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# **Enforceability of Regulatory Decisions and Protection of Rights of Telecommunications Undertakings**

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## **Enforceability of Regulatory Decisions and Protection of Rights of Telecommunications Undertakings**

by

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### ***Abstract***

The article discusses problems of enforceability of regulatory decisions issued by the Polish regulatory authority – the President of the Office of Electronic Communications (UKE) in the context of the protection of the rights of electronic undertakings. The author refers to the standards for implementing decisions and provisional protection developed in the law of the Council of Europe and

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Community legislation, including Framework Directive 2002/21/EC. He also analyses Polish legal regulations which introduce European solutions, including regulations implementing Community framework for electronic communications, into the national legal order. Special attention is devoted to the competence of Polish administrative courts and the Court of Competition and Consumer Protection in suspending the enforcement of contested regulatory decisions. The author also points to significant gaps in existing national regulations and postulates the introduction of necessary legislative changes to better protect the rights of telecommunications undertakings.

**Classifications and key words:** telecommunication law, national regulatory authorities; enforceability of regulatory decisions, provisional court protection

## I. Introduction

Enforceability of administrative decisions is among the principal issues of administrative law, since decisions serve administrative authorities as a tool for pursuing the tasks that are set for them by the legislator. It therefore becomes important in this context to ensure the enforcement of the orders and prohibitions contained in a decision<sup>1</sup>. This is particularly meaningful in the case of activities of regulatory bodies, including those in the area of electronic communications. Their aim is to evoke, in the social and economic reality, specific changes, new behaviours or circumstances that, without an intervention of this type would:

- not arise at all,
- arise with a considerable delay, or
- arise in a form that does not sufficiently take into account the demands of the market environment, including consumers<sup>2</sup>.

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<sup>1</sup> Cf. e.g. Z. Leoński, *Egzekucja administracyjna świadczeń niepieniężnych*, Warsaw 1968, pp. 5–8; E. Knosala, *Problemy decyzji wykonawczych w administracji publicznej (szkic z nauki administracji)* [in:] *Administracja publiczna u progu XXI wieku. Prace dedykowane prof. zw. dr hab. Janowi Szreniawskiemu z okazji Jubileuszu 45-lecia pracy naukowej*, Przemyśl 2000, pp. 295–298.

<sup>2</sup> On sectoral regulation, see in particular works by T. Skoczny: “Wspólnotowe prawo regulacji in statu nascendi” [in:] C. Mik (ed.), *Prawo gospodarcze Wspólnoty Europejskiej na progu XXI wieku*, Toruń 2002, pp. 231–247; “Stan i tendencje rozwoju prawa administracji regulacyjnej w Polsce” [in:] H. Bauer, P. Huber, Z. Niewiadomski (eds.), *Ius Publicum Europeum*, Warszawa 2003, pp. 115–164; “Ochrona konkurencji a prokonkurencyjna regulacja sektorowa” (2004) 3(5) *Problemy Zarządzania* 7–34. See also: I. Kawka, *Telekomunikacyjne organy regulacyjne w Unii Europejskiej. Problematyka prawna*, Zakamycze 2006, pp. 27–70; M. Szydło, *Regulacja sektorów infrastrukturalnych jako rodzaj funkcji państwa wobec gospodarki*, Warszawa 2005, pp. 89–182.

Enforcement of an administrative decision (and, in broader terms, an administrative act) is deemed to mean “introducing such a condition in social reality, which is in compliance with the provisions of the administrative act”<sup>3</sup>. Hence, enforceability of a decision equals its capability to have effects in the legal and factual spheres of its addressee<sup>4</sup>. A distinction is made between substantive and formal enforceability. The former means enforceability with regard to the provisions of the decision that has been reached, that is, the actual possibility to exercise the rights or obligations contained therein. Such capability is an attribute, predominantly, of decisions that provide for rights and those imposing obligations. In contrast, negative decisions are not enforceable, as a rule. Formal enforceability, in turn, points to the moment from which the act may and should be enforced.

The purpose of this paper is to discuss the formal enforceability of decisions taken by the Polish regulatory authority in matters of electronic communications – the President of the Office of Electronic Communications (UKE)<sup>5</sup>. The rules that govern this enforceability will be considered, including the appeal stage of the proceedings, emphasising, in particular, the requirements which follow in that regard from Community law. This will lead to formulating proposals *de lege ferenda*, which will improve the effectiveness of judicial review of regulatory administration in Poland. Seeking the right solutions, the standards and models applied in broadly understood European law will be referred to.

## **II. Standards of the Council of Europe concerning the enforceability of administrative decisions**

### **1. Enforcement of a non-final decision**

The problem of the enforceability of an administrative decision may occur as early as the point of taking the decision at first instance, regardless of the available means of appeal against it in the due administrative course of instance. The Council of Europe has not yet developed a comprehensive position on administrative appeals, including the effects of such appeals on

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<sup>3</sup> J. Jendrośka, *Zagadnienia prawne wykonania aktu administracyjnego*, Wrocław 1963, p. 22.

<sup>4</sup> T. Barnat, “Ostateczność i prawomocność decyzji administracyjnych a ich wykonalność” (1984) 9 *Państwo i Prawo* 81–82; L. Klat-Wertelecka, “Wykonanie aktu administracyjnego” [in:] J. Zimmermann (ed.), *Koncepcja systemu prawa administracyjnego*, Warszawa 2007, pp. 545-547.

<sup>5</sup> Hereinafter: “President of UKE”.

the enforceability of decisions<sup>6</sup>. A major step in this direction, however, is the report *on the desirability of preparing a recommendation on administrative appeals*, adopted in Strasbourg on 7 December 2007, by the Council of Europe's Working Party of the Project Group on Administrative Law<sup>7</sup>. In support of the adoption of such a recommendation, the Working Party points to the existence of a broad consensus amongst the member states of the Council of Europe as to the general rules of the administrative appeal procedure. These include the need to ensure the effectiveness of an appeal. This means not only the necessity on the part of the appeal body to act swiftly but also, in certain cases at least, the necessity to suspend the implementation of the impugned decision. If the law of a particular member state does not provide for an automatic suspension of a decision when an administrative appeal was lodged, the possibility to obtain such a suspension should be created upon request from the appellant.

## 2. Suspension of implementation of a final decision

The European Convention for the Protection of Human Rights and Fundamental Freedoms does not refer directly to the necessity of ensuring, in the legal systems of the signatory states, the possibility for courts of law to suspend the implementation of an administrative decision. Article 13 of the Convention, which provides for the right to an effective remedy, stipulates only that “[e]veryone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity”. In its judgment of 2001 in the *Jabari* case, the European Court of Human Rights (ECHR) held, in particular, that the notion of effective remedy used in this provision includes, *inter alia*, the possibility of suspending the implementation of the decision impugned in a situation, where such implementation poses a realistic risk for the appellant to be subjected to treatment contrary to Article 3 of the Convention (Prohibition of torture).<sup>8</sup> This issue was later developed by the ECHR in its judgment in the *Čonka* case.<sup>9</sup> The Court held therein that “the notion of an effective remedy under

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<sup>6</sup> Cf. A. Skóra, “Polska procedura administracyjna w świetle standardów europejskich” (1999) 1 *Przegląd Prawa Europejskiego* 67–68.

<sup>7</sup> CJ-DA-GT (2007) 9. The Report is available at: [http://www.coe.int/t/e/legal\\_affairs/legal\\_co-operation/administrative\\_law\\_and\\_justice/Texts\\_&\\_Documents/CJ-DA-GT%20\\_2007\\_%209%20E.pdf](http://www.coe.int/t/e/legal_affairs/legal_co-operation/administrative_law_and_justice/Texts_&_Documents/CJ-DA-GT%20_2007_%209%20E.pdf).

