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## Legislative Developments and Decisional Practice in the Postal Sector in 2009 and 2010

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## Legislative Developments and Decisional Practice in the Postal Sector in 2009 and 2010

by

Monika Krakafa-Zielińska\*

### I. Legislation

In Poland, the rendering of postal services is regulated by the Act of 12 June 2003 – Postal Law (in Polish: *Prawo Pocztowe*; hereafter the PP Act)<sup>1</sup>. The Act determines the conditions governing postal activities and their control as well as the rendering of postal services and the universal postal service. In 2009, the National Regulatory Authority proposed to the Ministry of Infrastructure a number of amendments to the PP Act<sup>2</sup>. The new provisions were to ensure in particular fair conditions for postal operators to compete and for consumers to obtain access to postal services of high quality and at affordable prices. In this context, separate definitions of the different types of postal services<sup>3</sup> were of key importance. The absence of such definitions makes it possible for private operators to classify postal services as carriage services to the detriment of consumer rights. Specific amendments were also to be introduced in light of the recommendations made in 2009 by the European Commission<sup>4</sup>. The changes suggested by the Commission followed the state aid notification concerning the Polish universal postal services provider Poczta Polska. Ultimately however,

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

<sup>2</sup> A summary of the term of office of the UKE President in postal market services 2006-2011, available at: [www.uke.gov.pl](http://www.uke.gov.pl).

<sup>3</sup> The consequence of introducing the postal service definition will be, among others, the changes in the granting of authorizations. For more see: [www.mi.gov.pl](http://www.mi.gov.pl).

<sup>4</sup> Commission Decision 2010/815/EU of 15 December 2009 on State aid C 21/05 (ex PL 45/04) which Poland plans to implement for Poczta Polska as compensation of universal postal service obligations (notified under document C(2009) 9962).

the aforementioned amendments will not be enacted due to the preparation of a new PP Act the aim of which is to implement Directive 2008/6/EC (III Postal Directive)<sup>5</sup> into the Polish legal system and to specify the legal conditions concerning the provision of postal services. The implementation of the III Postal Directive is to be completed in Poland by 31 of December 2012. On this account, the current legal changes affecting the Polish postal sector are a consequence of the amendments of other legislation and are mainly of an organisational character.

The amendment most relevant to the postal sector in 2009 was introduced by the Act on Customs Service<sup>6</sup>. By its virtue, postal items were placed under the control of the Polish Customs Service. In particular, the Service is authorized to control documents concerning the items and the number of inward cross-border and outward cross-border postal items [Article 48(1)]. The Customs Service is also authorized to search the parcels and take samples of the goods sent [Article 48(2)]. In specific situations, postal operators are obliged to disclose the personal data of postal services users (Article 74).

In 2010, the Polish postal sector was affected most by the legislative changes introduced by the Act on the provision of services in the Republic of Poland<sup>7</sup> (in Polish: *ustawa o świadczeniu usług na terytorium Rzeczypospolitej Polskiej*; hereafter, the USU Act). The USU Act implemented Directive 2006/123/EU on services in the internal market<sup>8</sup>. The aim of the Services Directive was to remove both administrative and practical barriers for the free movement of services across borders in the EU. Due to the significance and the scope of its provisions, the Directive was widely discussed and subject to a number of disputes among the EU Member States. Hence, Poland had trouble keeping to the three yearly implementation deadline set for the end of 2009 and adopted its USU Act four months late (the Act came into force on 4 March 2010).

According to Article 3 of the USU Act, its provisions do not apply to the rendering of universal postal services. Thereby, it is to be applied to all remaining postal services. The amendments introduced by the USU Act pertain to four main issues. The first refers to the adjustment of the PP Act to the requirements of EU law as to the notion of the principal place of business. Being one of the primary notions associated with the freedom of

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<sup>5</sup> Directive 2008/6/EC of the European Parliament and of the Council of 20 February 2008 amending Directive 97/67/EC with regard to the full accomplishment of the internal market of Community postal services, OJ [2008] L 52, pp. 3–20.

<sup>6</sup> The Act of 27 August 2009 on Customs Service (Journal of Laws 2009 No. 168, item 1323).

<sup>7</sup> The Act of 4 March 2010 on providing the services in the Republic of Poland (Journal of Laws 2010 No. 47, item 278).

