

**Katarzyna Chałubińska-Jentkiewicz, *Media Audiovizualne.  
Konflikt Regulacyjny w dobie cyfryzacji*  
[*Audiovisual Media: regulatory conflict in the digitalisation era*],  
Wolters Kluwer Polska – LEX, Warszawa 2011, 356 p.**

The book under review here is entitled *Audiovisual Media: regulatory conflict in the digitalisation era* by Katarzyna Chalubinska- Jentkiewicz. As the title suggests, I expected it to be a monograph on new regulatory problems in the increasingly digital audiovisual field. The sector itself is well known to cause competence conflicts between the as many as three different regulatory bodies overseeing it in Poland: the national telecoms regulator (the UKE President), the audiovisual media supervisory body (the KRRiT) and the competition authority (the UOKiK President). The impact of the European Commission can also not be overlooked. The book does indeed deal in great detail with what is seen as the ‘regulatory conflict’ in the audiovisual field but the approach applied therein is that of the theory of administration and administrative/constitutional law rather than that of market regulation. As a result, the analysis focuses primarily on the perceived ‘conflict’ between Poland’s interests and regulatory competences and the impact exercised by the European Union as a whole, rather than on any existing or potential internal conflicts. Key to the entire analysis is the contraposition of the notion of ‘public interest of a nation’ (State) and the ‘general interest of the EU’ whereby the special characteristics of ‘national’ public interest are associated with the notion of ‘public morality’ and also, ‘public mission’.

It is already clear from the Introduction that the Author is acutely concerned with the conflict existing at the intersection of national public interests and the EU general interest on the one hand, and that between technological and economic aims as opposed to social (content-related) objectives on the other. She is clearly right to see EU intervention as predominantly technology and economy-driven and associating a far more socially-oriented focus with national initiatives. As such, a conflict of goals is said to occur when what is determined by economic/technological objectives clashes with what is purely social in nature. This brings the analysis to the impact of the ‘primacy of EU law rule’ on the sovereignty of national authorities and to the criticism of the progressing Europeanization of public policy overall and audiovisual policy in particular considering its close proximity to national identity. The thesis is proposed therefore that in certain areas related to the realisation of national public interests such as culture (and thus audiovisual media realises culture-related objectives), the EU law primacy rule must be subject to exceptions caused by purely national considerations.

The Author argues for prioritising social considerations based on the notion of an individually defined public morality over those related to market considerations (such as competition for instance).

The conclusion is reached that neither the Polish legal system nor its administrative system nor finally the regulatory techniques used are currently adequate to deal with the complexity of the issues arising in the digital era. The Author proposes a number of possible changes that would in her opinion better serve the objectives of national public interest. In order to do so, she speaks for instance for a clear division of competences between the telecoms regulator (UKE President), which is seen as subordinate to the European Commission and subservient to EU general interests, and the audiovisual media supervisory council (KRRiT) which protects national general interest goals in the audiovisual field. The make-up, decisional practices and organisation of the latter is seen as more constitutionally sound in particular due to its, at least formal, independence not just from the Polish government, but also from the direct influence of EU institutions. Another worthwhile suggestion is made with respect to the decision-making powers of the telecoms regulator which are currently vested in a single individual, the President of UKE, whose personal preferences and actual knowledge put into question the objectivity of his/her regulatory decisions.

The book is divided into six chapters. The existence of a regulatory conflict in audiovisual media is closely associated with the notion of public interest. Chapter I, entitled 'The notion of public interest. Duality of regulatory approach', presents a detailed analysis of the fluid notion of public interest in light of: societal needs, interests of individuals; interests of the State; governmental preferences; aims and function of public administration. Most importantly perhaps, public interest is seen as the justification for the restriction of individuals' rights and the source of limitation for public intervention. Presented next are the many facets of digitalisation and the legal basis of the dual regulatory environment applicable to audiovisual media. Noted on the EU side are primarily the i2010 initiative, the evolution of the Audiovisual Media Services Directive (AVMSD) and the EU Telecoms Package of 2002. Considering Polish legislation, the Author is quick to criticise the fact that the main legislative act in the audiovisual field, the Radio and Television Act, regulates both content-related and distribution issues (i.e. broadcasting concession). The chapter closes stressing the dominance of the pursuit of the EU general interest objective in the regulatory framework applicable to the digital economy.

