This book examines and offers critical comments on the evolution of national law and regulatory practice concerning the telecommunications sector in Poland. The Telecommunications Law Act was promulgated in 2004 with the intention of finally harmonizing the institutional and substantive laws regulating Polish telecommunications with the EU regulatory framework on electronic communications. The analysis of the compliance with, adaptations to and deviations from the standard rules of the EU regulatory framework is an important part of this book.

From the book reviews:

This pioneering joint study edited by Prof. Stanisław Piątek is devoted to key legal aspects of regulation in the telecommunications sector. The authors thoroughly analyze the normative context, broad selection of judicial decisions and commentary output in this sector. For this reason it will be an interesting reference work for academics, practicing lawyers and regulatory authorities in electronic communications throughout Europe.

Prof. Kazimierz Strzyczowski
University of Łódź

This book presents the main elements of the regulatory practice in the telecommunications sector, as well as specific experiences and problems encountered in the implementation process of the EU regulatory framework in Poland. The selection of topics follows the main course of European discussion on electronic communications law. Therefore this book delivers a lot of comparative materials for a foreign reader. The dominating approach in this book refers to the regulatory impact and presents the role of "law in action" in the telecommunications sector.

Prof. Włodzimierz Szpringer
Warsaw School of Economics (SGH)
Telecommunications Regulation in Poland
CARS came into being by the order of the Council of the Faculty of Management of the University of Warsaw of 21 February 2007. It was founded in accordance with para. 20 of the University of Warsaw Statute of 21 June 2006 as an ‘other unit, listed in the faculty rule book, necessary to achieve the faculty’s objectives’. CARS conducts cross- and inter-disciplinary academic research and development as well as implementation projects concerning competition protection and sector-specific regulation in the market economy. It also prepares one-off and periodical publications, and organises or participates in the organisation of conferences, seminars, workshops and training courses. In the future CARS will also act as a patron of post-graduate studies.

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

The contributions cover selected elements of Poland’s regulatory practice that were of special importance for the development of the national telecommunications market and proved relevant, at the same time, for the implementation of EU rules. A significant part of this book is devoted to the identification and description of measures that were adopted by national legislative and regulatory authorities in order to take into consideration justified national circumstances while implementing the EU regulatory framework. European rules leave a number of significant issues that have to be resolved at the national level. The boundary conditions, resulting from the electronic communications directives, became even broader at
the current development stage of new generation access networks. The contributions aim to address both the theoretical and practical problems encountered in the practice of the national regulatory authority – the President of the Electronic Communications Office.

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

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

Stanislaw Piątek

Warsaw, December 2013
I.

REGULATORY ENVIRONMENT
1. The structure of telecommunications policy

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

Figure 1.
The three types of policies differ on the issue of instruments used by public authorities while pursuing public goals in the telecommunications sector. Regulation is defined in a relatively narrow manner as an activity of a public authority that has an executive, future-oriented (ex-ante) and sectoral character, aimed at the promotion of competition. The concept of “regulation” differs in legal and administrative sciences mainly as regards legislative measures. In this contribution, the concept of regulation does not include legislative measures. The main focus of further remarks is on the activity of the Polish regulatory authority responsible for the telecommunications sector – the President of the Office of Electronic Communications (UKE) – in the regulator’s pursuit of the goals of national telecommunications policy. However, one of the features of the overall activity of the President of UKE is the regulator’s involvement in the legislative process of drafting statutory acts. Among the many public authorities, the President of UKE has a unique knowledge and experience with regard to the needs of the telecommunications market. The engagement of the National Regulatory Authority (hereafter: NRA) in the policy of direct intervention and in facilitation measures results from the growing conviction that the achievement of key goals of the national telecommunications policy is practically impossible with recourse to market forces and regulatory measures alone.

