Chapter 9 Poland

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A Market Definition in Competition Law in Poland

The first part of this chapter on market definition in the media sector in Poland gives a brief overview of the legal and regulatory framework for protection of competition and describes the general approach in defining the relevant product and geographic markets under Polish competition law (part A). The second part examines cases of particular media sectors the competition authority and the national courts have had to deal with so far and analyses in detail the relevant product and geographic markets as they were delineated in the decisions and judgements (part B). The third part provides a comparative analysis of the different markets in the media sector in Poland on the one hand and the market definitions applied by the EC Commission on the other (part C). The last part of this chapter presents the other relevant authorities and the regulatory framework in the media sector in Poland that might have an impact on market definition (part D).

I Introduction

1 Relevant legislation

The main legislation on competition law in Poland is the 2000 Act on Protection of Competition and Consumers (hereinafter referred to as: ‘the Competition Act’) which entered into force on 1 April 2001. It replaced the 1990 Act on Combating Monopolistic Practices and Protection of Consumer Interests which introduced specific provisions on antitrust and merger control into Polish legislation. Earlier on, in the era before 1990, Poland was the first of the Middle Eastern European States which joined the EU in 2004 to adopt relevant legislation in the field of competition which at the time of the adoption already met the international requirements. This was when the Act on Combating Monopolistic Practices in the National Economy was issued in 1987. The latter picked up the for long interrupted tradition of Polish cartel law dating back to the time before World War II when the first legislation in this field, the Cartel Act, had been adopted in 1933.

1 Ustawa z dnia 15 grudnia 2000r. o ochronie konkurencji i konsumentów, Dz.U. 2003, Nr 86, poz. 804 - Act of 15 December 2000 on the competition and consumer protection, (the Competition Act), J L 2003 No 86 item 804; The full text of the Polish Competition Act in Polish and English is available on the website of the Polish competition authority at www.uokik.gov.pl.


4 Ustawa z dnia 28 Marca 1933r. o kartelach, Dz.U. 1933, Nr 31, poz. 270 - Act of 28 March 1933 on the cartels, J L 1933 No 31 item 270.
The adoption of the 2000 Competition Act reflects the latest efforts to bring Polish legislation entirely in line with Community competition law and to introduce the necessary amendments which had been stipulated by the EC Commission. Aiming at ensuring a sustainable development of competition for the benefit of the consumers and the economy, it contains detailed provisions on competition restricting practices and mergers between undertakings that have or might have an impact on the Polish territory. Accordingly, agreements between undertakings which distort or aim at distorting competition on the market as well as the abuse of a dominant market position are prohibited. With regard to competition restricting agreements, of course, this applies only to those which are not exempted from the general prohibition on the grounds provided in Articles 6 and 7 of the Competition Act.

In the scope of merger control, the provisions of the Competition Act stick closely to the definition of merger contained in Article 3 of the EC Merger Regulation No. 4064/89 and accordingly cover mergers of at least two independent undertakings, the direct or indirect takeover of one undertaking and the establishment of a joint undertaking, provided that the respective thresholds are exceeded. In this respect, however, two significant distinctions between the Competition Act and the corresponding EC rules are to be noticed. Firstly, the Polish law already stipulates that the intention to carry out a merger has to be notified whereas under the New EC Merger Regulation No. 139/2004 a notification at such an early stage is not obligatory. Secondly, although a merger may result in restricting competition on the market, it may be cleared in case it is expected to contribute to the economic development or technological progress or it may exert a positive impact on the national economy. On behalf of this wide-reaching justification which has no parallel on Community level, the Competition Act provides for a wide-reaching possibility of adopting discretionarial decisions in merger cases.

As to the media sector, other provisions related to market definition are in particular introduced by the recently adopted Telecommunications Act, in force since 3 October 2004. In this respect, the Telecommunications Act contains specific provisions on significant market power in Articles 4, 7 and 24.

2. **Relevant competition authority in Poland**

The central administrative body responsible for the enforcement of the Competition Act and, since 1 May 2004, also for the direct application of Articles 81 and 82 of the EC

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6 Article 1(2) of the Competition Act.

7 Articles 5 to 7 of the Competition Act.

8 Article 8(1) of the Competition Act.

9 Articles 12 and 13 of the Competition Act.


11 Article 19(2) items 1 and 2 of the Competition Act.

Treaty\textsuperscript{13}, is the President of the Office of Competition and Consumer Protection (\textit{Urząd Ochrony Konkurencji i Konsumentów}, hereinafter referred to as: ‘the OCCP’). The OCCP in its present shape exists since 1996 after the first independent competition authority, the Antimonopoly Office (established in 1990), had been assigned tasks in the field of consumer protection. The OCCP consists of the directorate in Warsaw and nine branch offices (delegations) on regional level with original competencies\textsuperscript{14}. Generally spoken, the directorate is competent for actions against nation-wide competition restricting practices and for issuing decisions in ‘significant’ merger cases\textsuperscript{15} whereas the branch offices are competent for antitrust cases directly concerning their region, mergers involving firms located in their region without a nation-wide significance and, irrespective of thresholds, all merger cases involving enterprises engaged in providing so-called municipal services. In the media sector, the latter is of importance as mergers between enterprises engaged in providing local cable TV infrastructure are regularly cleared by the branch offices.

3. Judicial Protection

The Court of the Competition and Consumer Protection (Sąd Ochrony Konkurencji i Konsumentów, hereinafter referred to as: CCCP), functionally integrated into the Warsaw District Court, is exclusively competent for complaints against all decisions issued by the President of the OCCP on the basis of the Competition Act. The Court was established together with the first independent competition authority in 1990 and, until 2003, called ‘the Antimonopoly Court’. Its judgements and decisions, given on the basis of the code of civil procedure, are subject to appeal before Appelate Court (Sąd Apelacyjny) and in second instance before the Supreme Court (Sąd Najwyższy).

With regard to market definition in competition cases, the Supreme Court held that according to Polish competition law, the enterprise subjected to the administrative procedure has the possibility to challenge the criteria which were considered by the OCCP when delineating the relevant market by presenting opposed arguments and evidences. However, the Supreme Court made it clear that objections of such kind were only successful in the procedure for the annulment of a decision when they prove that basic elements [of market definition] have not been considered or have not been analysed from the competition point of view\textsuperscript{16}.

II General Approach to Market Definition in Polish Competition Law

In order to establish whether an undertaking enjoys a dominant position or a merger would result in restrictions to competition on the market, the relevant product and geographic markets have to be determined. In contrast to the competition acts of many EU


\textsuperscript{14} The assignment of tasks has been laid down in detail in the Rozporządzenie Prezesa Rady Ministrów z dnia 19 lutego 2002 r. w sprawie określenia właściwości miejscowej i rzeczowej delegatur Urzędu Ochrony Konkurencji i Konsumentów, Dz. U. 2003, Nr 18, poz. 172 - Regulation of Prime Minister of 19 July 2002 on the Geographical and Material Competencies of the Branch Offices of the OCCP, J L 2003 No 18 item 172).

\textsuperscript{15} This applies to cases where the combined turnover of all undertakings involved in the marketing year before the merger exceeds € 500 million. Cases, in which this threshold is not exceeded, are not considered to have a nation-wide significance and, hence, are cleared by the country branches.

\textsuperscript{16} Supreme Court, Judgement of 24 June 2003 in Case I CKN 408/01, \textit{UPC Telewizja Kablowa/OCCP}, p. 6.
Member States which do not contain any definitions and as such do not provide any further clarifications on the approach to be taken when defining relevant markets, the Competition Act contains in its Article 4 explicit definitions of the principal terms\textsuperscript{17}. The reason for this approach to introduce definitions for reason of transparency was obviously the necessity to provide a certain degree of legal certainty in this relatively new domain of law in Poland as well as the lack of settled case law. The wording of the definitions reflects their understanding in EC competition law as the Polish legislator had been under strict obligation to take into account all relevant Community legislation, the EC Commission’s practice and the case law of the European Courts. Accordingly, the approach followed by the Regulations No 17/62\textsuperscript{18} and No 4064/89\textsuperscript{19} as well as the 1997 Commission Notice on Market Definition have been transposed into the Polish Competition Act which provides in Article 4 item 8 the following definition of the relevant market:

‘\textit{relevant market} shall mean market of products, which by reason of their intended use, price and characteristics, including quality, are regarded by the buyers as substitutes, and are offered on the area in which, by reason of their nature and characteristics, existence of market access barriers, consumer preferences, significant differences in prices and transport costs, the conditions of competition are sufficiently homogeneous.’

Additionally, Article 4 item 9 of the Competition Act clarifies the conditions for the assumption of a dominant position on the market in the following:

‘\textit{dominant position} shall mean position of the entrepreneur which allows him to prevent the efficient competition on the relevant market thus enabling him to act in a significant degree independently from competitors, contracting parties and consumers; it is assumed that entrepreneur holds a dominant position where his market share exceeds 40%.’

For the sake of completeness it shall be noted that the abovementioned definition of the relevant market is also provided in the annex to the 2002 Regulation on the Notification of the Intention of Concentration between Entrepreneurs\textsuperscript{20}, the Polish equivalent to the Form CO in EC competition law.

Although a first approach for defining relevant markets under the Polish competition law is given, the Supreme Court pointed out that in practice reference to the decisions issued by the OCCP and the case law of the Court for the Protection of Competition and Consumers is necessary as the Polish legislator did not provide any further criterions for applying this definition\textsuperscript{21}. In the following, the application of this definition in the decisional practice of the OCCP and the case law of the Polish courts shall be analysed in more detail.

\textsuperscript{17} The same applies to the preceding 1990 Act on Combating Monopolistic Practices.

\textsuperscript{18} OJ 1962, p. 204.

\textsuperscript{19} OJ 1989, L 395, p. 1.

\textsuperscript{20} Rozporządzenie Rady Ministrów z dnia 3 kwietnia 2002 r. w sprawie zgłoszenia zamiaru koncentracji przedsiębiorców, Dz.U. 2002, Nr 37 poz. 334 - Regulation of 3 April 2002 on the notification of intended concentration, J L 2002 No 37 item 334.

\textsuperscript{21} Supreme Court, Judgement of 24 June 2003 in Case I CKN 408/01, UPC Telewizja Kablowa/OCPP, p. 6.
1. Relevant product market

Although self-evident, on several occasions the OCCP made it clear that equally to 9.13 market definition under EC competition law, the term ‘product market’ has a very broad understanding and applies also to the provision of services as well as the supply of non-material goods such as energy and securities. When defining the relevant product market, the demand-side and supply-side substitutability have to be analysed first.

a) Demand-Side Substitutability

Similarly to the approach of the EC Commission, the primary focus of the OCCP when defining relevant product markets lies on the degree of substitutability on the demand-side which is, generally spoken, determined by the comparison between products and services offered to the customers. In this respect, products are regarded as belonging to the same product market when they are substitutable from the perspective of the latter. In the media cases available for the purpose of this study, the factors taken into account by the OCCP when defining relevant product markets from the perspective of the buyers (customers) were in the first place those listed in the Competition Act: the intended use of the product, its price and characteristics including quality. In this context, however, it is noticeable that although the wording makes explicit reference to buyers and, hence, the term covers consumers as well as commercial clients, the predominant number of decisions available for the purpose of this study made solely reference to end-consumers. Accordingly, in Telewizja Kablowa Poznań, a case concerning the provision of pay TV, the OCCP analysed from the consumers’ perspective the existence of alternative or comparable products on the market which offered to the unsatisfied viewer the possibility to change the provider. In this context, the OCCP identified the price which any viewer would have to pay for a comparable product (i.e. a comparable content package) as one of the key factors in delineating one product market.

b) Supply-Side Substitutability

In contrast to the demand-side substitutability, which undoubtedly constitutes the main approach in defining relevant product markets, the supply-side substitutability is only an additional element. It is applied in particular cases to justify the assumption of a homogenous product market on the grounds that suppliers are able to switch their production capacity to the relevant products at issue within a short period of time and without having to bear significant additional costs or risks. Nevertheless, although this element is obviously known in Polish competition law, it does not seem to be very popular. In fact, it is neither mentioned in the definition of the relevant market nor can its application be demonstrated on the basis of the cases available in the media sector.

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c) Other criteria

In order to obtain a comprehensive definition of the relevant market which reflects the particular situation in the area subjected to the investigation, occasionally additional elements are taken into consideration.