**Chapter II 'Regulatory conflict: diversified views on public interest in audiovisual media'**. The Author starts her analysis by noting the special place of audiovisual media in the public sphere. Briefly listed are Polish public interest goals defined by its Constitution, Radio and Television Act and Telecommunications Law Act including: the protection of minors, public health and morality; progress and technological neutrality; cultural diversity and medial plurality. The book continues on to introduce the place of audiovisual legislation in the context of EU law overall covering the Protocol on Public Broadcasting, discretionary exemption for 'cultural' State aid, the AVMSD and the Telecoms Package of 2009. The latter part focuses on the duality of audiovisual media regulation in Europe, that is, parallel application of national and

EU legislation. The Author speaks at length about the consequences of the 'primacy of EU law' rule in this field covering also the subsidiarity and proportionality principle. Presented next are jurisprudential developments in free movement of services cases; a number of national judgments on the relationship between EU law and national constitutional norms and finally; the jurisprudence of the European Court of Justice and its doctrinal interpretation with respect to public goals.

**Chapter III 'Regulatory conflict: public morality and public mission as determinants for differences in the understanding of public interest'.** The Author analyses at length what morality and public morality are and their relationship to the State and public interests. Stressing how important this concept is for Poland, the Author quotes the special provisions attached to its Accession Treaty that state that EU Treaties cannot limit Poland's competences to legislate on morality issues. Supported by ECJ jurisprudence, the Author argues for the need to pursue national public interests alongside the EU general interest since only individual member states can define what lies in the ambit of their public morality which determines the direction of national public interest. Considered next is the protection granted to public morality by Polish law via its constitutional rules on the freedom of speech and freedom of economic activity and content-related rules contained in the Radio and Television Act. Special emphasis is placed on the constitutional debate concerning the obligation placed on public broadcasters for their programmes to respect 'common Christian values'.

The following part deals with the notion of 'public mission' which defines public interest goals in audiovisual media. Once again the analysis turns to the role of public administration in defining and realising public interest goals. Unsurprisingly, the Author speaks in favour of the public mission being defined at the national level acknowledging the EU's support of this approach. Indeed, from the Amsterdam Protocol to numerous other EU acts, not only are member States competent to define their public mission, they are allowed to expand its scope in particular by entering the on-line domain for instance, in order to facilitate inclusiveness. The Chapter closes with interesting remarks concerning the potential need to redefine some of the public interest goals in the increasingly digital audiovisual media, the suggestion that public mission broadcasting should be shielded from governmental influences and based on a contractual relationship with an independent regulator and finally, that the pursuit of the public mission should be moved towards the public-private partnership domain.

**Chapter IV 'European regulatory directions and national public interest in the audiovisual media sector'.** This Chapter focuses on telecoms regulation because rather than broadcasters, infrastructure operators are seen as likely to be the ones to shape future audiovisual markets. After presenting the historical evolution of EU telecoms intervention, noted in particular is the 2002 EU Telecoms Regulatory Package that affected the audiovisual field directly via the broadcasting transmission market (so-called market 18). The Author acknowledges here that EU initiatives foresee the regulation of transmission only (in the general interest of the EU); regulating content is associated with national public interests. A regulatory conflict could thus emerge since the interests of the stakeholders can differ.

Moving on to the assessment of the Polish regulatory sphere, the Author emphasises that it is very closely entwined with EU initiatives. She continues on to assess the justification of State intervention into telecoms markets; procedural issues (consultation and consolidation procedures) including the involvement of the Commission as well as the issue of regulatory obligations. Assessed next is the notion of concessions in general (and concession tenders) and concessions for broadcasting activities in particular. Considered here is the spill-over of telecoms regulatory solutions into audiovisual media. While, however, having telecoms regulation oriented primarily at the EU general interest is not as controversial, using the same approach to the audiovisual field is seen as unacceptable. Although administrative decisions issued by the telecoms regulator are seen as a means of realising national public interest goals defined in the constitution; the Author is wary of the fact that the regulator must prioritise EU law which would, in her opinion, exceed their competences.

Also discussed in this chapter is the fact that the development of electronic communications causes some difficulties in the content-regulation field also, such as 'jurisdiction shopping' which results in the avoidance to fulfil public interest goals. The most problematic issue is seen in the regulation of the content of Internet services especially where they slip between the gaps of the Press Law Act and the Radio and Television Act.