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

1. Introduction

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

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


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

2. National regulatory authorities in EU electronic communications law

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

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The application of competition law in the Polish telecommunications sector

1. Introduction

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

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I. REGULATORY ENVIRONMENT

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

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

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

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


II. REGULATION OF TELECOMMUNICATIONS
Regulatory support for the development of broadband access networks NGA

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

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

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

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\(^{1}\) Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: A Digital Agenda for Europe, COM (2010/245).
1. Broadband coverage in Poland

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

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

3 The 2013 Scoreboard, p. 46. Quite surprisingly, Poland nonetheless fulfils the first of DAE’d goals – basic broadband for all by 2013 – because it belongs to the 24 EU member States entirely covered by satellite technology which may potentially deliver high-speed broadband (downstream). Potential ability is, however, clearly different from actual deployment. As the Commission admits in this context, “despite the high coverage, satellite take-up is still marginal, as it represents less than 1% of all EU broadband lines” (The 2013 Scoreboard, p. 44).
4 The 2013 Scoreboard, p. 47.
The concept and future of universal service in telecommunications

1. Introductory remarks

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

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

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

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

\begin{itemize}
\item the scope of universal service;
\item the financing model of universal service; and
\item the role of the regulatory authority.
\end{itemize}

All of the above issues will be discussed below.

2. Concept of universal service

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

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

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

1. Introductory remarks

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

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

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

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

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


Regulation of interconnection rates in mobile networks

1. Market definition and analysis

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

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

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

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

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

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

Poland’s 2004 EU accession meant that the evolution of its national telecoms markets was strongly influenced by EU developments and thus so were, indirectly, the telecoms foundations of audiovisual media. That
influence was exercised primarily by a decade-worth of harmonisation initiatives in the telecoms sector introduced by the 2002 Telecoms Package with its 2009 revision which regulated issues such as telecoms access\(^1\). EU impact shows also in the current shift in the technological foundations of Polish audiovisual media – switch-over from analogue to digital broadcasting.\(^2\) Albeit outside of the realm on telecoms regulation and thus scope of this paper, worth mentioning is also the 2007 amendment of the 1989 Television Without Frontiers Directive (Audiovisual Media Services Directive)\(^3\) which brought non-liner media services, the provision of which became largely possible thanks to the evolution of telecoms, into the EU harmonisation framework so far reserved to traditional broadcasting.

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

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

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

In Polish telecommunications law, the enforceability of regulatory decisions is provided primarily through the construction of the “immediate enforceability rigour”. The latter means that a given decision is immediately enforceable. In practice therefore, even if an appeal is lodged against a regulatory decision issued under the rigour of immediate enforceability, its implementation must proceed until it is eventually repealed, amended or excluded from the immediate enforceability rigour.

The institution of the immediate enforceability rigour was introduced into the Polish Telecommunications Law Act in 2005. It was inserted into the provisions of Article 206(2a) TL which was added by way of Article 1(9b)) of the Act of 29 December 2005 on amendments to the Telecommunications Law Act and the Code of Civil Procedure Act. Article 206(2a) has since been repelled and now the immediate enforceability rigour is placed in Article 2006(2aa).

It was explained in the justifications of the Draft of the aforementioned Amendment Act that the aim of the changes relating to Article 206 TL was to implement Article 4(1) of Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic networks and services (Framework Directive). In accordance with those provisions: “1. Member States shall ensure that

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1 Journal of Laws of 2006, No 12, item 66.
2 Cf. draft Act on amendments to the Telecommunications Law Act, Printed material No 51 of 19 October 2005.
3 OJ 2002 L 108/33.
effective mechanisms exist at national level under which any user or undertaking providing electronic communications networks and/or services who is affected by a decision of a national regulatory authority has the right of appeal against the decision to an appeal body that is independent of the parties involved. This body, which may be a court, shall have the appropriate expertise available to it to enable it to carry out its functions. Member States shall ensure that the merits of the case are duly taken into account and that there is an effective appeal mechanism. Pending the outcome of any such appeal, the decision of the national regulatory authority shall stand, unless the appeal body decides otherwise. 2. Where the appeal body referred to in paragraph 1 is not judicial in character, written reasons for its decision shall always be given. Furthermore, in such a case, its decision shall be subject to review by a court or tribunal within the meaning of Article 234 of the Treaty.” According to the Polish legislator, the introduction of this rule was meant to ensure effective regulation of the telecommunications market by the NRA – the President of the Office of Electronic Communications (UKE). It was also meant to improve the situation of the so-called ‘alternative operators’, contributing at the same time to faster development of competition in the domestic telecoms sector.

