

**Stanisław Piątek, *Sieci szerokopasmowe w polityce telekomunikacyjnej,*
[*Broadband Networks in Telecommunications Policy*],
Wydawnictwo Naukowe Wydziału Zarządzania
Uniwersytetu Warszawskiego, Warszawa 2011, 218 p.**

A new book from Professor Stanisław Piątek, an established authority on telecommunications law, brings the reader closer to the inner workings of broadband technology in its legal environment. The title reflects the focus of telecoms policy on access whereby the only access that matters is to the broadband network in its many variations. The subject matter itself makes the book worth reading, particularly in the absence of other major Polish works on this topic. Even if some authors regarded broadband technologies as obsolete years ago¹, in reality it still represents a lion's share of the telecoms business. Professor Piątek himself is well aware of the historical and transitory nature of the subject matter when he defines broadband not by association with any particular technology but as the ability of whatever technology available at any given moment to provide a certain minimum transmission speed. Thus the central notion is open to absorb technologies nonexistent as of yet. This in turn may pose serious regulatory issues as to what future industries will be subject to regulation, particularly since the distinction between content and carrier regulation is becoming increasingly blurred.

This seminal book covers telecoms policy, broadband access networks, institutional architecture of the sector, strategies for the development of broadband networks, regulation, regulatory impact on investment, next generation networks policy, public aid, local government powers in the development of broadband networks, all arranged in nine separate chapters. This short list gives merely a foretaste of the richness of pertinent legal issues examined in the book.

This is the first Polish work of this size and depth to tackle this difficult subject. The book represents a class in itself because of the Author's profound knowledge of the telecoms sector. Reading it is a humbling experience for a telecoms student for it proves that a lawyer without a technical background, formal or not, has changed the field of interest for the better.

The first two chapters explain the key terms contained in the title, telecommunications policy and broadband technology, which positions the book among integrative,

¹ J. Thorne, P. W. Huber, M. K. Kellog, *Federal Broadband Law*, Little, Brown and Company, Boston 1995, p. 27.

interdisciplinary scholarly achievements. The concept of sectorial regulation adopted by the Author is a broad one. It includes the activities of public authorities directed at telecoms enterprises which are aimed at promoting competition. These are *ex ante* decisions, lacking the attributes of legislation. Such an approach puts the reader at the crossroads of telecoms law and a broader theory of law. It could be argued whether regulatory rulings and other regulatory acts (e.g. recommendations or setting up investment expectations) *vis-à-vis* telecoms really fall under the ambit of policy rather than legislating. However, the Author does not get distracted from the main course of his considerations. Instead, he provides the reader with ample and complex material as food for thought about the place of this highly technological and atypical State interference with high-tech business. The main questions tackled in the book revolve around telecoms policy. Rather than exploring various theoretical concepts, Professor Piątek describes policy by presenting its aims and external contexts. One of the concerns prominently present throughout the book is the dilemma of reconciling the need for regulatory intervention (essentially administrative) with investment incentives in new technologies (which calls for softer regulatory grip). In essence, it is a Hamletic question of whether to allow for a somewhat privileged positions of the already dominant incumbents which, nevertheless, contribute the most to network development but are posed to reap excessive benefits from their position in the future, or to rigorously apply 'regulatory justice' now and make the consumer worse off in the long run due to technological backlog.

Apart from its ability to overwhelm, the book explains the basic notions of broadband telecommunication including what is called in the text the institutional structure of the telecoms sector (Chapter III). It examines classical notions of competition and regulation such as: incumbent, significant market power, a dominant and alternative operator along with other types of operators and the various types of users in their special broadband context. Under a separate heading, the book discusses 'transactional institutions' to include telecoms access in a variety of its forms. Most terms and technicalities are explained in their historical and functional context.

