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STATUS OF THE PRESIDENT OF THE OFFICE OF ELECTRONIC COMMUNICATIONS AS A MEDIATOR IN THE FIELD OF TELECOMMUNICATIONS SERVICES

Abstract

The subject of this paper is an analysis of the status of the role of the President of the Office of Electronic Communications in the area of mediation concerning telecommunications services. The paper includes a legal analysis relating to the subject and object aspect of mediation in the area of telecommunications services. It also presents the procedure and the type of actions undertaken by the President of the Office of Electronic Communications in terms of disputes covered by its jurisdiction as a mediator. The article also answers the question whether the juxtaposition of the role of a regulator and a mediator in one body can lead to an abuse of one of these positions.

KEYWORDS

mediation, President of the Office of Electronic Communications, consumer, provision of publicly available telecommunications services

SŁOWA KLUCZOWE

mediacja, Prezes Urzędu Komunikacji Elektronicznej, konsument, dostawa publicznie dostępnych usług telekomunikacyjnych

1. INTRODUCTION

Economic regulation as a mode of action of the public administration can be analysed from a functional aspect, indicating the role of the entities implementing it. When performing the regulatory function, national public administration bodies are obliged to implement detailed regulations and strictly enforce the behaviour of entrepreneurs. At the same time, their competences include the concretisation of the law, while it takes the form of formulating only such legal norms, which will depend on supra-statutory legal acts. Some of the bodies with a regulatory function also have the competence to resolve disputes amicably through mediation proceedings. One of the authorities entrusted with the role of a mediation entity is the President of the Office of Electronic Communications.

The subject of this paper and, at the same time, the basic research issue is the analysis of the status of the President of the Office of Electronic Communications as a mediator in the field of telecommunications services. The paper sets out three main research questions. The first one relates to determining the subject and object scope of disputes in which the President of the Office of Electronic Communications may act as a mediator. The second one relates to establishing the scope of activities undertaken by the President of the Office of Electronic Communications in terms of disputes covered by its jurisdiction as a mediator. The last one concerns an attempt to answer the question whether the juxtaposition in one body of the role of a regulator and a mediator may lead to an abuse of one of these positions.

2. SUBJECT AND OBJECT SCOPE OF MEDIATION

Pursuant to Article 109 of the Act of 16 July 2004, Telecommunications Law¹ (hereinafter: Telecommunications Law), a civil law dispute between a consumer and a provider of publicly available telecommunication services may be settled

¹ Journal of Laws of the Republic of Poland: Journal of Laws of 2022, item 1648, as amended.

amicably through an out-of-court consumer dispute resolution procedure.² Thus, under the Telecommunications Law, mediation conducted by the President of the Office of Electronic Communications is available in civil law disputes between a consumer and a provider of publicly available telecommunications services.

The term ‘consumer’ is defined in Article 2(18) of the Telecommunications Act. It means a natural person applying for or using publicly available telecommunications services for purposes not directly related to his/her business or profession. Public providers, on the other hand, are telecommunications enterprises within the meaning of Article 2(27) of the Telecommunications Act.³ On the other hand, the notion of a publicly available telecommunications service should be understood as a telecommunications service available to the general public (Article 2, point 31). Thus, it should be concluded that the aforementioned mediation is not subject to disputes involving subscribers who are not consumers and those related to services provided in non-public networks.

The literature on the subject indicates that within the meaning of paragraph 1 of Article 109 of the Telecommunications Act, a civil law dispute means a disputed civil case.⁴ At the same time, it should be pointed out that according to Article 1 of the Act of 17 November 1964, the Code of Civil Procedure,⁵ civil cases mean all kinds of cases from the relations in the field of civil law, family and guardianship and labour law, as well as those in the field of social security and others to which the provisions of this Code are applied by virtue of special acts. The judiciary also draws a distinction between civil cases in the substantive

² The legislator’s insertion of provisions on out-of-court dispute resolution into telecommunications law is the result of the implementation of recommendations from the Universal Service Directive. Article 34 of the Directive requires Member States to ensure that transparent, non-discriminatory, simple and inexpensive out-of-court procedures are made available for dealing with unresolved disputes between consumers and enterprises providing electronic communications networks and/or services, arising within the scope of this Directive and relating to the conditions or performance of contracts concerning the provision of such networks and/or services. Member States shall adopt measures to ensure that such procedures enable disputes to be settled fairly and promptly and may, where warranted, adopt a system of reimbursement and/or compensation. Such procedures shall enable disputes to be settled impartially and shall not deprive the consumer of the legal protection afforded by national law. Member States may extend these obligations to cover disputes involving other end-users, see A. Krasuski, *Prawo telekomunikacyjne. Komentarz*, Commentary to Article 109, Lex/el. 2015 (accessed 1 October 2023).

