

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

by

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### I. Legislation

Postal services in Poland are governed by the Postal Law Act of 2003 (in Polish: *Prawo Pocztowe*)<sup>1</sup> which maintains the monopoly of the public operator Poczta Polska with respect of letters weighing up to 50 grams. However, Poland will have to fully liberalize its postal services market by 31 December 2012. For this reason, the Government adopted on 5 October 2010 Assumptions for the Draft Postal Law Act as proposed by the Minister of Infrastructure<sup>2</sup>. However, the Draft was not placed on the Government's legislative agenda for 2011. Thus, the majority of legislative work will have to be completed in 2012, a fact that jeopardizes the implementation of Directive 2008/6/EC. The latter indicates 31 December 2012 as the deadline beyond which Member States must not maintain a privileged position of operators providing universal postal services<sup>3</sup>.

On 1 January 2011, the Act Amending the Goods and Services Tax Act (in Polish: *Ustawa o zmianie ustawy o podatku od towarów i usług*) came into force containing new VAT exemption rules applicable to the postal sector<sup>4</sup>. Prior to the amendment, the said exemption concerned services provided

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<sup>1</sup> Act of 12 June 2003 – Postal Laws (Journal of Laws 2003 No.130, item 1188, as amended).

<sup>2</sup> [www.mac.gov.pl](http://www.mac.gov.pl).

<sup>3</sup> Article 3 of Directive 2008/6/EC on common rules for the development of the internal market of Community postal services, OJ [2008] L 52, pp. 3-20.

<sup>4</sup> Act of 29 October 2010 Amending the Act on Goods and Services Act (Journal of Laws 2010 No. 226, item 1476).

specifically by Poczta Polska. According to the new version of Article 43(1.16), the VAT exemption extends now to ‘postal services and delivery of goods directly related to these services rendered by the operator obligated to provide universal postal services’. In practice, this means that the exemption continues to apply exclusively to Poczta Polska as the only entity legally obligated to provide universal postal services in the public interest. The exemption does not, however, cover services individually negotiated with customers. Such an interpretation of the exemption has been confirmed by the Court of Justice of the European Union<sup>5</sup> as well as by Polish tax authorities<sup>6</sup>. Nevertheless, Poczta Polska does extend the scope of this exemption to individually negotiated services offered to businesses. Such offer is of particular interest for prospective business customers which themselves do not have the right to deduct VAT (e.g. financial institutions). By purchasing VAT-exempt services, these firms can significantly lower their operating costs. A service called ‘Agglomeration Mailing’ constitutes an example of Poczta Polska’s stretching of the statutory exemption seeing as this service does not have a universal character because it is offered to companies mailing over 5,000 letters a month only<sup>7</sup>.

After Poczta Polska introduced its new offer, independent postal operators started to lose customers and saw a drop in letters delivered (e.g. the decrease amounted to about 3% in January–February 2010 alone). Private operators claim also that the principles of fair competition are breached with respect to tenders held pursuant to the law on public procurement because they must compete with Poczta Polska, which illegally offers prices calculated on the basis of a VAT exemption. As a result, Poczta Polska enjoys an outright advantage of 23%, as private operators are obligated to apply 23% VAT to their services. Private operators stress that Poczta Polska is trying to preserve its existing market position, especially in light of the 2013 implementation deadline for market liberalization. Operators demand therefore that VAT rates should be uniform across the entire postal market.

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<sup>5</sup> Judgment of the Court of Justice of the EU of 23 April 2009, case C-357/07 *The Queen, on the application of TNT Post UK Ltd v The Commissioners for Her Majesty’s Revenue and Customs*, ECR [2009] I-03025.

<sup>6</sup> See e.g. interpretations no. IPPP1-443-844/11-2/BS and ITPP2/443-686/11/AP.

<sup>7</sup> Poczta Polska argues that both ‘Agglomeration Mailing’ service and other services offered under the VAT exemption are not individually negotiated because according to the general rules of the provision of e.g. ‘Agglomeration Mailing’, this service is available to all customers meeting certain criteria. These conditions are not subject to individual negotiations. See: [www.poczta-polska.pl](http://www.poczta-polska.pl).

