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The Autonomy of Sector-Specific Regulation - Is It Still Worth Protecting? Further Thoughts on the Parallel Application of Competition Law and Regulatory Instruments

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The Autonomy of Sector-Specific Regulation – Is It Still Worth Protecting? Further Thoughts on the Parallel Application of Competition Law and Regulatory Instruments

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CONTENTS

- I. Introduction
- II. Supreme Court rulings
- III. Criticism of the Supreme Court's position
 1. The Supreme Court's position
 2. What is the rationale for the sector-specific legislation?
 - A. The competition community's voice
 - B. The purpose of sector-specific regulation
 - C. The adequacy of regulatory tools to remedy competition problems
 - D. The problem of 'double jeopardy'
 - E. Creating a 'vicious circle'
 - F. No room for autonomous regulatory policy
 3. How to interpret the law?
 - A. Looking for the right perspective
 - B. The Deutsche Telekom case should not be directly applied to Polish circumstances
 - C. The need for a strict interpretation of regulatory and antitrust legislation
 - D. The properly defined relationship between the national sector-specific act and national competition law
- IV. Conclusions

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Abstract

This article sets out to contribute to the on-going discussion regarding the relationship between competition law and sector-specific regulation, as well as the parallel application of competition law and regulatory instruments. Thus, this article attempts to provide a systematic outline of arguments which are conclusive for the proposition that sector-specific regulation must remain fully autonomous, while taking a critical stance with respect to the views of both the Supreme Court and academic lawyers who advocate the supremacy of competition law.

Résumé

Le sujet du présent article est la relation entre le droit de la concurrence et le droit des secteurs régulés, ainsi que l'application parallèle des institutions du droit de la concurrence et des instruments réglementaires. Le but de l'article est de présenter les arguments selon lesquelles les réglementations des secteurs doivent rester autonomes. Il est important de polemiquer avec l'avis exprimé par la Cour Supérieure polonaise et par certains juristes qui croient le droit de la concurrence supérieur aux autres réglementations.

Classifications and key words: abuse of dominant position, sector-specific regulation.

I. Introduction

For many years the relationship between competition law and sector-specific regulation has been a focus of discussion among academic lawyers and practitioners¹. It has also been addressed in numerous court decisions, including by Poland's Supreme Court. Despite such broad interest, the issue is still far from being resolved and there is continued uncertainty about how the existence of sector-specific regulation affects the applicability of competition law.

This article sets out to contribute to that on-going discussion, rather than attempting to sum up its current status. Based on the practical experience of

¹ For a distinction between competition law and sector-specific regulation, characteristics of each of these branches of law, and the purposes which they are supposed to serve, etc., see especially T. Skoczny, 'Ochrona konkurencji a prokonkurencyjna regulacja sektorowa' (2004) 3 *Problemy Zarządzania* 7 et seq. Cf. M. Szydło, *Prawo konkurencji a regulacja sektorowa*, Warszawa 2010; 'Stosowanie przez przedsiębiorstwo energetyczne cen w oparciu o taryfę zatwierdzoną przez Prezesa URE a zarzut naruszenia ogólnego przez antymonopolowego' (2009) 9 *Monitor Prawniczy* and by the same author 'Regulacja sektorowa a ogólne prawo antymonopolowe' (2008) 1 *Problemy Zarządzania* 237 et seq.

representing regulated undertakings in administrative proceedings before the competition authority and regulatory authorities and in the related appeal cases, I am one of those authors who for a long time have advocated the view that sector-specific regulation should be treated as *lex specialis* in relation to competition law and that, therefore, the Polish National Competition Authority (*Prezes Urzędu Ochrony Konkurencji i Konsumentów*; hereafter, UOKiK President) should not have adjudicative power where such power is vested in the relevant National Regulatory Authority (hereafter, NRA)². Until just a few years ago, it seemed that such a view would become more popular, partly because that was where the Supreme Court's case law was apparently headed. But then came the unfortunate decision of the European Commission in *Deutsche Telekom* and things took a complete turnaround³. And I really mean 'unfortunate' not only because I deeply disagree with that decision (as well as with the subsequent affirmative court decisions), but also because these rulings were later eagerly transplanted into the national case law without considering that, for many different reasons (which I will mention later on), they cannot be directly applied in the relations between Polish sector-specific regulation and Polish competition law⁴. In consequence of the