As such, the OCCP considers the time aspect to be of relevance when delineating markets. At least, in one merger case in the media sector which is analysed in detail below (see hereto part IV), the OCCP has explicitly held in this context that the delineation applied was referring to the market in the year of the merger.

Finally, although applied only in one of the available cases dealing with the abuse of a dominant position, another element in market definition seems to be the structure and the current economic situation in the market. These two elements had been taken into consideration by the Antimonopoly Court in case Stowarzyszenie Użytkowników Telewizji Kablowej Zachód in order to analyse the applicant’s position on a market and to assess whether he was facing significant competition. The court identified that the relevant market at issue, a local market for the provision of cable TV infrastructure, was a duopoly in which one market participant was unable to take an economic decision which would not have a direct effect on the market behaviour of his competitor. As in this case the market was considered to be already satisfied and, hence, the only possibility for the undertakings to increase their market share had been the lowering of prices which resulted in harmful competition, the court recognized the abuse of a dominant position without making further comments on the usual elements of market definition described above.

However, it appears uncertain whether the court applied this criterion in order to replace the initial analysis of relevant market. It is also possible that the court has taken the abovementioned definition formerly ascertained by the OCCP as the basis and the additional criteria were only intended to characterise the position of the parties at a subsequent stage that would be entirely in line with the approach followed by the 1997 Commission Notice. Unfortunately, on this point the judgement is not sufficiently precise.

According to a scholar’s report, further elements are applied in order to obtain a precise definition of the relevant market such as the market level on which a particular transaction took place, i.e. whether it was a market for wholesale, retail or detail sale and the product’s stage of development. Regrettfully, the author makes neither explicit reference to particular cases dealt with by the OCCP nor have cases of such kind been available for the purpose of this study.

2. Relevant geographic market

According to Article 4 item 8 of the Competition Act, the geographic market shall be regarded as an area ‘in which, by reason of their nature and characteristics, existence of market access barriers, consumer preferences, significant differences in prices and

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27 Antimonopoly Court, Judgement of 25 July 2001 in Case XVII Ama 96/00, Stowarzyszenie Użytkowników Telewizji Kablowej Zachód v. OCCP.

transport costs, the conditions of competition are sufficiently homogeneous’. In contrast to the definition applied by the Commission which makes reference to the neighbouring areas, the wording of this definition does not provide any further clarifications on the range of local markets. Nevertheless, this aspect was dealt with by the OCCP and the courts in a large number of cases since the early 1990s, as the preceding Act on Combating Monopolistic Practices explicitly differentiated between national and local markets\(^\text{29}\). Although the distinction between those two levels of the relevant geographic market does not reappear in the 2000 Competition Act\(^\text{30}\), most of the markets in the media sector are considered to be either nation-wide or local for reason of the language barrier separating them from the markets in the neighbouring countries.

Similarly to the approach under EC competition law, the decisive factors in determining whether a product belongs to the national or a local market are: the density and the location of supply sources for the consumers, the possibilities of transporting the product by using common ways of transport as well as the proportion between the costs of transport and the price by the piece of the product\(^\text{31}\).

**B Market Definition in the Polish Media Sector**

In contrast to certain other EU Member States which had the time to develop a sustainable media sector over many years, Poland has seen the emergence of independent mass media only after the first autonomous elections in 1989. It was in the early 1990s that private radio stations appeared and, in 1994, the first private TV operator entered the market. Since then, the media market first went through significant changes and then was consolidated within a relatively short period of time. Today the Polish media landscape is dominated by large international multimedia groups which develop parallel activities in different media sectors.

This part of the study provides an analysis of the available cases in the publishing sector (I), in the music and copyright sector (II), the film sector (III), the TV and radio broadcasting sector (IV) and the advertising sector (V).

**I Market Definition in the Publishing Sector**

1. *Newspapers*

The publishing sector in Poland is dominated by five large national and international multimedia companies which are active in publishing both national and regional newspapers as well as weekly and monthly magazines. At present there are over ten national daily newspapers on the market, each of them having a particular focus on issues related to politics, business, finance, catholic religion or sports, besides providing general

\(^{29}\) Article 2 sections 6 and 7 of the Act on Combating Monopolistic Practices.

\(^{30}\) This differentiation has been given up after the Antimonopoly Court and the Supreme Court had held that in some particular cases the relevant geographic market may go beyond the Polish territory.

\(^{31}\) Cf. Stefaniuk, Publiczнопrawne Reguly Konkurencji, 2005, at p. 41. Unfortunately, the author does not prove the application of these criteria on particular cases.
information of a nation-wide interest. Additionally, the reader has a wide choice among various regional newspapers in the respective areas. Nevertheless, when analysing different markets for newspapers one has to keep in mind that a large number of regional newspapers is belonging to the aforementioned multimedia companies (as such, at least two of those companies are publishing more than ten different regional newspapers each).

Due to the vast consolidation in this sector, the OCCP had to examine numerous cases concerning mergers and acquisitions of publishing companies. In this context, the authority pointed out that it was not possible to assume the existence of one homogenous market for press products, but further distinction was necessary in order to adequately reflect the existing forms of competition in this sector. The frequency of publication, the content and price of the press product have been identified as the main criteria for this distinction

In the 2004 merger case *Dolnośląskie Wydawnictwo Prasowe/Slowo Media and Echo Media*, a large media group standing behind the acquiring company was to obtain two local daily newspapers in addition to other local and a national newspaper it was already possessing. The question at issue was if the acquisition would provide the media group with a dominant position on the Polish newspaper market. In its decision the OCCP distinguished between relevant product and geographic markets for national and regional daily newspapers and held that from the perspective of the readers and the customers of advertising space these two print products were not substitutable due to significant differences in their content and the area of distribution.

Further important comments are to be found in case *Polskapresse* in which the OCCP had to deal with the company’s infringement of the Competition Act by failure to notify the intention of concentration. According to the findings, a national daily newspaper contains general news which is of a global and a nation-wide interest whereas local newspapers concentrate on general information which meets the casual interests of the community’s local groups in their specific area of publication. As such, only national newspapers were found to be targeting at all readers throughout the entire country without any further differentiation with regard to their place of living, sex, education, profession or main interests. In this context, it is found not an obstacle to the assumption of different product markets that local newspapers usually contain a summary of information which is of a nation-wide interest and, vice versa, that there are nation-wide newspapers which contain different regional supplements with the respective local news.

In order to obtain a narrow market definition, daily newspapers containing information of general interest have to be further distinguished from specialised daily press products, such as newspapers with a strong focus on financial issues or sports. Whereas the first contain a wide range of information of many different kinds, the usually more expensive specialised newspapers concentrate on a limited number of selected topics which are treated in more detail, often using technical terminology

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33 OCCP, decision on 1 September 2004 in Case DOK-2-421-3/04/ML Dolnośląskie Wydawnictwo Prasowe / Slowo Media / Echo Media.
Two further important distinctions with regard to the relevant product market for daily newspapers have been introduced in the merger case *Polskapresse*. Firstly, the OCCP held that daily newspapers belonging to the so-called yellow-press formed together a relevant market of their own for reason of their sensational character, the content’s focus on the most actual and delicate issues which are often illustrated by confusing pictures as well as the form of presentation which is characterised by short and pungently written articles. Secondly, free of charge newspapers also have to be excluded when defining a homogenous product market for (regional) daily newspapers. Unfortunately, the OCCP does not give precise comments on the reason for this exemption but merely states that it is not only based on the price criterion.

As regards the geographic dimension of the markets, the key factor for distinguishing between national and local newspapers is the limited area of distribution of the latter. Whereas national newspapers are sold on the entire territory, local newspapers cover an area which is usually similar to an administrative region (*Województwo*), a town or even a smaller part of it such as a district or an urban area. Nevertheless, in some cases this area may also comprise a wider territory for reasons of a particular history, traditions or culture (i.e. a local journal for ethic minorities living in neighbouring regions). In this context, the OCCP held that there was no homogenous nation-wide market for local newspapers although most of them belong to large publishing companies, but that each region represented a local market of its own. The reason for this assumption was again the local focus of the content. Accordingly the OCCP took the view that it was not possible to gain a significant market power by possessing local newspapers with different distribution areas.

2. **Magazines**

In its decision in case *Polskapresse* the OCCP has also clearly distinguished between relevant product markets for daily newspapers and for periodical magazines. The key factors for the assumption of different product markets were the publishing frequency (daily, weekly, two-weekly and monthly issues), the usually higher price of magazines and the form in which the information is presented to the readers. With regard to the latter, the OCCP pointed out that weekly and monthly magazines contain selected information and present it in a more attractive and elaborated form (e.g. longer articles including the author’s personal comments on the news) whereas daily newspapers rather contain brief information which is given shortly after the event and as such enjoys only a limited actuality. When compared to daily newspapers, the lecture is supposed to take more of the reader’s time and the information provided in weekly and monthly magazines does not require to be read on the day of its publication.

Taking the content of periodical magazines as the basis for a further differentiation, the OCCP delineated in case *Agora/Prószyński* seven relevant product markets with regard to the content of the specific magazines published in colour by the parties to the merger (motors, construction, culinary etc.). In the context of this case, special attention was paid to the question of colourful inserts in national newspapers on the same issues which

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39 OCCP, decision of 3 April 2002 in Case DDI-34/2002, *Agora S.A. /Prószyński*
were found not to belong to the same market. The main reason for this assumption has been obviously the fact, that specific magazines are sold at market price whereas the inserts are given free of charge to the readers of the respective newspaper. Additionally, the OCCP has also taken into consideration that the inserts were published more often than the periodicals at issue and that the latter were printed on a high quality paper and concluded that magazines and inserts to national newspapers satisfied different needs of consumers and customers of advertising space and therefore have different target groups.

When considering the scope of the relevant product market for magazines, attention has to be paid to the fact that in the view of the OCCP free of charge weekly magazines are obviously falling outside this definition. They are considered to be more resembling to the yellow-press than to periodicals as regards the content and the form in which the information is presented to the readers\(^\text{40}\). Although no further explanation is given, it seems that the OCCP is apt to consider this periodical publication as belonging to a specific product market of its own.

3. **Distribution of printed press**

In the two available cases the OCCP dealt with competition restricting practices involving the Polish leader for the distribution of printed press, *RUCH*, who operates a nation-wide network of newspaper kiosks. The decision of 2002 concerned the company’s abuse of dominant position\(^\text{41}\), whereas the 2004 decision dealt with a horizontal distribution agreement it concluded with a smaller competitor\(^\text{42}\). On both occasions the OCCP held that from the perspective of consumers distribution of press products (newspapers, magazines and periodicals) through points-of-sale and direct distribution by delivering the press products via mail to the individual readers upon subscription formed together on homogenous product market which was considered to be nation-wide in its geographic dimension. The key factor for justification of this definition was the comparable price of two forms of distribution which made them substitutable. Unfortunately, on this point the decision does not make it clear whether it refers to the view of the consumer or to those of the publisher of the press product. Furthermore, the OCCP considered the conditions for distribution of press products to be similar in the whole country with an equal demand from the readers’ and the publishers’ side\(^\text{43}\). Reading the decision of 2004, however, it becomes obvious that the part on market definition has been one-by-one transferred from the findings in the case of 2002.

Finally, in 2004 the OCCP had to analyse possible restraints of competition resulting from an agreement between the city of Warsaw and *Metropol*, the publishing company of free-of-charge newspapers. According to the agreement, *Metropol* was granted for a period of ten years the exclusive right to distribute its newspapers in the town’s public transport facilities. The OCCP identified a market of its own for the distribution of free press which was found to be very narrow in its geographic dimension, comprising solely the public transport system in the city of Warsaw. The decision of the OCCP was upheld by the

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Court of the Competition and Consumer Protection\(^{44}\), but is currently under appeal before the Supreme Court.

II Market Definition in the Music and Copyright Sector

1. Music

In the 2004 merger case *Sony/Bertelsmann*, the OCCP authorised the establishment of a world-wide operating joint company between the two large multimedia companies having impact on the Polish territory\(^{45}\). The OCCP analysed possible effects on competition with regard to the different areas of economic activity of the parties to the merger and defined separate product markets for music recording (1), for the distribution of music recordings (2) and for music publishing (3). However, the only market on which the merger was found to have an impact was the product market for music recordings. According to the findings of the OCCP, the market for music recording covered the activities artist search, artist development, music recording, marketing and promotion of the recording. Regarding the geographic dimension, the market was found to be nation-wide. Unfortunately, in this context the OCCP did not apply the substitutability-test nor other criteria to give reasons for its definition, but solely made reference to the economic activities and the market shares provided by the companies in the notification form.

