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2009 Legislative and Juridical Developments in Telecommunications

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2009 Legislative and Juridical Developments in Telecommunications

by

Kamil Kosmala*

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Abstract

This article assesses the 2009 amendments to the Polish Telecommunications Law and the most significant executive regulations that have been passed in its context. The amendments are discussed considering their compliance with EU law, taking into account the rulings of the European Court of Justice on the conformity of some of the Polish provisions with the set of directives constituting the European telecommunications regulatory framework of 2002. The analyzed amendments relate to, in particular, the manner in which *ex ante* regulation should be implemented, the principles of telecoms services provision to end-users and the performance of state security and defence obligations (the implementation of Directive 2006/24/EC on Data Retention). Furthermore, the article contains an analysis of key Polish case-law issued in 2009 with respect to the telecoms field covering the most controversial cases decided in that period by both, domestic administrative courts as well as the Supreme Court. The jurisprudence under consideration concerns the following regulatory issues: (1) number porting fees, (2) the term for the expiration of claims regarding the provision of telecoms services as well as, (3) the appropriate procedure to be followed when appealing certain decisions of the National Regulatory Authority relating to the performance of regulatory obligations. The lack of a clear distinction of procedural competences of civil as opposed to administrative courts in this latter regard is shown. The article also covers the ruling of the Court of Justice of 1 July 2010 issued in response to a preliminary reference submitted by the Polish Supreme Court concerning the establishment of number porting fees (case C-99/09).

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Résumé

Le présent article traite des changements dans le droit de télécoms et dans les principaux règlements d'exécution de la loi qui ont été apportés en 2009. Les modifications de ces dispositions ont été analysées et discutées quant à leur compatibilité avec le droit européen, tout en tenant compte de la jurisprudence de la Cour Européenne de Justice concernant la compatibilité des règles polonaises avec les directives du Paquet télécoms de 2002. Les modifications présentées concernent la manière de traiter la réglementation *ex ante*, les principes de l'activité de prestation de services de télécoms aux usagers finales et l'exécution des obligations du système de défense (transposition de la Directive 2006/24/EC sur la conservation des données). L'article présente également l'essentiel de la jurisprudence des tribunaux nationaux concernant le secteur de télécoms de l'année 2009. Les décisions de la Cour Suprême et des tribunaux administratifs ont été analysées sous l'angle des points le plus controversés concernant: (1) les frais de transfert des numéros, (2) le délai de déclaration des revendications au titre de la prestation de service de télécoms et (3) la voie de recours de certaines décisions de l'organe de réglementation en rapport avec l'exécution des obligations réglementaires. Concernant ce dernier point, le problème de la compétence des tribunaux : civils ou administratifs, reste non résolue. L'article mentionne également l'arrêt de la Cour de Justice - étant la réponse à la question préjudicielle de la Cour Suprême polonaise - dans le domaine de l'établissement des droits de transfert des numéros (arrêt du 1 juillet 2010 C-99/09).

Classifications and key words: legislation; jurisdiction; court proceedings; telecommunication; implementation; regulatory obligations; number portability; subscribers rights; expiration of claims; data retention.

I. Legislation

In 2009, the most significant changes to the Polish Telecommunications Law (in Polish: *Prawo Telekomunikacyjne*; hereafter, PT)¹ were introduced by the Act of 24 April². The amendments were extensive and covered issues such as relevant market analysis and the imposition of regulatory obligations, the rules on the provision of services to end users (including universal service) and the performance of obligations related to national defense and State security.

¹ The Act of 16 July 2004 – Telecommunications Law (Journal of Laws 2004 No. 171, item 1800, as amended).

² The Act of 24 April 2009 on the amendment of the Act – the Telecommunications Law (Journal of Laws 2009 No. 85, item. 716).

Many of these changes arose out of the necessity to amend Polish law in order to meet the requirements of EU law.

