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Who Controls Polish Transmission Masts? at the Intersection of Antitrust and Regulation

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by

Ewelina D. Sage*

CONTENT

- I. Background – behind the scene
 - 1. Introduction
 - 2. Relevant variables
 - 3. What is the business of an incumbent?
 - 4. Markets relevant to whom?
- II. The law and the market
 - 1. Procedural intertwining
 - 2. Between the markets
- III. State of play: action or reaction?
- IV. Divergent characteristics: from separation to combination
- V. Afterthoughts

Abstract

This paper will be devoted to the most acute point of intersection between sector specific regulation and the enforcement of competition law – a parallel scrutiny of the market position and behaviour of EMITEL TP, an incumbent infrastructure holder in the Polish broadcasting transmission field, by the national telecoms regulator and the antitrust authority. After presenting the relevant EU background, the discussion will focus on four basic factors that have influenced the relationship between antitrust and regulation in this case. The peculiarities of national legislation transposing the EU liberalisation package will be considered first, followed by the state of competition in Polish telecoms and the potential existence of prohibited market practices. Emphasis will be placed here on the use of the antitrust concept of relevant market definition in the framework

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of sector-specific regulation. The analysis will continue with an assessment of the differences between the two types of market intervention noted by the authorities in the context of a potential competence dispute. In conclusion, the need will be presented to shift the current focus placed on the separation of antitrust enforcement and regulation, which has made them both ineffective in achieving their purpose, towards that of their combination in order to facilitate the emergence of competition in the Polish broadcasting transmission services field.

Résumé

L'article concerne le point le plus aigu d'intersection entre la réglementation sectorielle et le renforcement de la loi de concurrence – le contrôle parallèle de la position sur le marché et le comportement de EMITEL TP, le propriétaire d'infrastructure dans le domaine de la radiodiffusion en Pologne, par le régulateur national des télécommunications et l'autorité chargée de la politique de concurrence. Après avoir présenté le contexte de l'UE, la discussion se concentrera sur quatre facteurs clés qui ont influencé les relations entre les politiques de concurrence et la réglementation sectorielle dans ce cas-là. Les particularités de la législation nationale transposant le train de mesures de libéralisation de l'EU seront considérées d'abord, suivies par l'état de concurrence dans les télécommunications en Pologne et l'existence potentielle des pratiques du marché interdites. L'emphase sera mise ici sur l'usage de la définition du marché en cause aux fins du droit de la concurrence, dans le cadre de la réglementation sectorielle. Dans la partie suivante, l'analyse sera centrée sur l'évaluation de la différence entre les deux types d'intervention sur le marché notés par les autorités dans le contexte d'un conflit possible en matière de compétence. Dans la conclusion, le besoin de tourner l'attention mise actuellement sur la séparation du renforcement de la loi de concurrence et la réglementation sectorielle, qui les avait faits inefficaces en atteignant leurs objectifs, vers la combinaison de les deux, afin de faciliter l'émergence de la concurrence dans le domaine des services de radiodiffusion.

Classifications and key words: antitrust enforcement; sector specific regulation; telecoms; market 18; transmission infrastructure; 'relevant' market; access to infrastructure; co-operation procedures; procedural intertwining.

I. Background – behind the scenes

1. Introduction

Few topics fit as well into the thematic framework of YARS as the interaction between a parallel public intervention by an antitrust body and a national regulatory authority (NRA)¹. The level of interest is of course the greatest if the corresponding proceedings coincide not only in time but also in their general subject matter – when two separate public bodies assess market power and practices on a potentially identical ‘relevant’ market. Among the segments of Polish telecoms that have been subject to both types of intervention² lies the so-called ‘market 18’ concerning transmission services to deliver broadcast content to end users. Even with the emergence of some new competition, the Polish broadcasting transmission services field remains dominated by Emitel Telekomunikacja Polska (EMITEL), the incumbent infrastructure holder that continues to control many aspects of the domestic broadcasting transmission field. Most importantly, the incumbent is still the only entity capable of providing country-wide broadcasting transmission services that are essential for public services broadcasters (PSBs).

EMITEL found itself subject to a regulatory decision adopted in 2003 by the Polish telecoms regulator, the UKE President (in Polish: *Urząd Komunikacji Elektronicznej*; hereafter, UKE) and a separate antitrust decision issued in 2004 by the national antitrust authority, the UOKiK President (in Polish: *Urząd Ochrony Konkurencji i Konsumentów*, hereafter, UOKiK). The analysis of these two parallel proceedings shows that their conduct was far from optimal. They also managed to achieve very little to improve the competitive structure on

¹ In Poland, the general relationship between antitrust and pro-competitive regulation has been subject to a detailed analysis mostly by T. Skoczny and M. Szydło. See in particular T. Skoczny, ‘Stan i tendencje rozwojowe prawa administracji regulacyjnej w Polsce’ [in:] *Ius Publicum Europaeum. Dwunaste Polsko-Niemieckie Kolokwium Prawników-Administratywistów, Warszawa, 20-22 września 2001 r. Referaty i głosy w dyskusji*, Warszawa 2003, pp. 115-164; T. Skoczny, ‘Competition protection and pro-competitive sector-specific regulation’ [in:] A. Z. Nowak, B. Glinka, P. Hensel (eds.), *Business Administration in Central Europe: Challenges, Problems and Opportunities*, Warszawa 2006; M. Szydło, *Regulacja sektorów infrastrukturalnych jako rodzaj funkcji państwa wobec gospodarki*, Warszawa 2005; for a most comprehensive discussion on competition law and regulation see the imminent book by M. Szydło, *Prawo konkurencji i regulacja sektorowa*, Warszawa 2010. The specificity of antitrust and regulation in European telecoms has been analysed by P. Larouche, *Competition law and regulation in European telecommunications*, Oxford 2000.

² For a detailed assessment of the results of telecoms market regulation in Poland see S. Piątek (ed.), *Regulacja rynków telekomunikacyjnych*, Warszawa 2007.

the Polish broadcasting transmission services market. Among the key reasons identified for this failure are:

- A significant degree of confusion concerning the relationship between the 18 markets pre-determined in the Commission Recommendation of 2003 and the obligation placed on NRA to define relevant markets according to the principles of competition law;
- Clear legislative weaknesses of the Polish Telecommunications Law Act (in Polish: *Prawo Telekomunikacyjne*; hereafter, PT);
- The persistence of the incumbent's market power and entry barriers;
- The complexity of the distribution chain with its dependence on diversified and largely, but not entirely un-replicable infrastructure which greatly complicates the delineation of relevant markets and thus also the establishment of potentially abusive market behaviour, and finally;
- An overall arguable lack of skill or at least, lack of will of the public authorities to use the available procedures to arrive at a balanced, coordinated solution to the commonly established competition problem.

Indeed, agreeing with J. Black that 'the significance of the decision makers' "world view"³ cannot be underestimated – the parallel proceedings regarding EMITEL show that while the two interventions could have complemented each other, the authorities have instead focused on stressing their distinctiveness. Noted in the closing remarks will also be the recent legislative amendments to the PT which are likely to eliminate at least some of the earlier uncertainties and the somewhat revised approach of the NRA shown in its new decision concerning EMITEL which was adopted in October 2010.

2. Relevant variables

The origin of the direct intersection between antitrust and regulatory intervention in telecoms are European rather than national in nature. They can be traced back to the implementation of the Electronic Communication Framework of 2002⁴ and the general applicability of competition law. Indeed,

³ J. Black, *Rules and Regulators*, Oxford 1997, p. 236.

⁴ The Liberalisation Package includes 5 directive and other associated acts the most important of which are in this context: Framework Directive 2002/21/EC, Authorization Directive 2002/20/EC, Access Directive 2002/19/EC and Universal Services Directive 2002/22/EC, OJ [2002] L 108 and the Privacy Directive 2002/58/EC, OJ [2002] L 201; Guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communications networks and services, OJ [2002] C 165/6, and Commission Recommendation on relevant product and service markets within the electronic communications sector susceptible to ex ante regulation C(2003) 497, OJ [2003] L 114/45.

seeing as incumbent telecom operators are far from immune to antitrust scrutiny, it is the prohibition of a dominant position abuse that is of particular relevance in this context. The Liberalisation Package's reliance on the antitrust concept of relevant market definition has nevertheless proven in Poland to be the source of an inherent uncertainty concerning the practical rapport of competition law enforcement and regulatory interventions.