## II. Jurisprudence

Three important court rulings were delivered in 2011 regarding the postal sector. Two involved Poczta Polska (public postal operator) while the third concerned one of its largest competitors – the private operator Integer.pl SA, mostly distributing unaddressed bulk mail and other advertising materials.

At the beginning of 2011, the Polish Constitutional Tribunal delivered a ruling in favor of Poczta Polska<sup>8</sup> which confirmed that the public operator had the right to limit its liability for non-delivery of postal money orders to an amount corresponding to five times the delivery fee. Such limitation is provided for in the Postal Law Act [Article 57(3) in connection with Article 59]. Accordingly, with respect to non-delivery of a postal money order, the aggrieved party may claim damages of up to five times the amount of the fee for the sending of the order (as well as the amount of the money order itself). This rule is an exception to the general principles of civil law, according to which compensation should cover the actual loss.

Jolanta Z represents one of Poczta Polska's customers who felt the detrimental effects of this liability limitation. She sent a PLN 95 money order to the Canadian embassy for her son's passport. However, the money order was not delivered on time, which led to a delay in the issue of the passport. Jolanta Z. was thus forced to move her departure date and rebook flight which resulted in an additional cost of PLN 2,160. She claimed such compensation from Poczta Polska but even though the operator found her demand valid, it only paid the statutory compensation of PLN 33.9 (five times the postage fee).

Jolanta Z. sued Poczta Polska in a civil court. The Regional Court in Tarnów expressed its doubts whether the privilege enjoyed by Poczta Polska was constitutional. It submitted an inquiry to the Constitutional Tribunal indicating three constitutional principles that could have been violated in this case: Article 45(1) (the right to a trial); Article 32(1) (the right to equal treatment by public authorities); and Article 64(2) and (3) (protection of ownership). As regards the equal treatment principle, the court stressed that the challenged provision of the Postal Law Act violates Article 32(1) of the Constitution as it makes the situation of customers using postal services dependent on the service provider they choose.

The Constitutional Tribunal decided that the challenged legal provisions were not in breach of any of the equality principles. First of all, Poczta Polska has a monopoly on postal money orders. There are therefore no entities to which it could be compared to in terms of compensation liability for non-performance or defective performance of a service (similarly, its customers

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<sup>8</sup> Ruling of the Constitutional Tribunal of 25 January 2011, P 8/08, OTK-A 2011/1/2.

could not be compared to customers of other entities in terms of their right to compensation). Secondly, as far as the unequal protection of property rights of Poczta Polska and its customers is concerned, the Constitutional Tribunal concluded that the privileged position of Poczta Polska was justified by its status as a public operator. Having a statutory obligation to provide universal postal services in such a way as to make them available to everyone at an affordable price, many of these services are unprofitable. If Poczta Polska were additionally burdened by the obligation to fully compensate for the losses incurred to the improper performance of its services, it would not be able to bear the financial burden. The Tribunal stated also that the Constitution did not guarantee full compensation to anyone so legislature is largely free to define (and limit) liability.

The views presented by the Tribunal seem controversial and conservative painting a picture of Poczta Polska as an entity that provides almost 'charitable' services. Among the controversies surrounding this case lays the question whether money orders should at all be classified as a universal postal service. Relevant is also the fact that Poczta Polska charges a fee for all of its services and obtains state subsidies for its unprofitable activities. For these reasons, amongst others, the argument of Justice Teresa Liszcz must be supported expressed in her dissenting opinion to the ruling of the Constitutional Tribunal. Most of all, she is correct in stressing that even if some liability limitation is justified, the extent of the limitation imposed by the challenged Article 57(3) and Article 59 of the Postal Law Act is excessive because these rules sever the relation between the compensation and the actual loss caused by non-performance or defective performance of postal money order services. Thus, the right to compensation for the loss incurred of Poczta Polska's customers is essentially illusory.