³ A telecommunications undertaking shall be understood as an entrepreneur or another entity authorised to carry out a business activity pursuant to separate regulations, which carries out a business activity consisting in the provision of telecommunications networks, the provision of accompanying services or the provision of telecommunications services, whereby a telecommunications undertaking authorised to: a) provide telecommunications services, b) provide public telecommunications networks or the provision of accompanying services shall be understood as an ‘operator’.

⁴ S. Piątek, *Prawo telekomunikacyjne. Komentarz*, commentary to Article 109, Lex/el. 2019 (accessed 1 October 2023).

⁵ Journal of Laws of the Republic of Poland: Journal of Laws of 2023, item 1550, as amended.

sense (i.e. those arising out of civil law relations) and those in the formal sense (i.e. those not arising out of civil law relations, but which are subject to recognition in civil proceedings). At the same time, it is emphasised that in case of doubt as to the nature of a case, there is a presumption that this is a civil case.⁶

Civil law disputes that may be the subject of out-of-court consumer dispute resolution proceedings are primarily disputes related to the performance of contracts for the provision of telecommunications services (Article 56(1)). On the other hand, a civil case does not lose its character if some elements of the civil law relationship (e.g. prices, obligation to conclude a contract) are shaped by public law norms or administrative decisions.⁷

The body conducting the proceedings is the President of the Office of Electronic Communications. Pursuant to § 29 of Ordinance No. 33 of the President of the Office of Electronic Communications of 31 December 2019 on granting organisational regulations to the Office of Electronic Communications, the tasks of the Department of Consumer Policy include conducting ADR proceedings in the area of civil law disputes between a consumer and a provider of publicly available telecommunications services for the Mazowieckie Voivodeship and coordinating the activity of the delegations in the organisation of ADR proceedings⁸ in the area of civil law disputes between a consumer and a provider of publicly available telecommunications services, and, in justified cases, conducting such proceedings or delegating them to the delegacies. Thus, in the remaining voivodeships, the conduct of proceedings in civil law disputes between a consumer and a provider of publicly available telecommunications services is the responsibility of individual delegacies of the Office of Electronic Communications.

3. PROCEDURE AND SCOPE OF ACTIONS UNDERTAKEN BY THE PRESIDENT OF THE OFFICE OF ELECTRONIC COMMUNICATIONS

Proceedings in civil law disputes between a consumer and a provider of publicly available telecommunications services shall be conducted at the request of the consumer, as well as *ex officio* by the President of the Office of Electronic Communications if the protection of the consumer's interest so requires. How-

⁶ A. Partyk, *Pojęcie sprawy cywilnej*, Published: LEX/el. 2015 (accessed 10 October 2023). Judgment of the Supreme Court of 13 October 2017, I CSK 20/17, LEX No. 2401832; Judgment of the Court of Appeal in Białystok of 15 March 2017, I ACa 857/16, LEX No. 2300231.

⁷ S. Piątek, *Prawo telekomunikacyjne. Komentarz*, commentary to Article 109, Lex/el. 2019 (accessed 1 October 2023).

