using the telecoms network (Article 9(2)). The Framework Directive also includes specific provisions on the quality of the telecoms services covered by universal service.

Directive 2002/22/EC does not specify a concrete method of designating an undertaking, or undertakings, which is to provide universal service. It only indicates that when a Member State makes such designation, in part or all of the national territory, it must do so using an efficient, objective, transparent and non-discriminatory designation method, whereby no undertaking is *a priori* excluded from being designated (Article 8(2) of Directive 2002/22/EC).

The provision of universal service may result in the designated undertaking having to incur additional unjust costs – when the universal service can only be provided at a loss or at a net cost which falls outside normal commercial standards[6]. Directive 2002/22/EC specifies alternative methods of both calculating such costs and their compensation.

Pursuant to Article 12 of Directive 2002/22/EC, the verification of the net cost shall be performed by a national regulatory authority (NRA). For this purpose, the NRA may:
– calculate the net cost of the universal service obligation, taking into account any market benefit which accrues to an undertaking designated to provide the universal service, in accordance with the appropriate annex

6 See point (18) of the preamble to Directive 2002/22/EC.

to the Directive (whereby the verification of documents and information serving as the basis for the calculation of the net cost of universal service obligations may be done by the NRA or other independent body); or
– make use of the net costs of the provision of the universal service identified by a designation mechanism in accordance with Article 8(2) of Directive 2002/22/EC.

Compensation for a designated undertaking may, pursuant to the Directive, take one of the following forms:
– compensation from public funds; and/or
– compensation by sharing the net cost of the universal service obligations between providers of electronic communications networks and services.

In the latter case, the sharing mechanism must reflect, *inter alia*, the principles of transparency, least market distortion, non-discrimination, and proportionality. Importantly, however, Member States may choose not to require a contribution from undertakings with a national turnover below a set limit (Article 13 of Directive 2002/22/EC).

4. Universal Service in the provisions of Polish Telecommunications Law

As mentioned, Polish legislation on universal service was changed by the TL Amendment Act meant to implement the 2009 amendments to Directive2002/22/EC.

The first change concerns the set of telecommunications services that is currently covered by universal service. They now include:
– connection of a network termination point at a fixed location, capable of supporting voice, facsimile and data communications, including functional Internet access at rates supporting the use of common applications to handle current daily life matters, in particular using electronic mail or applications that support payments;
– maintaining the subscriber line with the above-mentioned network termination point ready for providing national and international telephone calls;
– national and international telephone calls;
– nationwide directory enquiry services, available also to the users of public payphones or other points of access capable of voice communications;
– nationwide directories;
– the provision of telephone services by means of public payphones or other points of access capable of voice communications.

Moreover, some institutions (e.g. schools) have the right to a network connection ensuring broadband Internet access of a speed indicated in secondary provisions (currently: download speed of 2 Mbit/s and upload speed of 1 Mbit/s).

The most significant amendment relating to the above set of telecommunications services is likely to be the reference to "functional Internet access" without determining what standards such access should be subject to. Clearly, this is an imprecise term (similar to the expression "current daily life matters"), the use of which may cause problems to a designated undertaking. On the other hand, however, such a solution is very favourable to users. It seems that an undertaking operating in the electronic communications market should know which services are most commonly used by Internet users in a certain period of time.

An extremely important amendment concerns the abandonment of the duty to actually designate an undertaking/undertakings obliged to provide universal service. Undertakings have long since postulated to make the imposition of a universal service obligation an option, rather than a legal necessity. Complete freedom in this regard was clearly out of the question because of the nature of universal service or, more generally, its nature as a service provided in a general economic interest, the provision of which must be ensured by the public authorities. No longer under an obligation to appoint a universal service provider, the President of UKE must now conduct an assessment of the availability, quality, and price affordability of the above listed telecoms services (new wording of Article 81a(1) TL). The regulator arrives at a decision as to the appointment of an undertaking obliged to provide universal service only after such assessment and its public consultation. The selection of the undertaking to be designated takes place via a competition announced by the President of UKE which, by the way, may concern merely a selected telecoms service contained in universal service, to be provided in a given area indicated by the regulator. The NRA is obliged to announce such a competition if the results of its assessment (and following consultations) show that a given service is not available on the market at all, or it is provided but not at a sufficient quality and for an affordable price.

If there are no offers fulfilling the conditions of the competition for the provision of universal service, or a particular telecoms service included therein, the President of UKE designates, by means of a decision, the telecommunications undertaking that is to provide the universal service. The regulator may impose on the designated undertaking specific obligations connected to the provision of universal service. They may relate to issues such

as: disabled facilities, ensuring affordability (also by means of standardized tariffs) or price cups (for instance, to use directory services and to use public payphones). The designated undertaking may also be placed under the duty to provide a special price package, that is, a special tariff option provided under terms and conditions that differ from normal commercial offerings, in order to ensure that consumers with low incomes and special social needs can have access to, and use publicly available telecoms services.

The NRA retains its special control rights, *inter alia*, thanks to the fact that the TL Act placed designated undertakings under the obligation to submit to the regulatory authority:

– draft tariffs with respect to special and basic tariff options;
– draft rules and regulations, as well as their modification, for the provision of universal service or particular telecoms services covered by universal service, together with their justification, at least 30 days prior to their planned implementation.

The President of UKE may raise an objection to the draft, or its part, and place a duty on the designated undertaking to submit a corrected draft within 30 days of the date of the submission of the original draft.

With certain exceptions, a designated undertaking is obliged to submit to the President of UKE its tariffs as well as rules and regulations for the provision of the service it was designated to provide within 2 weeks of the said tariffs, rules or regulations coming into force, and upon each occasion of their modification.

The current TL Act also contains a completely new provision relating to a designated undertaking's intention to transfer its local access network assets, or a substantial part thereof, to a separate legal entity under different ownership. Pursuant to Article 94a, the designated undertaking must notify such an intention to the President of UKE, in order for the regulator to examine the impact of such a transaction on ensuring, and providing network connection and call services. It is also the purpose of such an examination to impose, amend or withdraw regulatory obligations in the retail market. The notification must be made at least 6 months before the planned transfer of assets.

With respect to the subsidy towards the costs of universal service provision by the designated undertaking, the methodology remains in principle the same. The Polish legislator kept the participation model whereby the cost is shared between other suppliers of electronic communications networks and services, provided of course that the actual service is not profitable. If the designation took place by means of a competition, the

subsidy may not be higher than the forecast net cost of the given service as declared during the competition. Aside from subsidies determined with reference to competitions, subsidies are normally set by the NRA at the level of the net cost of the universal service provision by the designated undertaking. However, the net cost shall only refer to those costs that would not be incurred by the designated undertaking, if it was not placed under the universal service obligation. The manner in which net costs are calculated is set out in Article 95(3) TL and in secondary provisions.

The subsidy procedure is an application-based procedure. A designated undertaking may submit a request for the subsidy within 6 months of the end of the calendar year in which it claimed to have incurred a net cost. A designated undertaking submits to the President of UKE the amount of the calculated net cost, as well as receipts and other documents containing data or information used as the basis for the calculation. The NRA is obliged to appoint an auditor in order to analyse this data.

The President of UKE verifies the net cost. Depending on the results of this verification, the regulator grants, by means of a decision, the requested amount of subsidy or refuses to grant it, if it had concluded that the verified net cost is not a justified burden for the designated undertaking.

The Polish legislator used the option provided by Directive 2002/22/EC and limited the circle of undertakings that are obliged to contribute to the subsidy. Pursuant to Article 97 TL, a contribution must be made only by those telecoms undertakings whose revenue from telecommunications activities exceeds ca. 1 million EUR (4 million PLN) in the calendar year for which the subsidy is due. An individual procedure is conducted in order to determine the share in the subsidy in relation to each of these entities. The President of UKE determines a uniform percentage contribution for all telecoms undertakings obliged to participate in the financing of the subsidy, taking account of the amount of the subsidy to be financed. The amount of the contribution of a given telecoms undertaking cannot be higher than 1% of its revenue and is determined proportionally to the amount of its telecoms revenue in the given calendar year. Individual contributions are collected on a special UKE account and then transferred to the designated undertaking entitled to receive them.

The above financing model is in effect since the provisions of the TL Act came into force – the fundamental elements of its construction were not affected by legal changes adopted by means of the 2012 Amendment Act.

5. Assessment of the current model of universal service provision

In June 2011, the President of UKE published the "Final report on the implementation of the universal service obligation (USO) by Telekomunikacja Polska S.A. in the period between 8 May 2006 and 8 May 2011, together with an analysis of the validity and scope of designating an undertaking/ undertakings to provide universal service (USO) in the successive period" (hereinafter "the Report"). The Report was commissioned by the NRA and drawn up by Audytel. As its title indicates, not only does the document contain an assessment of the performance of TP's universal service obligations, but also general comments on the model of universal service provision in the future. Although some arguments and postulates included in the Report grew stale as a successive amendment of the TL Act came into force in 2012, a considerable number of them remain noteworthy.

In the review of the results of the realization of obligations falling within the scope of universal service, particular attention was drawn to the fact that a drop in interest in certain services was a major factor affecting the fulfilment of TP's duties. This took place primarily with respect to obligations concerning line connections and keeping them at standby. As a result of the 2012 amendment, the definition of universal service was expanded and it was added that universal service is provided with the use of any technology, in accordance with the requirement of technological neutrality. This does not mean, however, that mobile services were covered by universal service. And it was the realization of the obligation to provide service connection (and keeping it on standby) that encountered an obstacle of an objective character – rapidly decreasing demand for that service as a result of fixed-mobile substitution and the substitution of services of cable and mobile network operators.[7] In other words, users were choosing to use mobile telephony services or telecoms services offered by cable television operators as an alternative.

At the same time, demand for telephone services provided via public payphones rapidly decreased. Also here, the reason for such a decrease was the fact that users were gradually obtaining access to other means of electronic communications. The same conclusion was reached with regard to the use of facilities and additional services. Therefore, the Report generally confirms the thesis that Poland "skipped" the stage of a fixed communication deficit, going straight to a massive use of other technologies, mainly mobile.

7 Report, p. 57.

Expectations of users change with their preferences. To a large extent, the telecoms network is now used for purposes different to those of 10 years ago. The percentage of entities that use the network solely to make calls is decreasing. More and more people use social networking sites, download movies, music, and search for information. Users are driven by technologies, mobility, and speed of transfer, which in turn raised the question of standards with respect to data flow capacity. The current wording of Directive 2002/22/EC and the TL Act as to the obligation to provide connection of a network termination point refers to quite general formulations on enabling "functional Internet access at rates supporting the use of common applications to handle current daily life matters". But would society today not take mobile services as a civilizational standard? Any moment now, such a question may also be raised with regard to network access through optical fibre. Universal service is a minimum set of telecoms services and there are no obstacles to extend it, but must this set be determined by legislation? A recent ITU Report indicates that many countries gave greater freedom to regulatory and other bodies in formulating the scope of universal service. Thus, the scope is not determined by the law, but left to an appropriate body to decide. Under European legislation, such a postulate is impossible to put into practice. It is so because even though the Directive provides for the possibility to change the scope of universal service, this can only take place on the basis of a periodic review made by the European Commission, and by amending the relevant provisions of the Directive itself.

The Polish legislator assumed, and rightly so, that certain institutions should be guaranteed network access on favourable conditions. This right concerns the so-called 'entitled units' specified in Article 81(5) TL which include educational institutions. The ITU Report indicates that some countries also list hospitals as units entitled to an appropriate data flow capacity[8]. Perhaps this issue is worth considering in Poland as well, seeing as granting a better data flow capacity to medical institutions can contribute to the development of new medical services (e.g. telemedicine).

A separate issue lies in covering the net costs of universal service provision. As mentioned, Poland has adopted a participatory system where non-designated telecoms operators (with certain exceptions) cover the necessary subsidy. Directive 2002/22/EC also allows, however, for an

[8] ITU Report, p. 34. Moreover, the ITU Report points out that due to gender discrimination in many countries, women have worse access than men to telecommunications services and allows granting special rights to women (e.g. subsidizing terminal devices).

alternative solution, that is, covering the net costs from the State budget. The participation model is the most commonly used mechanism today, yet it may take different forms. Unlike Polish subsidies, these costs are included in some countries in annual fees paid by telecoms undertakings on account of their business operations. They can also be covered from fees paid for permits or fees declared within an auction for the allocation of frequencies.[9]

One of the most important issues, however, is that of calculating the net costs of the universal service provision. Polish experiences in this field are very disappointing. During the entire period when TP was obliged to provide universal service, the incumbent was in a constant dispute with the regulator as to the validity and/or amount of the required refund. Yet this is not a typically Polish phenomenon, seeing as such disputes were, and still are, underway in other countries also[10] (Great Britain, Czech Republic, and Italy). Unfortunately, disputes concerning subsidies for TP are still pending before the Polish courts. This illustrates the great level of difficulty in determining the net cost of the provision of universal service. However, it seems impossible to change the method of calculating the costs or to clarify it.

Another widely discussed question is how to distribute the subsidies. The Polish legislator has not chosen to establish a special unit (fund) managing the amount of the subsidy. The ITU Report lists many benefits the existence of such a special entity could have, arguing for a unit independent from political pressure, professionally managed and meeting all transparency standards. The advantage of such a solution would also be the creation of the possibility to use financing sources other than operators' subsidies. A specialised fund could perform tasks related to the financing of universal service in cooperation with, for instance, non-governmental organizations, using the formula of a public-private partnership etc. Independent entities-funds exist in Bulgaria and Hungary. Perhaps such a unit should also be established in Poland.

6. Conclusions

The universal service formula, and in particular its funding aspect, has been raising concerns for a long time now. Changes made recently to the TL Act that were meant to, according to the model set out in

[9] ITU Report, p. 6.

[10] Audytel Report, p. 53.

Directive 2002/22/EC, eliminate the duty to designate an undertaking with a universal service obligation should be assessed positively. The powers of the regulator in this area should be designed in a flexible manner and should depend primarily on the assessment of whether, and under what conditions, a particular telecoms service falling within the scope of universal service is available on the market. The determination of the scope of universal service remains a separate issue. It seems that in this case the regulator should have greater flexibility, but this would require a change in EU law.

The way in which the costs of universal service provision are refunded should also be considered. There is no better and more transparent method of determining their net costs than the model currently envisaged in the Directive and in Polish law. However, a new method of how these funds are to be distributed should be considered. Perhaps creating a dedicated unit-fund would bring additional benefits to this area, provided it had the capability to use other financing sources, investing and participating in projects in the PPP formula or other similar solutions.

A radical change in European provisions on the method of universal service provision it not likely to be introduced in the near future. This issue is considered to a modest extent only in the recent Proposal for a Regulation of the European Parliament and of the Council announced on 11 September 2013 and laying down measures concerning the European single market for electronic communications and to achieve a Connected Continent, and amending Directives 2002/20/EC, 2002/21/EC and 2002/22/EC and Regulations (EC) No. 1211/2009 and (EU) No. 531/2012[11]. However, it is worth noting that pursuant to that proposal a European electronic communications provider[12] "may be subject to the contributions imposed to share the net cost of universal service obligations in the host Member State only if it has an annual turnover for electronic communications services in that Member State above 3% of the total national electronic communications turnover. In levying any such contribution only the turnover in the Member State concerned shall be taken into account" (Article 3(4) of the Proposal for a Regulation).

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11 http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2013:0627:FIN:PL:PDF

12 Pursuant to the proposal, a 'European electronic communications provider' means an undertaking established in the EU providing or intending to provide electronic communications networks or services, whether directly or by means of one or more subsidiaries, directed at more than one Member State, and which cannot be considered a subsidiary of another electronic communications provider.

Jan Siudecki*

Voluntary separation in telecommunications – Polish experiences

1. Introductory remarks

With the liberalization of telecommunications in the European Union, public authorities faced a completely new challenge. It was the challenge of regulating not only a very complex sector represented by big, resourceful companies, but also of regulating according to an *ex ante* rather than *ex post* model. Although the effectiveness and global profitability of *ex ante* regulation is still being disputed, it has to be stressed that the liberalization of telecoms markets has profound significance for both the sector, as well as for public administration. The latter, faced with a task as demanding as *ex ante* telecoms regulation, tends to turn to alternative methods of regulation and to search for new regulatory instruments. One of those methods is sanctioned self-regulation. European doctrine has given much attention to sanctioned self-regulation as an instrument of public policy--making since its emergence in European policy-making in the 1980'. The topic causes much controversy even until today with respect to its effectiveness and the legality of its use. Voluntary commitments of telecoms incumbents concerning functional separation provide excellent material for an analysis of how public agencies may react towards self-regulation and what problems might arise for administrative law.

Functional separation is also a relatively new concept that has been implemented only in a few Member States so far. Due to the scarce experiences in its use, a blueprint for its implementation has not yet been

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developed, both when it comes to its content and the form in which it should be carried out. On the basis of Polish experiences, this paper may provide some insights as to the need to involve a vertically integrated incumbent when separating it into its wholesale and retail parts. Bearing in mind that the revised Framework Directive[1] sets out two methods of imposing functional separation on an incumbent (a coercive one in Article 13a and one involving an element of voluntariness on the part of the incumbent in Article 13b), this issue seems to be currently a relevant one.

It is argued here that the concept of sanctioning self-regulation as well as the notion of functional separation have emerged as an answer to a common problem of contemporary public administration, affecting especially authorities in sectors susceptible to *ex ante* regulation. This is the problem of informational asymmetry. Voluntary regulatory measures are meant to involve the industry in the regulatory process and eventually make the industry disclose information which, if coercive measures were used instead, would be hard for the regulator to obtain. Functional separation is, on the other hand, a remedy aimed at reducing information asymmetry between the regulator and the incumbent. The increased transparency it provides allows regulators to grant further discretion to the regulated company to set prices and to identify discriminatory conduct.[2] Functional separation is an attempt to combat resource deficiencies on the part of the regulator. It has to be noted, however, that a measure as complex as breaking up a private company is in itself significantly affected by the phenomenon of informational asymmetry. This paper intends to offer some insights as to the use of sanctioned self-regulation to implement functional separation. It also tries to answer the question whether embracing voluntary industry commitments by public administration may deliver on information deficiencies. The paper will also highlight the general advantages and disadvantages of using sanctioned self-regulation for conducting functional separation of an incumbent, primarily on the basis of the Polish example of separation.

The first part of this paper outlines the emergence of voluntary undertakings offered by the industry and the attempts to use them in regulatory policy. Generally identified will also be issues arising from public involvement in self-regulation. The second part of this paper contains

1 Directive 21/2002 of the European Parliament and of the Council of 7 March 2002, on a common regulatory framework for electronic communications networks and services (L 108/33, 24.4.2002).

2 Oxera Consulting, *Vertical functional separation in the electronic communications sector. What are its implications for the Portuguese market?*, Final report, July 2009, p. 21.

a detailed description of some examples of how sanctioning self-regulation may collide with contemporary administrative standards and principles. The third part attempts to offer some insights as to what benefits may arise from encouraging the incumbent to actively participate in the implementation of functional separation instead of resisting it.

2. Emergence of self-regulation sanctioned in the form of a public contract in the European and Polish legal framework

It is worth analyzing the emergence of self-regulation as a regulatory instrument in European policy as it sheds some light on the source of the entire problem of its legality. Voluntary agreements first emerged in environmental policy and were used when institutions lacked formal law-making or executive capabilities[3]. They were seen as a remedy for a slow and cumbersome legislative process, often ending in stalemates or gridlocks[4]. The European Commission first engaged in sectorial agreements as early as 1989[5], but it was not until 1996 that it decided to provide general guidelines on this issue in a formal policy document. In its Communication to the Council and the European Parliament on Environmental Agreements, the Commission set out general guidelines for the use of environmental agreements and introduced a differentiation between self-regulatory and co-regulatory agreements[6]. The European Parliament reacted with skepticism. It noted in a Resolution on the Communication from the Commission to the Council and the European Parliament on Environmental Agreements[7] that: "*mere recognition of unilateral undertakings given by industry cannot adequately guarantee the transparency, credibility and, above all, legal certainty of such measures which are expected by the public, since the legal status of such recognition by the Commission, and the judicial consequences deriving therefrom, are extremely uncertain*". The European Parliament's concern was understandable as sanctioning self-regulation

3 Peters A., Pagotto I., *Soft-law as a new mode of governance: A Legal Perspective*, Basil, 2006, p. 5.

4 Heritier A., *New Modes of Governance in Europe: Policy-Making without Legislating?*, Bonn, 2002, p. 2.

5 Agreement on the labeling of detergents and cleaning products and an agreement on the reduction of chlorofluorocarbons by the aerosol industry

6 COM(1996)561, Communication from the Commission to the Council and the European Parliament on Environmental Agreements.

7 C4-0013/97, Resolution on the Communication from the Commission to the Council and the European Parliament on Environmental Agreements, O.J 1997, C 286, p. 254.

(formally accepting or approving voluntary commitments)[8] could constitute a means of circumventing its role in the regulatory process. That would be the case, for example, if the European Commission used a voluntary measure instead of adopting a directive. Subsequently, the Commission addressed the most controversial issues relating to self-regulatory mechanisms in a communication on Environmental Agreements on European Level[9].

It is worth noting that self-regulation was part of a broader European debate concerning Better Regulation. Its problems were addressed in the White Paper on European Governance of 2001[10], in the Action Plan on Simplifying and improving the regulatory environment of 2002[11] and finally in the Interinstitutional Agreement on better law-making of 2003[12] (which finally secured a role for the European Parliament in sanctioning self-regulation). All of these documents were generally mean to provide guidelines on the use of new methods of governance and to alleviate some of the fears regarding the use of such measures[13]. The number of documents setting out guidelines for the use of new modes of governance and the time-span of their adoption clearly show how controversial the whole issue really is. Yet establishing those rules resulted in the creation of a new benchmark, which the European Commission called a '*new legislative culture*'[14]. The latter is largely inspired by the notions of flexibility and differentiation and that not only from a substantive point of view, but also from an institutional or instrumental one (when it comes to the modes or instruments by which European integration is to be given shape[15]). It is a manifestation of a general trend visible both at the national and European

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8 Heijden van der J., *Enforcement of building regulations: from public regulation to self-regulation; a theoretical approach.* ENHR International Conference 2007 Rotterdam.

9 COM(2002)412, Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions – Environmental Agreements at Community Level – Within the Framework of the Action Plan on the Simplification and Improvement of the Regulatory Environment.

10 COM(2001) 428 White Paper on European Governance 25 July 2001.

11 COM(2002) 278 final, Communication from the Commission, Action plan '*Simplifying and improving the regulatory environment*', 5 June 2002.

12 O.J. 2003, C 321/01.

13 For more detail see: European Parliament resolution of 4 September 2007 on institutional and legal implications of the use of "soft law" instruments (2007/2028(INI)) http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P6-TA-2007-0366+0+DOC+XML+V0//EN

14 See the Report on Implementation of the Commission's work programme for 1996, European Commission, Brussels, 16 October 1996, p. 10.

15 Senden L., *Soft law, self-regulation, and co-regulation in European Law: Where do they meet*?, EJCL, t. 9, 1 January 2005, p. 5.

level that law-making and law enforcement instruments are increasingly diversified.[16] A conclusion may be drawn therefore that the use of voluntary measures as a European policy instrument was an answer to very practical problems related to the possibilities and effectiveness of policy realization and that they were conceptualized only when concerns were voiced by relevant parties.

The controversies considered in the aforementioned documents as well as in legal doctrine focused on situations where these new methods were to be used instead of a legislative rather than in place of an executive act. This was generally the manner in which the European Commission applied them (for example, the ACEA commitment which explicitly states in point 2 that: "*As long as its commitments (see below) are being honoured, ACEA is assuming that this Commitment provides complete and sufficient substitute for all new regulatory measures to limit fuel consumption or CO2 emissions, and for any fiscal measures in pursuit of the CO2 objectives of this Commitment.*"[17]). Yet it is worth noting that sanctioning self-regulation may stir problems not only when used instead of a legislative act but also when used in place of an executive act. It may even be argued that legality issues are much more profound in the latter case because an administrative body has considerably less discretion to decide whether to regulate than a legislative body has to decide whether to legislate[18].

Although the aforementioned documents provided many guidelines as to what should be treated as self-regulation, a clear classification of that notion has not been established. Indeed, divergent definitions can be found in the official documents of the European Commission. In the Interinstitutional agreement on better law-making, self-regulation is defined as *the possibility for economic operators, the social partners, non-governmental organizations or associations to adopt amongst themselves and for themselves common guidelines at European level (particularly codes of practice or sectoral agreements)*[19]. In the Communication on Environmental Agreements on Community Level, self-regulation is described as concerning a large number of practices, common rules, codes of conduct and, in particular, voluntary

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16 Peters A., Pagotto I., *Soft Law as a New Mode of Governance: A Legal Perspective*, Newgov, 28 February 2006, p. 14.

17 http://aei.pitt.edu/3388/1/3388.pdf

18 Cafaggi F., *Rethinking Private Regulation in the European Regulatory Space*, EUI Working Papers, Law No. 2006/13, p. 49: "*It is certainly the case that such discretion is higher in the context of rule – making than in that of monitoring and supervision* […]."

19 European Parliament, Council, Commission *Interinstitutional Agreement on Better Law--Making*, O.J. UE 2003, C 321, p. 3.

agreements which economic actors, social players, NGOs and organized groups establish among themselves on a voluntary basis in order to regulate and organize their activities. The Communication states further that unlike co-regulation, self-regulation does not involve a legislative act and that it is usually initiated by stakeholders.[20]

This paper aims to analyze the legal consequences for an administrative body that wishes to sanction a self-regulatory initiative. It is thus sufficient to note that two characteristics are key traits differentiating self-regulation from other regulatory measures: the lack of explicit legal basis for the measure (which differentiates self-regulation form co-regulation) and the element of voluntariness (a constitutive feature of self-regulation as it differentiates it from purely coercive governmental actions).

Only sanctioned self-regulation is relevant from the perspective of administrative law and public regulatory policy because purely self-regulatory measures, which do not involve State action, do not seem to pose legality issues. For this study, a public contract between an industry representative and a public body has been used. It seems that this method of sanctioning self-regulation causes some additional problems relating to the general competence of the State to conclude public contracts. Still, not all sanctioned self-regulatory measures take the form of a public contract since not every public contract contains voluntary commitments of a private party. At the same time, not every public contract constitutes self-regulation such as, for example, those that have an explicit legal basis. Nevertheless, the majority of legal concerns are typical for both institutions. Bearing this in mind, it has to be pointed out that most of the conclusions reached in this paper will be true also for sanctioning self-regulation in other forms (for example, in the form of notices or communications). Yet some specific questions related to the use of a public contract as a public policy measure have to be addressed also.