<sup>8</sup> Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market, OJ [2006] L 376, pp. 36–68.

establishment, it points out whether a given enterprise is established in the EU. As a result, in an application for the authorization and for the entry into the postal operators' register, an entrepreneur is now obliged to indicate its registered office and address or adobe and its principal place of business [Article 9(1) and Article 15(1)]. Moreover, the rendering of postal services on a temporal basis also requires an authorization or registration [Article 6(6)].

The second major change of the legal regime affecting the Polish postal sector as a result of the USU Act refers to one of the key provisions of Services Directive: submissions by electronic means of communication. In this respect, both applications as well as associated documents can now be submitted by electronic means [Article 9(3) and Article 15(3a)]. In the third amendment, the provisions of the PP Act concerning authorisations granted for a limited period were removed. According to the requirements of the Services Directive, authorisations for the provision of postal services are now granted for an indefinite period of time (Article 11). The fourth amendment restricts the list of cases related to the prohibition to reapply for an authorization to provide postal services within 3 years of the date of the final withdrawal decision (new wording of Article 14).

## II. Decisional practice

The National Regulatory Authority responsible for the Polish postal sector is the President of the Office of Electronic Communication (in Polish: *Prezes Urzędu Komunikacji Elektronicznej*; hereafter, UKE). The competences of the UKE President with respect to postal services can be divided into four categories<sup>9</sup>. The first is related to the regulation of the postal market – mainly by means of granting authorizations and maintaining the register of postal operators but also through the withdrawal of authorizations and prohibitions to continue postal activities. Within this realm, the UKE President is also authorized to impose fines and to approve proposal for the rule book and tariff list of universal postal services. The second category of competences includes the control whether postal operators comply with the law and provide services, especially universal postal services, of an appropriate quality. The third category covers mediation among postal operators themselves and between operators and consumers. The fourth category of the competences of the UKE President refers to the participation in legislative works and consultations as to new acts of law.

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<sup>9</sup> By virtue of Postal Laws and the Act of 16 July 2004 – Telecommunications Law (Journal of Laws 2004 No. 171, item 1800, as amended).

In 2009 and 2010, the UKE President issued over 80 decisions concerning the postal sector. The one most interesting and significant for the situation in the Polish postal market is the decision regarding the break-up of the monopoly of the universal postal services provider Poczta Polska. By virtue of the III Postal Directive, Poland was granted a 5-year transitional period to complete the liberalization process of its postal sector (Article 3). Until 31 of December 2012, the exclusive right to deliver post of up to 50g are thus to be exercised by Poczta Polska S.A (Article 47(4) PP). Other postal operators have the right to provide postal services with respect to such items also but they are obliged to charge not less than two-and-a-half times the public tariff for each item of correspondence in the first weight division of the fastest standard category defined in the public provider's universal postal services tariff list (Article 47(2) PP). The UKE President investigated in 2009 one of the private postal operators. In the course of the procedure, the Authority established that the operator in question provided postal services exclusively to a single energy company. Its activities included the collection, transport and delivery of correspondence which contained invoices for the sale of electricity. In a decision issued in 2010, the UKE President ordered the scrutinised operator to cease its postal activity because packets weighed less than 50g were charged significantly lower rates than those of Poczta Polska. The private operator appealed the regulatory decision. In its opinion, the services provided in this case could not be regarded as postal services and consequently, they could not be considered to be part of the reserved services of Poczta Polska. The operator argued that its activity represented an exchange of documents concerning electricity sales between the energy provider and its customers. The UKE President upheld the original decision and thus the dispute was brought before the District Administrative Court in Warsaw (in Polish: *Wojewódzki Sąd Administracyjny*; hereafter, WSA)<sup>10</sup>. In its judgment, WSA confirmed the position of the UKE President. The activity in question could not be regarded as an exchange of documents since the transport and delivery of the correspondence was performed by the postal operator rather than the employees of the power company. Also, none of the parties offered means including the supply of ad hoc premises which allowed the delivery of own packets by means of a mutual exchange of packets between these entities. The power company ordered the postal operator to deliver the correspondence to its clients while it did not receive any documents from them in return. In

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<sup>10</sup> The judgment of the Regional Administrative Court in Warsaw of 14 July 2010, VI SA/Wa 986/10. In this contest it is worth mentioning that the other Polish courts pass the judgments concerning broadly construed postal sector. However, these are mainly related to the judgment of the appeals against the fiscal authorities decisions. See i.e: the judgment of Regional Administrative Court in Gdańsk of 5 March 2009, I SA/Gd 369/08.

effect, the scrutinised activity was a postal service and its provision had to be regarded as a breach of the legal monopoly of Poczta Polska.

