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The Impact of EU Liberalization Regulations on the Market Audiovisual Media Services Market

Wpływ unijnych regulacji liberalizacyjnych na rynek usług audiowizualnych

ABSTRACT

In the last years, the audiovisual media services market has changed significantly from its initial stage of liberalization. Of course, if we look at the steps as far as the regulation of services is concerned, it has also undergone significant changes, but the assessment of the effectiveness of liberalization may be different. This is simply because with the development of technology, such as the emergence of online services, various new sorts of services and players have entered the market, the regulation of which requires EU action in several respects. Firstly, the significance of this lies in the fact that, in order to achieve media convergence, the scope of regulation has now expanded compared to the early stage of liberalization. Secondly, large service providers outside of Europe are now competing for European consumers, that poses a challenge to both the regulation and the interests of the EU. Thirdly, it has to be mentioned that the Brexit, occurred in early 2020, re-arranged the map of the European audiovisual services market and relocated several service providers to an EU Member State. This study – in order to understand the phenomena outlined above – seeks to analyse the liberalization of a small slice of the European telecommunications market.

Keywords: liberalization; audiovisual media services; market; Brexit

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INTRODUCTION

The audiovisual media services market has changed significantly from its initial stage of liberalization and is perhaps on the most dynamic developmental trajectory in the telecommunications services sector. Of course, if we look at the steps as far as the regulation of services is concerned, it has also undergone significant changes, but the assessment of the effectiveness of liberalization may be different. This is simply because with the development of technology, such as the emergence of online services, various new sorts of services and players have entered the market, the regulation of which requires EU action in several respects. Firstly, the significance of this lies in the fact that, in order to achieve media convergence, the scope of regulation has now expanded compared to the early stage of liberalization. Secondly, large service providers outside of Europe (Netflix, Amazon Prime, etc.) are now competing for European consumers, that poses a challenge to both the regulation and the interests of the EU. On the other hand, these companies often face tax evasion problems that can have a detrimental effect on Member States and EU budgets. Thirdly, it has to be mentioned that the Brexit, occurred in early 2020, re-arranged the map of the European audiovisual services market and relocated several service providers to an EU Member State, such as the Netherlands, Sweden or Luxembourg. And if we look at the current state of the liberalized market from these perspectives, we can get a completely different picture of global political processes and the success of legislation.

This study – in order to understand the phenomena outlined above – seeks to analyse the liberalization of a small slice of the European telecommunications market: the audiovisual media services market, to evaluate its results and support it with statistical data.[1]

The research underlying the study is fundamentally based on the research methodology of the law and political sciences (jurisprudential method). In the framework of this, I examined the relevant European Union legislation and its changes, using a legal comparison and legal analysis method. Furthermore, I examined the relevant data of the Emerging Data Information System (EMIS) database using the method of empirical data processing. The processed data cover the period from 2017 to 2020, and basically focuses on the European audiovisual media market.

[1] The paper was prepared in the framework of Project no. 134499 titled "Increasing government intervention in market regulation" and has been implemented with the support from the National Research, Development and Innovation Fund of Hungary, financed under the K_20 "OTKA" funding scheme.

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CONTENT AND CONCEPTUAL BASICS

The liberalization of the telecommunications sector is taking place within a uniform framework and processes worldwide,[2] including in the European Union, as the networks, the techn(ology)ical conditions on which the systems are based on are closely linked. At the same time, this also means that market opening would have taken place with the same pace and in the same way for some sub-markets in the telecommunications sector. For example, the liberalization of telecommunication is considered to be one of the most successful policies in the European Union, especially when it comes to the market of fixed and mobile telephone networks.[3] In contrast, the postal services market has not achieved the results expected from full market opening.[4]

