

## Legislative Developments in the Telecoms Sector in 2008

by

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### I. Introduction

Two issues were the primary subject of amendments in 2008 in the Polish telecoms sector. The first concerned the introduction of “technical” provisions relating to the fulfilment of Poland’s obligation to realize calls to the 112 European Emergency Number, as well as to other emergency service numbers (police, state fire rescue, medical emergency service). The second issue concerned the legal provisions relating to the functioning of the Polish National Regulatory Authority (NRA) and specifically, to the manner of appointment of the deputy President of the Office of Electronic Communications (Prezes Urzędu Komunikacji Elektronicznej; UKE). Subject to amendments were the relevant provisions of Acts of the Polish Parliament (in Polish: *ustawa*), as well as those set out in executive regulations of the relevant public authorities (in Polish: *rozporządzenia*). An issue of relevance in this context is also the failure of the Polish legislator to appropriately address certain key developments on the EU level that concerned the telecoms sector. While certain legal rules

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were indeed amended in 2008, Poland was nonetheless unable to respond swiftly enough to all EU requirements.

## II. Calls to emergency numbers

The Act of 11 January 2008 on the amendment of the Polish Telecommunications Law Act (in Polish: Prawo Telekomunikacyjne; PT) and of the National Medical Rescue Act entered into force on 1 August 2008<sup>1</sup>. It introduced major changes regarding the performance of the obligation to correctly route calls to emergency numbers by providers of publicly available telecoms services.

First, the rules concerning the servicing of calls to emergency numbers (Article 77(2) PT) were amended by placing an obligation on telecoms operators to route calls to emergency numbers to so-called "rescue notification centres", created by the National Medical Rescue Act<sup>2</sup>.

Second, more detailed rules regarding the transfer of information concerning the location of those making emergency calls were introduced. The old rules contained in Article 78(1) PT<sup>3</sup>, were amended by more comprehensive provisions of Articles 78(1)-(8). So far, information on the location of the network termination point from where a call was made to an emergency number was rendered available to competent services on a real-time basis, if technically feasible. The recent changes made the UKE President into the administrator of a system that processes such information and transfers it to the appropriate rescue notification center. Specific details concerning this system can be found in the executive regulation of the Council of Ministers of 10 December 2008 on the organisation and functioning of the system which gathers and makes information and data accessible on the location of the network termination point from where a call is made to the 112 emergency number or other emergency numbers<sup>4</sup>. Simultaneously, telecoms operators were obliged to adapt their IT systems to this system and to transfer the necessary information to this system within two months of its launch. According to Article 3(2) of the Act of 11 January 2008, until the launch of the system, telecoms operators shall perform the obligations related to the routing of emergency calls and to the location of those making such calls, in accordance

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<sup>1</sup> Journal of Laws 2008, No. 17, item 101.

<sup>2</sup> The Act of 8 September 2006 on National Medical Rescue (Journal of Laws No. 191, item 1410 as amended).

<sup>3</sup> The Act of 16 July 2004 – Telecommunications Law (Journal of Laws No. 171, item 1800 as amended).

<sup>4</sup> Journal of Laws 2008 No. 236, item 1620.

with the provisions of the PT in existence at that time. It shall also be noted that, from the end of November 2009, the location system managed by the President of UKE has ceased to exist.

The incentive for the aforementioned legislative changes was to ensure that the provisions of the PT satisfy the requirements of Article 26(3) of the Universal Services Directive<sup>5</sup>. Its incorrect implementation was subject to an infringement procedure launched against Poland in December 2006 by the European Commission under Article 226 EC. The Commission specifically objected to the inaccessibility of information on the location of a 112 caller if the call was made from a mobile phone. However, following the aforementioned amendment, these proceedings were closed on 16 October 2008<sup>6</sup>.

However, the new rules do not make the fulfilment of the obligation to make the relevant information accessible dependent upon the technical capacity of the operator, making them somewhat arbitrary since the actual capacity of particular operators is disregarded. Instead, the new approach is based on the assumption that “[t]he possibilities provided by the technologies relied upon nowadays remove all technical obstacles in this scope”<sup>7</sup>. While such a solution is correct in principle, it goes further than the requirement of Article 26(3) of the Universal Service Directive which obliges Member States to ensure the availability of information on the location of an emergency number caller to an extent that is technically feasible.

### III. The functioning of the National Regulatory Authority

The Act on civil service, passed on 21 November 2008<sup>8</sup>, changed the appointment procedure for the deputy to the UKE President, previously based on Article 190 PT. The Act on civil service established also a new set of criteria to be met by a candidate for this position. While the deputy President of UKE is still appointed by the President of the Council of Ministers (the Prime Minister), the candidate must now be chosen by way of an open and competitive recruitment procedure. According to the old rules, the deputy President of UKE was selected from a group of candidates from within the

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<sup>5</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 (Universal Service Directive), OJ [2002] L 108/51.

<sup>6</sup> Communication from the European Commission of October 16, 2008, IP/08/1529.

<sup>7</sup> Reasoning for a draft of the Act, Lower Chamber Parliament's document no. 56.