<sup>8</sup> See ECHR judgment of 11 July 2000 in Case No. 40035/98, *Jabari v. Turkey*, para. 50.

<sup>9</sup> See ECHR judgment of 5 February 2002 in Case No. 51564/99, *Čonka v. Belgium*.

Article 13 requires that the remedy may prevent the execution of measures that are contrary to the Convention and whose effects are potentially irreversible [...]. Consequently, it is inconsistent with Article 13 for such measures to be executed before the national authorities have examined whether they are compatible with the Convention, although Contracting States are afforded some discretion as to the manner in which they conform to their obligations under this provision” (Article 13(79)). In the Court’s opinion, even though the interested party can apply for staying the execution of the decision, a procedure where the court uses its discretion as to whether to apply such stay or not, does not meet the requirements of an effective remedy. It can be concluded that the Court opts for essentially automatic staying of the execution of the impugned decision in cases where a realistic risk exists that potentially irreversible consequences will occur, contrary to the provisions of the Convention<sup>10</sup>.

The issue of suspending the execution of final decisions is dealt with in the Recommendation No. R (89) 8 of the Committee of Ministers to member states on provisional court protection in administrative matters<sup>11</sup>. The recitals to this Recommendation point out that “immediate execution in full of administrative acts which have been challenged or are about to be challenged may, in certain circumstances, prejudice the interests of persons irreparably in a way which, for the sake of fairness, should be avoided as far as possible”. Thus, this Recommendation indicates the necessity to create, within the legal systems of each member state, a possibility for the applicant to request the court to take measures of provisional protection against the administrative act (Principle I). Such measures can include “suspending the execution of the administrative act, wholly or partially, ordering wholly or partially the restoration of the situation which existed at the time when the administrative act was taken or at any subsequent time, and imposing on the administration any appropriate obligation in accordance with the powers of the court” (Principle III). The possibility of requesting measures of provisional protection should be available where court proceedings have already been opened to review the

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<sup>10</sup> “It is not possible to exclude the risk that in a system where stays of execution must be applied for and are discretionary they may be refused wrongly, in particular if it was subsequently to transpire that the court ruling on the merits has nonetheless to quash a deportation order for failure to comply with the Convention, for instance, if the applicant would be subjected to ill-treatment in the country of destination or be part of a collective expulsion. In such cases, the remedy exercised by the applicant would not be sufficiently effective for the purposes of Article 13.” (para. 82).

<sup>11</sup> See also: J. Chlebny, “Europejskie standardy procedury administracyjnej i sądowo administracyjnej” [in:] Z. Kmieniak (ed.), *Postępowanie administracyjnej w Europie*, Zakamycze 2006, pp. 22–23; Z. Kmieniak, “Ochrona tymczasowa w postępowaniu sądowoadministracyjnym” (2003) 5 *Państwo i Prawo* 20–22.

act in question as well as in cases of urgency, even though the act concerned has not yet been challenged in court. It should also be available when an administrative complaint, the making of which does not have, in itself, any suspensive effect, has been lodged against the administrative act and has not yet been decided upon (Principle I). In accordance with this Recommendation, in deciding whether the applicant should be granted provisional protection, the court shall take account all relevant factors and interests (Principle II). For this reason, the role of the court is to balance the various interests which come into play in a given case, including the ones which are in support of executing the act. Provisional protection should be granted, in particular, if the execution of the administrative act is liable to cause severe damage, which could only be made good with difficulty. This would be the case where the setting aside of the challenged act could not lead to the reinstatement of the applicant's prior legal status. The other situation where, in the light of this Recommendation, a suspension of the execution of an act is justified, is if there are, *prima facie*, serious legal grounds against the administrative act. This concerns serious defects which are identifiable as early as at the stage of the preliminary review of the case, and which will undoubtedly lead to the setting aside of the challenged act<sup>12</sup>. The Recommendation emphasises the necessity for the court to act speedily in cases of provisional protection. This may mean that an oral hearing can be dispensed with but the proceedings must remain adversarial (Principle IV). The proceedings should not only involve the applicant; a representative of the administrative authorities and interested third parties should also have the possibility of presenting their views. Although this Recommendation does not mention the necessity to provide a statement of reasons for the court's judgment on the provisional measure, the Explanatory Memorandum seems nevertheless to support such a solution. The statement of reasons should then briefly but clearly substantiate the issuing of the provisional measure. As already mentioned, there may be circumstances in which the urgency of the case makes it impossible to organise an adversarial court hearing. If, however, the court decides to grant provisional protection without hearing the interested parties, it should examine the case again within a short time, in adversarial proceedings. The court may act here on an *ex officio* basis or at the wish of one of the interested persons who previously could not be heard by the court.

The creation of possibilities to apply provisional measures of protection by a court, which is examining the legality of an administrative act, is also a requirement set by Recommendation Rec(2004)20 of the Committee of Ministers to member states on judicial review of administrative acts adopted

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<sup>12</sup> See Explanatory memorandum attached to Recommendation No. R (89) 8.

on 15 December 2004. The Explanatory memorandum attached to this Recommendation points out, as is the case in relation to Recommendation R (89) 8, that provisional measures may include, in particular, the full or partial suspension of the execution of the disputed administrative act. This is to enable the tribunal to re-establish the *de facto* and *de jure* situation, which would prevail in the absence of the administrative act, or to impose appropriate obligations on the administrative authorities (Paragraph 94 of the Explanatory Memorandum).

### III. Enforceability of decisions under Community law

The problem of enforceability of administrative decisions is also present in Community law. Particular attention should be drawn in this context to the activities of the European Commission. Amongst its various functions, this institution also has the competences of an administrative authority that determines, through its decisions, the rights and obligations of individually specified addressees (an example of such decisive power of the Commission may be the enforcement procedure of Community competition law). The procedure before the Commission is, by its nature, a single-instance one, and the binding character of its decisions follows directly from the Treaty establishing the European Community (Article 249 EC). The Treaty requires that such decisions be notified to their addressees, whereby the date of such notification is of principal importance for determining the moment upon which its addressee becomes bound by the decision. Indeed, the Treaty stipulates that the decision takes effect upon such notification (Article 254(3) EC) and hence, the addressee is obliged to implement it.

The addressee of a decision may institute proceedings against a decision addressed to that person at the European Court of Justice (ECJ) (Article 230 EC)<sup>13</sup>. In the case of individuals, such actions are heard and determined at first instance by the ECJ (Article 225(1) EC). However, in accordance with Article 242 EC, actions brought before the ECJ shall not have suspensory effect. Hence, even though an action is brought, the decision in question continues to be binding upon, and should be fully implemented by, its addressee. It should be emphasised that Community law does not make any distinctions between decisions, for instance, in terms of their subject-matter. Bringing an action to court does not suspend the execution of the challenged decision, even for

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<sup>13</sup> For more detail, see e.g.: A. Arnall, *The European Union and its Court of Justice*, Oxford 2006, pp. 53–94, K. Lenaerts, D. Arts, I. Maselis, *Procedural Law of the European Union*, London 2006, pp. 203–328.



decisions which interfere particularly strongly with the sphere of rights and obligations of their addressees, such as, for instance, Commission decisions imposing financial penalties or imposing behavioural or structural remedies upon an undertaking that violates Community competition law.