When the institution of the immediate enforceability rigour was being introduced into the TL Act, a discussion emerged as to its compliance with Polish laws governing administrative proceedings and proceedings before administrative courts. Nevertheless, the immediate enforceability rigour was, and remains compliant with the aforementioned legislation. According to Article 130 § 1 CAP⁴ (regulating administrative procedure), a decision is not to be implemented before the laps of the time limit for its appeal. According to Article 130 § 2 CAP, lodging of an appeal within the specified time limit suspends the implementation of the decision. Having said that, provisions of Articles 130 § 1 and 2 CAP do not apply in the following cases: 1) the decision was made immediately enforceable (Article 108 CAP); 2) the decision is immediately enforceable by law. The decision is also enforceable before the laps of the time limit for an appeal if it is consistent with the demands of all parties (Article 130 § 4 CAP).

The institution of the immediate enforceability rigour contained in the TL Act is also consistent with Polish legislation on procedures before administrative courts, that is, the Act of 30 August 2002 – Law on procedures before administrative courts⁵ (“LPAC”). In principle, lodging of an appeal

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⁵ Consolidated text Journal of Laws of 2012, item 270 as amended.
III.

PROTECTION OF PRIVACY IN TELECOMMUNICATIONS
Telecommunication data retention in Poland: does the legal framework pass the proportionality test?

The purpose of this paper is to find out whether Polish legal provisions on telecommunication data retention, based on Directive 2006/24/EC, are a necessary and proportional measure in view of the relevant provisions of the Constitution of the Republic of Poland and the principles of European law, including EctHR case law.

The paper consists of four sections. The first section provides background information on the subject matter while the second part is an attempt to scrutinize the effects of the Directive on the Polish legal system. The proportionality of existing legal provisions on data retention is evaluated in the third section. In this respect, an attempt is made to demonstrate how to apply the proportionality test in order to examine the issue under consideration with respect to its individual requirements. Last but not least, briefly outlined in section four are two complaints lodged with the Constitutional Tribunal concerning the implementation of Directive 2006/24/EC into the Polish legal system.

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1. Background

Confidentiality of communications is guaranteed by the Polish Constitution of 1997 in its Article 49. Accordingly, any limitations of this right “may be imposed only in cases and in a manner specified by statute”. This legal rule has two fundamental implications. First, telecommunication traffic data has been recognized as legally protected information under the definition of “telecommunication secrecy” provided by the Telecommunications Law Act (hereafter: TL) of 2000. Second, due to statutory limits on telecommunication secrecy, Article 67(4) TL 2000 has for the first time granted the right to access traffic data to law enforcement and criminal justice authorities. Initially, however, the legitimate goal of gathering and storing traffic data by telecoms providers was determined by business matters (that is, fees and payment dispute solving). As such, it was carried out in compliance with Directive 1997/66/EC and Directive 2002/58/EC and the relevant provisions of the Polish TL.

The Polish legal regime of mandatory telephone traffic data retention, to the benefit of agencies’ of law enforcement and national security, dates back to 2003. Both the regulation of the Ministry of Infrastructure of 2003 and the Telecommunications Law Act of 2004, as amended in 2005, provided a twelve month long period for the retention of data concerning on-line interactions of subscribers and users of telecoms services. This period was extended to two years in 2005. However, a proposal submitted by a group of MPs for its further lengthening (up to 5 years) was not accepted by the relevant parliamentary commission in 2006 despite governmental support which claimed that an additional extension would increase “efficiency in combating crime and terrorism.” The legislative draft was rejected by the commission as incompatible with Directive 2006/24/EC.