<sup>8</sup> Journal of Laws 2008 No. 227, item 1505.

“national personnel reserve”<sup>9</sup>. According to the new Article 190(8a) PT, the criteria which must be satisfied in regulation for a candidate to be appointed for the position of deputy President of UKE include, amongst other things, a level of education which corresponds to the scope of the competence of the regulatory authority, a suitable period of professional practice (6 years) as well as a minimum period of managerial experience and capability. The amended Act describes also the manner of carrying out the recruitment procedure for selecting a candidate (the so-called “competition”). Still, the dismissal procedure of the deputy President of UKE remains unchanged – it is conducted at the request of the UKE President by the minister responsible for communications.

#### IV. Secondary legislation

In 2008, a total of 15 executive regulations were issued in relation to the PT. Among the most important of them is the regulation of the Minister of Infrastructure of 28 February 2008 introducing a new national numbering plan for public telephone networks<sup>10</sup> which primarily changes the format of special subscriber services (so-called “AUS” numbers) used, for instance, by taxis. On its basis, the old four digits format (9XYZ) was replaced by a five digits (19XYZ) starting from 15 February 2009. A timetable for the alteration of the way of calling national numbers from a fixed network was also introduced according to which, from 30 September 2009, the aforementioned numbers will not need to be preceded by the ‘0’ digit. The ‘0’ prefix will be totally removed from any national traffic starting from 15 May 2010.

In another development, low-power base stations (so-called “femtocells”) were covered by the amended executive regulation concerning radio equipment that may be used without a radio permit<sup>11</sup>. By communicating with the controller of a cellular network base station *via* an IP Network, reliance on this type of equipment could ensure coverage for wireless networks inside

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<sup>9</sup> The national personnel reserve is a group of candidates who may be selected for high state positions. It was in force from October 2006 until March 2009 on the basis of Act of August 24, 2006 on the National Personnel Reserve and High State Positions (Journal of Laws 2006 No. 170, item 1270 as amended). The said Act was revoked by the Act of November 21, 2008 on the civil service.

<sup>10</sup> Regulation of the Minister of Infrastructure of 28 February 2008 on the National Numbering Plan for Public Telephone Networks (Journal of Laws No. 52, item 307).

<sup>11</sup> Regulation of the Minister of Infrastructure of 29 February 2008 amending the Regulation on the Transmitting or Transmitting-Receiving Radio Equipment which May Be Used Without a Radio Permit (Journal of Laws No. 47, item 277).

buildings as well as places not covered by “normal” base stations. Importantly, the aforementioned equipment can only be used by those telecoms operators which possess a nationwide frequency reservation, as indicated in § 2(1)(5a) of this regulation<sup>12</sup>.

The executive regulation on fees relating to the use of frequencies was also amended<sup>13</sup>. A general rule was established for setting fees concerning public mobile networks of a cellular structure. The practical consequence of this amendment is the regulation of fees for mobile networks working in the CDMA 2000 and 802.16 (WiMAX) standards. This is relevant because prior to this there was no legal basis for setting fees for the right to use frequencies as regards CDMA and WiMAX mobile systems. Still, the level of fees relating to the use of NMT 450i, GSM 900, GSM 1800 and UMTS remained unchanged.

Telecoms access constitutes another key issue regulated by way of an executive regulation in 2008. On 21 July 2008, the Minister of Infrastructure issued two acts concerning telecoms access: the first related to the scope of the application of a framework offer for telecoms access<sup>14</sup>, the second set detailed requirements ensuring telecoms access<sup>15</sup>. The first regulation addressed the scope of the framework offer concerning access to the local loop for the purpose of broadband data transmission (so-called “Bitstream Access”), an issue that was not regulated by the previous regulation of 2005<sup>16</sup>. The second executive regulation covered (as a part of the detailed provisions concerning cooperation between independent operators) the requirements necessary to ensure all forms of telecoms access, rather than only the manner of telecoms access realised by the interconnection of networks<sup>17</sup>, as has previously been the case<sup>18</sup>.

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<sup>12</sup> 880–915 MHz and 925–960 MHz; 1710–1730 MHz and 1805–1825 MHz; 1920–1980 MHz and 2110–2170 MHz.

<sup>13</sup> Regulation of the Council of Ministers of 12 November 2008 amending the Regulation on Fees for the Right to Use Frequencies (Journal of Laws No. 215, item 1356).

<sup>14</sup> Journal of Laws 2008 No. 138, item 866.

<sup>15</sup> Journal of Laws 2008 No. 145, item 919.

<sup>16</sup> Regulation of the Minister of Infrastructure of 11 August 2005 on the Scope of a Framework Offer for Telecoms Access (Journal of Laws No. 160, item 1350).

<sup>17</sup> The interconnection of networks is one of the specific forms of telecoms access. According to Article 2.25 PT, the interconnection of networks constitutes a special form of telecoms access realised between operators.

<sup>18</sup> *I.e.* on the basis of the regulation of the Minister of Infrastructure of 11 August 2005 on detailed requirements related to the interconnection of networks (Journal of Laws No. 160, item 1349).