In order to improve the functioning of the common market, the legislator has broadened the competences of the President of the Office of Electronic Communications (in Polish: *Urząd Komunikacji Elektronicznej*; hereafter UKE) as set out in Article 8 PT. The amendments were to allow the National Regulatory Authority (NRA) to pass on the information received from telecom entrepreneurs not only to the European Commission and NRAs of other EU Member States (as it was previously) but also to the regulatory authorities of the Member States of the European Economic Area (other than EU Member States). The UKE Preside was obliged at the same time to inform those that have provided the said information about its transfer to any of the aforementioned authorities.

A significant amendment related to the performance of the freedom to provide telecoms services. On the basis of the new wording of Article 10 PT, entities from other EU and EEA Member States are now allowed to be entered into the Polish register of telecoms entrepreneurs. Nevertheless, the substance of this change did not concern the entry of foreign entities into the register maintained by the UKE President, seeing as previous provisions did not exclude it. Instead, it concerned the creation of an actual obligation to enter into the register of those which, even on a temporary basis, provide telecoms services on the territory of Poland. This is a controversial solution considering the Treaty right³ to provide services in the territory of the entire European Union without the necessity to establish a seat in the Member State where the services are to be provided (or in fact, the necessity to satisfy any additional conditions). Still, the new registration duty does not apply to entrepreneurs from another Member State if they request telecoms access from a Polish entity but do not at the same time carry out telecoms activities in the territory of Poland (Article 26(4) PT).

The most important amendments introduced in 2009 in the context of *ex-ante* regulation concerns the procedure for market analysis and the imposition of regulatory obligations. The key change concerns the means of defining relevant markets that will be subject to telecoms regulation. The Polish legislator has abandoned the unusual (when compared with other Member States) manner of defining the relevant markets by means of an executive regulation to the PT Act⁴. Since the amendment, a relevant market definition is carried out each time a telecoms product or services market is analyzed

³ Article 56 TFEU, OJ [2010] C 83.

⁴ See: K. Kosmala, 'Legislative Developments in the Telecoms Sector in 2008' (2009) 2(2) *YARS* 209–210.

in the light of the Commission Recommendation⁵. The definition of the relevant market is a compulsory element of both, a decision on the existence of effective competition on a given market (Article 23 PT) as well as a decision on the designation of an entrepreneur holding significant market power and the imposition of regulatory obligations upon such an entity (Article 24 PT). The new solution is clearly superior to the previous one and effectively ensures full cohesion of the PT with binding EU rules. A process of market regulation more compliant with the approach mandated by the European Commission may be undertaken using the new Article 25a PT concerning the assessment of significant market power whereby the UKE President is explicitly obliged to perform this task taking into consideration the Recommendation adopted by the European Commission.

A significant change occurred also with regard to the PT rules on telecoms access and regulatory obligations imposed on wholesale markets. The amendment regarding telecoms access negotiations were a result of an infringement procedure opened by the Commission and the subsequent decision of 13 November 2008 of the European Court of Justice in case C-227/07⁶. The Commission objected, subsequently confirmed by the ECJ, to the fact that the PT placed on telecom undertakings obligations with respect to access negotiations that were described in a too broad a manner. According to the previous wording of Article 26 PT, each public telecom network operator, irrespective of its market power, was obliged to negotiate all forms of telecoms access. By contrast, only the interconnection of networks⁷ is subject to the negotiation obligation according to Article 4(1) of the Access Directive⁸. The new Article 26a PT no longer imposed such an extensive obligation; agreements concerning other forms of access must only be negotiated now if so required by way of specific regulatory obligations imposed on a given operator. This

⁵ Currently binding Commission Recommendation of 17 December 2007 on relevant product and service markets 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, 2007/879/EC, OJ [2007] L 344/65.

⁶ OJ [2009] C 6/5. For insightful discussion on this judgment see: S. Piątek, 'Stopping the creeping telecoms regulation. Case comment to the judgment of the European Court of Justice of 13 November 2008 – European Commission v Republic of Poland (Case C-227/07)' (2009) 2(2) *YARS* 229–234.

