Of Polish politicians and (their) media. The pursuit of regulatory agency independence in Polish media law and practice

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ABSTRACT: The article discusses the issue of independence of the Polish Broadcasting Council, providing an account of legislative solutions aiming to assure the Council's independence as well as barriers in their practical implementation.

KEYWORDS: media, broadcasting, regulation, independence, Poland, politics

INTRODUCTION

Recent years have been quite a tormented period for the idea of independent regulation in the media sector in Poland and numerous events then to occur proved that the idea has not yet settled and more to say it has been misunderstood or simply neglected (Open Society Institute, 2005, p. 1088 ff.). The issue of a degree of independence enjoyed by the Polish Broadcasting Council (Krajowa Rada Radiofonii i Telewizji, KRRiT) – the Polish media regulatory agency – has been fiercely discussed, however, to vast extent this discussion again followed the political paradigm in thinking about media, which permeates the Polish academic and daily press practice. It is a kind of paradox that the accusations of growing media politisation (and its counterpart – the decreasing Council's regulatory independence) are discussed by use of language which reveals deeply embedded inclination of thinking about media regulation as a world of political tradeoffs where party elites convene with media tycoons on how to do good to their common semi-clandestine interests. Unfortunately even the distinction between, on the one hand, the process of group decision making engaging political parties referred to in English as *politics* and on the other, the methods and tactics used to formulate and implement certain strategy to address public needs referred to in English as *policy* is lost in Polish language which applies in both cases a uniform term *polityka*. This linguistic drawback causes a lot of confusion in formulating and implementing long term policy goals as the

distinction between the current "sheer politics" and the multiannual programs of advancing public good objectives remains substantially blurred here to the detriment of the second. Little was done in the past and little is done now for this paradigm to be abandoned and to overcome this linguistic impairment. For years now it has been subject to discussion in Poland the issue of constitutional status of the Council, political ups and downs affecting its composition, political process of setting and defining its regulatory and supervisory goals, and more generally the issue of current politics as a factor shaping the media regulatory practice. Still little has been said however about the Council as an independent regulatory agency, which idea implies to delegate legislative authority to a body assigned particular tasks, which body is then to determine autonomously how to realize the tasks assigned thereto and is held accountable if it fails to realize them. Even less is discussed the issue of structural solutions, which would enable better performance of the Council in pursuit of these tasks, and free it from pressure exerted by both politicians and industrial stakeholders – which is presumably the source of its moderate activism, politically biased decisions taken in the past and general lack of transparency in the Council's regulatory practice. The aim of this article is to bring an update account of the degree of independence of the Council and identify the weak points of its regulatory framework inviting other social actors to infringe upon its independence – by scrutinizing the process of legislative changes, which might affect the Council's independence. The analysis shall follow a simple model of four dimensions of independence – regulatory, supervisory, institutional, and budgetary – which already proved its usefulness in discussions concerning the independence of financial sector supervisors (cf. e.g. Quintyn et al., 2007).

THE COUNCIL AND ITS FOREIGN INSPIRATIONS

It is common opinion (Balczyńska-Kosman, 2000; Sobczak, 2001) that the Council in its original constituency has been modeled after the two Western-European regulatory bodies: Conseil Supérieur de l'Audiovisuel (CSA), the French one and the Italian one – Autorità per le Garanzie nelle Comunicazioni (AGCOM). Whereas structural similarities between the Council and CSA are indeed substantial – as we shall see below – the most distinct traces of the Italian law influence could have been seen in the special status of the Chairman of the Council, in particular him being appointed by the President of the Republic, which is however no longer the case. These French inspirations by no means should be taken as a surprise. Poland has always nurtured strong political and cultural relationships with France and so did many of the members of the former anti-communist opposition. Also the CSA itself was at the time when the regulatory overhaul in Poland took place a relatively new project – instituted in 1989 (however replacing the already existing Commission nationale de la communication et des libertés of similar character) thus having an air of novelty, but at the same time – a novelty being the product of a developed

administrative culture and rooted in the long tradition of liberal thought. Of French inspiration were in particular nine (originally) members of the Council appointed for six years by the Sejm, the Senat, and the President (but not by the President of either lower or the upper chamber of the parliament – unlike in case of CSA), where the composition of the Council was refreshed in 1/3 every two years. This led for the Poland to be counted (Machet, 2002) amongst the group of countries (Poland, Romania, Bulgaria, the Ukraine and – of course – France) having adopted the "French regulatory model" – characteristic by the legislative and the executive having the power to appoint the members of the regulatory agency.

