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## 2010 Legislative Developments in Telecommunications

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## 2010 Legislative Developments in Telecommunications

by

Kamil Kosmala\*

### I. Amendments to the Polish Telecommunications law

The Act from 9 April 2010 on the amendment of the Telecommunications Law Act<sup>1</sup> (in Polish: *Prawo Telekomunikacyjne*; hereafter, PT) introduced a broad range of changes concerning the principles in accordance to which telecoms services are to be provided to end users in Poland. It is important to stress first the change in the definition of a ‘subscriber’ [Article 2(1) PT]. Accordingly, every entity that is party to an agreement for the provision of telecoms services concluded with a provider of publicly available telecoms services, irrespective of whether the agreement is concluded in a written or any other form, is now considered a ‘subscriber’. This amendment results from the ECJ judgment of 22 January 2009<sup>2</sup>. The Court declared therein that the limitation of the definition of a ‘subscriber’ to entities that are party to written telecoms agreements only is incompatible with Article 2(k) of the Framework Directive. Its incorrect implementation led to the violation of a number of subscriber rights as set out in specific provisions of the EU telecoms package. Such rights include, in particular: the right to have their information entered into a publicly available directory service (required by Article 25 Directive 2002/22<sup>3</sup>); the right to receive non-itemized bills (required by Article 7 Directive 2002/58<sup>4</sup>); the possibility, by

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<sup>1</sup> Journal of Laws 2010 No. 10, item 554.

<sup>2</sup> OJ [2009] C 69/9.

<sup>3</sup> Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users’ rights relating to electronic communications networks and services, OJ [2002] L 108/51.

<sup>4</sup> Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector, OJ [2002] L 201/37.

simple means and free of charge, of preventing the presentation of the calling line identification on a per-call basis as well as preventing the presentation of the calling line identification of incoming calls (required by Article 8 Directive 2002/58); the possibility of preventing automatic call forwarding by a third party to the subscriber's terminal (required by Article 11 Directive 2002/58); rights concerning the publication of subscriber directories (required by Article 12 Directive 2002/58); rights concerning unsolicited communications (required by Article 13 Directive 2002/58). The change in the definition of a 'subscriber' necessitated further amendments of the content of Polish Telecommunications Law including: provisions on the methods used to change contractual provisions by remote means (Article 56(6) PT); rules concerning general terms and conditions (Article 59, 60 and 60a PT); provisions on prices of services provided (Article 61 PT); and finally, rules concerning certain rights which, until now, applied exclusively to subscribers who had signed a written telecoms contract (Articles 80, 103 and 131 PT).

The aforementioned amendments should be appraised as appropriate and necessary in the light of the ECJ ruling. It is, however, difficult to explain why did it take the Polish legislator more than a whole year to complete the implementation of the judgment, particularly considering that the infringement procedure leading to the ruling was initiated as early as May 2005.

Among the key legislative development in Polish telecoms in 2010 are also the changes introduced by the Act of 29 October 2010 on the amendment of the Telecommunications law Act<sup>5</sup> concerning the use of negotiated regulatory instruments. On its basis, a new legal framework was established that makes it possible to conclude an 'understanding' (settlement) between the Polish telecoms regulator, the President of the Electronic Communication Office (in Polish: *Urząd Komunikacji Elektronicznej*; hereafter, UKE), and specific telecoms undertakings. The first of such 'understandings', which was in fact concluded before the entry into force of these provisions and thus in the absence of a binding normative basis, was signed on 22 October 2009 by the UKE President and Telekomunikacja Polska S.A.<sup>6</sup>, the incumbent Polish telecoms operator.

At the same time, the Amendment Act of 29 October 2010 introduced a new Article 43a into the Polish Telecommunications Law Act. Accordingly, an operator with significant market power (SMP), which is subject to regulatory obligations, may request the UKE President to accept specific conditions for the performance of such regulatory obligations. The request may also concern the approval of other obligations provided they can lead to: the effective realization of regulatory obligations already imposed on that undertaking; the

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<sup>5</sup> Journal of Laws 2010 No. 229, item 1499.

<sup>6</sup> Text of this Agreement available on the website of the UKE President: [www.uke.gov.pl](http://www.uke.gov.pl).

development of fair and effective competition; or if they provide end users with certain benefits (with respect to the variety, price and quality of telecoms services). The benefits referred to in Article 43a(1)(2) must however have a maximum dimension. The latter concept must be treated as an indication, or a point of reference, for the comparison between different offers submitted by one or several different telecoms undertakings.

Aside from typical tools of administrative procedure, the procedure for the approval of a proposal submitted by a telecoms enterprise includes the conduct of negotiations between the UKE President and the requesting party as well as the consultation of experts. The approval of particular regulatory conditions that are referred to above is undertaken by the UKE President in the form of an administrative decision, which may be issued subject to specific terms and conditions. A decision issued under Article 43a PT can be appealed to the court for competition and consumer protection. A key consequence of the determination by the UKE President of specific regulatory conditions in accordance with Article 43a PT is the regulator's ability to penalize the requesting party for its failure to implement such decision. The UKE President can impose in this context a fine of up to 3% of the income of the offender on the basis of the newly inserted Article 209(1)(12a) PT.