From the legality point of view, a clear distinction must be made between a public contract concluded between the State and private parties employed to furnish services (contracting out), and regulatory contracts used to set out norms determining the conduct of a private party. The competence of public bodies to contractually entrust the realization of certain functions in the public benefits sphere is widely accepted and has been thoroughly discussed. By contrast, the use of public contracts to regulate a private party

[20] COM(2002) 412 final *Communication from the Commission to the European Parliament, The Council, The Economic and Social Committee and the Committee of the Regions Environmental Agreements at Community Level Within the Framework of the Action Plan on the Simplification and Improvement of the Regulatory Environment*.

is a relatively new development in administrative and regulatory studies and certainly calls for greater attention. The issue of regulatory contracts has been addressed by Professor J. Freeman in a paper entitled "*The contracting state*"[21]. The author notes that regulatory contracts pose unique problems for administrative law: "*Among other things, they depend heavily on private actors that tend not to be bound by constitutional or administrative law constraints.* […] *It also highlights the potential conflict between the government's role as authoritative regulator and its role as contracting partner. Finally, the contractual prism foregrounds the ways in which contract, as a particular mode of decision making, might uniquely obstruct or facilitate public participation.*" It can thus be generally said that the risks of employing a contract in order to regulate are as follows: the need to safeguard an efficient execution and public participation as well as complications arising from the fact that a public body is acting in a non-authoritative manner when trying to define private conduct. Yet these serious legality issues do not deter public authorities form concluding such public contracts seeing as they also facilitate clear advantages. They include: the accomplishment of policy goals that cannot be achieved in other ways because of legal or political reasons, greater flexibility than in a formal enforcement process and the inclusion of private actors and, as a result, exacting concessions or knowledge sharing.

It has been outlined already what measures may be classified as sanctioned self-regulation and what is the relationship between a public contract and sanctioned self-regulation on the basis of European experiences with self-regulation. A general conclusion may be drawn here that sanctioned self-regulation was a concept designed to address some very practical problems arising in the course of policy formulation and its implementation by the European Commission. It is worth analyzing if the same conclusion applies to transferring this concept onto national grounds and what implications does that pose from the legal perspective.

The first major example of sanctioning self-regulation in Poland was the acceptance of voluntary commitments concerning the functional separation of the Polish telecoms incumbent, Telekomunikacja Polska (henceforth "TP"). These undertakings were accepted by the Polish telecoms regulator, the President of the Office of Electronic Communications (henceforth "President of UKE") in the form of a public contract concluded in October 2009 (henceforth "the Agreement"). However, the idea of functional separation surfaced in Poland somewhat earlier, in September 2007, when

[21] Freeman J., *The contracting state*, Florida State University Law Review vol. 28/2000, p. 155.

the President of UKE published a communication on the possibility of imposing a functional separation obligation[22] as a regulatory measure on the basis of Article 44 of Polish Telecommunications Law (henceforth "TL"), implementing Article 8 paragraph 3 of the Directive 2002/19/EC[23] (henceforth Access Directive). A public consultation begun on the necessity of separating TP's wholesale access unit from the rest of its business, a consultation which included meetings with members of British, Italian and Swedish regulatory authorities. As was to be expected, the incumbent strongly objected to the envisaged remedy.

The greater part of the debate focused on the legal basis for the implementation of a functional separation. In its conclusions, the 2007 communication suggested that the only possible legal basis for imposing a functional separation would be Article 8 paragraph 3 of the Access Directive and the implementing Article 44 of the TL. The President of UKE referred in this context to Italian experiences. The incumbent opposed this approach and put forward strong arguments against such interpretation[24]. It highlighted the fact that a significant part of the obligations that make up a functional separation transcends the definition of telecommunications access and interconnection, as contained in the Access Directive. They include, for example, management division, separate motivation schemes and "Chinese walls". As a result, they could not be imposed on the basis of Article 8 paragraphs 3 of the Access Directive because latter provides for a possibility to impose access obligations only. TP invoked in this context an opinion[25] expressed by the European Regulatory Group which, in the incumbent's view, precluded the imposition of a functional separation on the basis of the Access Directive. In light of the legislative amendment process underway at that time, TP stated also that the wording of the Directive applicable at the time of the consultation did not permit the imposition of such obligation, unlike the revised version of the Access Directive which contained explicit provisions on functional separation. Moreover, doubts on using the European telecoms framework as a basis for a functional

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22 http://www.uke.gov.pl/_gAllery/81/71/8171/Funkcjonalna_separacja_informacja_UKE.pdf

23 Directive 2002/19/EC of the European parliament and of the Council of 7 March 2002 on access to, and interconnection of, electronic communication networks and associated facilities (Access Directive), O.J. L 108/7 of 24.4.2002.

24 http://www.uke.gov.pl/_gAllery/92/97/9297/TP_stanowisko_separacja.pdf

25 ERG Opinion on Functional Separation ERG (07) 44. http://www.irg.eu/streaming/erg07_44_cp_on_functional_separation.pdf?contentId=543366&field=ATTACHED_FILE

separation were voiced by the Commission[26], Ofcom and OPTA[27]. Similar doubts were also expressed by the Polish Ministry of Infrastructure which, after ordering an expert opinion, issued a formal position stating that "*imposing functional separation obligation via regulatory decision issued on the basis of art. 44 of Telecommunications Law, being a direct transposition of art 8 paragraph 3 subparagraph 2 of the Access Directive, is currently legally impermissible*"[28].

It is not necessary to settle this dispute in this paper. It is relevant to note though that the legal basis for imposing functional separation in the Polish legal framework was, at that time, ambiguous at best. Nevertheless, the President of UKE continued his efforts and initiated on the 15th of December 2008 formal administrative proceedings on TP's functional separation on selected relevant markets. The incumbent reacted with its first voluntary commitment – the Charter of Equivalence – containing undertakings alternative to functional separation but meant to achieve a similar result with respect to transparency and nondiscrimination. The Charter of Equivalence was deemed insufficient by the regulator. However, it was this initiative that allowed both sides to initiate negotiations on further commitments that finally led to the conclusion of the Agreement. The described course of events shows that taking up voluntary obligations and their subsequent sanctioning is a process of negotiation, even bargaining, which has little in common with the exertion of State powers entrusted to administrative bodies. It shows how a public authority leaves its position of power and levels itself to the position of an equivalent party, typical for contract law. Such contracting obscures the boundaries of accountability inherent in administrative law and raises questions as to the extent of the freedom of a regulatory body to carry out its entrusted tasks.

Indeed, legal concerns with regard to public contracts focus on the discretion of a public body concerning the form in which it executes its tasks. This issue reflects, in fact, the question whether a lawful goal justifies the use of whatever method the administrative body perceives as the most effective in the execution of its policy? It may be argued that regulation in general is pervaded by negotiations and an exchange, and that it does not conform to an idealized hierarchical model of governmental power whereby agencies authoritatively determine private conduct under the threat

26 memo/06/257 of 29th June 2006.

27 Ofcom's Strategic Review of Telecommunications and BT's Undertakings, Prepared on behalf of OPTA, Netherlands, Nera Economic Consulting, 15th February 2007, p. 32.

28 biuroprasowe.netpr.pl/getFile.PressRelease.93078.po?oid=44461

of sanctions.[29] Yet it is obvious that regulation is not only about policy shaping or, in other words, about content. Widely understood procedure contains requirements on the form of governmental action also, rather than just requirements for issuing an administrative act. One must not overlook the profound function that procedure performs and rights it secures. The question has yet to be answered as to the boundary between effectiveness and legality (understood as compliance with basic procedural requirements) with regard to self-regulation sanctioned in the form of a public contract. The following part of this paper is meant to shed some light on this issue by providing insights as to what established procedural requirements and principles may be threatened by the use of sanctioned self-regulation in the form of a public contract. They will be based on an analysis of the aforementioned Agreement.

3. Legal doubts concerning sanctioned self-regulation

It may be deduced from the definition set out above that sanctioned self-regulation differs from pure self-regulation in that it requires some form of action on the part of a governmental actor. This involvement of a public entity implies that sanctioning of a self-regulatory initiative cannot be rendered irrelevant from the point of view of public law in general, and from the point of view of the legality principle in particular. It may be argued that since public authorities may act only on the basis of the law, none of their actions can be treated as a legally irrelevant 'gentleman's agreement'. Governmental actions will always have consequences in the public law sphere, irrespective of their binding or non-binding character. This issue is clearly reflected in a definition formulated by L. Senden that accurately grasps the essence of voluntary measures: "*Rules of conduct that are laid down in instruments which have not been attributed legally binding force as such, but nevertheless may have certain – indirect – legal effects, and that are aimed at and may produce practical effects.*"[30]

The conclusion of the Agreement, and the ambiguity of its legal consequences especially when it comes to securing its execution for the parties involved, resulted in an amendment to the TL. A new legal provision was added giving a telecoms operator the possibility to make voluntary

[29] Winter G., *Bartering Rationality in Regulation,* Law & Society Review, vol. 19 no. 2, 1985.

[30] Senden L., *Soft law, self-regulation, and co-regulation in European Law: Where do they meet?*, EJCL, t. 9, 1 January 2005, p. 23.

commitments which would be subject to approval by the President of UKE in the form of an administrative act. Because voluntary obligations undertaken on the basis of an explicit statutory allowance constitute co-regulation, as highlighted earlier, this amendment will not be further analyzed here. It is nevertheless worth noting that the rationale of the amendment stated that "*In particular Polish law does not provide for agreements concluded between the telecommunications regulator and an operator possessing significant market power, subjected to regulation. Although assuming general obligations by such an entrepreneur is not excluded, Polish legal framework does not associate with such undertakings clear legal consequences, in particular there is no legal basis for their subsequent execution.* […] *this legal form does not permit for general regulation of SMP operator's conduct.*"

As to the execution possibilities of the Agreement, an asymmetry of positions can be identified between the regulator and the regulated. One has to bear in mind that the Agreement in question is a contract of public rather than private law. While execution possibilities of private law do not apply to the Agreement, administrative procedural law bounds the public contractor only, not the private. This results in a situation where, at least on the grounds of Polish law, a public contract practically imposes obligations only on the public party. This in turn results in a situation where a public body is not only bound by its actions, but must also search for possibilities of securing execution outside administrative law. It is this very problem which is one of the main sources of legality concerns. Not only is the private body not bound by its voluntary obligations (in the sense that they are not enforceable on the basis of the law), it may also have means to challenge the State action.

The possibility of challenging non-coercive State actions is envisaged in the Polish legal order in the Act on proceedings before administrative courts[31]. According to its Article 3, the control exercised over public administration by administrative courts encompasses acts other than decisions or orders which concern rights and obligations stemming from legal provisions. Although no complaint about unbinding public contracts has yet been filed on this basis, it seems that all the statutory requirements are met. In accordance with Article 146 of the Act on proceedings before national courts, the consequences of recognizing such a complaint are either the annulment of the challenged act or ordering its ineffectiveness. The success of challenging the Agreement on the discussed basis is uncertain

[31] Journal of Laws of 2002, No. 153, Item 1270 with amendments.

in light of the lack of case law. Nevertheless, a possibility to evade the consequences of concluding the Agreement exists for the private party.

The regulator on the other hand has no legal instruments to enforce the Agreement. The Act on executive proceedings in public administration[32] is applicable to obligations stemming from acts other than an administrative decision or order (or to obligations stemming directly from a legal provision), but only if separate provisions stipulate so. The TL does not explicitly provide for the sanctioning of self-regulatory measures, nor does it contain such separate provisions. The TL may also not serve as a basis for the execution of the Agreement independently of regulations on executive proceedings in public administration. The TL stipulates that the President of UKE may control compliance with legal provisions, administrative decisions and orders in the field of telecoms, frequency management and compliance with electromagnetic compatibility. However, the Agreement was based on procedural provisions only (general competence provisions) rather than on material provisions stipulating obligations of private parties. It thus has to be assumed that control and subsequent fine imposition is not possible with regard to the Agreement on the basis of the TL.

That means that the President of UKE does in fact not have any legal remedies at his disposal to ensure the execution of the Agreement. The shape of his regulatory policy and "regulatory pressure" exerted upon the incumbent are the only means of ensuring compliance with the obligations accepted in the Agreement. Pending formal administrative proceedings for the imposition of a functional separation, which have been suspended until October 2012, are the regulator's trump card here. Should the evaluation of the implementation of the Agreement prove to be negative, then the proceedings would be resumed. The similarity with the Commission's solution used with regard to the automotive industry's ACEA agreement is evident. Yet it is acknowledged that imposing a functional separation would take two to three years from when the formal proceedings are resumed. It would also require a resource-consuming analysis and the gaining of an uncertain consent from the European Commission.

The shadow of regulation has therefore proven to be enough to encourage TP to self-regulate, albeit there is no guarantee that its voluntary undertakings will be fulfilled. That is most likely the reason why a vast majority of the provisions of the Agreement were later incorporated into reference offers. This regards TP's commitments on the procedure of placing orders on regulated access services, inter-operator and inter-service

32 Journal of Laws of 1966, No. 24, Item 151 with amendments.

switching, modifications of regulated services as well as undertakings on the Time to Market process and Price and Margin Squeeze tests. Alternatively, some of these commitments were contained in SMP decisions as detailed non-discrimination obligations. This in turn concerns the implementation of an information system for ordering access services, the implementation of "Chinese walls", the application and publishing of Key Performance Indicators and the application of a code of practice on non-discrimination for the employees of TP.

The final version of the Agreement was not subject to public consultation and there was no possibility for alternative operators to voice their opinions on an act that stipulated many procedures that would affect their cooperation with TP. It has to be stressed here that such conduct may seem incompatible with the principle whereby regulatory decisions are to be consulted with interested parties. This principle is not only highlighted in the Framework Directive ("*It is important that national regulatory authorities consult all interested parties on proposed decisions and take account of their comments before adopting a final decision.*"), but also inherent in general standards of contemporary regulation. That is because an administrative body cannot simply ignore an earlier participation in a self-regulatory measure in the course of subsequent formal regulatory proceedings. This view has been confirmed by the Polish Supreme Administrative Court in a judgment of 7th July 1996[33]. It has been established therein that public administration bodies are bound by fundamental principles stemming from the code of administrative procedure, including its Articles 8 and 9 (respectively, the principle of augmenting trust of citizens towards the State and principle of informing the parties). This rule not only applies from the moment of the initiation of formal administrative proceedings but also every time the actions or forbearances of administrative bodies influence events that may become factual circumstances decisive for the outcome of a future procedure. A similar position is held by the Polish Supreme Court[34].

In consequence, including in a regulatory decision remedies settled earlier with one of the parties to that decision, may render public consultation a fiction with regard to those remedies. Since the President of UKE is to a broad extent bound by the stipulations of the Agreement in accordance with the aforementioned jurisprudence, future remedies would in principle have to comply with the provisions contained in the Agreement.

33 SA/Gd 850/95.

34 Order of 20th of July1995, sign. III ARN 21/95.

One may argue that similar limitations for public administration are inherently bound with regulation. For example, the President of UKE issues communications similar to the recommendations[35] frequently used by the European Commission, outlaying his enforcement principles and clarifying his regulatory policy. Those documents have to be taken into consideration when issuing regulatory decisions as much as the Agreement. Yet such notices or communications are a manifestation of the authority and discretion of public bodies to shape their regulatory policy. They are adopted independently by a given public body – this realization is not changed by the fact that they undergo public consultation because their shape is ultimately decided by the regulator. The same cannot be said with regard to the Agreement or any other self-regulatory measure sanctioned by the conclusion of a contract. Even if it is assumed that there is no equality of parties, as is usual for civil contracts, an agreement is always based on the assumption of consent of both parties. As such, it cannot be regarded as a display of the right to freely shape regulatory policy because it is not an independently formulated document. As a result, implementing solutions agreed upon with only one of the private parties to a final regulatory decision seems to be incompatible with the requirement of their public consultation. In practice, the outcome of those consultations would not reflect the positions of the consulting parties unless they are convergent with the stipulations of the earlier agreement. In other words, it is doubtful if a situation where the final outcome of the consulted measure was previously agreed upon with only one of the parties to that measure is in accordance with the principle of the 'hearing of the interested parties'.

It can also be argued that in some sense the Agreement has more stringent consequences for the President of UKE than a formal communication or notice. An administrative body has the possibility to deviate from the principles of its own soft law acts since they are not addressed to a specific private party. Of course such shifts require due justification most commonly with reference to specific factual circumstances of a particular case or in fact their change. By contrast, there does not seem to be a possibility to modify rights and obligations stemming from the Agreement in subsequent regulatory proceedings (without the private party's consent of course) due to specific circumstances or their subsequent change. That is because, in contract law, the principle justification for the non-execution of a contract

[35] Whose semi-binding legal status was clarified by the Court of Justice in *Grimaldi* (judgment of the Court of 13 December 1989. – *Salvatore Grimaldi v Fonds des maladies professionnelles*. Case C-322/88. ECR 1989, p. 044).

cannot be based on the specific situation of its execution. As the Agreement is a contract concluded with a private party, invoking the conditions of its conclusion in order to withdraw from its provisions would not be possible. Moreover, a contractual party cannot normally invoke a change of circumstances to refrain from fulfilling its obligations stemming from the agreement. Indeed, even if there was a possibility to modify the obligations previously agreed upon, some scholars remark that an "*agency is unlikely to reopen issues it considered resolved*"[36] most probably because of resource savings and the unwillingness to dedicate additional time to "dealt with" issues.

It may be concluded that public contracts of these types might bind an administrative body stronger than its soft law acts. Sanctioning self-regulation in the form of a public contract is binding upon the public body – such act may constrain subsequent regulation and influence compliance with specific requirements. The conclusion that stems from the above discussion is that the choice of form of a public act has consequences for the legal situation of private parties as well as for the regulator. As a result, general discretion as to the choice of the form of the action should be defined with regard not only to securing the rights of the private party, but also with regard to ensuring the realization of public tasks by the public body with accordance to relevant procedure.

The issue of discretion in sanctioning self-regulation emerges when it comes to the form of the action as well as when it comes to its content. In principle, norms allowing binding regulation of private parties state clearly when, to what an extent and with what prerequisites can a private party be regulated. As mentioned, sanctioning self-regulation is applied only on the basis of general competence norms and those defining duties and aims of the given public body. It is rational and undisputed that coercive and binding measures require explicit and strictly defined competence norms; regulatory measures that do not define rights and obligations may be applied on the basis of general competence norms. However, sanctioning of self-regulation skips this dichotomy. It is applied on the basis of general competence norms and yet it may, in practice, largely influence the rights and obligations of a private party. The voluntariness of self-regulation does not rehabilitate these shortcomings for two already discussed reasons. First, self-regulation is in practice seldom purely voluntary seeing as it is facilitated by 'regulatory pressure'. Second, from the perspective of the public bodies,

[36] Seidenfeld M., *An Apology for Admnistrative Law in "Contracting State"*, Florida State University Law Review, Public Law and Legal Theory Working Paper No. 26, p. 24.

the sanctioned commitments of private parties must be taken into account in the course of further regulation despite their voluntary character. In other words, sanctioned self-regulation is something more than a realization of tasks normally dealt with by way of non-binding measures (such as, for example, fostering an open method of coordination, public campaigns, reference documents, policy documents etc.) and yet it is adopted on the same legal basis. Since those norms are general in nature there is much scope for interpretation, while more detailed provisions would normally apply in accordance to legislative standards.

Functional separation illustrates this issue well. It is an extremely intrusive measure and a serious exception from the freedom of economic activity principle. As such, it should be "caught" in a precise legal framework. However, in Europe it is so far being imposed on an ambiguous legal basis. This issue reflects the question whether an administrative body should use nonbinding measures in situations when using legally binding measures would normally be applicable. While these issues are most relevant to political bodies and should be resolved at the legislative level, other concerns relate to extensive discretion when sanctioning self-regulation, which are more relevant for law enforcement authorities.

Discretionary latitude inherent in sanctioning self-regulation may tempt public bodies to achieve results that are beyond their reach for political or legal reasons. A flagrant example of such conduct may be found in the Agreement which states in paragraph 2 subparagraph 1 point i) that TP is obliged to terminate court proceedings pending from actions and appeals lodged by TP against administrative decisions issued by the President of UKE. It is true that a hostile attitude towards regulation and a "mechanical" challenging of regulatory decisions may pose a serious obstruction to regulation. A fine example in this context can be found in the United States where "*the resisters of the Federal Communications Commission policy have exerted considerable influence on the FCC'S decisions by investing in lawyers, lobbyists and politicians*"[37]. Constant court battles not only resulted in the reorientation of FCC policy but also caused that "*unbundling regulations* […] *ended up inoperable to the broadband services and unsuitable with the institutional characteristics of the U.S.* […]"[38]. Similar problems were observed in Europe, for example in Sweden: "*TeliaSonera has appealed against a large number of the orders relating to LLU that have been*

[37] Choi. S., *Facilities to service based competition, not service to facilities based, for broadband penetration: A comparative study between the united States and South Korea*, Telecommunications Policy, vol. 35, issue 9–10, October/November 2011, p. 812.

[38] Ibidem.

issued by PTS. In a couple of cases where the orders were appealed against, the courts revoked or provisionally suspended the decisions, for which reason these problems still persist. The court processing time for these types of case is also very long, which creates uncertainty in the market."[39]

A similar situation was observed by the President of UKE in the Polish market. Recent statistics show that about 1166[40] appeals were lodge against decisions of the telecoms regulator between 2006 and 2011. Although the exact number of decisions challenged specifically by TP was not disclosed, it can be assumed that they formed a significant part of the aforementioned number. By way of digression, decisions on Mobile Termination Rates are another considerable source of court disputes in Poland but seeing as the number of mobile operators is far larger than that of fixed operators, the adopted assumption stands. Regulatory obstruction has been identified as a major problem for effective regulation. It is doubtful, however, from the point of view of administrative law principles, whether pressuring those being regulated to refrain from challenging regulatory decisions in court is the right approach. That is so especially if the influence is exerted by the body that issued those decisions in the first place. The importance of the right to appeal an administrative decision does not need further discussion. The aforementioned commitment seems all the more dubious in the light of the fact that it is not completely voluntary, seeing as the shadow of forced functional separation still looms over TP. This conduct illustrates the activity described in American doctrine as "*administrative arm-twisting*" defined as the use of threats by an administrative agency to impose a sanction or withhold a benefit in hopes of encouraging voluntary compliance with a 'request' that the agency could not impose directly on a regulated entity.[41]

The conclusion reached here provides further evidence for the existence of a wider problem of contemporary regulation – tension between effectiveness and legality, which may result in the need to reformulate the legality principle.[42] The increasing use of alternative methods of regulation arouses the question if traditional regulatory measures guarantee the achievement of public tasks, especially in an environment hostile to

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39 Post & Telestyrelsen, *Improved broadband competition through functional separation. Statutory proposal for non-discrimination and openness in the local loop*, June 2007.

40 http://www.rp.pl/artykul/788684.html

41 Noah L., *Administrative Arm-twisting in the Shadow of Congressional Delegations of Authority*, Wisconsin Law Review, No. 5, 1997.

42 Dawson M., *Soft Law and the Rule of Law in the European Union: Revision Or Redundancy?*, EUI Working Papers (RSCAS) 2009/04, 5th of June 2009.

regulation, dominated by powerful industry groups committed to resisting regulation through legal challenges[43].

4. Information asymmetry between the regulator and the regulated and voluntary approaches to regulation

Information asymmetry is a phenomenon very well known in economics. It is long since economic doctrine described how important better or wider information is, and how information influences the decisions of both principals and agents[44]. Yet it is extremely important to bear in mind that information may be asymmetrical not only between the consumers and companies, but also between companies and public authorities[45]. P. Saramento and A. Brandão claim that "*Asymmetric information is an important feature of the relationship between regulated firms and regulatory authorities. When firms have more information than the regulatory authorities, it might be expected that they use their advantage to influence the regulator's decision to their own benefit.*"[46] Thus informational asymmetry also concerns regulators and their decision making and thus undoubtedly requires the attention of legal and administrative sciences scholars.

The problem of information gathering by governmental bodies has been analyzed *inter alia* by T. Lewis and M. Poitevin in *Disclosure of Information in Regulatory Proceedings*[47] and by C. Coglianese, R. Zeckhauser and E. Parson in a paper *Securing Truth for Power: Informational Strategy and Regulatory Policy Making*[48]. These authors point out that in order to comprehend the extent and cause of problems that require State intervention, regulators need to acquire data based on scientific or administrative research as well as information on business operations, feasibility of different technologies,

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43 Freeman J., ibidem, p. 189.

44 Akerlof G.A., *The Market for "Lemons": Quality Uncertainty and the Market Mechanism*. The Quarterly Journal of Economics, 84 (3), 1970, p. 488–500.

45 Armstrong M., Sappington D.E.M., *Recent Developments in Theory of Regulation*, October 2005, p. 7; Besanko D., Spulber D.F., *Antitrust Enforcement under Asymmetric Information*, The Economic Journal, Vol. 99, No. 396, June 1989, p. 408–425.

46 Saramento P., Brandão A., *Entry Regulation under Asymmetric Information about Demand*, 8th of September 2010, p. 1.

47 Lewis T., Poitevin M., *Disclosure of Information in Regulatory Proceedings*, Centre interuniversitaire de recherché en analyse des organizations, Montreal, January 1995.

48 Coglianese C., Zeckhauser R., Parson E., *Securing Information for Power: Informational Strategy and Regulatory Policy Making*, John F. Kennedy School of Government Faculty Research Working Paper Series, May 2004.

risks of products etc. Such information, often specific and complex, is necessary not only to form policies and set strategic goals, but also, or maybe primarily, to enforce the law of market regulation through administrative acts. Regulators must thus gather information about benefits and costs for regulated companies as well as for consumers and the sector as a whole. Any effective policy should be based on an analysis of possible solutions and their outcomes, in a longest foreseeable time perspective. It is undisputable that regulated companies are in a better position to predict the consequences of possible regulatory decisions for their own business. It is also worth noting that information needed to regulate the market is usually in the possession of those subject to regulation. It is obvious therefore that the latter are not eager to disclose what they know. Moreover, selective disclosure of information may be used by those being regulated to influence the outcome of regulatory policy.

Information asymmetry is thus not a problem that should be underestimated – it is not only a problem of gathering information, but also of verifying it. This problem seems to be even more relevant in network sectors susceptible to *ex ante* regulation, which is aimed at regulating future conduct of regulated entities, rather than at determining legal consequences of actions already performed: "Interdependence between governments and suppliers and problems in coordinating their actions are particularly acute in network industries. […] Finally, there are major problems about information asymmetries between governments and suppliers. Network industries are highly technical and problems are worsened if there is a monopoly or oligopoly, which limit independent sources of information and comparators."[49] It is an accepted belief that information asymmetry leads to insufficient transparency of the incumbent's conduct and may result in discrimination and unequal treatment of alternative operators[50].

The attempt to set a common mobile number portability charge represents a very good example of this issue in the Polish telecoms market. The President of UKE tried to regulate mobile number portability charges based on costs incurred by infrastructural mobile operators. However, these operators presented a wide spectrum of costs incurred, ranging from

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[49] Tatcher M., *Europe and the reform of national regulatory institutions: a comparison of Britain, France and Germany,* Paper for Council of European Studies Conference 15th conference, Chicago 29 March–1st April 2006, p. 4.

[50] Bergström O., *Functional Separation in Europe: the Swedish Model*, Telecommunications Journal of Australia, vol. 58, no 1, 2008 p. 6: "[…] *it has been observed that TeliaSonera has an information advantage in relation both to other operators and PTS* [Post-och telestyrelsen – Swedish NRA]".

a couple of Euro up to 20 Euro. Since regulatory accounting obligations did not encompass number portability services, and the President of UKE had no way of mandating the presentation of specific audited data, there was no possibility of verifying unreliable information. As a result, the attempt to set a common mobile number portability charge in Poland failed.