Article 242 EC, second sentence, authorises the competent Community court to suspend the application of the contested act. The decision in that regard is left to the discretion of the court (“if it considers ...”), with the sole premise being the necessity to take such an action (“if ... circumstances so require”). The application for suspension of the operation of a measure shall be admissible only if the applicant is challenging the measure in proceedings before the Court<sup>14</sup>. The application must be made by a separate document, filed together with, or immediately after the bringing of the action. For it to be dealt with urgently, it must not exceed 25 pages<sup>15</sup>. It must also state “the subject-matter of the proceedings, the circumstances giving rise to urgency, and the pleas of fact and law establishing a prima-facie case for which the interim measure is to be applied”<sup>16</sup>. The applications are adjudicated upon, usually, by the President of the ECJ or the Court of First Instance (CFI) and, exceptionally, by a judge appointed for this purpose<sup>17</sup>. Community law does not set a time limit during which the application for suspension of the application of a decision should be examined.

The decision on an interim measure should contain a statement of reasons, and Community law indicates that the effect of such a decision is only temporary and does not affect the court’s decision as to the merits of the case (Article 39 of the Statute of the ECJ)<sup>18</sup>. It needs to be emphasised that such a decision may be changed or reversed any time due to a change in circumstances. This means that the dismissal of an application for suspending the application of a decision does not preclude a repeated filing of a corresponding application by the party, as long as that party is capable of demonstrating, in the new proceedings, that new circumstances support the application of the interim measure (suspending the application of the decision).

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<sup>14</sup> Procedural issues relating to the suspension of operation of the Community decisions are specified in detail in Article 83–90 of the Rules of Procedure of the Court of Justice and Article 104–110 of the Rules of Procedure of the Court of First Instance.

<sup>15</sup> See Court of First Instance, Practice Directions to parties, OJ [2007] L 232/7, para. 68–71.

<sup>16</sup> Article 83(2) of the Rules of Procedure of the Court of Justice, Article 104(2) of the Rules of Procedure of the Court of First Instance.

<sup>17</sup> Article 39 of the Statute of the Court of Justice. The CFI appoints such a judge for a period of one year. See OJ [2008] C 171/31.

<sup>18</sup> Article 83(1) of the Rules of Procedure of the Court of Justice, Article 104(1) of the Rules of Procedure of the Court of First Instance.

Having regard to the aforementioned procedural provisions applicable before Community courts as well as the case law of the ECJ and the CFI, three grounds should be mentioned that determine the possibility of applying an interim measure<sup>19</sup>:

- A demonstration, by the applicant, of the existence of pleas of fact and law establishing a *prima facie* case for the interim measures that are being applied for (*fumus boni iuris*).

In the case of an action against a Commission decision, it should be demonstrated that the decision is, *prima facie*, in breach of Community law in a manner which will in the future result in its invalidation by a Community court. The CFI points out, however, that an application must not set out in full the text of the application in the main proceedings<sup>20</sup>. The literature on the subject emphasises that the premise of *fumus boni iuris* is gradually transformed into the premise of *fumus non mali iuris*<sup>21</sup>. Therefore, this is not the conviction that the main action will succeed, as much as the view that it is sufficiently justified.

- A demonstration, by the applicant, of the urgency of the case, and hence that the applicant will suffer serious and irreparable damage if the court does not apply the interim measure.

In such circumstances the damage would not be possible to repair even if the party obtains, in the future, a favourable judgment based on the merits of its case. It follows from the case law that the damage should be certain, or at least established with sufficient probability. The burden of proof in this regard rests fully on the applicant. The damage does not necessarily have to be financial in nature. On the contrary, only in exceptional cases can financial damage be considered to be irreparable or repairable only with difficulty. Indeed, such damage can, as a rule, be covered by future compensation. The occurrence of financial damage justifies, however, the application for an interim measure where, without that measure, the applicant would be in a position that could imperil its existence before the final judgment if the main action is taken<sup>22</sup>. In Community case law, a serious and irreversible change in the market share of the undertaking concerned, which would take place in the absence of the suspension of the application of the contested Community

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<sup>19</sup> See K. Lenaerts, D. Arts, I. Maselis, *Procedural Law...*, p. 433–442; P.K. Rosiak, M. Szpunar, *Postępowanie przed Trybunałem Sprawiedliwości i Sądem Pierwszej Instancji Wspólnot Europejskich. Aspekty praktyczne*, Warszawa 2007, pp. 69–70.

<sup>20</sup> See Court of First Instance, Practice Directions to parties, OJ [2007] L 232/7, para. 70.

<sup>21</sup> K. Lenaerts, D. Arts, I. Maselis, *Procedural Law...*, pp. 434–435.

<sup>22</sup> See e.g. order of the President of the Court of First Instance in Case T-346/06 R *IMS v Commission* [2007] ECR II-1781, paras. 121–123, and the case-law cited.

act, is treated equally to the disappearance from the market. As noted by the President of the CFI, in the order in Case T-326/07 R, *Cheminova*, “it is therefore not sufficient that a market share, however minimal, may be irremediably lost; on the contrary it is necessary for that market share to be sufficiently large. An applicant who invokes the loss of such a market share must demonstrate, furthermore, that regaining a significant proportion of it, in particular by appropriate publicity measures, is impossible by reason of obstacles of a structural or legal nature”<sup>23</sup>.

- The application of the measure is supported by the result of balancing the various interests that come into play, that is, the interests of the parties and the general interest.

This provides an opportunity for the judge to take account the broader context of the case. It may happen that a particularly serious general interest or the interest of third parties support the refusal to allow the application, even if the other two premises for suspending the application of the decision are fulfilled in the case in question<sup>24</sup>.

An appeal against a decision of the CFI concerning an interim measure can be lodged with the ECJ within two weeks of the notification of the first-instance decision. The right to file an appeal concerning interim measures is also held by the other parties within the time limit of two months (Article 57 of the Statute of the ECJ). The appeal is heard by way of a summary procedure (Article 39 of the Statute of the ECJ). It has no suspensory effect (Article 60 of the Statute of the ECJ).

In 2007, the CFI heard 41 cases for the application of interim measures; only in 4 cases were the applications granted<sup>25</sup>.

#### **IV. Enforceability of decisions of national regulatory authorities in the light of the provisions of Framework Directive 2002/21/WE**

The principal act of the new Community regulatory order in the field of electronic communications is the Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory

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<sup>23</sup> Order of the President of the Court of First Instance in Case T-326/07 R *Cheminova and Others v Commission* [2007] ECR II-4877, para. 100, and the case-law cited.

<sup>24</sup> See e.g. Order of the President of the Court of First Instance in Case T-12/93 R *CCE Vittel and CE Pierval v Commission*, [1993] ECR II-785, para. 20; the order of the President of the Court of First Instance of 18 March 2008 in Case T-411/07 R, *Aer Lingus Group Ltd. v Commission*.

