

**Stanisław Piątek (ed.) *Regulacja rynków telekomunikacyjnych*
[*Regulation of Telecommunications Markets*]
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[*University of Warsaw, Faculty of Management Press*], Warszawa 2007, 395 p.**

The collective work entitled *Regulation of Telecommunications Markets* edited by Prof. Stanisław Piątek is the first publication in Poland to present a comprehensive overview of the regulatory practice concerning the Polish electronic communication market and, at the same time, to assess the efficiency of the undertaken regulatory measures. The first part of the book is dedicated to the presentation of the status of regulatory proceedings in particular telecoms markets: access to a fixed telecoms network (FTN), exchange calls services, leased lines, originating and terminating calls as well as transit in FTNs, local loop access and broadband access services, mobile phones as well as transmission of radio and TV programmes. The second part is dedicated to specific problems of telecoms market regulation in Poland.

In light of the presented problems, a few reflections are in order. A detailed overview of both the regulatory proceedings and the regulatory problems described by the individual Authors in relation to the issues originating from such proceedings suggests a need to consider whether current regulations resulting from the implementation of the EU Telecoms Directive Package of 2002, are adequate to the development of the market in Poland. The 2002 package was introduced on the assumption that electronic communications markets have already been de-monopolised in particular Member States and so, that a modification of existing regulatory instruments is needed.

The Polish Telecommunications Law of 2004 (TP), which follows the 2002 EU telecoms package, equipped the national regulator with “manual” market steering instruments, as opposed to the former model that provided an automatic imposition of regulatory obligations whenever a dominant market position was ascertained (thus, the role of the regulator used to be smaller than it currently is). On one hand, Poland was bound to implement the package, but on the other, the situation on the local market might have seemed not mature enough to adopt a new regulatory model which, as rightly emphasised by Szpringer and Piątek¹, assigns many powers based on comprehensive discretion of the regulatory authority.

¹ S. Piątek, W. Springer, *Efektywność regulacji rynków telekomunikacyjnych [Efficiency of Telecoms Markets Regulation]*, p. 354.

In 2004, many Polish markets were still dominated by a single entity – Telekomunikacja Polska S.A. (TP SA). As Piątek pointed out, the share of TP SA in both the consumer and non-consumer markets for connections to a fixed network (market 1 and 2) was over 90% in the years 2002-2005. This situation made it necessary for the regulator (first the President of the Office of Telecommunications and Post Regulation and later the President of the Office of Electronic Communications: UKE) to take strong actions to compensate for the delays, as compared to other markets. However, using discretionary decisions to make up for them often induced controversies (*inter alia*, the fact that the UKE President “extended” market 1 and 2 to cover access to all telecoms services rather than telephone only² etc., as described by Piątek).

It should be stressed however that the position of the UKE President, his/her appointment procedure and procedural aspects of proceedings before that authority (reviewed by Kosmala³) lead to a conclusion that the Polish regulator enjoys a rather independent position and, in practice, is not subject to a large degree of control. This is illustrated by the fact that the decisions of the UKE President are immediately enforceable, even concerning key matters such as the determination of the market position, the imposition of regulation obligations and dispute resolution, while the mechanism of court supervision over these decisions has been purely theoretical so far. Administrative courts (which only adjudicate in some telecoms cases) scrutinise decisions exclusively from the perspective of their legality. The entire regulatory activities area (implementation of regulation policy) lies outside of the scope of their scrutiny. The control exercised by the Court of Competition and Consumer Protection (SOKiK) does not safeguard the basic rights of telecoms companies either. This fact is attributable primarily to the drawn-out duration of the proceedings combined with the immediate enforceability of regulatory decisions and the fact that the annulment of a decision, if appropriate, does not equal the possibility of seeking damages for the losses incurred. Together these factors constitute a breach of the fundamental standards associated with the rule of law.

While SOKiK should not only verify the validity but also the legitimacy of actions taken by the regulator, the inconsistency of its judgments as well as frequent lack of a content-related analysis should be mentioned (e.g. in cases concerning the WLR (*Wholesale Line Rental*) service). The lack of an explicit approach of SOKiK towards controlling the actions of the UKE President greatly contributes to the growth in the number of litigations (several hundred in 2009) since operators count on a change in juridical approach in a given type of cases.

Consequently, in exercising its powers, the European Commission is the only body that may correct the actions of the Polish regulator, first and foremost, within the consolidation proceedings. Therefore, there is a justified concern about the loss of control by State authorities over the activities of the UKE President and the

² S. Piątek, *Rynki dostępu do stacjonarnej sieci telefonicznej [Markets of Access to a Fixed Telephone Network]*, p. 22.

³ K. Kosmala, *Procedury regulacji rynków telekomunikacyjnych [Telecoms Market Regulation Procedures]*, p. 175.



arbitrary nature of some of the moves undertaken by this regulator. Given the fact that Poland lacks a comprehensive and clear governmental policy concerning electronic communications, the UKE President became a self-dependent authority who decides about the shape of that market, regardless of whether the regulator's policy pertaining to a given sector is different than the state policy in that sector. This is because both, in principle, differ as to their goals⁴.