What kind of information deficits may NRAs encounter when implementing functional separation? As M. Webb noted, it would be very difficult to develop functional separation requirements without extensive input from the incumbent.[51] This is because these conditions cannot be developed without far reaching knowledge about the incumbent's business and its products, which only the company itself would possess. Normally, incumbents will be much better equipped to deal with this sort of situation than regulators and governments. If the latter are out-gunned in this encounter, the result will be a sub-standard and ineffective separation.

To limit the abovementioned problem, the regulator must create an incentive mechanism which makes the firm reveal true and precise information. Naturally, such a mechanism can only work if it actually benefits the company[52]. Thus the question arises whether voluntary involvement may constitute such an incentive in itself, and how it may influence conduct of private actors and encourage them to disclose information they would otherwise retain?

On the one hand, part of the legal doctrine believes that voluntary commitments do not help to tackle information asymmetry. To the contrary, they put governmental actors at risk of regulatory capture[53]. A regulator, seeking greater involvement of expert private actors in its policy making, may choose to engage in a voluntary measure. Yet the private party may use its knowledge to its own advantage by setting "business as usual" targets, for example. Due to lack of expertise, a hindrance the regulator intends to overcome, it is difficult for the public body to verify such targets or assure compliance[54]. An example of such case presents itself

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51 Webb M., *Breaking up is hard to do: the emergence of functional separation as a regulatory tool*, ITU, February 2008, p. 19.

52 Börkey P., Glachant M., Lévěque F., *Voluntary Approaches for Environmental Policy in OECD Countries: An Assessment*, CERNA, November 1998, p. 22.

53 Lenschow A., Rottmann K., *Privatising" EU Governance: Emergence and characteristics of Voluntary Agreements in European Environmental Policy*, Paper prepared for Scientific Workshop "Soft Modes of Governance and the Private Sector – The EU and the Global Experience" (Darmstadt, 1–3 November 2005).

54 Heritier A., Eckert S., *New modes of Governance in the Shadow of Hierarchy: Self-Regulation by Industry in Europe*, EUI Working Paper RSCAS 2007/20.

in a commitment contained in the ACEA[55] agreement concluded by the European Commission with the automotive industry. The commitment was meant to reduce emissions from passenger cars. However, some suggest that the lack of technical expertise on the part of the authority (lack of specific technical or commercial studies) during the negotiation process led to the setting of modest targets only, seeing as the European Commission could only rely on data presented by the ACEA[56].

On the other hand, some legal scholars point out that involving the stakeholders in the regulatory process may be one of the answers to the phenomena of informational asymmetry. Highlighted here are the positive effects voluntary measures have on the willingness of regulated entities to disclose information[57]. After enumerating advantages of voluntary accords such as lower political decision-making costs, time savings, better compliance and implementation, A. Heritier summarizes: "*All these elements help overcome the informational asymmetry between regulators and regulatees and prevent industry from an information capture* […]."[58] It is also noted that: "*NAs* [Negotiated Agreements] *might present advantages for public authorities too: NAs may be more flexible and quicker to implement, easier and quicker to upgrade than legislation allowing them to follow technological evolution and market changes and provide a way to address the information asymmetry between public authorities and firms about the existing technical possibilities for e.g. improving energy efficiency and the costs of implementing these possibilities.*"[59]

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55 ACEA Commitment on CO2 emission reductions from new passenger cars in the framework of an environmental agreement between the European Commission and ACEA http://www.eesc.europa.eu/self-and-coregulation/documents/codes/private/029-private-act.pdf

56 Volpi G., Singer S., *Will Voluntary Agreements at EU level deliver on environmental objectives? Lessons from the ACEA VA,* WWF Discussion Paper, p. 10; Vedder H., *Voluntary Agreements and Competition Law: What Are, and What Should be the Boundaries to VA's Imposed by Competition Law?,* FEEM Working Paper 79.2000, November 2000, p. 7.

57 It is worth noting that some authors notice also other negative aspects in combating information asymmetry with voluntary approaches. See for example C.J. Higley, F. Leveque in *Environmental Voluntary Approaches: Research Insights for Policy-Makers*, CERNA, May 2001, who notice that a voluntary regulatory initiative ('induced regulation'), especially in situations of asymmetric information between the regulator and private agents, could be used to create barriers of entry.

58 Heritier A., *New Modes of Governance in Europe: Policy-Making without Legislating?.*

59 Rezzesy S., Bertoldi P., Persson A., *Are Voluntary Agreements an Effective Energy Policy Instrument? Insights and Experiences from Europe,* 2005 ACEEE Summer Study on Energy Efficiency in Industry, p. 2.

What qualities determine that voluntary approaches may be more helpful in leveling information asymmetries than traditional coercive measures? First and foremost, a private actor may be presented with positive incentives or a perspective of avoiding coercive regulation (what causes the above discussed legality problems) if engages in self-regulation. Such approach is excluded in case of imposing obligations through traditional administrative acts since compliance in case of administrative measures is assured by way of administrative sanction only. If properly encouraged, the willingness of private actors to cooperate with the regulatory authority and to share knowledge, may thus be greater[60].

The significance of the incumbent's expert cooperation in implementing a functional separation has been stressed in a report on the feasibility of functional separation of TP prepared for the President of UKE in 2008[61]. The report's Authors have noted a number of factors that may negatively influence the balance of costs and benefits in this context. Insufficient options (i.e. resources, budget, instruments) on the part of the President of UKE to effectively execute a functional separation obligation may prolong the implementation process, for instance. This in turn may result in a delay in eliminating the anticompetitive behavior of the incumbent. Lack of motivation and hindering the implementation process on the part of TP would have the same effect.

Why is functional separation influenced by information asymmetry in particular? As BEREC notes in its guidance on functional separation "*functional separation involves several granular decisions about how the separated firm is to operate, e.g. who is to report to whom (governance), who is permitted to talk to whom and about what topics (Chinese walls), what systems can be shared between the separated business and its retail affiliate and which ones must be duplicated (OSS separation), and who is remunerated for what, etc*."[62] Those issues are closely related to operational functioning of a private company. The imposition of mechanisms and procedures meant to substitute previously used operational schemes, without the separated company being prone to disclose all relevant information, may make it impossible to verify if the imposed procedures are efficient. They may even compromise the functioning of the company.

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60 Heritier A., Eckert S., *New modes of Governance in the Shadow of Hierarchy: Self-Regulation by Industry in Europe*, EUI Working Paper RSCAS 2007/20, p. 3.

61 KPMG Advisory; Grynhoff, Woźny, Maliński Kancelaria Prawna, Instytut Łączności, *Analiza funkcjonalnej separacji Telekomunikacji Polskiej S.A.*, November 2008.

62 BEREC *Guidance on functional separation under Articles 13a and 13b of the revised Access Directive and national experiences*, BoR (10) 44, February 2011, p. 7.

One possible example illustrating the above with regard to functional separation is an issue as basic as the exact point of separation. As the Australian Competition and Consumer Commission pointed out with regard to the functional separation of Telstra, the Australian incumbent: "A pivotal issue in separating an integrated entity such as Telstra is the question of where to separate. Given the information asymmetry that exists between the Government/regulator and Telstra, functional separation is more likely to occur at the appropriate point and hence be more effective if the firm is co-operative. In the absence of co-operation there is a much greater risk that the point of separation will not occur at the optimal point"[63].

Moreover, the International Telecommunications Union stresses in its ICT Regulation Toolkit that it may be difficult to define the best way to separate overall operations into their specific components. Although the document refers to structural separation, this statement is true for functional separation also. It highlights, for example, the influence that NGN deployment exerts on functional separation. NGN may create more logical separation points between the infrastructure that carries electronic communications and the services that they comprise (it is possible for NGN to be oblivious to the types of services and content that it carries). However, the task is by no means straightforward, nor is there likely to be a generic solution. What is more likely to happen is that networks will remain hybrids of different legacy systems, making it difficult to identify an appropriate boundary at which to apply structural separation.[64] There is therefore a risk of imposing and entrenching an inappropriate structure on the market. This issue was addressed in Poland by Polkomtel, a mobile operator, in the consultation process regarding the feasibility of imposing a functional separation of TP: "*without precise specification how particular solutions* [variants of the level of separation] *would be applied to the actual structure of TP, Polkomtel is of the view that it is impossible to evaluate the effectiveness of any of them.*"[65]

In other words, functional separations exceptionality stems from the fact that it is an extremely intrusive measure because it requires the NRA to determine and define anew some of the operational and management processes of the integrated operator. Considerable informational input from the incumbent is relevant also for the imposition of 'Chinese walls'. 'Chinese walls' form one of the crucial elements of functional separation,

63 Australian Competition and Consumer Commission, *National Broadband Network: Regulatory Reform for 21st Century Broadband*, June 2009, p. 29.

64 ITU, ICT Regulation Toolkit: http://www.ictregulationtoolkit.org

65 http://www.uke.gov.pl/_gAllery/20/40/20403/Polkomtel_opinia.pdf

providing equivalence of access to information controlled by the incumbent's wholesale business to both its retail part and alternative operators. To this end, measures are applied such as the selection of relevant staff, establishing separate premises, separation of management information systems and implementing a proper code of conduct. It seems that establishing all those measures would be extremely difficult without extensive support from the incumbent. For example, when it comes to management information systems, separated entities should have access to limited, selected information resources only. The same is true for customer care call centers (incumbent's retail business's call center staff should have exactly the same information as the call centre staff of alternative operators). Unequal access to information may in principle result in different periods for complaint processing or the setting up of service provision. Identifying and specifying all the possible means of undesirable information flow within an incumbent's business, without its goodwill to disclose relevant information, would undoubtedly be extremely challenging for the NRA.

Another fine example of how the Agreement fostered the incumbent's inclination towards information disclosure is the Price Squeeze test. Price Squeeze tests aim to examine if a price for a new wholesale counterpart of a new retail service enables alternative operators to implement a competitive retail offer. Since the wholesale service subjected to the Price Squeeze test is new, only the incumbent has the information on its actual provision costs. Particularly, the incumbent forecasts the shifts in end-user choices resulting from new service parameters offered as well as the change of relevant network costs. They include, for example, the parameter of average bit rate used by a given end-user, influencing the size of network costs associated with the provision and upkeep of the infrastructure necessary for sustaining a proper bit rate. Certainly, the President of UKE can conduct the Price Squeeze test (or a Margin Squeeze test) without the consent or the voluntary commitments of TP in accordance with Article 13 of the Access Directive. The regulator can also coercively acquire the necessary information. This solution would, however, be considerably more time consuming and would impede the flexibility of service implementation. If the President of UKE wished to follow a formal path in accordance with Article 13 of the Access Directive, and found that the prices proposed by TP are incorrect, the NRA would have to conduct an ordinary administrative procedure in order to set them on an appropriate level. In case of a Price Squeeze tests conducted on the basis of the Agreement, when applying for a change of the relevant reference offer, TP proposes wholesale prices based on the outcome of the Price Squeeze test instead of the originally proposed price. As a result, the

President of UKE does not have to conduct an administrative procedure in order to adjust the proposed prices.

It follows from the above that information asymmetry between an NRA and a regulated company is a serious obstacle to effective regulation. This is true especially for a measure as complex and intrusive as functional separation. It has been indicated that embracing voluntary commitments may help overcome this effect. It seems that involving the incumbent in the separation process to avoid information deficits was the very reason why most functional separations in Europe took the form of self-regulatory measures.

5. Conclusion

This paper analyzed the application of self-regulatory measures as a regulatory instrument with regard to functional separation primarily on the basis of the Agreement concluded between the President of UKE and TP. The analysis of the emergence of self-regulation in European policy as well as in the national regulatory regime suggests that this is not a conceptualized form of government but, like many other regulatory instruments, a commitment to expediency.

It turns out that sanctioning self-regulation by a public body may rise doubts not only as to problems of legal certainty for private parties, an issue widely discussed in doctrine, but may also largely bind the regulator. The fact that the private party cannot be forced to honor its commitments results in a situation where the regulator must search for ways to secure execution outside of administrative or civil law. This imbalance is all the more clear when the sanctioning of self-regulatory measures takes the form of a contact. Without any hold in administrative law, the inadequacy of civil law forms with regard to State actions seems to be the main source of legality problems concerning self-regulation and the use of a regulatory contract as a policy instrument. This problem is only to a certain extent resolved by the setting of a legal framework for voluntary commitments such as, for example, Article 13b of the Framework Directive. Only time will tell if incumbent operators will be willing to take up voluntary commitments when the enforcement possibilities for the regulator are greater. Leaving this particular issue aside, there are certain circumstances when the regulator must bargain with a private party instead of imposing coercive measures. From that the question arises if there is a need to move from juridical towards instrumental rationality, from application of law towards goal-

achievement.[66] Functional separation, being an exceptionally intrusive and challenging measure, seems to require extensive informational input from the incumbent. It also makes it necessary to overcome an approach that is hostile to regulation, which may compromise the whole commitment. Referring the above to the revised European telecommunications framework, it seems that in applying Article 13b instead of 13a of the Framework Directive, the regulator may gain considerable benefits without exposing itself to risks associated with sanctioning self-regulation.

[66] Rehbinder E., *Environmental Agreements. A New Instrument of Environmental Policy*, European University Institute, Jean Monnet Chair Paper RSC No 97/45, 1997, p. 1.

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Regulation of interconnection rates in mobile networks

1. Market definition and analysis

Markets predefined by the European Commission as susceptible to *ex ante* regulation are listed in the Annex to the *Commission Recommendation of 17 December 2007 on relevant product and service markets within the electronic communications sector susceptible to ex ante regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services*[1] ("Commission Recommendation on relevant markets"). Such markets, according to the Commission, have the following characteristics: (i) they are subject to high and non-transitory barriers of entry; (ii) they do not tend towards effective competition within the relevant time horizon and; (iii) competition law cannot adequately address the market failures by itself. Only when identifying markets other than those defined in the Annex, National Regulatory Authorities overseeing telecoms (hereafter,

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[1] O.J. L 344, 28.12.2007; replaced Commission Recommendation of 11 February 2003 on relevant product and service markets within the electronic communications sector susceptible to ex ante regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communication networks and services, O.J. L 114, 08.05.2003.

NRAs) should apply the so called "three criteria test" and ensure that these criteria are met cumulatively.

The market for voice call termination on individual mobile networks ("market 7") is one of the markets listed in the Annex to the Recommendation. National telecoms regulators are thus not required to apply the "three criteria test" prior to their analysis. For this reason, the Polish NRA – the President of UKE – has never applied the above test in relation to market 7. The definition of the Polish market for voice call termination on individual mobile networks, both in its product and geographical scope, does not differ from the definition contained in the Recommendation.

According to the principles of the EU Regulatory Framework in electronic communications, the definition of relevant markets for *ex ante* regulation should be based on an analysis of the status of competition at the retail level, seeing as the objective of any *ex ante* regulation is ultimately to produce benefits for end-users by making the retail market competitive on a sustainable basis. The declared aim of the EU Regulatory Framework is also to progressively reduce specific *ex ante* obligations alongside the development of market competition.

However, the decisions issued by the President of UKE on market 7 have not taken into account the status of competition in the corresponding retail market. They have, in particular, failed to consider that the domestic mobile market is characterized by a high degree of competition, leading in turn to a steady decline in prices as well as an increase in service quality and diversity of offers. The NRA's reflections regarding the retail market have been limited to recognizing that the retail equivalent of wholesale voice call termination services on individual mobile telephony networks are calls from fixed and mobile telephony networks. This finding has led the President of UKE to the conclusion that the product scope of the market for wholesale voice call termination services includes voice calls terminated on individual mobile telephony networks and initiated both in fixed, and in mobile telephony networks. It has been indicated on the other hand, as far as the geographic market is concerned, that the analysis carried out by the Polish regulator (which, nonetheless, is not contained in its decisions) confirms the Commission's position on this issue. The President of UKE has concluded that a call termination service on an individual network cannot be substituted by a service terminated on the network of another operator. This has led the regulator to the conclusion that the relevant geographical market is consistent with the geographical coverage of individual mobile networks.

The NRA has also acknowledged in its analysis that market share forms a sufficient basic criterion to determine that an undertaking holding a 100% market share has significant market power (hereafter, SMP). Although the President of UKE has also analysed selected other criteria, he has nevertheless stated in advance that this would not help him obtain a more complete picture of the Polish market. In its key aspects, however, the approach of the President of UKE does not differ substantially from the Commission's Recommendation or the findings of its counterparts in other EU Member States, be it with respect to market definition or market power.

2. Regulatory obligations

As a result of the analyses of the market for voice call termination on individual mobile networks, the President of UKE has imposed the following regulatory obligations on mobile network operators (MNOs):

- access;
- non-discrimination;
- transparency ensured by the publication on the operator's website of information necessary for telecommunication access;
- price control.

It should be noted, however, that some of those obligations were not the same for all undertakings operating on the Polish mobile market. They were also not applied to all operators at the same time. Only the last round of market analyses, which led to the announcement of the December 2012 decision, encompassed almost all of the operators active on the domestic mobile market.

All of the obligations imposed on the scrutinised undertakings have been formulated on a general level and have usually been reflected in relevant legal provisions, without any adjustments being made to particular markets. In practice, however, only two of them have led to practical problems: the obligation of non-discrimination and the price control duty. The wording of the obligation of non-discrimination has not undergone any changes in subsequent rounds of market analyses and has remained the same in all of the SMP decisions (the same for all market players). In theory therefore, the President of UKE has imposed a symmetrical obligation on all undertakings operating on the market. However, its application has not been symmetrical, as explained below. With respect to price control, the NRA has adopted a policy of asymmetric obligations, both in their wording and practical application. The asymmetry ended with the imposition on

most market players of a symmetric price control obligation based on the results of a pure BULRIC (Buttom Up Long run Incremental Cost)cost calculation, but this was not until the last round of market analyses. The following part of the study will focus on these two obligations.

With regard to the obligation of non-discrimination, the problem surrounded the part of the requirement that related to: "the offer of services and access to information on conditions not less favourable than those used within the company or in its relations with its subsidiaries" (understood by the regulator as "internal" non-discrimination). The President of UKE conducted an inspection concerning the obligation of non-discrimination. These administrative proceedings closed in July 2008 with a decision requiring the operators to remove "irregularities involving the violation of the obligation of non-discrimination". These were, according to the NRA, evidenced by "the identified disparities between the retail (on-net) and wholesale prices for voice call termination rates on mobile networks".

In terms of time, the above decision should be regarded as the basis and justification for future Mobile Termination Rates (hereafter, MTRs) cuts. At that point, however, the MNOs regarded it as an attempt to regulate the retail market without a prior market analysis and the establishment of SMP, which would be in breach of the EU Regulatory Framework of 2002. This position was shared by the European Commission in a letter addressed to the Polish Chamber of Information Technology and Telecommunications dated 26 September 2008 (DG INFSO/B3/KS/aj D (08) 938612-A/5335154). The Commission noted therein that it has repeatedly referred to the proposed regulatory measures aimed at linking the termination rates with retail prices for on-net calls. The Commission stipulated that such an approach "would result in the regulation of the retail market through a remedy imposed in connection with an analysis of the wholesale market." Therefore, under the procedure set out in Article 7 of the Framework Directive, the European Commission called upon the Polish regulator not to impose the internal non-discrimination obligation.

It is worth noting that such an interpretation of the non-discrimination obligation has been applied selectively to three mobile network operators only: PTK Centertel, Polkomtel and PTC. The President of UKE has never implemented such an approach to non-discrimination (albeit it did use the same wording) in relation to the so-called "new entrants", despite the fact that the difference between the high asymmetric MTRs of the new entrants and their retail prices was in fact significantly larger than that of the three established operators.

Due to its impact on daily operations and financial results, the price control duty has always been the most important regulatory obligation in this context. In order to start the discussion on the application of the price control obligation, the substance and nature of the obligation ensuing from Article 13 of the Access Directive[2] needs to be considered once again.

3. Price control

The price control obligation provided under Article 13 of the Access Directive is intended to resolve the market deficiency of wholesale access service prices being set at an inefficient level (either too high or too low) by an undertaking holding SMP. In extreme cases, this problem may be addressed by granting an NRA the authority to actually determine the price level of a regulated service – a power normally exercised by the managing bodies of the company.

In order to maximize social welfare, the price level set by the NRA should correspond to the price level expected on a market with effective competition. The conditions of the decision-making process of the NRA should thus correspond to the conditions under which the management of the regulated telecoms operator takes its decisions, if operating on an effectively competitive market. In other words, like the board of directors which takes its decisions on the level of service prices in a market characterized by effective competition, the decision-making process should take into account the following criteria:

- cost of the operations;
- assurance of financial resources for current and future investments;
- risks associated with the activity in question;
- prices of comparable services provided by competitors in comparable markets.

The same criteria are set out in Article 13 of the Access Directive as factors that are to be taken into account by NRAs in setting price levels of regulated services. Still, in order to minimize the risk of an erroneous regulatory decision regarding prices (a result of asymmetric information possessed by the NRA in regard to the operator), it is the operator that should first present the justification for the rates to be applied, as it is the company itself that has superior knowledge about its own activities. If

[2] Directive 2002/19/EC of the European Parliament and of the Council of 7 March 2002 on access to, and interconnection of, electronic communications networks and associated facilities (Access Directive), O.J. L 108/7, 24.4.2002.

the given NRA does not agree with the justification of the rates proposed by the operator, it may adjust them to an appropriate level. Prior to such a decision, the draft decision should be thoroughly consulted with all stakeholders active on the relevant market in order to obtain their views on the proposed measure.

Having considered the above role of the NRA and the rules governing price control obligations, the following sections of the paper will focus on the main decisions affecting MTRs levels on Polish mobile networks.

On 17 July 2006, the President of UKE issued his first set of decisions[3] imposing an obligation to set cost-based fees (on the basis of a price control obligation (based on Article 40 TL) on three, out of the four active operators on the Polish mobile market (PTK Centertel Sp. z o.o., Polkomtel S.A. and PTC Sp. z o.o.[4]). As a result, mobile operators reduced their MTRs from 68/48/40 gr/min.[5] to the level of 44/40 gr/min. as a reflection of the costs incurred. However, the President of UKE rejected the justification of the costs of the MTRs submitted by the operators and issued another decisions[6] on 26 April 2007 setting more severe MTRs reductions in line with the following glide path:

	From 1 May 2007	From 1 May 2008	From 1 May 2009	From 1 May 2010
MTR [gr/min]	40.00	33.87	27.75	21.62

Importantly, the above decisions were issued in breach of the requirements of Article 6 and 7 of the Framework Directive[7], that is, without prior consultation at the national and EU level (consolation & consolidation procedures). As a result, they not only violated procedural requirements, but also failed to take into account the opinions of the market and of the European Commission, a fact that constitutes a material breach of telecommunications law. It should also be noted that the President of UKE did not, at that time, regulate the level of the MTRs of the new

3 http://www.uke.gov.pl/zakanczanie-polaczen-w-sieci-ptc-8900; http://www.uke.gov.pl/zakanczanie-polaczen-w-sieci-polkomtel-8901; http://www.uke.gov.pl/zakanczanie-polaczen-w-sieci-ptk-centertel-8902.

4 Presently T-Mobile Polska S.A.

5 MTR depends on the period of day.

6 http://www.uke.gov.pl/nizsze-stawki-rozliczen-mtr-2396.

7 Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive) O.J. L 108/33, 24.4.2002.

entrant. When the fourth player (P4 Sp. z o.o.) had entered the market, it had set its own rates on a symmetrical level with all the existing mobile operators. As a result, the 2006 MTRs regulation of the three established mobile operators without regulating the rates of P4, led to a significant MTRs asymmetry between P4 and the other regulated operators.

In October 2008[8], the President of UKE decided to change the previously established level of MTRs and issued another decisions concerning PTK Centertel, PTC and Polkomtel. The regulator set therein the following level of MTRs:

	From 1 January 2009	From 1 July 2009
MTR [gr/min]	21.62	16.77

The new glide path significantly accelerated and increased MTRs reductions in comparison to the primary plans.

Once again, the decisions setting specific price levels had not been subject to consultation with market participants and had not been communicated to the Commission – a major legal defect of the decisions. The President of UKE once again rejected the cost data submitted by the operators. At the same time, the continued failure to regulate P4's rates further increased the MTRs asymmetry in favor of that operator. Indeed, P4 remained unregulated until 2008, when the President of UKE issued a decision[9] imposing upon it an obligation to not apply excessive rates for voice call termination on its network, an obligation based on Article 44 TL (implementing Article 8(3) of the Access Directive). However, the decision did not define the term "excessive prices", nor was the price obligation supplemented by the ancillary requirement to provide the NRA with an annual justification of P4's MTRs (an analogous duty was at that time imposed on other regulated MNOs).

The President of UKE explained the imposition of such an asymmetric obligation by what the regulator saw as "objective factors beyond P4's control", such as its later market entry, necessity of deploying UMTS networks, smaller economies of scale, which in turn would allegedly generate the operator's higher unit costs. Yet no cost calculations confirming these assertions were presented – not only at the time of issuing the decision, but also in the later course of the regulatory process. Still, even if higher

8 http://www.uke.gov.pl/nizsze-stawki-mtr-dla-ptc-3817

9 http://www.uke.gov.pl/uke/index.jsp?place=Lead01&news_cat_id=199&news_id=3590&layout=3&page=text.

costs of a new entrant were in fact evidenced, this would merely serve as a justification for higher (asymmetric) MTRs, rather than for the use of asymmetric obligations. This is all the more so if the same market failures had been identified concerning the new entrant as was the case with the established operators. A price control obligation, based on costs incurred, would make it possible to account for the differences in the new entrant's costs, if any.

The imposition of asymmetric obligations aroused serious concerns for the rest of the market players because it permitted higher MTRs for certain operators to be set in an arbitrary manner. At that time, the level of Poland's MTRs asymmetry was significantly higher than in other EU countries.

A similar obligation was laid down in a decision taken in March 2009[10] and addressed to *Cyfrowy Polsat* (a full MVNO). This decision was amended in 2011 when the President of UKE decided that there was in fact no justification for asymmetrical rates to be applied by a full MVNO as opposed to those used by incumbent operators.

As mentioned, the SMP decision neither defined nor determined what rates were seen as excessive. These were subsequently established by the President of UKE in a non-binding Position (soft-law document) published on the NRA's website and later implemented in decisions issued under the dispute resolution procedure in December 2009. In practice, the new entrant was thus granted 7 years of MTR asymmetry (calculated from the date of its commercial market entry).

Years from market entry	3	3.5	4	4.5	5	5.5	6	6.5	7	7.5*
Maximum level of asymmetry between new entrants and incumbent MNOs	141%	126%	110%	94%	79%	63%	47%	31%	16%	0%

* The asymmetry of MTR rates was finally ended on 1 January 2014.

[10] http://www.uke.gov.pl/uke/index.jsp?place=Lead01&news_cat_id=168&news_id=3884&layout=3&page=text

In the SMP decisions concerning market 7 issued in September 2009 (second round of market analyses), no alterations to the obligation of price control were made. In December 2009, the President of UKE issued decisions upholding the earlier level of MTRs at 16.77 gr/min. For the first time, the Polish NRA both consulted the draft decision and notified it to the European Commission. Although it once again rejected the cost calculations submitted by the operators, it determined the new level of MTRs using its own calculations based on the operators' data.