<sup>25</sup> See Court of Justice, *Annual Report 2007*, Luxembourg 2008, p. 184.

framework for electronic communications networks and services (Framework Directive)<sup>26</sup>. The Framework Directive transfers the solutions that function with regard to the enforceability of decisions of Community institutions into the electronic communications law in EU member states. Article 4(1) of the Framework Directive, which provides for the right of appeal, stipulates in its final sentence that “pending the outcome of any such appeal, the decision of the national regulatory authority shall stand, unless the appeal body decides otherwise”. The expression that the decision ‘shall stand’ should be understood to refer to its enforceability, its addressees being bound by the provisions of the decision made by the national regulatory authority, and hence the necessity to enforce it<sup>27</sup>. A position to the contrary is presented in this context by M. Rogalski, who considers that Article 4(1) of the Framework Directive only provides for the finality of decisions taken by national regulatory authorities and not their immediate enforceability by virtue of law<sup>28</sup>. This position is not accurate. Leaving aside the incorrect identification of the finality of a decision with its effectiveness, the Prof. Rogalski’s interpretation of Article 4(1) of the Framework Directive is, in fact, detached from the stipulations of the provision in question. If, as M. Rogalski wishes, the decision remaining in force were to mean its finality, the power of the appeal body would be hard to understand, which deprives a decision of this very attribute (i.e. finality), while the appeal procedure is still pending (“pending the outcome of any such appeal...”), that is, before the substantive examination of the claims made against the decision. In such a case, a subsequent judgment on the merits of the case concluding the appeal procedure would not, in fact, be necessary if the issue of finality of the contested decision were to be resolved at an earlier stage of the appeal procedure.

It is worth noting that the Framework Directive does not specify the moment from which the addressee is bound by the decision of the regulatory authority. This Directive only mentions that the time continues until the appeal is heard. An absolute requirement to be bound by the decision of the national regulatory authority from the moment the decision is issued, or rather delivered to the party, does not therefore follow from the foregoing. Article 4(1) of the Framework Directive requires only that the decision has, as a rule, the legal

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<sup>26</sup> OJ [2002] L 108/33. For more detail, see e.g. S. Piątek, *Prawo telekomunikacyjne Wspólnoty Europejskiej*, Warszawa 2003, p. 32–38; J. Kolasa, “Krajowe organy regulacyjne” [in:] W. Gromski, J. Kolasa, A. Kozłowski, K. Wójtowicz, *Europejskie i polskie prawo telekomunikacyjne*, Warszawa 2004, pp. 234–247; I. Kawka, *Telekomunikacyjne organy...*, pp. 133–139.

<sup>27</sup> See e.g. S. Piątek, “Prawo telekomunikacyjne w świetle dyrektyw o łączności elektronicznej” (2005) 3 *Prawo i Ekonomia w Telekomunikacji* 8.

<sup>28</sup> M. Rogalski, *Zmiany w prawie telekomunikacyjnym. Komentarz*, Warszawa 2006, pp. 247–248.

effects provided for therein, regardless of the appeal procedure pending with respect to it. The procedure referred to in this provision is a procedure before an appeal body independent of the parties involved (that is, independent from the appellant, the authority and other parties affected by the decision). This may be a court of law, even though this is not an absolute requirement in the light of Article 4(1) of the Framework Directive. The function of an independent appeal body may also be performed by quasi-judicial institutions of various types, as long as the national legislator is able to guarantee their independence, and if they are specialised enough and have the capacity to collect case-law experience (in its Article 4(1), the Framework Directive points to a body that “shall have the appropriate expertise available to it to enable it to carry out its functions”).<sup>29</sup> Administrative bodies, even higher-tier ones, can hardly be referred to as independent of the regulatory authority. The “inter-dependence” and hierarchical relationships between them, as well as the fact that they both belong to administrative structures that usually report to the government, would not let any administrative body, regardless of where it is situated in the administrative structures of a member state, meet the criteria of an appeal body referred to in Article 4(1) of the Framework Directive<sup>30</sup>. The foregoing means that the enforceability of decisions of the national regulatory authority does not necessarily materialise at the stage of the administrative appeal, or quasi-appeal procedure<sup>31</sup>. As a result, if the national legislator provides, in the administrative course of instance, for the possibility of filing an appeal against a decision of the national regulatory authority to a higher level body, or an appeal to the authority, which issued the challenged decision, this Directive does not require that the challenged decision “shall stand” for the duration of such procedures. Hence, it is allowed for the appeals under administrative procedures provided for in national law, to have the suspensory effect, that is, for them to suspend the application of the contested decision. The “suspensory” effect of such an appeal is excluded only where a party can avail itself of the possibility of filing an appeal with an independent appeal body, which is, in practice, most frequently a court of law. It should be emphasised that the decision remaining in force during the appeal procedure, required under Article 4(1) of the Framework

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<sup>29</sup> Cf. S. Piątek, *Prawo telekomunikacyjne Wspólnoty...*, p. 58; N.Th. Nikolinakos, *EU Competition Law and Regulation in the Converging Telecommunications, Media and IT Sectors*, Kluwer Law International, 2006, pp. 211–212.

<sup>30</sup> Certain concerns in that regard were expressed by the European Commission in its report of 2003. See Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions, *European Electronic Communications Regulation and markets 2003, Report on the Implementation of the EU Electronic Communications Regulatory Package*, Brussels, 19.11.2003, COM(2003) 715 final, pp. 26–27.

<sup>31</sup> Cf. S. Piątek, *Prawo telekomunikacyjne w świetle...*, p. 9.

Directive, should have an *ipso iure* effect, and should not be made dependent on the activities of the regulatory authority.<sup>32</sup> For due implementation of this Directive, it is thus not sufficient for the national regulatory authority to be competent to recognise the enforceability of the challenged decision and put it into force at the stage of the appeal procedure. Hence, the very possibility for this authority to make the contested decision enforceable immediately at this stage would not be an appropriate method for the performance of the implementation obligations of an EU member state.

It should also be emphasised that the principle of a decision of the national regulatory authority remaining in force for the duration of the appeal procedure, referred to in Article 4(1) of the Framework Directive, is not absolute in its nature. The foregoing provision clearly points to the possibility for this principle to be overturned by a decision of the appeal body. It means that it is the obligation of the national legislator to create, for the appeal body, the possibility of temporarily (that is for the duration of the appeal procedure) suspending the application of the contested decision. The Community legislator thus puts the effective decision, concerning the enforceability of the decision of the national regulatory authority, in the hands of the appeal body, that is, in practice, a court of law. It then assumes that situations may occur in the application of national legislations that implement the package of Directives on electronic communications, whereby the independent appeal body should suspend the application of the contested decision, even though the decision is essentially enforceable by virtue of law itself. The Framework Directive does not specify what grounds should determine such suspension.

## V. Enforceability of decisions by the President of UKE

### 1. Introductory remarks

The basic act of law, which implements the package of Community Directives on electronic communications in Poland, is the Act of 16 July 2004 on Telecommunications Law (PT)<sup>33</sup>. However, issues of enforceability of the decisions taken by the President of UKE are also governed by the Code

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<sup>32</sup> Such a position was taken by the Commission in the abovementioned *Report on the Implementation of the EU Electronic Communications Regulatory Package* of 2003 (p. 26). Differently: M. Rogalski, who considers that immediate enforceability should follow in this case from a decision by the national regulatory authority and not by virtue of law itself. See. M. Rogalski, *Zmiany w prawie...*, p. 250.

<sup>33</sup> Dz.U. 2004, No. 171, item 1800, with further amendments.

of Administrative Procedure (KPA) containing the principal set of rules on the proceedings before all public administration bodies in matters resolved through administrative decisions within their competence (Article 1 point 1 KPA). From this point of view, the provision of Article 206(1) PT is of an organisational nature only and does not, in fact, introduce any new content<sup>34</sup>. It needs to be emphasized that the KPA applies to proceedings before the President of UKE directly and not, for instance, by analogy. It is clear at the same time that the provisions of the PT, which is a special statute, may introduce certain modifications with respect to the solutions contained in the Code. In such a case, the provisions of the PT should prevail, in line with the commonly adopted method of legal interpretation of *lex specialis derogat legi generali*. Due to the nature of the derogations introduced by the PT with respect to the KPA, special rules of this type may not be interpreted broadly and hence, where in doubt, a presumption should support the adoption of the concepts contained in the Code.