On the one hand, competition law and its enforcement practice precedes telecoms regulation both in time as well as experience and can thus be perceived as somewhat of an older brother in this relationship. This realisation seems to be reflected by the fact that Article 15(1) of the Framework Directive⁵ explicitly requires the use of competition law principles for the definition of relevant markets in the electronic communications field. This fact alone effectively introduces one of the most fundamental concepts of competition law, the notion of 'a relevant market', as the basic comparative framework for telecoms regulation. It represents the formalisation of the growing and increasingly acknowledged entwining of sector-specific regulation and antitrust enforcement⁶. The EU liberalisation process is in fact directly based on the assumption that regulation can be imposed only on those markets, defined as relevant on the basis of antitrust rules, which are void of effective competition. As a result, the Framework Directive effectively established an obligation to directly respect some basic principles of competition law in the framework of regulatory proceedings.

However, the unquestionably case-specific nature of relevant market definition in antitrust enforcement has been notably blurred here by the pre-determination of markets in the Commission Recommendation 2003/311/EC⁷ regarding relevant product and service markets within the electronic communications sector susceptible to *ex ante* regulation in accordance with the Framework Directive 2002/21/EC⁸. Crucially, the Recommendation contained a list of markets that the Commission considered at the time of its issue to suffer from the lack of effective competition and thus, which it believed to be susceptible to *ex ante* regulation. Broadcasting transmission services used to

⁵ Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services, OJ [2002] L 108/33.

⁶ This entwining was noted by literature already before the liberalisation package see e.g. P. Larouche, *Competition law...*; A. Bavasso, *Communications in the EU Antitrust Law: Market power and Public Interest*, Hague 2003; W. Kip Viscusi, J. E. Harrington, J. M. Vernon, *Economics of Regulation and Antitrust*, MIT Press, Cambridge Mass 2000.

⁷ 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 C(2003) 497, OJ [2003] L 114/45.

⁸ Issued on the basis of Article 15(1) of the Framework Directive.

deliver broadcast content to end users (market 18) were among the 7 retail and 11 wholesale electronic communication markets originally identified by the Commission. However, no list of that kind has ever been used in the realm of competition law. The rapport between the individualistic nature of relevant markets in antitrust enforcement and the generalist nature of the list created for the purpose of telecoms regulation has thus become subject to controversy between the involved national authorities⁹. As such, regulation can be perceived as the younger sibling in this relationship that is expected to use the experiences accumulated over the years by its competition law counterpart but within the special borders pre-determined by their parent, in other words, the European Commission.

In practice, the uncertainty about the state of the relationship between antitrust and regulatory intervention can be reinforced by the peculiarities of national legislation implementing the EU package as well as its domestic enforcement practice. This consideration derives from the inherent feature of EU directives – the fact that they must be transposed into the legal systems of all EU Member States. Eventual divergences, not only between the pro-competitive results achieved in different Member States but also between the aspirations of the EU liberalisation package and the outcomes of its practical application are thus inevitable.

The second factor affecting the distance in the relationship between antitrust and regulatory intervention is the actual state of competition found on particular national telecoms markets. While the Commission has identified what criteria a market must fulfil to be subject to *ex ante* regulation, the NRAs are obliged to individually assess which of their own relevant markets fulfils the specified conditions of *ex ante* regulation. Moreover, the ECJ confirmed recently that this obligation, placed on NRAs by the Framework Directive, cannot be limited by national legislation¹⁰. The three criteria to be considered are: high and non-transitory barriers to entry enforced by the fact that the structure of the market does not independently evolve towards effective competition within the relevant time horizon coupled with the realisation that the application of antitrust alone is not able to adequately address the arising issues¹¹. As a

⁹ The Recommendation is not binding on national competition authorities in their analysis of the electronic communication field. It does however constitute an essential constraint of regulatory intervention.

¹⁰ ECJ judgment of 3 December 2009, C-424/07 *Commission v Republic of Germany*, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62007J0424:EN:HTML>, recital 65-67.

¹¹ Particularly relevant here is the fact that because antitrust enforcement relies on individual cases, its principles, and thus also market impact, develops 'sporadically (...) and may leave key issues untouched' see R. Baldwin, M. Cave, *Understanding Regulation. Theory, Strategy and Practice*, Oxford 1999, p. 45.

result, while competition law enforcement and regulation would by design have no point of direct intersection on competitive markets (since they would not become subject to *ex ante* regulation), that relationship was predestined to be close on markets struggling with market power.

While it is the state of competition in domestic telecoms that is decisive for the application of *ex ante* regulation, it is the identification of prohibited market practices that conditions the involvement of antitrust authorities. Thus, while both bodies must start their intervention by defining their relevant markets, the conclusions they reach can, but by no means have to coincide. Leaving aside for the moment the issue of the correctness and accuracy of market definition in any given case, the two bodies see the relevant market from an entirely different perspective. NRAs look first to the list published by the Commission. In truth, the list has neither a definite, bidding or indeed closed character – national regulators are meant to define actual relevant markets in their own territory and in particular, to segment them further subject to notification and approval of the Commission. By contrast, it is the alleged existence of prohibited market practices (such as discrimination) that triggers an antitrust intervention. In other words, competition authorities will not get involved if market power exists but is not abused. In such circumstances, there will be no point of direct impact between antitrust enforcement and regulation. Still, if a dominant undertaking actually abuses its position on an interconnected, or indeed potentially identical relevant market to that defined by the NRA, then the two types of intervention will surely intersect.

Finally, the closeness of the bond between regulation and antitrust enforcement can also be greatly affected by their diverging nature (primarily reactive vs. proactive), character (*ex ante* vs. *ex post*), instruments of intervention (type of sanctions) and direct aims¹² assuming that the improvement of consumer welfare constitutes their common ultimate goal¹³. On highly concentrated markets both types of interventions are likely to coincide with

¹² The immediate aim of sector-specific regulation is to facilitate competition while antitrust is used to minimise its distortion; on the specifically pro-competitive function of telecoms regulation in Poland see M. Szydło, *Regulacja sektorów infrastrukturalnych jako rodzaj funkcji państwa wobec gospodarki*, Warszawa 2005 pp. 93–94.

¹³ The ultimate goals of competition law are still being debated both on the international as well as national level see D. Miąsik, 'Controlled Chaos with Consumer Welfare as the Winner – a Study of the Goal of Polish Antitrust Law' (2008) 1(1) *YARS*; on the other hand, regulators have been well known to pursue other, socio-political goals that are sometime in stark opposition to consumer welfare cf 'Although maximising economic efficiency (...) may be touted by economists as our goal, in practice (...) regulators (...) respond to a variety of political constituencies' in W. Kip Viscusi, J. E. Harrington, J. M. Vernon, *Economics of Regulation ...*, pp. 9–10; see also M. Król, 'Liberalization without a Regulator. The Rail Freight Transport Market in Poland in the years 1996-2009' (2010) 3(3) *YARS*.

respect to the same entities and potentially, consider the very same market practices. However, while the comparative framework applicable to both is meant to coincide (relevant markets defined on the basis of competition law rules) their diverging characteristics might affect their outcome. Considering instruments of intervention for instance, while regulation is by definition meant to prescribe future actions (pro-active), the traditional approach the enforcement of the unconditional prohibition placed by antitrust rules on the abuse of dominance puts a stop to an existing infringement and penalises past misconduct (reactive & repressive¹⁴). Thus, the divide between regulatory and abuse decisions would not be as great where the latter can contain remedies (positive obligations referring to the means of ceasing the infringement), as is the case on the basis of Article 7 Regulation 1/2003 in the EU¹⁵. The difference would be much more pronounced if the traditional approach was followed, as is the case in Poland¹⁶.

2. What is the business of an incumbent?

EMITEL was established in 2001 as part of the Polish Telecoms Capital Group (in Polish: *Telekomunikacja Polska*; hereafter, TP) to take control over the terrestrial broadcasting transmission infrastructure that TP has amassed over the long duration of its legal monopoly. TP has managed to create a network of transmission masts, transmitters and associated facilities, capable of reaching the entire Polish territory both with relation to receiving and transport of television and radio signals as well as their broadcast. Even in light of its relatively recent ‘creation’, EMITEL must thus be perceived as an incumbent that used to be privy to monopoly rights before the liberalisation process begun. This realisation carries with it important legal, structural and financial consequences. The Polish terrestrial broadcasting transmission field is characterised by significant legal barriers associated with the need to obtain permission to build new infrastructure. Structural problems are primarily reflected by the fact that the best places, or indeed the only usable locations

¹⁴ See in particular T. Skoczny, ‘Competition protection and pro-competitive sector-specific regulation’ [in:] A. Z. Nowak, P. Hensel (eds.), *Business Administration...*, p. 192 (point 2.3.3).