² Cf. especially: J. Baehr, A. Stawicki, 'Prawo energetyczne jako *lex specialis* w stosunku do przepisów ustawy o ochronie konkurencji i konsumentów' [in:] C. Banasiński (ed.), *Prawo konkurencji – stan obecny oraz przewidywane kierunki zmian*, Warszawa 2006, p. 132 et seq., and by the same authors 'Rozważania wokół równoległego stosowania prawa konkurencji i instrumentów regulacyjnych', [in:] C. Banasiński (ed.), *Ochrona konkurencji i konsumentów w Polsce i Unii Europejskiej*, Warszawa 2006, p. 145 et. seq. See also: A. Stawicki, 'Waiting for the Polish *Trinko*', Oil Gas and Energy Law Journal, Special Issue *Antitrust in the Energy Sector (OGEL No. 1/2010)*, A. Stawicki [in:] A. Stawicki, E. Stawicki [ed.], "Act on Protection of Competition and Consumer Interest. Commentary", Warsaw, 2011, p.60 et seq.. A similar view seemed to be agreeable to, inter alia, P. Lissoń, 'Kompetencje organu antymonopolowego a kompetencje organów regulacyjnych w Polsce', [in:] C. Banasiński (ed.), *Aktualne problemy polskiego i europejskiego prawa ochrony konkurencji*, Warszawa 2006, p. 113 et seq. For a critical approach see e.g. C. Banasiński, 'Równoległe stosowanie prawa konkurencji i instrumentów regulacyjnych w Polsce (na przykładzie telekomunikacji i energetyki)' [in:] C. Banasiński (ed.), *Prawo konkurencji...*, p. 93 et seq.

³ Case COMP/C-1/37.451, 37.578, 37.579 – *Deutsche Telekom* (2003) and judgment of the Court of the First Instance T-271/03 *Deutsche Telekom AG v. Commission*, ECR [2008] II-477. For discussions of the Commission's decision in *Deutsche Telekom*, see especially J. Baehr, A. Stawicki, 'Rozważania wokół równoległego stosowania...', p. 146 et seq. or, in foreign literature D. Geradin, R. O'Donoghue, 'The Concurrent Application of Competition Law and Regulation: the Case of Margin Squeeze Abuses in the Telecommunications Sector' (2005) 4 *The Global Competition Law Centre Working Papers Series*; N. Petit, 'The Proliferation of National Regulatory Authorities alongside Competition Authorities: A Source of Jurisdictional Confusion' (2004) 2 *GCLC Working Paper*; C. Veljanovski, 'Margin Squeezes in Telecoms' (2008) 36 *Intermedia*.

⁴ Act of 16 February 2007 on competition and consumer protection (Journal of Laws 2007 No. 50, item 337, as amended), hereafter, Polish Competition Law or PCL. References to 'competition law' are references to the competition law in general.

foregoing recent developments, there is an increasing number of opinions that the applicability of competition law to undertakings from the so-called regulated sectors is not excluded by the fact that their conduct is authorized by (grounded in) specific statutory provisions, as long as the entity in question is left with some sort of 'discretion'. Under those views, the existence of such 'discretion' makes it possible to challenge business conduct as inconsistent with Poland's Competition Law.

The author who takes this view to the extreme is M. Szydło⁵, who argues that regulatory authorities should be 'bound' by the rules of competition law. This proposition has led him to conclude that if a regulated undertaking's conduct (and which is authorized by the regulator or regulatory framework) has consequences that are contrary to competition law, then the competition authority is permitted to question such conduct⁶. This is supposed to hold true even where the undertaking applies rates or prices under a tariff approved by the regulator. M. Szydło further concludes that a regulated company should take its own measures to make sure that its conduct is in compliance with competition law, even when applying approved tariffs, for if the application of an approved tariff leads to anticompetitive effects, the company may become liable under competition law.

Even though not quite as strongly articulated, a similar line of thought can be seen to surface in case law, including the most recent cases where the Supreme Court addressed the matter⁷. The Supreme Court also seems to be increasingly more prepared to hold that the risk of antimonopoly intervention can be avoided only in the case of a very detailed, or even thorough, regulatory framework that does not leave the subject businesses any room for manoeuvre (I will come back to this issue further below).

This reasoning, no doubt heavily inspired by the *Deutsche Telekom* decision and the related case law, and which, unfortunately, seems to be increasingly widespread, commands us to seriously consider if there is still any purpose

⁵ Interestingly, M. Sieradzka, the author of another article published in the same source – *Monitor Prawniczy* (and co-editor of the whole publication), seems to follow a contrary approach when she writes that: 'According to the principle *lex specialis derogat legi generali*, the Energy Law excludes the application of anti-trust law. In many situations, the conduct of a utility company will be lawful even if the Competition Act treats it as anticompetitive'. See M. Sieradzka, 'Praktyczne problemy rozgraniczenia kompetencji pomiędzy Prezesem UOKiK oraz Prezesem URE na podstawie art. 8 PrEnerg' (2009) 9 *Monitor Prawniczy*. The references to 'Energy Law' are references to Act of 10 April 1997 – Energy Law (consolidated text: Journal of Laws 2006 No. 89, item 625, as amended).

⁶ And its intervention may be enabled not only by EU law, but also by the national competition law on an autonomous basis.