REGULATORY INDEPENDENCE

The Council and its constitutional empowerment

A formula of Art. 213 (1) of the Polish Constitution of 1997 preceded by a similarily worded provision of Art. 36b of the Constitution of the Republic of Poland of 1952 (now repealed), vested the Council with a task "to safeguard the freedom of speech, the right to information as well as safeguard the public interest in the field of radio and television broadcasting". The sheer fact that the Council is constitutionally empowered contributes much to its independence and more to say assures its existence – the Council has been repeatedly addressed with threats of being dissolved by namely any political force actually in power. On the other hand this poses an obstacle to follow the world trend of establishing a convergent regulator competent in the fields of both content – and technologically – related issues in mass communication like e.g. OFCOM. It is a kind of misfortune also that for years now the constitutional status of the Council has been subject to an intensive but quite inconclusive debate, which overshadowed discussion on further key issues of the Council's daily practice. Much has been said on this occasion on the peculiarities of the Council, this has been not however followed by recognition of the Council as a regulatory body in the very practical sense of this word, as an organization enforcing laws and setting guidelines to apply a coherent and long-term media policy. An impressive work done by constitutionalists (Chruściak, 2007, and others cited therein), which pretended to be a blueprint for more general reflection of what the Council really is and how it should work found no continuance, and appeared to be a mixed blessing for the idea of having an independent regulatory body, paradoxically bringing even more political allure to the issue of the media regulation. The Council has been praised here as an "organ of a new type not fitting squarely into the tripartite division of powers" enjoying a "unique blend of competences: legislative (enacting regulations) executive (allocating concessions) and quasi-judicial (resolving disputes between the broadcasters along the rules of administrative procedure and imposing fines)" (Sokolewicz, 2004, p. 53). By its composition "the Broadcasting Council constitutes [...] a *sui generis* 'condomin-

ium' of [...] the three highest-level State organs" subject to "permanent cohabitation of these three powers" (Sarnecki, 2004, p. 327). The Council "has been placed seemingly as if 'between' the legislative and executive powers, by sharing competences to appoint the Council members and discharged from their duties by Sejm, Senat and the President" (Judgement by the Constitutional Tribunal of 13 December 1995, W. 6/95) These and further metaphors support the view on the „uniqueness" of the Council, its inability to be fitted squarely into the present legal framework, which does not correspond directly to its "independence." This claim of "uniqueness" with only a few positive cues on the true nature of the Council – being entirely new concept of an independent regulatory body – made the Council instead vulnerable to further private interpretations of its legal status done by the political parties in their pursuit to seize control over it or negating its competences.

The Council, its Chairman and their competences

The Council shall "safeguard the freedom of speech, the right to information as well as safeguard the public interest in the field of radio and television broadcasting" (Art. 213 (1) of the Polish Constitution of 1997). The act of 29 December 1992 on radio and television (hereinafter referred to as "Broadcasting Act" or "BA") develops this formula, by assigning the Council the task "to safeguard freedom of speech in radio and television broadcasting, protect the independence of broadcasters and the interests of the public, as well as ensure open and pluralistic nature of radio and television broadcasting" (Art. 6 (1) BA) and provides a non-exhaustive list of specific duties to be executed by the Council to this end (Art. 6 (2) BA). Thus the tasks of the Council shall be, in particular:

1) to set, in agreement with the Prime Minister, the guidelines for the State policy in the field of radio and television broadcasting;

2) to determine, within the competences granted to it under the Act, the conditions for the broadcasters to conduct their activities;

3) to make, in cases referred to by the Act, decisions concerning broadcasting licenses to transmit and retransmit program services;

3a) to grant to a broadcaster the status of a social broadcaster or to revoke such status, on terms laid down in the Act;

4) to supervise the activity of broadcasters within the competences granted to it under the Act;

5) to organize research on the content and audience of radio and television program services;

6) to determine the fees for the award of broadcasting licenses and registration;

6a) to determine license fees in accordance with the relevant laws;

7) to act as a consultative body in drafting legislation and international agreements related to radio and television broadcasting;

8) to initiate research and technical development and training in the field of radio and television broadcasting;

9) to organize and initiate international cooperation in the field of radio and television broadcasting;

10) to cooperate with organizations and institutions in the field of protecting copyright as well as the rights of performers, producers and broadcasters of radio and television program services.

The Chairman directs the Council work and represents it (Art. 10 (1) BA) i.e., convenes the meetings of the Council, determines the agenda, chairs over the proceedings, supervises the implementation of decisions and also executes further important competences vested with him by the Broadcasting Act. He may demand a broadcaster (and respectively also the person who retransmits radio and television program services – Art. 10 (5) BA) to provide materials, documentation and information necessary to assess the broadcaster's compliance with the provisions of the Act and the terms of the broadcasting license (Art. 10 (2) BA), may call upon a broadcaster to cease unlawful practices in respect of production or transmission of program services (Art. 10 (3) BA) as well as – acting by virtue of the Council's resolution – issue a decision ordering the broadcaster to cease these practices (Art. 10 (4) BA). Also acting by virtue of the Council's resolution the Chairman issues broadcasting licenses (Art. 33 (3) BA) and consents to purchase or acquire by a foreign person of shares or interest, or rights in shares or interest in a company holding a broadcasting license to transmit a program service (Art. 40a BA). Where the Chairman acts "by virtue of the Council's resolution" means that he is determined to act accordingly, in certain cases however he is to take decisions as an organ by himself (e.g. impose fine on the broadcaster who persists in acting in breach of certain provisions of the Broadcasting Act – Art. 53 (1) BA).