Another important case of 2011 involving Poczta Polska concerned its failure to ensure the timely delivery of domestic mail. This issue was investigated in 2008 by the President of the Office of Competition and Consumer Protection (in Polish: *Prezes Urzędu Ochrony Konkurencji i Konsumentów*; hereafter, UOKiK President) acting upon a report submitted by the President of the Office of Electronic Communications (in Polish: *Prezes Urzędu Komunikacji Elektronicznej*; hereafter, UKE President)<sup>9</sup>. The report stated that actual timeline indicators for almost all types of domestic mail fell short of the minimum requirements specified in appropriate secondary legislation (ordinance of the Minister of Infrastructure). On this basis, the UOKiK

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<sup>9</sup> *Report on assessment of the quality of universal postal services in terms of the mail delivery timeliness indicator and information on the quantity and types of complaints received and manner of dealing with them for 2007*; available at: [www.uke.gov.pl/\\_gALLERY/10/81/10814/Raport\\_jakosc\\_uslug\\_pocztowych\\_2007.pdf](http://www.uke.gov.pl/_gALLERY/10/81/10814/Raport_jakosc_uslug_pocztowych_2007.pdf).

President decided that there was a reasonable suspicion that Poczta Polska engaged in an unlawful activity violating collective consumer interests<sup>10</sup>.

The UOKiK President observed that a company acts against the law both in situations where it undertakes illegal actions and where it fails to fulfill a statutory obligation. The timely delivery of domestic mail obligation derives from the ordinance of the Minister of Infrastructure on the conditions of conducting universal postal services (section 43.1 and Annex no. 2)<sup>11</sup>. The ordinance was issued to ensure compliance with the provisions of Article 16 and 17 of Directive 97/67/EC<sup>12</sup> on setting service standards for domestic universal postal services. The minister determined therein, amongst others, minimum requirements concerning the quality of universal postal services including a timeframe indicator for deliveries. The indicator reflects the proportions of letters delivered within particular time periods (calculated from the date of dispatch to the date of delivery) against the total number of letters dispatched.

The pre-report investigation conducted by the UKE President showed that the actual timeline indicators for domestic mail delivered by Poczta Polska have not only failed to meet the prescribed standards but have actually gradually and markedly deteriorated since 2006.<sup>13</sup> The UOKiK President decided that failure to comply with statutory minimum quality standards resulted in sizeable financial consequences for consumers as well as some intangible effects such as loss of time, organizational problems, uncertainty as to the actual date of delivery, and a sense of unfair treatment by the company. Poczta Polska's activities were deemed illegal and detrimental to collective consumer interests (a practice violating collective consumer interests).

The UOKiK President's conclusions deserve full support. The intention of both EU and Polish legislators was to ensure a continuous improvement of postal service quality. It is generally agreed upon that high quality postal services are vital not only for the efficient functioning of the postal sector itself but also to some other economic sectors that depend on postal services such as banking or advertising<sup>14</sup>. Still, Poczta Polska has ignored its statutory

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<sup>10</sup> Decision of the UOKiK President of 30 December 2008, RWA-62 /2008.

<sup>11</sup> Ordinance of the Minister of Infrastructure of 09 January 2004 conditions of conducting universal postal services (Journal of Laws 2004 No. 5, item 34).

<sup>12</sup> Directive 97/67/EC on common rules for the development of the internal market of Community postal services and the improvement of quality of service, OJ [1998] L 15, pp. 14–25.

<sup>13</sup> The investigation revealed that Poczta Polska did not meet the required time limits for: priority letters (to be delivered on the day following mailing), regular letters, regular parcels, and priority parcels. See footnote 9.

<sup>14</sup> For more on this subject see M. Krakala-Zielińska, *Prawo pocztowe Unii Europejskiej [European Union Postal Law]*, Toruń 2009, pp. 49–50.

obligation to conform to the minimum timeline standards for letter delivery. The quality of its services has not only failed to comply with the improvement expected by the lawmakers, but has actually gradually declined<sup>15</sup>.