2. Implementation of the Directive

The Directive was transposed into the Polish legal system in 2009 in a two-stage manner. In April 2009, pursuant to the amended Telecommunication

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Privacy protection in the telecommunications sector – new rules of storing information in telecommunications terminal equipment

1. Introduction

The so-called online tracking, that is, tracking users in their Internet activities, has nowadays become a significant issue of privacy protection of natural persons\(^1\). The implementation of new laws, as discussed below, was meant to restore the possibility of deciding about the scope of user actions within which they may remain anonymous, at least to a certain extent. For this purpose, the European legislator has decided to abandon the “opt-out” model, and move towards the so-called “opt-in” model. This article is an attempt to assess the transposition into the Polish legal order of EU solutions concerning the scope of the possibilities and conditions of storing information in telecommunications terminal equipment of subscribers (end-users) and the use of cookie files. It is clear that the implementation of such new solutions raises concerns both in terms of European and national law. The unease results from the wording of the provisions adopted in relevant EU directives, as well as from the European legislator’s lack of firmness in unambiguously determining a valid and effective model. With this in mind, many countries have decided to follow their own path creating

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peculiar hybrid systems, which are somewhere in between the opt-in and the opt-out model².

2. Cookies

The Act of 16 November 2012 Amending the Telecommunications Law Act and Certain Other Laws³ was adopted in Poland in response to the implementation of Directive 2009/136/EC⁴ amending Directive 2002/58/EC⁵, and the resulting fact that member States had to adopt laws, regulations and administrative provisions necessary to comply with this Directive. The Telecommunications Law Act of 16 July 2004 was fundamentally amended⁶ as a result with respect to its provisions on storing information in terminal equipment of subscribers (end-users). The Amendment related, in particular, to cookie files (the so-called “cookies”), the online use of which has become very wide-spread, stirring up many controversies and discussions.

In a nutshell, cookies are small text files containing a unique identification code for a given user of a particular computer (or other device used for web browsing). What must be kept in mind, however, is that cookies can not only constitute a threat to privacy, but are also a tool that can significantly help users to efficiently navigate the web, and to perform certain of its functions. As such, they may facilitate the functioning of web users. On the one hand, therefore, cookies can serve a very useful purpose, for example, they improve and accelerate the functioning of websites, remember language

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Wyłączenia grupowe spod zakazu porozumień ograniczających konkurencję we Wspólnotie Europejskiej i w Polsce. Pod redakcją Agaty Jurkowskiej i Tadeusza Skocznego, Warszawa 2008

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S. Piątek, Regulacja rynków telekomunikacyjnych. Pod redakcją Stanisława Piątka, Warszawa 2007
This book examines and offers critical comments on the evolution of national law and regulatory practice concerning the telecommunications sector in Poland. The Telecommunications Law Act was promulgated in 2004 with the intention of finally harmonizing the institutional and substantive laws regulating Polish telecommunications with the EU regulatory framework on electronic communications. The analysis of the compliance with, adaptations to and deviations from the standard rules of the EU regulatory framework is an important part of this book.

From the book reviews:

This pioneering joint study edited by Prof. Stanisław Piątek is devoted to key legal aspects of regulation in the telecommunications sector. The authors thoroughly analyze the normative context, broad selection of judicial decisions and commentary output in this sector. For this reason it will be an interesting reference work for academics, practicing lawyers and regulatory authorities in electronic communications throughout Europe.

Prof. Kazimierz Strzyczowski
University of Łódź

This book presents the main elements of the regulatory practice in the telecommunications sector, as well as specific experiences and problems encountered in the implementation process of the EU regulatory framework in Poland. The selection of topics follows the main course of European discussion on electronic communications law. Therefore this book delivers a lot of comparative materials for a foreign reader. The dominating approach in this book refers to the regulatory impact and presents the role of "law in action" in the telecommunications sector.

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