The competences of both the Council and the Chairman within it have been apparently properly defined in the original version of the Act and then supplemented but actually have not changed much and have not been subject to controversies (leaving aside the recent attempts to transfer the Council's competences in part to UKE).

The Council and its regulatory instruments

The Council (or to be more specific – its Chairman) may demand a broadcaster (and respectively also the person who retransmits radio and television program services – Art. 10 (5) BA) to provide materials, documentation and information necessary to assess the broadcaster's compliance with the provisions of the Act and the terms of the broadcasting license (Art. 10 (2) BA). He may also call upon a broadcaster to cease unlawful practices in respect of production or transmission of program services (art. 10 (3) BA) as well as order the broadcaster to cease these practices (Art. 10 (4) BA). The Chairman may also impose fines on broadcasters

refusing to comply with the Act acting "by virtue of the Council's resolution," but also taking decision on his own where the Council is unable to decide on the infringing character of the broadcaster's activity and the infringing acts occur repeatedly (cf. Ożóg, 2007).

The Council may also adopt resolutions and issue regulations on the basis of statutes and for the purpose of their implementation (Art. 9 (1) BA), which means that it was attributed not only a supervisory but also a rulemaking power. The Council shall also adopt its internal rules of procedure (Art. 9 (3) BA). Resolutions shall be adopted by a 2/3 majority of votes of the total number of the Council members (Art. 9 (1) BA). Until the amending act of 29 December 2005 on transformation and changes in division of tasks and competences of state organs competent for communication, radio and television it was "an absolute majority", which meant that 5 out of 9 members should have voted "for", whereas now it is 4 out of 5 members (their number has been lowered by the same amending act), which makes consensus within the Council more difficult to be reached than it was before. However this does not impair the overall independence of the regulatory body it may lower its activity (voting obstruction may occur) thus indirectly (but not substantially) diminishes the role of the Council in regulating the media market.

SUPERVISORY INDEPENDENCE

Council members' qualifications

Prior to the enactment of the Broadcasting Act it has been discussed whether the future regulatory agency should be rather a kind of a "wise men panel" issuing opinions on what is fair and just in media or maybe a body gathering renowned media professionals more actively involved in shaping the competition environment in the media sector. It has been decided finally in the outcome of this discussion that the Council members should be appointed by the Sejm, the Senat and the President "from amongst persons with a distinguished record of knowledge and experience in social communication media" (Art. 7 (1) BA). This formula makes a condition for the member of the Council *in spe* to show a certain degree of professional media-related knowledge and skills, for his choice not to be a purely political one (Szmulik, Żmigrodzki, 2001). The future Council member is required to be both learned in the field of social communication media (which does not mean that he needs to be graduated from any media-related studies or to have any other formal media-related education), and to have the first-hand experience being active as e.g. journalist or member of the managing board of a media company (Sokolewicz, 2003). Whether the future member is or is not properly qualified remains to be assessed by the organ to appoint him, a common practice appeared however to appoint as the members the persons who had little (and not to say "distinguished") media expertise, which caused regular outbursts of discussion on whether there

should be any further mechanism to pre-assess the competences of the Council members before they are ever designated for the post. It has been recently proposed to institute the scheme of pre-elections where the member *in spe* would have to be first recommended by two educational institutions of university level, two nationwide organizations of journalists or two organizations of authors and the idea of avoiding politization by inviting different social actors to govern media has been present in Polish media debate for at least a few years (cf. National Polish Electronic Media Policy, 2004). It has been also adviced by the Open Society Institute experts "ensuring that nominees of the Polish Parliament and President constitute a minority on the Council, *inter alia*, through the inclusion of nominees of civil society organisations and non-state media organisations" (Open Society Institute, 2005, p. 1146). It is then presumably first and foremost a lack of competence of the Council members, not their political linkeage, which fuels frustration in the media circles – the fact that the requirement of professionalism fells prey to the political trade, to the extent it impairs the Councils' activity and reputation. The Guidelines annexed to the Council of Europe's Recommendation Rec (2000) 23 of the Council of Europe Committee of Ministers on the Independence and Functions of Regulatory Authorities for the Broadcasting Sector are however clear on that point (rule II-8) and also the new directive 2007/65/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in member States concerning the pursuit of television broadcasting activities (*Audiovisual Media Services* Directive) requires Member States to construe their media regulatory bodies not only as independent (rec. 65 and Art. 23b of the directive) but also "competent," where "competent" most probably means not solely "authorized" but also "professional." Whether such amendmends would help to improve the quality of the Council's work may be however also a matter of discussion. Surely enough this solution would invite politicians to channel their preferences to the journalistic and scientific circles and journalists and universities to trade their candidates and involving in political rent seeking. It is also yet another argument to prove that Polish media policy praises the elitaristic model of media governance refusing to participate in the media supervision process the consumers-viewers or consumers-listeners being *altera pars* of the mass communication process, who should be also (and more specifically: consumer organizations) enabled to approve candidates to the Council.