The subsequent market entry of two new operators, Mobyland[11] and Centernet[12], resulted in new SMP decisions issued at the beginning of 2011 containing an obligation not to apply excessive rates. However, the NRA explicitly referred therein to its earlier views expressed in decisions in which it had set the maximum level of asymmetry and its gradual reduction.

Particularly noteworthy are subsequent decisions of the Polish NRA issued in May[13] and June[14] 2011, defining a new level of MTRs for the years 2011–2012 (the so-called 'Investment Decisions'):

3 MNOs	From 1 July 2011	From 1 July 2012
MTR [gr/min]	15.20	12.23

and respective asymmetrical rates for P4

P4	From 1 July 2011	From 1 January 2012	From 1 July 2012
MTR [gr/min]	15.20*179%	15.20*163%	12.23*147%

The legal basis for the adoption of the decisions in question was the newly introduced Article 43a TL. This legal provision allows undertakings with SMP, on which regulatory access obligations had previously been imposed, to submit a request to the NRA for the approval of a proposal defining the detailed conditions of the performance of regulatory obligations and other commitments of a telecoms service provider.

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11 http://www.uke.gov.pl/uke/index.jsp?place=Lead01&news_cat_id=449&news_id=6478&layout=3&page=text

12 http://www.uke.gov.pl/uke/index.jsp?place=Lead01&news_cat_id=449&news_id=6478&layout=3&page=text

13 http://www.uke.gov.pl/decyzja-regulacyjna-dla-polkomtela-7199; http://www.uke.gov.pl/decyzja-regulacyjna-dla-ptk-7146.

14 http://www.uke.gov.pl/decyzja-dla-p4-7327; http://www.uke.gov.pl/decyzja-dla-ptc-7323

These decisions, in addition to establishing a new level of MTRs, also defined the scope of the investment commitments placed upon the MNOs for the expansion of their mobile network coverage. The range of the investment expenditure to be undertaken was set for each operator at a different value but using the same calculation method – by calculating the difference obtained by an operator making interconnection settlements based on two different levels of MTRs using the actual level of interconnect traffic:

	H 1 2011	H 2 2011	H 1 2012	H 2 2012
Level I [gr/min]	16.77	15.20	15.20	12.23
Level II [gr/min]	15.20	9.66	9.66	8.00

It should be noted that the NRA recognized the level of MTRs amounting to 9.66 gr/min as the level corresponding to the costs incurred by the MNOs[15]. The application of MTRs exceeding the level resulting from the calculation of costs incurred (15.20 gr/min, 12.23 gr/min) was, in the opinion of the NRA, an additional 'premium' for the operators earmarked for investments to expand their radio coverage in selected areas.

The operators' investments were allocated to three types of geographical areas:

- white spots in 2G networks – geographical areas where no mobile network operator has a radio access network;
- 3G white spots – geographical areas where the given operator does not have a 3G network (operating in the 900 – 2100 MHz frequency band) and where there are towns with up to 20,000 inhabitants;
- other areas of investment – geographical areas where there are towns with more than 20,000 inhabitants.

The improvement of network coverage in these areas was achieved by the construction of new BTS/Node-B network elements or the expansion of existing ones. According to the President of UKE, the Investment Decisions resulted in the operators spending ca. 64 mln Euro on investments, building/expanding circa ca. 670 locations.

It is worth mentioning that the Investment Decisions were this time subject to a consultation process and that the European Commission gave a negative opinion to the proposal of setting the level of MTRs above the costs incurred by the operator (opinion submitted under Article 7). However,

15 http://www.uke.gov.pl/decyzja-regulacyjna-dla-ptc-7207

the Commission closed the notification procedure with "a comment" only to the draft measure without opening a second phase of the procedure. Despite the negative opinion of the Commission and notwithstanding the circumstances accompanying the issuance of the Investment Decisions, they did generate some positive results. They represent the first instance on the Polish mobile market for the NRA to attempt to balance two regulatory objectives: promotion of investment and competition. As such, the following were combined in one measure:

- the policy of determining the optimum level of prices taking into account the costs of the operator (thereby driving the process of a further decline of retail prices for end-users) and;
- the policy of supporting investment in areas where investment is economically not viable.

The President of UKE thereby adopted a policy that was in existence on other regulated markets (such as the energy market) where the level of prices (if regulated) covers an additional premium for those subject to regulation to carry out certain investments or major innovation projects, which generally require a long-term planning horizon and create significant risks (*Performance Based Regulation*).

It should be noted, however, that the ability of the Polish NRA to influence investment projects and innovation through MTRs regulation has diminished with every rates reduction. Lower MTRs generate lower additional cash flows, which could in turn facilitate the financing of additional investment projects.

The recent decisions of the President of UKE of December 2012[16] sets the MTRs at the following level:

	From 1 January 2013	From 1 July 2013
MTR [gr/min]	8.26	4.29

The level of MTRs determined in these decisions is an outcome of cost calculations based on the bottom-up model created by the Polish regulator and the "pure" LRIC ("pure BULRIC") methodology. It does not take into account investment and competition related issues. In this regard, this approach is far from the aforementioned principles according to which the NRA aims to set the prices taking into account both the company's ability to innovate and the level of prices charged in competitive markets.

[16] http://www.uke.gov.pl/nizsze-stawki-mtr-w-sieciach-komorkowych-11877.

Moreover, an analysis of the content of the decisions shows that imposing a price obligation based on pure BULRIC methodology had not been motivated and justified by premises of an economic nature. Instead, it merely reflected the fact that the Commission Recommendation (a non-binding document) of 7 May 2009 on the regulation of call termination rates on fixed and mobile networks (the 'Recommendation on FTRs and MTRs') stipulates the use of the pure BULRIC methodology to determine the level of MTRs and FTRs by NRAs.

The necessity of modifying the obligation was also not justified by identified market failures. An analysis of the earlier and the latest SMP decisions shows that the established 'competition problem' with regard to MTRs has not only not intensified over the years but quite the opposite. While the SMP decisions of 2006 identified 'excessive termination rates…' as an actual market problem, the recent SMP decisions speak of a potential problem only ('the possibility to apply excessive termination rates'). This comes as no surprise considering that voice call termination charges have in fact been regulated by the President of UKE since 2006. MTRs have steadily decreased because of the implementation of regulatory obligations as well as due to the decline in the cost of the service. The question arises therefore whether the obligation to set the rates on the basis of the costs incurred was an adequate measure to solve the 'real' problem and it is insufficient for solving the 'potential' problem? The SMP decision leaves this question unanswered.

The President of UKE failed to indicate what led him to the conclusion that such a severe regulatory measure (in consequence of the application of the pure BULRIC model) would facilitate a better achievement of the objectives set out in Article 2 TL or Article 8 of the Framework Directive than the measures imposed thus far.

A distinctive feature of the pure BULRIC methodology is that it excludes common costs, general operating costs, and the costs of the operation of the radio access network (which are considered as costs not related to traffic). Therefore, calculations carried out on the basis of this methodology preclude operators from recovering all costs associated with the provision of call termination on mobile networks. These costs must be allocated to other services, including services provided on the retail market.

This has been confirmed by Deloitte in a report entitled 'Analysis of the methodology of "pure LRIC" – the determination of the potential consequences of its application to the calculation of MTR on the Polish mobile market'. By definition, 'Mobile Termination Rates determined under the 'pure' LRIC model do not permit the recovery of all the costs of

the provision of termination services incurred by the operator – even of effective provision. The approach based on the 'pure' LRIC model can only take into account a very limited "increment of cost of the termination service which in turn is associated with the inability to recover a number of other significant costs without which, in practice, the service could not be provided".[17]

The overall conclusion is that the policy pursued by the Polish NRA in recent years in the regulation of MTRs' levels was characterized by inconsistency. This may prove the lack of a stable definition and implementation of all regulatory objectives. The President of UKE has arbitrarily changed his decisions on MTRs, at times ignoring cost calculations submitted by the operators. In practice, the rates were established by means of administrative decisions issued on the basis of Article 40(4) TL and under the dispute resolution procedures. The President of UKE's favorite regulatory instrument with regard to MTRs, asymmetry, etc., was a non-binding Position published on the UKE website. Although it was a soft-law document, it did express the intentions of the NRA and was later reflected in particular dispute resolution decisions. By contrast to its SMP decision, the non-binding Position of the President of UKE was characterized by a high level of detail. At times, it was the only (albeit non-binding) source of information available to undertakings not only for long-term, but also for short-term planning. For example, it was from the Position of the President of UKE published in March 2010 that the MNOs were able to determine what level of MTRs they would have to apply that year as well as when the next rates reduction was to be expected. Such a regulatory instrument was convenient for the NRA because it provided it with a great deal of flexibility and the ability to quickly introduce desired changes. Yet from the operator's perspective, it did not provide adequate legal predictability. Moreover, it was also the reason for the President of UKE's frequent interventions into issues relating to interconnection agreements. The only way to make the essence of the NRA's Position the subject of juridical control, was to earlier obtain an actual administrative decision.

Such a regulatory approach did not gain the approval of the European Commission during the last round of market analyses. In the first version of the last SMP decisions on market 7, the President of UKE once again tried to impose a general obligation based on the pure BULRIC model.

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17 http://www.uke.gov.pl/files/?id_plik=10750; Deloitte „*Analiza metodologii „pure LRIC" z określeniem potencjalnych konsekwencji jej zastosowania do kalkulacji stawek MTR na polskim rynku telefonii komórkowej*", p. 4.

The outcome would, however, be presented in the President of UKE's Position. For operators, it was the unpredictable revisions and accelerated rates reductions that caused the greatest problems. Such circumstances always diminish legal predictability and the operator's ability to carry out long-term planning, a fact that increases operational risks.

The practice of issuing repeated regulatory decisions together with a prolonged appeal procedure created a situation where the lifetime of some of the decisions was shorter than even the shortest period of an appeal. Seeing as regulatory decisions are by virtue of the law immediately enforceable, and thus they generate market effects immediately after their issuance, they cause irreversible changes in the retail market and its structure. Another important issue that arises in this context is the question of judicial review and the consequences of a possible revocation of the decision or its annulment. As mentioned, the decisions issued by the President of UKE are by virtue of the law immediately enforceable. As a result, although a decision might be subject to an appeal procedure, it remains enforceable until it is withdrawn from the legal system or suspended. This, in turn, creates the risk of erroneous regulatory decisions. The significance of the risk increases with the duration of the juridical review process which takes a lengthy minimum of 2 years in Poland. This issue is of particular importance here, especially in connection with the due payments for the period in which the erroneous decision served as the basis for interconnection settlements. The question emerges: who should bear the consequences of incorrect regulatory decisions? The presumption that liability should be assigned to operators regulated by an incorrect decision – an argument which currently appears in discussions on the implementation of regulatory decisions – would be inconsistent with the democratic rule of law.

The implementation of regulatory obligations in Poland has not only caused doubts among telecommunications undertakings, but has also provoked serious apprehension of the European Commission. The latter raised concerns with regard to the following key issues:

- failure to act in accordance with the procedures laid down in Article 6 and 7 of the Framework Directive (consultation and consolidation);
- unjustified and excessively long enforcement of asymmetric termination rates for new entrants (for instance, the notification of the draft decisions of Centernet S.A. and P4 Sp. z o.o. under article 7 of Framework Directive);
- failure to communicate information on planned rate reductions in a timely manner;

- imposition of regulatory obligations under the settlement of disputes procedure that may be discriminatory to the entities not covered by the decision.

Leaving aside the question of its proportionality and adequacy, the measure included in the European Commission's Recommendation on FTRs and MTRs is a comprehensive regulatory tool, the use of which may only lead to desired effects when applied in its entirety. However, the President of UKE introduced it only in part in his last market analysis. As a result, rather than limiting negative market effects, the measure introduced will create new market failures. The pure BULRIC methodology has so far only been applied in the calculation of termination rates on mobile networks. Prospects that the same approach will soon be used for fixed-line operators are grim. One of the main reasons cited by the Commission as a justification for the adoption of the pure BULRIC methodology was the need to prevent "unreasonable" transfers between fixed and mobile operators, which would lead to inefficiency. A selective application of the pure BULRIC methodology will, however, produce the same effect but in the other direction.

4. Regulation and investment decisions

It is worth noting that, on the one hand, past regulatory measures imposed by the President of UKE have over the past few years significantly reduced the investment capacities of private entities. On the other hand, the NRA has directed significant amounts of state aid to other undertakings for the deployment of next generation access networks. The recent Investment Decisions have shown that this goal could be achieved without the spending of any public money and without depriving consumers of the benefits resulting from moderate, but repetitive, price reductions.

One thing is certain, however. Without long-term governmental support, large investment/innovation projects have little chance of success. The Investment Decisions, despite the limited scale of the project they cover, demonstrated the possibility of pro-active regulation in this field. Nonetheless, the mobile market is presently at a stage where a change from the current regulatory policy on MTRs to one which is more pro-investment seems difficult to achieve. It is more likely that if a fundamental change is to take place, it will be at the European Union level, or in other EU countries, and will then be followed by Polish administration.

The Commission is currently reviewing its Recommendation on relevant markets. It is therefore the right moment to consider the need to maintain the market for call termination on individual mobile networks on the list of markets susceptible to *ex ante* regulation. MTRs are already at a very low level. Voice-over-IP services (such as Google Talk, Viber, etc.) have become increasingly popular – their usage is growing and they have indeed become an alternative to regular voice calls. They impose competitive constraints on traditional calls even today and will continue to do so in the near future. This development should thus be taken into account while defining the relevant market and/or applying the three criteria test. Moreover, competition on the mobile market is fierce, forcing further price cuts. There is no justification for maintaining *ex ante* regulation while competition law is sufficient to tackle any issue that may arise.

Ewelina D. Sage*

Telecommunications aspects of audiovisual media

1. Introduction

The relationship between telecoms and audiovisual media remains close as technological convergence shows no signs of abiding. While consumer demand for increasingly tailor-made access to media-related services has clearly driven telecoms advancements, they have opened up many new possibilities for media--services providers with respect to their ability to reach end-users. In fact, overcoming capacity limitations in telecoms has not only made access to media services more convenient, it also created demand for an ever increasing amount of diversified content to fill the easier available bandwidth. Since access to around-the-clock communications services is nothing short of fundamental for modern society, telecoms could, arguably, be seen as a totally separate entity from the media sector. The latter is unlikely however to be able to escape its reliance upon the evolution of telecoms in particular with respect to transmission services of broadcasting signal, the use of frequencies for broadcasting purposes and analogue-to-digital switch over.

Poland's 2004 EU accession meant that the evolution of its national telecoms markets was strongly influenced by EU developments and thus so were, indirectly, the telecoms foundations of audiovisual media. That

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influence was exercised primarily by a decade-worth of harmonisation initiatives in the telecoms sector introduced by the 2002 Telecoms Package with its 2009 revision which regulated issues such as telecoms access[1]. EU impact shows also in the current shift in the technological foundations of Polish audiovisual media – switch-over from analogue to digital broadcasting.[2] Albeit outside of the realm on telecoms regulation and thus scope of this paper, worth mentioning is also the 2007 amendment of the 1989 Television Without Frontiers Directive (Audiovisual Media Services Directive)[3] which brought non-liner media services, the provision of which became largely possible thanks to the evolution of telecoms, into the EU harmonisation framework so far reserved to traditional broadcasting.

Telecoms aspects of audiovisual media are governed in Poland by the following two main legal acts which partially at least implement relevant EU harmonisation acts and policy initiatives:

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1 Directive (2002/21/EC) on a common regulatory framework as amended by Directive 2009/140/EC (Better Regulation Directive); Directive (2002/19/EC) on access and interconnection as amended by Directive 2009/140/EC; Directive (2002/20/EC) on the authorization of electronic communications networks and services as amended by Directive 2009/140/EC; Directive (2002/22/EC) on universal service and users' rights relating to electronic communications networks and services as amended by Directive 2009/136/EC (Citizens' Rights Directive); Directive (2002/58/EC) on privacy and electronic communications as amended by Directive 2009/136/EC; Regulation (EC) No 1211/2009 of 25/11/09 establishing the Body of European Regulators for Electronic Communications (BEREC) and the Office.

2 Most importantly: *Communication from the Commission: Towards a new framework for electronic Communications infrastructure and associated services* which specified that Member States should take actions based on clear policy objectives; be proportionate, transparent, technologically neutral and follow the subsidiarity principle; the 2005 *Communication from the Commission on accelerating the transition from analogue to digital broadcasting* on the other hand proposed 2012 as the deadline for EU wide switch off.

3 Directive 2010/13/EU of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services which is the codified version of Directive 2007/65/EC of 11/12/07 amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities (Television without Frontiers Directive).

1) Telecommunications Law of 2004 with subsequent amendments, hereafter TL (in Polish: *Prawo Telekomunikacyjne*) implementing the 2002 Telecoms Package[4] revised in 2009[5];
2) Implementation of Terrestrial Digital Television Act of 2011, hereafter DTTV Act (in Polish: *Ustawa o wdrożeniu naziemnej telewizji cyfrowej*) implementing some changes introduced by the 2009 reform of the 2002 Telecoms Package as well as acting as Poland's answer to a number of EU policy propositions expressed in the Digital Agenda 2020.

These two are complemented by Polish media law – the Radio and Television Act of 1992, hereafter R&TV Act (in Polish: *Ustawa o radiofonii i telewizji*) with subsequent amendments the most recent of which entered into force on the 28th February 2013 finally harmonising the Polish law with the provisions of the Audiovisual Media Service Directive.[6]

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4 Directive 2002/19/EC of the European Parliament and the Council of 07/03/02 on access to, and interconnection of, electronic communications networks and associated facilities (Access Directive); Directive 2002/20/EC of the European Parliament and the Council of 07/03/02 on the authorisation of electronic communications networks and services (Authorisation Directive); Directive 2002/21/EC of the European Parliament and of the Council of 07/03/02 on a common regulatory framework for electronic communications networks and services (Framework Directive); Directive 2002/22/EC of the European Parliament and the Council of 07/03/02 on universal service and users' rights relating to electronic communications networks and services (Universal Service Directive); Directive 2002/58/EC of the European parliament and the Council of 12/07/02 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications).

5 Directive 2009/140/EC of the European Parliament and of the Council of 25/11/09 amending Directives 2002/21/EC on a common regulatory framework for electronic communications networks and services, 2002/19/EC on access to, and interconnection of, electronic communications networks and associated facilities, and 2002/20/EC on the authorization of electronic communications networks and services; Directive 2009/136/EC of the European Parliament and of the Council of 25/11/09 amending Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks and services, Directive 2002/58/EC concerning the processing of personal data and the protection of privacy in the electronic communications sector and Regulation (EC) No 2006/2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws; Regulation (EC) No 1211/2009 of the European Parliament and of the Council of 25/11/09 establishing the Body of European Regulators for Electronic Communications (BEREC) and the Office.

6 Despite the laps of the transposition date on the 19.12.2009, the first report on the application of the Directive published in May 2012 placed Poland among the two Member States that failed to implement the AVMSD even at this very late date. It was not until October 2012 that the last necessary amendment was finally promulgated which brings the R&TV Law in line with the AVMSD as of 28/02/13.

It is useful to note that the multitude of legal sources applicable to this economic area is reflected in a multiple of public bodies competent to deal with telecoms aspects of audiovisual-media on the basis of a number of difference procedures (sole decision, co-operation, consultation, consolidation[7]). These include:

- Minister of Culture and National Heritage – competent for audiovisual policy;
- Minister of Administration and Digitalization – competent for telecommunications policy**;**
- Telecoms regulator (National Regulatory Authority, NRA) – the President of the Electronic Communications Office (in Polish: *Urząd Komunikacji Elektronicznej*) – the President of UKE – competent to supervise most telecoms aspects of audiovisual media in Poland albeit often only upon receiving approval from the media Council;
- Audiovisual media council – the National Council for Radio and Television (in Polish: *Krajowa Rada Radiofonii i Telewizji*) – KRRiT[8] – the TL Act requires the UKE President to consult the Chairperson of KRRiT[9] as party of consultation proceedings with respect to broadcasting (Article 16 TL) and take its decisions in agreement with the KRRiT Chairperson if they concern broadcasting activities (Articles 112 & 114, 122, 123 TL);
- National Competition Authority – the President of the Office of Competition and Consumer Protection (in Polish: *Urząd Ochrony Konkurencji i Konsumentów*) – the President of UOKiK, who takes part in consultation proceedings according to Articles 15–17 TL with respect to all draft decisions which define relevant markets, find SMP therein and impose regulatory obligations;[10]

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7 Article 15–17 TL for consultation procedure, Art. 18–20 for the consolidation procedure.

8 KRRiT is a national body competent to oversee audiovisual media and as such it fulfil many of the tasks assigned to Member States by the AVMS Directive such as, for instance, protection of minors or advertising and broadcasting concessions; for more details on the complex position of KRRiT within the Polish legal and constitutional system see Chałubińska-Jentkiewicz K., *Media Audiowizualne. Konflikt regulacyjny w dobie cyfryzacji (Audiovisual Media. Regulatory conflict in the digitalisation era)*, Warsaw 2011, p. 244 and following.

9 The KRRiT Council is a collegial body, the Chairperson of KRRiT issues administrative decisions on the basis of its binding resolutions.

10 Art. 15 TL 1. '[...] a decision in cases of: 1) definition of a relevant market [...], its analysis and designation of a [telecoms] undertaking with significant market power or [telecoms] undertakings holding jointly significant market power [SMP] or repeal of a decision in this matter, 2) the imposition, withdrawal, maintenance or amendment

- European Commission who takes part in consolidation proceedings based on Article 18-20 TL for decisions that might affect EU trade[11] whose comments thereto and soft laws on relevant market definition must be respected to the greatest extent possible (Articles 19(3) TL) and who has the power to, among other things, halt the issue of a national regulatory decision (Article 19(2) TL).[12]

2. Regulation of broadcasting transmission services ('market 18')

Audiovisual media's reliance on the telecoms sector proved very acute with respect to broadcasting transmission services provided to broadcasters by telecoms operators in control of transmission infrastructure (masts, transponders etc). This highly concentrated, even monopolised, telecoms field (the so-called 'market 18') was named by the Commission in 2003[13] as potentially in need of sector specific regulation provided of course, according to the overall approach of the 2002 Telecoms package, that a given NRA deemed it necessary after an individual assessment. As such, broadcasting transmissions services were placed under the same 'regulatory' regime as other telecoms markets in Europe. The broadcasting transmission services market was taken off the Commission's 2007 list[14] due to competitive advancements achieved in many member States. Unfortunately, Poland

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of regulatory obligations in relation to a [telecoms] undertaking with or without [SMP], 3) decisions concerning access to buildings and telecommunications infrastructure [...], 4) other cases indicated in the Act [...].

11 For more on EU effects of national regulatory decisions see Piątek S., *Prawo telekomunikacyjne. Komentarz (Telecommunications Law. Commentary)*, Warsaw 2005, p. 211.

12 On seeing the European Commission as a party to regulatory decision making see Larouche P., de Visser M.C.B.F., *The triangular relationship between the commission, NRAs and national courts revisited*, Communications & Strategies, 64, p. 130; Commission soft law acts on relevant market definition must be respected by the NRA to the greatest extent possible (Article 19(3) TL).

13 Commission Recommendation C(2003)497 on Relevant Product and Service Markets within the electronic communications sector susceptible to ex ante regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communication networks and services.

14 Commission Recommendation C(2007) 5406 on relevant product and service markets within the electronic communications sector susceptible to ex ante regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services.

was definitely not among those that managed to bring competition into the transmission services market.

The first regulatory decision in this field was issued on 9 November 2006 by the Polish NRA towards the infrastructure holder Emitel[15] (owned at that time by the incumbent telecoms operator Telekomunikacja Polska). The operator, which was generally perceived as a persistent monopoly, was unsurprisingly found in control of the relevant market and thus subjected to nearly all possible regulatory obligations provided by Polish telecoms law[16]. Those included, most importantly, the obligation to give alternative operators access to its transmission infrastructure.[17] Taking regulatory actions in order to generate competition in the mid-level transmission services market by creating an effective top-tier infrastructure access market[18] was certainly correct especially since the NRA does not have the competence to directly shape the relationship between telecoms operators and broadcasters in its individual 'regulatory decisions'. Indeed, broadcasters are not seen as 'telecoms operators' and it is only the later that are subject to regulatory intervention on the basis of the TL Act.

However, the basic findings of the 2006 decision issued by the UKE President were embedded in an inaccurate definition of the relevant market (making the finding of significant market power unsustainable) and an incorrectly understood relationship between the different authorities involved in the decision-making process. Unsurprisingly, Emitel appealed but despite its numerous valid complaints, the decision was sustained by both SOKiK[19], competent first instance court, and by the Court of Appeals. The infrastructure holder submitted ultimately a cassation request to the Supreme Court which disagreed with both the NRA and the two lower instance courts and thus sent the case for a renewed assessment to the Court

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15 For a detailed assessment of the regulatory process see Sage E.D., *Who Controls Polish Transmission Masts? At the Intersection of Antitrust and Regulation'*, YARS 2010, 3(3).

16 Obligation to consider all reasonable access requests (Article 34 TL); no discrimination (Article 36 TL); information disclose (Article 37 TL); regulatory accounting (Article 38 TL); cost-based access prices (Article 40 TL); reference offer (Article 42 TL).

17 Piątek S., *Polityka telekomunikacji elektronicznej Unii Europejskiej (EU electronic communications Policy)*, in: Jurkowska A. and ors (eds), *Polityki Unii Europejskiej: Polityki Sektorów Infrastrukturalnych. Aspekty Prawne (EU Policies; Infrastructure Sector Policies. Legal Aspects)*, Warszawa 2010, p. 177.

18 Along the same lines as OFCOM which differentiates a 3 level value chain; OFCOM *Broadcasting Transmission Services: a review of the market & Provision of managed transmission services for public service broadcasters*.

19 Incidentally, SOKiK has annulled another UKE's Emitel decision see http://www.uke.gov.pl/sokik-uchylil-decyzje-prezesa-uke-8279.

of Appeals.[20] The final judgment was delivered on 14 October 2011 and ultimately decided in favour of Emitel due to the mistakes that occurred in the original decision-making process. After a second review, the Court of Appeals annulled the UKE decision finding faults in the relevant market definition employed by the NRA as well as in the latter's disregard of the critical comments submitted thereto by the Competition Authority[21].

Interestingly, the biggest legal difficulty for the Polish regulatory regime to actually work in the transmissions services field has proven to be not of telecoms or indeed broadcasting but of a competition law nature. The tailor-made regulatory process failed as the NRA was unable to formulate a correct relevant market definition on which significant market power should have been established – an overall precondition for telecoms regulation in Europe. One must wonder if the regulatory failure could have been avoided if the NRA had complied with its statutory duty to incorporate the, arguably, expert input of the Polish Competition Authority, especially since the UOKiK President has made valid observations concerning the NRA's market definition process. UKE's failure to respect its cooperation duty was among the criticisms expressed by the Supreme Court, later confirmed by the Courts of Appeals. Overall, the 2006 regulatory decision proved riddled with analytical faults, unsustainable in court and thus completely ineffective in achieving its pro-competitive objective seeing as only one access agreement has actually been signed during its problematic 'tenure'.