The Polish postal sector is also directly affected by the decisional practice of the National Competition Authority, the President of the Office of Competition and Consumer Protection (in Polish: *Prezes Urzędu Ochrony Konkurencji i Konsumentów*; hereafter, UOKiK). In 2009-2010, the UOKiK President issued over 10 decisions expressly aimed at the postal sector the most significant of which concerned the endangerment of collective consumer interests. In the most crucial decision of 2009 concerning the activities of *InPost*, the UOKiK President stressed that a loophole might exist with respect to consumer protection in the postal market<sup>11</sup>. The decision concluded an investigation of *InPost* – one of the biggest private postal operators in Poland – that is well known for being a company that circumvents the law but does not violate it. *InPost* attaches paper or metal cards onto postal items in order for them to exceed the 50-gram weight limit. As a result, *InPost* could deliver them even though the correspondence itself (the envelope) falls within the area reserved for the public postal operator – Poczta Polska S.A. The UOKiK President investigated the standard contract form used by *InPost*. The Authority questioned the low threshold of *InPost*'s liability for its correspondence and parcels as well as the considerable length of time after which complaints are considered (30 days after posting). These provisions were far less favourable to consumers than those used by the public postal operator.

The legal issue under consideration here arises from the fact that the public (Poczta Polska) and private postal operators are bound in Poland by two separate legal regimes with respect to consumer protection. Poczta Polska is obliged to apply the PP Act that determines the limits of the liability of the universal postal services provider. It is worth mentioning that these limits are fairly broad. Private postal operators bear on the other hand full contractual liability because they are bound by the obligation to comply with the Civil Code. But the Civil Code does not include any specific provisions in the area of consumer rights in the postal market. That is why, the law authorised private postal operators to determine themselves the scope of their liability and the applicable complaints procedure. Such a situation may result in the adoption of less favourable provisions by private postal operators than those applicable to Poczta Polska – to the detriment of their consumers. Evaluating the practices of *InPost*, the UOKiK President referred therefore to the PP Act noting that the postal legislation sets out a standard form of good customs and a standard of consumer protection in the postal market. By applying a lower

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<sup>11</sup> Decision of the UOKiK President of 7 October 2009, RKR-18/2009.

level of consumer protection, InPost violated the PP Act in the view of the Competition Authority.

Consumer rights were also found to have been violated by the standard form contract used by *TNT Express Worldwide (Poland)*<sup>12</sup>. In 2010, the UOKiK President established that changes introduced to TNT's complaints procedure were unlawful. They included: handling of complaints submitted by means of a registered letter only and imposing an obligation to submit data not required by the law (i.e. a bank account number). Furthermore, TNT was alleged to have used unfair commercial practices because it did not specify which type of services were to be provided – postal services or carriage service. The importance of this distinction was apparent in another UOKiK decision concerning *UPS Polska*<sup>13</sup>. The standard form contract used by UPS did not include any information about the rendering of postal services (even though UPS is a provider of such services) – mentioned instead were carriage services only. This unfair commercial practice misled the consumers – a key consideration for compensation claims seeing as the provision of postal services entails full contractual liability while carriage services entail partial liability only (do not include lost benefits).

The *Kwoczala* decision of 2010<sup>14</sup> is the most important UOKiK case of competition-restricting practices. The UOKiK President found here a competition law infringement (tender-fixing agreement) in the domestic market for the supply of automatic stamps to institutional customers. The concerned practice related to the manufacturing and supplying of automatic stamps put out to tender by Poczta Polska S.A. Two undertakings were found to have colluded in this case (separate entities owned by two individuals who were in private a couple). The UOKiK President found proof of concertation in the terms and conditions of the submitted bids as well as in the behaviour of the supposed competitors during the procedure itself. Collusion was found to have taken place because the proposed prices differed only by a few percent points between the participants, and because of the last minute withdrawal of the undertaking that won the bid (due to its lower prices) in order for the more expensive entity to be selected.

To sum up, the decisional practice of the UKE and UOKiK Presidents have a significant influence on the Polish postal market – each within their respective competences. However, in light of the expected complete liberalization of postal services, UKE's proposals for legal changes concerning the postal sector require a major reconsideration.

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<sup>12</sup> Decision of the UOKiK President of 17 November 2010, RWA-17/2010.

<sup>13</sup> Decision of the UOKiK President of 30 October 2009, RWA-35/2009.

<sup>14</sup> Decision of the UOKiK President of 4 October 2010, RWR-24/2010.