Council members' remuneration and labor law issues

The Council's members are remunerated according to the act of 31 July 1981 on remunerating persons executing managerial posts in state administration. The average salary in 2006 amounted to 14 775 PLN (*circa* 4200 EURO) (Polish Supreme Chamber of Control, 2006) this is nearly six times the average salary in Poland in

the same year (2477 PLN) according to data provided by the Central Statistical Office of Poland and more than the remuneration due to the President of the Republic at the same time (*circa* 12 500 PLN). Applying these rules to the Council members makes them also eligible to rent a flat in the seat of the Council (i.e. Warsaw) on preferential conditions. Beyond that, members are forbidden to involve in any other gainful activity (and this having in common with radio or television in particular) save for holding academic positions or performing a creative work (Art. 8 (4) BA). The employer of the Council's member shall, at the member's request, grant him a leave of absence, without pay, for the time of holding an office. The time of leave shall make part of the total period of the member's employment, on the basis of which other benefits resulting from the relation of employment are derived (Art. 8 (1) BA). To summarize, the institutional setting in this case was drafted correctly, assuring the Council members a proper level of financial independence and limiting the threat of corruption behavior.

Incompatibilitas

A member of the Council shall not belong to a political party, a trade union or perform public activities incompatible with the dignity of his function (Art. 214 (2) Constitution). Working on this provision, the Broadcasting Act provides that it shall be suspended during the term of office of members, their membership in governing bodies of associations, trade unions, employers' associations, as well as church or religious organizations (Art. 8 (3) (2) BA). The Art. 8 (3) (1) BA, now repealed, provided also for suspension of the membership of the Council members in political parties. This provision has been declared by the Constitutional Tribunal as in line with the Art. 22 of the International Covenant on Civil and Political Rights, as well as Art. 11 and 17 of the European Convention for the Protection of Human Rights and Fundamental Freedoms but at odds with the Art. 214 (2) Constitution. The Tribunal argued that the "suspension" of membership being temporary by its nature means that the Council's member may still be linked to the particular party and identified as its member, which would offend the said Constitutional rule (Judgement of the Constitutional Tribunal of 10 April 2002, K. 26/00). Surprisingly enough in the result of the said ruling, the Art. 8 (3) (1) BA has been simply repealed in its entirety, however one could have expected that its formula should be rather transformed into an explicit ban of the Council members' affiliation with political parties. However the ruling by the Constitutional Tribunal holds good and combining membership in the Council with political party involvement would be unlawful as unconstitutional this lack of explicit statement of political impartiality of the Council members is meaningful. Enough to say that as of 2005 the non-politically affiliated specialists have numbered only one of the total 33 members of the Council since its establishment (Open Society Institute, 2005).

The Council members may not also be Sejm or Senat deputies. It is also forbidden for them to combine the service of a member with holding interests or shares, or with any other involvement, in an entity which is a radio and television broadcaster or producer, as well as with any other gainful employment, save for holding academic position or performing creative work (Art. 8 (4) BA).

"Be independent" – the words at miss

What surprises most in the debate concerning the issue of the Council's regulatory independence is avoiding discussion of the most simple independence-enhancing measure one could imagine, this is imposing a statutory duty on the Council as such or on the Council members to be "independent". Unlike in case of e.g. French CSA, which is referred to as *autorité indépendante* in the very first provision of the relevant French media act, the Art. 3 (1) of the loi n° 86-1067 du 30 septembre 1986 relative à la liberté de communication modifiée et complétée and the Italian AGCOM which is addressed in Art. 1(1) of the Legge 31 luglio 1997, n. 249 Istituzione dell'Autorità per le garanzie nelle comunicazioni e norme sui sistemi delle telecomunicazioni e radiotelevisivo with even more explicit phrase ("Autorità [...] opera in piena autonomia e con indipendenza di giudizio e di valutazione"), Polish Broadcasting Act lacks any provision of similar weight. The independent status of the Council has been confirmed in the resolution by the Constitutional Tribunal of 10 May 1994, W 7/94, but this important statement (made only *obiter*, frankly speaking) has not been transformed into the rule of law. This means that paradoxically "independence" remains the unspoken word of a public debate related thereto, and as long as it remains so the debate will presumably rest inconclusive. This apparent omission proves also that the political circles remain reluctant toward the idea of assuring independence to the Council by such a statutory declaration which would irreversibly overrule any further attempts to infringe upon the Council's independence principle and put beyond their control further public debate over the regulatory issues.

