

## Legislative and Jurisprudential Developments in the Telecommunications Sector in 2011

by

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### I. Legislation

The Telecommunications Law Act<sup>1</sup> (in Polish: *Prawo Telekomunikacyjne*, hereafter: PT) was subject to a number of amendments in 2011 introduced by the Amendment Act of 14 April 2011 and the Amendment Act of 16 September 2011 as well as by the separate Act of 30 June 2011 on the implementation of digital terrestrial television.

In response to the reservations expressed by the European Commission regarding the compatibility of the way in which regulatory obligations concerning the setting of wholesale prices are imposed in Poland, the Amendment Act of 14 April 2011 changed Articles 39 and 40 PT<sup>2</sup>. The direct reason for this amendment was set out in a reasoned opinion prepared by the Commission in October 2010 under Article 258 TFEU<sup>3</sup>. It was stated therein that Polish rules regarding the establishment of wholesale prices may give rise to legal uncertainty and may be discriminatory towards certain telecoms operators.

Allegations concerning the lack of legal certainty and predictability arose because the Telecommunications Law Act permitted the imposition of regulatory obligations with respect to the setting of wholesale prices within the scope of dispute resolution procedures between individual operators.

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<sup>1</sup> Act of 16 July 2004 (Journal of Laws 2004 No. 171, item 1800, as amended).

<sup>2</sup> Act of 15 April 2011 on the amendment of the Telecommunications Law Act (Journal of Laws 2011 No. 102, item 587).

<sup>3</sup> See: Commission requests Poland to comply with telecoms wholesale price rules, EC press release, 28 October 2010, IP/10/1408.

A decision taken in this framework was not generally applicable, and did not, therefore, apply to all inter-operator relations at the wholesale level with respect to which the contested obligation(s) was imposed. The allegation of possible discrimination concerned situations where wholesale prices were subject to regulation on the basis of decisions taken by the UKE President (Polish National Regulatory Authority, hereafter: NRA) at different times and with respect to particular operators. The Commission found such activity to be potentially in conflict with Article 8 (3) (c) of the Framework Directive<sup>4</sup>.

The Commission questioned also the Polish mechanism for the implementation of cost obligations and the substance of such obligations. The previously applicable provisions of Article 39(4) PT allowed the UKE President to set wholesale prices to be implemented by an operator on the basis of the NRA's own unspecified cost methodology. These rules were without prejudice of the existence of a separate requirement to implement a cost accounting system and irrespective of the positive results of audits carried out by an independent organ.

Such provisions were in breach of basic principles of telecoms regulation which require that any regulatory obligations imposed should be specific, based on the nature of the identified problem, proportionate and justified on the basis of the objectives set out in Article 8 of the Framework Directive, in accordance with the requirements stressed in Article 8 of the Access Directive<sup>5</sup> and Article 16 of the Framework Directive.<sup>6</sup>

When implementing cost calculation requirements with respect to the granting of telecoms access on the basis of Article 39(1) PT, the UKE President must since the aforementioned amendment demonstrate the method to be used for the establishment of fees in situations where a discrepancy emerges between the accounting presented by the operator and UKE's verification [Article 39(1a) PT].

A similar change was made to Article 40 PT which facilitates the imposition of less restrictive obligations regarding the setting of cost-based prices for telecoms access (unlike Article 39 which concerns the taking into account of 'justified' costs). Likewise, and when applying Article 40, the UKE President must now demonstrate a means of verifying and setting costs for telecoms

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<sup>4</sup> Directive 2002/21/EC of the European Parliament and of the Council of 07/03/02 on a common regulatory framework for electronic communications networks and services, OJ [2002] L 108/33, as amended.

<sup>5</sup> Directive 2002/19/EC of the European Parliament and of the Council of 7 March 2002 on access to, and interconnection of, electronic communications networks and associated facilities, OJ [2002] L 108/7.

<sup>6</sup> See reasoning for a draft of the Act, Lower Chamber Parliament's document no. 3796.

access [Article 49(1a) PT], which will then be used in order to verify the correctness of the fees actually charged by an operator [Article 40(4) PT].

Moreover, in the case of a decision taken on the basis of Articles 39 and 40 PT, the UKE President may now establish a fee for telecoms access only in a separate and generally applicable decision, and not, as was the case prior to the amendment, by means of a decision resolving individual disputes between telecoms operators.