Certain services in the telecommunications market developed gradually over time due to the fact that the liberalization regulations originally meant telephone services, and this was accompanied by the first regulations, as evidenced by the European Economic Community (EEC) directives adopted in the 1980s and 1990s.[5] The most complex change came with the 2002 regulatory reform, that introduced the concept of electronic communications[6] and extended it to several areas of the telecommunications market. Thus, for example, before 2002, the Community legislation did not cover broadcasting, i.e. radio and television services, that have significant relevance regarding this study. The aim of the new concept was to summarize all kinds of electronic communications services and the networks connected to the transmission of signals by wire, radio, optical or other electromagnetic means (i.e., fixed, wireless, cable or satellite networks) in a single concept for the sake of convergence.[7] The adoption of the European Electronic Communications Code (EECC) is another milestone.[8] Then in 2019, the European Union also adopted

[2] A. Lapsánszky, *A hírközlés közszolgáltatási – közigazgatási rendszerének fejlődése és szerkezeti reformja*, Budapest 2009, p. 395.

[3] P. Bordás, *Az elektronikus hírközlés hálójában. A hírközlési közszolgáltatás liberalizációja egy változó európai környezetben*, "Európai Jog" 2019, vol. 2, pp. 17–27.

[4] Idem, *A postai liberalizáció zsákutcája?*, "Európai Jog" 2020, vol. 1, pp. 10–20.

[5] For example, Commission Directive 88/301/EEC of 16 May 1988 on competition in the markets in telecommunications terminal equipment (OJ L 131/73, 27.5.1988) or Commission Directive 90/388/EEC of 28 June 1990 on competition in the markets for telecommunications services (OJ L 192/10, 24.7.1990).

[6] Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (OJ L 108/33, 24.4.2002).

[7] Commission Directive 2002/77/EC of 16 September 2002 on competition in the markets for electronic communications networks and services (OJ L 249/21, 17.9.2002), para. (7).

[8] Directive (EU) 2018/1972 of the European Parliament and of the Council of 11 December 2018 establishing the European Electronic Communications Code (EECC) (OJ L 321/36, 17.12.2018).

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a new directive on the provision of digital content (DSD).[9] It is important to note that the regulation does not cover the provision of the content displayed/broadcasted by the above networks, nor it is discussed in this present study.

Television services can be divided into two groups; therefore, we can talk about linear (i.e., real-time broadcasted and viewable) and on-demand, non-linear (i.e., viewable at any time via the Internet) services. The market for television broadcasting services (i.e., linear services) is very wide, as it includes analogue and digital television, live streaming, and Internet broadcasting, while on-demand video is a non-linear service such as SVOD[10] (HBO Go, Netflix, Amazon, etc.) services. On the supply side of the market for these services, we can also make a distinction, as there is a separate market for pay television (subscription television) providers, video-on-demand distributors and device manufacturers, as well as for free-to-air public and commercial broadcasters.

An audiovisual media services featuring programs containing sound or silent motion pictures or still images, the content of which, regardless of the mode of transmission, is suitable for television broadcasting and regardless of whether the editorial work and the service provider's liability appear in a fixed schedule or a catalog.[11] EU legislation basically only covers economic activities as defined in the Treaty (TEU, TFEU), regardless if it is provided by a public service provider. The emphasis, therefore, is on the economic activity that is provided for remuneration for a certain period of time and on a continuous basis by the service provider; contents outside of the aforementioned without economic purposes do not fall within the definition of audiovisual media services.

The specificity of the market is that traditional audiovisual content distribution networks are national in scope, in contrast to, e.g., telephone services, while broadcasting and linear networks primarily serve national audiences or a specific language area.[12]

[9] Directive (EU) 2019/770 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the supply of digital content and digital services (DSD) (OJ L 136/1, 22.5.2019).

[10] Subscription Video on Demand (SVOD) is essentially a home video library in which a broadcaster makes regularly updated content available online for a regular monthly fee, from which it can choose according to consumer needs.

[11] Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) (OJ L 95/1, 15.4.2010).

[12] Green Paper on the online distribution of audiovisual works in the European Union: opportunities and challenges for the digital single market, COM/2011/0427 final.