INSTITUTIONAL INDEPENDENCE

Appointment of Council members and its Chairman

The members of the Council are appointed by the Sejm, the Senate and the President of the Republic (Art. 214 (1) Constitution) and dismissed by them accordingly (Art. 7 (6) BA). It may be subject to discussion, whether this solution really enhances the Council's independent status as the nominating organs may still keep their nominees at arm's length influencing their decisions. Whatever would be the answer, it should be mentioned that the same legal framework has been applied in France, which is an indirect proof that it is an acceptable solution to keep the regu-

latory agency away from the current political business. It is also rightly observed (Sokolewicz, 2003; Sobczak, 2001) that in certain European countries there are even one-person regulatory organs appointed solely by the executive which *ceteris paribus* should cause the degree of political subordination of such regulators to be substantially higher. From the very beginning it has been argued that enabling the executive to appoint the Council members makes it gradual politization inevitable (Miżejewski, 2005 and others cited therein), whether this became subsequently true in certain cases should be however attributed not to the structure of the legislative framework itself but to lacking effective regulatory culture, fostering the concept of a goal-oriented regulatory problem-solving rather than the concealed political tradeoffs. The issue deserves further discussion, however it would be enough to say here, applying a classic distinction, that in Poland there is still maintained a discrepancy between the "law in action" and the "law in books," which attracted in the past much criticism from legal writers addressing the "textocentric" attitude prevailing in the Polish legal thinking. A seminal study by Łętowska (1997, p. 59) brings the following account of this tendency: "There are several adverse consequences of our 'textocentrism.' It makes people used to disparities between legal provisions and real life. It does not stimulate, however, any attempts to examine the very reasons for these disparities. Only changes of legal instruments of state are believed to improve the law. At the same time the problems that are to be eliminated by such amendments of legal provisions are not attribute to the latter or can be only partly attributed to them. In such situations a new text is hardly any improvement. Secondly, several aspects of legal standards (especially case law) are only to a very limited extent in the centre of interest of the doctrine of law. University studies are still almost exclusively concentrated on the text of legal norms. We can also suspect that our law-makers and politicians believe in good faith that their 'textocentrism' is not a vice but a real virtue and other aspects of law are outside the scope of their efforts with legal texts – as they stood in the past, stand now and are to stand in the future." This tendency may be exemplified also by the case of the Council, where the foreign regulatory model has been correctly reflected in the provisions of national law, yet the whole background of legal culture conditioning the development of these models and more important their performance has been apparently left behind. Presumably that is the reason, why the concept of the Council members being appointed by the three organs of the executive was and still is taken too literally, with these organs claiming their right to get actively involved in the regulatory practice.

The Chairman is now elected by the Council members from amongst them, and so he shall be dismissed (Art. 7 (2b) BA), which strengthens the independence of the Council enabling its members to choose the best of them to manage the Council's work and execute other important competences assigned to him by law. Between July 1993 (this is originally) and December 1995 as well as between December 2005 and May 2006 (until the amendment of December 2005 giving the President a right to appoint the Chairman of the Council has been declared as un-

constitutional by judgement by the Constitutional Tribunal of 23 March 2006, K 4/06) the Chairman was designated for the post by the President of the Republic. Originally also the Chairman was irrevocable, which caused a crisis in March 1994 when Lech Wałęsa, then the President of the State, dismissed the Chairman of the Council, Marek Markiewicz for his decision to issue a broadcasting license to the Polsat broadcasting organization, which President opposed. The Constitutional Tribunal, which was requested for interpretation of the legal basis of the case, declared the presidential decision to be unlawful but also its own declaration as binding only *pro futuro*, thus allowing the new Chairman to continue his mission (Resolution by the Constitutional Tribunal of 10 May 1994, W 7/94).

Number of Council members

The Council has been construed as a collective and pluralistic panel of (originally) nine members presumed to represent the variety of political groups or, more generally, ideological options present in Poland, interested in shaping the media sphere. The original idea was that the number of the representatives for each of the organs appointing members should be equal, but this idea attracted little attention (Sobczak, 2001) and finally it came down to 4 members appointed by the Sejm, 2 by the Senat, and 3 by the President. The number of members, however not as impressive as in case of certain German Landesmedienanstalten, and the fact that the number was uneven aimed to assure that none of the organs appointing members would have been capable to subordinate the whole Council. It is argued however (Sokolewicz, 2003) that the original composition of the Council where 1/3 of its members were appointed by the President aimed to shorten the distance between the Council and the executive making it more prone to political pressure.

The ideas of collectivity and pluralism, however unspoken in the Act but fundamental for the organizational model approved therein, have been commonly acknowledged as a factor soothening tensions between the three organs indirectly involved in the Council's activity. Since the amendment of December 2005 the Council consists of 5 members, 2 appointed by the Sejm, 1 by Senate, and 2 by President (Art. 7 (1) BA). This overall downsizing in number of the Council members was at the time presented as cutting excessive public expenditures (*tanie państwo*), however at the same time it served goal of a premature removal of the Council in its then present composition being also the precedent inspiring further acts of applying legislative change as the instrument to influence the Council's activity.