The Telecommunications Law Act was also subject to a change by the Amendment Act of 16 September 2011<sup>7</sup>. The amendment primarily concerned the principles for the provision of premium rate services as well as certain details regarding the conditions for the granting of radio permits (on the basis of a permission granted by the holder of spectrum rights and a temporary authorization).

Provisions of the Telecommunications Law Act on premium rate services were expanded and specified in an effort to protect end-users. It was stated first that premium rate services are publicly available telecoms services which are comprised of a telecoms service and of a separate service provided in addition thereto. This additional element, related to a telecoms service, may be undertaken by a party other than the party providing the telecoms services. In this manner, providers of content offered within the scope of premium rate services were brought within the scope of the Telecommunications Law Act.

Responsibility for the delivery of premium services to subscribers and for registration in the register of numbers used for premium rate services kept by the UKE President used to be placed on telecoms service providers. By contrast, only content providers are now required to submit such registration at least 7 days prior to the launch of their service (Article 65 PT). A broad set of obligations regarding the provision of information on premium rate services is imposed at the same time by Article 64 PT. These requirements apply both to the providers of premium rate services providing information directly to subscribers [Article 64(1) PT] as well as to anyone making information on premium rate services available to the public [Article 64(2) PT]. These obligations foresee, amongst others: (1) the provision of individual prices or information on the cost of connection as well as the identification of the entity providing the additional service; and (2) the implementation of requirements regarding the manner in which information on premium rate services is presented visually, such as requirements on the background and font size used as well as the time within which the price of the service is presented. In the case of a repetitive premium rate service (in accordance with prior

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<sup>7</sup> Act of 16 September 2011 on the amendment of Telecommunications Law (Journal of Laws 2011 No. 234, item 1390).

consent of the subscriber), their provider is obliged to provide its subscriber with clear and transparent information on the rules regarding the use of the service. The provider is now also obliged to enable the subscriber to cancel the service at any given time in a straightforward manner and free of charge [Article 64(4) PT].

The provisions of the Telecommunications Law Act have also been amended so as to require the blocking of a premium rate service free of charge [Article 64a PT]. Moreover, monetary thresholds regarding the accumulated amount that a subscriber can spend on such a service have also been established. The subscriber must be informed once the threshold is exceeded. Provisions were also made for the eventual blocking of the service if the threshold is met.

Article 209(1)(14a) has been amended in order to allow the UKE President to impose a financial penalty (up to 3% of annual income) on an entity which fails to fulfill, or which improperly fulfills, the requirements contained in Articles 64, 64a and 65 PT. This penalty may be imposed on telecoms undertaking as well as providers of additional services. At the same time, the more general provisions on the imposition of fines by the NRA [Article 209(2) PT] provide for the possibility of imposing a fine on the person in charge of the undertaking responsible for the failure to fulfill its obligations (of up to 300% of the relevant monthly salary). The latter applies, however, only to those in charge of telecoms undertakings and not to those directing an entity providing additional services; unless the latter also qualifies as a telecoms undertaking.

The Telecommunications Law Act was also amended by the Act of 30 June 2011 on the implementation of digital terrestrial television<sup>8</sup>. A number of definitions associated with digital broadcasting was inserted first of all such as: ‘multiplex’, ‘multiplex signal’, ‘multiplex operator’, ‘operator of a broadcasting network’ and ‘digital receiver’. In this manner, the same set of definitions applies now with respect to: the Act on the implementation of digital terrestrial television, the Act on radio and television broadcasting<sup>9</sup> and the Telecommunications Law Act. The most important telecoms provisions that apply to digital television refer to the responsibilities of the UKE President and concern the granting of frequency reservations to multiplex operators [Article 114(2) and (3) PT]. The powers of the NRA cover also the definition of technical parameters and standards for digital transmission as well as the conditions for throughput management and the use of capacity [Article 114(4) PT]. Inserted into the Telecommunications Law Act was a separate Chapter IVa concerning the operation of multiplexes [Article 114(2) & (3) PT]. The obligations of an operator of a multiplex include: (1) the diffusion of radio and

<sup>8</sup> Journal of Laws 2011 No. 153, item 903.