⁷ See judgement of the Supreme Court of 15 July 2009, III SK 34/08.

in defending the autonomy of sector-specific regulation⁸. The issue is in fact much more serious and our discussion should basically be about whether defending such autonomy generally is at all worthwhile. If the regulated undertakings (and other undertakings operating on regulated markets) cannot trust regulatory action but must instead take their own measures to check whether they are in compliance with competition law in whatever they do, then maintaining sector-specific regulation tends to have a rather limited justification. Regulation is a solution that is neither simple to use nor cheap to operate. It is thus only logical to ask if we are still better off using instruments whose importance has decreased so dramatically.

Because, despite all the setbacks, I firmly believe that there is a purpose in sector-specific regulation, I will try to outline below certain arguments which in my opinion do not allow us to take for granted the increasingly visible domination of competition law over sector-specific special legislation. My further discussion will first of all turn to the evolution of the Supreme Court's approach (as its decisions will have the greatest impact on the Polish landscape over the next years). In the next section of this paper I will attempt to provide a systematic outline of arguments which I think are conclusive for holding that sector-specific regulation must remain fully autonomous, while taking a critical stance with respect to those views of both the Court and academic lawyers which advocate competition law supremacy⁹.

II. Supreme Court rulings

As has already been mentioned, the existing controversies are reflected in Supreme Court rulings on these issues. Consequently, it is worthwhile having a closer look at the Court's views in this respect. The key decisions here are most certainly: the resolution of the Supreme Court of December 7, 2005, III SZP 3/05; the judgment of the Supreme Court of October 19, 2006, III SK 15/06, and the judgement of the Supreme Court of July 15, 2009, III SK 34/08.

⁸ Whenever in this article the concept of 'autonomy' of the regulatory regime or of the regulator is discussed, this applies not to their formal autonomy or independence, but rather to the autonomy of the decision-making process. The key issue is whether the regulator is free to autonomously shape its own regulatory policy or whether such policy should rather be inferior to the goals of competition law.

⁹ Note also that the discussion below draws heavily from my article 'Waiting for the Polish *Trinko*', published in Oil Gas and Energy Law Journal Special Issue *Antitrust in the Energy Sector* (OGEL No. 1/2010) as well as from the commentary to Art. 3 of the Polish Competition Law published in A. Stawicki, E. Stawicki [ed.], "Act on Protection of Competition and Consumer Interest. Commentary", Warsaw, 2011, p.60 et seq.

All the foregoing verdicts resulted from appeals against the decisions of the Polish Competition Authority¹⁰.

The Supreme Court's resolution comes first in chronological order and is on a path towards finding that to the extent the sector-specific act¹¹ governs matters related to competition on the given market, under the Polish legal system it is of a specific nature (*lex specialis*) in relation to the general competition protection rules applicable under the PCL (*lex generalis*). Therefore the application of sector-specific legislation is an obstacle for the application of the provisions of the Polish Competition Law. Consequently, there is also, according to the Supreme Court, a division of legal powers between two separate central government administration bodies. Each of the two bodies (i.e., the regulator and the competition authority) may only act within its remit and may not interfere with the statutory powers of the other, though they are also required to cooperate with each other while performing their respective tasks.

The Supreme Court seems to have expressed a different view in the decision of October 19, 2006. In this case, as in the previous one, the starting point for the Court's discussion is the partial overlap between the Telecommunications Law and the Polish Competition Law. Still, the Court held that this is not a sufficient reason to find that the relationship between the PCL and the sector-specific acts falls within the ambit of the classic *lex specialis derogat legi generali* rule. The Supreme Court expressed the opinion that the provisions of the Polish Competition Law apply to all markets, including that of telecommunications, unless a specific act generally excludes the application of the Competition Law or compels a form of conduct which should be deemed a restrictive practice from the perspective of the Competition Law's provisions. Thus, save as expressly provided by statutory provisions, Polish Competition Law cannot be disapplied by the mere fact that provisions of another act govern the conduct of entrepreneurs or lay down specific dispute resolution procedures.

The two rulings seem to be going in two different directions. The reason behind this difference may, to a certain extent at least, reflect the facts of the two cases, which were essentially different. In the first case, the one to which the Supreme Court's resolution of 2005 relates, the crux of the dispute and the essence of the practice which was found anticompetitive was the refusal of access to the infrastructure (network) in a specific instance. In the other

¹⁰ The decisions in question referred to the conduct of undertakings preceding EU accession (i.e., prior to 1 May 2004), therefore all three cases had been decided by the Competition Authority and by the Courts solely on the grounds of Polish national law. There was no question of the application of the Community law rules to the potentially abusive conduct.