Before the final judgment was actually delivered and the original findings invalidated, the UKE President issued on 12 October 2010 a revised regulatory decision concerning Emitel and its activities on 'market 18'.[22] Although once again aims to foster competition by retaining the cost-based infrastructure access obligation,[23] the new decision is notably more accurate than its predecessor by better tackling the controversial issue of market definition. In particular, the NRA managed to provide here a far clear

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20 Kosmala K., *Legislative and Jurisprudential Development in the Telecommunications Sector in 2011,* YARS, 2012, 5(7), p. 219.

21 According to Article 25(2) TL applicable at the time of the decision, the UKE decision should be taken 'in agreement' with the UOKiK President, see http://www.uke.gov.pl/sa-uchylil-decyzje-prezesa-uke-7740; see Piatek S., *Komentarz*, Warsaw p. 254, who acknowledges that the binding nature of UOKiK's comments was at that time seen as arguable – a realisation now overturned by the most recent judgment of the Court of Appeals in this matter.

22 http://www.uke.gov.pl/files/?id_plik=7766.

23 At the same time is applies a wider definition of the Art. 34 TL obligation concerning reasonable access request but eliminated the regulatory accounting obligation albeit it is somewhat inconsistent in its analysis.

delineation of the demand and supply side of both the top-tier and mid-level transmission markets and their respective roles. Another notable difference concerns the decision-making process doubts about which contributed to the failure of the 2006 decision. Where there was previously an obligation for the NRA to take its decisions on market definition 'in agreement' with the Competition Authority[24], without however the terms being specifically defined, amendments to the TL Act made it so that the UKE President is now explicitly not bound by such opinions (Article 25c TL).[25] As a result, it is up to the NRA to incorporate UOKiK comments or not, it is prise-worthy that the UKE President chose to do so in its 2010 decision.[26]

It is certain that Emitel continues to completely control at least some segments of the national broadcasting transmission services market, regulatory intervention has so far done little to eliminate the problem. There is hope for improvement however with the improved 2010 decision and the fact that some broadcasters are investing in their own transmission infrastructure severing their reliance on the incumbent. Emitel has meanwhile been also sold to an independent investor, leaving the decisive influence of the notorious Telekomunikacja Polska SA[27], resulting hopefully in a long-term shift in Emitel's corporate culture.

3. Broadcasting frequency management

The purpose of administrative frequency management is to ensure the most effective and least distortive use of frequencies seeing as they are generally seen as a 'common' good which, as a rule, 'transcends' national borders. As a rule, frequency management lies in the competences of the Polish telecoms regulator (UKE President). This includes broadcasting frequencies since a major amendment of the Radio & TV Act (R&TV Act) took that competence away from the Audiovisual Media Council (KRRiT)

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24 Article 25(2) TL applicable in 2006.

25 Article 25c TL: The measure referred to in Article 23 (1) or in Article 24:1) shall be issued having sought the opinion of the President of UOKiK who shall issue a resolution [...].

26 http://www.uke.gov.pl/_gAllery/29/25/29255/Komentarz_rynek18.pdf.

27 TP's wide spread market foreclosing practices are well documented despite it being subject to extensive regulatory obligations imposed over the years by the NRA; indeed, TP SA was not only subject to numerous interventions by both Polish authorities (UKE and UOKiK Presidents) but also subject to an extensive 2011 decision of the European Commission which deemed its activities intentionally hindering the emergence of competition in Polish telecoms.

in 2005[28] in order to better assign the supervision of the technological and the programming side of broadcasting. As a result, the UKE President is responsible for the supervision of frequencies used for broadcasting while the KRRiT oversees the actual broadcasting activity. Nonetheless, the TL Act explicitly acknowledges their close relationship because while it gives a lion's share of the powers to the UKE President, the NRA manages broadcasting frequencies generally 'in agreement' with the KRRiT (represented by its Chairperson who is bound by the resolutions of the Council).[29] As a result, broadcasting is not only subject to general frequency management rules contained in the TL Act but also to the more detailed rules applicable to the audiovisual field only. Together, they create an explicit need for regulatory cooperation in public decision-making and impose a stringent regulatory regime relating to broadcasting frequency management.

The Polish frequency management system[30] reflects its evolving nature and the key realization that as a 'common good' a frequency cannot be 'acquired' by individuals but rather, that its use can be temporarily permitted (assigned to them) by public authorities overseeing them. Frequency management in Poland includes multiple tiers:

1) National Frequency Allocation Table (NFET) which sets its general purpose (eg maritime navigation) and character (governmental, civil, mixed) which can be accompanied by Executive Regulations of the Communications Minister on specific usage conditions[31];
2) specific frequency management plans (FMPs) for particular frequency bands which identify the purpose of a given band providing transparency and legal certainty to frequency management;
3) individual general exclusive frequency licences granted to particular users/groups of users (know in Polish under the far more representative

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[28] Amendment Act of 29.12.2005; it is worth noting that with respect to broadcasting frequency management, the KRRiT was seen as a body of public administration – a position contrary to its desired 'independent' character, for more details see Winczorek P., *Prawo Konstytucyjne Rzeczpospolitej Polskiej (Constitutional Law of the Republic of Poland)*, Warsaw 2003; in favour of a clear separation of KRRiT and UKE's supervisory and regulatory power is Chałubinska-Jentkiewicz K., '*Media Audiowizulane. Konflikt regulacyjny w dobie cyfryzacji*, Warsaw 2011, p. 257 & 261.

[29] An equivalent agreement with the railway regulator is needed for frequency reservations for the railway operations.

[30] For more detail on frequency management in Poland see Busiło M., *Prawa z rezerwacji częstotliwości radiowych (Right deriving from radio frequency reservations)*, Prawo i Regulacje Świata Telekomunikacji i Mediów, 2010, Nr 1.

[31] None issued so far.

name of 'frequency reservation decisions') which place a given frequency (band) at the disposal of the addressee;

4) where necessary, radio permits usually issued to those already in possession of a general exclusive licence, which allow them to use specific transmission equipment, in other words, they permit a specific use of the reserved frequency.

The TL Act provides for a degree of direct governmental impact in response to supra-national aspects of frequency management. General allocation of frequencies or frequency bands to particular radio-communication services and their use are specified in the National Frequency Allocation Table (NFAT)[32] issued by the Council of Ministers, which must respect the multitude of related international agreements Poland is party to.[33] Key among them is of course the European Table of Frequency Allocation and Application. Statutory factors taken into consideration in the formulation of the NFAT include, most of all, telecoms considerations but also national security, for instance. Despite the power given to the Administration and Digitization Minister to specify detailed conditions for the performance of particular services within the allocated frequency bands and for the use o frequency bands, no such act has yet been issued (Articles 111–113 TL).[34]

It is thereafter up to the UKE President to formulate specific frequency management plans and to modify them. Their overall purpose is to introduce much needed transparency into frequency management by the NRA providing stakeholders with detailed information about the assignment and use of frequencies only generally assigned in the NTFA. Plans are formulated considering factors such as national telecoms, broadcasting & defence policy as well as EU cooperation after conducting a consolation procedure with the many public entities involved in the above fields (Article 112(4) TL).[35] Seeing however that the UKE President is not generally bound

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[32] Act of 2005 with amendments (in Polish: *Rozporządzenie Rady Ministrów w sprawie Krajowej Tablicy Przeznaczeń Częstotliwości*).

[33] Some are world-wide through the World Radio Conferences (WRC) & the Internal Telecommunications Union (RR ITU) while others are regional e.g. the European Conference of Postal and Telecommunications Administrations (CEPT); key among them the European Table for Frequency Allocation and Application, see http://www.erodocdb.dk/Docs/doc98/official/pdf/ERCREP025.PDF.

[34] Designated for equipment used in industry, medicine or science, on the basis of the same requirements as observed while drawing up the National Frequency Allocation Table (Article 113 TL).

[35] The NRA can generate such plans on its own initiative or in cooperation with a body requesting the right to use a frequency taking into consideration the needs and technical capabilities within the remaining frequency bands (Article 112(1) TL).

by such comments, some criticise the arguably 'authoritarian' manner in which the NRA creates the FMPs.

By contrast, the special position of the KRRiT is visible already at this early stage of frequency management for broadcasting purposes since broadcasting FMPs (both analogue and digital frequencies) are determined and modified by the UKE President only in agreement with the Chairperson of KRRiT at the binding request of the latter or independently by the NRA. The statutory requirement that the two authorities must reach an agreement means that without a positive assessment by the KRRiT of a given draft, the UKE President cannot issue a broadcasting frequencies management plan. More stringent approach to broadcasting is also visible with respect to the content of FMPs which must always specify the number and type of planned frequencies and networks as well as the coverage and location of transmitting stations (Article 112 TL). Other frequency management plans do not have to contain such details. For legal certainty reasons, no frequency management plan can infringe frequency reservation decision already issued (Article 112 TL).

Upon a specific request of an interested party, the UKE President can grant, change and withdraw specific general exclusive frequency licences known as frequency reservation decisions[36]. These must specify the frequencies[37] which remain, during the period of the validity of the licence, at the disposal of the licensee (or at the disposal of an entity to which the frequency rights or the rights to use the frequencies for the purposes of obtaining a radio licence were transferred) (Article 114(1)&(2) TL). The telecoms regulator is obliged to make details of frequencies which are already reserved freely available and keep them up to date. It should be stressed here that a reservation decision does not give the addresses the right to directly use the frequency itself (for that a general exemption for the need of a permission or an individual radio permit is necessary). Rather, it gives the recipient the right to have the frequency at its disposal which might facilitate the application for a radio permit or in fact, allow it to transfer the reservation to a third party.

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36 These individual decisions are called in Polish 'frequency reservation decisions' – a term which clearly specifies their nature unlike the official translation of the TL Act (which is used in this publication) which speaks of 'exclusive frequency (orbital resources) licences'.

37 The provision states 'frequency or orbital resources' despite Poland's lack of satellites.

Once again, general exclusive frequency licences for the broadcasting or re-broadcasting (transmission)[38] of radio and TV programmes are granted by the UKE President in agreement with the Chairperson of KRRiT, albeit the latter's consent can be implied from his/her lack of timely comments to a draft license (Article 114(2) TL).[39] It is essential to stress here that although these competences were transferred to the NRA, the leading role in the supervision of broadcasting remains firmly with the KRRiT as the body competent to oversee public service operators and issue broadcasting concessions to private entities fulfilling the criteria specified in the R&TV Act.[40] As a result, the UKE President issues a reservation to public broadcasters or to private operators which already hold a concession on terms fully agreed to with the KRRiT (Article 114(2a) TL). The term 'in agreement' translates therefore into receiving a written consent of the Chairperson of KRRiT to the draft reservation.

A general license is granted within 6 weeks of the application or closure of the contest provided the applicant fulfills all statutory conditions including conditions of engaging in the specific activities for which purpose the frequency reservation is sought[41], the frequency is available, was allocated for the requested purpose in the NFAT and applicable FMPs and if it can be used effectively and safely both in Poland and, if applicable, abroad. Licenses must be granted for a specified duration not exceeding 15 years considering telecoms policy, the character of the planed service and investment costs associated with their use. Incidentally, the TL Act does not explicitly state what considerations might warrant a longer or shorter reservation period posing questions as to the compliance of this rules with the technological neutrality principle.[42] Worth stressing here are also the special provisions concerning the length of broadcasting frequency reservations which, as the TL explicitly states, should correspond to the duration of the respective concession. Here, once again, the leading role of the KRRiT and its concession procedure is visible assigning a secondary

[38] The term 'broadcasting' is defined in Art. 4 pt. 7 R&TV Act; 're-broadcasting' in Art. 4 pt. 8.

[39] Inserted recently into the TL Act in order to clarify and simplify the cooperation proceedings between the two regulators.

[40] Article 26 R&TV Act for public operators and Art. 37(3a) R&TV Act for concessions to private operators.

[41] Piatek S., *Komentarz*, Warsaw 2013, p. 683.

[42] Some commentators not only criticizes this lack of clarity but suggests that it goes against the principle of technological neutrality, Żmudzin S., Barej G., *Gospodarowanie częstotliwościami i numeracją (Frequency management and numbering)*, in: Rogalski M., *Prawo Telekomunikacyjne (Telecommunications Law)*, Warsaw 2011, p. 572.

role to UKE's frequency reservations. Finally, the UKE President can give a frequency reservation jointly to multiple entities specifying the conditions of its joint usage (Article 114 TL).[43]

The content of a general exclusive frequency licenses must specify: the identity of the licensee; frequency reserved; area of permitted use; form of use unless unlimited; timeframe including start date; conditions of use considering Poland's obligations resulting from international agreements; commitments of the winner of a contest if applicable. Key public policy objectives, such as safety for instance, can justify the imposition of conditions on the use of the reserved frequency, set specific safety requirements or impose proportionate & non-discriminatory limitations on the freedom to use the reserved frequencies (eg identifying the telecoms service which should/should not be thereby provided). Unlike earlier versions of the TL Act, the later rules are no longer an obligatory element of frequency reservations reflecting the more relaxed approach of the recent shifts in Article 6(1) Directive 2002/20/EC and Article 9 Directive 2002/21/EC. In order to improve procedural efficiency, the NRA can eliminate the need for a recipient of a reservation from subsequently having to apply for a radio permit if the general exclusive frequency licence specifies the conditions of the use of the frequency in sufficient detail (Article 155 TL).

Key to the increasingly digital audiovisual field are the newly added provisions on the obligatory content of licences for digital broadcasting or re-broadcasting of TV/radio channels[44] via digital terrestrial/satellite diffusion. Accordingly, such licence must identify: channels (identified by name or type) contained in the multiplex signal[45]; their respective arrangement and proportion within the signal; geographic area for broadcast or re-broadcast; and transmission capacity's use. Stricter rules yet apply to licenses for terrestrial diffusion which must additionally specify the technical parameters and standards for digital TV transmission; management

[43] The above provisions are inapplicable to frequencies allocated in the NFAT for governmental use (Article 114(8)); licenses granted for a mixed civil/governmental use are granted by the UKE President in agreement with the interested public parties (Article 114(7)).

[44] It is worth noting that the English version of the TL Act inaccurately uses the term program (programme) instead of channel.

[45] The term 'multiplex signal' is defined as a unified digital signal broadcast or re-broadcast by means of a licensed frequency which comprises TV or radio channels (broadcasters must have a separate concession for that purpose); it is these very channels which are known jointly as the 'audiovisual components' of the multiplex signal.

conditions for software updates in digital terrestrial TV receivers; and the use of the multiplex's capacity[46] (Article 155 TL).

Although digitalisation has greatly improved availability, scarcity of resources can still affect frequencies resulting in the need of selection.[47] It is established in cases where what is 'on offer' is exceeded by notified interest after the first request for a reservation is made or, as a secondary method, if the NRA arrives at such conclusion on its own initiative in light of information is possess[48] (Article 116(1-7) TL). In cases of insufficient frequencies, a general exclusive licence can be granted by the UKE President only after[49] the completion of a separate selection procedure.[50] A contest is used to choose a future recipient of frequency reservations intended for the digital broadcasting or re-broadcasting of radio and TV channels; a contest[51] for frequencies meant for other uses. One again, the competences of the NRA are considerably limited with respect to selections made in the broadcasting field. First of all, channels to be broadcasts by a multiplex operator via terrestrial digital diffusion are governed by normal rules on frequency reservations rather than the provisions on contests. Secondly, the selection of operators is generally left to the KRRiT in its concession procedure (which is primarily concerned with programming rather than frequency considerations) rather than the NRA. As a result, the UKE President uses a content to select a user in cases of 'insufficient broadcasting

46 In the period of parallel analogue and digital transmission – planned until end of July 2013, an exclusive frequency license for TV/radio diffusion for broadcasting re-broadcasting of TV channels via digital terrestrial diffusion must also state: the conditions of throughput in the multiplex; conditions of use during the transitory period; analogue switch-off date on that frequency; start date for digital transmission on that frequency (Article 115b TL).

47 For a comprehensive overview of the entirety of the selection procedures see Piątek S., *Komentarz*, p. 712–758.

48 Piątek is firm in his statement that the NRA should find scarcity on its own only as a last resort, Piątek S., *Komentarz*, p. 719.

49 Occasionally a respective reservation will not be issued after the completion of a selection procedure if the winner resigns or, for instance, due to grave public policy reasons (Article 118b(2)).

50 It is a prerogative of the NRA to conduct a contest/tender/auction. The NRA can open such procedure on its own initiative if it is aware of market interest in an available frequency [Article 116(12) TL). Rogalski claims that the NRA has on occasion taken a heavy handed approach and opened a tender without actual scarcity (interest expressed by multiple entities) being fulfilled, Żmudzin S., Barej G., *Gospodarowanie częstotliwościami i numeracją*, in: Rogalski M., *Prawo Telekomunikacyjne*, Warsaw 2011, p. 576.

51 The possibility of auction as separate procedure was introduced into the TL in 2012, but was possible earlier as a final part of a tender on the basis of an executive regulation.

frequencies' only in the remaining cases including, most importantly, the selection of a multiplex operator. Finally, the actual conditions of contests must find approval from the KRRiT.

All types of selection procedures must be pre-empted by a consultation (Article 118(1) TL). The UKE President is then obliged to officially open the procedure and specify the specific documentation conditions for participation therein, requirements to be met by the offers, their evaluation criteria and their respective 'weight' if applicable. All of these must be duly communicated. Broadcasting is once again subject to stricter provisions. Not only are the conditions of any given contest prepared by the UKE President in agreement with the KRRiT; they are accompanied by additional programming-related criteria, including those related to must-carry obligations, which are separately prepared by KRRiT. This fact is fundamental to the selection of a multiplex operator[52] because while a broadcasting frequencies reservation decision must contain details of the components of the multiplex signal – components chosen by the KRRiT – it is essential for the conditions of the respective contest to specify such requirements as attached programming obligations greatly affect the desirability/value of a frequency (Article 118 TL).

Amount is the only evaluation criteria for auctions. The NRA is however entitled to preclude certain entities from participating in an auction if such decision is considered necessary to protect competition. Tenders are assessed with respect to their effect on competition to which an opinion from the UOKiK President must be obtained, but not followed. Relevant is also their declared amount; the NRA can set other objective criteria.[53] A contest is decided on the basis of compatibility with competition as well as other objective criteria provided they were stated in the official documentation. It is worth noting that a selection procedure can end inconclusive or can be annulled (Article 118a, e & 118d TL).

It is worth noting that the overall process of acquiring an exclusive frequency licence can be lengthy as well as costly for the applicants. The selection procedure alone can take months (albeit should not exceeded 8 month) and is further followed by a separate procedure in which a reservation is actually granted. In order to avoid superfluous proceedings when other entities do not show interest in a given frequency, the UKE President is to prolong an exclusive licence provided the licensee has not

52 This duty reverts back to the UKE President in cases where the KRRiT fails to do so.

53 Directive 2002/21/EC speaks of reservations being given on objective, transparent, non-discriminatory and proportionate criteria.

committed grave violations without opening another selection procedure. Similarly, if a change is requested, a new selection must take place only if the amendment would results in an expansion of the existing coverage. A new provision allows the NRA to refuse to renew a licence stating here, unlike elsewhere in the TL Act which generally only requires the attainment of a non-binding opinion from the competition authority, that the UKE President must do so in agreement with the UOKiK President if that is seen as necessary for competition and effectiveness (Article 116 TL). That would be the case, most importantly, if such renewal caused an excessive concentration of frequencies in the hands of a single economic unit which could endanger media plurality. The form that the 'agreement' must take is similar to the many aforementioned instances of obligatory co-operation with the KRRiT.[54]

The TL Act makes the transfer of the rights deriving from frequency reservations possible, as required by the EU telecoms package at least with respect to frequencies specified by the European Commission (Article 9b Directive 2002/21/EC). The right to both digital broadcasting and all re-broadcasting frequencies can be transferred in Poland in their entirety or part (divided by coverage or rights/obligations). Although the transfer itself is of a civil law nature (Article 112 TL), it takes place upon consent of the UKE President reaffirming public oversight over frequency allocation. Rights transfers remain a somewhat controversial issue posing questions as to the fairness of a system where small operators receive preferential treatment in the selection procedure only to 'pass on' the rights to generate a sizable profit. Another problem lies in the qualification of the resulting profit in the context of state aid for instance.[55] The UKE President can change the entity holding a general licence granted by means of a contest upon requesting a non-binding opinion of the UOKiK President with respect to the effects of such change on competition. Changes concerning broadcasting must additionally be approved by the Chairperson of KRRiT. The above realisations are without prejudice for the fact that a reservation can also be revoked for a number of reasons including: in order to eliminate harmful electromagnetic disturbances; according to changes of the NTFA; for national security reasons; failure to use the frequency or comply with its usage conditions (Article 122 &123 TL).

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54 Piatek S., *Komentarz*, p. 721.

55 Żmudzin S., Barej G., *Gospodarowanie częstotliwościami i numeracją*, in: Rogalski M., *Prawo Telekomunikacyjne*, Warsaw 2011, pp. 578–579.

It is essential to stress in conclusion that having obtained a frequency reservation is not sufficient to be actually allowed to 'use' the reserved frequency band. The right to use frequencies in a given way can be of a general or of an individual nature. The use of radio equipment is currently permitted in Poland on the basis of an individual radio permit or in light of a general exemption from the obligation to obtain such permit contained in the TL Act itself or in an executive regulation of the responsible minister[56] (Article 144 TL). End-user receivers are among the most important types of equipment the use of which does not need a permit while broadcasting transmitters can be used only with a radio permit.[57] Radio permits are issued by the NRA and must at least specify: the recipient, covered equipment (eg transmission station), conditions for the use of the frequency & equipment (eg strength or location of the equipment), duration of the permit and its start date (Article145 & 146 TL).

A number of conditions must be met in order to receive a radio permit. The first set of criteria concerns the potentially harmful effects of the use resulting from the permit (the use of the equipment cannot be harmful to public interest such as security) and the question whether the requested use is effective. The assessment covers also the legal and factual 'availability' of the frequency (eg whether the entity is in fact entitled to request a permit in light of existing reservation decisions).[58] The UKE President considers finally the entitlement of the requesting party to engage in the planned activities by way of the equipment covered by the permit. Since many of these issues have already been analysed during earlier stages on the frequency management process, it is not surprising that the NRA can individually exempt an entity from the need to apply for a radio permit if the reservation decision acquired earlier specified its conditions in sufficient detail (Article 148 TL).

Worth mentioning in conclusion is the fact that radio permits are generally issued on request of those with a frequency reservation decision. Importantly however, they can now also be issued to entities to which such entitlement was transferred to by the reservation holder (Article 143(4) TL).

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56 The existing Regulation is from 2007 but it has been amendmended in 2008 and 2010 (in Polish: *Rozporządzenie Ministra Infrastruktury w sprawie urządzeń radiowych nadawczych lub nadawczo-odbiorczych, które mogą być używane bez pozwolenia radiowego*).

57 See also Commission Decision 2000/299/EC of 06.04.2000 establishing the initial classification of radio equipment and telecommunications terminal equipment and associated identifiers.

58 Reservations must also be in agreement with EU agreements on frequency use, cannot collide with existing reservations and cannot result in an ineffective use of the frequency.

This important change was caused by the 2011 Implementation of Digital Terrestrial Television Act which amended TL provisions on radio permits overall. As a result, not just the grantee of a frequency reservation but also an entity empowered by that grantee, may request the granting of a radio permit enabling it to use the frequency resources subject to that reservation during its duration. This provision creates a specific legal framework which allows a 3rd party to benefit from individual rights granted by means of an administrative decision to another entity (e.g. the right to use radio frequency resources which arises out of a frequency reservation)[59].

4. Switch-over from analogue to digital broadcasting

4.1. Implementation of the Digital Terrestrial Television Act

The aforementioned new law entitled: Implementation of Digital Terrestrial Television Act[60] (hereafter, DTTV) was promulgated by the Polish Parliament on 30th June 2011 with the clear purpose to establish a binding framework for the completion of the switch-over process (as well as to transpose certain provisions of the 2009 Better Regulation Directive[61]). Albeit the Act will have a shorter than usual applicability, it is nevertheless worth discussing as its effects will be both far reaching and long lasting for the Polish broadcasting field. The most ground-breaking of its provisions is the 'creation' a completely new telecoms entity – a 'multiplex operator' and the regulation of the activities of the first multiplex operators (Multiplex I & II) established for the switch-over period. As such, the DTTV Act must be seen in light of the TL Act's newly introduced Chapter IVa entitled: 'Multiplex operator and access to the multiplex' which constitutes a continuation of the transitory solutions introduced in the DTTV Act.

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59 See in detail Article 122prim of the TL Act.

60 The political will to pursue the advantages of digitalisation, strongly advocated by the EU in recent years, are also clearly reflected by the Act on Support for the Development of Broadband Services and Networks Law of 2010 (in Polish: *Ustawa o wspieraniu rozwoju usług i sieci telekomunikacyjnych*) which reflects EU digital policy directions expressed in the EU Digital Agenda 2020.

61 Directive 2009/36/EC of 25.11.2009 amending Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks and services, Directive 2002/58/EC concerning the processing of personal data and the protection of privacy in the electronic communications sector and Regulation (EC) No 2006/2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws.

It is worth stressing first of all that it is the DTTV Act that introduced a number of new definitions into the TL Act relating to switch-off including: multiplex, multiplex signal, multiplex operator, operator of a broadcasting network, digital receiver [Art. 2 DTTV]. As a result, the same definitions now apply in all legislative sources relevant to digital broadcasting: the TL Act, the DTTV Act and R&TV Act.

One of the DTTV Act's features is that it is clear in dividing competences in the digital broadcasting field between the Minister of Administration and Digitalization, the Telecoms regulator (UKE President) and the Audiovisual Media Council (KRRiT). Accordingly, the former is primarily responsible for an information campaign meant to prepare the Polish society for the switch-off. The Minister's impact on digital broadcasting will be limited thereafter. In the switch-over period, the UKE President was obliged to prepare the national switch-off plan and supervise that actual switching-off of the analogue signal. The NRA is continuously competent to oversee technical issues related to the use of broadcasting frequencies while the KRRiT remains responsible for the uninterrupted oversight of broadcasting (broadcasting concessions) including, temporarily, the supervision of the fulfilment of broadcasters' transitory duties during the information campaign.

The aforementioned 'temporal' obligations of public bodies are reflected by statutory duties placed in this context on private stakeholders. The DDTV Act is once again very clear in assigning specific transitory' obligations on specific market players involved in the switch-over process.[62] Importantly however, responsibilities of the switch-over period do not negate long-established statutory obligations of the media Council and NRA concerning concessions and frequency reservations/radio permits respectively. These two fundamental forms of regulatory interventions have, in the context of the DTTV Act, simply been accompanied by the newly created duties concerning the operation of multiplexes.