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On-demand audiovisual media services are characterized by the fact that they compete for the same audience as television broadcasting,[13] but are not necessarily tied to the audience of a given country. Thus, for example, the same movie can serve the demand of audiences in more than one country by providing a subtitle or language selection, so it is possible that pan-European service providers could appear in the market.

One of the hypotheses of the research is that the liberalization of this field is specific, as it has developed with the development of the fixed and mobile telephone networks, but is subject to separate regulations due to different technological bases. On the other hand, the regulation responds to changes in the range of market services, including the change of the actors, as a result of changes in economic policy in the background. Furthermore, the Anglo-Saxon trend has influenced the liberalization process from the very beginning, that is now reflected in the market share of telecommunications operators.

Compared to the telephone services, the specialty of the product is that satellite technology, public terrestrial analogue and digital mobile communications, and radio data communication systems appear as important networks.[14] Another specialty of it is that in addition to paid services, a range of services provided free of charge with respect to public interest, such as the offer of public service channels, that is not covered by the present study. Its special feature is that compared to other communication services it means a one-way data transmission. The use of the service is often sold by service providers in packages, together with other communication services, that also affects competition and generates a number of specific problems.

Due to the technological contexts mentioned above, the range of individual sub-market participants shows a high degree of overlap. During the liberalization of telecommunications, large western European and American service providers have emerged in the field of television services, taking advantage of their existing and newly established networks. As a result, individual Member States' markets for paid services are less diverse, dominated by a few larger groups of companies, and essentially oligopolistic markets have developed.[15] Thus, there is a risk that, due to their market position, they will engage in behavior that has a negative impact on the market, that could make consumers vulnerable. On the other hand, service providers provide several communication services at the same time and often offer them to consumers in a package, that also raises competition and consumer

[13] 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 (OJ L 332/27, 18.12.2007).

[14] A. Lapsánszky, *op. cit.*, p. 396.

[15] Z. Pápai, *A verseny kérdése a szélessávú ologopolpiacon*, "Verseny és szabályozás" 2010, vol. 4(1), pp. 228–273.

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protection issues. Due to accelerating technological developments, the allocation of terrestrial radio frequencies has become limited, and regulation is constantly being forced to keep pace with consumer and business needs in order to achieve Community objectives. If only because there is a growing demand for paid services, especially due to the epidemiological constraints of 2020, and the use of online television and related products is also increasing. EU regulation must respond to this, and an appropriate regulatory framework needs to be put in place to protect the interests of the internal market and its consumers.

Summarizing, in the last decade the conceptual basics and the regulation has changed significantly, thanks to technical progress and other factors. The specialty of these regulatory waves, as in other areas of electronic communications, is that liberalization and the certain individual directive reforms generate more and more problems to be solved, that is to be addressed by the forthcoming regulatory waves. As a result, under the goal of creating the internal market, the EU regulation reaches a far deeper layer of policy, often not just prevailing internal market goals. After all this, it is worth examining what the regulation has brought in practice with regard to market participants.

THE SIGNIFICANCE OF THE EUROPEAN AUDIOVISUAL MARKET

Not only the range of services but also the range of service providers has changed. As far as on-demand services are concerned, American-based businesses play a significant role, that is also reflected in the regulation. In the following, the importance of the audiovisual media market and the range of actors will be presented. Among other things, by analyzing how much we can talk about a liberalized market, how service providers relate to services in other areas of communications.

The European audiovisual sector accounts for a significant share of the Union's economy, accounting for around 3% of the total EU GDP generating EUR 500 million a year in market value and employing more than 6 million employees.[16] And, when it comes to television time, the Union is second in the world, producing more films than any other region in the world and hosting more than 500 online video-on-demand services.[17]

The market segment is therefore growing steadily, even if its extent varies from one Member State to another. The biggest increase was in the area of paid services, together with the declining or stagnating role of free public service television broadcasting. Revenues from SVOD services accounted for 84% of the EU Video

[16] KEA European Affairs, *The Economy of Culture in Europe. 2011 Study Creative UK: The Audiovisual Sector & Economic Success*, http://www.keanet.eu/en/ecoculturepage.html (access: 13.7.2021), p. 7.