⁷ For more on agreements on telecoms access, including network interconnection: S.J.H. Gijrath, *Interconnection Regulation and Contract Law*, Amstelveen 2006. See also: K. Kosmala, 'Cywilnoprawne aspekty dostępu telekomunikacyjnego' ['Civil aspects of a telecommunications access'] (2005) 4 *Prawo i ekonomia w telekomunikacji*.

⁸ 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 (Access Directive), OJ [2002] L 108/7.

issue has led to the long awaited amendment of Polish law (five years following the entry into force of the PT) to bring it in line with the principles of EU law concerning the obligation to negotiate telecoms access. In the past, the wider negotiation duty gave rise to a number of problems in Polish telecoms and was used as a basis for the belief that the negotiation obligation was accompanied by a duty to execute telecoms access agreements (going beyond the scope of network interconnection), irrespective of the market power or regulatory obligations imposed on a given undertaking.

The Act of 24 April 2009 also partially amended the PT provisions concerning the imposition of cost-related obligations on wholesale markets. The new wording of Articles 39 and 40 PT fosters the regulation of using benchmarks and other methods of cost verification as well as the cost calculation used by the operator. The earlier use by the UKE President of methods other than benchmarking, for the purpose of verifying cost-related obligations, was questioned in practice by those subject to regulation.

The rules concerning the provision of telecoms services to end users constitute another very significant group of PT provisions that were amended in 2009. Changes were made to Articles 56-61 PT concerning the use and content of documents describing the commercial relationship of telecoms operators with end users. Until now, two types of documents were used in commercial relations with subscribers: agreements and standard terms concerning the provision of services. Currently, all of the necessary elements of the contractual relationship regarding the provision of telecoms services may be covered by an agreement; as such, the service provider is not required to create additional standard terms. Still, the requirement to create them has been maintained in relation to pre-paid services where no written agreements are signed between the users and the service provider. Included may be some obligatory contractual provisions of a more general and repetitive character (such as information on the quality of services, the manner and the time of the termination of the agreement, the scope of the liability of the service provider and complaints). Unlike the provisions of the PT prior to the 2009 amendment⁹, there is currently no need to duplicate in the standard terms certain provisions included in the contract.

The amendment has also affected the issue of altering the terms of a subscriber agreement by means of distance communications. Despite the fact that such possibility had previously existed, on the basis of general Civil Code rules, an additional obligation to confirm in writing the fact and the scope of the alteration made by means of distance communications was introduced.

⁹ Such an obligation was confirmed in some judgments, e.g. the judgment of the Supreme Administrative Court of 27 May 2009, II GSK 975/08, available at: <http://orzeczenia.nsa.gov.pl/doc/C1F4323A77>.

Moreover, the subscriber was granted the possibility to waive change already made within a 10 day period commencing on the day of the written confirmation. While this solution is certainly advantageous to subscribers, it is nevertheless criticized by service providers as an additional organizational and costly burden. Subscribers benefit also from the introduction of the principle of a proportional decrease of the benefit which has to be re-paid by the subscriber to the service provider in case of a pre-term agreement termination either by the subscriber or by the provider due to the subscriber's fault (Article 57(6) PT).

As a result on an infringement procedure¹⁰ opened by the Commission in January 2008, the PT was also amended with respect to the scope of the consequences of an alteration of a standard terms of service provision and price-list, provided the change results from an amendment of the law. The former provisions allowed the subscriber to terminate the agreement without the obligation to pay back the reduction received during its execution if the price-list or standard terms were altered, including situations where it was a result of a change in the law. The old provisions were justly questioned by the Commission as non-compliant with the Universal Service Directive and as a source of excessive legal uncertainty. According to the amended Article 60a(3) and Article 61(6-6a) PT, a subscriber is now allowed to terminate the agreement (provided she/he is obliged to pay back the reduction received at its execution) if the alteration of the standard terms or price-list was due to legal amendments. The same procedure applies if abusive (prohibited) contractual clauses are being removed from the standard terms (but not from the price-list).