Chapter IV testifies to the Author's intention of presenting policy rather than law, thereby revealing the true interdisciplinary nature of the book. Found here are familiar notions of competition and regulation cast against their technological and demographic backdrop. Here, the reader must face the fact that the various State approaches are not so much inspired by scientific considerations as might, and should be expected. Instead, State policies represent an entanglement of administrative and judicial developments tailored to the specific level of technological development in the given country, its population density and desire to stimulate the growth of national economies. Three distinctive models are recognized in this context: the European, Asian and North-American model. The Author is quick to admit that examples of successful foreign policies cannot be mechanically replanted into the Polish telecoms environment. He also points out that regulation is only one of the three key instruments of State policy, the other two being planning and finance. Nevertheless, Professor Piątek is against a hasty withdrawal of regulatory instruments once infrastructure

moves from lesser technology to broadband on the premise of effective competition since the move might lead to an ineffective use of existing resources.

Another point which, *per se*, reaches far beyond telecoms policy is the financing of telecoms investment and the cushioning by public money of inherent investment risks. This includes financing through public ownership of telecoms. The book does not dwell upon the political intricacies of this process and is not expected to do so. Importantly however, public funding of supranational corporations where the public does not receive a share of the resulting benefits is subject to a sharp criticism outside the field of telecoms law.

Chapters V and VI deal with regulation as a decision-making process seen from the perspective of technology and economics. References to the canons of public law are few and far in between. Instead, regulation is analyzed by pointing to regulatory cycles which begin with the determination of the need to regulate. The criteria to be applied are: 1) existence of serious and permanent entry barriers, 2) ability to achieve effective competition within a foreseeable future at a predictable cost, demand, under given technology characteristics and 3) inability of competition law instruments in providing effective competition. Access to the local loop is examined next. It is an exercise in policy rather than subsuming the law, for a typical local loop remains in the hands of an incumbent. This brings us again to the issue of network funding by the State during a time when the incumbent was still a State-owned monopoly. The reader will find here useful explanations of basic terms pertinent to local access followed by a presentation of national regulatory policies in selected European countries.

Professor Piątek voices his criticism of Polish regulatory, legislative and policy practices on several occasions. One can even wonder if the government has any such policy at all, which the book describes as blurred, unskilled and sourced in low-profile documents. Above all, Polish telecoms policy is vested in regulatory authorities, constitutionally placed below the government, rather than somewhere within the State's political center (p. 76–77). It is also inconsistent with the Polish model of regulation which remains limited to individual decision-making with no legislative traits. Correspondingly, the success in opening access to the local loop in Poland is modest (p. 93). Nevertheless, some discrepancies between Polish regulatory policy and that formulated by the European Commission are praiseworthy such as the status of a BSA service in the State's regulatory policy. Still, having a different policy is not an accomplishment in and of itself. It serves as proof of healthy relations between the pan-European regulator and its national counterparts as well as of the independence of the decisions taken by the Polish NRA (the UKE President). It also confirms that, unlike the government, the Polish regulator has a clear vision of what it wants to achieve. The scope of a potential dispute could be much wider to include, among others, the necessity of regulating In Poland peering and transit markets, or defining emerging markets as in the 2007 dispute between the Commission and Germany. This part leaves one wondering just how much of regulation is simply the national style of projecting State power, and what exactly is perceived as being in a nation's interest in the telecoms sector when it comes to investment?

The regulatory mechanism is being charged with, in Professor Piątek's account, decreasing capital return which in turn deters investment. Such a negative effect may take place when network access is granted to competitors too soon after the investment, the latter being usually shouldered by the incumbent. Literature remains split on the benefits of regulation and the Author seems to side with the skeptics. He rightly observes that non-dominant market players tend to take it for granted that the regulator will sooner or later grant them network access. Their investment policy thus tends to focus on the development of peripheral facilities never to threaten the infrastructural position of the incumbent. As a result, they never really climb to the top of the investment ladder (an issue which in itself has been the subject of much scholarly debate). The danger of providing 'free rides' has thus become an inherent problem of regulatory and State policy. Taken together, the above circumstances pose regulatory risks not only to investors but also to the State itself because one of the aims of regulation is to stimulate network development, which will either not be achieved at all, or will do so but at the price of perpetuating the power of the incumbent. This may also be a crucial factor in positioning the national economy on the global economic scene where a given economy's standing increasingly depends on the technological competitiveness of its telecoms infrastructure. Thus the book rightly asserts that market leaders should not be subjected to excessive regulatory burdens since, effectively, they are the ones to foot the bill. Regulatory restraint and caution seem to be the best policy.