[17] *Ibidem*.

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on Demand (VOD) revenue of € 11.6 billion in 2020.[18] The emergence of broadband Internet-based IPTV services, the switchover from analogue to digital cable, the consolidation of pay-TV providers in the cable and satellite segments and, last but not least, the rise of on-demand video-on-demand (SVOD) services have all played a major role in this process.[19] In 2018, the number of television subscribers in the European Union increased by 1.1% compared to the previous year. This percentage is lowered by the fact that the number of traditional subscribers has decreased in six Member States (Sweden, Denmark, Lithuania, Greece, the United Kingdom, and the Netherlands), that is basically a consequence of the rise of SVOD services in the northern EU Member States.[20]

The fact that the range and growth of each service vary from one Member State to another is due, among other things, to the fact that each national market is shaped and formed by very specific conditions, such as those exogenous to pay-TV services. These include purchasing power, the range of free services available, the penetration of broadband access and, last but not least, legislation.[21]

According to EMIS data, more than two-thirds (67%) of the providers established by 2017 in the linear and SVOD services market in several Member States can be connected to only three countries, namely the United Kingdom, the Netherlands and Ireland. The situation is very similar for traditional linear operators, where the United Kingdom, the Czech Republic and France accounted for 69% of the services (providers).[22] However, after the UK left the EU in early 2020, these proportions may also change. This tendency is supported by the data, as it shows the UK market share fell by 5% already in 2019 compared to the previous year, but even so, UK providers bear the largest market share. It is also a sign of downturn that international television operators that wish to remain in competition after Brexit, have already tried to relocate their headquarters, or at least obtained a broadcasting license outside of the UK. While half of the TV channels targeting the foreign market were operating in the UK in 2018, this number fell to barely a third by the end of 2019. If we look at where the transfer of broadcasting licenses was aimed, the Netherlands can clearly be highlighted, followed by Spain. Interestingly, according to statistics from the European Audiovisual Observatory covering 41 European countries, the vast majority of television channels, more than 95%, are still established in Europe, and only 8% of these are state-owned.[23]

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[18] C. Grece, *Trends in the VOD market in EU28*, January 2021, https://rm.coe.int/trends-in-the-vod-market-in-eu28-final-version/1680a1511a (access: 21.11.2021).

[19] L. Ene, *Pay AV services in Europe: The state of play*, June 2019, https://rm.coe.int/pay-av-services-in-europe/168094b6bd (access: 21.11.2021).

[20] *Ibidem*.

[21] *Ibidem*.

[22] *Ibidem*.

[23] European Audiovisual Observatory's MAVISE TV and VOD database 2019.

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The growth is not balanced, as in some countries its pace has slowed or even stopped. Another reason for this is that in some countries a relatively large percentage of the population already has a subscription, so new contracts can only be concluded there by terminating the old one, that only rearranges the share of service providers but does not add to growth. So, markets are saturating, that at the same time can generate more competition between the competing providers.

Figure 1 shows how closely the markets in each Member State are interconnected through the largest service providers. It is clear that most consumers in the Member States are fighting for the majority of consumers, that means that in most cases we can talk about limited competition.