## V. The failure of the national legislature to address certain key issues in 2008

At least two significant events occurred in late 2007 and 2008 at the EU level that should have been taken into account by the Polish legislator in 2008: (i) an Article 226 EC infringement procedure initiated by the Commission against Poland concerning the perceived lack of independence of the Polish NRA, and (ii) the issue by the Commission of the new Recommendation on the relevant product and service markets within the electronic communication sector<sup>19</sup>. Both of these events were not addressed until the 2009 amendment of the Polish PT. Still, both of them shall be addressed in the context of the overview of the legislative developments which took place, or rather, should have taken place, in 2008. Poland's failure to address these EU developments must be evaluated negatively.

The infringement procedure against Poland relating to the perceived lack of independence of the President of URE (the Polish NRA) was launched by the Commission in December 2006<sup>20</sup>. Interestingly, this procedure commenced at exactly the same time as the aforementioned proceeding concerning Poland's failure to implement the requirements relating to 112 emergency number calls.

Due to Poland's passive attitude, the Commission brought a case to the ECJ<sup>21</sup> acting on the basis of Article 226 EC. In this case, the Commission objected to an insufficient separation of the Polish State's regulatory functions from the exercise of ownership or control rights by the Polish State in a number of telecoms enterprises. Such a conjuncture was interpreted by the Commission as an infringement of Article 3(2) and (3) of the Framework Directive<sup>22</sup>, which requires Member States to ensure that their NRA are independent and exercise their powers impartially and transparently. Since the

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<sup>19</sup> 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. This act reduced the list of markets which had formerly been subject to *ex ante* regulation from 18 to 8, and almost completely omits the need for the *ex-ante* regulation of retail markets in the electronic communications sector (except of the retail market for access to the public telephone network at a fixed location for residential and non-residential customers).

<sup>20</sup> Communication of the European Commission of December 13, 2006, IP/06/1798.

<sup>21</sup> The case was commenced on 11 July 2008, Case C-309/08, OJ [2009] C 247/12.

<sup>22</sup> Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive), OJ [2002] L 108/33.

evaluation of the independence of a NRA refers to the relationship between the regulator and market players (those providing electronic communications networks, equipment or services), the main argument in this context concerned the absence of provisions defining the duration of the NRA's term in office and the lack of an exhaustive list of conditions for the dismissal of the Polish NRA. In consequence, the European Commission decided that the Polish NRA is greatly dependent on the Prime Minister and fails to guarantee that State-owned or controlled enterprises will be treated in the same way as other market participants. As noted above, the amendment required in this respect was not introduced into the Polish PT until 2009<sup>23</sup>.

Regarding the legal amendments necessitated by the new Recommendations on relevant markets in the electronic communication sector, considered must be certain rules concerning the definition of relevant markets subject to *ex ante* regulation by the UKE President on the basis of the PT. Between the entry into force of the PT in September 2004 and July 2009, the minister responsible for communications was responsible for the definition of relevant markets (carried out by way of an executive regulation) subject to *ex ante* regulation. The old regulation of the Minister of Infrastructure issued on 25 October 2004<sup>24</sup> defined 18 relevant markets corresponding to the list contained in the Commission's Recommendation of 2003<sup>25</sup>.

It should be noted that the approach introduced in the Polish PT (the fact that the relevant markets subject to sector-specific regulation are defined by means of an executive regulation), is unusual when compared to the practice of implementing the electronic communications Directives that regulate the actual procedure for analysing the relevant markets. The approach commonly used in other Member States associates the relevant market definition with specific regulatory decisions. In particular, these decisions contain the definition of the analysed market and simultaneously decide upon the eventual imposition of regulatory obligations upon the entities acting on that specific market<sup>26</sup>.

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<sup>23</sup> Act of 24 April 2009 on the amendment of the Telecommunications Law Act and other Acts (Journal of Laws No. 85, item 716).

<sup>24</sup> Regulation of the Minister of Infrastructure of 25 October 2004 on Defining Relevant Markets Subject to Analysis by the President of the Office for Regulation of Telecommunications and Post (Journal of Laws No. 242, item 2420).

<sup>25</sup> Commission Recommendation of 11 February 2003 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 communication networks and services, OJ [2003] L 114/45.

<sup>26</sup> For more discussion on this issue, see: T. Skoczny, "Ocena konkurencyjności rynków" [in:] S. Piątek (ed.), *Regulacja rynków telekomunikacyjnych*, Warszawa 2007, pp. 213-220; S. Piątek, "Prawo telekomunikacyjne w świetle dyrektyw o łączności elektronicznej" (2005) 3

The Polish model makes it necessary to immediately amend the executive regulation of 2004 so as to ensure its continuing compatibility with the new list contained in the 2007 Recommendations. However, no such change occurred throughout the whole of 2008. This failure to act on the part of a national legislator is contrary to the requirement of Article 15(3) of the Framework Directive which requires NRAs to define relevant markets appropriate to national circumstances, taking the utmost account of the Commission's recommendations and guidelines.

## Literature

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