Although the decision did not provide a detailed examination of the market for the distribution of music recordings as it was not affected by the merger, the OCCP distinguished between different ways of distribution, in particular sale to various wholesalers and retailers (record shops, multimedia stores and supermarkets) as well as direct sales to end-consumers via Internet, the latter with a subsequent delivery of the recording either in digitalised form or by sending the hard copy via mail. Unfortunately, no further comments were made on the crucial point whether the two different forms of distribution were belonging to the same relevant product market.

Finally, the OCCP delineated a market of music publishing which is found to be characterised by the exercise of copyrights. For reason of providing the chapter with a clear structure, the OCCP’s findings hereto are discussed below.

2. Copyright

In the abovementioned case *Sony/Bertelsmann* the OCCP obviously agreed with the view of the parties to the merger that the acquisition and the exercise of copyrights on both words and music constituted a relevant product market of its own\(^{46}\). However, in this context the OCCP did not give an answer to the question raised by the parties, whether a further distinction was necessary between the market for the exercise of intellectual property rights on music and text on the one and the market for the exercise of copyrights

\(^{44}\) CCCP, Judgement of 1 December 2004, XVII Ama 67/03, *Metropol/OCCP*.

\(^{45}\) OCCP, decision of 27 July 2004 in Case DOK 75/2004, *Sony Corporation of America/Bertelsmann AG*.

of the recording on the other hand. The OCCP held merely, that the market for music publishing comprised the exploitation of copyrights in the form of licences for reproduction of the recording in physical form, for the use in films and advertisings, for printing music notes and for the right to public performance and broadcasting.

Another case in this area concerned the abuse of dominant position by the Polish copyright-management society ZAiKS\textsuperscript{47} which refused to take under its protection music works on which it had not been granted the exclusive right to give licences for their performance in public, recording and broadcasting on radio and TV. The OCCP identified a nation-wide product market for the collective exercise of copyrights on music works. In particular, the different ways of exercising copyrights, i.e. individually by the author on the one and by a copyright-management society on behalf of the author on the other hand, were found not to be substitutable one by another. The OCCP considered that an author who manages his copyrights by himself has on the one hand a wider influence on the contractual shape of the agreement, e.g. as regards the price, but on the other hand does not enjoy a significant market power and, hence, is a weaker party than a copyright-management association. Accordingly, the OCCP concluded that the author's copyrights may only be protected effectively by a copyright-management association with a strong market power.

Furthermore, the OCCP held that both forms of managing copyrights were neither substitutable from the view of the customer who seeks to present the protected work. In case of individual protection the customer may obtain the copyright on each particular work only directly from the respective author whereas in case of works protected by a copyright management association he is able to obtain the copyrights on various works of different authors from the same body.

### III Market Definition in the Film Sector

As far as it can be determined, so far there have been no cases in Poland in which a definition of the relevant market in the film sector has been exercised.

### IV Market Definition in the Broadcasting Sector

Before providing an analysis of the available cases in the broadcasting sector in Poland, it appears necessary to give some background information on the structure and the situation within this particularly important media market.

For a long time the two programmes of Telewizja Polska (TVP), the State owned broadcasting company, were the only source of TV information and entertainment in Poland, besides a small number of publicly controlled radio stations. The situation changed dramatically since: in 2004, the Polish broadcasting sector consisted of more than 200 licensed broadcasters of radio and TV programmes via satellite and terrestrial facilities. In addition, further 170 commercial broadcasters were engaged in providing access to programmes on cable networks, making the Polish cable television market with more than 4 million subscribers the third largest cable market in Europe. Furthermore, pay TV and digital TV increasingly play a significant role in the broadcasting sector since the

first provider of pay TV, the French company CANAL+, entered the market in 1995 and opened the Polish digital platform CYFRA+ in 1998. 2001 then saw an important consolidation on the pay TV market when CYFRA+ merged with its principal competitor, Wizja TV.

1. Television

The decisions and judgements concerning the TV broadcasting sector which were available for the purpose of this study dealt with the delineation of relevant product markets in the field of pay-TV services, the transmission of TV-sIGNALS and the provision of cable infrastructure. Apart from the narrow geographic market for the latter, the markets for the broadcasting of digital pay TV and the market for the transmission of TV signals are considered to be national markets.

a) Retail markets

In 2002, the OCCP had to analyse the abuse of a dominant position by the public broadcasting company Telewizja Polska (TVP) which had been accused by a competitor of significantly lowering prices for TV advertising if the customer obliged himself to spend more than 50% of his total TV advertising budget on the acquisition of advertising time on TVP. Although the question at issue concerned the definition of advertising markets (see hereto below, part VI), the OCCP made important comments on the definition of markets in the TV broadcasting sector by making explicit reference to the Commission’s findings in its landmark decisions in cases MSG Media Service, Bertelsmann/CLT and RTL/Veronica/Endemol. Accordingly, the OCCP established that a product market for the provision of pay TV existed which had to be distinguished from the free TV market for the reasons provided in the Commissions’ decisions, i.e. in the first place the specific trading relationship between the supplier of pay TV and the viewer as subscriber. However, further comments on competition in the free TV sector, enabling to assess whether the OCCP assumes the existence of one homogenous free TV market, have not been included. Nevertheless, the OCCP held in this context that pay TV and free TV together formed the primary market for broadcasting of TV programmes (the viewers’ market) which had to be distinguished from the secondary market for TV advertising.

The findings in TVP have been recently confirmed in the decision Telewizja Kablowa Poznań. The OCCP confirmed the existence of a product market for the provision of pay-TV services which is characterised by competition among pay TV operators who seek to attract potential subscribers for their programmes. Furthermore, the OCCP recognised that from the viewers’ perspective the content packages offered by operators of digital cable TV on the one and operators of satellite TV on the other hand were substitutable and, hence, together formed one relevant product market. Both had only marginal differences with regard to the price as well as to the number and the content of the programmes available in those packages.

50 COMP/M. 779, Bertelsmann/CLT, OJ 1996, C 364, p. 3.
b) Markets for transmission of digital TV-Signals

So far, a large number of cases and judgements dealt with the question whether there are different markets for the transmission of digital pay TV signals via satellite on the one and via cable on the other hand. In fact, for a long time this question has been highly disputed between the OCCP and the courts.

A rather thorough delineation of markets was recently provided by the OCCP in the abovementioned decision *Telewizja Kablowa Poznań*943. Although leaving it open whether the transmission of TV-signals via terrestrial broadcasting facilities on the one and via satellite on the other hand may be regarded as substitutable from the viewers’ perspective in general, broadcasting of digital pay TV programmes via cable and broadcasting via satellite were found to belong to the same product market. In the view of the OCCP in *Telewizja Kablowa Poznań* neither the price criterion (i.e. the price which the consumer has to pay in order to gain access to the transmitted signal) nor the technical quality of transmission was such as to justify the assumption of different product markets. Furthermore, the fact that the costs of transmission did not have any significant impact on the price of the proposed programme packages had also been considered.

In this respect, the decision *Telewizja Kablowa Poznań* refers to former case law of the Supreme Court, according to which the price criterion has been established as the key factor in defining relevant product markets for digital broadcasting and the transmission of TV-signals via cable944.

Nevertheless, the findings of the OCCP in *Telewizja Kablowa Poznań* depart from the narrow definition of a relevant product market for the transmission of digital TV signals via satellite to end-consumers as applied by the OCCP in three other cases, the 2001 merger Wizja TV/UPC945 and the 2003 decision *Canal+ Cyfrowy*946. In particular in case Wizja TV/UPC the OCCP gave a thorough explanation for the assumption of such a narrow market definition, expressly rejecting former case law of the Antimonopoly Court947. Referring to the perspective of satellite TV operators, the OCCP held that in contrast to cable TV, the reception of satellite TV by an unlimited number of viewers was not restricted for technical and economic reasons. However, the main reason for the assumption of different product markets was the fact that besides the provision of TV programmes only cable TV providers were offering integrated services such as access to the Internet making them more attractive for the end-consumers.

c) Market for TV broadcasting infrastructure via cable

Due to the fact that in nearly all cities in Poland the entirety of apartment buildings located in extensive housing areas are (still) belonging to the local cooperative housing
societies, in a considerable number of cases the OCCP had to deal with problems of restricting competition in access to broadcasting cable facilities in those buildings. In general, all of those cases have had almost a similar background: the housing society at issue confers the exclusive right to operate the broadcasting cable facilities in its buildings to one single operator for a very long period of time (up to 20 years) in order to generate revenues for necessary modernisation in return. This wide-spread practice prevents competitors from access to significant parts of the city’s housing district, as they get no permission to build up a parallel broadcasting infrastructure. In the context of such disputes, the OCCP and the courts have identified a relevant product market for the provision of cable infrastructure giving access to the reception of TV programmes, regardless of their source of transmission58.

As regards the geographic dimension of those markets, the OCCP and the Courts in general take the view that it is the single cable network which has to be determined as the relevant market, provided that it is technically separated from other cable networks in the respective city or housing area.

2. Radio

In the landmark case in the radio broadcasting sector, the merger Agora/Wibor, the OCCP distinguished between a relevant product market for radio broadcasting (listeners' market) and a market for advertising on the radio59. Similarly to market definition on Community level those markets were found to be closely interconnected as the market share in the listeners' market usually reflects the market share in the advertising market. The OCCP delineated national and regional geographic markets, depending on the broadcaster's range of transmission.

V Market Definition in the Internet Sector

The only case available for the purpose of this study in the Internet sector was the 2004 merger between two recruitment companies, Monster Worldwide/Jobpilot60. Although both companies were offering their services on the Internet, the OCCP did not define a narrow market for online recruitment services, but delineated a rather broad product market for services in the context of recruitment of employees. In this context, the OCCP stated that the services provided by the parties to the merger comprised the publication of vacancies and recruitment announcements in newspapers and on the Internet. Making explicit reference to previous Commission decisions61, the OCCP held that although the services offered by the parties were available worldwide, the relevant geographic market comprised only the territory of Poland for reasons of the specific legal provisions on labour in Poland and the working language.

58 OCCP, decision in Case Telewizja Kablowa Poznań, RPZ 24/2004, p. 4. Unfortunately, the wording is not very precise.
59 OCCP, decision of 7 April 2004 in Case DPI-22/2003, Agora S.A. /Wibor. The OCCP has already assumed the existence of a homogenous product market for radio advertising in the 2002 case Art Market Syndicate, see hereto part VI.
VI Market Definition in the Advertising Sector

In the abovementioned case Telewizja Polska (TVP) the OCCP delineated a nationwide relevant product market for advertising in free TV. However, on this occasion the OCCP did not provide further justifications for this definition but made reference to the decision in case MSG Media Service in which the Commission applied its financing by advertising as one of the key factors for the assumption of different pay TV and free TV markets.

In case Art Market Syndicate / Ströer Polska / Europlakat Polska / Outdoor Promocja Plakatu, the OCCP had to analyse whether four marketing companies were abusing their dominant position on the advertising market. The companies had agreed to reduce the number of large billboards by 20% in order to adapt their capacities to the actual demand and by this to stop the price decrease. Although the enterprises at issue were only active in the market for billboard advertising, the OCCP has occasionally made a remarkable effort in distinguishing between different markets for advertising in the media sector.

After having thoroughly identified the advantages and disadvantages of the different media channels with regard to their aptitude for advertisement, i.e. broadcasting media (TV and radio), print media, direct marketing, outdoor advertisement and others (internet, cinema etc.), the OCCP considered that the particular influence which advertising generally has on potential customers was largely depending on the way in which it is communicated. In this respect, any decision on the acquisition of advertising time or space had first to consider the kind of product at sale, the target group and the marketing strategy of the distributing company, irrespective of the fact that all advertising had the common goal to stimulate the customers’ choice of purchase. In addition, the different price of the advertising on each medium and the way in which it is calculated (i.e. depending on the time of broadcast, the number of pages or the location of a billboard) indicate the existence of different advertising products. From these particularities the OCCP concluded that it was not possible to delineate one general nation-wide market for advertisement and delineated a relevant product market for billboard advertising which was regarded as nation-wide in its scope. Unfortunately, a further definition of the relevant product markets had not been necessary, but the findings suggest that in view of the OCCP each of the above mentioned media represented an advertising market of its own. This is confirmed by the finding that the medium chosen for a special marketing campaign or a part of it could not be substituted by another medium and that even the fact of giving up one advertising medium and switching to another within a campaign does not give prove of their substitutability.

