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COMPETITION ISSUES IN TELEVISION AND BROADCASTING

Contribution from Poland

-- Session II --

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-- Poland --

1. Background information

1. The history of television sector in Poland dates back to 1938 when the first experimental TV station was established in Warsaw. In the late 50s, Telewizja Polska (TVP), a public broadcaster started the transmission of a regular programme. The private television market has been evolving in Poland since the early 90's when the pioneering private local television stations started their operation. Polsat satellite TV came next as in 1994 it was granted a nationwide licence for terrestrial broadcasting. Gradually, other private broadcasters as well as satellite programmes started to appear. Moreover, since the mid 90's, there have been emerging first thematic channels of foreign broadcasters available in the Polish language.

2. Nowadays on the Polish television market there operate over 100 nationwide channels. In principle, particular channels belong to the leading media companies (groups) such as: [Grupa ITI](#), [Telewizja Polsat](#), [Canal+ Cyfrowy](#). Very few channels are accessible by means of a non-coded satellite transmission. They are mostly accessible at a charge and by means of digital platforms operating on the Polish market as well as cable TV networks. Except for nationwide channels, there are also local television stations which usually broadcast their programme within the cable TV network.

3. For the last few years we have been facing a rapid development of new technologies which significantly affect the dynamic of changes in the TV access services sector. Activating the Internet TV service by telecommunications operators, or the digital terrestrial television – to name just a few examples of technological advancements on the market of media services. It is assumed that in the year 2014 the number of subscribers of pay TV in Poland will be 13.7 mln whereas the contribution of thematic channels (including the free access via the digital terrestrial television) may exceed even 90 percent. New generation networks are bound to expand and facilitate the development of new forms of consumption in the scope of television services.

4. The introduction of terrestrial digital television in Poland is an element of a world-wide process to convert from analogue signal transmission to digital transmission. Pursuant to the GE6 agreement concluded in Geneva in 2006 during the ITU Regional Radiocommunication Conference, Poland is obligated to cease analogue transmissions by 17 June 2015. The introduction of terrestrial digital television should be associated with the possibility of developing competition on the market for television broadcasts. The introduction of digital television will make it possible to improve the quality of transmission, and will facilitate transmitting additional data related to the programs (e.g. subtitles). What is more important, thanks to the increased efficiency in the use of the radio frequency spectrum, it will also allow more programs to be offered. An immediate result of the increased number of television stations will be more competition on the market for television advertisements. Furthermore, the implementation of terrestrial digital television will enable the development of additional services, such as EPG, pay-per-view, e-commerce. Digitisation will also facilitate the convergence of television with other digital technologies (e.g. GSM, UMTS, GPS). The termination of analogue broadcasts of television programs will take place no later than on 31 July 2013. By this time, access to digital television signal should be ensured throughout Poland.

2. Pay television market analysis

5. In the past few years, Office of Competition and Consumer Protection (hereinafter UOKiK) has been closely following developments in the television sector. In 2010-2011 pay television market in Poland has been a subject of careful analysis covering over 185 undertakings, both at the nationwide level and local markets (31 cities were examined). The collected data related primarily to years 2007-2009. The report also used exterior materials, including those of the Polish Chamber of Electronic Communication, the National Broadcasting Council and the Office of Electronic Communications.

6. The results of inquiry confirmed that the services of pay TV in Poland are provided by satellite digital platforms, cable operators and IPTV. The largest number of subscribers (over 6 million) belongs to the operators of digital satellite platforms – i.e. about 60 percent of pay TV users. A dynamic growth in the number of people using these services can be seen.

7. There are over 600 operators of cable TV. Cable television has slightly fewer subscribers - approximately 4.6 million people, making the Polish market the third largest in Europe. Cable networks registered a much smaller increase in the number of subscribers than satellite platforms primarily due to the high costs of building the network necessary to provide services. This limits the activity of cable networks mainly to urban areas and multi-family housing. Markets of large cities are already heavily penetrated, which cannot yet be said about the villages and small towns, where the digital platforms expand. In addition, one of the problems of development of cable television involves housing co-operatives refusing operators access to certain buildings. Such behaviour was already subject to numerous proceedings conducted by UOKiK.

8. The least widespread way of receiving pay TV is IPTV. In 2009, four local cable operators provided this type of service. According to surveyed entities, the reason for low popularity of these services include high costs of building the necessary infrastructure and strong saturation of the market by other means of broadcasting, as well as issues with program content security.

9. In 2009, the offer of most pay TV operators included the average of 56 Polish-language channels broadcast in analogue system. In the case of programs broadcast in a digital system there are significant differences between individual operators. Their number varies from several dozen to over 100. The range of channels broadcast in HD is also growing. As the first in Poland, in 2007, this standard was introduced by Television N. Multimedia Poland was a pioneer among the cable networks. Currently, the major market players offer at least some HD programs.