**Chapter V 'The must carry rule as a tool of public interest protection in a national perspective in the audiovisual media sector'.** 'Must carry' is presented here as a form of restriction on individual freedoms justified by national public policy in the audiovisual field. The use of 'must carry' is seen as inseparably related to national public interests – facilitating the fulfilment of the public mission in broadcasting (mostly by public operators) by ensuring general availability of channels/programmes aiding the achievement of public interest goals. That realisation remains valid in the opinion of the Author also in light of the changes caused by digitalisation. The Polish system is peculiar however because rather than listing must carry channels, it imposes the order in which they are to be introduced into cable offers (effectively covering all channels on offer in a given region). However, current Polish legislation is not seen as technologically neutral – its 'quasi' must carry rules apply to cable operators only. The Author is critical of giving decisional powers of an equivalent effect (deciding on the inclusion into a multiplex) to the telecoms regulator with respect to digital platforms – this issue is said to be an important element of the regulatory conflict in the digital era. Speaking in favour of a continuing use of 'must carry' even in the era of digitalisation, the Author suggests a number of changes to the current legislative framework including the equalisation of alternative technologies and a competence shift which would see all of must carry-like obligations supervised by the KRRiT (as the organisation responsible for content-regulation).

The chapter also contains a description of the regulatory and jurisprudential (primarily ECJ judgment C-250/06) developments of 'must carry' in Europe, stressing that EU regulation expects must carry rules to be imposed in a proportionate and transparent manner and only when necessary for the fulfilment of public interest goals

**Chapter VI 'Public authorities in the regulatory conflict in audiovisual media'**  
The last chapter focuses on the conflict between different regulators seen in light of

the challenges posed by digitalisation, convergence and ‘Europeanization’ of public administration to the traditional take on political systems, governance and public policy. The Author states here that digitalisation is causing priority being given to the EU general interest over that of national public interests and argues that the law of public administration (political system norms) must adjust to technological developments. The Author presents an interesting comparison here between the basis of the activities of the Polish telecoms regulator (UKE President) and the audiovisual media supervisory council (KRRiT) stressing once again that while the former must submit to EU general interest objectives, the latter’s constitutional nature makes it firmly set on the protection of the national public interest. In this context, she argues in favour of a regulatory shift giving the KRRiT’s current powers with respect to broadcasting concessions to the UKE President, provided, however, that the content side of audiovisual media remains firmly in the hands of the KRRiT.

The book by K. Chałubińska-Jentkiewicz presents an exhaustive analysis of the regulatory conflict existing in the audiovisual media in the digital era from the point of view of the theory of administration, constitutional values, governance and political system. The title of the book made me expect more information on the content of audiovisual media regulation in Poland focusing instead on public policy. For that reason alone I expect that this book will be of great value for those interested in administrative and constitutional law, less so for those interested in market regulation or competition protection. Indeed, it is difficult to find any specific examples of cases where a regulatory conflict arose in practice in the regulation of the Polish audiovisual field – be it between the UKE President and KRRiT or in their interaction with the competition authority (UOKiK President). Similarly, I was surprised that even the existing differences between the content of the AVMSD (expresses the general interest of the EU) and respective Polish legislation (meant to express the Polish public interest) were somewhat glossed over. From the perspective of a pro-integration reader, the Author’s main theses seem also somewhat one sided – she speaks for the superior importance of national public interests goals over the general interest of the EU and the resulting need to limit EU influences in favour of national solutions. She seems to elevate public morality above other values, overlooking the views of those that see it as an overly nationalistic and religion-based approach to public life. She is certainly not alone in this approach, however, as the Polish State is particularly protective of its competences to regulate issues surrounding ‘public morality’ even in light of its EU accession.

The Author is very thorough in presenting her thesis in the light of the theory of public administration and constitutional law and shows abundant legal and jurisprudential examples to support her thesis. Indeed, she identifies a number of important regulatory conflicts and is particularly articulate in counterpoising the national interest with that of the EU. The Author firmly argues that in the digitalisation era, and the resulting duality of goals (EU general interest vs. national public interest) and duality of regulation (EU law and national legislation), a need exists to redefine public interest goals as well as the usefulness of the regulatory tools used for the achievement of these goals. The book does well to identify the

many conflict areas existing in audiovisual media regulation as far as the theory of administration and constitution values are concerned. I see however its greatest asset as the Authors recommendations for future changes. I found especially convincing the arguments speaking in favour of a clearer division of competences between the KRRiT, which should be left to decide on all content-related matters, and the UKE President who should be left in charge of all transmission issues. I also fully endorse the need to improve the transparency, objectivity and at times even availability of juridical supervision of the decision-making processes in the Polish audiovisual field. In light of the diminishing importance of sparse resources, speaking for more policing (ensuring the operators do not violate content-related rules) seems also perfectly acceptable, as is the favouring of national regulation in content-related issues.

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