<sup>9</sup> The Act of 29 December 1992 (Journal of Laws 2011 No. 43, item 226, as amended).

television programmes of broadcasters with a concession for the distribution of programmes in a given multiplex; (2) ensuring that they have access to the multiplex under non-discriminatory conditions; (3) ensuring uninterrupted transmission of the digital multiplex signal, with the exception of cases where the interruption results from a technical issue or if the broadcaster ceases to provide a given programme [Article 131a(1) PT]. The UKE President may impose a financial penalty (of up to 3% income) on an operator of a multiplex for its failure to respect these requirements [Article 209(19a)].

The principles for the granting of access to a multiplex are set out in Article 131b–131f PT. The model adopted by the legislator contains the obligation for a multiplex operator to negotiate and finally to grant access to the multiplex. The applicable model is comparable to that used with respect to telecoms access, including the associated powers of the UKE President. On this basis, a multiplex operator must enter into negotiations regarding the conclusion of relevant agreements. The UKE President was granted the power to shorten such negotiations, and to issue a decision resolving a dispute or replacing an agreement on access to a multiplex.

Importantly, the provisions of Chapter IVa are only applicable to situations where the position of the multiplex operator is not jointly held by a group of broadcasters (which have, on the basis of Article 114(6) PT, collectively been granted a frequency reservation for the dissemination or distribution of radio or television programmes by means of digital diffusion). In such cases, the principles governing the cooperation between broadcasters acting jointly as a ‘multiplex operator’ are set out in their own agreement on that matter and in the Act on the implementation of digital terrestrial television.

In addition to issues strictly related to the implementation of digital terrestrial television, the Act of 30 June 2011 introduced also important amendments to the Telecommunications Law Act regarding the granting of radio permits. These changes not only concern broadcasting but also apply to making frequency reservations for any purpose. In accordance with the amended Article 143(4) PT, the grantee of a frequency reservation, or an entity empowered by that grantee, may request the granting of a radio permit enabling it to use the frequency resources subject to that reservation during its term. This provision creates a specific legal framework which allows a third party to benefit from individual rights granted by means of an administrative decision to another entity (such as the right to use radio frequency resources which arises out of a frequency reservation). The application of this legal solution may facilitate situations similar to spectrum sharing which, in spite of the fact that it is provided for in the 2009 review of the Framework Directives, has not yet been implemented into Polish law.

## II. Jurisprudence

According to the 2011 report on the activities of the UKE President, 247 regulatory decisions were appealed in that year: 50 of which were adjudicated by the Court for Competition and Consumer Protection (in Polish: *Sąd Ochrony Konkurencji i Konsumentów*; hereafter, SOKiK) while 197 were heard before an administrative court. An increase in the number of cases examined by administrative courts is noticeable in comparison with previous years (48 in 2010, 84 in 2009), while the number of appeals to SOKiK remained, in comparison, relatively small (43 in 2010, 165 in 2009).

The dual-verification model of the decisions delivered by the UKE President derives from Article 206 PT. Appealed to SOKiK may be: regulatory decisions; decisions imposing fines; post-control decisions; dispute resolution decisions (with the exception of post-tender decisions); and certain decisions taken on the basis of the Act on supporting the development of telecommunications services and networks (the so-called Broadband Act<sup>10</sup>). According to the provisions of the Code of Civil Procedure, SOKiK judgments may be appealed to the Court of Appeals while its ruling may in turn be appealed to the Supreme Court. All other administrative decisions taken by the UKE President can be appealed in accordance with the general rules on administrative procedure and administrative court procedure (first, a request for the reconsideration of a case, second, appeal to the Regional Administrative Court and, final, appeal to the Supreme Administrative Court).

The most interesting judgments of 2011 would appear to be those concerning: (1) the principles for the conduct of a consolidation procedure for a draft regulatory decision having an effect on Member States trade (in accordance with Article 7(4) of the Framework Directive); (2) imposition of fines by the UKE President and; (3) making available of information qualified as a telecoms secret by telecoms undertakings as required by a court within the framework of civil proceedings.