¹¹ Here – the Act of 16 July 2004 – Telecommunications Law (Journal of Laws 2004 No. 171, item 1800, as amended, hereafter as Telecommunications Law.

case, the one to which the Supreme Court's judgement relates, the practice was not so much a refusal of network access, but evasion of contracts for network access to be made with numerous entities, also in situations where the regulator declared that there was an obligation to enter into such a contract. The Supreme Court found such conduct of the dominant undertaking to be impeding competitors' access to the market. In the context of the foregoing facts of the two cases, an attempt may be made to perceive the Supreme Court's judgment more as an addition to and elaboration upon the points made in the Court's resolution. This is because the Court seems to be highlighting the need to define the practice properly. In particular, the essence of the practice may not be simply defined as 'refusal of access to the network' in a specific instance, as such conduct must be assessed solely on the basis of sector-specific provisions. If it were made possible to assess it also under the Polish Competition Law, this would actually undermine the purpose of sector-specific regulation. Such would also pose a risk of contradictory decisions by state authorities. The Supreme Court's judgement seems therefore to be leading to the conclusion that it is not the refusal of access to the network in a specific instance as such, but the refusal-related conduct which may be penalized, if it meets the conditions to be categorized as abuse of a dominant position. For example, a discriminatory refusal of access may be penalized in a situation where the network undertaking relies on sector-specific regulation to deny access to some of the entities operating on the market and provides access to its infrastructure to some entities in a discriminatory fashion, which adversely affects competition on the related market. Similarly, refusal of network access may be found abusive if it forms part of a broader anticompetitive strategy of deterring access to the market or foreclosing the existing competitors¹².

¹² The following part of the statement of grounds for the Supreme Court judgment is crucial here: 'To the extent governed by the PCL the only purport of Art. 46, Art. 79, Art. 81(4) and Arts. 83–85 of the Telecommunications Law is that – as follows from the Supreme Court resolution of 7 December 2005, III SZP 3/05 – these provisions exclude a claim of abuse of a dominant position by refusal to provide a specific entrepreneur with access to the essential facility. This is because they provide that access to the network may be obtained as a result of interference by the President of RATC [the NRA for the telecoms sector – AS]]; consequently, impossibility to obtain access to the essential facilities, which is one of the prongs of the test required to effectively invoke the essential facilities doctrine, is not met (see US Supreme Court judgment in *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko*, L.L.P. (540 U.S. 398 (2004)). However, this does not disapply Art. 8(1) in conjunction with Art. 8(2)(5) of the Competition Law under the circumstances of the instant case. As mentioned above, it was 'the plaintiff's evasion of cooperation agreements between operators' which was considered to have been a practice of preventing the development of conditions required for competition to arise or grow (the Competition Authority decision of 5 January 2004 [...]). The plaintiff's conduct affected a wide range of market players, thus blocking practically all possible new entrants and harming consumers' interests. This is the difference between the facts of this

Unfortunately, the foregoing ambiguities have not been clarified with the Supreme Court's judgment of July 15, 2009. The vast majority of the Court's reasoning in the statement of grounds seems to show that the Court does not agree with the view according to which the regulatory law (here: Energy Law) could be considered to be *lex specialis* in relation to the Competition Law. This is because, in the Court's opinion, the Energy Law deprives a certain category of entities of a claim for conclusion of a transmission services contract under the sector-specific legislation. This does not mean, in the Supreme Court's opinion, that it is prohibited by the regulatory regime to provide access to transmission infrastructure in circumstances other than those set out in the law; accordingly, there is no reason to disapply antitrust provisions to refusal to provide such service in said circumstances. In some other sections of its reasoning the Court states that, 'other than to the extent arising from third party access rules, network undertakings are not required to provide access to the network under sector-specific legislation. However, this does not mean that it was contrary to the Energy Law to enter into a gas transmission contract for imported or domestic gas with an entity which was not yet entitled to make a transmission contract'. Apparently the Court believes that, if there is no clear prohibition of certain conduct in the sector-specific regulation, a possibility is opened for interference by antitrust authorities. Consequently, the Court's discussion as aforesaid apparently leads to a conclusion that sector-specific legislation in fact does not exclude the possibility to assess the network undertaking's conduct, in light of the competition laws. More specifically, such legislation could exclude the application of the PCL only where it expressly prohibits or compels certain conduct without allowing the network undertaking any discretion. That such understanding of the ruling is correct may be confirmed by another passage from the grounds, where the Court finds that 'the above shows that access to the transmission network has not been regulated comprehensively in the Energy Law, hence the Energy Law was not *lex specialis* with respect to Competition Law during the period which the imported gas transmission related to'. Accordingly, this finding may imply that energy law would be *lex specialis* in relation to Competition Law to the extent the energy law regulations were comprehensive (that is to say, it would not allow any discretion).