Having regard to the issues relating to the enforceability of decisions taken by the President of UKE, it seems reasonable to divide them into two groups: decisions that may be appealed to an administrative court and decisions that may be appealed to the Court of Competition and Consumer Protection (SOKiK). It is only in the latter case that the decisions are clearly enumerated in the PT. These are decisions on the designation of significant market power, the imposition of regulatory obligations, the imposition of penalties, and decisions issued in disputes (Article 206(2) PT)<sup>35</sup>. The foregoing means that decisions, which are not listed as appellable to the Court of Competition and Consumer Protection in the provisions of Article 206(2) PT, may be appealed, on general terms, to an administrative court<sup>36</sup>. This division is the more justifiable in that only with regard to decisions that can be appealed to the Court of Competition and Consumer Protection (except for decisions on the imposition of penalties) that the legislator has decided that they shall be enforceable immediately (Article 206(2a) PT).

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<sup>34</sup> In accordance with this provision, "Proceedings before the President of UKE shall be governed by the Code of Administrative Procedure with the amendments hereunder". See also: S. Piątek, *Prawo telekomunikacyjne. Komentarz*, Warszawa 2005, p. 1120.

<sup>35</sup> Except for decisions on general exclusive frequency licences following a tender or a contest and decisions that deem the tender or a contest unresolved.

<sup>36</sup> In accordance with Article 184 of the Polish Constitution and Article 3 of the Act of 30 August 2002 – Law of Procedure before Administrative Courts (Journal of Laws 2002, No. 153, item 1270, with further amendments), in the Polish legal system, the presumption of competence of administrative courts applies in cases of review of administrative activities.

## 2. Decisions which may be appealed to the administrative court

As regards this group of decisions of the President of UKE, in the absence of special rules, they are governed in full by the provisions of the KPA and the Act on the Law of Procedure before Administrative Courts (PPSA). This sets a clear situation whereby a party to the procedure has the right to file an application for re-examining the case (Article 127(3) KPA), with regard to a decision taken by the President of UKE, as the central authority of government administration whose process position, for the purposes of the administrative procedure, is made equal to that of a minister (Article 190(3) PT, Article 5(2) point 4 KPA). Such an application is not transferred the case to the superior authority and hence, the case is re-heard by the body that issued the decision being challenged in the application. Since the legislator requires that such an application be governed by the provisions on appeals against decisions, the decision shall not be enforceable before the expiry of the time limit for filing the said application (Article 130(1) KPA). Filing of the application within the time limit suspends its enforcement (Article 130(2) KPA).

However, the principle of non-enforcement of a decision during the course of the proceedings opened upon an application for having the case heard again does not apply absolutely. Exceptions to this rule are provided for in Article 130(3) and (4) KPA. Leaving aside the issue of immediate enforceability of a decision by virtue of law (which will be presented below), a particular place is occupied by the possibility of making the decision enforceable immediately following the procedure provided for under Article 108 KPA (Article 130(3) point 2 KPA). In accordance with this provision, the order of immediate enforceability may be given in four situations. Situations are included where it is necessary:

- to protect human health or life,
- to protect the national economy against heavy losses,
- to protect another social interest,
- to protect an exceptionally important interest of a party<sup>37</sup>.

There is consensus in the doctrine and the case-law of administrative courts that the above grounds may not be interpreted broadly<sup>38</sup>. The notion of necessity seems to be of key importance in this regard. The possibility of

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<sup>37</sup> In the latter case, the authority may demand the appropriate security from the party.

<sup>38</sup> See e.g. Z Janowicz, *Kodeks postępowania administracyjnego. Komentarz*, Warszawa 1996, p. 281; W. Chróścielewski [in:] W. Chróścielewski, J.P. Tarno, *Postępowanie administracyjne. Zagadnienia podstawowe*, Warszawa 2002, p. 124.; Cz. Martysz [in:] G. Łaszczycza, Cz. Martysz, A. Matan, *Postępowanie administracyjne ogólne*, Warszawa 2003, p. 676; J. Borkowski [in:] B. Adamiak, J. Borkowski, *Kodeks postępowania administracyjnego. Komentarz*, Warszawa 2005, p. 519.



invoking, for instance, a social interest pursued by the decision in question is not sufficient. If the entire activities of state administration are aimed at pursuing this interest, its existence in a specific case does not distinguish it amongst other cases in a manner that would support the departure from the general rules of the procedure concerning the possibility to suspend the appeal and the application for re-examining the case concerned. The need to protect social interest should, therefore, be such that it requires, beyond any doubt, not only the decision itself to be issued, but also its immediate application. Consequently, social interest could suffer material damage if the decision was enforced only after it gets the status of an effective decision (Article 16(1) KPA). As the Supreme Administrative Court (NSA) holds in its judgment of 19 February 1998, V SA 686/97, “[r]eferring to the notion of “necessity” for immediate action, the legislator finds that it may be the case, where, in the particular time and particular situation, it is not possible to do without the exercise of the rights and obligations that are established in the decision, because a delay endangers the protected values specified in Article 108 § 1 KPA. Such a threat must be realistic rather than just probable, and the circumstance must be demonstrated in the statement of reasons for the order of immediate enforceability”<sup>39</sup>.

The PT specifies also the cases where a decision of the President of UKE can be made immediately enforceable. This applies to the decisions mentioned in Article 98(3)<sup>40</sup>, Article 178(1)<sup>41</sup>, Article 201(9)<sup>42</sup>, Article 202(2)<sup>43</sup> and Article 203(1)<sup>44</sup> PT. The PT stipulates that the decision concerned “shall be enforceable immediately”. The foregoing means that the said decisions are not enforceable immediately by virtue of law, in the meaning of Article 130(3) point 2 KPA. Instead, it is the authority that is obliged to provide the decision with the order of immediate enforceability. Thus, the foregoing provisions of the PT complement the grounds for making a decision enforceable immediately, as set out in Article 108(1) KPA. In contrast, however, to the aforementioned provision of the KPA, they do not offer the authority a choice of whether to attach an order of immediate enforceability. In each case of

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<sup>39</sup> ONSA 1998, No 4, item 147.

<sup>40</sup> Decision on the amount of the participation in financing the subsidy for a telecommunications undertaking.

<sup>41</sup> Decision imposing certain obligations in the event of a particular threat.

<sup>42</sup> Decision to prohibit the performance of telecommunications operations, modify or withdraw a general exclusive frequency licence or orbital resources licence, or a numbering assignment.

<sup>43</sup> Decision to order the inspected entity to take steps aiming at eliminating the threat referred to in Article 202 para. 1 PT.

<sup>44</sup> Decision to order discontinuation to use or operate radio equipment by unauthorised person.

issuing a decision based on the PT, the authority is, in fact, obliged to give it such an order. Essentially, the order of enforceability should be set out in the decision itself even though, if the authority does not do so for any reason, it should have the possibility to issue a decision on giving such an order at a later date. The legal basis for such a decision would be Article 108(2) KPA. Since the order of immediate enforceability is required to be given in such cases by PT itself, when hearing appeals the President of UKE could annul it only if the case concerned did not refer to one of the decisions specified in Article 98(3), Article 178(1), Article 201(9), Article 202(2) or Article 203(1) PT. The party's position to the effect that, for instance, the order is unnecessary to perform the obligations imposed in the situation concerned, or too onerous, or its consequences could only be alleviated with difficulty, etc., could not be accepted.