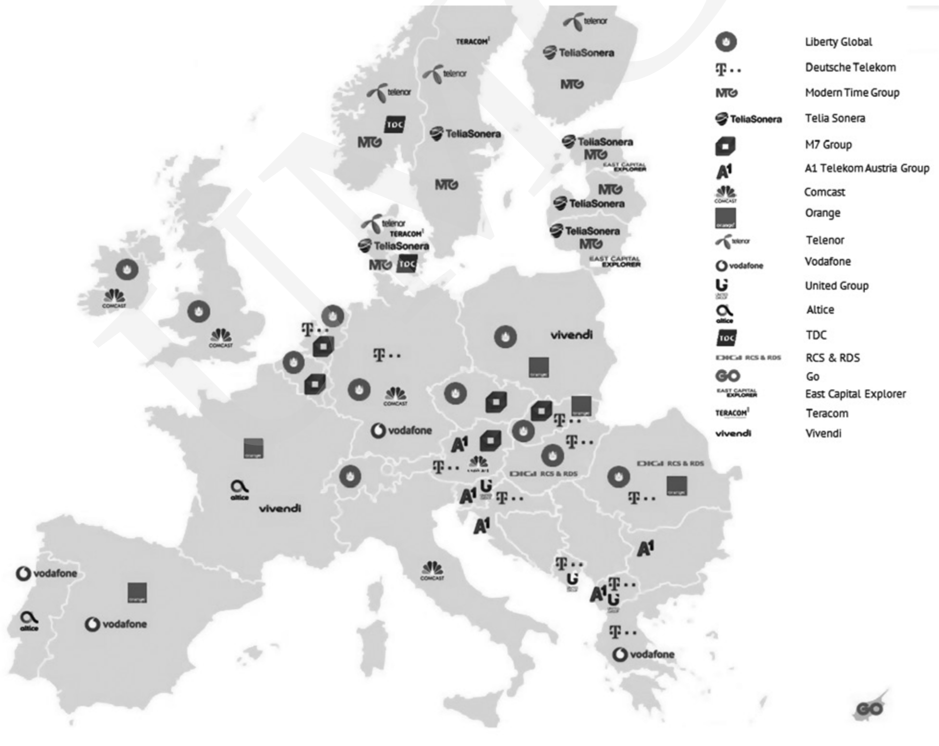

Figure 1. Pay AV services by ownership, geography segmentation (2017)

Source: European Audiovisual Observatory, 2019.

Based on the map, it can be clearly seen that in each country, typically two, three or four service providers dominate the national, paid services market, that, moreover, belong to a well-identifiable sphere of interest. It has not been specifically mentioned, but the market for SVOD services is dominated by three service providers with a predominantly American interest, Netflix and Amazon at the pan-European level, and HBO Go as the third, mainly in the Eastern European markets.

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In European terms, if we look at which providers appear in most countries, it can be seen that it is led by UK-based Liberty Global, followed by Germany's Deutsche Telekom and Sweden's Modern Time Group. The role of the Swedish TeliaSonera, the Luxembourg M7 Group, the Austrian A1 Telekom Austria Group, the American Comcast or the French Orange is also not insignificant. Furthermore, as we can see, there are several service providers in the market that provide services in some countries, however, due to the different size of the markets, their weight should not be underestimated. Another interesting fact is that if we look at the portfolio of the above service providers, it can also be seen that in addition to television services, the majority of service providers also provide telephone service (both traditional fixed and mobile) in the telecommunications market.

Therefore, it is worth examining the traditional broadcasting market. In 2019, these service providers generated revenues of EUR 111.7 million.[24] It can be clearly seen that the markets of the large western and southern European countries represent more than half of the total European market in terms of market value, as illustrated in Figure 2.

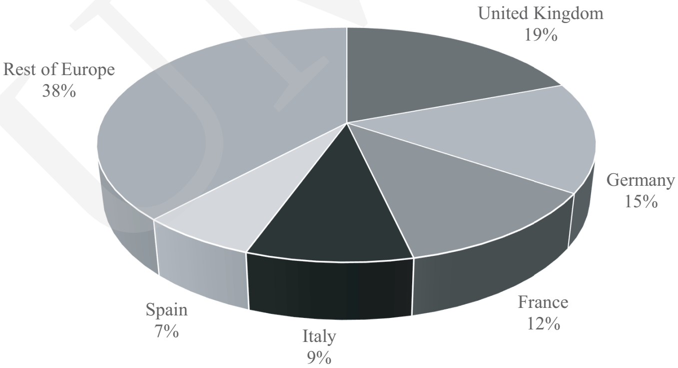

Figure 2. Europe broadcasting and cable TV market geography segmentation (% share by value 2019)

Source: own elaboration based on EMIS data (EMIS, *Europe – Europe – Broadcasting & Cable TV – Market Segmentation*, August 2020).