At the same time, the Supreme Court in its judgement does not prejudge if the refusal to access the network constituted abuse of the natural monopoly of the network company under the Polish Competition Law. The Court seems to

case and of the one which the Supreme Court's resolution of 7 December 2005 (III SZP 3/05) referred to. Therefore, the telecommunications operator's conduct which involved impeding market entry by independent dial-up Internet access providers may be assessed in terms of the Competition Law'.

accept that the level of (un)development of the gas market, that translated into overall regulations related to the functioning of that sector of the economy on the date of the refusal, could justify the position of the network undertaking. Such refusal could have been therefore objectively justified, which excludes qualifying it as an anticompetitive practice on the basis of the Competition Law¹³.

III. Criticism of the Supreme Court's position

1. The Supreme Court's position

The foregoing views of the Supreme Court, which were – in the last two cases discussed above – inspired by reasoning adopted in the *Deutsche Telekom* case, may suggest that this is the direction that Polish courts will take. This must prompt serious concern since the motives behind the decision of the Court may raise substantial doubts.

This issue requires special attention, therefore it is discussed in more detail below, with focus on two major issues. First, the reasoning of the Supreme Court goes against the rationale (*ratio legis*) of the sector-specific legislation and such rationale should always be taken into account when interpreting provisions of law; second, the Court does not follow in a satisfactory way the rules for interpreting legal text that come into play when the provisions of different pieces of legislation are in a conflict with each other.

2. What is the rationale for the sector-specific legislation?

A. The competition community's voice

When we go back in time and observe the reactions of the competition community to the Commission's and CFI's rulings in the *Deutsche Telekom* case, we shall see that many authors expressed concerns that this line of reasoning is undermining the proper functioning of the regulatory regimes. Those comments are undoubtedly also valid for the Polish situation, as the

¹³ The Court seems to ignore in its reasoning the fact that the level of the market's development had already been taken into account by the legislator on the stage of shaping the energy sector regulations. That was the reason why the Energy Law allowed for the refusal of network access in some circumstances. Therefore the provisions of the sector regulation should be perceived rather as 'codified' objective justification for the refusal.

reasoning of the Supreme Court seems to go against the rationale for the existence of the sector-specific legal regimes in the Polish legal system.

B. The purpose of sector-specific regulation

Sector-specific (regulatory) acts are addressed to businesses which either operate in a natural monopoly (network undertakings) or under conditions of limited competition. This is precisely why such entities need to be subjected to the regulatory regimes¹⁴. Accordingly, sector-specific acts are designed to provide a legal framework for the conduct of businesses which operate in a situation of limited competition, frequently including natural monopolists. To put it differently, they are addressed only to undertakings which, given the specificity of their business, remain dominants or monopolies on their markets.

For the foregoing reasons, it is the sector-specific acts which define – in relation to regulated undertakings – how the monopolist is to behave in order to create as much room for competition as possible¹⁵. The extent to which such an undertaking is made subject to competition (within the framework of the regulatory regime) is a result of many various factors and political decisions and therefore it may evolve, depending for example on the stage of market development or the degree of its liberalization.

Given the role it is to play and its individual character, sector-specific legislation is much more detailed than antitrust law. For instance, access to the gas or electricity network is governed both at the statutory level (by numerous provisions of the Energy Law Act) and at the level of secondary legislation (by the so-called system regulations¹⁶) when in the competition law the only basis of the prohibition to abuse the dominant position is Article 9 of the Polish Competition Law, which merely repeats the wording of Article 102 of the Treaty on the Functioning of the European Union (hereafter, TFEU). Therefore, as it is rightly indicated by some authors, ‘the main advantage of ex ante regulation is that it provides a greater degree of certainty to incumbent operators’¹⁷.

¹⁴ See e.g. T. Skoczny, ‘Ochrona konkurencji...’, p. 9 et seq. and M. Szydło, *Prawo konkurencji a regulacja...*, p. 13 et seq. J. Majcher also believes that regulation is a substitute for a competitive market (cf. J. Majcher, ‘Dostęp do urządzeń kluczowych w niezależnych regulacjach sektorowych’ (2004) 3 *Problemy Zarządzania*. Cf. also A. Szablewski, ‘Strukturalny aspekt regulacji prokonkurencyjnej w elektroenergetyce’ (2008) 1 *Problemy Zarządzania* pp. 205–206.

¹⁵ Accord: T. Skoczny, ‘Ochrona konkurencji...’, p. 17.

¹⁶ In Polish: rozporządzenia systemowe.

¹⁷ See D. Geradin, R. O’Donoghue, ‘The Concurrent Application...’.

C. The adequacy of regulatory tools to remedy competition problems

Because of its very nature, the regulatory regime is also better placed to remedy certain competition problems, as the regulatory authorities are usually empowered to apply, on an *ex ante* basis, detailed, tailor-made solutions that are not available for the competition authorities¹⁸. Another problem with the tools of competition law is that the competition watchdogs have neither the supervisory tools and nor resources necessary to safeguard proper implementation of their decisions aimed at remedying the problem in the regulated industry. They may also lack the necessary knowledge of the functioning of the regulated sector, which may result in the adoption of mistaken decisions¹⁹.