¹⁵ G. Monti, ‘Art 82 EC and New Economy Markets’ [in:] C. Graham, F. Smith, *Competition law, regulation and the New Economy*, Oxford 2003, p. 18; of course, European competition law enforcement is at its most prescriptive in cases of multilateral practices where conditional approvals can be issued; see the criticism of the use of antitrust in a quasi ex-ante manner in G. Monti ‘Managing the Intersection of Utilities Regulation and EC Competition Law’ (2008) 4(2) *Competition Law Review*.

¹⁶ T. Skoczny, A. Jurkowska, D. Miąsik (eds.), *Ustawa o ochronie konkurencji i konsumentów. Komentarz*, Warszawa 2009, p. 725.

for the construction of transmission masts are already used by the former monopolist. Finally, the creation of a comprehensive transmission network carries with it huge sunk costs which are in most cases impossible to overcome by new market entrants.

It is not surprising therefore that EMITEL had from the start the power to control its economic field. Indeed, even now it remains the only operator to control a country-wide terrestrial broadcasting transmission network comprising masts carrying low, medium and high strength transmitters. While certain local and regional infrastructure elements have been replicated by others, both competing telecoms operators as well as directly by broadcasters, EMITEL remains the only one capable to provide broadcasting coverage of the entire population. It is not surprising therefore that it has become subject to a comprehensive regulatory scrutiny by the relevant NRA¹⁷ commencing on 20 December 2004 followed by the adoption of a regulatory decision by the UKE President on 9 November 2006¹⁸.

It is worth noting at this point that the European Commission has in the meantime completed a second consultation procedure and issued new a Recommendation¹⁹ that no longer lists the broadcasting transmission field as a market that is in its opinion susceptible to *ex ante* regulation in Europe. Nevertheless, the competitiveness of the Polish terrestrial transmission market remains largely unchanged. Considering in particular the practical effects of the regulatory decision of 2006²⁰, the Polish NRA has conducted a renewed assessment of broadcasting transmission field. The analysis has made it arrive at the conclusion that little progress has been made since its original decision and that the three conditions of *ex ante* regulation generally applicable to European telecoms are still fulfilled in the Polish case. Thus, after having gained the approval of the Commission, a new regulatory decision has been adopted by the UKE President on 12 October 2010²¹.

On the basis of its infrastructure, EMITEL started in 2002 to provide broadcasting transmission services offered up to that point directly by the

¹⁷ The proceedings were initiated by the Regulatory Office for Telecommunication and Post (in Polish: *Urząd Regulacji Telekomunikacji i Poczty*; hereafter, URTiP), the institutional 'predecessor' of UKE created in 2005.

¹⁸ Decision of the UKE President of 9 November 2006.

¹⁹ 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 C(2007) 5406, OJ [2007] L 344/65.

²⁰ Available at: http://www.uke.gov.pl/uke/index.jsp?news_cat_id=168&news_id=5400&layout=3&page=text&place=Lead01 .

²¹ Available at http://www.uke.gov.pl/_gALLERY/34/49/34491/Decyzja_R18_8_09.pdf.

former monopolist. According to company information, EMITEL offers ‘TV services including emission of TV programs and terrestrial transmission of modulation signals in various configurations (to broadcasting stations, TV studios, etc.)’ as well as ‘nation-wide radio services, including signal transmission and radio broadcasting, based on the newest technologies.’ It is also directly involved in the progressing digitalisation of broadcasting transmission. Indeed, from the moment of its creation, EMITEL has become party to numerous transmission services contracts with commercial broadcasters. At the time of the antitrust proceedings, EMITEL was said to provide broadcasting services on the basis of nearly 100 separate agreements²². Among them, EMITEL became party to long term transmission services contracts concluded as early as 1996 with Polish public television (in Polish: *Telewizja Polska*; hereafter, TVP S.A.) and radio (in Polish: *Polskie Radio*; hereafter, RP S.A.). These agreements became the direct basis of an antitrust investigation opened in 29 December 2005 and a decision issued by the UOKiK President on 25 October 2007²³. Incidentally, the antitrust decision under consideration in this paper was annulled on 19 October 2009²⁴ by the first instance court for antitrust matters SOKiK (in Polish: *Sąd Ochrony Konkurencji i Konsumentów*; hereafter, SOKiK) fundamentally because of an incorrect relevant market definition. Still, the ruling was repealed by the Court of Appeals on 13 May 2010 which remanded the case to SOKiK for a renewed assessment²⁵. In line with existing Polish jurisprudence²⁶, the Court of Appeals stressed that SOKiK was competent to decide on the merits of the case rather than merely annul the original decision. Thus, the first instance court should have performed its own market analysis to accurately determine the relevant market and on this basis decide whether the charges brought against EMITEL were justified.

3. Markets relevant to whom?

Considering the position of an incumbent from the point of view of the infrastructure it holds on the one hand, and the services it provides on its basis on the other, is essential to a clear delineation of markets and their respective positioning within the distribution chain. As an incumbent that does not interact with consumers (does not act on down-stream retail markets), EMITEL has taken over TP’s wholesale provision of transmission services to

²² UOKiK Decision, p. 16.

²³ Decision of the UOKiK President of 25 October 2007.

²⁴ Judgment of SOKiK of 19 October 2009, XVII AmA 66/08, not reported.

²⁵ Judgment of the Court of Appeals of 13 May 2010, VI Aca 126/10, not yet reported.

²⁶ E.g. Judgment of the Court of Appeals, VI Aca 46/08.

broadcasters as its customers. It is this very market that has been identified both by the Commission and UKE as lacking in effective competition and thus in need of *ex ante* regulation. However, not unlike in many other areas of telecoms, it is often necessary to address the lack of competition on a market placed lower in the distribution chain (transmission services) by the imposition of regulatory obligations on a market placed higher in the chain (access to non-replicable infrastructure elements necessary to provide transmission services²⁷). Indeed, while it is less common now to find a telecom incumbent in complete control of retail, generally subject to lesser entry barriers, the wholesale level continues to suffer from more prevalent and persistent monopolisation²⁸. Opening access to the infrastructure necessary for the provision of wholesale services is thus not only a common, but arguably the most important means of regulatory intervention²⁹.

Alongside the traditional transmission services provided by EMITEL on the wholesale level, the incumbent was thus ‘regulated’ so as to provide access services to its infrastructure to other telecom operators in order for them to be able to compete with EMITEL’s primary offer. As such, the 2004 UKE decision has effectively created a top-tier terrestrial network access market resulting in a further segmentation of the Polish broadcasting transmission value chain into broadcasting (multiple down-stream retail markets³⁰), transmission services market/s (mid-level wholesale markets³¹) and the transmission infrastructure access market (up-stream wholesale market). The liberalisation process has thus caused a significant shift in telecom customer relations – a move away from a dual (monopolist v. broadcasters) towards a three-fold division of the

²⁷ E.g. imposition of WLR to improve the competitiveness of call termination.

²⁸ The new 2007 Commission Recommendation on relevant markets in the electronic communication sector list only 1 retail market that it believes to be in need of *ex ante* regulation but still 6 wholesale markets.

²⁹ S. Piątek, ‘Polityka komunikacji elektronicznej Unii Europejskiej’ [in:] A. Jurkowska, T. Skoczny (eds.), *Polityki Unii Europejskiej: Polityki sektorów infrastrukturalnych. Aspekty prawne*”, Warszawa 2010, p. 177.

³⁰ Over the years many separate relevant markets have been identified on retail level of broadcasting on the basis of European competition law starting with: **free-access tv** in *Dow Jones/NBC-CNBC Europe* (Case IV/M1081), OJ [1998] C 83/4, para. 7; **Tv-advertising** in *Kirch/Mediatel* (Case IV/M 1574), OJ [1999] OJ C 255/3, para. 12; **pay-tv** in *MSG* (Case IV/M469), OJ [1994] L364/1 para. 32 which directly concerned **technical and administrative services for pay-tv** as a mid-level wholesale market; see also the discussion on substitutability of broadcasting transmission services from an antitrust perspective in A. Bravasso, *Communications in EU Antitrust Law...*, pp. 158-160.

³¹ Potentially multiple markets segmented according to the type of transmission services provided into e.g. transport of signal v. signal diffusion, or the type of programming transmitted e.g. television v. radio transmission services; or according to the signal type e.g. analogue v. digital transmission services.

value chain (incumbent vs. other operators & incumbent/other operators vs. broadcasters)³². For that very reason, customers of the transmission services markets, in other words, its demand side (broadcasters) must be clearly differentiated from EMITEL's new/potential customers on the up-stream access market (telecom operators)³³.

Among the most striking realisations coming to mind after the analysis of the regulatory decision of 2004 is that the Polish NRA has failed to fully realise and act on this fundamental difference. This fact is especially regrettable because the comments submitted by the UOKiK President concerning the draft regulatory decision have not only noticed but actually stressed the incorrectness of considering both telecom operators and broadcasters as the buying side of the market defined as relevant in these proceedings³⁴.