⁸ ADR stands for alternative dispute resolution.

ever, such proceedings cannot be initiated at the request of the provider of publicly available services. Adoption of such a solution shows that the legislator's will was for the institution of mediation proceedings to serve exclusively to secure and protect the interests of the consumer.⁹ Moreover, as some authors point out, providers of publicly available telecommunications services, which act as professional entities, have greater financial and organisational possibilities to use other means of resolving disputes with consumers than mediation proceedings before the President of the Office of Electronic Communications.¹⁰ Nevertheless, it seems justified to grant both parties to the dispute the possibility to submit an application for mediation to the President of the Office of Electronic Communications. The above will enable a more complete implementation of the principle of effective dispute resolution, which should be implemented by the possibility to use amicable proceedings that can lead to a quick resolution of a conflict by both parties to the dispute.¹¹

Mediation conducted by the President of the Office of Electronic Communications is voluntary and does not exclude the possibility to pursue claims in court proceedings.¹² The condition for it to be conducted is that both the consumer and the provider of publicly available telecommunications services agree to it. The consumer expresses his or her consent by filing a request for mediation with the President of the Office of Electronic Communications, and the provider of publicly available telecommunications services does so by joining the mediation proceedings. The voluntariness of mediation also means that, in the course of mediation, the parties may withdraw from it. If at least one of the parties declares that he or she does not consent to an amicable resolution of the matter, the President of the Office of Electronic Communications shall withdraw from the mediation proceedings.¹³ The above shall also apply to the proceedings initiated *ex officio* by the President of the Office of Electronic Communications.

The President of the Office of Electronic Communications shall refuse to examine a civil law dispute between a consumer and a provider of publicly available telecommunications services when its subject matter falls outside the categories of disputes falling within its jurisdiction. He may also refuse to consider a dispute in the event that: 1) the consumer has not, prior to submitting an

⁹ H. Wolska, *Prezes Urzędu Komunikacji Elektronicznej*, (in:) M. Jas-Nowopolska, K. Łuczak, H. Wolska, *Zakres działania, kompetencje i zadania organów regulacyjnych na rynkach infrastrukturalnych*, Warszawa 2018, p. 45.

¹⁰ E. Galewska, *Zastosowanie mediacji w sporach z udziałem konsumentów w sektorze telekomunikacyjnym*, (in:) D. Szostek, J. Gołaczyński (eds.), *Konsument w świecie cyfrowym*, Katowice 2015, p. 92.

¹¹ H. Wolska, *Model relacji pomiędzy krajowymi organami administracji publicznej a przedsiębiorcami*, Warszawa 2022, p. 246.

¹² Judgment of the Regional Court in Poznań of 28 December 2018, XV Ca 1579/18, *Legalis*.

¹³ K. Gajda-Roszczyńska, *Spory o ochronę indywidualnych interesów konsumentów w postępowaniach cywilnych*, Warszawa 2012, Lex/el.

application for the initiation of proceedings for out-of-court resolution of consumer disputes, made an attempt to contact the provider of publicly available telecommunications services and resolve the dispute directly, including the failure to exhaust the complaint procedure; 2) the dispute is trivial or the application for the initiation of proceedings for out-of-court resolution of consumer disputes will cause inconvenience to the provider of publicly available telecommunications services; 3) a case over the same claim between the same parties is pending or has already been considered by the President of the Office of Electronic Communications, another competent entity or a court; 4) the value of the subject matter of the dispute is lower than the financial threshold specified in the implementing regulations to the Telecommunications Act; 5) the consumer has applied for the initiation of proceedings for out-of-court settlement of consumer disputes after one year from the day on which he/she made an attempt to contact the provider of publicly available telecommunications services and resolve the dispute directly; 6) the consideration of the dispute would cause a serious disturbance to the operation of the President of the Office of Electronic Communications.¹⁴

During the mediation proceedings, the President of the Office of Electronic Communications acquaints the provider of publicly available telecommunications services with the consumer's claim, presents the parties to the dispute with the provisions of law applicable to the case and a proposal for resolving the dispute.

In order to streamline the proceedings, the President of the Office of Electronic Communications may also set a deadline for the parties to conciliate the case.¹⁵ Some authors stress that the above actions make the President of the Office of Electronic Communications play the role of a conciliator rather than a mediator.¹⁶ However, one cannot agree with the above position due to the fact that mediation is a tripartite process led by an impartial person with the simultaneous participation of the parties to the dispute. In the case of conciliation, a special conciliation committee takes the place of the mediator. This can be a standing committee or an *ad hoc* committee appointed by the parties to the dispute. At the same time, there is a special procedure for the appointment of the conciliation commission. Each party to the dispute appoints its conciliators and then the commission is supplemented by neutral conciliators in a number that ensures them a majority on the commission. The role of the commission, on the other hand, is to propose a settlement that would be acceptable to the parties to the dispute or allow them to reach their own settlement. The committee's conclusions are merely a proposal

¹⁴ Article 109(8) of the Telecommunications Act.