2.1 *Relevant market*

10. UOKiK takes the stance that as far as products are concerned, all pay TV operators build up one market. The provision of packages of TV programmes to final users performed by operators of satellite digital platforms, cable operators as well as operators using other modes of transmission [e.g. Direct-To-Home (DTH) satellite broadcasting, transmission of TV signal in broadband networks based on IP – IPTV(Internet Protocol Television)] should be classified as the same relevant market due to the fact that a consumer is provided with a similar service regardless of the applied technology.

11. However, it is much more difficult to determine the relevant geographic market. There are both satellite digital platforms (nationwide) and operators active within certain areas, which are limited by the infrastructure of their cable network – to set an example of asymmetry of substitutability. On the one hand, pay TV service provided by operators of satellite digital platforms serves as a substitute of the service rendered by cable operators, except these cases when there emerge some technical limitations in broadcast. On the other hand, due to certain limitations in providing cable services in many areas (necessity to have a

well-developed infrastructure), it should be assumed that local markets (*sensu largo* regarded as whole cities, and *sensu stricto* approached as given areas throughout cities) constitute the relevant market for cable operators.

3. Competition enforcement

12. The President of the Office of Competition and Consumer Protection has recently delivered several significant merger as well as antitrust decisions in television sector.

3.1 Merger control

3.1.1 Decision DKK- 101/11 of 5 September 2011- UPC Polska/Aster conditional clearance

13. Information gathered by the Office in the abovementioned market analysis contributed to the conditional clearance of a transaction involving UPC Polska – the largest cable TV operator in Poland – taking over Aster, a cable TV provider with particularly strong presence in Warsaw and Cracow. UOKiK's analysis showed that the concentration would result in a significant restriction of competition in Warsaw and Cracow on the markets of pay television and stationary broadband Internet (combined market share of both companies ranging from 50 to 60 percent).

14. UPC Polska was allowed to take over Aster under the condition that within 18 months from the date of decision issuance it will sell its network, where it overlaps with that of Aster to the independent operator. The resale must cover the undertakings out of the capital group of the acquiring entity, after obtaining the acceptance of UOKiK.

15. Taking into consideration the technical aspects of the concentration and interests of consumers, the President of the Office additionally required UPC Polska to provide subscribers with services of the right quality and continuity before and during the acquisition of the part of Aster's network. Moreover, UPC was prevented from contractually hindering customers from the area where Aster's and UPC's networks overlap from changing providers. In particular, such customers were not to bear any costs of early contract termination.

3.1.2 Decisions DKK-93/2012 and DKK-94/2013 of 14 September 2012

16. In March 2012, as a result of a request of the undertakings subject to the concentration, the European Commission has referred a case with an European dimension to the consideration of the Polish Competition Authority. When assigning the case to UOKiK, the Commission took into account the fact that the transaction involved only the Polish market and that the Polish Competition Authority has had a significant experience in examining the TV and advertising sectors.

17. In connection with the notified transaction, since April 2012 UOKiK has conducted two proceedings in concentration cases. One concerned the takeover of N-Vision by Groupe Canal+, which is to be exercised jointly with ITI Holdings. The second – taking control by Groupe Canal+ and TVN over the entity created by merging Canal+ Cyfrowy and ITI Neovision, which will allow for joining the activity of satellite platforms.

18. Groupe Canal+ belongs to the international group Vivendi. It operates mainly in France, and deals with the production, distribution and marketing of tv channels and services provided by any types of media platforms. In Poland it operates under a company Canal+ Cyfrowy, providing pay tv services available via the satellite platform Cyfra+. Additionally, it is a distributor of over 100 tv and radio channels, including these broadcast by companies of Vivendi group, e.g. Canal+, Ale kino, or Mini Mini+.

19. TVN is a dependent undertaking of N-Vision, dealing inter alia with broadcasting general use channels and licensing the paid ones such as TVN24 and TVN Turbo. Moreover, it controls a number of companies, including ITI Neovision, the operator of satellite platform n. Both N-Vision and TVN constitute a part of ITI Holdings capital group.

20. Taking a joint control by Groupe Canal+ over N-Vision will take place as a result of acquiring the minority package of shares amounting to 40% and certain rights entitling to exercise joint control. As regards the second transaction, the assets of Canal+Cyfrowy, following its transformation into a joint stock company, will be transferred to ITI Neovision for the exchange of shares in the increased initial capital.

21. The inspection of UOKiK revealed that concentrations will most powerfully affect the domestic markets of granting licenses to pay TV channels as well as access services to pay TV and TV commercial. However, none of these markets will experience the significant restriction of competition. Therefore, the President of the Office has given her consent to both concentrations.

3.2 Antitrust cases

22. Aside from the merger cases, UOKiK has triggered antimonopoly proceedings regarding competition- restricting agreements relating to television and broadcasting sector. The first one concerned the mobile television whereas the other broadcasting sports events.