The incorrectness of the approach applied by the UKE President is clearly reflected in the position of OFCOM, the British NRA, which explicitly identified 3 levels in the broadcasting transmission value chain: wholesale access market (up-stream), intermediate (mid-level) managed transmission services market and retail broadcasting markets³⁵ (down-stream). Importantly, the British antitrust authority, the Competition Commission, follows a similar approach where it differentiated the wholesale access level from the intermediate wholesale transmission services level and finally from retail broadcasting.

II. The law and the market

1. Procedural intertwining

After the opening of the regulatory proceedings, the UKE President notified the proposed decision to the European Commission stating in particular the reasons for the narrowing down of the market listed in the Recommendation³⁶. The NRA also fulfilled its legal obligation based on Article 16 of the Polish

³² In either case, retail broadcasting markets remain outside of the telecoms domain.

³³ Rather than differentiating three distinct levels which intertwines telecoms with the broadcasting sector, some commentators speak of the wholesale level (infrastructure markets) as opposed to retail (infrastructure services) only see M. Szydło, *Regulacja sektorów...*, p. 99.

³⁴ Alternative telecoms operators should have been placed on the same side of market 18 as Emitel as its competitors. The imposition of access obligations on Emitel would have taken place on a, so to speak 'newly created', access market.

³⁵ OFCOM 'Broadcasting Transmission Services: a review of the market' & 'Provision of managed transmission services for public service broadcasters'.

³⁶ According to Article 18 of the Act of 16 July 2004: Telecommunications Law (Journal of Laws 2004 No. 171, item 1800, as amended).

Telecommunications Law of 16 July 2004 (in Polish: *Prawo Telekomunikacyjne*; hereafter, PT) to submit the draft decision to the UOKiK President for consultation. Unfortunately, since the PT did not specify at what stage of the proceedings the notification should take place, UKE did so only after the draft was fully formulated. That fact was unsuccessfully contested by EMITEL because formally no breach of PT took place³⁷. The incumbent was right however to note that the primary purpose of a consultation process between the NRA and the antitrust authority was for the former to be able to use the expertise of the latter as far as market definition is concerned, a concept which constitutes the basic framework of the entire regulatory proceeding. However, the authorities agreed that not only did the PT not specify the moment of the necessary consultation it also did not oblige the UKE President to actually incorporate the comments of the UOKiK President in the decision. As J. Black put it a ‘rule (...) is only as good as its interpretation [as] rules cannot apply themselves [to] be applied rules have to be interpreted’³⁸ – regrettably, the NRA followed here a formalistic interpretation of the existing law rather than fulfilling what would have been its intended purpose.

The involvement of the antitrust authority in the regulatory proceedings was further limited by the provision that the UOKiK President was meant to assess the correctness of the proposed decision only on the basis of the legal and factual circumstances presented by the NRA. The design of Polish legislation has therefore effectively eliminated the UOKiK President’s ability to actually influence the content of the regulatory decision unless of course, the NRA would admit to its mistakes in the formulation of the draft and voluntarily change it. If the regulator was however willing to do so, it would have most likely consulted the antitrust body at a much earlier stage of the investigation so as to increase the likelihood of its analysis taking place within the framework of an accurately defined relevant market. Incidentally, unlike the comments submitted by the UOKiK President, those received by the NRA from the European Commission were incorporated into the final decision³⁹. The fundamental difference in the treatment of two sets of comments can be attributed to the fact that Article 19(1) PT imposes an obligation on the UKE President to consider the comments received from the Commission to

³⁷ Comments of the UOKiK President to the draft decision.

³⁸ J. Black, *Rules and Regulators...*, pp. 12-13.

³⁹ Agreeing with the view that sees the Commission as a party in the regulatory decision-making chain, rather than a policing instance, the UOKiK President should have a similar position see P. Larouche, M.C.B.F. de Visser, ‘The triangular relationship between the commission, NRAs and national courts revisited’ (2006) 64 *Communications & Strategies* 130.

the greatest extent possible⁴⁰ while there is no such duty with respect to the observations submitted by the UOKiK President⁴¹.

Under the Act on Competition and Consumer Protection of 15 December 2000⁴², antitrust proceedings could be initiated *ex officio* as well as on request of those entities, or their associations, that had a legal interest in the case. On 12 December 2005, the Association of the Employees of Public Broadcasters (in Polish: *Związek Pracowników Mediów Publicznych*; hereafter, ZPMP) took advantage of the possibility provided by Article 84 of the Competition Act 2000 and submitted a formal complaint to the competition protection body alleging that EMITEL has committed a violation of the prohibition of a dominant position abuse with respect to its treatment of public broadcasters⁴³. Incidentally, all antitrust proceedings are currently initiated *ex officio*⁴⁴ a fact that does not preclude ‘injured’ or, indeed any other interested parties from filing complaints or providing the UOKiK President with data on alleged infringements. However, such submissions no longer compel the authority to initiate antitrust proceedings allowing it to free itself from the duty to take actions on ‘personal’ interests of market players⁴⁵.

Formal competition law proceedings were opened against EMITEL on 29 December 2005 on request from ZPMP that explicitly argued against the incumbent’s market practices against its members, including most importantly, price discrimination and exploitation. The fact that antitrust proceedings against EMITEL were initiated by a group of its clients is strongly reflected by the great extent of the involvement of the claimant in the UOKiK’s assessment of the case. It also directly emphasises the ‘individualistic’ focus of antitrust enforcement as they are bound by the alleged existence of a given prohibited practice used against a specific entity or group of entities⁴⁶. It is also the origin of a very court-like framework of the assessment where two independent undertakings argue

⁴⁰ According to Article 19(2) PT, the issuance of a regulatory decision can be postponed or the regulatory process suspended if the Commission objects to the draft as far as the establishment of SMP or market definition different from the Recommendation where it endangers the development of the single market or is in breach of EU law; see S. Piątek, *Prawo Telekomunikacyjne. Komentarz*, Warszawa 2005, pp. 214–219.

⁴¹ For more details see S. Piątek, *Prawo Telekomunikacyjne...*, pp. 204–206 where it is explicitly noted the consolation obligations under Article 16 PT are fulfilled as long as the NRA goes through the motions of informing the antitrust authority and publishing its comments; see also K. Kawalek, M. Rogalski, *Prawo Telekomunikacyjne. Komentarz*, Warszawa 2010, p. 145.

⁴² For more details see T. Skoczny, A. Jurkowska, D. Miąsiki (eds.), *Ustawa...*, p. 1389.

⁴³ The decision of the UOKiK President established ultimately only the existence of prohibited discrimination.

⁴⁴ See Article 49 Competition Act 2007.

⁴⁵ See Article 86, 87 and 101 Competition Act 2007.

⁴⁶ It is worth noting that in July 2007 ZPMP successfully requested a limitation of the extent of the proceedings to an alleged infringement of Article 8(2) point 3 only; UOKiK decision page 5.

with each other in front of the judge-like-figure of the UOKiK President. By contrast, sector-specific regulators are bound by the existence of market power only and thus view market practices from the point of view of the incumbent as opposed to 'the entire/potential rest of the market'. The individualistic character of competition law enforcement is thus in opposition to the far more wide-ranging approach employed by the regulator.

The difference between the 'specific' as opposed to 'general' nature of the two interventions was stressed by both the UOKiK and the UKE Presidents. Unlike the consultation procedure provided for by the PT, the Polish competition authority is not legally obliged to consult anyone before it reaches its decision, be it another public body or an individual or undertaking, unless they are party to the proceedings⁴⁷. Nevertheless, the UOKiK President sought confirmation from the UKE President⁴⁸ whether the NRA believed that a competence dispute existed between the two parallel proceedings. The UKE President responded⁴⁹ that the two interventions do not collide seeing as one has an *ex-ante* (more general, future oriented) while the other an *ex-post* character (very specific, focusing on past conduct). The NRA pointed out also that while its own proceedings will have horizontal consequences for telecom operators competing with EMITEL, the antitrust proceedings will affect directly the vertical relationship between the incumbent and broadcasters as its customers/clients⁵⁰. The UOKiK President confirmed the conclusions of the NRA adding also that it is stated already in Article 1 PT that it does not constitute *lex specialis* to the Competition Act, in other words, that the application of the PT in regulatory proceedings does not preclude the possibility of a parallel antitrust intervention⁵¹. UOKiK also correctly stressed that, unlike EMITEL's claims, the competition body is very much competent to assess and intervene into the vertical relationship between the incumbent and its clients, that is, broadcasters.