Furthermore, the principle of a free-of-charge porting of numbers assigned to end users has been introduced at retail level. The possibility for subscribers to terminate agreements without respecting their notice period in the case of a request to port a number to another service provider was also introduced. This change has created a new (particularly with regard to the principles of the Civil Code) basis for an immediate pre-term termination of an agreement. The legislator has accepted the discursive assumption that the will of a subscriber to change her/his service provider (while keeping her/his current number) constitutes sufficient justification for the immediate termination of a contractual relationship by the subscriber.

By modifying the rules regarding the provision of universal services, the Act of 24 April 2009 introduced also (Article 91 PT) the possibility of imposing, *inter alia*, an obligation to provide a special tariff package on the entrepreneur designated to provide universal service. The principles of universal service provision, coupled with the nature of the fees within the special price package

¹⁰ Commission's information of 31 January 2008, MEMO/08/67.

used by the fixed incumbent (TP S.A.), used to be questioned by the market as a means of discriminating against end users (e.g. no pre-selection, high unit costs for calls with low fees for access to and line maintenance). According to the new wording of Article 91(3) PT, the terms of service provision within a special package may vary from usual commercial conditions.

The Act of 24 April 2009 amended also the provisions of the PT concerning the performance by telecom undertakings of national defence and State security obligations. The changes introduced in this context were a result of Poland's duty to implement the Data Retention Directive¹¹. The purpose of the latter is to harmonize national rules governing the retention of data processed by telecom operators in order to ensure its availability for the purpose of the investigation, detection and prosecution of serious crime (Article 1(1))¹². The Polish implementation of the Directive raises concerns however even if one considers only the aforementioned purpose of the Directive. Not only do Polish provisions fail to define the notion of 'serious crimes', they introduce also rather 'strict' rules regarding the retention of data, which is protected by the principle of telecom confidentiality, for the purpose of combating all forms of crimes, rather than only those crimes which are of a serious nature. In effect, State authorities may access such data in relation to any procedure concerning the investigation of any category of crimes. The Polish measures implementing the requirements of the Directive may therefore be assessed negatively as too strict – when compared to the EU pattern – in relation to the applicability of one of the most basic constitutional values, i.e. the right to maintain the confidentiality of communications¹³. By the way, the ruling of the German Federal Constitutional Court on 2 March 2010 was based on a similar reasoning whereby the Court repealed existing German legislation transposing the provisions of the Data Retention Directive¹⁴.

¹¹ Directive 2006/24/EC of the European Parliament and of the Council of 15.03.2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC, OJ [2006] L 105/54.

¹² The legal basis relied upon by the EU legislator for the Data Retention Directive was challenged by Ireland before the ECJ. On 10 February 2009, the ECJ dismissed an action for annulment of the EU Directive on data retention brought by Ireland (Case C-301/06). The court confirmed that the directive was correctly adopted under Article 95 TEC. For more on the lawfulness of the legal basis chosen by the Commission when enacting the Data Retention Directive, see: C. Flynn, 'Data Retention, The Separation Of Power In The EU And The Right To Privacy: A Critical Analysis Of The Legal Validity Of The 2006 Directive On The Retention Of Data' (2008) 8 *University College Dublin Law Review*.

¹³ Article 49 of the Polish Constitution (Journal of Laws 1997 No. 78, item 483).

¹⁴ The court developed several principles which must be respect in order for the retention of data to be lawful and found that the current German provisions were not in compliance with those

The new PT provisions which provide for the mandatory retention of a broad catalogue of information by telecom operators have been complemented by the executive regulation of 28 December 2009¹⁵, which describes in detail what data must be retained by particular categories of undertakings.