This amendment has provided telecoms undertakings with a relatively flexible tool for the formulation of regulatory obligations imposed upon them. It is important to note however that telecoms undertakings might face in its light onerous financial responsibilities similar to those relating to the performance of regulatory obligations implemented in the usual manner. The aforementioned sanction does not concern, however, every infringement of a decision issued under Article 43a PT but only the failure to perform, or the improper performance, of specific regulatory conditions as accepted by an Article 43a PT decision (which corresponds to the scope of the norms under Article 43a(1)(1)). The possibility of a fine does not, therefore, concern the acceptance of 'other obligations' (in accordance with Article 43a(1)(2), which may be subject to a separate decision (or part of a decision) concerning the performance of regulatory obligations. It is difficult to say if the Polish legislator actually intended for a partial penalization of the failure to implement an Article 43a PT decision. Still, experience with respect to the implementation of this provision shows that the so-called 'other obligations' make up a very important part of decisions taken under Article 43a PT<sup>7</sup>.

2010 saw also the introduction of a number of minor amendments to the Telecommunications law Act by the following legislation:

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<sup>7</sup> See decisions issued on the request of mobile network operators, available on the website of the UKE President: [www.uke.gov.pl](http://www.uke.gov.pl).

- Act of 9 April 2010 on the making available of economic information and the exchange of economic information<sup>8</sup>,
- Act of 5 September 2010 on the protection of confidential information<sup>9</sup>,
- Act of 26 November 2010 on the amendment of certain Acts associated with the realization of the budgetary Act<sup>10</sup>.

## II. Broadband Act

In 2010, the Polish telecoms market was also greatly influenced by the Act of 7 May 2010 on supporting the development of telecommunications networks and services<sup>11</sup> (hereafter, Broadband Act). The Broadband Act established the principles for supporting telecoms investments (particularly with respect to broadband networks) most importantly in this context, those regarding the establishment of regional broadband networks. Set out therein were also the principles for the carrying out of telecoms activities by local government authorities.

The Broadband Act amended a large number of administrative law provisions including a number of rules on the activities of local governments and those concerning construction, real estate and other areas relating to the undertaking of telecoms-related investments. Due to the broad range of issues falling within its scope, the Broadband Act is certainly worthy of separate consideration. This discussion will focus on an analysis of the changes introduced by the Broadband Act into the Polish Telecommunications Law Act.

First, the Broadband Act expanded information-related obligations applicable to operators of telecoms networks. In compliance with the provisions of Article 6a and 6b PT, such operators are now obliged to submit, at the request of the UKE President, information on the location and type of infrastructure in their possession. That data is to be submitted in order to fulfill requirements concerning telecoms access applications by local governments, or to evaluate the merits of public intervention into the telecoms sector. The latter condition appears to be rather vague and should thus be interpreted as a need for a substantive analysis necessary in order for the telecoms regulator to perform its competences *ex officio*. With respect to the Broadband Act, these competences cover, for example, amendments to the decision on the co-use

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<sup>8</sup> Journal of Laws 2010 No. 81, item 530.

<sup>9</sup> Journal of Laws 2010 No. 182, item 1228.

<sup>10</sup> Journal of Laws 2010 No. 238, item 1578.

<sup>11</sup> Journal of Laws 2010 No. 106, item 675.

of, or access to, technical infrastructure in cases of a justified need to protect the interests of end users or effective competition (Article 22(4)).

Second, the Broadband Act set out registration requirements with respect to local government units performing telecoms activities that do not have the character of an economic activity. The appropriate register, as in the case of the register of telecoms undertakings, is maintained by the UKE President.

Third, in an effort to expand the competences of the UKE President with respect to the building of telecoms networks, the Broadband Act inserted a new Article 122a into the Polish Telecommunications Law Act. Therein, the regulator was given the ability to establish a schedule for the development of a network using radio frequencies and to identify the areas that should be excluded from its range. These powers concern situations where the subject in possession of a frequency reservation fails to comply with its commitments made in a tender or frequency-allocation competition, for the purposes of telecoms or broadcasting respectively. The granting of a decision under Article 122a PT must be preceded by a consultation procedure performed in accordance with Article 16 PT. The last requirement may, however, be overlooked in exceptional circumstances requiring immediate action in compliance with Article 17 PT. In such cases, the resulting regulatory decision can be granted for a maximum duration of 6 months.

Fourth, the Broadband Act formulated the principles for a local authority unit to carry out telecoms activities and set out relevant limitations. On the one hand, it established that the carrying out of telecoms activities is the task of local authorities (surprisingly, those on all three administrative levels, i.e. *gmina*, *powiat*, and *województwo*)<sup>12</sup>. On the other hand, it established that the provision of internet-access services to end-users under preferential conditions (free of charge or for a rate lower than the market price) is allowed exclusively if end-user requirements in this respect are not met by the market, and subject to the approval of the UKE President issued in the form of a decision. A decision to that end is granted on the basis of Article 7(2) of the Broadband Act. The UKE President shall define therein relevant conditions and parameters for the provision of internet-access services by local government units including, among other things, the area of their activity, the maximum bandwidth as well as certain other conditions.