Moreover, legislative actions strengthen the position of the UKE President continuously extending the scope of his/her powers as illustrated by one of the most important problems in telecoms – the way of shaping the rates on the wholesale market. Adamski⁵ dedicates a major part of his paper to this very problem. Wholesale market price control and the obligations concerning cost calculations are meant to stop those with significant market power from charging extortionate prices and to prevent a related phenomenon of a market position transfer via price squeeze and internal subsidy mechanisms⁶. Before the 24 April 2009⁷ amendment to the PT, regulatory obligations relating to wholesale rates were formulated insofar as Article 39 (pertaining to the obligation of applying charges based on reasonable costs) set forth a principle of auditing of reasonable costs by a chartered accountant, provided that the UKE President could apply other methods of cost calculation than those used by the operator. On the other hand, Article 40 (concerning the obligation to apply charges based on the costs incurred) used to stipulate that the UKE President could verify the amount of charges based on benchmarks.

By contrast, Article 39 makes it now possible to verify the amount of the rates based on any method, including benchmarks. In turn, Article 40 extends the power to verify the amount of the rates based on incurred costs by giving the regulator the possibility to consider other methods to assess the regularity of such charges (apart from benchmarks). Prior to the amendment, it was thus inadmissible to use, based on Article 39, the “retail minus” method, which Adamski identified as one of price control methods alongside cost orientation and benchmarks⁸. However, the UKE President applied this method (*inter alia*, in cases pertinent to the WLR service). The regulator has now been granted such powers.

Still, concerns might arise because of the amended wording of Article 39 and 40, which gives the UKE President practically unlimited freedom to choose the methods of controlling the amount of the rates. This can be the case, *inter alia*, given that,

⁴ W. Szpringer and S. Piątek drew attention to the doubtful legal basis of the Regulation Strategy 2006-2007 on the telecommunications markets, as published by the Council of Ministers (Monitor Polski 2006 No. 65, item 674). They pointed out that the government made for other criteria than the regulator. See S. Piątek, W. Szpringer, *Efektywność regulacji rynków telekomunikacyjnych [Efficiency of Telecoms Market Regulation]*, p. 342.

⁵ D. Adamski, *Dobór obowiązków regulacyjnych na rynkach hurtowych [Choice of Regulation Obligations on Wholesale Markets]*, p. 238.

⁶ *Ibidem*, p. 244.

⁷ The Act of 24 April 2009 on Amendments to the Act – the Telecommunications Law and Certain Other Acts of Law (Journal of Laws No. 85, item 716).

⁸ D. Adamski, *Dobór obowiązków... [Choice of Regulation Obligations...]*, p. 245.



when using the “retail minus” method, the regulator calculated the “minus” side based on average costs of alternative operators. Such an approach does not seem to be consistent with the assumption referred to by Adamski, namely, that the minus should be calculated from the standpoint of “an effectively operating entrepreneur”, which is not always the case with an alternative operator⁹.

Attention should also be drawn to UKE President’s actions inconsistent with EU law (at present sanctioned by virtue of the amendments of 24 April 2009) whereby the regulator questions the outcome of a cost calculation audit performed by a chartered accountant. Pursuant to Article 13(4) of the Access Directive 2002/19/EC¹⁰, interpreted in the light of point 21 of its preamble, a regulatory authority may reject the results of a cost calculation solely in the case of a negative outcome of a control process over how the obligation to introduce an accounting system of cost calculation is performed by such authority or any other qualified authority independent from the operator to which the audit applies (a chartered accountant). Therefore, in the light of EU law, a regulator may not “verify” an audit performed earlier by a self-dependent chartered accountant.

The publication under review here refers to all key regulatory problems concerning telecoms. Among other contributions not mentioned so far, special attentions should be paid to Skoczny’s analysis of competitive market power assessment, Rzeszotarski’s paper on regulatory obligations on retail markets and Kubasik’s interesting economic analysis concerning the methods of telecoms services price regulation. Moreover, the aforementioned paper by Piątek and Szpringer gives the reader a specific recapitulation of the efficiency of Polish telecoms regulation which, even though included in the “problem-part” of the publication, constitutes a good summary of the whole book.

This extremely interesting publication closes with Szydło’s discussion on the prospected changes to the telecoms regulation system. Reviewed here are the most important trends identified by the European Commission in its document of 29 June 2006 *et al.* Some of the suggestions suffered then certain changes, but it is proper to bring forward, *inter alia*, the change in the way of managing radio spectrum (including a possibility of transferring powers to other subjects in this respect), and to all suggestions aiming to build up users’ rights.

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⁹ Ibidem, p. 246. The Author points out, *inter alia*, that a market subject may be less effective than an entrepreneur with a significant market power.

¹⁰ Directive 2002/19/EC of the European Parliament and European Council of 7 March 2002 on access to the electronic communication networks and associated facilities, and interconnections (directive on access) (OJ [2002] L 108; OJ, Polish special edition [2004] chapter 13, vol. 29/323).