An equally disquieting issue is regulatory policy towards next generation networks (NGNs) and next generation access (NGA). The difficulty here lies in arranging regulatory intervention in such a manner as to create favorable conditions for new technologies without losing the benefits of existing policy towards copper networks, and without creating yet more barriers to competition. The task of formulating a sensible regulatory policy is formidable when neither the telecoms operator nor the regulator has many clues as to future market developments. Technology, economy, information and stranded cost are among the sources of regulatory uncertainty listed in this context. While presenting pros and cons of various configurations based on broadband technology types, Professor Piątek reaches the conclusion that the stability of the regulatory environment cannot be achieved by legal means alone. It is recommended instead to enhance the exchange of information between the UKE President and the operator, the latter trading off information on its investment plans in exchange for regulatory declarations as to future access policy. That particular regulatory *laissez-faireism* seems justified in view of so many variables affecting the future of telecoms. The doubts outlined above are not altogether dispersed in the discussion of EU policy on NGNs/NGA. Even if the reader is not necessarily convinced of the superiority of EU policy, the book offers a concise presentation of the EU approach and, again, a detailed explanation of the consequences of diverse regulatory movements. Particularly enlightening are remarks on imposing additional costs on an investor (such as a requirement to develop multi-fiber technology) to ensure sustained competition made possible by simultaneous access to the final users by multiple operators. Other valuable observations concern investment risks

involved in the most capital consuming networks such as FTTH and the withdrawal of regulatory measures.

The last two chapters address public aid and local government involvement in network formation. It is a mixed bag where classical issues of State aid (embodied in the Altmark case) and sector-specific considerations overlap. The reader gets a glimpse into various Europe-wide projects such as Citynet Amsterdam, where the imposition of an obligation to provide a service is accompanied by public assistance. Different models of aid are presented. Most controversial seems the aid to NGNs where justifying public assistance is increasingly couched in terms of long-range strategic plans aimed, as is the case in Finland, at securing the service to all citizens, instead of pointing to the usual calamities listed in Article 107 TFEU. Financing NGNs/NGA cannot be justified by a mere elimination of 'a digital gap' for NGNs/NGA is always promoted in States with most advanced networks anyway. Here, too, the Author is critical of administrative support that the Polish telecom sector receives from the State. The list of charges is long and includes, *inter alia*, not taking advantage of the funds already granted, slow decision-making process, inaccurate identification of areas in need of investment, overlapping and fragmentation of various aid programs, delays in the setting of conditions for conducting telecoms activity and the lack of powers to act.

The last chapter is devoted to local government participation in network development and it is very telling indeed. The reader may learn that the cult of superiority of private initiatives over public involvement (as practiced in Poland) is not in fact typical for the modern telecoms sector. In highly advanced economies, local governments both own and develop substantial parts of telecoms networks. In his incisive critique, Professor Piątek points out that the false paradigm of private ownership remains coupled with unclear statutory foundations. Local governments fear, therefore, the legal and material responsibility for the allocation of public funds, which are mostly of EU provenience and dwindling. There is hope for improvement for the obstacles are not intrinsically systemic, but rather a product of inadequate administrative know-how.

The conclusions offered by the Author suggest that the high position of regulation as a factor in network development is overstated. States, seemingly at odds with academic wisdom, resort frequently to non-systemic solutions such as agreements between NRAs and incumbents or direct legislative and administrative interventions. The rich mosaic of national interpretations of the very basic notions of competition and regulation as envisioned in the founding treaties of the EU as well as its secondary law leaves ample room for viewing regulation and policy as an art of governing as much as science.

Despite its reserved style the book makes passionate reading for scholars and students alike.

Dr. hab. Waldemar Hoff

Chair of Administrative Law and Administrative Economic Law, Kozminski University,
Warsaw