The Regulation of the Minister for Infrastructure of 17 July 2009 on the tender for the allocation of frequency licenses or orbital resources¹⁶ can be considered as one of the most significant executive legal acts adopted in 2009 on the basis of the Telecommunications Law. It introduces the long-awaited possibility of holding auctions during frequency license tenders. The amount to be paid by the tender winner in exchange for the acquisition of the right to use particular frequencies is established by means of an auction. As an auction style model is applied more and more frequently as a means of assigning radio frequencies by telecoms regulators in other countries, the introduction of such a possibility into the Polish legal system will, without a doubt, be evaluated positively.

II. Jurisdiction

The rulings of the Court issued in appeal proceedings concerning the decisions of the UKE President constitute the most significant source of jurisprudence in telecoms. The Polish legal system provides for two distinct procedures for the legal scrutiny of UKE decisions. In the majority of cases, the parties have the right to file a motion requesting the UKE President to reconsider the case and may, subsequently, appeal the decision to administrative courts (county administrative courts as well as the Supreme Administrative Court). However, certain categories of decisions may be appealed to a civil court, that is, the Court for Consumer and Competition Protection (SOKiK) and subsequently, to the Court of Appeals and the Supreme Court¹⁷. The latter procedure is applicable to decisions listed in Article 206 PT: regulatory

principles. However, according to the court, the preventive retention of telecommunications traffic data is not incompatible with the German constitution *per se*.

¹⁵ Regulation of the Minister of Infrastructure of 28 December 2009 on the detailed list of data types and operators of public telecommunications networks or providers of public telecommunications services obliged to the retention and storage of such a data (Journal of Laws 2009 No. 226, item 1828).

¹⁶ Journal of Laws 2009 No. 118, item 990.

¹⁷ For more on the means of appealing a decision of the UKE President, see: K. Kosmala, 'Procedury regulacji rynków telekomunikacyjnych' ['Procedures of telecommunications markets regulation'] [in:] S. Piątek (ed.), *Regulacja rynków telekomunikacyjnych [Regulation of telecommunications markets]*, Warszawa 2007, pp. 194 – 198.

decisions, decisions imposing financial penalties, post-control decisions, dispute resolution decisions (aside from post-tender decisions) and, commencing in 2010, certain decisions issued on the basis of the Act on the support of the development of telecommunications services and networks¹⁸ (the so-called Broadband Act). The issue of the competences to settle particular types of telecoms cases either by administrative or civil courts was the subject of several noteworthy rulings.

In 2009, 165 decisions of the UKE President were appealed to SOKiK and simultaneously, 84 appeals were submitted to administrative courts¹⁹. Mentioned in this context should also be a ruling of the ECJ regarding Poland's improper implementation of the Framework Directive regarding the definition of a 'subscriber' (case C-492/07 launched as a result of a complaint submitted by the Commission). According to Article 2(1) PT as binding until 20 July 2010²⁰, a subscriber was an entity which was party to a written agreement for the provision of telecoms services. The ECJ stated in its ruling of 22 January 2009 that Poland had failed to fulfill its obligations under the Framework Directive by incorrectly transposing its Article 2(k) with respect to the definition of the notion of 'subscriber'²¹.

The ECJ ruling confirmed the Commissions' position that, by not including customers that conclude agreements other than written, Poland had effectively discriminated against them by not guaranteeing that they would be privy to the specific rights provided for by the directives. Such rights include, in particular: the right to have their information entered into a publicly available directory service (required by Article 25 of Directive 2002/22); the right to receive non-itemized bills (required by Article 7 of Directive 2002/58); the possibility, by 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 of Directive 2002/58); the possibility of preventing automatic call forwarding by a third party to the subscriber's terminal (required by Article 11 of Directive 2002/58); rights concerning the publication of subscriber directories (required by Article 12 of Directive 2002/58) as well as rights concerning unsolicited communications (required by Article 13 of Directive 2002/58). The adjustment of the provisions of the Polish PT in order to bring them in line with the

¹⁸ The Act of 7 May 2010 on the support for the development of broadband services and network (Journal of Laws 2010 No. 106, item 675).

¹⁹ Report on the activities of the UKE President in 2009, available at <http://www.uke.gov.pl>.