The Council members' term of office

The term of office of the Council members shall be six years from the day of appointment of the last member and the members shall perform their functions until the appointment of successors (Art. 7 (4) BA). In case of a dismissal or death of

a member prior to the end of the term of office, the body, by which he was appointed, shall appoint another member for the remainder of the term (Art. 7 (7) BA). A member may not be appointed for another full term of office (Art. 7 (4) BA), which means that the members who held posts in case referred to in Art. 7 (7) BA may be so appointed and the past members may be appointed for another full term of the office after vacating for one term or more (Piątek, 1993; Sobczak, 2001; Rakowski, 1996; *contra* Sokolewicz, 2003). It has also been provided that the organs to appoint members for the first term of office after the Broadcasting Act entered into force should specify which members have been appointed for a term of two and of four years (Art. 69 (1) BA) – which provision corresponded to (now repealed in this part) the provision saying that every two years the term of office of one third of the members should expire (Art. 7 (4) BA). This solution – practised also in case of the French CSA, but also other non-regulatory collective organs (US Senate, French Conseil Constitutionnel) – enabled the Council to work permanently, preserve continuity of its mission and regulatory projects being in progress. It also helped to reflect current changes in composition of the Parliament due to the elections held every 4 years, thus enabling adjustment of the Council's goals and principles to the expectations of the voters (assumed TV viewers and radio listeners). This system of a constant refreshment of the Council's composition is now gone because the amending act of December 2005 which removed all the Council members from their posts and allowed for the new Council to be appointed for the new uniform 6-years term.

The Council members dismissal

A Council member shall be dismissed by the organ, by which he has been appointed, solely in cases when he (Art. 7 (6) BA):

1) has resigned,

2) has become permanently unable to discharge of his duties for reasons of illness,

3) has been sentenced for a deliberate criminal offence and the said sentence is valid and enforceable,

4) has committed a serious breach of the provisions of the act and the said breach has been confirmed by the ruling of the Tribunal of State.

It is worth to notice that relatively shortly after the Broadcasting Act was enacted its provisions governing the dismissal of the Council members have been substantially amended by the act of 29 June 1995 amending the act on radio and television and certain other acts. First, the wording of the Art. 7 (6) BA, which allowed for the member to be dismissed in cases listed therein (member "may be dismissed") was changed to make the dismissal obligatory (member "shall be dismissed"). Second, the premise of the "grave breach of the act", which has been stipulated in the Broadcasting Act from its very beginning, only subsequently has been

supplemented by the requirement for this grave breach of the act to be declared by the ruling of the Tribunal of State – a body composed of a chairperson, two deputy chairpersons and 16 members chosen by the Sejm for the current term of office of the Sejm from amongst those who are not deputies or senators (Art. 199 of the Polish Constitution) to rule on the political accountability for violations of the Constitution or of an act committed within their office or within its scope, by – apart from the KRRiT members – the President of the Republic, the Prime Minister and members of the Council of Ministers, the President of the National Bank of Poland, the President of the Supreme Chamber of Control, certain officials of a ministerial rank and the Armed Forces Commander-in-Chief (art. 198 (1) of the Polish Constitution). It has been rightly observed that "the act" (Polish *ustawa*), which might be subject to "grave breach" should mean "any act" not only "the Broadcasting Act" (Sokolewicz, 2003).

The purpose for the amendment was to bring more objectivity in the assessment of the situation justifying the dismissal by allowing to dismiss the member on condition it is so approved by the Tribunal of State not by the organ, who would dismiss the member itself (Sobczak, 2001). It should be then rememebered that the immediate cause for this amendment has been a dismissal by President L. Wałęsa of two of "his" KRRiT members in September 1994, due to the alleged "grave breach of the act" commited by both of them, which allegation was as a matter of fact a pretext to prosecute these two members for disobeying the Presidential directives in taking regulatory decisions. The premises for the dismissal are objective, leaving little discretion for the organ willing to argue that the breach and more to say a "grave" breach of the act occurred. Also it is worth to mention that the procedural thresholds to institute proceedings before the Tribunal are high and since its establishment in 1982 the Tribunal of State has issued its rulings only twice (in 1984 and in 1997), which makes the possibility to dismiss the Council member on that ground illusory. This of course brings stability to the Council's composition and thus improves the continuity of its mission yet it also invites political forces to seek for measures enabling to circumvent these strict rules – the rules which may cause the newly elected political constellations to be heirs to the Council already composed of supporters or alleged supporters of their defeated political opponents. Applying the mode of legislative change came finally as the solution and as another milestone in the process of developing the repertoire of tools used to threaten the Council's independence.