D. The problem of 'double jeopardy'

The reasoning adopted by the Supreme Court deviates from the foregoing basic features of sector-specific legislation. In consequence it undermines the legal certainty the regulatory regime is supposed to offer to market participants. This problem has been very well described by C. Veljanovski, who, when commenting on the *Deutsche Telekom* case, stressed that 'a dominant network operator appears now to be subject to 'double jeopardy', even when in full compliance with its regulatory obligations. The case law requires a dominant network operator to ensure that all its regulated margins over which it has some pricing flexibility allow equally efficient competitors to make an adequate return. If this is not done, and the regulator refuses to act, then the operator will infringe competition rules and will be open to fines and possible damage claims (...)'²⁰. This view holds true also in Poland, if the reasoning of the Supreme Court is followed. The simple fact that the regulated undertaking acts within the framework of the sector-specific regulation does not make it immune from the intervention of the competition authority, unless the regulatory regime leaves no room for manoeuvre at all (which is seldom the case). Therefore a 'double test' is required to assess whether its actions are legitimate: first under sector-specific legislation and then under competition law. This means high legal uncertainty²¹.

¹⁸ Cf. T. Skoczny, 'Ochrona konkurencji...', pp. 16–17.

¹⁹ See for example N. Petit, 'Circumscribing the Scope of EC Competition Law in Network Industries? A Comparative Approach to the US Supreme Court Ruling in the *Trinko* Case' (2004) 5(3–4) *Journal of Network Industries*.

²⁰ See C. Veljanovski, 'Margin Squeeze...'. See also discussion of this problem by D. Gerardin and R. O'Donoghue in: 'The Concurrent Application...'. The authors propose some solutions for this problem under Community law. See also N. Petit, 'The Proliferation...'.
²¹ See N. Petit, 'The Proliferation...'. For the relationship between regulation and commercial certainty, see also T. Skoczny, 'Ochrona konkurencji...', p. 17.

E. Creating a 'vicious circle'

The foregoing approach to conflicts between the regulatory regime and competition law may also lead to a 'vicious circle'. This is again precisely put by C. Veljanovski, who indicates that 'the justification of sectoral regulation is the inadequacy of competition law. That is sectoral *ex ante* remedies and price controls are used because (a) *ex post* competition law is claimed to be too slow and uncertain to provide an effective remedy; and (b) it is not a legitimate goal of competition law to regulate prices. (...) The DT decision turns the justification for separate regulation (...) on its head. Regulation which is supposed to fill the gaps arising from inadequate competition rules, is subject to competition law to plug regulatory gaps'²².

F. No room for autonomous regulatory policy

Such reasoning defeats the purpose of any autonomous regulatory policy with respect to undertakings concerned. But, as even those advocating the *Deutsche Telekom* approach admit, regulatory frameworks are informed by other values (and designed to attain other goals) than the 'hard' competition law²³. In particular, liberalization efforts to open the markets to maximum possible competition are just one of the purposes behind regulatory regimes (with other purposes being quite on a par, such as protection of end customers or promotion of environmentally-friendly energy generation methods). Furthermore, sector-specific regulation often incorporates state regulatory policy agendas, which by necessity means that there are interim periods when regulatory authorities must authorize conduct that could otherwise be questionable under competition law (e.g., denial of service to a customer who, under sector-specific legislation, is not yet entitled to use it). If we accept that the competition authority may review regulatory decisions in the sense of being empowered to challenge anti-competitive conduct of regulated undertakings, then we undermine the justification for having any autonomous regulatory policy. That is because, in order not to allow its decisions to be negated by the competition authority, the regulator will have to actually depart from its autonomous policy goals and focus rather on pursuing competition policies (i.e., on ensuring that its decisions conform to the goals of antimonopoly legislation). This strips the regulator of its power and thus places in question whether the

²² See C. Veljanovski, 'Margin Squeeze...'. The problem of price regulation as such and of its influence of the competitiveness of the market in question is outside of the scope of this text.

²³ Cf. especially M. Szydło, 'Regulacja sektorowa...' and by the same author *Prawo konkurencji a regulacja...*. An interesting approach can be seen in U. Böge, who goes so far as to note the existence of 'regulation which restricts competition', see U. Böge, 'Nadzór konkurencji i regulacja sektorowa: podział ról i kooperacja' [in:] C. Banasiński (ed.), *Prawo konkurencji...*, p. 116 et seq.

regulator will in such cases remain autonomous (with autonomy being, after all, one of the fundamental tenets of regulation as such)²⁴.

3. How to interpret the law?

A. Looking for the right perspective

As already indicated, the problem of the relationship of the sector-specific regulatory tools and competition law must be seen not only from the perspective of the *ratio legis* of the regulatory regime, but also in the context of the rules for interpreting the national legislation applied in the Polish legal system, as this exercise sheds a lot of light on the merits of the issue discussed here²⁵.