3.2.1 Decision DOK 8/2011 of 23 November 2011 – cartel of operators

23. In 2009 the regulator - Office of Electronic Communications determined the bid result concerning the reservation of frequency which would enable inter alia the TV digital video broadcasting via a mobile phone (DVB-H). There were two entities participating in the procedure - Info-TV-FM and consortium Mobile TV, intentionally formed for this occasion by four mobile network operators (Polkomtel, Polska Telefonia Cyfrowa, PTK Centertel and P4). The reservation of frequency was granted to Info-TV-FM. However, the company was subsequently unable to gain support from the mobile operators. In order to offer services to individual consumers at a large scale the entity had to sign agreements with them. After the tender UOKiK observed disturbing signals of market behaviours among operators who failed to win it. Consequently, in September 2010 the President of UOKiK instituted the antimonopoly proceedings concerning the alleged unlawful agreement concluded between the four mobile operators.

24. As a result of conducted proceedings and the inspection with search performed in undertakings' premises, the Office managed to collect considerable evidence proving that the mobile operators who failed to win the tender for granting frequencies, concluded an unlawful agreement. Moreover, the Office examined the information placed by the operators inter alia in the media, on Internet portals and blogs. The Office determined that the participants of the consortium formed especially for the tender, agreed on their actions towards the bid winner right after failing to win the tender. The operators assessed in cooperation the financial and business conditions included in the selected offer. Furthermore, they agreed on PR actions aiming at questioning in public the validity and reliability of the Info-TV-FM bid. Such behaviours of competitors resulted in impeding the mechanism of effective competition. This unlawful agreement lasted over two and a half year and effectively hobbled the development of the DVB-H wholesale TV market and so prevented consumers from having access to mobile TV services. All participants of the cartel were ordered to cease the practice and imposed financial penalties exceeding in total PLN 113 mln.

3.2.2. *Broadcasting sport events*

25. Moreover, in November 2012 the Office of Competition and Consumer Protection initiated antitrust proceedings concerning the market of granting the right to broadcast sports events. The President analyses the way of fixing prices for broadcasting football elimination matches for the 2014 Football World Cup, played by the Polish team with Montenegro and Moldova. In fact the fans had a chance to follow the live transmission of the event on TV provided they paid PLN 20.00 to a selected supplier for watching the matches in the so- called pay-per-view (PPV) system¹.

26. Sportfive, a company which enjoys the right to TV broadcasts of these events, granted the license to selected undertakings to provide their transmission via the pay-per-view system. The information collected by UOKiK clearly shows that when concluding contracts with eleven TV operators, Sportfive fixed the minimum price to be paid by viewers for the transmission in the amount of PLN 20.00. The proceeding is under way.

27. This is not the first case when broadcasting of sports events raised anticompetitive concerns. In 2006 the President of UOKiK imposed the penalties of almost PLN 8 million on the Polish Football Association (PZPN) and Canal+.

28. The Polish Football Association had an exclusive right to grant the license for the broadcast of football matches. Any TV station which wanted to broadcast the matches of the national 1st and 2nd league and the Polish Cup had to take part in a tender organised by the Association. What is important, the right for live broadcast of the league matches was granted by the PZPN as an exclusive license. It was granted to the broadcaster which submitted the best bid.

29. In 2000 PZPN signed a contract on the broadcast of football matches with Canal+. The contract was effective until 2004/2005 season. The Office of Competition and Consumer Protection established that there was a clause in the contract which granted Canal+ the priority to obtain the exclusive license for broadcasting the matches from 2005/06 to 2008/09. Pursuant to this provision the Association was obliged to inform the station about the conditions of the bids submitted by its competitors. According to the contract, Canal+ obtained the license automatically if within 30 days it presented the conditions equal to the bid considered to be the most favourable by the Association.

30. In the opinion of UOKiK the privileged position granted to Canal+ by PZPN which had monopoly for granting the license for the broadcast of club matches in Poland had an anticompetitive nature. On the basis of the contract the company did not have to undertake the market competition on the same rules as other TV stations. In order to have a chance to obtain the license, other bidders had to offer the amounts which would be large enough to guarantee that Canal+ will not be able to pay them. In its initial bid Canal+ could offer the conditions much worse than other broadcasters, knowing that it may use the right of preemption and increase the amount it offered to the level determined by the competitor with the highest rating.

31. The privileged position of Canal + station deteriorated the situation of its competitors which could not enter the market on the same conditions. The agreement harmed not only the broadcasters but also the viewers who were not able to obtain a wider access to the broadcast of the PZPN football matches.

¹ PPV is destined to provide specified contents. In most cases it provides live broadcasts of sports events – upon incurring the additional charge, not included in the subscription contract.

5. Conclusions

32. Pay-TV market in Poland is going through a period of rapid and profound change. It is continually faced with technological change and innovation. Only just has digital cable TV been introduced - providing many additional services such as video on demand (VoD), the possibility to watch different channels at the same time using one decoder – when the television faced a new challenge - 3D TV. Apart from the digitalization, two other trends can be outlined: the bundling of services, both by cable operators, and digital platforms, and the accelerated consolidation of cable operators. Emergence of new methods of video transmission, media convergence, and further advances in technology will undoubtedly affect consumer preferences and alter the competitive dynamics of the broadcast television industry in the future.