The findings in the Art Market Syndicate / Ströer Polska / Europlakat Polska / Outdoor Promocja Plakatu case are entirely in line with those in the above discussed merger case Dolnośląskie Wydawnictwo Prasowe / Slowo Media and Echo Media in which the OCCP distinguished between markets for advertising in national and local newspapers. Accordingly, there is no common market for national and local advertising as nation-wide operators were in the first place interested in advertising in national newspapers and

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64 In this context, the OCCP has made extensive reference to various scientific publications on marketing strategies and on the use of media in advertising.
hence, local newspapers mostly contained advertising which was local in its scope. In the view of the OCCP, however, the assumption of a common advertising market would be possible if there was the opportunity to advertise in a significant number of local newspapers from different regions at once.
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### C Comparative Analysis of Media Market Definitions adopted by the European Commission and those adopted under Polish Competition Law

#### I General Remarks

When looking at the decisions and cases which have been analysed for the purpose of this study, it becomes obvious that the OCCP and the Polish courts apply the same principles of market definition than those under EC competition law. Taking the definition of the relevant market introduced by the Commission in its 1997 Notice on market definition which has been transposed into the Competition Act as the starting point of any determination, the results obtained in defining relevant markets are in general very similar to those ascertained by the Community institutions.

The procedure of market definition follows the same pattern than the one on Community level. Similarly to the approach of the Commission, the demand-side substitutability constitutes the main criterion for defining markets whereas the supply-side substitutability obviously seems to play only a marginal role. However, in this context it is noticeable that in nearly all of the examined cases the perspective of the consumer instead of the customer had been applied when investigating the supply-side substitutability. Also for this reason, it is unfortunately not possible to determine whether it is the perspective of a typical or a reasonable consumer (customer) which is considered under Polish competition law when defining markets.

As regards the other criteria applied for the purpose of market definition, it appears that the OCCP and the courts seem to be reluctant in applying economic tools on market definition such as the Hypothetical Monopolist Test (SSNIP-Test) and the cross-price
The substitutability test. On the other hand, occasionally different criteria such as the time criterion in merger cases are expressly introduced in the scope of market definition\(^{65}\).

With regard to the content of the submitted decisions and judgements, it is noticeable that in a large number of the examined cases the OCCP and the judiciary made explicit reference to relevant Commission decisions and case law of the European Courts. In fact, several of the here discussed decisions included lengthy passages with express quotations of the Commission's findings on market definition in a reference case. In a few cases one might even get the impression that the quotations provided play the role of replacing the OCCP's own considerations. For example, in the 2002 case *Telewizja Polska*\(^{66}\), the OCCP first gave the definition of the relevant market, which had been the *market for advertising on free TV*, and subsequently merely quoted the relevant passages in somehow elder cases *MSG Media Service, Bertelsmann/CLT* and *RTL/Veronica/Endemol* in order to justify that this definition was in line with the Commission's approach. The reason for this kind of practice might be the fact that the Commission's findings are in general assumed to have a very high power of persuasion on the parties to the procedure on the one hand and that in many cases such a reference to previous decisions of the OCCP and settled case law of the courts is simply not possible due to the rather short experience in dealing with the issue of market definition on the other.

Furthermore, it appears that in many proceedings the courts do not seem to consider the issue of market definition with a particular interest where a decision is not challenged for manifest error in this respect. Especially where the courts have to deal with more or less standardised forms of abuse of a dominant position, often there are no further comments on the definition previously adopted by the OCCP in the judgements.

**II Conclusions**

Although it is rather difficult to draw a representative conclusion on the basis of such a limited number of cases from the decision making practice of the OCCP and the case law of the Polish courts, at least two facts can be ascertained. Firstly, it is obvious that a sound basis for the application of market definition exists in Poland and that it is overall recognised as constituting a key issue in competition procedures. Except for the rather marginal differences described above, this basis is entirely in line with the approach followed by the Commission and the European Courts. Secondly, among the staff of the OCCP and the judiciary there is a wide-spread knowledge on the concept of market definition and its application under EC competition law. For this reason the decisions and judgements largely reflect the market definition at Community level.

On the other hand, when considering the application of the criteria in practice, various decisions and judgements prove the necessity for a more detailed differentiation with regard to the different product markets. In this respect an augmented introduction of economic tools would constitute an advantage, not at least due to the fact, that economic figures have a power of persuasion of their own which in the long term will prove to be

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more convincing for the parties to the procedures than a mere reference to a previous Commission decision.
D. Impact of different (media) regulatory frameworks on market definitions

I. Regulatory frameworks in Poland having an impact on the media sector


Regarding the media sector the main principles that the Constitution of the Republic of Poland⁶⁷ declares are:

- ensuring the freedom of the press and other means of social communications⁶⁸, due to the freedom to express opinions, to acquire and to disseminate information⁶⁹, including the freedom of artistic creation and scientific research, etc.⁷⁰; the art. 54.2 contains the more detailed provisions, which are very important for creating the media system in Poland: a) “preventive censorship of the means of social communications shall be forbidden”⁷¹, b) “...the licensing of the press shall be forbidden. Statues may require the receipt of a permit for the operation of a radio or television station”;

- respecting and protecting the inherent and inalienable dignity of the person (which constitutes a source of freedoms and rights)⁷² – “Everyone shall have the right to legal protection of his private and family life, of his honor and good reputation…”⁷³,

- ensuring the freedom of economic activity and protecting the ownership⁷⁴ – “Limitations upon the freedom of economic activity may be imposed only by means of statute and only for important public reasons”⁷⁵.

According to the Polish Constitution’s rules, the more detailed provisions concerning media system are included mostly at Acts’/ Laws’ level.

⁶⁸ Chapter I – The Republic, art. 14. It is important to indicate that the Assembly marked the “social” role of the mass media.
⁶⁹ Chapter II - The Freedom, Rights and Obligations of Persons and Citizens, art. 54.1 - Personal Freedoms and Rights. Those rights obviously refer not only to the individuals but also to the different group of people, e.g. ethnic minorities (art. 35), etc.
⁷¹ Even, that since early nineties of XX century, the prohibition has been in force, the introducing of this principle to the Constitution is significant.
⁷² Chapter II – art. 30 - General Principles.
⁷³ Chapter II - art. 47 - Personal Freedoms and Rights.
⁷⁴ Chapter I - art. 20, 21.1.
⁷⁵ Chapter I - art. 22.
2. **Sector-specific regulations**

a) Legal framework

**aa. Broadcasting**

In December 1992 the Polish Parliament passed the *Broadcasting Act*, which came into force on March 1, 1993. The former Act of December 2, 1960, *on the Committee for Radio and Television*, which, according to the then existing political system’s rules, has concerned the state owned media sector only, was repealed. Since then the Polish audiovisual media market has been governed by the *Act*\(^{76}\), which mainly covers all the special legal aspects of this sector.\(^{77}\)

During the last ten years, there were some amendments to the *Act*, due to the developing of the internal market as well as directed to fulfill the Polish international obligations (mainly in the course of the EU accession negotiation procedure).

The most important is to indicate the main changes included in the *Amendment Act from 2004*, which are now the part of the consolidated version of the *Act*\(^{78}\).

The main group of issues were those which have been related to the full harmonization of the Polish legal system with the community standards, included in the *Television without Frontiers Directive*\(^{79}\) mainly within the scope of:

- **jurisdiction** – the proper provisions were introduced into the *Act* (art. 1a); therefore the standard, conforming to the community law, within the scope of determining the jurisdiction as part of the internal legal order was established;

- **program quotas** – the definitions of the European work, as well as independent European work were formulated more precisely from the point of view of the criteria adopted in the community legislation; also the proper proportion between works created originally in Polish and the European works were introduced (art. 15);

- **protection of minors** – relevant European provisions concerning this matter have been precisely reflected at the level of the *Act* (art.18).

It is to be marked, that the Polish obligations required the harmonization of the respective home law provisions with the principles of the community law within the scope of


\(^{77}\) Some general principles for the whole media sector, irrespective of their kind are included in the *Press Law*.

\(^{78}\) The last Amendment of April 2nd 2004. Journal of Laws of 2004 No. 91, item 874.

\(^{79}\) Directive No. 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, amended in 1997 by the Directive No. 97/36/EC.
possibility of conducting broadcasting activity in Poland by the entities originating from the European Union, which requires the relevant capital liberalization; the level of the foreign capital in the Polish broadcasting system has remained unchanged since the date when the Act came into force till 2004 and makes up 33%.

- since the day of Polish accession to the EU the full capital liberalization towards Members States is in force;
- moreover the Act contains the provisions allowing for a higher share of the foreign capital for the investors form other (non EU) countries - up to 49% (art. 35).

The Act also covers changes affecting the public radio and television sector, mainly the issues related to the public mission (which were introduced in 2004), among which the following aspects are the most important ones:

- there is a wide mission’s definition, directed to fulfill the tasks regarding the democratic, social, cultural and educational needs of Polish society, and considering the pluralism, impartiality and high quality of a program principles (art. 21.1). It is to be mentioned that since the 2004 amendments public broadcasters are authorized to product and transmit the thematic program services, but this requires a licence to broadcast (art. 21.1a); in 2004 the Polish Public television was granted the first license for the thematic program - TVP Kultura, devoted to the culture issues;\footnote{TVP Kultura started its transmission in April 2005.}

- the manner of financing\footnote{Due to the fact that the current system of collecting fees for the use of receivers is not sufficiently effective, which leads to a decrease in the forecasted revenues from subscription fees, and results in the deterioration of the financial situation of public broadcasters as well as the relevant Constitutional Tribunal’ s Judgement (see below Ib), the new Law concerning collecting fees issues is now under the parliamentary procedure (draft of November 2004).} according to the EU standard included in the Treaty’s provisions concerning a public procurement as well as Commission Directive 80/723/EEC of 25 June 1980 on the transparency of financial relations between Member States and public undertakings and Commission’s guidelines referred to this matter\footnote{Commission Directives: 85/413/EEC of 24 July 1985, 93/84/EEC of 30 September 1993, 2000/52/EC of 26 July 200 amending Commission Directive 80/723/EEC; Communication from the Commission on the application of State aid rules to public service broadcasting (2001/C 320/040).}; Development of new technologies, innovation of programs, creative activity ought to be supported. Transparency and impartiality principles should be guaranteed with a separate accountancy of the public and commercial activities (art.31a.);

- the Act also includes the provisions in the scope of the organizational structure of public broadcasters, and the role of their supervisory bodies, taking into account that they (both radio and television) operate exclusively in the form of the sole-proprietor joint stock company of the State Treasury.\footnote{“The State treasury shall be represented at the general meeting of shareholders by the minister in charge of the State treasury” - art. 29.1 - Chapter IV – Public Radio and Television.} Therefore, the relevant provisions of the Code of the Commercial Companies shall apply to public broadcasters (art. 26.4).
The Act consists of nine chapters and covers the provisions concerning: National Broadcasting Council (see below, p. II) and program services (quotas, advertising, sponsorship, teleshopping, protection of minors, access to the major events). The main issues relevant for this study are provisions included in Chapter V – Broadcasting License and Chapter VI – Retransmission of Program Services in Cable Networks. The issue of a dominant position of the applicant or the broadcaster is considered within the scope of a licensing (granting/revoking) procedure.  

bb. Telecommunications

The legal framework for telecommunications is provided by the Act of 16 July 2004 – Telecommunication Act which on 1st January 2005 wholly entered into force, replacing the Telecommunications Law of 21st July 2000. As stipulated in the new Telecommunication Act, the main reason for such a rapid amendment was a harmonization of the Polish system with a new EU telecommunication standard.

The Telecommunication Act specifies inter alia (art.1.1):

- the principles of performing and monitoring business activity consisting of the provision of telecommunications services, and networks or associated facilities,
- the rights and obligations of telecommunications undertakings,
- the conditions for undertaking and pursuing business activity which consist of networks and associated facilities provision and telecommunications services provision, including radio and television program broadcasting or distribution networks and services,
- conditions for: a) regulating relevant market, b) providing universal service, c) service user protection, d) frequency, orbit resource and numbering management, etc.