The determination of the moment from which the order of immediate enforcement applies, remains controversial<sup>45</sup>. The literature on the subject refers in this regard to both the moment the decision or ruling referred to in Article 108(2) KPA<sup>46</sup> is issued, and the moment it is delivered<sup>47</sup>. It seems that the latter is better supported by the provisions of the Code, since the legislator links the effect in the form of the authority being bound by the decision or the ruling issued with the moment of its delivery (Article 110 in conjunction with Article 126 KPA). Even if immediate enforcement of a decision upon its issuance, or upon the issuance of a ruling on giving the decision the order of immediate enforceability, were accepted (Article 108(2) KPA), this should not apply to decisions imposing obligations upon a party. Indeed, it would be contrary to the principles of the rule of law, including the principle of the citizen's trust in state authorities, to impose obligations upon a party, which such party stands no chance to fulfil, if it has not been notified in the form provided by the law.

The order of immediate enforceability given pursuant to Article 108 KPA expires upon the issue of the decision changing or annulling the prior decision (as a result of the filing of an application for re-examination of the case) by the President of UKE. The order of immediate enforceability provided for in the decision itself also expires upon the issue by the President of UKE of a decision annulling such an order. Where the order is given after the decision

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<sup>45</sup> Doubts arise not only where a decision is pronounced orally (the order would then apply from such pronouncement). This form of communicating the decision to its addressee(s) is exceptional though (cf. Article 14 and Article 109 KPA) and is of no major importance in practice.

<sup>46</sup> A. Wróbel [in:] M. Jaśkowska, A. Wróbel, *Kodeks postępowania administracyjnego. Komentarz*, Zakamycze 2005, p. 677.

<sup>47</sup> Cz. Martysz [in:] *Postępowanie administracyjne...*, p. 678.

is issued, in a separate ruling (Article 108(2) KPA), subsequently challenged in an application for re-examining the case, the order loses effect upon the issuance by the President of UKE of a ruling that annuls the ruling on making the decision enforceable immediately.

With respect to this group of decisions by the President of UKE, a party has the possibility of opening the procedure for review of their legality by administrative courts (Regional Administrative Court (*Wojewódzki Sąd Administracyjny*, WSA) in Warsaw and, further, the Supreme Administrative Court (*Naczelny Sąd Administracyjny*, NSA).

The filing of an appeal with the WSA does not have an automatic suspensory effect<sup>48</sup>. This is indicated in the provisions of Article 61(1) PPSA, under which the filing of an appeal does not suspend the enforcement of the contested act or activity. Therefore, the decision can be enforced. A party has, however, the right to apply in the first place to the authority that issued the decision (in this case the President of UKE), and, as a next step, to the court, to suspend the enforcement of the contested decision. As pointed out in by the doctrine, the provisions of the PPSA concerning these issues are designed with reference to the rules of the aforementioned Recommendation No. R (89) 8 of the Committee of Ministers<sup>49</sup>. Both the literature on the subject and the case law of the NSA present a view pointing to the necessity to observe “far-reaching prudence” in the enforcement of effective decisions before the expiry of the time limit for appealing against them, due to the risk of the occurrence of irremediable consequences<sup>50</sup>. What is meant here is to keep the necessary compromise between the effectiveness of administrative acts and the effectiveness of their review as exercised by administrative courts.

The PPSA does not set out positive grounds that could support the suspension of the enforcement of decisions taken by the administrative authority. Article 61(2) point 1 PPSA specifies only the negative grounds, the occurrence of which excludes the possibility of suspending enforcement. Therefore the authority may suspend the enforcement of the decision unless there are grounds which in administrative proceedings makes the decision

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<sup>48</sup> For more detail, see: R. Sawuła, “Suspensywność skargi sądowo administracyjnej” (2000) 1–2 *Samorząd Terytorialny* 197–206.

<sup>49</sup> W. Chróścielewski, Z. Kmiecik, J.P. Tarno, “Reforma sądownictwa administracyjnego a standardy ochrony praw jednostki” (2002) 12 *Państwo i Prawo* 39.

<sup>50</sup> NSA judgment of 21 August 1981, II SA 108/81 (1983) 1 *Orzecznictwo Sądów Polskich*, item 19; J. Borkowski, “Wstrzymanie wykonania aktu zaskarżonego do Naczelnego Sądu Administracyjnego” [in:] *Institucje współczesnego prawa administracyjnego. Księga jubileuszowa Profesora zw. dra hab. Józefa Filipka*, ed. I. Skrzydło-Niżnik, P. Dobosch, D. Dąbek, M. Smaga, Kraków 2001, pp. 70–71; T. Woś [in:] *Postępowanie sądowoadministracyjne*, ed. T. Woś, Warszawa 2004, p. 217; same [in:] *Prawo o postępowaniu przed sądami administracyjnymi. Komentarz*, ed. T. Woś, Warszawa 2005, p. 294.

or order immediately enforceable or where specific statute excludes staying of their enforceability. This solution is criticised in the legal literature as excessively restrictive from the viewpoint of the authority. T. Woś assumes in this context that, when refusing to suspend the enforcement of a decision, the authority has to demonstrate that one of the grounds for making the decision enforceable immediately has been fulfilled (Article 108(1) KPA). Then, in practice, it will be rare for the authority to deny enforcement<sup>51</sup>. These concerns do not seem to be fully justified. Indeed, even where the grounds contained in Article 108(1) KPA do not hold, the authority is not obliged to suspend the enforcement of the decision but can only use this possibility. Indeed, if the rule is the absence of a suspensory effect of an appeal filed with the administrative court, suspending the enforcement of the contested decision should always be regarded as an exception, rather than be commonly applied.

The authority decides on an application for suspension in a ruling. Even though such a ruling is unappealable, it may, as a next step, be changed or annulled by the court of law (Article 61(4) PPSA). Refusal on the part of the authority to suspend the enforcement of a decision or a ruling does not deprive the applicant of the right to file a corresponding application with the court.

Suspending the enforcement of a decision by the authority pursuant to Article 61(2) point 1 PPSA should not apply at all with respect to the decisions specified in Article 98(3), Article 178(1), Article 201(9), Article 202(2) and Article 203(1) PT. As far as these decisions are concerned, “grounds hold which condition, in administrative proceedings, the making of a decision [...] enforceable immediately” in the meaning of Article 61(2) point 1 PPSA.

If, as already demonstrated, the legislator requires that the authority gives these decisions the order of immediate enforcement, it is hard to conclude that the same authority could subsequently waive that order. Such competence should be vested solely with the administrative court.

A view is expressed in the legal literature that due to the wording of Article 4(1) of the Framework Directive, the possibility to suspend the enforcement of a decision of the President of UKE should be excluded after an appeal is filed with the administrative court<sup>52</sup>. This opinion should be considered correct with regard to the decisions taken by the President of UKE, which are based on the rules of Polish law implementing the provisions of the electronic communications package of 2002. Even though Article 4(1) of the Framework Directive refers to the possibility of suspending the enforcement of decisions of the national regulatory authority, this competence is, nevertheless,

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<sup>51</sup> T. Woś [in:] *Postępowanie sądowo administracyjne...*, s. 220; same [in:] *Prawo o postępowaniu...*, p. 298.