4.2. Switch-over period

The switch-over debate commenced in Europe over a decade ago and saw the issue of numerous policy documents (soft-laws) including the 1999 *Commission Communication Towards a new framework for electronic Communications infrastructure and associated services – the 1999*

[62] Reinforced by detailed provisions on fines for failure to comply with the duties – up to 3% turnover in the preceding calendar year; these are without prejudice to the possibility of imposing procedural fines as well (Article 17 & 18 DTTV).

communications review. Formulated therein were the basic principles that the Commission believed member States should follow with respect to the digitalisation process. Accordingly, actions were to be transparent, justified, proportionate, non-discriminatory, technologically neutral[63] and timely to minimise the risks of market distortion. They were also to follow clear policy goals, with a careful impact assessment as well as monitoring of both implementation and market evolution. The 2005 *Commission Communication on accelerating the transition from analogue to digital broadcasting* proposed an actual, but still non-binding, deadline of 2012 for analogue switch-off in Europe – not far off the Polish deadline. It is important to stress that although the EU remained encouraging and facilitative in its initiatives concerning the switch-over process, it never imposed any binging laws in this field. It is worth noting, however, that Poland is bound by an ultimate deadline for analogue switch off (17 June 2015) set during the 2006 ITU Regional Radio Conference held in Geneva (GE06).

Poland's road to analogue switch-off was riddled with problems; many stakeholders were either uninterested or even obstructive in their approach thereto. In order to remedy the perceived lack of progress, the DTTV Act imposed a statutory date for the switch-off of the analogue broadcasting signal in Poland – the 31st of July 2013. The actual replacement of analogue terrestrial transmission with its digital counterpart was to take place gradually by region following a time-table set by the NRA. Accordingly, Poland's first switch-off took place on the 7th November 2012; the final was planned for 23rd July 2013.[64] It is worth noting at this point that in order for the switch-over process to be considered successful, 95% of the Polish population must be covered by the new transmission[65] (Article 3 & 9 DTTV).

Five major broadcasters operated in Poland at the time of the entry into force of the DTTV Act: 1) public service operator Telewizja Polska (hereafter: TVP); 2) Telewizja Polsat; 3) TVN; 4) Polskie Media and; 5) Telewizja Puls. In order to meet the statutory switch-off date, the DTTV Act has explicitly obliged them to stop using the frequencies assigned to them

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63 Some commentators argue that the entire switch-over process contradicts the notion of technological neutrality, see Żmudzin S., Barej G., *Gospodarowanie częstotliwościami i numeracją*, in: Rogalski M., *Prawo Telekomunikacyjne*, Warsaw 2011, p. 587.

64 Switch-off dates by region can be found at http://cyfryzacja.gov.pl/Harmonogram,wylaczen,748.html.

65 According to UKE data, 98% of the population of the regions which have already experienced switch-off are successfully receiving digital terrestrial TV; see http://www.uke.gov.pl/uke/index.jsp?place=Lead04&news_cat_id=19&news_id=8262&layout=1&page=text.

for their analogue terrestrial broadcasting in a given region no later than the date set by the UKE President and latest by the final statutory switch-off date. In order to minimise broadcasting interruptions, a simultaneous obligation was put in place for broadcasters with a frequency reservation for digital terrestrial diffusion part of the frequency plan for Multiplex I and II to sign, within 30 days from the date of the entry into force of this Act, a contract with a provider of broadcasting transmission services. An even stricter duty was placed on those that received such frequency reservation with respect to Multiplex II as they had to sign an appropriate contract within 30 day of the issued of the frequency reservation decision by the NRA (Article 4 & 10 DTTV).

Maximising the number of viewers acquiring appropriate equipment is without a doubt a key factor for a successful switch-over. For that reason, retailers of digital reception equipment being sold to consumers which does not conform to the technical specification that guarantees reception of digital terrestrial TV in Poland, were obliged to inform buyers of that fact in a clear manner (Article 6 DTTV).[66] These rules accompany a 2009 Regulation of the Minister of Infrastructure on the technical and utilisation requirements for consumer equipment for digital terrestrial television reception, a highly-technical act covers issues ranging from reception capabilities to power supplies and analogue interfaces; some of covered issues are obligatory components of digital terrestrial TV receivers (e.g. subtitling) others are regulated only if the device in question actually co6ntains them (e.g. API).[67]

A notable part of the DTTV Act is devoted to the information campaign to precede the switch-off. The Administration and Digitalization Minister was placed under the obligation to formulate and run it by way of, among others, the operation of a dedicated info-line and website with easy access to all data concerning the national switch-over process. All broadcasters were placed under an obligation to transmit until 31 July 2013 a variety[68]

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66 A fine to be imposed by the Regional Trade Inspector in an amount up to 50000 PLZ (12500 EURO) was created for the failure to comply with this obligation (considering the scale of the infringement and its effects as well as prior actions and finances).

67 *Rozporzadzenie Ministra Infrastruktury z dnia 18 grudnia 2009 r. w sprawie wymagan technicznych i eksploatacyjnych dla urzadzen konsumenckich sluzacych do odbioru cyfrowych naziemnych transmisji telewizyjnych*); most of the technical parameters therein can be found at www.etsi.org; www.iec.ch and www.itu.int.

68 1x 3 min info-spot a week were presented during primetime TV as well as 2 daily spots of 30 seconds to be shown between 6am and 11pm to accompany news programmes whereby these length and frequency requirements could be limited by the KRRiT President if appropriate.

of info-spots[69] providing switch-off dates, explaining how to adjust reception equipment as well as pointing viewers to additional information sources (such as to official website). Stricter yet obligations were imposed on the public service operator, TVP[70] (Article 12 &16 DTTV).

It is worth noting here an interesting insertion into the DTTV of a media--law specific provision. In order to protect viewers from excessive TV advertising & similar programmes (know jointly as 'audiovisual commercial communications'), their amount and character is heavily regulated in Europe by the provisions of the AVMSD. Analogue legal rules are found in Poland in its R&TV Act. It is understandable that reasons of legal certainty suggest that the legal standing of info-spots (despite their transitory nature) had to be clarified also. The DTTV Act stated therefore that the rules on audiovisual commercial communications contained in Articles 16 and 16a R&TV Act (on recognisability and hourly amount/on their interaction with mass-media programmes respectively) were inapplicable to info-spots in order to minimise the burden on broadcasters. As such, they did have to transmit the info-spots, but at least they did not 'loose' their precious advertising time to do so. Incidentally, info-spots themselves could not be interrupted in order to transmit adverts (Article 13 DTTV).

To sum up, the Polish legislator decided to impose four different sets of obligations jointly meant to facilitate a successful switch-off process: an obligation placed on equipment retailers to 'inform' their customers and thus maximise the spread of functional equipment; a duty placed on broadcasters to discontinue the use of analogue frequencies by the set date and a simultaneous requirement to conclude appropriate carriage contracts both meant to ensure that the new signal actually reaches its destination on time and finally, an obligation placed on both broadcasters and the Administration and Digitalization Minister to facilitate the dissemination of information designed to inform the society as best possible of the changes to come.

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69 The formulation of the specific criteria for the content of the info-spots was left in the competences of the Communications Minister, upon consultation however with other relevant bodies (Article 14 DTTV).

70 Failure to comply with any of the aforementioned duties could result in a fine equivalent to those mentioned above but imposed by the KRRiT (being a 'broadcasting', rather than transmission, related offence).

4.3. Provision of digital broadcasting – Multiplexes

The DTTV Act introduced into the Polish legal system a new category of a telecoms entity – a multiplex operator – subject to the provisions of the DTTV Act in the transitory period and to the newly added Chapter IVa of the TL Act thereafter. For the transitory period, the DTTV Act explicitly assigned the role of Multiplex I operator to TVP until the laps of the related frequency reservation decision issued by the UKE President. TPV is to hold this position together with broadcasters that received a concession from the KRRiT to broadcast their channels via digital terrestrial diffusion on Multiplex I (Article 7 DTTV). The DDTV Act provides also that until coverage reaches 95% of the population on the basis of the frequencies provided in the frequency use plan for Multiplex III, but no later than 25 April 2014, distributed in Multiplex I are both of the public broadcaster's national channels (TVP1 & TVP2) as well as one of its regional channels.

At same time, the DTTV Act assigned the role of the Multiplex II operator jointly to the 4 largest Polish private broadcasters: Polsat, TVN, Polskie Media and Puls. These four held, at the time of the entry into force of the DTTV Act, a concession to distribute their channels via terrestrial analogue means on the basis of a frequency reservation issued by the UKE President for the terrestrial digital diffusion via Multiplex II [Art.8 DTTV]. Importantly, and unlike the statutory assignment of the role of the multiplex operators for Multiplex I & II, subsequent operators will be 'selected' on the basis of the aforementioned contest procedure later to be followed by frequency reservation proceedings conducted by the UKE President in agreement with the KRRiT.

Considering the statutory obligations of a multiplex operator, operators of Multiplex I & II must provide users with free access to the channels contained therein (channels provided by TVP as well as those that received an appropriate concession). Both are also obliged to ensure that 95% of the population is covered by the Multiplex I & II signal according to the conditions specified in the frequency reservation decision (Article 9 DTTV). Chapter IVa of the TL Act[71] specifies a set of statutory obligations for

[71] Chapter IVa is only applicable to situations where the position of the multiplex operator is not jointly held by a group of broadcasters (which have, on the basis of Article 114(6) TL, collectively been granted a frequency reservation for the dissemination or distribution of radio or television programmes by means of digital diffusion). In such cases, the principles governing the cooperation between broadcasters acting jointly as

multiplex operators of terrestrial digital television towards broadcasters, that is, providers of the components of the multiplex signal. Listed therein are: (1) the diffusion of radio and TV programmes of broadcasters with a concession for the distribution of programmes in a given multiplex; (2) ensuring that they have access to the multiplex under non-discriminatory conditions[72]; (3) and ensuring uninterrupted transmission of the digital multiplex signal unless the interruption results from a technical issue or if the broadcaster's decision.[73] The above obligations are without prejudice from those imposed on a multiplex operator in its own frequency reservation decision such as the setting of the content and arrangement of the programmes provided in the multiplex.

The model adopted by the legislator concerning access to a multiplex is analogues to that used with respect to telecoms access overall (Article 28 TL), including the associated powers of the NRA. It contains the obligation for a multiplex operator to enter into negotiations on the conclusion of relevant agreements and, ultimately, to grant access to the multiplex. The UKE President holds the power to shorten such negotiations and to issue a decision resolving disputes and thus replacing an access agreement. Still, although such decision can indeed replace a civil-law contract and thus overcome a negotiation stalemate, involving the regulator means that the replacement will be 'public' in nature seeing as the NRA must consider factors such as the development of competition on media markets, an issue not usually relevant for private contracts. Moreover, public impact is not limited to the NRA only as the UKE President can take such decisions only in agreement with the KRRiT if the conflict concerns programming issues, including must carry obligations, upon consideration of non-economic factors of national interest such as culture, language and media plurality. Replacing negotiations with public intervention is thus a double edged sword (Article 131a–e TL).

Worth noting in conclusion is the fact that while multiplex access provisions largely resemble general rules on telecoms access, important differences between the two remain. On the one hand, the very definition of telecoms access contained in Article 2 of the TL Act has been expanded

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a 'multiplex operator' are set out in their own agreement on that matter and in the DDTV Act.

72 Discriminatory terms are defined here unlike in other parts of the TL Act as terms different than those offered to other broadcasters for the same service unless justified by diverging circumstances (Art. 131a(2) TL).

73 The UKE President may impose a fine of up to 3% income on an operator of a multiplex for its failure to respect these requirements (Article 209(19a) TL).

in order to incorporate multiplex access. That in itself is an important realization but, while it might on first glace equalize the two, it does in fact create an important difference. It gives the right of access, normally associated with alternative telecoms operators, to another type of entity all together – broadcasters – which are not actually subject to NRA supervision but to that of the KRRiT. Moreover, being of statutory nature, multiplex access differs fundamentally from normal telecoms access obligations which can be imposed by an NRA only if necessary and significant market power is established. By contrast, the access obligation relating to multiplexes binds all operators by statute. The law itself thus outright assumes the existence of market power due to the exclusivity of frequency reservation.

Maciej Rogalski*

Enforcement of regulatory decisions

1. The immediate enforceability rigour

In Polish telecommunications law, the enforceability of regulatory decisions is provided primarily through the construction of the "immediate enforceability rigour". The latter means that a given decision is immediately enforceable. In practice therefore, even if an appeal is lodged against a regulatory decision issued under the rigour of immediate enforceability, its implementation must proceed until it is eventually repealed, amended or excluded from the immediate enforceability rigour.

The institution of the immediate enforceability rigour was introduced into the Polish Telecommunications Law Act in 2005. It was inserted into the provisions of Article 206(2a) TL which was added by way of Article 1(9b)) of the Act of 29 December 2005 on amendments to the Telecommunications Law Act and the Code of Civil Procedure Act.[1] Article 206(2a) has since been repelled and now the immediate enforceability rigour is placed in Article 2006(2aa).

It was explained in the justifications of the Draft of the aforementioned Amendment Act[2] that the aim of the changes relating to Article 206 TL was to implement Article 4(1) of Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic networks and services (Framework Directive).[3] In accordance with those provisions: "*1. Member States shall ensure that*

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1 Journal of Laws of 2006, No 12, item 66.

2 Cf. draft Act on amendments to the Telecommunications Law Act, Printed material No 51 of 19 October 2005.

3 OJ 2002 L 108/33.

effective mechanisms exist at national level under which any user or undertaking providing electronic communications networks and/or services who is affected by a decision of a national regulatory authority has the right of appeal against the decision to an appeal body that is independent of the parties involved. This body, which may be a court, shall have the appropriate expertise available to it to enable it to carry out its functions. Member States shall ensure that the merits of the case are duly taken into account and that there is an effective appeal mechanism. Pending the outcome of any such appeal, the decision of the national regulatory authority shall stand, unless the appeal body decides otherwise. 2. Where the appeal body referred to in paragraph 1 is not judicial in character, written reasons for its decision shall always be given. Furthermore, in such a case, its decision shall be subject to review by a court or tribunal within the meaning of Article 234 of the Treaty." According to the Polish legislator, the introduction of this rule was meant to ensure effective regulation of the telecommunications market by the NRA – the President of the Office of Electronic Communications (UKE). It was also meant to improve the situation of the so-called 'alternative operators', contributing at the same time to faster development of competition in the domestic telecoms sector.

When the institution of the immediate enforceability rigour was being introduced into the TL Act, a discussion emerged as to its compliance with Polish laws governing administrative proceedings and proceedings before administrative courts. Nevertheless, the immediate enforceability rigour was, and remains compliant with the aforementioned legislation. According to Article 130 § 1 CAP[4] (regulating administrative procedure), a decision is not to be implemented before the laps of the time limit for its appeal. According to Article 130 § 2 CAP, lodging of an appeal within the specified time limit suspends the implementation of the decision. Having said that, provisions of Articles 130 § 1 and 2 CAP do not apply in the following cases: 1) the decision was made immediately enforceable (Article 108 CAP); 2) the decision is immediately enforceable by law. The decision is also enforceable before the laps of the time limit for an appeal if it is consistent with the demands of all parties (Article 130 § 4 CAP).

The institution of the immediate enforceability rigour contained in the TL Act is also consistent with Polish legislation on procedures before administrative courts, that is, the Act of 30 August 2002 – Law on procedures before administrative courts[5] ("LPAC"). In principle, lodging of an appeal

4 The Act of 14 June 1960 Code of Administrative Procedure, consolidated text Journal of Laws of 2013, item 267.

5 Consolidated text Journal of Laws of 2012, item 270 as amended.

does not suspend the enforcement of the contested legal act or activity (Article 61 § 1 LPAC). Still, according to Article 61 § 2(1) LPAC, if an appeal has been lodged against a decision or ruling, the original issuing body may suspend (either *ex officio* or upon the request of the appellant) its enforcement in whole or in part. That is so unless there are reasons for making the decision or ruling immediately enforceable in the administrative procedure or, if there is a specific law that excludes the suspension of the enforceability of the decision or ruling. Article 61 § 3 LPAC states furthermore that also the court may, upon a request of the appellant, issue a decision to suspend the enforceability of the whole or part of the contested legal act or activity once the appeal has been lodged. The court may do so provided there is a risk of significant harm or irreversible effects, except if provisions of applicable special laws exclude the possibility of suspending enforceability. Refusal to suspend the legal act or activity by the authority does not deprive the applicant of the right to lodge an appeal with the court. It applies to legal acts issued or adopted in all procedures conducted within the boundaries of the same case.

2. Decisions subject to immediate enforcement by law

According to the current wording of Article 206(2aa) TL, which now contains the immediate enforceability rigour, all decisions referred to in Article 206(2) TL are immediately enforceable, except those on the imposition of fines. The list includes:

- decisions on the designation of significant market power (Article 24(2) TL);
- decisions imposing, lifting, amending or repealing regulatory obligations (Article 24(2(a-c)) TL);
- decisions on voluntary acceptance of specific regulatory conditions by a telecoms undertaking with significant market power (Article 43a TL);
- decisions on removing irregularities identified as a result of inspections (Article 201(3) TL);
- decisions issued with respect to matters of disputes, except decisions on general exclusive frequency licences following a tender, auction or contest and against decisions on recognising a tender, auction or contest as unresolved.
- decisions in matters relating to the support of the development of telecommunications services and networks (Article 30 of the Act of 7 May 2010 on the support of development of telecommunications

services and networks).[6] In particular, decisions referred to in Article 7(1) of the aforementioned Act (on the provision of free Internet access services or their provision for a fee lower than the market price) and decisions referred to in its Article 13(2) (on the provision of telecoms access by local government units to telecoms undertakings and other local government units).

Article 206(2) TL refers to "matters of disputes" without specifying which issues fall within this category. It must be assumed that the term will reflect disputes between telecommunications undertakings resolved by way of court decisions. They include: matters relating to telecoms access, which decisions referred to in Article 28(1), (2), (6) and (29) TL pertain to; decisions on making available data covered by a nationwide directory, issued on the basis of Article 67(2) TL; decisions on assigning numbering following a tender, referred to in Article 126(1) TL; decisions on making available numbering, referred to in Article 128(4) TL; decisions on access to buildings and communications infrastructure, referred to in Article 139(4) TL. Importantly however, Article 206(2) TL pertains only to disputes between undertakings. In case of disputes between an undertaking and a telecoms service user, the powers of the President of UKE have been regulated in a different manner.

The immediate enforceability rigour does not apply to decisions on general exclusive frequency licences following a tender, auction or contest, and to decisions on the recognition of a tender, auction or contest as unresolved. If the immediate enforceability rigor was assigned to such decisions and yet they were later changed, the rigour could end up forming the basis of damages claims (both by those to the advantage of whom the decision was changed and those to the disadvantage of whom it was changed). The enforcement of decisions that may be subsequently declared no longer legally valid, as a result of appeals, may lead to the loss of invested financial resources and even to the discontinuation of the commenced business activity at stake.

Article 206(2aa) TL is specific in not assigning the immediate enforceability rigour to decisions on the imposition of fines. This rule is also explicitly stipulated in Article 210 TL which states that "the decision to impose a financial penalty shall not be immediately enforceable". This restriction applies to fines imposed both on telecommunications undertakings and on their managers.

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6 Journal of Laws of 2010, No 106, item 675 as amended.

Case law points to the need for an interpretation of the TL Act in the light of the provisions of EU Directives on electronic communications. This realisation relates to, in particular, the provisions of Article 206(2) TL. In its decision of 6 May 2008, VI Sa/Wa 266/2008, the Provincial Administrative Court in Warsaw explained that all decisions of the President of UKE, except those referred to in Article 206(2) TL, are to be verified according to administrative procedure in the manner defined in the Code of Administrative Procedure. They may subsequently be appealed before an administrative court. The content of Article 206(2) TL represents an exception to the principle whereby the legality of administrative decisions is examined by administrative courts. Although their verification remains with the judiciary, it is however assigned to the Court of Competition and Consumer Protection and based on civil procedure rules. This provision should be interpreted in light of EU directives on electronic communications which treat equally all decisions on regulatory obligations. It is thus recognised that the mode defined in Article 206(2) TL applies to all decisions on regulatory obligations, that is, decisions imposing, maintaining, modifying and lifting those obligations.[7]

3. Decisions imposing immediate enforceability

Article 206(2aa) TL is not the only provision based on the TL that regulates immediate enforceability of regulatory decisions. It is, however, the only one which provides for immediate enforceability by virtue of the Act itself. There are, however, also other decisions of the President of UKE, which are assigned the immediate enforceability rigour such as those based on Article 98(3), Article 178(1), Article 201(9), Article 203(1) TL. The provisions of Article 98(3) TL concern decisions on the amount of the participation of telecoms undertakings in covering another's losses resulting from the provision of the universal service. In a situation of a serious threat, the President of UKE may also by way of a decision impose on telecoms undertakings obligations referred to in Article 178(1) TL concerning the restriction of certain publicly available telecommunications services. Such intervention must be guided by the seriousness of the threat and the need to limit its effects, according to the principle of minimising the negative effects of the imposed obligations for the continuity of services and for the business activity of the undertaking. The provisions of Article 201(9)

7 LexPolonica No 1897994; http://orzeczenia.nsa.gov.pl.

allow to impose the immediate enforceability rigour decisions in which undertaking is oblige to stop commercial activity due to negative results of control against it. Finally, the provisions of Article 203(1) TL pertain to issuing a decision banning the use or operation of radio equipment by an unauthorised person. In the case of the aforementioned legal provisions, the immediate enforceability rigour is assigned by the NRA to decisions issued on their basis by virtue of the TL Act. They differ from decisions referred to above in that the immediate enforceability rigour must here be included into the decision itself. By contrast, decisions listed in Article 206(2) TL are enforceable automatically by virtue of the TL Act. They thus become immediately enforceable without the need for the NRA to include such clause in the decision.[8]

According to Article 206(1) TL, proceedings before the Polish NRA shall be governed by the Code of Administrative Procedure. Aside from the decisions listed above, the President of UKE may thus assign the immediate enforceability rigour to any other of his decisions also, provided statutory requirements materialise. Article 108 CAP states in this context that a decision (which can be appealed) may be assigned the immediate enforceability rigour if this is necessary to protect human health or life; to protect the national economy against major losses; in view of another social interest; or an exceptionally important interest of the procedural party. In the latter case, the public administration authority may, by way of a decision, demand the relevant security measures. However, reasons for assigning the immediate enforceability rigour to an administrative decision, referred to in Article 108 § 1 CAP, are defined in broad terms. As a result, administrative authorities can assign the immediate enforceability rigour to most of their decision in practice, especially referring to an important social interest. The content of the applicable legal provision suggests that the scope of its hypothesis comprises a very broad extent of actual situations. This enables the authority to carry out State powers insofar as they are defined with respect to that authority by applicable laws.

4. Practical application of the immediate enforceability rigour

In the practical application of Article 206(2aa) TL (contains the immediate enforceability rigour), some doubts were raised as to the statutory solution adopted. The matter under dispute concerns the possible

[8] K. Kawałek (in:) K. Kawałek, M. Rogalski, *Prawo telekomunikacyjne. Komentarz (Telecommunications Law. Commentary)*, Warsaw 2010, p. 1080.

suspension of the rigour of immediate enforceability of decisions issued by the President of UKE. Doubts were raised in view of the fact that an effect appearing by virtue of the law, such as the immediate enforceability of regulatory decisions, should not be assessed by the court (which should apply the provisions of the TL Act when examining the cases). However, a reference should be made to the provisions of Article 206(2) TL which state that appeals may be lodged with the Regional Court in Warsaw – the Court of Competition and Consumer Protection. Appealed in such manner can be decisions on: the designation of significant market power; imposing, lifting or modifying regulatory obligations; imposing fines; decisions referred to in Article 201(3) TL; decisions issued in matters under dispute (except decisions on general exclusive frequency licences following a tender or contest and against decisions on the recognition of a tender or contest as unresolved). According to Article 206(3) TL, proceedings concerning appeals and complaints referred to in Article 206(2) and 206(2b) are governed by the Code of Civil Procedure on proceedings in business cases ("CCP")[9]. According to the applicable Article 479[63]CCP, in the event of an appeal against a decision of the President of UKE, the Court of Competition and Consumer Protection may suspend the enforceability of the contested decision pending the outcome of the case. Accordingly: "*In the event of an appeal against the decision of the President of the Office, the court of competition and consumer protection may, at the request of the party who filed the appeal, suspend the enforceability of the decision pending the case outcome, if there is a risk of significant harm or irreversible effects. The decision may be issued in closed session.*"

This legal provision is not the only one enabling the suspension of the enforceability of a regulatory decision. A similar situation arises with respect to a decision being subject to re-assessment on the basis of an application for the re-examination of a case under Article 127 § 3 CAP. The President of UKE, as the appeal body in such cases, may in reasonable situations suspend the enforceability of his original decision under Article 135 CAP. Moreover, if an appeal is lodged against a decision of the President of UKE, the enforceability of the original decision may also be suspended *ex officio* or at the request of the party under Article 61 § 1(1) LPAC upon the re-examination of the case. According to Article 135 CAP, the appeal body may, in reasonable cases, suspend the immediately enforceability of the decision. Incidentally, this provision does not distinguish between

[9] The Act of 17 November 1964 – Code of Civil Procedure, Journal of Laws of 1964, No 43, item 296 as amended.

situations where the immediate enforceability rigour was assigned by the body issuing the decision and those where it derives automatically from the TL Act. Article 135 CAP merely provides for the possibility of the suspension of the decision's immediate enforceability – the executive body may thus suspend both the enforceability of decisions which had the immediate enforceability rigour specifically assigned to them and those subject to immediate enforceability by virtue of the TL Act.[10]

Once the appeal has been lodged with the administrative court, the enforceability of the decision may be suspended only by the court, at the request of the appellant, by way of a decision issued under Article 61 § 3 LPAC (provided no earlier ruling on the suspension of the enforceability of the decision was issued). The court decides on the suspension f enforceability in a ruling. According to Article 61 § 3 LPAC, once the appeal has been lodged with the court, the court may issue at the request of the appellant a decision on suspending the enforceability of an entire or part of the legal act or activity if there is a risk of significant harm or irreversible effects, unless specific applicable laws excludes the possibility of suspending the enforceability of the contested legal act or activity.

It seems reasonable for the Court of Competition and Consumer Protection to be able to issue a ruling suspending the enforceability of decisions, which have the status of immediate enforceability by virtue of the law, such as those referred to in Article 206(2) TL. The provisions of Article 479[63] CCP should otherwise be deemed redundant as it only applies to decisions that are immediately enforceable by law seeing as only such decisions, in addition to those imposing fines, may be appealed before the Regional Court in Warsaw – the Court of Competition and Consumer Protection. The legislator seems to have been rational therefore in not establishing standards which cannot be used.