²⁰ This provision was amended by the law of 2 April 2010 on the amendment of the Act – the Telecommunications Law (Journal of Laws 2010 No. 86, item 554).

²¹ OJ [2009] C 69/9.

mentioned EU law requirements was brought about by the Act of 29 April 2010 that entered into force on 20 July 2010²².

The most significant telecoms case to reach the Supreme Court in 2009 was the appeal submitted by Polska Telefonia Cyfrowa against the decision of the UKE President which imposed on that operator a fine of PLN 200,000 for establishing a fee for providing porting services in a manner contrary to the PT (case No. III SK 27/08). The procedure concerning the imposition of a fine *per se* was not as important as the associated legal issue that the Supreme Court referred to the Court of Justice of the European Union. The Polish Supreme Court questioned the right of the Polish NRA to require, on the basis of Article 30 (2) of the Universal Service Directive that fees for number porting take into account the costs borne by the operator when providing this service²³. The Court of Justice ruled on 1 July 2010 stating that 'Article 30(2) of Universal Service Directive²⁴ is to be interpreted as obliging the national regulatory authority to take account of the costs incurred by mobile telephone network operators in implementing the number portability service when it assesses whether the direct charge to subscribers for the use of that service is a disincentive. However, it retains the power to fix the maximum amount of that charge levied by operators at a level below the costs incurred by them, when a charge calculated only on the basis of those costs is liable to dissuade users from making use of the portability facility'²⁵.

The aforementioned ruling differs from the ECJ judgment in *Mobistar*²⁶ where it was stressed that the fees charged for the reciprocal use of connected networks shall be established in compliance with the principle of cost-orientation and that these prices must not discourage consumers from using number porting services. The decision in the Polska Telefonia Cyfrowa case moves therefore the centre of gravity towards ensuring the accessibility of number porting and allows for the possibility of establishing a porting fee

²² See footnote 20.

²³ The case is registered in the ECJ as C-99/09 *Polska Telefonia Cyfrowa v UKE*. For more on this issue, see: E. Galewska, 'Ustalenie wysokości jednorazowej opłaty za przeniesienie numeru telefonicznego w UE' ['Determining the amount of a one-off fee for porting phone numbers in the EU'] (2010) 6 *Europejski Przegląd Sądowy* 24-27; national jurisprudence on number portability is explained by M. Wach, 'Should a fee for mobile phone number portability be determined solely by subscriber preferences? Comments to the judgments of the Court of Competition and Consumers Protection of 8 January 2007 (Ref. No. XVII AmT 29/06) and 6 March 2007 (Ref. No. XVII AmT 33/06) – Portability fee' (2008) 1(1) *YARS* 266-270.

²⁴ Directive 2002/22/EC of the European Parliament and of the Council of 7.03.2002 on universal service and users' rights relating to electronic communications networks and services (Universal Service Directive), OJ [2002] L 108/51.

²⁵ OJ [2010] C 243/12.

²⁶ Judgment of the Court of 13 July 2006, C-438/04 *Mobistar SA v Institut belge des services postaux et des télécommunications (IBPT)* [2006] ECR I-06675.

which is actually below the cost level of the operator. The issue as to the exact fee that may be set for the provision of number porting services was settled in Poland by the Act of 24 April 2009 which, by amending Article 71(3) PT, introduced the principle of a free of charge number porting service for both subscribers and end users²⁷.

Of particular importance in this case is a ruling of the Supreme Court of 7 May 2009 (ref. no. III CZP 20/09) which addressed a legal question posed by one of the Polish regional courts (in Polish: *sąd okręgowy*). The Supreme Court was asked whether the provisions of the Civil Code²⁸ governing commissions apply also to contracts concerning the provision of telecoms services. The relevant rules establish, *inter alia*, a period of two-years for the expiration of claims under agreements that have not been regulated under any specific legal provisions (the so-called *unnamed agreements*). The Supreme Court concluded that the rules on commissions do not apply to agreements for the provision of telecoms services, as they are regulated separately by the Telecommunications Law of 2004. In effect, the term for the expiration of claims arising from such contracts shall be established according to general principles²⁹. The Supreme Court ruling in this case is very significant because it finally removes any doubts in this regard that arose from its older judgment of 17 November 1999 (ref. no. III CKN 450/98)³⁰, the improper interpretation of which was used as a basis for the belief that claims arising from the provision of telecoms services expired after a two year period³¹.