The first of these judgments was handed down by the Supreme Court on 2 February 2011 (III SK 18/10) and concerned a decision of the UKE President on the market for broadcasting transmission services to deliver broadcast content to end users (the so-called market 18)<sup>11</sup>. Considering an appeal submitted by EMITEL, the Supreme Court overturned the earlier ruling of the Court of

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<sup>10</sup> The Act of 7 May 2010 (Journal of Laws 2010 No. 106, item 675).

<sup>11</sup> According to Commission Recommendation of 11/02/03 on relevant product and service within the electronic communications sector susceptible to *ex ante* regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services (2003/11/EC).

Appeals in Warsaw, thus enabling the eventual annulment of the contested regulatory decision. The Supreme Court identified a number of breaches of PT provisions relating to the carrying out of the required consolidation procedure. The violation directly concerned Article 18 PT (as it stood at the time of the issue of the decision) in conjunction with Article 7 of the Framework Directive, Article 8(4) of the Access Directive and Article 4(3) TEU<sup>12</sup>. The Supreme Court held that, after amending the text of a draft decision subject to a consultation process with the European Commission, an NRA is obliged to once again consult the amended text with the Commission. This applies, in particular, to situations concerning the imposition of new regulatory requirements on the introduction of which the Commission did not have the opportunity to comment on yet. If this principle was not respected, than the consolidation process would be a mere fiction. This conclusion does not concern, however, situations where the draft is changed so as to reflect the comments or reservations already expressed by the Commission. The Supreme Court's view is praiseworthy, and clearly indicates the material (as opposed to merely "formalistic") nature of the requirement to consult draft regulatory decisions with the Commission.

In the aforementioned judgment, the Supreme Court also referred to the scope of the cooperation between the regulator (the UKE President) and the national competition authority (the UOKiK President). In accordance with earlier version of Article 25(2) PT, regulatory decisions were taken by the NRA 'in agreement' with the competition authority. In practice, the cooperation between these two organs consisted of the preparation of an official position by the UOKiK President regarding a draft regulatory decision based on the factual and material description of the case provided by the UKE President<sup>13</sup>. In the opinion of the Supreme Court, the requirement that an 'agreement' be reached between the regulator and the competition authority required that the impact of the latter on the decision-making process of the former be greater than the mere preparation of an opinion, and that the competition authority should also be required to actually 'accept' the content of the regulatory decision. It is important to note that the Polish legislator has since then limited, rather than expanded, the scope of influence of the UOKiK President on the content of regulatory decisions. Following the 2009 amendments of the Telecommunications Law Act<sup>14</sup>, the requirement that the UKE President takes regulatory decisions 'in agreement' with the UOKiK

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<sup>12</sup> The appealed decision has been issued before the Lisbon Treaty.

<sup>13</sup> Such a solution was criticized by Sage, E. D. in the article: *Who Controls Polish Transmission Masts? At the Intersection of Antitrust and Regulation*, YARS Vol. 2010, 3 (3), s. 145–146.

<sup>14</sup> The Act of 24 April 2009 on the amendment of the Act – the Telecommunications Law (Journal of Laws 2009 No. 85, item. 716).

President has been replaced by the requirement that the NRA merely obtains a non-binding ‘opinion’ from the competition authority [Art. 25(1) PT].

The next judgments concerned the principles for the imposition of a fine by the UKE President, and, in particular, whether it is permissible under the Telecommunications Law Act to impose a fine without carrying out a control procedure first. In a ruling of 5 January 2011 (III SK 32/10), the Supreme Court clarified the nature of fines imposed by the NRA as well as the procedural standard to be observed in this context. In the opinion of the court, financial penalties imposed by a regulator do not constitute a criminal sanction. However, and in so far as it comes to imposing a fine on an undertaking, rules on judicial verification of the correctness of a regulatory decision should be similar to those that apply to a trial court in a criminal procedure. This key finding is based on a ruling of the European Court of Human Rights concerning the procedural guarantees laid down in Article 6 of the European Convention on Human Rights and Article 42 of the Constitution of the Republic of Poland. Procedural safeguards which arise in this regard should be respected not only in cases of a strictly criminal nature. Despite the fact that the plaintiff’s (telecoms operator) appeal was overturned in this specific case, the judgment presents the views and argumentation relied upon by the Polish Supreme Court on numerous occasions in cases regarding the imposition of fines by the UKE President<sup>15</sup>.