<sup>52</sup> S. Piątek, *Prawo telekomunikacyjne w świetle...*, p. 9.

reserved for the appeal body and not the authority itself. This indicates the necessity to provide in the PT for a clear exemption from Article 61(2) point 1 PPSA. Having regard to the principle of superiority and the principle of direct applicability of Community law, it should be concluded that even in the absence of a clear national rule, the President of UKE is obliged to refuse to suspend the enforcement of any decision that is challenged in the court and that pursues, in the case concerned, the objectives of Community electronic communications Directives. In any event, the competence concerning the suspension of a contested decision expires once the appeal is passed on to the administrative court. From that moment on, it is only the court that can decide on the suspension of the enforcement of the decision or ruling (in part or in whole) (Article 61(3) PPSA).

A view has been established in the case law of the administrative courts that “the analysis of the grounds for providing the appellant with provisional protection leads to the conclusion that the principal objective behind the procedure is, above all, to ensure maximum judicial effectiveness of administrative review, through the creation of conditions warranting effective enforcement of a court judgment... This objective, which is fundamental for the exercise of justice, and which is pursued by administrative courts, converges with the interest of the appellant: to keep the status quo until the case is heard by the court. From this point of view, provisional protection is an extremely important procedural guarantee of the party’s right because, in a considerable proportion of cases, it is the only way to protect the party against the consequences of defective acts and activities of public administration bodies”<sup>53</sup>.

An application for suspending a contested decision, filed with the administrative court, may be accompanied by an appeal, or may follow at a later date. Unlike in proceedings before an administrative authority, the PPSA sets out the positive grounds for suspending the enforcement of a decision, or a ruling, by the administrative court. This is a situation “where there is a risk of causing material damage or consequences that are difficult to repair”. The list of these grounds is exhaustive. It makes reference to future events that can, however, be anticipated on the basis of a reasonable assessment of the situation, as a consequence of the issuance of the decision<sup>54</sup>. The case law of the NSA assumes that it is a damage (financial as well as non-financial), which cannot be compensated by a subsequent return of a performance or the

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<sup>53</sup> NSA resolution of 16 April 2007, I GPS 1/07, (2007) 4 *Orzecznictwo Naczelnego Sądu Administracyjnego i Wojewódzkich Sądów Administracyjnych*, item 77. See also the comment to the resolution by R. Sawuła, in: (2008) 1–2 *Samorząd Terytorialny* 162–166.

<sup>54</sup> J. Borkowski, “Wstrzymanie wykonania decyzji w postępowaniu kasacyjnym” (2005) 14 *Monitor Prawniczy* 677.

situation when it is not possible to restore original position. This is the case where there is a risk of losing the subject of the performance that, due to its properties, cannot be replaced with any other item, and its pecuniary value would be insignificant for the complaining party, or where there is a risk of loss of life or damage to health<sup>55</sup>.

In its aforementioned resolution of 16 April 2007, I GPS 1/07, the NSA held that the legislator does not co-relate, even in the smallest degree, the grounds for granting of provisional protection with the likelihood/probability of the appeal against the decision being, eventually, succeeded. Hearing the application for the suspension of the enforcement of a decision, the court cannot thus consider, even preliminarily, whether the decision is defective in any way.

The court cannot suspend the enforcement of the challenged acts where “the special statute excludes the suspension of their performance” (Article 61(3) PPSA). It should be concluded that both, in the procedure before the authority and in the administrative court, this ground should be understood narrowly. This is a situation where the legislator clearly excludes the possibility of suspending the enforcement of certain decisions or rulings by the court. As a result, such an exclusion may not be implicit, as it constitutes an exception to the principle of effective judicial review of administrative acts. It is worth noting that the PT does not provide for the exclusion of the possibility of suspending the enforcement of a decision by the regulatory authority.

A court ruling on suspending the enforcement of a challenged decision does not bear the attribute of permanence, as it can be changed or annulled at any time ‘where circumstances change’ (this also applies to final rulings)<sup>56</sup>. The foregoing means that the complaining party may re-submit its application for suspension, even if it was rejected previously, provided that the party demonstrates that the change in circumstances justifies a change in the court’s position concerning the suspension of enforcement of the challenged decision or ruling.

A complaint can be filed with the NSA against the ruling of the regional administrative court concerning the suspension, or refusal to suspend, of the enforcement of a decision or ruling (Article 194(1) point 2 PPSA). The foregoing means that the ruling of the regional administrative court concerning suspension is not final, until the expiry of the time limit for filing the appeal, or until the NSA dismisses the complaint (Article 168(1) PPSA). This brings about uncertainty as to the rights and obligations of the complainant, and

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<sup>55</sup> NSA ruling of 20 December 2004, GZ 138/04, unpublished. See also B. Dauter [in:] B. Dauter, B. Gruszczyński, A. Kabat, M. Niezgódka-Medek, *Prawo o postępowaniu przed sądami administracyjnymi. Komentarz*, Zakamycze 2006, pp. 161–163.

<sup>56</sup> The ruling may be issued on an in-camera session (Article 61 § 5 PPSA).

is contrary to the requirement of speediness of court decisions on interim measures<sup>57</sup>.

In any event, the suspension of the enforcement of a decision or ruling no longer holds where the court issues a judgment that concludes the procedure at first instance (Article 61(6) PPSA). Where the judgment accepts the complaint, the court finds ‘whether and to what extent the contested act or activity cannot be performed’. This decision applies until the judgment becomes final (Article 152 PPSA).

Suspension of the enforcement of a decision is also possible at the stage of the procedure before the NSA in the case of a cassation complaint. This has recently been confirmed by the aforementioned resolution of the NSA of 16 April 2007 under which: “[f]or provisional protection to yield the desired result, it must be possible to apply it at any stage of the judicial and administrative procedure, including in the proceedings before the Supreme Administrative Court”.

### **3. Decisions that may be appealed to the Court of Competition and Consumer Protection**

The decisions in cases for the designation of significant market power listed in Article 206(2) PT, for the imposition of regulatory obligations, for the imposition of penalties and decisions issued in disputes (except decisions on general exclusive frequency licences), may be appealed to the SOKiK<sup>58</sup>. This Court is part of the state court system in Poland and operates within the structures of the Regional Court (*Sąd Okręgowy*) in Warsaw. The proceedings before the SOKiK are governed by the provisions of the Code of Civil Procedure (KPC); appeals against its judgments are heard by the Appellate Court in Warsaw.

The possibility of filing an appeal with the SOKiK applies to situations, where the party is not entitled to use the means of appeal typical for the review of the functioning of central administrative authorities in Poland, such as an application for the re-examination of a case, or a complaint to the administrative court. The legislator has decided that the said decisions are enforceable immediately by virtue of law itself (Article 206(2a) PT). It means that in such cases Article 108 KPA or another special procedure does not apply, and the party is obliged to proceed with implementing the decision upon its delivery. However, the authority should inform the party of its immediate

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<sup>57</sup> Cf. T. Woś [in:] *Postępowanie sądowo administracyjne...*, p. 220

<sup>58</sup> As rightly pointed out by S. Piątek, these are any decisions issued in such cases, both positive and negative, annulling, changing, declaring invalidity. See. S. Piątek, *Prawo telekomunikacyjne...*, *op.cit.* p. 1122.

enforceability by virtue of law in the content of the decision itself (Article 9, Article 11 and Article 107(3) KPA).

The effect of the immediate enforceability of a decision by virtue of law is excluded, however, with respect to decisions on the imposition of financial penalties. Furthermore, in the case of penalties, the legislator excludes even the possibility of making the decision enforceable immediately by the authority pursuant to Article 108 KPA. Article 210(1) second sentence PT directly stipulates that “[t]he decision to impose a financial penalty shall not be enforceable immediately”. The foregoing means that where an appeal is filed with the SOKiK on the imposition of a financial penalty, such a decision will become enforceable only when the judgment of the court, provided it is unfavourable to the appellant, becomes final (Article 363 KPC). This usually means a situation where the SOKiK has dismissed the appeal of the punished entity, and the Appellate Court has subsequently dismissed the appeal against such a judgment of the SOKiK.