B. The *Deutsche Telekom* case should not be directly applied to Polish circumstances

First of all, it should be noted that it is not possible simply to use the arguments set forth in the *Deutsche Telekom* case directly in Polish conditions. It is not to be forgotten that the main reason why a ruling such as the one in *Deutsche Telekom* could be passed was that the sector-specific legislation governing the company's conduct derives from directives and national legislation enacted therein. Competition rules, on the other hand, are laid down in the Treaty on the Functioning of the European Union which is the primary EU legislation. Therefore it could be argued that the national legislation may not render provisions of primary legislation, such as Article 102 TFEU ineffective, especially whenever regulatory measures are not used effectively or are insufficient to ensure compliance with Article 102 TFEU. This may provide grounds for the conclusion that EU competition law takes precedence over national legislation. This part of the argument was very clearly emphasized in both the Commission decision and in the CFI ruling²⁶.

²⁴ For regulator autonomy, see especially T. Skoczny, 'Ochrona konkurencji...', p. 19.

²⁵ For the discussion of this issue, see also A. Stawicki in A. Stawicki, E. Stawicki (Ed.), "Act on Protection of Competition..." op. cit., p. 60 et seq.

²⁶ Naturally, this does not resolve the issue of the relationships between EU competition law and sector-specific regulation. The issue is too broad to be discussed here. I will only briefly mention that both the Commission's decision and the subsequent court rulings give rise to substantial doubt. But these decisions and rulings pertain to a specific factual matrix so we should not draw any definitive conclusions until we have more judicial authority on similar cases (e.g. Case COMP/38.784 – *Wanadoo España v. Telefonica* [2007]). Even if the *Deutsche Telekom* reasoning ultimately wins, various authors have proposed certain practical solutions permitting sector-specific regulation to keep its autonomy (cf. e.g. N. Petit, 'The Proliferation...', p. 25 et seq.).

The hierarchy of legal rules underlying the Polish Supreme Court's adjudication is fundamentally different. Sector-specific legislation and the Polish Competition Law are at the same legislative level in national law: these are acts of Parliament, thus having equal status. Thus, there is no reason to believe that the Polish Competition Law is some sort of 'super-legislation' that can make other national legislation ineffective. Losing sight of this fundamental difference is the major sin committed by the proponents of the theories which rely on the *Deutsche Telekom* case ruling.

C. The need for a strict interpretation of regulatory and antitrust legislation

As long as an interpretation of the law (the regulatory and also antimonopoly provisions) applicable to network undertakings may provide a basis for certain imperative provisions or prohibitions, it should be also assumed that both laws must be interpreted strictly and, more specifically, that their liberal interpretation is not acceptable. This is because there are all sorts of penalties, including very large fines, for violation of both pieces of legislation²⁷. Therefore if relevant sector-specific legislation specifies detailed conditions for access to the network, one should rather assume that the regulatory regime is complex (comprehensive) and covers the whole spectrum of possible situations, than assume that there are areas not covered by the regulatory regime and therefore open for competition law intervention.

D. The properly defined relationship between the national sector-specific act and national competition law

What is of crucial importance is that the Supreme Court's ruling leaves aside the issue of the addressees of the Energy Law and the Competition Law. Yet it is crucial for the interpretation process to determine the addressee of such laws, or, more specifically, of the rules of conduct which may be derived from these laws.

As already indicated, sector-specific (regulatory) acts are addressed to businesses which either operate in a natural monopoly (network undertakings) or under conditions of limited competition. This refers in particular to the provisions governing network access: they are addressed to network undertakings and the network business is always carried on in a situation of (network) natural monopoly.

²⁷ Therefore, these provisions are more and more frequently said to be of a criminal (penal) or quasi-penal nature. Such provisions may not be open to doubt, and they also may not be subject to liberal interpretation.

This means that if monopolist's conduct conforms to the regulatory act, that is to say when such conduct is within the framework of the act, it must be considered to be in accordance with the law. Hence, in a purely national context, there is no reason to assess it additionally in the context of the PCL as the lawmakers authorized said conduct and provided the basis for it in the law. If there is some sort of decisional discretion left to the regulated undertaking, this is also because of the decision of the legislator to shape the regulatory regime in this way.