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84 More information - point II, 1b.
The purpose of the Telecommunication Act is to create the conditions for: “the support of equal and effective competition within the scope of telecommunications services provision, the development and usage of a modern telecommunications infrastructure, ensuring that users derive maximum benefit in terms of choice, price, and quality of telecommunications services, the ensuring of technological neutrality” (art.1.2).

The Telecommunications Act consists of parts, devoted to different issues; the most important of them should be indicated below:

- the part of telecommunication market regulation concerns the analysis of relevant markets, in the context of imposition and withdrawal of obligations. The Telecommunication Act stipulated that “the relevant market”’s definition should be understood. In the meaning of the definitions included in the Act of 15 December 2000 on Competition and consumer protection; according to the article 4. p. 8 “relevant market” shall mean market of products, which by reason of their intended use, price and characteristics, including quality, are regarded by the buyers as substitutes, and are offered on the area in which, by reason of their nature and characteristics, existence of market access barriers, consumer preferences, significant differences in prices and transport costs, the conditions of competition are sufficiently homogeneous”.

- the part III includes provisions concerning end user protection and universal access – the Law defines the set of telecommunications services which should be available for all end users, preserving the required quality and at reasonable price as universal access;

- the Part V of is devoted to digital radio and television transmissions. According to the Part’s provisions Public telecommunications networks, used for digital transmissions should ensure the interoperability and meet the technical and exploitation requirements for offering wide-screen TV services.

cc. Competition

The legal framework for competition is provided by the Act of 15th December of 2000 on Competition and Consumer Protection. The Competition Act does not include the media specific regulations, however, since the middle of nineties of XX century, debates concerning this issue have been carrying on, focusing in particular on: 1) defining the notion of relevant market in media sector, 2) determining a dominant position of the media player, 3) determining the competencies of different authorities operating in broadcasting, telecommunications or competition field, and 4) settling the respective provisions in the scope of the media or competition regulations.
dd. Press

The legal framework for press activities is provided by Press Act of 26th January 1984,\(^91\) since 1989 it has been changed several times, but – it is to be seen - that basic principles, as well as structure of Press Act are still valid; the amendments were directed to achieve the harmonization with other acts/laws (e.g. Penal Code of Procedures) which had been connected with the Press Act. The most of its provisions concern both press and audiovisual media, irrespective of their kind and type (basic definitions, journalists’ rights and duties, right for the correction and reply, professional secrets, etc).

A citizens’ freedom to express opinions, and to acquire information is the basic principle for the media activity in Poland (which is marked in art. 1). Therefore the main rules of the Press Act are as follows:

- the chapter II contains the provisions concerning the medias’ rights and duties; the main task of the press is public service to the society and state (art. 10.1) and the others are derivative from this principle;

- the mixed system of right of reply, included in chapter V, enables: a correction of untruthful or imprecise news or/and a factual reply to a statement infringing personal goods (as dignity, honour, good name, renown, etc.) or other rights and interests.

There is a basic difference between the pursuit of legal media activities on the audiovisual and on the printed press market. As the sole legal precondition to start publishing activity on the printed press market, the Act obliges its publisher to be entered into the official register, kept by the special Court Register Division (art. 20), on a purely formal registration -declaratory basis. As the registration of a new printed press title can be refused only on grounds of formal non-compliance with the provisions of the Press Act or when it infringes the legal rights and protection of an existing press title, as its brand name on the press market (art. 21). So, in fact, there is no state regulator of any kind on the printed press market except for the purely formal court registration body.

ee. Film

Concerning a cinematographic film issues the regulatory framework is provided by Cinematographic Act of 16th July 1987\(^92\). The Cinematographic Act regulates the activities connected with a film production, distribution, diffusion of a film culture and determines the organization and financing rules of Polish cinematographic (which comprises film creation and production, protection of cinematographic art, scientific research, education, etc. - art.1, 2).

The minister responsible for the matters of culture and protection of national heritage should play the special governmental role in:


- ensuring for the society the universal access to Polish and worldwide film creation,

- supporting the development of the sector within the frame of projecting and planning cultural policy, preserving a film creation sources, etc. (art. 8).

Since 1989 there have been a lot of drafts of amendments of this Act as a result of the difficult organizational and economical situation of the Polish cinematography, which has long and valuable tradition and world renown. In the draft of amendments of 11th December 2003,93 which is now under the final stage of parliamentary procedure, the system transformation is predicted. The most important premises included in the draft are as follows:

- establishing a Film Institute as an institution responsible for the development of the sector of cinematography – the director and the Institute’s Council members shall be appointed by the Minister;

- creating the cultural policy aimed at the development of Polish film market, e.g. via supporting the ambitious, artistic not only strictly commercial film production;

- ensuring the wider range of revenues including e.g. trade in film rights, and different budget donations, according to the provisions stipulated in the Draft; the Institute could be inter alia supported with the budget subsidies, and obligatory exposition levies and contributions of television and cable broadcasters, film distributors, etc.

ff. On-line services

Regarding the media sector in the context of internet one of the most important premises is the clear-cut distinction between the regulation of contents and of technical transmission. From this point of view it ought to be stressed that there is no special regulation for internet content in Poland; therefore the existing legal provisions in the scope of Broadcasting Act, Press Act, Copyright and related rights Act and, wider, the Penal and Civil Code, etc. should be applied, taking obviously into consideration the international character of internet.

Concerning the technical issues of digital broadcasting and internet access, the relevant act is the Telecommunication Act. It is important to stress that in the case e.g. of schools, public continuous education centres, public libraries, the expenses related to network connection service provided to ensure broadband internet access are financed from the national budget (art. 81, 100).

According to the presumptions included in the national strategy towards the information society development, which is in accordance with EU standards in this scope, two Acts were adopted. The first is an act on electronic services of 18th of July of 200294 and consists primarily of rules, concerning mainly the duties of service providers and data protection issues, the second one is on the electronic signature of 18th September 200195.

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95 Journal of Laws of 2001 No. 130, item 1450.
It is also to be mentioned that according to the strategy of the National Broadcasting Council\textsuperscript{96} conditions allowing to create Polish information and cultural resources in the internet should be provided. “\textit{In the line with worldwide trends, feeding of program contents into the cyber space should consist promotion and creation of conditions for the operation of radio and TV broadcasters ...in the Internet and for their transformation into multimedia content producers and distributors}”

\textit{gg. Copyright}

The Act of 4\textsuperscript{th} February 1994 on copyright and related rights\textsuperscript{97} replaced the previous Act of 10 July 1952 on Copyright Law\textsuperscript{98}. The Act is a comprehensive legislation including all issues of copyright and neighbouring rights; it was amended several times (2002, 2003, 2004) mainly in order to guarantee its alignment with EU and other international standards;\textsuperscript{99} some of them ought to be indicated.

According to the abovementioned amendments, the Act applies e.g. to works whose author or co-author is a Polish citizen, or whose author is a citizen of a member state of the European Union, or the member states of the European Agreement on Free Trade (EFTA) – parties to the agreement on the European Economic Area (art.5). The Act ensures wide protection of e.g.: works expressed in words, mathematical symbols, graphic signs (literary, journalistic, scientific and cartographic works, and computer programs), artistic, photographic, architectural, musical, stage, choreographic, audiovisual works, etc. (art.1).

Regarding the content of copyright, the Act distinguishes separately and differentiates the author’s moral and economic rights; basically the owner of the copyright shall be the author (art. 8). The moral rights provisions protect the rightholder unlimited in time and independent of any waiver or transfer, e.g.: to be an author of the work, to decide about the scope and manner of use it and control it; they may not be transferred as they do not belong to the market field;

The permissible use of protected works has been regulated in a more precise manner (see e.g. the added article 33\textsuperscript{1}-33\textsuperscript{5}, creating the detailed criteria for permissible usage e.g. “the

\begin{itemize}
\item \textsuperscript{97} Ustawa z dnia 4 lutego 1994 r. prawo autorskie i prawa pokrewne, Dz. U. 2000, Nr 80 poz. 904 - Act of 4 July 1994 on the copyrigt and related rights (Copyright Act), Journal of Laws of 2000 No. 80, item 904 with later amendments, including the Amending of 1\textsuperscript{st} April 2004; Journal of Laws of 2004 no. 91, item 869.
\item \textsuperscript{98} Journal of Laws of 1952, No. 34, Item 234, of 1975, No. 34, Item 184; and of 1989, No. 35, Item 192.
\end{itemize}
disseminated works for the purpose of advertising, a public exhibition or a public sale of works within the scope justified by the promotion of the exhibition or sale, with the exclusion of any other commercial use of such works” (art. 33 3) or works in connection with the presentation or repair of equipment (art. 33 4);

The Act also introduces a distinction between the authors and holders of related rights (such as artistic performances, rights to phonograms and videograms, rights to broadcast).

The Act includes specific provisions for computer programs and for audiovisual works - “It shall be presumed that the producer of an audiovisual work acquires, under a contract for the creation of the work or for the use of the existing work, exclusive economic rights to exploit those works within the framework of the audiovisual work as a whole” (art. 70.1).

The rights to broadcast program services are included in the scope of the related rights.

The Minister responsible for the matters of culture and protection of national heritage appoints a copyright commission, which shall approve or refuse approval of the remuneration tables presented by the collective management organizations for the use of works or artistic performances covered by collective management (art. 108).

b) Administrative regulations/rules

According to the provisions of the Polish Constitution, the legal system in Poland is formed jointly by the parliament and president with means of legislation, mostly at the act of law, i.e. on a statutory level. Regarding the media system, on the basis of the legislator’s authorization, the non convergent regulators acting on the audiovisual media market National Broadcasting Council (NBC), Office of Telecommunication and Post Regulation (URTIP) and respective Ministers issue regulations, within the scope of their legally outlined constitutional tasks.

For example NBC issued so far and amended few times the following regulations, concerning:

- the contents of the application and detailed procedures of granting and withdrawing licenses to provide radio and television programme services;
- the detailed procedures for the registration and retransmission of program services in cable systems, model registers and registration fees;
- the detailed methods of classifying, transmitting and announcing programs and other broadcasts that might impair the physical, psychological or moral development of minors.

National Broadcasting Council in individual cases adopts resolutions, concerning e.g. the matters of license, violence of provisions, etc.

There is also the Constitutional Tribunal appointed to examine the conformity of a normative act to the Constitution and to implement other objectives specified in it. Regarding the media sector impact it is important to present the Judgment of 9th September 2003 indicating that in the light of the Constitution provisions (art. 217) the license fees should be regulated exclusively by statute laws. Statutory authorizations, permitting NBC to issue regulations in this scope did not fulfil the requirements stipulated.
in the Constitution’s provisions, in particular it did not contain the precise guidelines concerning the content of such a regulation: “Only such issues as have no substantial significance on the construction of this levy may be regulated by means of an executive act (i.e. regulation),” therefore a new act is required.100

3. Other provisions

The self-regulation of the broadcasters from 1998 includes the principles of presenting program services, in particular those contents which might have a negative impact upon the development of minors; it is very detailed and includes the specific time restrictions, the system of signs (e.g. graphic symbols) describing the character of the program, system of qualifying program services, etc.

As the system of self-regulation seemed not to be sufficient to protect minors, in 2004 the legislator decided to put some of the provisions to the Broadcasting Act (art.18) and authorized the NBC to issue more precise regulation in this scope, taking into account the manner of presentation, and harmfulness of the program services to particular age groups. As the legislator stipulated: „The presentation of the foregoing issues in a detailed manner and the fact of including that in the legal act is aimed at improving the system of protection of minors from the contents that may negatively affect their development”.

II. Regulatory authorities in Poland having an impact on the media sector

The most important authority having an impact on the media sector in Poland is the National Broadcasting Council (NBC). In some matters the body acts in close cooperation with other authorities in particular with the President of the Office of Telecommunications and Post Regulation (URTIP), which is significant in the field of new technologies. Within the scope of the competition issues they also cooperate with the President of the Office for Competition and Consumer Protection.

1. The National Broadcasting Council

a) Legal basis

The Constitution of the Republic of Poland includes provisions concerning NBC in Chapter IX – Organs of state Control and for Defense of Rights. Article 213 stipulated the main principles of its activities:

- safeguarding the freedom of speech, the right to information as well as
- safeguarding the public interest regarding radio and television broadcasting.