Examining the number of subscribers in the market for traditional linear and newer SVOD services further reshapes the mapping of the European market. If only because, as I have already pointed out, online technology allows a service provider to appear on all Member States' markets. According to a report by the European Audiovisual Observatory, in 2019 a total of around 237.7 million subscribers used such services in the European Union, including the fact that a person could have obtained more than one subscription at the time of the survey.

[24] EMIS, *Europe – Europe – Broadcasting & Cable TV – Market Segmentation*, August 2020.

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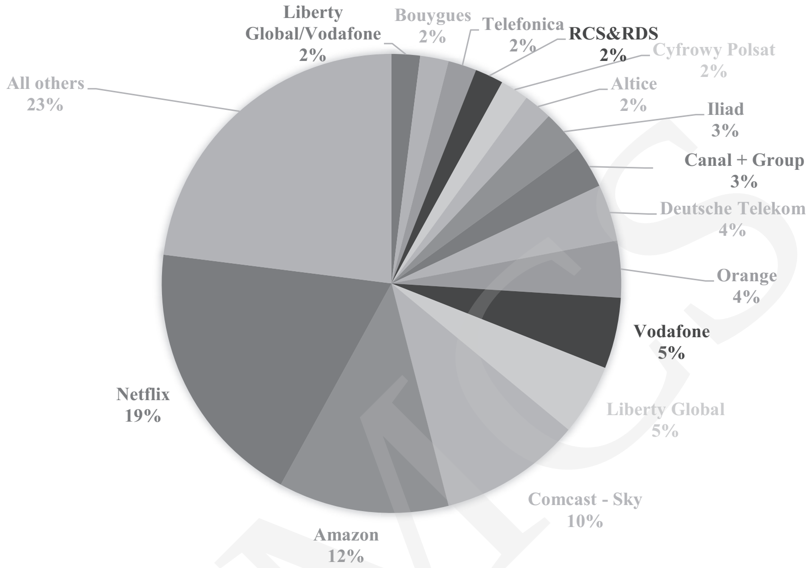

Figure 3. Number of subscribers to TV and SVOD services per company in 2019 as a percentage of total subscriptions in the European Union

Source: own elaboration based on the data of the European Audiovisual Observatory and L. Ene, *Pay AV services in Europe: The state of play*, June 2019, https://rm.coe.int/pay-av-services-in-europe/168094b6bd (access: 21.11.2021).

For the entire audiovisual media market, the number of subscribers to on-demand services is outstanding, with 19% of all subscriptions being connected to Netflix and 12% to Amazon, of which 78% are SVOD services. In addition, the two market participants acquired almost one-third of the subscriptions within 5 years after entering the European market. Thus, it seems to be more clear that the aforementioned waves of amendments to the directive, that were intended to regulate these services, albeit not explicitly, would be more detrimental to US-owned companies. Moreover, it also highlights why the Commission refused to initiate certain procedures to counter prohibited State aid proceedings, that led Netflix to bring an action before the Court of Justice of the European Union.[25]

The two participants mentioned above are followed by five major operators – that provide basically traditional but of course non-linear services – that is: Comcast (formerly Sky), Liberty Global, Vodafone, Orange and Deutsche Telekom, accounting for 45% of subscriptions, and the latter three of which are also the market leaders in telephone services. This in return gives them a market advantage,

[25] See Case T-238/18: Action brought on 12 April 2018 – *Netflix International and Netflix v Commission* (OJ C 231/28, 2.7.2018), where France is also involved.

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as consumers often buy product packages, that, on the consumer side, sometimes generates consumer protection problems.