The Council may be also collectively dismissed in the particular case of Art. 12 BA, which article provides that by the end of March each year, the Council shall submit to the Sejm, the Senate and the President an annual report on its activities undertaken during the preceding year (Art. 12 (1) BA). By way of resolutions, the Sejm and the Senate shall accept or reject the report (Art. 12 (2) BA) and in case of rejection of the report by both the Sejm and the Senate, the term of office of all the Council members shall expire within 14 days from the date of the last resolution to

this effect (Art. 12 (4) BA) but only on condition if such collective dismissal is approved by the President (Art. 12 (5) BA). This means that the Council shall discontinue its mission after all the three organs, which appoint its members, express distrust toward its achievements in the past year (Szmyt, 2006). This solution deserves approval as a safety valve presumed to be applied only in blatant cases of the Council's misconduct in particular due to its inability to take timely, reasonable regulatory decisions. Actually this solution has been never applied in practice, however it happened in the past few years (in 2003 and in 2006) that the report submitted by the Council was rejected by the Sejm.

BUDGETARY INDEPENDENCE

The Council is financed entirely from the state budget and the allocation of financial sources is made according to the preliminary yearly plan of employment, incomes and expenditures, which the Council presents to the Minister of Finance. The issue of financing the Council came to the fore in the years 2003–2006, where the resources allocated to the Council were substantially lower than these the Council actually applied for (2005 – 28,7% less the demand, 2006 – 16,5%), which subsequently caused necessity to provide the Council with additional support from the governmental reserves on explicit requests submitted by the Council's chairman (Polish Broadcasting Council, 2008, pp. 167–171). Clearly the Council fell victim of political trading here, with certain politicians voting to have developed tourism, stipendiary programs aiming youth, etc. at cost of the Council only to show their disrespect to the Council composed of supporters of their political opponents.

RECENT TENDENCIES IN SHAPING THE MEDIA REGULATORY ENVIRONMENT

Legislative action as a tool for political intervention in the Council's regulatory practice

As it was mentioned above, it is difficult in legal terms and in practice virtually impossible to dismiss the Council member, which is a situation definitely worth approval, if the issue of the regulatory independence is concerned. The idea of having the regulatory agency the members of which would be irrevocable seemed thus to be accepted and settled and pretending to be a part of the emerging Polish media regulatory culture. This allegation came false in December 2005 when the whole Council was dismissed by a legislative change and new Council members were subsequently appointed assumed to be more cooperative toward the parliamentary majority. The dismissal of the whole Council has not been necessary in this case – the amendment aimed at decreasing the number of the members from 9 to 5, and the 4 members could have been instead simply dismissed by the organs who appointed them: the Sejm, the Senate and the President. The Constitutional Tribunal invited to investigate the issue of constitutional compliance of this amendment de-

clared it to be constitutionally doubtful, however refrained from deciding that the new Council members should be evicted from their posts (Judgement by the Constitutional Tribunal of 23 March 2006, K. 4/06). What looked like an isolated incident attributed to the radicalism of the political parties then in power (led by Prawo i Sprawiedliwość) has been repeated subsequently by the winner of the elections of 2007, Platforma Obywatelska, who submitted in December 2007 a proposal of an amending act aiming i.a. again to dismiss the whole Council, also without an explicit reason to do so. In any case the proposals for legislative change have been fiercely opposed by the academic and journalist circles, however, to no avail. This dispute attracted also little interest among the public apparently because of it being used to political buzz which starts to rise each time the issue of regulating media comes to the fore. It may be assumed that a new political practice has born, first applied in 2005 and having its legitimacy confirmed in 2007, which practice is applying the method of legislative change to appoint and dismiss the Council members instead of doing this under usual statutory conditions.

Shifting powers between the Council and the Head of UKE

A relatively novel idea conceived by the political forces being recently in power (Platforma Obywatelska) and fostered in a legislative proposal of December 2007 has been to transfer regulatory competences in the field of radio and television, now assigned to the Head of the Office of Electronic Communications (UKE), the telecom regulator. According to the amendment, the Head of UKE would give concessions for broadcasting and the Council would only assess the process, having only consultative competences. Furthermore, the UKE would approve mergers and divisions in the media sector. The idea clearly aimed to limit the Council's current role as a media regulatory agency, which was to be achieved here not by doing personal or organizational changes within the Council itself, but simply by depriving the Council of certain of its competences and allocating them with the other regulatory agency, which was presumably expected to be more favorable to the expectations of the political sponsors of the proposal. The issue sparked a lot of controversies. The proponents of the project managed to overcome the claim for alleged lack of constitutionality – the relevant provisions of Constitution being flexible enough to allow to confine the competences of the Council to these strictly content-related (e.g. controlling the ad time limits and the decency of media content) but not these of governing the concession allocation process or competition-related issues. Also the allegations of this proposal to be an attempt to diminish the degree of independence in regulating the broadcasting related issues evade straightforward assessment. Actually the degree of independence in case of the Head of UKE seems to be substantially lower than it is in case of the Council – the Head of UKE (who is a one-person organ – the Office is his secretarial and research support) is appointed by the Prime Minister, and so was the main argument