The decision of the UOKiK President was fully supported by the Court of Competition and Consumer Protection (in Polish: *Sąd Ochrony Konkurencji i Konsumentów*; hereafter, SOKiK)<sup>16</sup>. The Court pointed out that Article 16 of Directive 97/67/EC calls for 'quality standards for national mail' in respect of 'routing times' and imposes the obligation on Member States to monitor the compliance of postal services with these standards on a regular basis. Similarly, section 43(1) of the aforementioned ordinance states that mail should be delivered in compliance with the specified timeline indicator which does not prescribe a state of affairs which the operator should aim to attain in the future, but a binding obligation for the present. Poczta Polska appealed SOKiK's judgment to the Court of Appeals in Warsaw which overturned the ruling<sup>17</sup>. Unfortunately, the Court of Appeals has yet to provide a reasoning for its judgment.

The third case of 2011 with substantial significance for the Polish postal sector concerned Integer.pl SA, a private postal operator distributing unaddressed bulk mail and other advertising materials. Integer.pl SA appealed to SOKiK a decision issued on 12 November 2009 by the UKE President<sup>18</sup> whereby the company was ordered to stop collecting, transporting and delivering letters weighing below 50 grams within 14 days of the date of the delivery of the decision. Furthermore, the company was fined PLN 500,000.00 for violating Article 47(2) of the Postal Law Act that grants the public operator a legal monopoly with respect to such mail. SOKiK stated in its judgment that there were no grounds for overturning the challenged decision<sup>19</sup> because Poczta Polska explicitly had the exclusive right to provide postal services with respect to letters weighing up to 50 grams. Other operators can deliver such letters but only provided that they charge more than two and a half times the fee charged by the public operator for mailing letters in the fastest delivery class

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<sup>15</sup> Also of interest are the UOKiK President's findings on the fine. Based on explanations provided by Poczta Polska, the UOKiK President found that the minimum timeline standards stipulated in the ordinance were treated by the public operator as guidance with no legal implications. The UOKiK President took this into account alongside the fact that this practice violated collective consumer interests on the national scale and that the UOKiK President had already issued several decisions concerning Poczta Polska's activities violating consumer interests. As a result, taking into consideration the financial possibilities of Poczta Polska, a fine amounting to PLN 6,600,000 was imposed, which seems adequate to the malpractice.

<sup>16</sup> Judgment of SOKiK of 17 November 2010, XVII AmA 68/09.

<sup>17</sup> Judgment of the Court of Appeals in Warsaw of 5 October 2011, VI ACa 354/11.

<sup>18</sup> Decision of the UKE President of 12 November 2009, DRP-WKP-7224-29/08(16).

<sup>19</sup> Judgment of SOKiK of 7 September 2011, XVII AmT 8/10.

of the lowest weight category under universal postal services. Contrary to the provisions of the Postal Law Act, Integer.pl SA had in fact provided postal services in the lightest weight category (up to 50 grams) charging lower fees than Poczta Polska. SOKiK confirmed therefore that the operator violated the Postal Law Act and decided against decreasing the fine originally imposed by the UKE President, as its amount was determined in accordance to the prescribed rules<sup>20</sup>.

This case brought to a close many years of efforts of the UKE President and Poczta Polska meant to force companies controlled by Integer.pl SA to stop providing postal services at prices below the rates of the public operator, thus functioning in the grey sphere of the law. Companies controlled by Integer.pl SA would, for instance, add extra materials onto letters to reach the statutory limit of 50 grams. As attempts to force the perpetrators to refrain from such practices by legal actions turned out to be futile, the UKE President chose to take a different road and issued a tailor-made regulatory decision (which was challenged) ordering the companies to stop delivering mail at prices lower than those offered by Poczta Polska. Although the public hand has finally achieved the intended result, the success is only partial because as of 1 January 2013, the monopoly of Poczta Polska will be completely abolished and private operators will no longer have to apply higher fees than the public operator.

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<sup>20</sup> The Court indicated that the decision imposing the fine is a derivative of a previous decision of 29 October 2008, OKR-WKT-7224-3/08(17) ordering Integer.pl SA to remedy the breach of Article 47(2) of Postal Law.