The most interesting Polish telecoms judgment of 2009 concerned the respective competences of administrative and civil courts to consider appeals against UKE decisions regarding the performance of regulatory obligations by operators holding significant market power (SMP). Administrative courts have developed two divergent approaches in this regard that were addressed in appeal cases concerning either (1) the confirmation or amendment of a reference offer, or (2) the imposition of an obligation to adjust rates for the provision of telecoms access. Both types of decisions may be classified as decisions “correcting” the activities of a SMP undertaking which submits, in

²⁷ See footnote 2.

²⁸ The Act of 23 April 1964 – Civil Code (Journal of Laws 1964 No. 16, item 93, as amended).

²⁹ In accordance with Article 118 of the Civil Code, the period of expiration for claims related to business activities and periodic claims is three years. Other claims expire after 10 years.

³⁰ (2000) 5 *OSNC*, item 97.

³¹ For more on this issue, see: K. Kosmala, ‘Przepisy o zleceniu a usługi telekomunikacyjne – glosa do wyroku Sądu Najwyższego’ [‘Provisions on orders and telecommunications services – a comment to the judgment of the Supreme Court’] (2004) 1 *Prawo i ekonomia w telekomunikacji*.

the course of the performance of a regulatory obligation, a reference offer for the approval of the regulator, or which provides the NRA with information on the costs of the provision of telecoms access. In both cases, the UKE President does not interfere with the content of a reference offer (which is drafted on the basis of Article 42 PT), nor requires the amendment of the rates provided for the provision of regulated services (which are established in accordance with Article 40 PT) as long as the draft (or the costs reasoning methodology) is compliant with the applicable legal and regulatory obligations. Moreover, if the SMP undertakings do not fulfil those obligations, the UKE President is entitled to influence the amount of the fees charged by the operator for the provision of telecoms access, by amending the reference offer (Article 43(1) PT) or by setting maximum, minimum or direct fees for telecoms access (Article 40(4) PT). Despite the similarity in the reasoning of both categories of decisions, administrative courts have nonetheless adopted fundamentally different approaches as to the appropriate procedure to be followed for the purpose of their verification.

One of the chambers of the Supreme Administrative Court expressed doubts as to whether a case concerning the approval of a draft reference offer on the basis of Article 43(1) PT relates to the imposition of regulatory obligations and thus, whether the decision issued in this matter is actually appealable to SOKiK. After considering the issue (judgment of 28 September 2009, II GPS 1/09), the seven ruling judges of the Supreme Administrative Court answered this question in the negative. They stated at the same time that the means of approving a reference offer does not constitute an issue concerning the imposition of regulatory obligations. In consequence, the proper procedure for the verification of a decision issued in such cases is by administrative procedure alone. The judges stressed that the purpose of Article 43(1) PT (approval by the UKE President of a draft reference offer) is the execution of a decision that imposes regulatory obligations, rather than imposing new obligations related to the determination of the offer's content. It was further clarified that the relationship between the imposition of a regulatory obligation on the basis of Article 42(1) PT (obligation to prepare a reference offer) and the case described in Article 43(1) PT (approval or amendment of a reference offer by the UKE President) is similar to the relationship between issues settled within the framework of a general administrative procedure on the one hand, and an enforcement procedure on the other. Therefore, while issuing a decision on the basis of Article 43(1) PT, the NRA does not deliberate on the subject of a regulatory obligation itself but refers instead to the manner of its execution by the operator.