It can also be seen that 14 companies own more than three-quarters (77%) of all subscribers, while the remaining 23% are made up of more than 90 service providers, thus dwarfing their importance compared to the previous ones. So, the European audiovisual services market is by no means as different at the Member State level as we might think, and there may be and are relationships of interest between the companies mentioned above that further reshape the picture and shed light on global public policy processes.

DISCUSSION AND CONCLUSIONS

The liberalization and regulation of the European audiovisual sector is influenced by several factors. The regulation of the area shows common features with the general rules for electronic communications; however, a number of specific features and problems can also be identified.

The regulatory reform that laid the foundations for liberalization was only an initial step, and in the following periods the subject matter of the regulation became wider and deeper. This is due to the rapid development of technology, that could only be followed by the Community regulations, and the individual waves of regulations tried to deal with the new situations and problems that emerged after the liberalization. This can be detected as a common feature of liberalization in the whole electronic communications sector. At the same time, it is a specialty that technological developments have had a much greater impact on regulations and the development of the current shape of the market. Since 2018, the regulation has also covered several new areas, such as online, on-demand services, creating a more difficult market environment for service providers in this field, that are typically registered overseas, whose role is growing, as it can be seen from the data.

It is important to emphasize that national regulatory authorities (NRAs) have a very important role to play in the regulation, that have a significant influence compared to all other sub-markets. However, these NRAs are not homogeneous and differ in the implementation of EU law. Regulatory reform in recent decades has brought their practices closer together, but there are some Member States who still provide, for example, less stringent or more favorable procedures for service providers and market presence. This is a feature of the audiovisual services market, that poses additional challenges for the Union.

The analysis of market participants revealed that although the market has been liberalized, basically at the level of pay-television services at Member State level we can talk about duopolistic or oligopolistic markets, where two or three service providers have a dominant role and where it is very difficult to enter for new compa-

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nies. This is accompanied by the fact that large service providers operate in several Member States. During the waves of enlargement of the Union, with the expansion of the common market, a market was created for large western companies (such as the eastern enlargement) and with the acquisition of former state-owned or privately owned television providers' markets are slowly saturating. Almost all of these providers provide not only audiovisual services, but also, e.g., fixed and mobile internet and telephone services, that further increase the competition in the market.

As we have seen, several factors and circumstances are currently affecting the further development of the market and regulation, as the Community faces newer and newer problems and challenges. The question is, where is EU regulation going towards, especially with the proliferation of online services and the relocation of headquarters by Brexit.

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ABSTRAKT

W ostatnich latach rynek usług audiowizualnych ulegał istotnym zmianom w porównaniu z początkową fazą liberalizacji. Oczywiście jeśli spojrzymy na dotychczasowe etapy dotyczące regulacji usług, również i ona uległa istotnym zmianom, ale ocena skuteczności liberalizacji może być inna. Wynika to po prostu z postępu technicznego, np. z pojawienia się usług internetowych oraz z tego, że na rynek weszły nowe rodzaje usług i podmiotów, których regulacja wymaga pod wieloma względami działania Unii Europejskiej. Po pierwsze, istota tego faktu polega na tym, że aby uzyskać konwergencję w dziedzinie mediów, rozszerzono teraz zakres regulacji w porównaniu do wczesnej fazy liberalizacji. Po drugie, więksi dostawcy usług spoza Europy konkurują obecnie o europejskich konsumentów, co stanowi wyzwanie zarówno z punktu widzenia regulacji, jak i interesów Unii. Po trzecie, należy wskazać, że Brexit, który miał miejsce w pierwszej połowie 2020 r., przeformułował mapę europejskiego rynku usług audiowizualnych i doprowadził do relokacji kilku usługodawców do państw członkowskich Unii. Aby zrozumieć wyżej wskazane zjawiska, w niniejszym opracowaniu przeprowadzono analizę liberalizacji małego wycinka europejskiego rynku telekomunikacyjnego.

Słowa kluczowe: liberalizacja; usługi mediów audiowizualnych; rynek; Brexit