2. Between the markets

Although no such obligation arose from the Liberalisation package, Article 22 (1)PT stated at the time of the regulatory proceedings⁵² that markets which

⁴⁷ Unless of course the case is of interest to the EU resulting in an involvement of the Commission or the competition authorities of other MS.

⁴⁸ On 14 June 2006, UOKiK decision page 30.

⁴⁹ On 13 July 2006, UOKiK decision page 30.

⁵⁰ UOKiK decision page 30.

⁵¹ This approach was confirmed by the Supreme Court on 19 October 2006 (III SK 15/06).

⁵² The need for an executive Regulation and thus hopefully the resulting problems concerning the relationship between the national list and individual relevant market definition have now been eliminated by the Act of 24 April 2009 on the amendment of the Act – the Telecommunications Law (Journal of Laws 2009 No. 85, item 716).

might need to become subject to *ex ante* regulation in Poland will be specified by the Communication Minister. An appropriate executive Regulation was issued on 25 October 2004 identifying the exact same markets listed in the 2003 Commission Recommendation⁵³. According to the Polish NRA, the 18 pre-determined markets were to be further specified (narrowed down in particular) by the regulator in the course of its individual proceedings. The regulatory decision stressed in this context that while the Commission was obliged⁵⁴ to issue its Recommendations and to prepare separate Guidelines on market analysis and the assessment of significant market power⁵⁵, the NRA was obliged to respect their provisions. Nevertheless, the NRA was right to consider itself able to define markets differently to those specified by the Commission due to existing national circumstances⁵⁶. The UKE decision made it clear that the NRA, not unlike the Commission, saw itself as obliged to base its relevant market definition process on competition law principles⁵⁷. The UKE President was therefore bound by Article 4 point 8 of the Competition Act of 2000 applicable in this case, whereby the relevant product market should comprise all those transmission services which are regarded as interchangeable or substitutable by those acting on the demand side of the market (their buyers) by reason of the products' characteristics, their prices and their intended use.

The UKE President concluded on this basis that market 18 as listed in the 2003 Recommendation and repeated in the Polish executive Regulation of 2004, needed to be further segmented. Ultimately, the relevant market was set to solely cover terrestrial transmission⁵⁸ as the only distribution method able of reach the entire Polish population at a relatively low cost, but also on

⁵³ For details on the process preceding the formulation of the Recommendation see in C. Hocepiéd, 'The approach to market definition in the Commission's Guidelines and Recommendation' [in:] P. A. Buigues, P. Rey (eds.), *The Economics of Antitrust and Regulation in Telecommunications. Perspectives for the New European Regulatory Framework*, Cheltenham 2004, pp. 72–79.

⁵⁴ Article 15(1) of the Framework Directive.

⁵⁵ OJ [2002] C 165/6; on the applicability of the Guidelines see K. Kowalik-Bańczyk, 'The publication of the European Commission's guidelines in an official language of a new Member State as a condition for their application: Case comment to the order of the Polish Supreme Court of 3 September 2009 (III SK 16/09) to refer a preliminary question to the Court of Justice of the European Union' (2010) 3(3) *YARS*, p. 306.

⁵⁶ That is so provided they acted in accordance with Article 7 of the Framework Directive – failure to notify a draft measure which affects trade between Member States as described in Recital 38 of Directive 2002/21/EC may result in infringement proceedings being taken.

⁵⁷ See Notice on the definition of relevant market for the purposes of Community competition law, OJ [1997] C 372/3.

⁵⁸ The need to segment market 18 into terrestrial and other transmission services was clearly noted already in the public consultation preceding the 2003 Recommendation and while the

the basis of a very limited offer. The narrowing down of the relevant market was notified to the Commission which requested an additional study of the substitutability between terrestrial and cable transmission⁵⁹. By contrast, analogue and digital services were not separated seeing as the latter was only just emerging⁶⁰. Furthermore, the product market was said to include all types of broadcasting transmission services: diffusion/broadcasting (in Polish: *emisja*) as well as signal transfer from one point to another (in Polish: *dosył*), on the basis of the assumption that they are generally supplied in one package despite the fact that they are not directly substitutable⁶¹. Transmission services for television and radio signal were also not separated and neither were any local or regional markets. As a result, the UKE decision identified a national market for terrestrial transmission as the narrowed down segment of the Polish 'market 18' that was susceptible to *ex ante* regulation.

The introduction of a national 'list' however, caused unnecessary uncertainty in the context of relevant market definition by the NRA. In its comments to the draft regulatory decision, the UOKiK President supported the view that a definition diverging from that of the list is only acceptable if it is assumed that it relates to the same markets⁶². The competition body was very insistent in stressing that according to its analysis of Polish legislation, the authority entitled to define relevant markets for *ex ante* regulation was at that time the Communication Minister and not the UKE President. While this objection is understandable considering the ambiguity that surrounded the relationship between the markets defined in the executive Regulation and those established in individual regulatory proceedings, it is at the same time unfounded. The views of the UOKiK President go against the essence of liberalisation which is based on the assumption that *ex ante* regulation is to be introduced only in those economic fields which are not subject to effective competition – supporting therefore further market segmentation by NRAs. It was not however until very recently that the ECJ explicitly confirmed that the obligation to define

Commission decided to set a very wide definition of market 18, it has subsequently agreed to it narrowing down in particular MS such as Italy or Estonia.

⁵⁹ Satellite transmission was omitted since it is not provided by any of the Polish telecoms operators.

⁶⁰ Similarly to France or Spain; by contrast, far greater segmentation is present in Finland and especially UK where OFCOM divided the markets not only into analogue v. digital radio and digital and analogue v. digital television transmission

⁶¹ The importance of the provision (demand & supply) of service bundles for the definition of relevant markets is stressed by J. Gual, 'Market definition in the telecoms sector' [in:] P.A. Buigues, P. Rey (eds.), *The Economics of Antitrust...*, p. 59.

⁶² Comments of the UOKiK President to the draft decision.

relevant markets is placed by the liberalisation package on the NRAs and not on legislators⁶³.

The European Commission has also recently clarified that the process of identifying markets in its Recommendation ‘is without prejudice to markets that may be defined in specific cases under competition law... Moreover, the scope of ex ante regulation is without prejudice to the scope of activities that may be analysed under competition law⁶⁴’. The antitrust authority has indeed established a different relevant market than the NRA even though it assessed the very same economic segment of the broadcasting transmission services. The UOKiK President agreed with the regulator that terrestrial transmission services cannot be substituted in Poland by cable or satellite primarily by reasons of their characteristics and prices. On the other hand, only diffusion (broadcasting) services were included in the relevant market leaving out signal transfer. Finally, the competition authority established that transmission services for television and radio were forming part of the same relevant market without also establishing any geographical segmentation. Ultimately, the competition protection body defined a national market for terrestrial diffusion (*broadcasting*) services for radio and television programmes⁶⁵.

However, according to Article 4 point 8 of the Competition Act of 2000, a relevant product market comprises all those services which are regarded as interchangeable or substitutable by those acting on the demand side of that market. Unfortunately, both decisions lack a comprehensive analysis of direct demand substitutability of broadcasters that unquestionably represent the buying side of the intermediate, wholesale transmission services market. The UOKiK President was right to criticise the UKE President for placing both clients (broadcasters) as well as competing operators on the demand side of the same market⁶⁶ and yet the antitrust authority later failed to precisely define the vertical structure on the distribution chain in its own decision. Furthermore, while it had justified reservations about the NRA’s decision to include all types of transmission services in the same relevant market; the antitrust body itself failed to fully consider the direct substitutability of demand, focusing instead on indirect substitutability on retail markets and the substitutability of supply.

⁶³ See ECJ judgment of 3 December 2009, C-424/07 *Commission v Republic of Germany*, recital 53-61, 74.

⁶⁴ Commission Recommendation 2007.

⁶⁵ EMITEL rightly argued that the demand for television and radio broadcasting transmission services is not substitutable at all and can therefore not form part of the same product market. EMITEL argued also, incorrectly this time, that the market should not be limited to terrestrial transmission only.

⁶⁶ The EU speaks of multiple wholesale markets for transmission services and access.

There is no demand substitutability on the intermediate market, even though it might very well exist on up-stream access markets seeing as transmission services for radio and television are not substitutable for broadcasters! They have fundamentally different prices and they often use very different infrastructure elements with different levels of compatibility and intended use. Moreover, the market structure itself has proven that some elements of radio transmission infrastructure can be successfully replicated – the creation of an alternative television transmission infrastructure is very unlikely, especially if it was to reach the entire country. Thus, while supply substitutability might indeed exist at least to a certain extent or in some geographic areas and should not be overlooked⁶⁷, there is certainly no demand substitutability for broadcasters. Indeed, the separation of the intermediate wholesale markets into transmission services for radio and those for television is supported by the UK Competition Commission which assessed the same segment of the UK market ‘It would not, in practice, be possible for a provider of radio MTS/NA to act as a competitive constraint upon a hypothetical provider of MTS/NA to television⁶⁸’.