The opinion of the Supreme Administrative Court is also worth noting that the mechanism for the approval and, if required, alteration of a reference

offer, while unknown to EU law, is not actually prohibited by the EU legislation. Referring to the requirement provided for in Article 4 (1) of the Framework Directive (which guarantees the recognition of the merits of each case and the existence of effective appeal remedies), the judges noted that this provision does not require the court to be competent to settle the merits of the case. According to the Court, it is enough for the merits of the case to be investigated in administrative proceedings only, while the court retains the right to assess the legality of the administrative decision. While this approach is controversial, its substantive reasoning is not challenged. It is therefore possible that all of the decisions of the UKE President may be verified, at some point in the future, by administrative courts only³². It should, however, be noted that two of the seven judges ruling on this case disagreed with the substantive reasoning of the final judgment.

Still, the Supreme Administrative Court followed a completely different line of reasoning in a case relating to a UKE decision imposing an obligation to set a cost-orientated fee for telecoms access (Article 40(4) PT) in accordance with regulatory obligation imposed under Article 40(1) PT. While considering the appeals against these decisions, both the County Administrative Court as well as the Supreme Administrative Court, took the position that decisions issued on the basis of Article 40(4) PT relate to regulatory obligations and, as such, should be verified on appeal by SOKiK. In the opinion of the Supreme Administrative Court presented on 31 March 2009 (ref. no. II GSK 823/08)³³, all decisions based on Article 40(1) and (4) are decisions concerning the imposition of regulatory obligations since they refer to Article 25(4) PT in its wording binding prior to 6 July 2009. The latter Article indicates that certain provisions, including Article 40 PT, relate to regulatory obligations imposed by the UKE President concerning the designation of operators with significant market power. In the Court's opinion, the fact that the PT does not foresee a separate market analysis prior to the issuance of a decision obliging telecoms operators to adjust their access fee (on the basis of Article 40(4) PT) does not prevent such a decision from being recognized as of regulatory nature. Moreover, the Court has clearly stated in its reasoning that the UKE President shall conduct an analysis of the relevant market prior to the adoption of this type of a decision.

³² The draft amendment of the Polish Codes of Civil Procedures, developed by the Commission for the Codification of Civil Law (draft of 11 April 2009) provides, *inter alia*, the elimination of separate proceedings before SOKiK in matters concerning the regulation of telecom and appropriate changes to the PT.

³³ A similar position was taken by the Supreme Administrative Court on 23 March 2010 (II GSK 517/09) as well as by the County Administrative Court in Warsaw in a decision of 9 March 2009 (VI SA/Wa 2478/08) and 10 March 2009 (VI SA/Wa 85/09).

Such position may be considered inaccurate for many reasons. First, the provisions of Article 40(2) and (3) PT set out a separate, specific procedure for the issuance of decisions on the basis of Article 40(4) PT, which does not cover any additional analysis of the relevant market. It could be argued alternatively that the Court's position is, to some extent, similar to the approach of the European Commission in spite of its reliance on different reasoning. The Commission reached a similar conclusion in this context and held that all of the rulings which establish fees for call termination should be treated as regulatory obligations and should therefore be subject to the consultation procedure set out in Article 7 of the Framework Directive³⁴. UKE considers all decisions obliging operators to adjust telecoms access fees to be decisions imposing regulatory obligations (i.e. the obligations to apply a certain fee) and thus submits them all to a national consultation and consolidation procedure (Articles 6 and 7 of Framework Directive). Consequently, their verification may be undertaken by SOKiK.

To sum up, both the legislative amendments as well as the jurisprudential developments of 2009 focused mainly on the need to harmonize Polish telecoms law with EU provisions and to remove any procedural discrepancies in the domestic legal system. Their analysis suggests however, that they cannot all be considered an unequivocal success, in particular as far as jurisprudence is concerned.

³⁴ In its communication of 3 December 2008, IP/08/1860, the Commission expressed concerns that the German national telecoms regulatory authority, Bundesnetzagentur, does not present the Commission with its draft rulings establishing the amount of fees for call termination in mobile networks in accordance with the procedure provided under Article 7 of Framework Directive.