Doubts certainly arise about such a far reaching interference by the telecoms regulator in the performance by local government units of their competences. This situation is all the more questionable because the clear objective of these new regulatory competences is the protection of the interests of telecoms enterprises. The interests of the latter are, incidentally, additionally

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<sup>12</sup> For more information see: A. Mednis, 'Megaustawa z punktu widzenia samorządów' (2010) 1 *Prawo i Regulacje Świata Telekomunikacji i Mediów* 27–31.

safeguarded on the basis of Articles 8 of the Broadband Act which gives them the right to make use of the infrastructure or telecoms networks belonging to local governments in exchange for a fee which is set below production costs.

Fifth, the Broadband Act was designed to regulate access to property and buildings in order to facilitate the installation of telecoms infrastructure – so-called right of way. Accordingly, Articles 58, 140 and 141 PT, which regulated this issue until now, were removed from the Telecommunications law Act. In comparison to the old provisions, the new rules contained in the Broadband Act broaden the range of entities entitled to the exercise of the ‘right of way’ with respect to local government authorities. At the same time, Chapter 3 of the Broadband Act entitled: ‘In-building wiring and the right of way’ contains more developed rules in this respect than those previously specified in the Telecommunications law Act.

Sixth, the Broadband Act formulated detailed provisions concerning the localization of telecoms investments and, in particular, the creation of regional broadband networks. Importantly in this respect, it precluded local space management plans created by individual municipal authorities from prohibiting (or rendering impossible) the localization therein of public investment in the electronic communications sector, provided that such investment is compatible with other binding legislation (e.g. rules regarding environmental protection and construction law). Without going into too much detail on this issue, it is worth noting that a relatively controversial procedural solution was applied here regarding the manner in which a decision issued by a voivod (representative of government administration at the regional level) in the above matters is verified. First of all, and in accordance with Article 58(5) of the Broadband Act, it is impossible to repeal a decision on the localization of a regional broadband network in its entirety. The invalidity of such a decision can also not be declared in cases where the fault or error concerns only part of the decision relating to the regional section of a broadband network. The final decision can also not be declared invalid where the application for a declaration of its invalidity is submitted more than 14 days after the day on which that decision became final and the investor has began the construction process. In such cases, an administrative court may declare that the decision is unlawful by virtue of the reasons set out in Articles 145 and 156 of the Code of Administrative Procedure<sup>13</sup> – without any consequences for the legal standing of the challenged decision however. It is fair to say therefore that in light of the potential social benefits of the creation of regional broadband networks, the legislator approved their operation on the basis of administrative

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<sup>13</sup> Act of 14 June 1960 – Code of Administrative Procedure (consolidated text: Journal of Laws 2000 No. 98, item 1071, as amended).

decisions defective by reasons of their invalidity or, under normal conditions, a prerequisite for the resumption of proceedings.

Seventh, the Broadband Act introduced procedural changes into the Telecommunications law Act by broadening the catalogue of regulatory decisions to be verified by means of an appeal to the court for competition and consumer protection on the basis of the Code of civil procedure (Article 206(2)(6) and Article 206(3) PT). This issue concerns decisions issued by the UKE President on the basis of the following provisions of the Broadband Act: Article 7(1) (consent for the provision of internet access services by a local government free of charge or for a fee that is below market price), Article 13(2) (decisions concerning telecoms access provided by a local government), Articles 20, 21(2) and Article 22 of the Broadband Act (decisions amending or replacing a contract on the co-use of, or access to, technical infrastructure concluded with an entity performing a public utilities activity).

At the same time, a completely new procedure was established for the appeal of decisions granted on the basis of Article 30 of the Broadband Act. Article 30 refers to the imposition on property owners, holders of a perpetual usufruct or property managers of an obligation to grant a 'right of way' to a telecoms undertaking. In accordance with the newly inserted Article 206(2a) PT, such decisions may be 'appealed to a common court'. Unfortunately, the legislator did not specify which court the Act refers to: regional or district; civil or economic. This situation is additionally complicated because the provisions of the Polish Code of civil procedure in economic matters do not apply to such procedures (reference from Article 206(3) PT does not include Article 206(2a) PT). Notwithstanding the fact that this solution is difficult to apply in practice, it constitutes an unnecessary differentiation of appeal procedures applicable in 'right of way' cases. Pursuant to Article 30(5) of the Broadband Act, the relevant provisions of its Articles 19 – 24 apply with respect to real estate access. As a result, they form the basis of the granting of a decision by the UKE President and verified by an appeal to the court for competition and consumer protection. The use of identical standards of competences regarding the settlement by the UKE President of infrastructure access disputes and the use of the 'rights of way' is thus verified under two different procedures.