Conversely, while market definition is meant to be based on the same criteria for both regulatory intervention and antitrust enforcement, the approach to it of those subject to parallel proceedings is essentially opposite – while entities subject to an antitrust scrutiny argue for the widening of the relevant markets (the wider the market the lesser the chance to establish market power which is the pre-requisite of the finding of its abuse), they argue for their narrowing down in regulatory proceedings (assuming that the existence of significant market power is prevalent especially in wholesale telecoms markets, the narrower the markets the fewer the market activities subject to the involvement of regulators).

Acknowledging that the completeness and objectivity of the data collected in the course of both proceedings is open to debate, it would be unreasonable to claim that there is a one and only correct relevant market definition applicable to broadcasting transmission services in Poland which one or indeed both of the authorities failed to establish. In reality, both proceedings concerned the very same segment of the distribution chain (transmission services) both trying to establish whether it was competitive and both reaching the conclusion that

⁶⁷ The importance of supply substitutability for the definition of relevant markets in telecoms is noted by J. Gual, ‘Market definition...’ [in:] P.A. Buigues, P. Rey, *The Economics of Antitrust...*; similarly, D. Adamski stresses the importance of price elasticity of demand see D. Adamski, *Europejskie prawo łączności elektronicznej. Telefonia, telewizja, Internet*, Warszawa 2005, pp. 119-120.

⁶⁸ Available at http://www.competition-commission.org.uk/rep_pub/reports/2008/fulltext/537.pdf, point 4.30

the market was still largely under EMITEL's control. Yet the actual market definition established by the UKE and the UOKiK Presidents were neither the same as each other (the regulator included more types of transmission services) nor as the definitions established by the Commission (the Polish authorities limited the assessment to terrestrial transmission services only) nor in fact in line with the examples of far more experienced authorities from different MSs. The resulting differences might be a reflection of analytical mistakes committed by the two authorities such as, for instance, the accumulation of television and radio broadcasting transmission services in the same market which is very questionable considering their complete lack of substitutability for broadcasters. Some divergences however, particularly whether all or only some of the types of available transmission services form part of the relevant market, can be attributed to the different focus of the two proceedings. While the NRA considered the relationship between EMITEL and the market overall, the UOKiK President was bound by the allegations submitted in the antitrust case by a very specific group of EMITEL's clients.

III. State of play: action or reaction?

The fact that the Recommendation of 2003, or indeed the executive Regulation of the Polish Communication Minister issued a year later, identified 18 markets susceptible to *ex ante* regulation does by no means mean that they will always be subject to regulatory intervention. The liberalisation package is based on the very premise that regulatory obligations may be imposed only on those markets that are not subject to effective competition, in other words, where an undertaking with significant market power exists. The NRAs were thus obliged to take action to individually assess which of the relevant markets, pre-determined by the Commission which they themselves further delineated, fulfilled the three criteria of *ex ante* regulation. The presence of high and non-transitory barriers to entry (structural, legal and regulatory) was unquestionable in the Polish broadcasting transmission field. They included extremely high sunk costs associated with the creation of alternative infrastructure and near impossibility of gaining permission to build new masts in urban areas. Existing entry barriers practically precluded the possibility of the structure of the transmission services market to independently evolve towards effective competition in any foreseeable time. The market share of the incumbent was set on a level exceeding 85% in 2005⁶⁹ as it remained the

⁶⁹ Taking into account the fact that the market was defined as including terrestrial transmission only but covering both television and radio transmission services.

only operator able to broadcast both television and radio signals to the entire country. The UKE President concluded that it was unlikely that antitrust enforcement alone could adequately address the profound lack of competitive pressure on the incumbent⁷⁰. The specific and individualistic character of the application of antitrust rules was identified as a decisive factor in this respect and so was the fact that it is triggered by the existence of a prohibited market practice, such as an abuse, an issue much harder to establish than the existence of market power.

At the same time, Article 8(2) of the Polish Act on Competition and Consumer Protection of 15 December 2000⁷¹ contained a prohibition of the abuse of a dominant position. Among the exemplary forms of abuse it listed was: unfair price imposition (Article 8(2) point 1), use in similar agreements of burdensome or dissimilar contractual conditions creating dissimilar conditions of competition for the parties (Article 8(2) point 3) and exploitation (Article 8(2) point 6). These three categories of abuse were named in the original complaint submitted by ZPMP and thus delineated at first the scope of the antitrust proceedings. However, the claimant's later request has narrowed down the scope of the final intervention to a violation of Article 8(2) point 3 only⁷². As a reaction to the practices alleged in the complaint, an antitrust procedure was opened which ended with the adoption by the UOKiK President on 25 October 2007 of a decision establishing that EMITEL has indeed abused its dominant position on the national market for terrestrial broadcasting services for television and radio programmes by way of discrimination.

The incumbent was said to have unjustifiably applied dissimilar contractual conditions that favoured commercial broadcasters (not completely dependent on EMITEL) over PSBs that remain obliged, by the very nature of their public service remit, to provide full coverage – a condition possible to fulfil only on the basis of the transmission network controlled by EMITEL. Unlike commercial broadcasters, PSBs had to acquire transmission services from the incumbent since it was the only operator capable of providing full broadcasting coverage. This fact alone was said to have given EMITEL the leverage necessary to extort unfairly high prices from public broadcasters while it applied a more market oriented pricing policy in its business dealings with private operators. The antitrust decision prohibited EMITEL from the continuation of the

⁷⁰ See M. Szydło, *Regulacja sektorów...*, p. 95.

⁷¹ Journal of Laws 2005 No. 244 item 2080, analogue to Article 9(2) point 5 and 7 of the Act on Competition and Consumer Protection of 16 July 2007, Journal of Laws 2007 No. 50, item 337.

⁷² On the basis of Article 67 of the Competition Act 2000, no longer in effect, UOKiK has thus discontinued the proceedings as far as the other two forms of abuse are concerned.

contested practice and levied on the incumbent a fine of over 19 million PLZ (about 5 million EURO) which was of a size reflecting major abuse.

Seeing as both of the aforementioned relevant market definitions are subject to many potential inaccuracies, it would be futile to try to assess the correctness of the reasoning behind the establishment of market power on any of these markets. Unlike national legislative solutions applied in the context of potential procedural intertwining and relevant market definition, the existence and abuse of market power constitute however far more straightforward variables affecting the relationship between regulation and the enforcement of competition law in practice. Even without an in-depth analysis by the antitrust authority or the regulator, EMITEL was correctly perceived as an operator with significant market power. That fact was confirmed in 2008 when EMITEL became the only subsidiary part of the TP SA Capital Group to find itself on the Polish Treasury's list of companies of key importance to the country because it was the only operator capable to broadcast television and radio signal to the entire country⁷³.

The fact that EMITEL would be subjected to some regulatory obligations was not generally questioned and neither was the realisation that it held a dominant position making it possible for the incumbent to engage in abuse. Indeed, while the scope of the regulatory intervention would have ultimately depended on the state of competition found by the NRA on particular relevant markets in Poland, some regulation of EMITEL's economic activities was seen as inevitable. Similarly, since it was clear that public broadcasters were practically dependent on the provision of transmission services by EMITEL⁷⁴, the incumbent was seen as having the market power enabling it to abuse it at least with respect to those broadcasters that had no alternative but to contract with EMITEL. It remained thus for the competition authority together with those affected, to prove that any of the incumbent's market practices constituted in fact an abuse, that is, an economic behaviour that could not be sustainable by entities without a dominant position.

It is thus fair to say here that a direct intertwining of the two public interventions occurred in Poland because the economic field in question was not generally competitive and because some of the practices of the entity that dominated it were questionable from the point of view of competition law. This realisation is reflected by the comments submitted by the UOKiK President to the draft regulatory decision where the competition authority agreed that EMITEL was indeed in control of significant market power on the relevant

⁷³ www.msp.gov.pl/portal/pl/29/3817/Nowa_lista_spolek_o_istotnym_znaczeniu_dla_porzadku_publicznego_lub_bezpiecznst.html .

⁷⁴ The obligation for the broadcast of public operators to reach the entire population derived from Articles 21-25 of the Broadcasting Act of 29 December 1992 applicable at that time.

market as defined by the NRA. Truthfully, unlike the problems associated with the accurate relevant market definition, the establishment of significant market power or dominance of the incumbent is not as controversial. Even if markets were to be defined much more narrowly that was ultimately the case, EMITEL would most likely have been found to hold market power on at least some, if not even most of them.