Court rulings on the suspension of the enforceability of decisions should reflect the fact that the purpose of regulatory decisions, issued upon the designation of an undertaking with significant market power, is to create the desired impact on the implementation of the principles of competition and consumer right protection. Decisions of that sort should thus be effective, a fact endangered by the postponement of their enforceability. Filing of an application to suspend the enforceability of a decision due to an appeal may not be used by the decision's addressee in order to postpone

[10] B. Adamiak, J. Borkowski, *Kodeks postępowania administracyjnego. Komentarz (Code of Administrative Procedure. Commentary)*, Warsaw 2003, p. 579; P. Przybysz, *Kodeks postępowania administracyjnego. Komentarz (Code of Administrative Procedure. Commentary)*, Warsaw 2004, p. 269.

its consequences – effects disadvantageous to the addressee, but desired by others. However, it cannot be excluded that a defective decision issued by the President of UKE may, as a result of its immediate enforceability, have irreversible consequences. The suspension of its enforceability in the course of proceedings initiated by an appeal may justify liability for damages. This state of affairs may be prevented by the court issuing a ruling to suspend the decision's enforceability until the final resolution of the case. In practice, not only have the Polish telecoms sector seen only very few rulings that suspended enforceability until the final resolution of a case, they actually gave rise to legal doubts.[11]

There were also divergent positions on the effects of a ruling of the Court of Competition and Consumer Protection that annulled a decision of the President of UKE upon an appeal. According to one view, such ruling results in the annulment of that decision's enforceability. This position should be supported. According to another approach however, such decision remains enforceable until the final resolution of the case, unless the court issues under Article 479[63] CCP a ruling suspending the decision's enforceability.[12]

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11 K. Kawałek (in:) K. Kawałek, M. Rogalski, *Prawo telekomunikacyjne. Komentarz (Telecommunications Law. Commentary)*, Warsaw 2010, p. 1081.

12 Cf. A. Oklejak, *Jak postępowanie sądowe wpływa na wykonalność decyzji Prezesa Urzędu Komunikacji Elektronicznej (The impact of judicial proceedings on enforceability of decisions of the President of the Office of Electronic Communications)*, Rzeczpospolita 20.5.2008, No 117, p. C7; K. Kawałek (in:) K. Kawałek, M. Rogalski, *Prawo telekomunikacyjne. Komentarz (Telecommunications Law. Commentary)*, Warsaw 2010, p. 1082.

III.

PROTECTION OF PRIVACY IN TELECOMMUNICATIONS

Andrzej Adamski*

Telecommunication data retention in Poland: does the legal framework pass the proportionality test?

The purpose of this paper is to find out whether Polish legal provisions on telecommunication data retention, based on Directive 2006/24/EC[1], are a necessary and proportional measure in view of the relevant provisions of the Constitution of the Republic of Poland and the principles of European law, including EctHR case law.

The paper consists of four sections. The first section provides background information on the subject matter while the second part is an attempt to scrutinize the effects of the Directive on the Polish legal system. The proportionality of existing legal provisions on data retention is evaluated in the third section. In this respect, an attempt is made to demonstrate how to apply the proportionality test in order to examine the issue under consideration with respect to its individual requirements. Last but not least, briefly outlined in section four are two complaints lodged with the Constitutional Tribunal concerning the implementation of Directive 2006/24/EC into the Polish legal system.

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1 Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC (OJ 2002, L 105/54).

1. Background

Confidentiality of communications is guaranteed by the Polish Constitution of 1997 in its Article 49. Accordingly, any limitations of this right "may be imposed only in cases and in a manner specified by statute". This legal rule has two fundamental implications. First, telecommunication traffic data has been recognized as legally protected information under the definition of "telecommunication secrecy" provided by the Telecommunications Law Act (hereafter: TL) of 2000. Second, due to statutory limits on telecommunication secrecy, Article 67(4) TL 2000 has for the first time granted the right to access traffic data to law enforcement and criminal justice authorities. Initially, however, the legitimate goal of gathering and storing traffic data by telecoms providers was determined by business matters (that is, fees and payment dispute solving). As such, it was carried out in compliance with Directive 1997/66/EC[2] and Directive 2002/58/EC[3] and the relevant provisions of the Polish TL.

The Polish legal regime of mandatory telephone traffic data retention, to the benefit of agencies' of law enforcement and national security, dates back to 2003. Both the regulation of the Ministry of Infrastructure of 2003 and the Telecommunications Law Act of 2004, as amended in 2005, provided a twelve month long period for the retention of data concerning on-line interactions of subscribers and users of telecoms services. This period was extended to two years in 2005. However, a proposal submitted by a group of MPs for its further lengthening (up to 5 years) was not accepted by the relevant parliamentary commission in 2006 despite governmental support which claimed that an additional extension would increase "efficiency in combating crime and terrorism." The legislative draft was rejected by the commission as incompatible with Directive 2006/24/EC.

2. Implementation of the Directive

The Directive was transposed into the Polish legal system in 2009 in a two--stage manner. In April 2009, pursuant to the amended Telecommunication

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2 Directive 97/66/EC of the European Parliament and of the Council of 15 December 1997 concerning the processing of personal data and the protection of privacy in the telecommunications sector (OJ 1997, L 24/1).

3 Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications) (OJ L 201/37).

Law Act of 2004, telecoms operators and service providers were placed under a general statutory data retention obligation. Detailed legal provisions on that subject, specifying the scope and conditions of data retention were made publicly known eight months later. " The respective regulation of the Minister of Infrastructure, covering *inter alia* the retention of Internet data, was enacted on 28th December 2009.

The implementation of the data retention directive resulted in changes being made in the Polish legal system primarily in the field of telecoms law – new obligations were imposed on telecoms operators and providers. In consequence, detailed legal rules were required concerning business matters. Some amendments were also made in the Law on the Police and the Criminal Procedure Code facilitating access of law enforcement authorities to telecoms traffic, location and subscribers data held by telecom providers.

2.1. Telecommunications law

The scope of data retention in Poland complies with Article 5 of the Directive and covers all types of data specified therein. Articles 3, 4, 6 and 7 of the Regulation of the Minister of Infrastructure of 28th December 2009 enumerate in detail all categories of data to be retained. These categories include data necessary to identify the following matters:

- the source and destination of the communication including: the telephone number or user id (for Internet e-mail and telephony) and the identity of the subscriber or registered user,
- the type, date, time and duration of the communication act,
- users' communication equipment, and
- the location of mobile equipment.

Subscribers' data or "data concerning a user" (as provided in Article 159 TL) is subject to legal protection under the telecommunications secrecy and personal data protection regime. Providers of publicly available telecommunications services are entitled to process the following data concerning users who are natural persons (Article 161 TL): 1) surnames and first names; 2) parents' first names; 3) place and date of birth; 4) address of permanent residence; 5) personal number (PESEL) for Polish citizens; 6) name, series and number of documents confirming identity, and in the case of foreigners being a citizen of a country which is not a member of the European Union or the European Economic Area – passport number or a residence card number; 7) data included in documents confirming the capacity to perform an obligation towards a provider of publicly available telecommunications services resulting from an agreement on the provision

of such services. This information, in combination with traffic data (such as IP address), makes it possible to identify basically any fixed network telephony and mobile telephony subscriber.

The retention period is the same for both means of communication, telephone and the Internet, and has initially been set to 24 months from the date of the communication act. However, this period has recently been reduced to 12 months by an amendment of the Telecommunications Law Act of 16th November 2012. Upon the expiry of the retention period, a telecoms operator or provider is obliged to destroy the transmission data, unless otherwise decided by the law. Such special reservation, included in Article 180a TL, paves the way for unlimited storage of traffic data, which is inconsistent with the Directive.

2.2. Access to the data

According to Article 180d TL, operators and providers of publicly accessible telecoms services are obliged to submit, on their own expense, traffic and location data to the police, secret services, state prosecutors and courts in compliance with the rules and procedures prescribed by other legal provisions. Corresponding statutory rules can be found in the Law on the Police (Article 20c), the Criminal Procedure Code (Article 218) and other laws concerning various state agencies of social control such as: the Internal Security Agency, Central Anticorruption Bureau, Fiscal Intelligence, Border Guard, Military Police and Military Counter-Intelligence Service. Statutory authorization granted to state agencies for accessing the retained data was upheld and the relevant provisions were only slightly modified in 2009.

Statutory authorization to access telecommunications traffic data "for the purpose of the prevention and detection of crime" was granted to the police and secret service (Urząd Ochrony Państwa) in 2000[4]. What

[4] Article 20c of the Law of 6 April 1990 on the Police (amended):

1. Data that identify a telecommunications network subscriber, termination points of a network or telecommunications device, data about completed or attempted connections between specific telecommunications devices or network termination points, and the circumstances and type of the connection may be disclosed to the Police and processed by the Police only with the view to crime prevention or detection.

2. The data referred to in Paragraph 1 may be disclosed:

(1) at a written request of the Police Commander in Chief or a Voivodship Police Commander,

(2) verbal request of a police officer being in possession of a written authorization issued by the persons referred to in Subparagraph 1 above.

aroused criticism in literature at that time were the inappropriate control mechanisms when it comes to making this data available to the police[5]. The Polish legislator failed to adopt a high standard of independent oversight, stemming from the ruling in the Malone case. What was introduced instead was an authorization procedure upon a written or oral request of a duly authorized police officer. For oral requests, the sole protective mechanism in place was the fact that the telecom network provider had to notify the Police Commander about the data disclosure to the policeman. However, this legal safeguard is no longer valid either. It was effaced from the amended Law on the Police despite objections of the Prime Minister's Legislative Council[6]. The legislation currently in force provides the police and secret services with direct (on-line) access to data. The so-called "standard requests", which cover most of all queries, are processed by telecommunication providers in a fully automatic way. In such circumstances, assistance or intermediation by telecoms operators' staff is not necessary, nor is a written or oral request required. Comparatively, it would be more than difficult to find an example of another EU member State where access to information as specific and sensitive on the private life of citizens as telecommunications data would

3. Telecommunications network operator shall notify disclosure of the data referred to in Paragraph 2 (2) to the territorially competent Voivodship Police Commander.

4. Telecommunications network operators shall disclose the data referred to in Paragraph 1 to the police officers specified in the request lodged by a Police authority.

5. The data referred to in Paragraph 1 may be disclosed via a telecommunications network.

6. The Police shall forward the materials obtained as a result of activities provided for in Paragraph 2 and containing information important for criminal proceedings to the territorially and technically competent prosecutor.

7. Materials obtained as a result of the activities provided for in Paragraph 2 and not containing any information which could be important for criminal proceedings shall be immediately destroyed in the presence of a committee, the fact being officially recorded.

8. The costs of disclosure of the data referred to in Paragraph 1 shall be incurred by the telecommunications network operator.

5 A. Adamski, *Obywatel bezpieczny, ale przezroczysty. Nowelizacja ustawy o policji a ochrona danych osobowych (Citizen safe, but transparent. Data protection and the law on the Police Act amendment)*, "Rzeczpospolita" daily, 18.08.2000, A. Adamski, *Przestępczość w cyberprzestrzeni. Prawne środki przeciwdziałania zjawisku w Polsce na tle projektu konwencji Rady Europy (Crime in Cyberspace. Legal countermeasures in Poland and the Council of Europe Draft Convention)*, Toruń 2001, pp. 75 and 94.

6 Rada Legislacyjna przy Prezesie Rady Ministrów, *Opinia o projekcie ustawy o zmianie ustawy Prawo telekomunikacyjne oraz niektórych innych ustaw*, RL-0303-32/09 (Legislative Council to the Prime Minister, Opinion on the draft law amending the Law on the Police and some other laws); http://radalegislacyjna.gov.pl/dokumenty/opinia-z-6-pazdziernika-2009-r-o-projekcie-ustawy-o-zmianie-ustawy-prawo-telekomunikacyjne

depend exclusively on the decision of a state agent. The present Polish data retention regime arouses concerns for two other reasons also. In contrast to Article 1 of the Directive, Polish legislation fails to introduce the "seriousness of the crime" as an accessibility premise. Moreover, it allows the wide use of traffic and location data. As a result, such information might be used not only to detect and prosecute crime, but also for the prevention thereof, which enables "data mining" practices.

On the basis of the amended Article 218 of the Criminal Procedure Code, every entity active in the telecoms sector is obligated to provide the court or state prosecutor (upon demand included in their order) with any correspondence and data specified in Article 180c and Article 180d TL, provided that such data is significant to the pending proceedings. It seems that Polish prosecutors take advantage of this possibility quite frequently. According to a recent survey, prosecutors examine billing data of suspects in 70% of preparatory proceedings concerning drug possession cases. In search for evidence of possible involvement in drug trafficking, the prosecutor conducting the investigation summons as witnesses those individuals who have been found to have frequently called the suspect. These are then summoned and interrogated concerning the location, frequency and quantity of drugs bought from the suspect.[7]

Access to retained data is restricted to the police, national security agencies and judicial authorities. All authorities designated by relevant laws are entitled to access traffic, subscriber and localisation data related to any crime, including trivial offences. There is no legal requirement concerning the seriousness of the crime, nor is there an independent mechanism that would make it possible to control data disclosure by telecom providers. Legal flaws in terms of data accessibility do not constitute the most pressing problem. Still, nothing has been done to improve these provisions. In addition, it is these very flaws that may account for the recently uncovered scandal concerning the surveillance of ten journalists by the secret services which have intensively (2005–2007) explored traffic and location data of the journalists' mobile phones. Allegedly, the practices were carried out in order to reveal their informants in a politically motivated investigation. However, the disclosed data shows that the agencies at stake were not collecting information in order to fulfill their statutory functions, that is,

7 E. Kuźmicz, Z. Mielecka-Kubień, D. Wiszejko-Wierzbicka (ed.), *Karanie za posiadanie. Artykuł 62 ustawy o przeciwdziałaniu narkomanii – koszty, czas, opinie. Raport z badań (Sentencing for possession. Article 62 of the Drug Control Act – costs, time and opinions. Report from a survey)*, Instytut Spraw Publicznych, Warszawa 2009, s. 58.

preventing and combating serious crimes that threaten vital interest of the State[8].

3. Proportionality of the data retention regime

Under the data retention regime, each and every use of fixed-line or mobile telephone, fax, e-mail and Internet telephony is recorded with respect to the identity of the users, the time and place of the communication etc. Massive collection and storage of telecoms data in a modern "information" society enable those to whom that data is accessible to reproduce a "map" of the private life of almost every citizen[9]. Mandatory data retention increases the scope of social control over citizens beyond the legally determined boundaries. As indicated in literature, *it not only affects communications taking place in public or business premises but for a large part also affects communications in private homes, despite the fact that monitoring a citizen's behaviour in their home is generally permissible only in exceptional circumstances*[10].

Keeping the above in mind, there can be no doubt whether the blanket retention of telecoms data constitutes an interference with the right to privacy guaranteed in Article 8 ECHR and other individual rights guaranteed in the constitutional laws of many countries, including Poland. In the case of Poland, blanket data retention stays in conflict with the right to privacy (Article 47 of the Constitution), the right to confidentiality of communications (Article 49 of the Constitution) and the right to self-determination of personal data processing (Article 51 of the Constitution). A very important provision in this context is paragraph 2 of Article 51: *"Public authorities shall not acquire, collect nor make accessible information on citizens other than that which is necessary in a democratic state governed by the rule of law"*. All of the aforementioned provisions are a relevant and necessary legal basis for the proportionality test.

The proportionality test is carried out on the grounds of constitutional law in most jurisdictions. The test focuses on specific constitutionally guaranteed

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8 W. Człuchowski, *Dziennikarze na celowniku służb specjalnych (Journalists targeted by the intelligence agencies)*, Gazeta Wyborcza 8.10.2010; http://wyborcza.pl/1,76842,8480752,Dziennikarze_na_celowniku_sluzb_specjalnych.html#ixzz1u4r0XEgW.

9 See: Malte Spitz data retention 2009, http://www.zeit.de/datenschutz/malte-spitz-data-retention

10 P. Breyer, *Telecommunications Data Retention and Human Rights: The Compatibility of Blanket Traffic Data Retention with the ECHR*, European Law Journal (2005) vol. 11, p. 365.

rights and freedoms in order to establish whether their restriction in the public interest is justified or not. This effort usually involves a rigorous four-stage enquiry through which the court needs to examine:

1) whether the purpose of any right's restriction is legitimate (whether the instrument in question is stipulated in statues or is determined by the court to be a legitimate democratic purpose);
2) whether the measure in question is suitable to attain the identified purpose;
3) whether the measure is necessary for the attainment of this purpose (whether it is the least restrictive measure available for achieving this purpose);
4) whether the measure is proportionate in the strict sense (whether it strikes a proper balance between the purpose and the given right of individuals)[11].

A similar approach has been adopted by the Polish Constitutional Tribunal in a number of judgments[12]. In the ruling of 12th December 2005 (K 32/04), the Constitutional Tribunal declared that to determine if police surveillance measures are proportional it is necessary to examine whether such measures: (a) are capable of leading to the intended results, (b) are indispensable for the protection of the public interest with which they are connected, and (c) their results are proportional to the burdens they place on the citizen (Judgment K32/04). Access to, and the use of, retained telecommunications data by law enforcement and secret service agencies are ranked among surveillance measures[13]. It is thus clear that legal provisions governing an application of data-retention-based surveillance should undergo a proportionality test in order to examine whether they are necessary in a democratic society.

The German Constitutional Court examined in a judgment of 2nd March 2010 data retention legislation against the proportionality principle. It was declared that in the context of Article 10 of the German Constitution (protecting the privacy of telecommunications), data retention provisions are

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11 B. Goold, L. Lazarus, G. Swiney, *Public Protection, Proportionality, and the Search for Balance*, Ministry of Justice Research Series 10/07, September 2007, p.1.

12 *Zasada proporcjonalności (w odniesieniu do prawa publicznego) w tezach Trybunału Konstytucyjnego (The principle of proportionality in public law in the rulings of the Constitutional Tribunal)*, Biuro Trybunału Konstytucyjnego, Zespół Orzecznictwa i Studiów, 2009.

13 A. Taracha, *Czynności operacyjno-rozpoznawcze, aspekty kryminalistyczne i prawno dowodowe (Operational powers of the police. Forensic and legal aspects)*, Lublin 2006, p. 75.

not proportional with respect to a number of issues[14]. Lack of proportionality was found in the rules concerning data security and the use of traffic and location data by the police against the principles of purpose limitation, transparency, judicial control and effective remedies[15]. The implementation of the Directive has lead to a very critical assessment of resulting legislation on constitutional grounds in Romania and the Czech Republic also. Both of their constitutional courts found national data retention laws to be a disproportional intrusion into the private lives of citizens[16].

• Is retention of data suitable to attain its purpose?

The aim of the Directive in terms of telecommunications data retention is to ensure that relevant information is available in order to investigate, detect and prosecute serious crimes. Obviously, it is difficult to discredit the usefulness of traffic and location data for such purpose. Both literature and media provide a variety of reports on real criminal cases which support this standpoint[17]. Still, a more systematic analysis showing, for instance, the relation between crime solving and the use of telecoms data is largely unavailable. Instead, the public is faced with general assertions on this subject such as the recent UK statement: "*Communications data provides evidence in court to secure convictions of those engaged in activities that cause serious harm. It has played a role in every major Security Service counter-terrorism operation and in 95 per cent of all serious organised crime investigations*"[18]. A similar approach has been presented in Poland: "*in the years 2000–2005 traffic data obtained by the prosecutors from telecom operators was crucial for*

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14 Federal Constitutional Court – Press office – Press release no. 11/2010 of 2 March 2010, Judgment of 2 March 2010 http://www.bundesverfassungsgericht.de/en/press/bvg10-011en.html

15 K. De Vries, R. Bellanova, P. De Hert and S. Gutwirth, *The German Constitutional Court Judgment on Data Retention: Proportionality Overrides Unlimited Surveillance (Doesn't It?), Computers, Privacy and Data Protection : an Element of Choice*, Eds. S. Gutwirth, Y. Poullet, P. De Hert & R. Leenes. Springer 2011, Available at: http://works.bepress.com/serge_gutwirth/53 p. 4.

16 A. Bannon, *Romania retrenches on data retention*, International Review of Law, Computers & Technology, Vol. 24, No. 2 July 2010.

17 *Who Knows Where You've Been? Privacy Concerns Regarding the Use of Cellular Phones as Personal Locators*, Harvard Journal of Law & Technology, Volume 18, Number 1 Fall 2004 http://jolt.law.harvard.edu/articles/pdf/v18/18HarvJLTech307.pdf

18 *UK government to store all internet traffic data*, http://www.v3.co.uk/v3/news/2271947/uk-government-store-internet

the effective prosecution of offenders in 402 serious crime cases"[19]. In view of such reports, the usefulness of telecoms data for the purposes of law enforcement and criminal justice cannot be questioned. However, this does not mean that the application of a data retention regime is a necessary condition for the successful operation of a criminal investigation system, nor does it mean that this purpose cannot be attained by less restrictive measures.

• Is retention of data necessary for the attainment of the purpose?

The widely held view among experts and the public is that the Polish data retention regime is deficient in many respects. It is also believed that the measure has serious disadvantages, especially from the protection of individual rights perspective. These disadvantages are even more visible in comparison with its main alternative – the preservation of data regime adopted in Article 16 of the 2001 CoE Convention on Cybercrime and many national legislations[20]. The leading argument in favor of data preservation is that it does not require a service provider to collect data prospectively, nor does it permit the government to preserve anything in a provider's system. Only this data is retained, which relates to a given

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[19] Projekt ustawy o zmianie ustawy – Prawo telekomunikacyjne (Draft law on the amendment of the Telecommunication Law Act) http://www.pis2.home.pl/dokumenty.php?s=rzad&iddoc=49&st=1

[20] Article 16 of the Council of Europe Convention on Cybercrime – Expedited preservation of stored computer data:

1. Each Party shall adopt such legislative and other measures as may be necessary to enable its competent authorities to order or similarly obtain the expeditious preservation of specified computer data, including traffic data, that has been stored by means of a computer system, in particular where there are grounds to believe that the computer data is particularly vulnerable to loss or modification.

2. Where a Party gives effect to paragraph 1 above by means of an order to a person to preserve specified stored computer data in the person's possession or control, the Party shall adopt such legislative and other measures as may be necessary to oblige that person to preserve and maintain the integrity of that computer data for a period of time as long as necessary, up to a maximum of ninety days, to enable the competent authorities to seek its disclosure. A Party may provide for such an order to be subsequently renewed.

3. Each Party shall adopt such legislative and other measures as may be necessary to oblige the custodian or other person who is to preserve the computer data to keep confidential the undertaking of such procedures for the period of time provided for by its domestic law.

4. The powers and procedures referred to in this article shall be subject to Articles 14 and 15.

investigation. This solution complies with the requirements of human rights protection[21].

In addition, research has shown that data preservation has proven to be a very efficient measure, at least in some countries. In Germany, for instance, the efficiency of communications service providers under the data preservation regime was high enough to satisfy almost all needs of law enforcement authorities concerning requested traffic data. As findings of two German studies suggest, under the so-called "quick freeze" approach, the rate of unsuccessful data requests (share of criminal cases in which traffic data was requested by German authorities but had already been deleted by the service providers) was very low. The Max Planck Institute carried out a survey that covered 467 criminal cases from 2003 and 2004 in which 1257 traffic data requests were made. The survey showed that only 4% of those cases had unsuccessful data requests. Taking into account that 40,000 telecommunications data requests were made in 2005 overall, this would represent only 0.01% of the 4.9 million criminal investigations in Germany nationwide[22]. In other words, for 99.99% of annual criminal investigations, data preservation might be a viable alternative to the data retention regime[23].

A parallel analysis conducted by the *Bundeskriminalamt* (Federal Office of Criminal Investigation) revealed that there were only 381 cases nationwide in 2005 – 0.001% of the 6.4 million annual crimes in Germany – where unavailable data was requested from communications service providers[24]. Most recent empirical evidence from Germany provides therefore an additional argument against the data retention regime. A study carried out by the criminology department of the Max Planck Institute for Foreign and International Criminal Law has demonstrated that the clearance rates for both serious and computer-related crimes did not increase under new data retention legislation (2008–2009)[25]. In other words, the security of

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21 Convention on Cybercrime (ETS No. 185), Explanatory Report, 152 and 161, http://conventions.coe.int/Treaty/en/Treaties/html/185.htm; http://conventions.coe.int/treaty/en/reports/html/185.htm

22 H-J. Albrecht et. al, *Rechtswirklichkeit der Auskunftserteilung über Telecommunications-verbindungsdaten nach chapter 100g, 100h StPO*, Max-Planck-Institute for Foreign and International Criminal Law [Reports on Research in Criminology] (February 2008).

23 Ch. DeSimone, *Pitting Karlsruhe Against Luxembourg? German Data Protection and the Contested Implementation of the EU Data Retention Directive*, German Law Journal 2010, vol. 1, issue 3, p. 311.

24 *Ibid.*

25 H-J. Albrecht, P. Brunst, E. De Busser, V. Grundies, M. Kilchling, J. Rinceanu, B. Kenzel, N. Nikolova, S. Rotino, M. Tauschwitz, *Schutzlücken durch Wegfall der*

the population appears to be unrelated to the existence of mandatory data retention regimes. In fact, even police statistics are approximately on the same level as in earlier periods when a data preservation scheme was in operation. Needless to say, the above findings may undermine the belief that data retention is necessary.

- Is the measure proportionate in the strict sense?

Finally, the proportionality assessment of the restrictions of constitutional rights and freedoms (Article 31(3) of the Polish Constitution) requires an answer to the question whether Polish law on data retention is proportional to the burdens it places on citizens. The view of the Author of this paper is that the answer to this question is definitely negative. It is clearly visible in light of the above discussion of the effects of the Directive's implementation into the Polish legal system, that the current legislation on data retention lacks any guarantees and safeguards for individuals' rights and freedoms, which are recognized both at the international (European) and national level.

The Constitutional Tribunal in its judgment of 12th December 2005 (K 32/04) specified what checks and balances the legislator should impose on surveillance measures when introducing them into the legal system. According to this ruling, police surveillance "*should be accompanied by appropriate substantial guarantees, including a definition of limits on interference within the sphere of privacy, as well as procedural guarantees such as: the obligation to report the control and to legalise it by an external organ; the obligation to make available, even if only in a limited scope and from a certain moment, the information regarding the control and its results to the concerned person; control mechanisms in case of abuse on the part of the controlling organ*". However, none of these guarantees is provided by the current legal framework on data retention. Simply speaking, despite it being such an intrusive measure, it is largely unregulated and its application remains beyond the scope of any external control.

Taking the above into account, it is not surprising that the number of requests for access to traffic and location data is incredibly high in Poland. The overall number of queries submitted by the law enforcement

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Vorratsdatenspeicherung? Eine Untersuchung zu Problemen der Gefahrenabwehr und Strafverfolgung bei Fehlen gespeicherter Telekommunikationsverkehrsdaten, Max-Planck--Instituts für ausländisches und internationales Strafrecht, Freiburg i.Br., Juli 2011.

and intelligence services amounted to 1.06 million in 2009 and 1.8 million in 2012.[26]

4. Awaiting a ruling of the Constitutional Tribunal

Two complaints were lodged in 2011 with the Constitutional Tribunal concerning the implementation of Directive 2006/24/EC into the Polish legal system. On 28th January 2011, a group of MPs from the Democratic Left Alliance party (*Sojusz Lewicy Demokratycznej*) submitted a motion requesting the Tribunal to consider the non-conformity of the Polish data retention legislation with the Constitution. A similar motion was lodged on 1st August 2011 by the Commissioner for Citizens' Rights. Both complaints alleged the breach of basically the same provisions of the Constitution (Articles 31 section 3, 47, 49, 51 section 2) and the European Convention on Human Rights (Article 8). They were also quite consistent in pointing out failures of the statutory provisions against that background (lack of independent oversight over access to data, lack of a precise legal provision that exactly determines the purposes of gathering and use of data, lack of notification to the subject of the measure, lack of obligation to delete data which is no longer necessary for the original purpose, etc.). Major discrepancy between the two writs can be noted as well. The first complaint was based on the argument that data retention itself is a disproportional intrusion into the private lives of citizens. As such, it would have to be regarded as a constitutionally objectionable legal provision. By contrast, the Commissioner's complaint is not as far-reaching as it does not question the constitutionality of data retention *per se*.