of the opponents of this change. It would seem unjustified however to judge this situation as offending the independence principle. As E. Machet observes in her characteristics of a "Northern European regulatory model" "[i]n the vast majority of cases, and sometimes exclusively, the executive, i.e. the government, the supervisory ministry or the President of the State (in countries with a presidential regime) has the power to appoint members of regulatory authorities. […] It would be wrong, however, to jump to any hasty conclusions and to consider that these authorities are not necessarily independent. However, this system of exclusive appointment by the executive presupposes a specific culture or tradition of independence from the State. Such a system is predominant in Northern Europe, e.g. in Anglo-Saxon countries and in Scandinavian countries which rely on unwritten traditions of non-interference by government" (Machet 2002, p. 3). By opposing the change their opponents indirectly confirmed that the broadcasting regulation may be seized by the government, however it should be added that the past regulatory practice of the Head of UKE in the field of commercial communication markets has not provided arguments to support this view. It should be mentioned that the independent status of the Head of UKE has been also made subject to discussion after the amendments of December 2005. In particular the Telecommunications Act lacks clear statement saying that the Head of UKE serves for a term, thus he may be any time dismissed by the Prime Minister. Also the European Commission expressed its doubts and sued Poland in February 2008. The proposal for the amendment of December 2007 incorporated also the provisions setting 5 years term of office for the Head of UKE and more demanding conditions for him to be dismissed.

CONCLUSIONS

As we may see from the above the point of departure for the media regulation process in Poland has been to construe a regulatory agency applying legislative solutions already tested in media regulatory practice elsewhere, mainly in France and also in Italy. It is justified therefore to say that Polish regulatory culture has been provided in its very beginning with favorable conditions to develop in line with the leading European standards. Unfortunately the foreign legislative solutions, which have been mirrored in the Polish broadcasting law, have not become subject to a more exhaustive reflection on what was their purpose, on how should this model be implemented in practice to enable development of media policy, assure continuity in pursuit of long-term regulatory goals, assure representative character of the Council if social or political groups are concerned, bring more professionalism to the Council's daily practice (sometimes criticized for lack of technical knowledge amongst its members), etc. As the situation developed – the number of broadcasters proliferated, Internet arrived as a commercially appealing

audiovisual content distributing platform, media show tendency to converge, etc. – there widened a hiatus between the growing regulatory challenges and the Polish regulatory model which remained trapped between the legacy of the communist heavily politicized and monopolistic model of media-related thinking and the modern replica of this school of thought, where the politics still played the predominant role. Lacking policy reflection further legislative changes caused fluctuations in the regulatory model (e.g. changing modes of appointment of the Council's Chairman) or departures from the original legislative idea (e.g. renewal of the Council's composition) which generally put the Council's independence at risk but also more generally impeded the evolution of the regulatory culture by reopening the discussion over the issues, which until then seemed to be axiomatic. Literally speaking the regulatory model still meets the criteria of the Council of Europe's Recommendation Rec (2000) 23 and the new *Audiovisual Media Services* Directive, which may be on the other hand broadly interpreted. There is however a substantial discrepancy between the structure and performance, due to the fact that even the correctly construed regulatory model has its natural limits and may be applied even in a manner which shall contradict its terms – if it lacks a social capital of knowledge, trust and values to support statutory regulation, make up for its drawbacks and to some extent make it obsolete.

Whatever the case may be, the debate over the Polish media regulatory model is yet to come and further hard times for the Council may be expected. First, Poland is still at the initial stage of terrestrial broadcasting digitalization and the fight for new frequencies freed as a digital dividend has not yet begun. The analogue transmission shall be terminated nationwide in 2012 yet for the time being the preparations are at standstill. In the meantime it has been conceived a project of developing a mobile TV in Poland, which shall presumably postpone the start-up of the DTT project. Second Poland is yet to implement the *Audiovisual Media Services* Directive and confront controversial issues referred therein i.a. provisions on circumvention of national media law and product placement. In view of this the Council may be subject to further pressions and so will be presumably any attempt to do changes in its organizational structure or its competences, which may made the legal reform both necessary and impossible to perform. It should be also mentioned that a powerful News Corporation debuted in the Polish market in autumm 2007 by taking over 35% of shares in TV Puls. TV Puls was subsequently, in January 2008, allocated further frequencies allowing it for rapid increase of coverage (which decision caused hysteric reactions among the TV Puls main competitors) and was expected to compete with the market leaders for the new frequencies released in the digitalization process – which could have change the Polish electronic media landscape. The News Corporation however suddenly withdrew from the project in October 2008 and apparently no further such spectacular market entries should be expected in Poland in nearby future.

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