VI. Divergent characteristics: from separation to combination?

According to the Polish authorities, the two parallel proceedings concerning EMITEL were fundamentally different. Both stressed the *ex-ante* character of regulatory intervention and its far more general nature. They pointed out that while the UOKiK President assessed and acted on past conduct only, the relevant market definition undertaken by the regulator was fundamentally forward-looking – it was meant to predict the likely future of the scrutinised economic field even if it was primarily based on past data. Finally, the concluding realisation that the regulatory intervention had no bearing on the antitrust proceedings was associated with the difference in the addressees of the respective decisions: while the regulator dealt with the horizontal relationship between EMITEL and other telecoms operators, UOKiK was concerned with the incumbent's vertical relations with broadcasters.

The observations concerning the differences in the character, nature and time horizon of a regulatory intervention as opposed to the antitrust case are valid but the two decisions do not reflect them very clearly. Considering the general features of regulation and antitrust enforcement, their *ex-ante v. ex-post* character is meant to be of key importance. However, the difference that should result from this fact in the emphasis of the two parallel assessments, (whereby regulation concentrates on significant market power and antitrust on abuse), is largely absent. Establishing abuse is not necessary for regulation; it merely confirms the existence of market power. Yet a large part of the regulatory decision was devoted to EMITEL's alleged mistreatment of PSB without any concrete consequences being drawn from this fact. Thus, the expected more general character of regulation was somewhat lost since the UKE President put far too much emphasis on EMITEL's market practices. It is also hard to see whether any of the differences in the establishment of the relevant market contained in the two decisions derived from the more future-oriented approach that the NRA claimed to have employed. The divergence seems more likely to have resulted from a misinterpretation of substitutability patterns rather than the different time horizon of the assessment. Thus, the

diverging characteristics of regulation and antitrust proceedings noted by the authorities are not actually greatly reflected in the two respective decisions.

Moreover, the aforementioned differences cannot be generalised – they refer specifically to the relationship between regulation and a traditional approach to the antitrust scrutiny of abuse applied in Poland at the time. Antitrust assessments of multilateral agreements, or of a planned concentration for that matter, often resemble regulation to a great degree. The conditional approvals that can be issued in such cases have many quasi-regulatory features such as their prescriptive and detail⁷⁵. In practice, it was the unconditional character of the prohibition of a dominant position abuse that notably set apart the two types of public intervention rather than any general differences between regulation and antitrust. Clearly, from among the many practices of interest to competition law, the existence of an abuse is the one most likely to result in parallel proceedings but it is by no means the only one. With the introduction of commitment decisions into the Competition Act 2007, the antitrust authority has now also the option to apply a negotiated solution even to alleged abuse cases and even though the traditional approach is still predominant in Poland, the recent ZAIKS decision⁷⁶ shows the UOKiK President's will to move towards more proactive instruments. If this was indeed the case the separate decisions reached by the regulator and the antitrust authority could have been far more similar.

The above realization is especially important considering that the final differentiating factor noted by the UOKiK President, the diverging addresses of the two decisions, is not actually a reflection of a general difference between regulation and antitrust, or even regulation and the enforcement of the abuse prohibition, but merely a result of the type of abuse established in this case. If the antitrust authority found, in a different set of circumstance, that EMITEL had abused its dominance on an emerging broadcasting transmission infrastructure market, for instance by limiting access to an essential facility such as a transmission mast built in a very remote location⁷⁷, both decisions

⁷⁵ The increasingly prescriptive character of antitrust enforcement is noted in general by commentators such as R. Whish, *Competition law*, 6th edition, London 2008 and in particular by I. Maher, 'Regulating Competition' [in:] Ch. Parker, C. Scott, N. Lacey, J. Braithwaite (eds.), *Regulating Law*, Oxford 2004, p. 194.

⁷⁶ The decision of 24 August 2010 DOC 7/2010 available at www.uokik.gov.pl/aktualnosci.php?news_id=2217 concerned ZAIKS, the 'incumbent' Polish copyright collecting society; it established that a likely violation of Article 9 of the Competition Act 2007 as well as of Article 102 TEFU took place and 'redesigned' some of ZAIKS's contractual provisions; for a detailed assessment of the Polish commitment procedure see T. Kozieł, 'Commitment Decisions under the Polish Competition Act – Enforcement Practice and Future Perspectives' (2009) 3(3) *YARS*.

⁷⁷ At least some elements of EMITEL's broadcasting transmission infrastructure could qualify as an essential facility due to its un-replicable & indispensable character.

could very well have concerned the horizontal relationship of EMITEL with other telecoms operators.

What set apart the two types of public intervention against EMITEL were in practice the legal instruments used. According to the Commission, ‘regulatory obligations must be appropriate and be based on the nature of the problem identified, proportionate and justified in the light of the objectives laid down in Directive 2002/21/EC, in particular maximising benefits for users, ensuring no distortion or restriction of competition, encouraging efficient investment in infrastructure and promoting innovation, and encouraging efficient use and management of radio frequencies and numbering resources’⁷⁸. In that light, UKE imposed on EMITEL nearly every regulatory tool at its disposal. The incumbent was obliged to consider all reasonable requests submitted by other operators for access to its infrastructure (Article 34 PT); to refrain from discrimination (Article 36 PT) and to disclose certain technical data (Article 37 PT). EMITEL was also obliged to use regulatory accounting (Article 38 PT) and cost-based access prices approved by UKE (Article 40 PT). Finally, the incumbent had to prepare a framework offer for its transmission services (Article 42 PT) which was approved, subject to some changes, on the 28 November 2007⁷⁹. Considering the extent of the regulatory obligations imposed on EMITEL, it is worth stressing that UKE was aware of the fact that the incumbent was the only entity burdened with the costs associated with the upkeep and expansion of its infrastructure; these burdens were however said to be nothing in comparison to what other operators would have to spend to build an alternative network.

The regulatory decision identified also three separate forms of ‘abuses’ of EMITEL’s market power but took no direct actions to counteract them. In the opinion of the regulator, the incumbent was greatly independent allowing it to: overcharge public broadcasters and impose on them onerous contractual conditions; discriminate against them; and use cross subsidies whereby it offered its lowest prices on markets subject to some competition but charged extremely high prices on segments which were still monopolised. The NRA noted in particular that prices for low and medium strength transmission are falling while prices for high strength transmission are increasing. Interestingly therefore, the regulator assessed in detail EMITEL’s vertical relationships with broadcasters even though it did not have the authority to do anything about them, seeing as its regulatory competences do not extend to entities other than telecoms undertakings. Thus, while the NRA identified all these issues, it did not place any direct price control obligations on EMITEL even though the Commission had suggested this in its comments to the draft decision. Instead,

⁷⁸ Recommendation 2007, recital 18.

⁷⁹ It is worth noting the wide use of pre-approval even though it is the most intrusive form of public intervention see A. Ogus, *Regulation: Legal Form and Economic Theory*, Oxford 2004, p. 9.

access obligations were placed on EMITEL relating to its infrastructure based on the assumption that if other operators gain wholesale access to its network, the prices for broadcasting services will fall overall.

Considering how difficult it can be to actually prove the existence of abuse in antitrust enforcement (as opposed to the discursive declarations contained in the regulatory decision), the UOKiK President formally established that EMITEL had engaged in a single form of abuse only, that is, discrimination against public broadcasters. The antitrust decision contains no prescriptive elements at all – it is a clear reflection of the enforcement of the unconditional prohibition of a dominant position abuse – its only instruments of intervention are the order for the abuse to be ceased, even though it was already discontinued at the time of the decision, and the imposition of a fine.

While the authorities stressed the division between the two interventions, the assessment presented by both public bodies was similar: they analysed the same economic field, the same entity controlling it and finally, the same practices used by it again the same single group of clients. What set apart the two interventions in practice were ultimately the different immediate effects that they aimed to achieve using the fundamentally diverse instruments of intervention at the disposal of the telecoms regulator and the antitrust authority. However, the unquestionable pro-activeness of the effects of the regulatory decision and the profound re-activeness characterising the antitrust scrutiny of its dominant position abuse⁸⁰ is very much a reflection of the specific case at hand and the procedural choices of the Polish legislator. It is truly a shame that the authorities perceived the differences between them as an argument merely justifying their separation rather than an opportunity to use their complementary nature to open the way to their combination⁸¹.

V. Afterthoughts

Considering the entirety of public intervention against EMITEL, it is fair to say that the telecoms regulator influenced, or at least tried to influence, its horizontal relationship with other telecoms operators on the top-tier infrastructure market while the antitrust authority aimed directly at its vertical relationship with broadcasters on the intermediate wholesale transmission

⁸⁰ Antitrust intervention directed towards multilateral practices and concentrations can have a prescriptive nature in cases of conditional decisions.