The motion submitted by the MPs is no longer valid – it expired along with their mandates in the last parliamentary elections and will thus not be considered by the Constitutional Tribunal. The Tribunal is expected to rule on the motion submitted by the Commissioner for Citizens' Rights shortly.

[26] Office for Electronic Communications, Statistical data provided in pursuant to Article 10 of the 2006/24/EC Directive, see: http://en.uke.gov.pl/making-available-the-telecommunications-data-in-2012-12285

Gerard Karp*

Privacy protection in the telecommunications sector – new rules of storing information in telecommunications terminal equipment

1. Introduction

The so-called *online tracking*, that is, tracking users in their Internet activities, has nowadays become a significant issue of privacy protection of natural persons[1]. The implementation of new laws, as discussed below, was meant to restore the possibility of deciding about the scope of user actions within which they may remain anonymous, at least to a certain extent. For this purpose, the European legislator has decided to abandon the "opt-out" model, and move towards the so-called "opt-in" model. This article is an attempt to assess the transposition into the Polish legal order of EU solutions concerning the scope of the possibilities and conditions of storing information in telecommunications terminal equipment of subscribers (end-users) and the use of cookie files. It is clear that the implementation of such new solutions raises concerns both in terms of European and national law. The unease results from the wording of the provisions adopted in relevant EU directives, as well as from the European legislator's lack of firmness in unambiguously determining a valid and effective model. With this in mind, many countries have decided to follow their own path creating

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1 See N. van Eijk, N. Helberger, L. Kool, A. van der Plas, B. van der Sloot, *Online tracking: Questioning the power of informed consent*, http://www.ivir.nl/publications/vaneijk/ITS_paper_Eijk%20et%20al_Online%20profiling%20(2).pdf

peculiar hybrid systems, which are somewhere in between the opt-in and the opt-out model[2].

2. Cookies

The Act of 16 November 2012 Amending the Telecommunications Law Act and Certain Other Laws[3] was adopted in Poland in response to the implementation of Directive 2009/136/EC[4] amending Directive 2002/58/EC[5], and the resulting fact that member States had to adopt laws, regulations and administrative provisions necessary to comply with this Directive. The Telecommunications Law Act of 16 July 2004 was fundamentally amended[6] as a result with respect to its provisions on storing information in terminal equipment of subscribers (end-users). The Amendment related, in particular, to cookie files (the so-called "cookies"), the online use of which has become very wide-spread, stirring up many controversies and discussions.

In a nutshell, cookies are small text files containing a unique identification code for a given user of a particular computer (or other device used for web browsing). What must be kept in mind, however, is that cookies can not only constitute a threat to privacy, but are also a tool that can significantly help users to efficiently navigate the web, and to perform certain of its functions. As such, they may facilitate the functioning of web users. On the one hand, therefore, cookies can serve a very useful purpose, for example, they improve and accelerate the functioning of websites, remember language

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2 Status of implementation of the amendment to Article 5.3 of Directive 2002/58/EC (the "EU Cookie Law"), http://www.maqs.com/sites/default/files/European%20Cookie%20Law%20Implementation%20Survey%20(July%202013)_0.pdf.

3 Act of 16.11.2012 Amending the Telecommunications Law and Certain Other Laws, Journal of Laws of 21.12.2012, item 1445.

4 Directive 2009/136/EC of the European Parliament and of the Council of 25 November 2009 amending Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks and services, Directive 2002/58/EC concerning the processing of personal data and the protection of privacy in the electronic communications sector and Regulation (EC) No. 2006/2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws, Official Journal of the European Union L No. 337 of 18.12.2009, p. 11; hereinafter referred to as Directive 2009/136.

5 Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector, O. J. L 2002, 201/37 ; hereinafter referred to as Directive 2002/58.

6 Journal of Laws No. 171, item 1800 as amended, hereinafter referred to as the: Telecommunications Law (TL).

preferences as well as recall user preferences in product searches when online shopping. On the other hand, cookies can generate specific risks related to obtaining information – they help web developers collect information about what websites a particular user visits and how long he/she spends on them. Linking such information with other data (for instance user IP address) may, as a consequence, lead to behavioural profiling of web users[7]. Such actions can undoubtedly lead to privacy violations, in particular if they are undertaken without the user's knowledge and awareness[8].

The original wording of Article 5 Directive 2002/58 read as follows "*Member States shall ensure that the use of electronic communications networks to store information or to gain access to information stored in the terminal equipment of a subscriber or user is only allowed on condition that the subscriber or user concerned is provided with clear and comprehensive information (underlined by G.K.) in accordance with Directive 95/ 46/EC, inter alia about the purposes of the processing, and is offered the right to refuse such processing by the data controller. This shall not prevent any technical storage or access for the sole purpose of carrying out or facilitating the transmission of a communication over an electronic communications network, or as strictly necessary in order to provide an information society service explicitly requested by the subscriber or user*." The above wording of Directive 2002/58 was transposed into the Polish legal order in the form of the following provision: "*Entities providing telecommunications services or services by electronic means, may install software and particularly text files in the subscriber's or end-user's terminal equipment intended for the use of these services or this software, provided that: 1) a subscriber or end-user is directly informed in an unambiguous, simple and understandable manner about the purpose of installing this software, and about the manner in which the service provider uses this software; 2) a subscriber or end-user is directly informed in an unambiguous, easy and understandable manner about the manner in which such a subscriber or end-user may express his objection, which will prevent the service provider from storing data in the end-user's or subscriber's terminal equipment in the future; 3) the stored information do not cause changes in the configuration of the subscriber's or end user's telecommunications terminal equipment and/or in the software installed on this equipment.*"

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7 Article 29 Data Protection Working Party Opinion 2/2010 on Online Behavioural Advertising, June 22, 2010, WP 171, p. 4.

8 More on awareness of users relating to behavioural targeting: N. van Eijk, N. Helberger, L. Kool, A. van der Plas, B. van der Sloot, *Online tracking: Questioning the power of informed consent*, p. 13. http://www.ivir.nl/publications/vaneijk/ITS_paper_Eijk%20et%20al_Online%20profiling%20(2).pdf

It is clear that both rules, the above-cited provision of Directive 2002/58 and the now invalid Article 173 TL, made it possible to store information in the subscriber's (end-user's) equipment without having obtained his explicit consent thereto. In other words, both EU and Polish legislation used to be based on a classic opt-out model. From the perspective of those providing services by electronic means, the opt-out approach is very pragmatic. In order to store "cookies", they were only required to inform users of this fact in advance, a requirement which did not generate a significant number of problems in obtaining such consent.

Awareness of particular dangers related to the use of cookies provoked a discussion across the entire EU. An amendment process concerning Article 5 Directive 2002/58 took shape which resulted in the introduction of Article 5.3 Directive 2009/136, which now reads as follows: "*Member States shall ensure that the storing of information, or the gaining of access to information already stored, in the terminal equipment of a subscriber or user is only allowed on condition that the subscriber or user concerned has given his or her consent (underlined by G.K.), having been provided with clear and comprehensive information, in accordance with Directive 95/46/EC, inter alia, about the purposes of the processing. This shall not prevent any technical storage or access for the sole purpose of carrying out the transmission of a communication over an electronic communications network, or as strictly necessary in order for the provider of an information society service explicitly requested by the subscriber or user to provide the service.*"[9] An extremely important provision was additionally included in point 66 of the preamble to Directive 2009/136, which reads as follows: "*where it is technically possible and effective, in accordance with the relevant provisions of Directive 95/46/EC*[10]*, the user's consent to processing may be expressed by using the appropriate settings of a browser or other application.*"

It is clear that the new wording of Article 5 Directive 2002/58 implements a completely different system of obtaining consent – the Directive has replaced the opt-out regime with the opt-in model. Concurrently, it must

[9] More on amendment process concerning Directive 2009/136: D. Karwala, *Nowe zasady przechowywania informacji w telekomunikacyjnych urządzeniach końcowych (New rules of storing information in telecommunications terminal equipment)* (comments relating to the amended art. 173 of the Telecommunications Law, Dodatek Specjalny do Monitora Prawniczego, No. 8/2013, p. 15).

[10] Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (O.J. 1995 L 281/31); hereafter referred to as Directive 45/46.

be noted that it is not until Article 5.3 Directive 2002/58 is read jointly with point 66 of its preamble that the new model of expressing consent can be assessed in its entirety.

During the transposition works meant to implement the amended Article 5.3 Directive 2002/58 into the Polish legal order, the said concept was evolving back and forth. A document entitled "Assumptions of the draft bill on amending the Telecommunications Law Act"[11] stated that the storing of text files in a subscriber's or user's terminal equipment requires their consent. However, the draft bill of 13 July 2011 proposed to extend the list of information specified in Article 173(1(1)) TL (added information on the time of storing information and gaining access thereto). The same draft bill left Article 173(1(2)) TL unchanged, deciding to keep the opt-out model. It was indicated in the justifications to this version of the draft bill that "*due to the fact that the option of expressing the will of a subscriber or end-user was changed in the directive (change from the opt–out option to the opt–in option), and, thus, replacing the objection currently in force with consent, it must be noted that implementing into the regime of the Telecommunications Law the consent postulated by the European Commission, in particular consent expressed by using appropriate web browser settings by a subscriber or end-user in advance, is impossible due to the wording of art. 174 of the Telecommunications Law (…) Bearing in mind that it is largely pointless to introduce exceptions from art. 174 of the Telecommunications Law for reasons of maintaining an appropriate level of protection guaranteed at present to end-users and subscribers, it must be assumed that the currently applied opt-out option within art. 173 of the Telecommunications Law, due to a great ease in making changes in web browser settings by a subscriber or end-user, which prevent storing and gaining access to data introduced by external entities, constitutes a sufficient premise in order to consider it consistent with the amended wording of art. 5 paragraph 3 of the directive*"[12].

The next draft bill of 17 May 2012 moved towards the opt-in regime, which introduced the requirement to gain consent to store computer data in the terminal equipment of subscribers (end-users). Introduced at the same time was the additional condition stating that consent may be given by using appropriate software settings (for instance, those of an Internet browser). This draft bill also specified cases where the possibility to store computer data in terminal equipment resulted from default software settings (Article 173(1b) TL). The latter was to be allowed by law if the information

11 Document dated 5 January 2011.

12 Ibid., p. 77–78.

obligation towards the subscriber (end-user) was met, and if the subscriber (end-user) did not change his software settings after having received the required information. Nevertheless, the final version of the draft bill dated 23 July 2012[13] abandoned the aforementioned provisions on default software settings. Finally, the amendment to the TL Act introduced the opt-in regime based on consent that can be expressed by the use of software settings of specific equipment. The final wording of Article 173 TL now reads as follows: "The storing of information or the gaining of access to information already stored in the telecommunications terminal equipment of a subscriber or a user is only allowed on condition that:

1) the subscriber or the end user is directly informed in advance in an unambiguous, simple and understandable manner with regard to:
   a) the purpose of storing and the manner of gaining access to this information,
   b) the possibility to define the conditions of the storing or the gaining of access to this information by using settings of the software installed on his telecommunications terminal equipment or a service configuration;
2) the subscriber or end user, having obtained information referred to in point 1), gives its consent (*underlined by G.K.*);
3) the stored information or the gaining of access to this information do not cause changes in the configuration of the subscriber's or end user's telecommunications terminal equipment and in the software installed on this equipment."

Article 173(2) TL states that "The subscriber or end-user may give his consent (…) using the settings of the software installed on his telecommunications terminal equipment or a service configuration."

It is clear that the final implementation of Article 5 Directive 2009/136 into the Polish legal order by way of the amended Article 173TL leads to making the possibility to store information in subscriber's or end user's terminal equipment contingent upon their consent. Therefore, the opt-out regime was replaced with the opt-in model.

[13] Draft Bill on amending the Telecommunication Law Act and certain other acts together with certain other acts with implementing regulations to draft bills dated 23 July 2012, parliamentary document No. 627, VII th tenure of Parliament, available at: www.sejm.gov.pl; hereafter referred to as: Draft Bill Amending the Telecommunications Law.

3. Subscriber's consent

As far as consent is concerned, it would not be required only in precisely specified circumstances. That is, if the storing of, or the gaining access to information stored in the terminal equipment of a subscriber (end-user) was necessary to transmit a communication over a public telecoms network or provide a telecoms service or services by electronic means, requested by the subscriber or the end user. Except for the above circumstances, which should be subject to precise interpretation, each case of storing information in the terminal equipment of subscribers (end-users) should be associated with the expression of their consent to such actions.

Thus, the new TL Act provides for two models of expressing consent by subscribers (end-users). The first classic model would be understood as explicit consent (not implied by any declarations of will of a different content). It would, generally, be connected with a specific kind of activity undertaken by the user. The second model, which derives from point 66 of the preamble to Directive 2009/136, is a non-standard model where consent is expressed by using software settings or a service configuration. Concerns were raised, however, whether the latter system may, in fact, be defined as the opt-in model[14].

Consent, within the scope of the first model, should be understood in accordance with the definition of consent adopted both in Article 174 TL and in the Act on Personal Data Protection[15]. Article 174 TL states, *inter alia*, that consent of a subscriber or end user may not be presumed or implied by his declaration of will of a different content. Article 7(5) of the Act on Personal Data Protection defines consent as a declaration of will by which the data subject signifies his agreement to the processing of personal data relating to him. In addition, consent cannot be alleged or presumed on the basis of a declaration of will of other content. In this context, consent to store information in terminal equipment should not be implied or originate from other actions undertaken by the user. Therefore, only an explicit declaration, the content of which would be expressing a given subject's will to store information in his terminal equipment, would be considered to form consent. Pursuant to the new wording of Article 173 TL, expressing consent must be connected with the realization of the information obligation. Article 173 is not really clear in this context, however. On the one hand, it states

14 D. Karwala, Ibid. p. 17.

15 Act dated 29 August 1997 on Personal Data protection (i.e. Journal of Laws of 2002, No. 101, item 926, as amended); hereafter referred to as the "Act on Personal Data Protection".

that a subscriber or end user must be directly informed in advance in an unambiguous, simple and understandable manner ("the subscriber or the end user is directly informed in advance in an unambiguous, easy and understandable manner with regard to: (…)". On the other hand, it is stated further in Article 173(1(2)) that a subscriber (end-user) expresses his consent having previously obtained proper information. A question arises here on how to interpret and, as a result, how to apply the rules on the information duty so that expressing consent would be effective in light of the provisions of the TL Act. At the same time, it seems that meeting the information obligation is a necessary condition to deem the giving of consent as effective.

As mentioned, Article 173(1(2) TL does not speak of the need to obtain information before expressing consent by a subscriber (end-user). However, the antecedence condition is specified in Article 173(1(1)) TL, which introduces the information obligation. Although, as mentioned, Article 173(2) TL does not directly say that informing a subscriber or end-user must be made prior to expressing his consent, this provision should be interpreted together with Article 173(1) TL, which contains such a condition. In the context of expressing consent in accordance with the opt-in model, meeting the information duty before the consent is expressed should not raise any doubts. This is so because the supplier will need to prove each time before obtaining the consent of a given subscriber (end-user), that he has already met the information duty. In this case, the burden of proof that the information duty has in fact been met is on the supplier. This could have a positive dimension having suppliers try to provide the relevant information in the friendliest way possible. Nevertheless, this will clearly not preclude the application of various privacy policies or similar. Expressing consent in this model does not need to be associated with an increased requirement of diligence, which should function within the model of expressing consent by using software settings and a service configuration. The explicit consent model seems rather limited as far as the use of cookies is concerned. This mostly follows from the specific character of the functioning of cookies and the fact that they will often be installed in the terminal equipment way before the consent is expressed by a subscriber (end-user). Being aware of the practical difficulties in the implementation of the opt-in model, the European legislator will stand by the provisions included in the preamble to Directive 2009/136 predicting an alternative model of obtaining consent (obtaining consent by using software settings or a service configuration), which was later implemented into the Polish legal order.

Pursuant to point 66 of the preamble to Directive 2009/136, the methods of obtaining consent as well as providing information and offering the right to object should be as user-friendly as possible. From a practical point of view, meeting the requirement to obtain the consent of a given subscriber (end-user) each time he visits a specific website (for instance, by clicking on a pop-up window on each separate website in order to give consent for the storage of their cookies) could in fact not be user--friendly. Taking the above into account, the introduction of a possibility to express consent in other ways, not necessarily inconsistent with the current understanding of "consent" pursuant to the TL Act and the Act on Personal Data Protection, seems to be a justified solution. For the above reasons, Article 173 TL introduces a new solution (deriving from point 66 of the preamble to Directive 2009/136) according to which "the subscriber or end user may give his consent referred to in paragraph 1 (2) using settings of the software installed on his telecommunications terminal equipment or a service configuration." It seems that the model of expressing consent by using software settings and a service configuration must be treated as an exception to the general rule laid down in Article 174 TL (conditions for consent under the TL Act) and Article 173(2) TL (general rule of expressing explicit consent to store information in the terminal equipment of a subscriber (end-user)). It must also be noted that the application of Article 174 will not be excluded in its entirety. The possibility to express consent via software settings (a service configuration) will not exclude the provision of Article 174(2) within the scope of expressing consent by electronic means. Neither will this affect Article 174(3), which provides for the right to withdraw the given consent at any time.

The introduction of consent given via software settings or a service configuration may give the impression that, in fact, we are dealing with implied consent. Acceptance of such a view could, however, lead to the conclusion that the TL Act provides, in fact, for two contradictory regimes of expressing consent – one based on explicit consent included in Article 174 TL and one based on implied consent (expressed by using software settings or a service configuration). In addition, such a model would be inconsistent with the provisions of the personal data protection regime (the definition of consent included in the Act on Personal Data Protection). Although it is difficult to agree that consent expressed via software settings and a service configuration equals that of explicit consent within the classic opt-in model, it seems that under certain assumptions such consent may be treated as consent that is not alleged or "co-explicit", within the meaning

that it links the characteristics of both explicit consent and, to some extent, implied consent.

Expressing consent by using software settings and a service configuration can be interpreted in at least two different ways – as active actions of introducing by the subscriber (end-user) specific settings to his software, or as the subscriber's (end-user's) acceptance of existing software settings and a service configuration made by the supplier. Acceptance of the first interpretation would actually mean the adoption of the prior consent model and, as a result, the consent of a particular subscriber (end-user) would need to have been expressed before the files can be saved on the terminal equipment. It seems, however, that in this case it is not about such understanding of the expressing of consent (that is, by using software settings or a service configuration). The introduction of the solution of expressing consent by using software settings or a service configuration should be understood as a kind of tacit consent to the software settings provided by a particular supplier.

4. Information obligation

In order to recognize that the consent of a given subscriber (end-user) was expressed by accepting particular software settings and a service configuration to store information in his terminal equipment, it must be proved that the subscriber (end-user) was effectively informed of these settings and their effects. It can be argued that the lack of express actions (failure to undertake certain actions) is in fact a type of action that shows the will of a particular subscriber (end-user) to maintain a certain state of affairs. That would be so when the failure to act results from a conscious state of affairs, that is, understanding of the applicable software settings or a service configuration. However, the lack of a reaction on the part of a subscriber (end-user) in a situation where he had no opportunity to familiarise himself with information, which could potentially cause the subscriber (end-user) to react, cannot be interpreted as the expression of his consent. In conclusion, consent may be expressed by using software settings or a service configuration if their acceptance is a result of the prior realization of the information duty, even if the subscriber (end-user) concerned failed to undertake any express actions in this regard. It can be stated in such a situation that, in fact, we are not dealing with presumed consent but the explicit consent (or "co-explicit").

A fundamental concern arises however as to how the information obligation should be met in order to conclude that consent expressed by using given software settings and a service configuration was in fact effectively given. It is worth noting that the legal provision which refers to expressing consent via software settings and a service configuration does not specify when such realization of the information duty should take place. Despite the lack of a clear reference, it must be concluded that it should occur directly before the expression of consent via software settings and a service configuration. It is worth mentioning here that Directive 2002/58 does not state that the information obligation must be met in a direct manner, a requirement provided by contrast in the TL Act. The obligation to provide information in a direct manner was specified in Article 5 of the Act on Providing Services by Electronic Means[16], which states that "*A service provider shall make, clearly, explicitly and directly available through a teleinformation system used by a service recipient, basic information specified in paragraphs 2 to 5.*" In this context, it is justified to ask whether the implementation of the information obligation and the condition of antecedence (in the model of expressing consent via software settings and a service configuration) will be met when the information is given, for example, by means of privacy policies or other similar rules. In the context of the previous text of Article 173 TL that contained the opt-out regime, information was made available in practice mainly by providing information about the use of cookies in different types of privacy policies. In view of the above, the assumption that such a solution meets the current requirements for obtaining consent expressed via software settings or a service configuration would, in fact, mean keeping the *status quo ante*[17]. It is hard to agree with such an approach and so the information duty (in the case of expressing consent via software settings or a service configuration) should be met in a manner ensuring a much higher standard of information provision.

It is understandable that the above approach can lead to reasonable practical concerns. They include the issue of how to deal with the problem of, for instance, websites that essentially assume storing information in the terminal equipment of a subscriber (end-user) upon accessing a particular website. They do so, therefore, before the subscriber is actually provided with any information and before expressing his consent. Here,

[16] Act of 18 July 2002 on Providing Services by Electronic Means (Journal of Laws dated 2002, No. 144, item 1204, as amended); hereafter referred to as the "Act on Providing Services by Electronic Means".

[17] See D. Karwala, op. cit., p. 19.

the performance of the information duty would, in fact, be infeasible or would have to take place at a very early stage, for example, upon the configuration of give software, which would, however, be very difficult. The initial and very restrictive approach of the British personal data protection authority to implement the opt-in regime has been evolving for years. This authority is now of the opinion that "many websites set cookies as soon as a user accesses the site. This makes obtaining consent before the cookie is set difficult. Wherever possible, the setting of cookies should be delayed until users have had the opportunity to understand what cookies are being used for and make their choice. Where this is not yet possible, websites should be able to demonstrate that they are doing what they can to reduce the amount of time before the user receives cookie information and is provided with setting options".[18] Storing information in terminal equipment before having obtained appropriate information would need to be treated as an exception only from the fundamental rule that states that any actions associated with the commencement of data processing, including installation of files on terminal equipment, must be done only after obtaining appropriate information and consent of the person concerned[19]. In light of the above, the current practice of informing subscribers (end-users) through different types of communications appearing upon accessing a website is a reasonable solution. This does not preclude the entity interested in storing subscriber (end-user) information from referring users to more detailed information contained in individual privacy policies. Still, the communication that a particular website uses cookies should be provided to a subscriber in a direct way and at the earliest possible stage.

5. Final remarks

In view of the foregoing, it is worth noting that the current wording of Article 173 TL does not state that the consent to store information in the terminal equipment of a subscriber (end-user) needs to be collected each time that subscriber (end-user) uses a particular site. A different approach could lead to excessive difficulties in using these websites.

It is worth mentioning that Article 173 TL has been amended with respect to its use of the term "computer data". The current wording of

[18] Guidance on the rules on use of cookies and similar technologies, 2012, p. 6; available at: www.ico.org.uk.

[19] P. Hustinx, *Do not track or right on Track? The privacy implications of online behavioural advertising*; source: https://secure.edps.europa.eu.

this provision uses the term "information", which may suggest that the legislator has employed a different, more comprehensive approach to this subject matter. Although such an interpretation is possible, it seems that the key reason for the amendments was to adjust the wording of Article 173(1) TL to the text of the respective provisions of the EU directive. In practice, the said rule will still primarily apply to computer data, in particular, to cookie files.

In the context of the amendments introduced to Article 173 TL, reference should be made to its subject scope both in terms of who potentially should be protected by this legal rule (subscriber or end-user), and who and to what extent they can benefit from the ability to store information in the terminal equipment of these two categories of entities. The legislator does not stress in the amended provision the subject scope on the part of the users. In its previous wording, Article 173(1) TL covered only entities providing services by electronic means. For this reason, it used to serve a complementary purpose to the Act on Providing Services by Electronic Means. In the current form, the entity placing cookies does not have to be the provider of publicly available telecoms services concluding the contract with the subscriber, albeit such a situation can potentially occur. Now, the applicable legal provision simply mentions activities undertaken with respect to the subscriber or end-user. This model seems to better meet the assumptions of Directive 2002/58/EC, which in its original form specified the subject scope only on the part of the user, on whose computer cookie files were installed. Such an understanding is confirmed by the wording of point 66 of the preamble to Directive 2009/136. It refers to parties, which "may wish to store information on the equipment of a user, or gain access to information already stored." In conclusion, the legislator focused on objective aspects of using *cookies* and only specified the subject scope of the rule relating to the use of the said files on the part of their recipient. The above solution deserves to be considered for at least two reasons. First, it corresponds to the provisions of Directive 2002/58. Second, it makes it possible, to the greatest extent possible, to cover a wide range of entities potentially interested in placing cookies in the terminal equipment of subscribers (end-users) by the extent of the rule.

In conclusion, new rules for storing information in telecommunications terminal equipment raise concerns both in terms of EU and national law. Since Directive 2009/136 is relatively ambiguous as to when the consent should be given, it is not totally clear what kind of form such consent should take (opt-in, opt-out, implied consent). This uncertainty has given rise to a lot of various solutions being used in Europe beginning from classic

opt-out/opt-in models to presumed consent solutions[20]. Current Polish provisions generally represent the opt-in model. However, the introduction of consent expressed via software settings or a service configuration represents a solution somewhat in between an opt-in and opt-out regime.

[20] www.twobirds.com/English/Expertise/Documents/Implementation_of_the_new_ePrivacy_Directive24.07.12.PDF

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This book examines and offers critical comments on the evolution of national law and regulatory practice concerning the telecommunications sector in Poland. The Telecommunications Law Act was promulgated in 2004 with the intention of finally harmonizing the institutional and substantive laws regulating Polish telecommunications with the EU regulatory framework on electronic communications. The analysis of the compliance with, adaptations to and deviations from the standard rules of the EU regulatory framework is an important part of this book.

From the book reviews:

This pioneering joint study edited by Prof. Stanisław Piątek is devoted to key legal aspects of regulation in the telecommunications sector. The authors thoroughly analyze the normative context, broad selection of judicial decisions and commentary output in this sector. For this reason it will be an interesting reference work for academics, practicing lawyers and regulatory authorities in electronic communications throughout Europe.

Prof. Kazimierz Strzyczowski
University of Łódź

This book presents the main elements of the regulatory practice in the telecommunications sector, as well as specific experiences and problems encountered in the implementation process of the EU regulatory framework in Poland. The selection of topics follows the main course of European discussion on electronic communications law. Therefore this book delivers a lot of comparative materials for a foreign reader. The dominating approach in this book refers to the regulatory impact and presents the role of "law in action" in the telecommunications sector.

Prof. Włodzimierz Szpringer
Warsaw School of Economics (SGH)

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