The members of NBC are appointed by the parliament and president and shall not belong neither to a political party nor to a trade union or perform public activities incompatible with the dignity of their function.

100 Some of the issues within the scope of the license fees could be included in NBC’s regulation but the statutory basis, in particular determining the amount of the fees should be put at the level of the act and in a very precise manner. K2/03. www.trybunal.gov.pl
Detailed principles for a mode of NBC’s work are specified in a *Broadcasting Act*, which constitutes the state authority competent in matters of radio and television broadcasting (art.6).

- as it was stipulated in the *Constitution*, the nine members of NBC are appointed, for a six years term, by the chambers of parliament (separately) and the president. Every two years one third of the Council is staggered; the member may not be appointed for another full term of office; they could only be dismissed upon an exceptional basis (e.g. death, resignation);

- it is prohibited to combine the service of a member of the NBC with holding an interest or shares, or with any other involvement, in an entity which is a radio and television broadcaster or a producer (art. 8);

- the Council of NBC acts with the assistance of the Office of the National Board Council. Upon the internal rules the Office consists of twelve departments (concerning legal, economical, strategic, international, program and license matters). The office is neither in charge of issuing legislative acts nor to take any decisions - this is the exclusive authorization of the NBC, which acts as a collective body. Costs of operation both of the Council and the Office are paid directly from the budget (art.11).

b) Functions and competencies

As it was indicated in the part presenting the *Constitution* the NBC safeguards freedom of speech in radio and television broadcasting, protects the independence of broadcasters and the interests of the public, as well as ensures an open and pluralistic nature of radio and television broadcasting (art. 6).

The functions of the NBC, which are strictly connected with competencies, focus on four major groups of tasks.

First is the general cooperation with governmental and parliamentary bodies, in particular with:

- the Prime Minister - in preparing the directions of the state policy in respect of radio and television broadcasting, including the international aspects in this field. The important role of NBC was its involvement in the EU accession negotiation procedure since 1998;

- the Ministry of Culture, who is responsible as a governmental body for the culture and the media sector - in a wide scope of issues, e.g. as a consultative body in drafting legislation, consultations, etc.;

- the Minister in charge of Communications - in the field of licence fees regulations and practical activities, concerning the public broadcasters;

- the parliamentary commissions - as a consultative body, whenever the parliament needs the consultations, opinions, etc;
It is also important to mention that by the end of March of each year, the NBC shall submit to both chambers of the Polish parliament and the President an annual report on its activities during the preceding year, as well as information concerning key issues in radio and television broadcasting. In case of rejection of the report by the Parliament (approved by the President), the term of office of all the members of the National Council shall expire within 14 days from the date of the last resolution to this effect (art.12).101

The second group is connected with organizing the audiovisual market in the scope of granting licence and registrating program services.

- broadcasting licence (terrestrial, satellite or cable broadcasters) shall be awarded by the Chairman of the NBC; he takes the relevant decisions on the basis of the resolution of the NBC (art. 33). In the scope of the method of transmitting the program service the licence is awarded in agreement with the President of the Telecommunications and Post regulatory Office (art. 37.3; art. 37.3a) as well as the reservation of the frequencies for public companies to perform their statutory tasks (art. 26.5);

- according to the art. 36.2 (2) if the applicant could achieve a dominant position in the given area, the licence shall not be awarded (on the same basis it could be revoked - art.38.2.3); the licence is inalienable. Abovementioned provisions are aimed at the prevention of media concentration; there is not any, more precise criterion in the Act concerning this matter103;

- the Chairman of the NBC is also authorized to register the retransmission of a program service on the basis of a notification (art. 41.3 and 44.1); it does not concern the retransmission of the national program service of a public broadcasters as well as other program services of domestic broadcasters receivable within the coverage area by means of receivers for use by the general public (art. 41.2);

- in the conformity with EU standards, the Chairman refuses to register a program services or imposes a fine upon the cable network operator to retransmit a program in a case of an infringement of the minors’ s protection provisions (art. 45.1 and 2).104

Third group of tasks concerns the determining, within the legal system framework, of the conditions and rules of conducting activities in the audiovisual media field and supervising them.

- the NBC issues regulations and in the individual cases adopts resolutions (art.9). The regulations are an internal legal means binding for broadcasters acting on

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101 Till this moment it has never happened.
102 In the meaning of the definitions included in the Act of 15 December 2000 on competition and consumer protection; Consolidated text Journal of Laws of 2003 No. 86, item 804; translation: www.uokik.gov.pl.
103 There was one attempt to regulate this matter in the scope of the Act. In the Draft from 2001, the article 36 par. 3 provided for the detailed criteria aimed at evaluating whether the granting of the license does not result in the broadcaster gaining the dominant position, including different criteria. Provisions included in the revision precisely specified cases in which the granting of the license would violate the principles of pluralism in the media sector; the Draft collapsed in 2003; more information see IV.4 below.
104 The Broadcasting Act included the “must –carry” principles (art. 43).
Polish market, precising the Broadcasting Act’s provisions in the scope of program services, e.g. quotas, advertising, sponsorship, protection of minors, licence and registration, etc.;

- the Chairman, who directs NBC’s work and represents the Council and performs the tasks specified in the Broadcasting Act, is appointed by and from the members of the Council (art.7); acting by virtue of the Council’s resolution, the Chairman may issue a decision, subject to the administrative procedure;

- the NBC organizes the research into content and audience of program services as well as the technical development and training in the broadcasting sector; it presents opinions, reports and proposes the guidelines for question’s matters, however, they may not be treated as a legal instrument. The NBC organizes seminars, conferences; it takes into account broadcaster’s opinions and suggestions as well as other market players such as collective management organizations in copyrights and related right’s domains;

- the NBC supervises broadcasters, monitors audiovisual market and is authorized to put sanctions in the cases of Act’s provisions infringement, according to the rules included in chapter VIII devoted to the liability under the law and consisting of a wide range of sanctions such as fees, temporary suspension of broadcast or even restriction of liberty and imprisonment. The supervising activity of the NBC is subject to judicial review. The sanctions concern mostly the program issues e.g. advertising, protection of minors and fulfilment of individual licence’s obligations/duties.

The NBC plays an important role in creating, monitoring and supervising the public broadcasting sector.

- NBC appoints most of the members of the Supervisory Board, which consist of five to nine members, and only one of them is appointed by the minister in charge of the State Treasury (art. 28);

- the public companies are obliged to submit to the NBC Council: 1) an annual and quarterly report on the use of different funds and costs incurred in connection with the public mission activities including the specification of their financing sources, and 2) financial guidelines underlying the implementation of the mission tasks (art. 31b, 31). Also the companies should specify the accounting principles, in a manner ensuring that books of accounts report revenues and related costs separately for the public and commercial activities, as well as allocation methods of revenues and costs to particular types of activities pursued (art. 31a);¹⁰⁵

- the detailed provisions of license fees for public broadcasters are still regulated via relevant regulation of NBC. However, according the Constitutional Tribunal’s judgments, the very precise statutory basis should be regulated exclusively by statute;¹⁰⁶ Regardless the new future legal framework the NBC remains the authority responsible for this area.

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¹⁰⁵ Referred to in Article 10 of the Ustawa z dnia 29 września 1994 r. o rachunkowości Dz. U. 2002, Nr 76, poz. 694 - Act of 29 September 1994 on the acouting system (Accounting Act) J L 2002, No. 76, item 694, as further amended; the Accounting Act is in conformity with EU standard.

¹⁰⁶ More information see point Ib.
c) Relation with general competition authorities

According to the Broadcasting Act’s provisions, there is not any special legal provisions and linkage between the NBC and the President of the Office of Competition and Consumer Protection. But in the part of granting licence the achievement of dominant position effects in refusing or revoking of license. Therefore in my opinion the competition rules should be applied; in the meaning of an Competition Act, a "dominant position” shall mean position of the entrepreneur which allows him to prevent the efficient competition on the relevant market thus enabling him to act in a significant degree independently from competitors, contracting parties and consumers; it is assumed that entrepreneur holds a dominant position where his market share exceeds 40%". 107

In abovementioned scope the practical cooperation seems to be necessary.

2. The President of the Office of Telecommunications and Post Regulation URTIP)

President of the URTIP is the regulatory authority within the scope of postal, telecommunication, management of frequencies activities and the control of requirements to electromagnetic compatibility.

a) Legal basis

According to the Telecommunications Act, the President of the URTIP is a regulatory body in the domain of the telecommunications and postal services market (art.190) and, jointly with the Minister competent for communications they create the National Regulatory Authority in the abovementioned fields (part X of Law).

- the URTIP President, appointed by the Prime Minister on the motion of the Minister competent for communications for a five years term, is a central body of government administration; therefore in the cases provided by the Law he is authorized to take a decision in a course of administrative procedure. He could be dismissed by the Prime Minister upon an exceptional basis (e.g. gross violation of the Law, resignation). The President is elected from the Polish citizens permanently residing in Poland, having completed a higher education and being experienced in the described field;

- the President’s consultative and advisory body is the Telecommunications Council, which issues opinions concerning telecommunications activity, frequency management and electronic compatibility (art. 195). The 15 members of the Council are appointed by the Minister competent for communications upon the motion of the President of the URTIP, including the representatives of the Chairman of the NBC and the President of OCCP;

- the President performs tasks with support of the URTIP, which runs its financial economy on the rules specified for budget units due to the provisions included in the statute; the statute is issued by the Minister competent for communications.

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The Office consists of regional departments, which directors are appointed and recalled by the President of URTIP, (art. 193, 194);

- the President annually till 30th of April submits to the Minister competent for communications, a written report of last year’s activities and provides information upon the Minister’s request; under the same conditions he announces a report of the telecommunication’s market condition, including the aims for current year regulation.

b) Functions and competencies

The abovementioned National Regulatory Authority carries out the regulation policy in the telecommunication field (art. 189), focusing on:

- supporting competition in the scope of telecommunications networks, associated facilities, inter alia ensuring that there is no distortion or restriction of competition and that users derive maximum benefit in terms of prices, choice of services and quality;

- supporting internal market development, including establishment and development of trans-European networks and interoperability of Europe-wide services, via inter alia: the removal of existing market barriers, ensuring the equal treatment of undertakings, etc.;

- promoting the interests of European citizens through ensuring a common access to a universal service, consumer protection, high level of personal data protection, etc. and guaranteeing of making regulation technologically neutral.

Those general principles are completed by the tasks of the President of URTIP, included in the Telecommunications Act (art. 192) which are, in particular, as follows:

- the analysing, evaluating of the described markets and the performing of the tasks provided in the Telecommunication Act with regard to regulate and control the market;

- the carrying out of environmental consultations with the representatives of e.g. operators users, consumers and manufacturers on issues associated with availability and quality of telecommunications services;

- the initiating of intervention in issues concerning the functioning of the markets, the settling of disputes between telecommunications undertakings, making decisions of professional qualifications;

- co-operating with the president of OCCP on issues concerning inter alia the counteracting of anti-competitive practices (restrictions on competition) and anticompetitive concentrations of telecommunications undertakings and their associations, and co-operation with NBC in the scope provided for in the Law;

Referring to the scope of the study-report some detailed competencies of the President of URTIP, should be indicated.

- the Telecommunication Act stipulated that the telecommunications activities which constitute business activities are regulated and subject to registration; the President
of the URTIP, is authorized body to keep the register (art.10.1 and 10.2) and is the authority in this field. Entry into the register, is carried out on the basis of a written application submitted by the undertaking; the President of URTIP, notifies the Chairman of the NBC in the cases within the scope of conditional access systems or EPG provision;

- in the media sector, concerning the digital environment comprising conditional access systems, electronic program guides, multiplexing of digital signals (art. 10.3), the authorized body is the Chairman of the NBC. The Chairman is also authorized to grant, change or revoke the spectrum rights for spreading and distributing radio and television programs and in above mentioned scope (art. 10.3) and carries out the analysis of the relevant market (art. 21.1).