⁸¹ On the complementary character of sector specific regulation and antitrust see Ch. Koenig, A. Bartosch, J.-D. Braun, M. Romes, *EC Competition and Telecommunications law*, The Hague 2002, pp. 64-69; see also M. Szydło, *Regulacja sektorów...*, p. 97.

services market. In other words, while the UKE President prescribed its actions up-stream, the UOKiK President restricted its actions on the mid-level wholesale market. EMITEL's freedom to act has therefore been considerably restricted – at least in theory – both in the horizontal and vertical context. However, both authorities intervened in order to improve the situation on the mid-level market – the regulator tried to make it more competitive while the antitrust authority tried to eliminate abuse that persisted because the market still lacked competition.

What conclusions can be drawn therefore about the overall impact of public intervention into the activities of EMITEL? The analysis has clearly shown that Poland's transposition of the Electronic Communication Package was lacking. The first problem related to the uncertainty surrounding the legal qualification of the executive Regulation issued by the Communications Minister that re-listed the markets originally identified in the Recommendation and their impact on the definition of relevant markets by the UKE President. This ambiguity will hopefully now be resolved with the recent PT amendments⁸² that have eliminated the need for an executive Regulation. From now on, the UKE President is explicitly expected to define its relevant markets in light of the Commission Recommendation (Article 23-25 PT) and on the basis of competition law principles.

The second problem associated with Polish telecoms legislation persists to this day and concerns the weakness of its consultation procedure. The antitrust authority is still expected to comment on draft regulatory decisions without the time of the consultation being specified in the PT. The NRA remains free also to choose whether to act on the observations submitted by the UOKiK President or not, unlike the comments received from the Commission which must be respected to the greatest possible degree. A consultation lacking in an 'imperative' seems to complicate the proceedings unnecessarily without ensuring that it will achieve its objective. It seems fair to say that it should either be eliminated or reformed, by law or practice, so as to combat its current shortcomings. Without an amendment in this respect, it is the willingness of the NRA to incorporate the comments of the UOKiK President, or indeed any other body that submitted its observations within the consultation process, that remains crucial in this context. The regulator has made some notable corrections⁸³ to the draft of its 2010 decision showing that some improvement

⁸² The change brings the PT in line with the ECJ judgment C-424/07 *Commission v Germany*; see K. Kosmala, '2009 Legislative and Juridical Developments in Telecommunications' (2010) 3(3) *YARS*, p. 237.

⁸³ E.g. it acted on UOKiK suggestion to redefine the demand side of the relevant market separating alternative operators from broadcasters; point 4.2; see a document available at http://www.uke.gov.pl/_gALLERY/29/25/29255/Komentarz_rynek18.pdf.

in this respect can be achieved by enforcement practice alone. Unfortunately, it remained largely adamant when it comes to its relevant market definition refusing to acknowledge EMITEL's justified objections concerning the lack of demand substitution between transmission services for television and radio. Once again, the NRA's market definition is based primarily on supply substitution⁸⁴.

The new decision adopted by the UKE President shows also that 4 years since the imposition of regulatory obligations including infrastructure access and a framework offer, EMITEL provided little access. Not much has thus been achieved in practice with respect to the competitiveness of the Polish transmission services market. Leaving aside the rather speculative issue of whether the incumbent is actively obstructing the conclusion of access agreements by the application of exaggerated price and prolonging negotiations⁸⁵ or simply acting in accordance with regulatory provisions that lack accuracy, it seems that EMITEL's position on 'market 18' has fallen only slightly since 2006. Conversely, rather than moving to cheaper competitors, some of the business loss experienced by the incumbent might be associated with the fact that some of its old clients (e.g. local broadcasters) have found it cheaper to build their own infrastructure elements than to continue their contractual relationship with the incumbent.

The assessment of the two interventions suggest that the authorities should fully acknowledge that the state of competition found on the Polish terrestrial broadcasting transmission services market differs greatly between its various segments. Local radio transmission is to some extent competitive and does not seem to justify *ex ante* regulations; national transmission services of television are still controlled by EMITEL suggesting that a different access imposing mechanism must be found. The fact that EMITEL TP is still monopolising the television transmission market 4 years after the original UKE decision might suggest that an overall regulation of the entire field (relatively widely defined relevant market that encompasses all types of transmissions services and all types of signal) cannot function properly in such diversified environment. It might however indeed mean that the incumbent is purposefully obstructing access negotiations, in which case an antitrust intervention would be in order.

The market assessment contained in the new regulatory decision shows the ineffectiveness of the measures imposed by the NRA in 2003. SOKiK's recent annulment of the 2004 antitrust decision explicitly condemns the weakness

⁸⁴ Ibidem, point 1.5; note also UKE unconvincing treatment of the UOKiK President's comment in point 4.1.

⁸⁵ UKE seems to believe so on the basis of the data acquired from other market players; ibidem, point 1.8.

of its market definition stage. While it remains to be seen whether the UKE President's new decision will prove more successful in facilitating mid-level competition than its predecessor, the already largely 'past' nature of the practices subject to the original antitrust decision is clear. For that reason, how much can competition gain now from a renewed SOKiK ruling? Perhaps the antitrust authority should address the evident lack of progress on razing in the incumbent by searching for possible abuses on the national top-tier access market and subject them to completely new proceedings based on the essential facilities doctrine⁸⁶. Or perhaps the antitrust authority could use the commitment procedure available now thanks to Article 12 of the Competition Act of 2007 to negotiate a workable solution with EMITEL even though it is known to be cautious to use it in 'evident' abuse cases. If not, the UOKiK President can always look to Article 102 TFEU in conjunction with Article 7 Regulation 1/2003 and bravely embrace the more regulatory-like enforcement instruments available to national antitrust authorities on the basis of the decentralised system of European competition law enforcement.

Still, antitrust enforcement's growing regulatory-like effects are not without dangers and thus an improvement in inter-agency cooperation could be pursued instead as a less controversial solution. Greater cooperation among regulators and antitrust authorities has recently been advocated by G. Monti concerning the relationships of the Commission⁸⁷ and it has been several years already since M. Szydło considered its advantages specifically in the Polish context⁸⁸. This certainly seems to be the simplest way forward to improve the competitiveness of the Polish broadcasting transmission field. What cannot be achieved single-handedly by one public body might succeed when two of them work together – the current 'separatist' approach has clearly shown its ineffectiveness. An institutionalised co-operation on the national level could also diminish the likelihood of a potentially very counterproductive dispute between the NRA and the Commission. The EMITEL experiences seem to suggest that a conscious alliance between the UOKiK President and the UKE President should be advocated whereby they combine, rather than merely

⁸⁶ Essential facilities and discrimination have long since been identified as the point of intersection between antitrust and sector-specific regulation see P. Larouche, *Competition law...*, pp. 165–232; see also J. Majcher, *Dostęp do urządzeń kluczowych w świetle orzecznictwa antymonopolowego*, Warszawa 2005.

⁸⁷ G. Monti, 'Managing the Intersection...'; it is worth noting that Monti correctly predicted the outcome of the Deutsche Telecom case, spelling out the supremacy of European competition law over national regulation but explicitly noting also the weakness of the German, and Spanish NRA as one of the causes for an intervention by the Commission.

⁸⁸ M. Szydło, *Regulacja sektorów...*, p. 315.

respect, their complementary powers⁸⁹. Whether by legal amendments or by a major shift in enforcement practice, a new balance should be found in order for both authorities to achieve their ultimate aim – a truly competitive sector that will benefit consumers. With the judicial confirmation of the Commission's right to take actions on the basis of Article 102 TFEU against autonomous practices of a 'regulated' operator⁹⁰, even EMITEL might now prove more amicable to a coordinated solution domestically.

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⁸⁹ The weaknesses in the institutional designs and lacking coordination between NRAs, the Commission and national courts are also among the current EU goals in telecoms note also by A. De Streel, 'Current and future European regulation of electronic communications: A critical assessment' (2008) 32(11) *Telecommunication Policy Journal*.

⁹⁰ See ECJ judgment of 14 October 2010, C-280/08 *Deutsche Telekom*, which confirms the ruling of the CFI T-271/03 of 10 April 2008 which in turn upholds the Commission Decision 2003/707/EC of 21 May 2003 fining Deutsche Telekom for abusing its dominant position by way of market squeeze even though its wholesale prices were fixed by the NRA and its retail prices were subject to a price cap. The ECJ confirmed however that DT had enough freedom in setting its retail prices to commit an abuse despite the fact that the NRA has capped them.

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