The KPC gives the SOKiK the possibility to decide to suspend the enforcement of a challenged decision of the President of UKE until the case is resolved (Article 479<sup>63</sup> KPC). This possibility undoubtedly applies also to decisions, which are enforceable immediately by virtue of law. Contrary to the concerns voiced in the legal literature<sup>59</sup>, suspending the enforcement of the latter decisions, the court does not change the provisions of the legal norm under Article 206(2a) PT. In such cases, the operation by the SOKiK has a clear legislative basis (Article 479<sup>63</sup> KPC). In other words, even though the legislator considers the above decisions to be enforceable immediately by virtue of law, it provides, at the same time, for such enforceability to be suspended in specific cases if the competent court so decides. Additionally, the competence of the appeal body (in this case the SOKiK) to suspend the enforcement of a decision of the regulatory authority is expressly provided for in Article 4(1) of the Framework Directive. This means that Article 206(2a) PT may not be interpreted in a way that would be contrary to the said Community act.

In cases for the suspension of the enforcement of a decision of the President of UKE, the SOKiK acts solely upon an application from a party. The possibility of filing an application has been closely linked to the filing of an appeal. An application may be filed only “[in] case of filing of an appeal...” (and hence, it would be inadmissible to file an application without appealing the contested decision of the regulatory authority), and only by the party that has filed the appeal (Article 479<sup>63</sup> KPC). The request for suspending the decision of the President of UKE may be submitted to the SOKiK together with the appeal or after it is filed.<sup>60</sup> By analogy to the proceedings before

<sup>59</sup> Cf. M. Rogalski, *Zmiany w prawie...*, pp. 250–251.

<sup>60</sup> The SOKiK may hear an application on an in-camera session.



the NSA, the additional creation of the possibility to file an application for suspending the enforcement of a regulatory decision at the stage of the appeal proceedings should be supported. This is dictated by reasons of effectiveness of judicial review of administration, taken into account by the NSA in its resolution of 16 April 2007, I GPS 1/07.

Even though it does not follow directly from the provisions of the KPC, it should be concluded that an application to suspend the enforcement of a decision can be filed again if justified in the light of new circumstances. A change in circumstances may also lead to the modification, or annulment, of the ruling already issued, on suspending the enforcement of a decision<sup>61</sup>.

The KPC does not set out the premises to be followed by the SOKiK adjudicating on an application for suspending the enforcement of a decision of the President of UKE. A view is expressed by the legal doctrine on this subject that it may be helpful to invoke the case law developed under Article 108 KPA, seen *a contrario*, or the grounds for suspending the enforcement of a decision of the administrative court specified in Article 61(3) PPSA.<sup>62</sup> It seems that the latter solution is more correct. The procedural guarantees under both types of proceedings (i.e. before administrative court and SOKiK) should be approximated to the greatest degree possible.

Hence the SOKiK should also consider whether in the case in question there is a risk of doing significant damage, or causing effects that may be difficult to reverse, whereas the ruling of the SOKiK should not be affected by the very issue of the defectiveness of the decision.

What is of considerable importance for the effectiveness of court protection is, amongst other things, the time that elapses between the filing of the application for suspending the enforcement of a decision and the issuance of the judgment by the SOKiK. Too long a delay in hearing the application may make it pointless for the party, due to the prior full enforcement (voluntarily or through administrative enforcement) of the challenged decision. Hence, the SOKiK should aim to hear the application in as short a period of time as possible. By analogy to the application for securing a claim (Article 737 KPC), the Court should act without delay, not later than within a week of the date it receives the application. This issue should be expressly defined in the provisions of the KPC on the proceedings before the SOKiK.

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<sup>61</sup> Article 359 § 1 KPC stipulates that “Rulings which do not conclude the proceedings in the case may be annulled and changed as a result of a change in the circumstances of the case, even though they were challenged, and even final.”

<sup>62</sup> S. Gronowski, *Ustawa antymonopolowa. Komentarz*, Warszawa 1999, p. 302; I. Gabrysiak, “Upadek ryguru natychmiastowej wykonalności decyzji uchylonej nieprawomocnym wyrokiem SOKiK” (2008) 2 *Prawo Teleinformatyczne* 20.

A judgment of the SOKiK that suspends the enforcement of the contested decision taken by the President of UKE is effective when pronounced, or when the conclusion thereof is signed (Article 360 KPC). However, the legislator does not require for the ruling to be provided with a statement of reasons (cf. Article 357(1) and (2) KPC). This gap should also be filled through an intervention from the legislator (modelled on the solutions, which are in place in proceedings before administrative courts). The foregoing is strictly connected with the necessity to create, in the Polish legal system, the possibility of appealing to the Appellate Court against judgments of the SOKiK on suspending the enforceability of decisions taken by the President of UKE. The rules currently in place do not offer such a possibility, which considerably limits procedural guarantees of the appellant, and discriminates between the proceedings before the SOKiK and those before administrative courts, to the disadvantage of the former.

Legal doctrine also considers the consequences of a non-final judgment by the SOKiK annulling the decision of the President of UKE for immediate enforceability of such a decision under Article 206(2a) PT. It is asserted that such a judgment (before it becomes final) should automatically result in the decision to which it pertains being deprived of the attribute of immediate enforceability<sup>63</sup>. This position does not seem convincing. Even though Article 4(1) of the Framework Directive offers the possibility of suspending the enforcement of a decision of the national regulatory authority, nevertheless, the Directive reserves the competence to determine this matter for the appeal body. Hence, until the judgment by the SOKiK becomes final, the effect in the form of suspending the enforcement of the challenged decision cannot occur by virtue of law itself. One can only propose for the legislator to decide, also in this context, to amend the provisions of the KPC modelled on Article 152 PPSA. Annulling a decision of the President of UKE, the SOKiK should therefore have a possibility to expressly decide whether and, if so, to what extent, a decision not yet finally annulled, may continue to be enforced.

## VI. Conclusions

The Polish legal system protects, in part, only the rights of telecommunications undertakings in connection with the enforcement of regulatory decisions on electronic communications. It is worth praising the administrative procedure rules concerning the proceedings held before the President of UKE, and the rules that govern the proceedings before administrative courts to the extent

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<sup>63</sup> I. Gabrysiak, *Upadek rygoru...*, pp. 20–21.

to which these courts are competent to hear appeals against decisions of the President of UKE. The only more significant suggestion *de lege ferenda* in this respect concerns the recognition of the full effectiveness of rulings of the regional administrative court (WSA) to suspend the enforcement of a decision of the regulatory authority.

The procedural guarantees relating to the suspension of the enforcement of decisions taken by the President of UKE by the SOKiK, on the other hand, should be viewed rather critically. Although the possibility of suspending the enforcement of such decisions also exists under the latter procedure, contrary to the aforementioned standards set out by the Council of Europe and the models taken from Community law, judgments of the SOKiK in such cases, do not require to be provided with a statement of reason and are not subject to review by the court of second instance. Neither does the law expressly set the premises to be followed by the court in such cases. This means that Polish law does not fully guarantee effective legal protection to Polish telecommunications undertakings, and by doing so, it limits their right of appeal referred to in Article 4(1) of the Framework Directive. This situation requires urgent legislative amendments, the closest model for which can be the rules concerning the proceedings before administrative courts.

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