- Due to the very precise and complex procedure both bodies cooperate in a very close manner. They, in the relevant scopes, at least once every two years carry out the analysis of relevant markets in order to inter alia designate the telecommunications undertaking (or undertakings) deemed to possess significant market power and to impose on them such obligations as provided by the Law, “if the relevant market does not have or has lost the characteristics of an effectively competitive market or that the telecommunications undertaking with the significant market power has changed” (art. 22.5 p.4). While assessing the “significant power in the relevant market” the following criteria should inter alia be applied (art. 24.3): the undertaking’s share in the relevant market, the existence of the undertaking’s technological superiority, its easy or privileged access to capital markets or financial resources, its vertical integration, the absence of potential competition, the existence of barriers to the relevant market entry, etc.

- the part V includes provisions on digital radio and television transmissions; the Law stipulates that both telecommunications undertakings providing conditional access systems and owners of industrial property rights to such systems (and services provided via them) should offer to broadcasters or consumers their services on equal and non-discriminating rules;

- the proceedings prior to the President of the URTIP, are run under the administrative procedure and subject to the judicial revive; in a part XI the penal regulations and financial penalties are included, e.g. fine, restriction of liberty or even imprisonment.

c) Cooperation with the general competition authority

Due to the consultation process with interested parties, prior to taking up a decision in cases of market analysis and indication of telecommunications undertakings with significant market power or the repeal of a decision in this matter, the President of the URTIP, or, in the abovementioned cases, the Chairman of the NBC informs the President of the OCCP about the commencement of the consultation proceeding (art.15, 16).

The Minister competent for communications specifies the relevant markets subject to analysis by the president of the URTIP,; the scope of the radio and television broadcasting markets will be determined after obtaining the opinion of the Chairman of the NBC (art. 22). After that the OTPR President or the NBC Chairman initiates by means of an administrative decision the proceedings aimed at determining whether the relevant market
III. Market definitions and criteria upheld for market perception in the relevant sector focused legislation

1. Publishing

The Press Act includes some definitions for the entire media and publishing sector, in particular press and broadcasting (art.7):

- the press – periodical publications which do not form a closed and homogeneous whole, appearing at least once a year, having a regular title or a name, current number and date, in particular dailies and periodicals, agency news, regular telex transmissions, bulletins, radio and television programs and newsreels;

- the press also includes all and any mass media, which exist or may exist in the course of the technical progress, including broadcasting stations, and wire broadcasting centers in employment institutions which disseminate periodical information through printing, vision, sound or other dissemination technique;

- the press also includes teams and individual persons engaged in journalistic activity;

- a daily - a generally informative periodical print or broadcast of sound or sound and vision, appearing more frequently than once a week;

- a periodical - a periodical print appearing not more frequently than once a week and at least once a year. The above provision applies accordingly to any broadcasts of sound as well as of sound and vision;

There is not any sector-specific regulation related to market definition regarding the press and publishing in Poland yet, but some remarks should be made here.

After 1989 the Polish press market experimented strong monopolization from the part of mostly foreign enterprises, which seriously infringed its balance. Therefore the debates on this problem have been carrying on. In 2003, a group of MPs elaborated a draft of amendments to the Press Law108 aiming at setting up provisions, which would counteract the concentration in the press sector. The draft proposes the introduction of a ban on ownership of two newspapers distributed partially or totally within the same area. The exception would be applied to a case of distribution of one nationwide and one local newspaper. The draft provisions provoked further discussion concerning wording of anti-monopolist law in the press sector in Poland, as it should be not only adapted to the current local situation but as well to the EU standards.

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108 The draft of 12th November 2003; no. 2430, www.sejm.pl
2. **Music and Copyright**

With regard to music works, which are subject to the *Copyright and Related Rights Act*; respective provisions of the Act include basic definitions (art.6): some of them should be indicated hereto:

- **published work** - a work which, with a permission of its author, has been reproduced and its copies were made available to the public,

- **simultaneous publication** - publication of a work within the territory of the Republic of Poland and abroad within 30 days from the date of its first publication,

- **disseminated work** - a work which, with a permission of its author, has been made available to the public by any means whatsoever,

- **the distribution of a work** - the making of the original or copies of that work available to the public by way of the transfer of their ownership made by the right holder or upon his permission;

- **the communication of the work** - communication via sound, image or combined sound and image carriers, on which the work has been stored, or by way of using devices intended for receiving a radio or television program service in which the given work is broadcast.

Regarding the notions related to the audiovisual sector, it should be noticed that the respective Copyright Act definitions differ from those included in the Broadcasting Act, e.g.:

- **the broadcasting of a work** - radio or television transmission carried out by wireless means (terrestrial or satellite) or by wire;

- **the rebroadcasting of a work** - the transmission of that work by an entity other than the original broadcaster by way of taking over the program service of a radio or television broadcasting organization in entirety and without any changes, as well as by way of simultaneous and integral transmission of that program service to the public.

Concerning the market related issues in the copyright sphere, author’s economic rights ought to be pointed out (part 3 of the *Act*). Generally the *Act* states that the author has an exclusive right to:

- use the work and to decide upon its use throughout all the existing fields of exploitation, in particular: 1) fixation and reproduction of the work - the production of copies of the work by way of using any specific technique, including digital one, 2) sale of the original work or of the copies on which the work was fixed, as well as distribution, lending or rental of the original or copies of the work, and 3) dissemination of the work on such fields of exploitation as: communication, broadcasting and re-broadcasting, public performance etc,

- receive remuneration for any use of the work on any existing separate field of exploitation; and
to transfer his economic rights to licence fees connected with the exploitation of his work to his legal successors, the general principle being that the author's economic rights shall expire only after the lapse of seventy full (calendary) years (previously fifty years) after the author’s death.

The author may transfer his economic rights to other persons, therefore they could be treated as marketable ones. Producers and importers of tape and video recorders, photocopying machines, scanners, blank carriers used for fixing, owners of reprographic equipment etc., are obliged to pay, via the organization for collective management of copyright or related rights, the fees, taking into consideration the amount of proceeds gained on the relevant account;

Fundamentally, a radio and television organization may broadcast minor musical, verbal and combined works, which have already been published, pursuant to the agreement concluded with the organization for the collective management of copyright. Regarding the audiovisual works, the Act stipulates that (art.70.1): “It shall be presumed that the producer of an audiovisual work acquires, under a contract for the creation of the work or for the use of the existing work, exclusive economic rights to exploit those works within the framework of the audiovisual work as a whole”.

Music works are strictly connected with the related rights, in particular within the scope of rights to the phonograms and videograms, e.g.: reproduction by specific technical means, distribution, rental or free-of-charge lending of copies, making them accessible to a public (art. 94); it is presumed that the producer is the person under whose name the phonogram or videogram was created for the first time:

- the phonogram – the first fixation of the sound layer of a work performance or other acoustic phenomena;

- the videogram – the first fixation of a sequence of moving images, whether accompanied by sound or not, irrespective whether it constitutes an audiovisual work.

The radio and television organization (broadcaster) has an exclusive right to manage and use their program services broadcast within the scope of: fixation, reproduction by means of a specific technique, broadcasting by another radio or television organization, rebroadcasting, distribution of their fixations, and making them available so that each person may have access to such broadcast in a place and at a time of his own choice and communication in public places against entrance fee (art. 97).

The important role in the Polish system of copyright law play organizations responsible for the collective management of copyright or related rights. Acting as the associations of authors, artistic performers, producers or broadcasting organizations, they provide the collective management and protect the rights entrusted to them (art. 104).

The Minister responsible for the matters of culture issues the permit to play the role of collective management to these organizations and supervises them. He may only grant such permits to the organizations capable to guarantee proper management of the

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109 It is important to add that operators of cable networks may rebroadcast in their cable networks the works broadcasted in programs of radio or television organizations only under a contract concluded with the competent organization for collective management of copyright or related rights.
entrusted rights and may revoke them in case of any serious breeches of the duties stemming thereof.

There are about 15 such collective management organizations, acting in different field of exploitation of copyright and related rights. Some of them with a very strong position, e.g. the society of authors (ZAIKS). It is to be observed, that the remunerations claimed within the scope of collective management by abovementioned organizations, which should take into account the sum of revenues received from the use of works and artistic performances and the nature and scope of use of such works and artistic performances (art. 110), is sometimes the core of debates between right holders and the users of their works. The second problem is a position of those organizations on the market in the context of the legal scope of their authorization.

3. Film

The Cinematographic Law of 16th July 1987 includes important definitions (art. 4) concerning film, the production and distribution of film, etc., but due to, the abovementioned wide draft of amendments of this Law, some of the principles of creation of the market environment, including the provisions regarding definitions, could change in the nearest future.111

However, it is important to mark that, within the scope of the draft, notions’ issues are formulated in line with the European Convention on Cinematographic Co-production of 2nd October 1992. The Draft of Amendments defines “film” similar to the provisions included in Art. 3a of the Convention and introduces the new category “Polish film” which seems to be based on the rules of Art. 3c and provisions included in Annex II; also the notions comprise the “production” and “co-production” in the given sector are in conformity with the European standard.

As it is even difficult to predict the precise final version of amending provisions it seems to be premature to make further explanations.

4. Broadcasting (Radio and TV)

a) Market perception in the Broadcasting Act

aa) “Product market”

The Broadcasting Act includes some important notions, which were defined in conformity with EU standards (art.4).

The general definition of the broadcaster is as follows: „broadcaster” - a person who produces or assembles programme services and transmits them or has them transmitted, in a complete and unchanged form, by other persons. There are three different categories of broadcaster: 1) commercial broadcaster which acts on the basis of the Chapter V provisions, concerning the broadcasting licences, 2) public ones which operates ex lege on the basis of special provisions included in the Chapter V and could also play on the commercial market within the scope of the production and transmission thematic

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110 See part. IV.

111 More information see point I point 2 (ee).
channels, and, 3) „social broadcaster” - a broadcaster who: a) propagates educational 
activities, promotes charitable deeds, respects the Christian system of values, being 
guided by the universal principles of ethics, and strives to preserve national identity in the 
programme service, b) protects minors - via eliminating all program services, which could 
have a negative impact for their development, (even those programs which are to be 
broadcast at other times than between 23.00 – 6.00, or, c) does not transmit advertising or 
teleshopping, sponsored programmes services, or d), does not charge any fees for 
transmission, retransmission or reception of the programme service.

According to the Act: the “program” means a separate part of a program service which 
is distinct in terms of its content, form, purpose or authorship. The Act distinguishes a 
“thematic programme service” defining it as a program service where at least 70% of the 
monthly transmission time during hours from 6 a.m. till 11 p.m. is devoted to programs 
and other broadcasts in line with the main theme of the said program service.

The notion of producers comprises a natural and legal person or an organisational unit, 
which ventures, actually organises and bears the risk of the creative, organisational and 
financial process of producing audiovisual works.

The Act precises also the definition of the “producer independent of a given broadcaster”, 
using as a criteria an employment relations and organizational matters in the scope of 
broadcasting (“… is not a broadcaster itself and holds no stake in the broadcaster’s 
organisation, and in which neither the broadcaster nor any of its subsidiaries nor any 
companies associated in the same group hold a stake”).

The market of the independent producers should play an important role in the television 
sector development as broadcasters are obliged to reserve at least 10% of their quarterly 
transmission time for European works produced by independent producers (art. 15a.1). 
According to the strategy of NBC\textsuperscript{112} the promoting of the development of the independent 
production sector is necessary as it is an important element of plurality and creative 
competition.

The Act specifies the rules for activities relating to the program transmission and 
retransmission, distinguishing three methods of transmitting the programme service - by 
terrestrial diffusion, satellite distribution and cable system.

- „transmission” – a) over-the-air transmission of a programme service for 
simultaneous reception by the general public (general reception system), 
b) introduction of a programme service into a cable network (collective 
reception system);

- „retransmission” - the reception and simultaneous transmission of a 
complete and unchanged programme service transmitted by a domestic or 
foreign broadcaster, with an exception of programme services transmitted 
by way of cable network.

Regarding the public broadcasters, it could be added that the legislator introduced the 
principles concerning the frequencies reservations issues, required for the public

\textsuperscript{112} More information see V p.4b.
companies to perform their statutory tasks. The Chairman of NBC acts in agreement with the President of URTIP; the procedure is governed by the provisions of the Telecommunications Law (art. 26 of the Act).

**bb) “Geographical market”**

The Broadcasting Act does not defines directly the geographic dimensions of the service in question by its area of reception. Nevertheless the Act includes the relevant notions but without any explanations of them.