In a judgment of 7 July 2011 (III SK 52/10), the Supreme Court considered the model to be applied to the imposition of fines on the basis of the Telecommunications Law Act. It was specified therein that the imposition of a fine does not have to be preceded by a control procedure (under Articles 199–200 PT). If, however, the UKE President commences such a procedure, the latter is already linked to the next procedural step foreseen in Article 201 PT. Accordingly, in the case of an allegation of a breach of the law, the UKE President should issue a follow-up recommendation first. The NRA is only entitled to impose a fine upon the failure by the undertaking concerned to respect the recommendation issued in this case. The Supreme Court relied in its ruling on Article 10 of the Authorization Directive<sup>16</sup> (prior to its 2009 amendment) which required that, if an NRA declares that an undertaking has committed an infringement, the regulator must inform the undertaking concerned of this fact and grant it the opportunity to respond to the allegation(s) and to remedy the alleged breach within a reasonable timeframe. A financial sanction

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<sup>15</sup> See judgments of the Supreme Court of: 14 April 2010 (III SK 1/10, Lex 577853), 21 September 2010 (III SK 8/10, Lex 646358), 21 October 2010 (III SK 7/10, Lex 686801), 7 July 2011 (III SK 52/10, Legalis).

<sup>16</sup> Directive 2002/20/EC of the European Parliament and of the Council of 07/03/02 on the authorization of electronic communications networks and services, OJ [2002] L 108/21.



may only be imposed if the offender fails to remedy the alleged breach within the appointed timeframe<sup>17</sup>.

The last of the judgments to be considered for the purposes of this review concerns the possibility for a court reviewing a civil law case to demand from a telecoms operator the disclosure of information that constitutes a telecommunications secret (e.g. the content of a communication, transmission data, localization data, data on attempted connections).

The Court of Appeals in Białystok stated in a judgment of 6 April 2011 (I Acz 279/11)<sup>18</sup> that neither the Telecommunications Law Act nor the provisions of the Code on Civil Procedure<sup>19</sup> constitute a basis justifying the decision of a court in a civil case to oblige a telecoms operator to provide that court with data constituting a telecommunications secret. This ruling followed the refusal by a telecoms operator to provide the requesting court with information on incoming and outgoing calls as well as SMSs from a specified phone number. As a result of the refusal to draw up and submit the required lists, a fine was imposed upon that operator by the requesting civil court. It was this very fine which was appealed to the Court of Appeals in Białystok. When the latter overturned the fine, it rightly pointed out that the generally formulated principles of Article 159(4) PT do not constitute a legal basis for a court to impose a disclosure obligation concerning information that qualifies as a telecommunications secret. In the opinion of the Court of Appeals, this issue concerned a decision taken on the basis of a specific competence, which arises out of a legislative requirement and permits the use by courts of data constituting telecommunications secrets. The provisions of the Code on Civil Procedure concerning the extraction of documentary evidence (Articles 248 and 251 Code of Civil Procedure) do not constitute a basis in this case either. The argumentation of the requesting court referred in particular to Article 49 of the Polish Constitution that guarantees the freedom and protection of secrets communicated to a third party<sup>20</sup>. The limitation of this right is only permissible in cases referred to in the law. Legislative requirements limiting this constitutional freedom are not satisfied by the provisions of the PT Act including its Article 161 (which outlines the permissible scope for the processing of data constituting a telecommunications secret) and Article 179 and 180d PT (concerning the fulfillment of obligations in the interest of State security).

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<sup>17</sup> Judgment of the Supreme Court of 06 October 2011, III SK 9/11, Legalis.

<sup>18</sup> Decisions of the Court of Appeal in Białystok from 2011, No 1, p. 36.

<sup>19</sup> Act of 17 November 1964 - Code on Civil Procedure (Journal of Laws 1964 No. 43, item 296, as amended).

<sup>20</sup> The Constitution of the Republic of Poland of 02 April 1997 (Journal of Laws 1997 No. 78, item 483, as amended).

In summary, none of the abovementioned provisions of the Code on Civil Procedure or the Telecommunications Law Act may constitute the basis of a request by a civil court for the preparation and disclosure of documents containing information protected by the principle of telecommunications secrecy.