¹⁵ H. Wolska, *Prezes Urzędu Komunikacji Elektronicznej*, (in:) M. Jas-Nowopolska, K. Łuczak, H. Wolska, *Zakres działania, kompetencje i zadania organów regulacyjnych na rynkach infrastrukturalnych*, Warszawa 2018, p. 45.

¹⁶ A. M. Arkuszewska, *Mediacja z operatorem pocztowym i dostawcą publicznie dostępnych usług telekomunikacyjnych*, ADR 2012, No. 1, *Legalis*.

addressed to the parties, without any binding force.¹⁷ Furthermore, the role of the mediator may not only consist in organising and conducting talks (negotiations) between the parties, but also in the possibility of actively participating in working out the substantive content of the agreement, including the presentation of possible ways of resolving the dispute. The mediator leads to a compromise that is satisfactory to the parties to the dispute.¹⁸

The provisions of the Telecommunications Law do not explicitly specify in what form a positive resolution of a dispute by the President of the Office of Electronic Communications takes place, nor what effects it produces. It should be noted, however, that pursuant to Article 109(3) of the Telecommunications Act, the provisions of the Act of 23 September 2016 on out-of-court settlement of consumer disputes¹⁹ shall apply to the extent not regulated. This Act, in Article 40(3), stipulates that the authorised entity shall, immediately after the last action in the proceedings on out-of-court resolution of consumer disputes, draw up a protocol of the proceedings which shall contain, at least, information on their outcome. In turn, the protocol shall be immediately delivered to the parties who may not agree to the submitted proposal for dispute resolution or comply with it. Thus, the President of the Office of Electronic Communications does not have any power to impose his/her solution in a commanding manner on the parties to the conflict.²⁰

4. SUMMARY

The President of the Office of Electronic Communications is a central organ of government administration that is both a regulator and a mediator. Entrusting the President of the Office of Electronic Communications with the role of a mediator stems from his knowledge and experience, which are necessary to resolve disputes between consumers and the provider of publicly available telecommunications services. The competence of the President of the Office of Electronic Communications in the area of mediation is also justified by the fact that he is a body that is widely respected, as evidenced by the number of requests submit-

¹⁷ According to the PWN Great Dictionary of Foreign Words, conciliation means “the amicable settlement of international disputes through the establishment of a conciliation commission which examines the situation and puts forward non-binding proposals for resolving the conflict”. M. Bańsko (ed.), *Wielki słownik wyrazów obcych PWN*, Warszawa 2003, p. 661.

¹⁸ H. Wolska, *Model relacji pomiędzy krajowymi organami administracji publicznej a przedsiębiorcami*, Warszawa 2022, p. 248.

¹⁹ Journal of Laws of the Republic of Poland: Journal of Laws of 2016, item 1823, as amended.

²⁰ H. Wolska, *Model relacji pomiędzy krajowymi organami administracji publicznej a przedsiębiorcami*, Warszawa 2022, p. 248.

ted for mediation proceedings. In 2019-2022, the President of UKE, conducted numerous ADR proceedings in the field of telecommunications services. In 2019, 1024 applications were received, of which the President of UKE refused to consider 5.7%.²¹ In 2020, 855 applications were received for the President to initiate proceedings and 6% of them were left without consideration.²² Whereas, in 2021 the President processed 561 ADR applications and in 2022, the number was 561.²³ The juxtaposition of the two functions – regulatory and mediation – in one body also does not lead to an abuse of one of these positions. The President of the Office of Electronic Communications, as a mediator, does not have any power to impose his or her settlement in a commanding manner on the parties to the conflict. On the other hand, the very idea of creating a mediator in the telecommunications law should be assessed positively. Mediation can be an effective and low-cost means of conflict resolution and its result is always the success of both parties.

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²¹ Report on the activities of the President of the Office of Electronic Communications in the field of out-of-court consumer dispute resolution (ADR) in 2019.

²² Report on the activities of the President of the Office of Electronic Communications in the field of out-of-court consumer dispute resolution (ADR) in 2020.

²³ Report on the activities of the President of the Office of Electronic Communications for 2022.