Regarding the public sector provisions, concerning the frequencies reservations, it mentions the following categories of public broadcasters:

- national television and radio program services - the frequencies required to cover the territory of the country by the programme services transmitted by the „Polish Television I” and „Polish Television II” channels and by first, second, third, fourth radio channels as well as the radio program services for listeners abroad;

- regional television and radio program services - the frequencies required to transmit regional program services,

Also the must-carry provisions contain the notions of national and regional program services of public radio and television.

Regarding the commercial part of the market due to the technical conditions of different methods of transmitting program services, which are verified in the course of granting licences, some geographical criteria could be determined; such criteria could help: 1) the power of the transmitter and the maximum transmission power in the scope of the terrestrial diffusion, 2) the power of the transponder for transmission via satellite and, 3) the area covered by the cable system.

Resuming the abovementioned remarks it is important to point out that, due to the legal system provisions and to the course of granting licences, some kind of geographical indicators of audiovisual market exist in practice; moreover in practice (even in the scope of the science researches) the broadcasters are even divided into three: national, regional and local groups.

**b) Market perception in the Telecommunications Act**

Regarding a media sector, the Telecommunications Law does not refer to the content matters. The Law (art.2) defines the telecommunications undertaking, which means:

- “any undertaking or entity authorized to pursue business activity under separate regulations and which conducts business activity consisting in the provision of telecommunications networks, associate facilities or the provision of telecommunications services;”

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113 Also the must-carry provisions provided the notions of national and regional program services (art. 43).

114 For example beyond the radio public broadcaster, 215 commercial, including 3 nationwide, 3 sub-regional and 209 of regional or local scope, 8 of them of social broadcaster status.
telecommunications undertaking authorized to provide:

a) telecommunications services is referred to as the “service provider”

b) public telecommunications networks - which is a network used mainly for the provision of publicly available telecommunications services – or associated facilities is referred to as the “operator”.

The Law defines also telecommunications (art.2) as a: “the emission, reception or transmission of information, regardless of its type, via wire, radio or optical waves or other electromagnetic means”.

5. Internet

The access to an internet service is realized via a telecommunications network, which means transmission systems and switching or routing equipment and other resource which enables the emission, reception or transmission of signals by wire, by radio, by optical or by other electromagnetic means irrespective of their type (art. 2.p. 35 of Telecommunications Law).

Concerning the market definition the Polish legal system generally reflects the EU standard within this scope.115

IV. Market definitions and criteria for market perception in the media-sector as upheld in sector specific practice of authorities and courts

1. Publishing

Regarding the sector specific practice, one of the remarkable decisions held within the scope of President of the Office of Competition and Consumer Protection (OCCP) competencies, should be pointed at: Polskapresse Company Ltd116. According to the control of concentrations procedure, the President of OCCP issued the decision imposing at the entrepreneur a financial penalty; the justification of the decision indicated that Polskapresse company Ltd did not notify to the President of the Office the intention of creating the joint control thereby achieving a controlling stake over the Silesian Company Ltd.

2. Music and Copyright

The Copyright and Related Rights Act operates mainly within the scope of the civil law, focusing on the relationship between rights holders and the other subjects, which exploit their works. Nevertheless last year the President of OCCP issued a decision in the case of the biggest collective management organization in the field of author rights – ZAIKS.


Generally, in the scope of the decision of 16th July 2004\textsuperscript{117} the President assessed the practice of ZAIKS as restricting the competition. ZAIKS abused its dominant position on the national market on the collective management of authors’ rights of music works in order to extortion on the authors protected by the ZAIKS, the exclusive authorization to manage the rights of entrusted works; the President imposed a financial penalty.

3. **Film**

Due to the wide range of amendments included in a abovementioned draft of Cinematographic Law it seems not to be useful to access the sector specific practice or other practical matters in respect of the market issues.

4. **Broadcasting (Radio and TV)**

a) Criteria for market perception in the decisions of the NBC

First of all one draft of amendments of the Broadcasting Act regarding the audiovisual sector within the scope of media concentration should be mentioned; this is the draft of 2002 which included the specific regulation for media concentration. It comprises the cross–media criteria, taking into account the position of the broadcaster on the press market as well as the geographical audience scope and amount of the edition of the given newspapers; due to its principles the Chairman of OCCP was in charge to deal with concentration issues and to control the market; the draft collapsed in 2003.

As for the present legal situation, the criteria for market perception are included in the scope of the competition regulations. But due to full capital liberalization towards the EU countries the audiovisual market in Poland will change, including competition environment conditions. Article 40a of the Act provides that purchase or acquisition of shares or interest, or the acquisition of rights in shares or interest in a company holding a broadcasting license to transmit a program service, by a foreign person, requires a consent of the Chairman of the NBC, issued by virtue of the NBC resolution; those provisions are not applicable to foreign persons or subsidiaries, as defined by the Code of Commercial Companies and Partnerships, of foreign persons having a seat or permanent residence in a Member State of the European Economic Area.

When the owner of a licence (broadcaster), due to consolidation or division or other transformation of the companies would like to transfer his title to the licence, it requires the permission of NBC, issued in the form of a resolution; the refusal is obligatory if the given broadcaster achieves the dominant position in the mass media sector on the given market, in the meaning of the competition regulation (art.38a).

b) Criteria for market perception in the decisions of the President of URTIP,

According to the new *Telecommunications Act* of 2004, which is in conformity with the European Union relevant legislation, the President of URTIP, and in the above described scope (II.) the Chairman of the Broadcasting Council are responsible for telecommunications market regulation, in particular for: 1) analysis of relevant markets, including the imposition and withdrawal of obligations in the meaning of the competition rules, 2) telecommunications access, including the conditional access, and, 3) digital radio and television transmission.

The President of URTIP, is solely responsible for: 1) end-users protection, including the data protection in the scope of the telecommunications confidentiality, 2) universal access, 3) numbering and frequencies management, 4) telecommunications infrastructure, equipments and radio equipments, and, 5) telecommunications fee issues.

Both authorities act in a close cooperation with the President of OCCP and also with the Minister competent for Communications.

In respect of the media sector issues such provisions should be indicated:

- public telecommunications networks and other equipment used for receiving digital radio and television transmissions should ensure the interoperability of those transmissions, in particular by the use of an open application program interface as well as should meet the technical and exploitation requirements which allow for the provision of wide-screen television services (art.132);

- generally the telecommunications undertakings providing conditional access systems should offer broadcasters technical services, allowing the receiving of digital transmissions using decoders installed in the networks or at the subscribers, on equal and non-discriminating rules (art. 133); but upon performing a market analysis the Chairman of the NBC may, by means of the administrative decision, waive the obligation to provide the access for a telecommunications undertakings which does not possess significant market power in the conditional access system market (art.134).

- the Chairman may impose on telecommunications undertakings the obligation to provide access to the: application program interface, EPG in order to ensure end-user access to digital radio an television transmissions (art.136).

*The Telecommunication Act* is in force since the end of last year, therefore, it is premature to make an adequate evaluation of market situation under its provisions.

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5. **Internet**

Regarding internet services no specific market definition has been adopted. The provisions of the *Telecommunications Act* as well as act on electronic services should be applied.

V. **Common factors and differences between these market definitions and the market definitions used in application of the national competition rules**

1. **Publishing**

Definitions concerning the press, a daily and a newspaper is directed to media sectors as well as the main principles of the activities in this field; differences result from the specific character of printed and audiovisual media. The *Broadcasting Act* is *lex specialis* to the *Press Act*. Therefore the NBC in its activity, including the market issues is obliged to apply the *Press Act* provisions as a *lex generalis*.

2. **Music and Copyright**

The differences between the definitions applied in *Copyright Act* and *Broadcasting Act* definitions within the scope of the same issues, e.g. “broadcasting/ rebroadcasting” and “transmission/ retransmission adequately” sometimes have been effected of difficulties in legal interpretation of the complex matters and cases.

3. **Film**

As it has been already mentioned in part IV (3), because of the advanced parliamentary procedure on amendments to the *Cinematographic Act* it seems to be unnecessary to make comments within this scope now.

4. **Broadcasting (Radio and TV)**

The National Broadcasting Council, as the competent authority for the audiovisual media market plays a specific role solely or in cooperation with others regulators, in the respect of the technological environment:

- *Broadcasting Act* – governs the analogue broadcasting - broadcasting license shall not be awarded or could be revoked if the transmission of program services by the applicant or broadcaster may result in achievement by the applicant or the broadcaster a dominant position in mass media in the given area, which is estimated within the framework of licence procedure;

- *Telecommunications Act* – governs the digital broadcasting – in respect to digital media issues the Chairman of NBC in agreement with the President of URTIP, and in cooperation with the President of OCCP deals with the market matters. As there is not sufficient experiences in this field yet it is difficult to predict the practical aspect of these procedures.

In respect of the issues concerning the differences between market definitions and the market definitions used in application of the national competition rules some principles of
the strategy of the National Broadcasting Council in the electronic media field should be mentioned\textsuperscript{119}.

Within the framework of “eEurope 2005” as well as Poland’s information strategy the economic significance of electronic media and new technologies ought to be recognized. The NBC is of the opinion that it is a precondition to the modernization of Poland’s market. The most important is to lay down the legal framework for digital broadcasting, comprising the public sector model and its market position as well as commercial broadcasting (with respect to provide the stable and foreseeable conditions of development of it); those entail protection of competition in electronic media. The audiovisual production (including films) and development of Polish program productions market (in particular by independent producers) should be supported.

5. Internet

The abovementioned strategy indicated that: “Polish content providers offer many multimedia content on the Internet, including radio and television programs, which are intended solely for this distribution medium, it will therefore be necessary to put in place a system of regulation, co-regulation and self-regulation of the audiovisual contents on the Internet”. There is also need to provide the proper conditions allowing to create Polish information and cultural resources in the scope of Internet.

VI. The impact of the non-competition framework and practice on the work of the competition regulator, in particular when defining the relevant markets

Reassuming the evaluation of the impact of sector-specific framework and practical activities of the state and co-regulatory authorities within the scope of the competition regulation, some final considerations should be made.

As regards the relationship between the relevant regulatory authorities the proposals of NBC should be presented first of all.

Taking into account some EU trends, as well as the impact of technological convergence and integration of individual market segments, the close cooperation between existing regulatory authorities responsible for audiovisual media, telecommunications and protection of competition is desirable. Therefore the alternative solution is to establish the joint, convergent regulatory body for the whole electronic media sector. NBC predicts that: “In a few years’ time Poland should establish an integrated regulator equipped with a competency to issue regulations based on the legislative framework in place, whose authority will cover telecommunications, radio and television, teleinformation services and competition policy, as appropriate”: In the opinion of NBC, regarding the new media environment: “… it is easier for regulatory structures capable of formulating comprehensive policies and regulatory practices for the entire electronic media sector to meet the challenges faced by media policies and regulations”.

As regards the sector-specific regulations there is to be noticed that, within the scope of broadcasting, press, film, and copyright statutory acts of law there are no specific provisions, concerning the competition issues. Nevertheless, some attempts to amend the Broadcasting Act and Press Act have occurred, probably because of the fact, that the existing general rules are not sufficient to protect the competition and to balance the media market. Taking into consideration the international, in particular European, trends, as well as the Polish practical and legal experiences, there is a probability, that some specific regulations concerning the media market competition will be introduced.

On the contrary, The Telecommunications Act includes very precise provisions in this respect, concerning regulation of the telecommunications market, but the main principles of the general competition regulation, as well as legal definitions are valid in this case.

As regards market definitions, the competition notions, included in different legal acts generally ought to be understood in the meaning of the competition’s regulation provisions (as it is directly stipulated in the Telecommunication Act). The Telecommunication Act includes very precise provisions, concerning the regulation of telecommunications market, but the main principles of the competition regulation are valid as well as general definitions. But other definitions, strictly connected with a market activities (e.g.: within the scope of production, transmission, etc.) are different for relevant sectors – and their specific regulations. The authorities, which operate on a given market are bound by the notions proper for that sector; what could result in some difficulties in their precise and proper legal interpretation in certain more complicated cases.

Concluding the review and assessment of the influence of the non-competition framework and practice on the work of the competition regulators, it should be pointed out, that no direct impact is observed. Nevertheless the links and mutual influences exist in practice. The cooperation between different regulatory authorities in the new technological environment could finally result in the creation of a convergent regulatory body in the electronic media sector in Poland.