The above argumentation of the Supreme Court may be presented in a simplified form as follows:

Table 1. The reasoning of the Supreme Court

[1] An energy undertaking	[2] may refuse network access as long as the conditions for such refusal under the Energy Law are met	[3] unless the energy undertaking has a dominant position on the market and it is not explicitly prohibited from providing transmission services by the sector-specific act even though the conditions for refusal under the Energy Law are met	[4] as the refusal will then be justified only provided that it is not an abuse of a dominant position on the market
[the starting point of the evaluation of the undertaking's behaviour under of the sector-specific provisions]	[first test – refusal to be justified under sector-specific law]	[the starting point of the evaluation of the undertaking's behaviour under the Polish Competition Law]	[second test – refusal not to violate the Polish Competition Law]

However, the above assumptions fail to take account of the fact that sector-specific legislation relating to network access is addressed solely to natural monopolies (network undertakings). Hence the foregoing table needs to be modified as follows:

Table 2. Potential problems resulting from the reasoning of the Supreme Court

[1] An energy undertaking which is a natural monopolist	[2] may refuse network access as long as the conditions for such refusal under the Energy Law are met	[3] unless the undertaking it is not explicitly prohibited from providing transmission services by the sector-specific act even though the conditions for refusal under the Energy Law are met	[4] as the refusal will then be justified only provided that it is not an abuse of a dominant position on the market
[the starting point of the evaluation of the undertaking's behaviour under the sector-specific provisions]	[first test – refusal to be justified under sector-specific law]	[the need for additional assessment under the Polish Competition Law]	[second test – refusal not to violate the Polish Competition Law]

It would seem the Supreme Court mistakenly assumes that provisions of one piece of legislation may authorize a monopolist to refuse a certain conduct (here: refuse network access) by setting detailed conditions for such refusal in precise terms (and, importantly, penalizing an unjustified refusal to provide the service), while another legal act (the Competition Law) may provide grounds for holding that the refusal – which was justified under the sector-specific legislation – contravened the other act and is thus unlawful. Such a line of reasoning defeats the purpose of sector-specific regulation and is contrary to the principle of a rational legislator. Also, the fundamental rule-of-law principles do not allow for penalizing under one piece of legislation a conduct which is expressly authorized by another legal act of the same status in the legal hierarchy.

Below I present the proper reasoning based on the assumption that a detailed regulation of network access by sector-specific legislation makes it impossible to assess such conduct under Competition Law.

Table 3. The relationship between the Polish Competition Law and the regulatory regime

[1] An energy undertaking	[2] which has a dominant position on the market (is a natural monopolist)	[3] is authorized to refuse network access as long as the conditions for such refusal under the Energy Law are met	[4] such authorized refusal is justified (legitimate) and thus it should not be in any circumstances subject to separate assessment under Competition Law
[the starting of the evaluation of the undertaking's behaviour under the sector-specific regulations]		[the only test – refusal to be justified under sector-specific law]	[possibility for additional test under the Polish Competition Law is excluded]

What stems from the foregoing analysis is that a form of conduct which is authorized by the sector-specific act (and is therefore legitimate) should not be in any circumstances considered as an anticompetitive practice (abuse of a dominant position) under national Competition Law. This is because the sole criterion of its lawfulness is compliance with the sector-specific legislation.

IV. Conclusions

When in 2006, Ulf Böge, at that time the President of German Federal Cartel Office, published his article on the relationship between competition law and sector-specific regulatory regimes, he emphasized the threat of an anticompetitive effect of regulation. He argued that the threat existed because ‘competition does not have its lobby’ in the regulated industries²⁸. Now, nearly five years later, the landscape is entirely different. It is regulation that does not have a sufficiently strong lobby and it is regulation that is at risk of being pushed aside. This is an unavoidable consequence of its increasingly limited autonomy.

As in any issue, here, too, choice is the order of the day. After all, it is not that there is one single prevailing model for relations between competition law and sector-specific regulation, so different systemic solutions are possible in this area as well. However, if we wish to maintain the parallel existence of both sector-specific regulation (with the enforcing regulators) and the ‘general’ competition law, then I believe we should abandon the way to disempowerment of regulation and to making it merely a tool to serve the purposes of competition law. Above all, we cannot allow situations whereby huge and costly regulatory efforts are stripped of their practical meaning in the sense of not being capable of providing the comfort of legal compliance, with regulated undertakings having to continue to analyze their entire conduct anyway, as if in fact no regulation effectively occurred. That would undoubtedly be the worst solution possible. On the one hand, we would have the regulatory wheels in motion (and this gives rise to substantial costs which, one way or another, are finally incurred by end customers), but on the other, this motion would be ‘empty’ in the sense of not being able to give regulated undertakings any point of reference. Undertakings would basically be in the same position as if there were no regulation because, at the end of the day, they must comply with competition law anyway.

Thus, if we decide to maintain the present dualistic system (and I guess no one today would deny that it is sensible), we must strive to keep it meaningful. One condition necessary for that to happen is the real, not sham, autonomy of sector-specific regulation, with the power to pursue autonomous regulatory policies rather than the requirement to use regulatory instruments for competition policy purposes. It therefore seems that there is a clear need to commence lobbying efforts to ensure that regulatory legislation has its proper place in the Polish legal reality.

²⁸ See U. Böge, ‘Nadzór konkurencji i regulacja...’, p. 117.

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