

CLASSIFICATION OF ACTIVITIES SUBJECT TO ENTRY IN THE REGISTER OF TELECOMMUNICATIONS ENTREPRENEURS

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1. INTRODUCTION

The judgments issued by the Court of Justice of the European Union (CJEU) in cases C-142/18¹ and C-193/18² unambiguously indicate that, regardless of the 18 years' period after a package of directives for the electronic communications sector of 2002 entered into force,³ the issues concerning the legal classification of electronic communications services still raise many considerable doubts among entrepreneurs as well as regulatory authorities and courts applying the law. Modification to the legal definitions and a new category of interpersonal communications introduced

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¹ Judgment of 5 June 2019 in case *Skype Communications Sàrl v Institut belge des services postaux et des télécommunications (IBPT)*, LEX No. 2677171.

² Judgment of 13 June 2019 in case *Google LLC v Bundesrepublik Deutschland*, LEX No. 2680395.

³ The package included:

- Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive) (OJ L 108/33, 24.4.2002);
- Directive 2002/19/EC of the European Parliament and of the Council of 7 March 2002 on access to, and interconnection of, electronic communications networks and associated facilities (Access Directive) (OJ L 108/7, 24.4.2002);
- Directive 2002/20/EC of the European Parliament and of the Council of 7 March 2002 on the authorisation of electronic communications networks and services (Authorisation Directive) (OJ L 108/21, 24.4.2002);
- Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services (Universal Service Directive) (OJ L 108/51, 24.4.2002).

in the European Electronic Communications Code of 11 December 2018,⁴ the implementation deadline of which is in December, only exacerbate the above-mentioned problems connected with the determination of the status of particular services. At the same time, the dynamic development of technology together with the broader and broader use of the Internet of Things or artificial intelligence create new challenges related to the need to determine the status of emerging services or solutions that are often and to a great extent based on communications techniques.

Taking into account the above introductory comments, it is necessary to discuss, in the context of both the above-quoted CJEU judgments and the forthcoming legislative changes, the approach to the classification of entrepreneurs' activities as telecommunications activities and the resulting obligation to obtain appropriate authorisation to conduct particular types of activities. The practical problems occurring in connection with the lack of certainty of the status of a particular activity disrupt the implementation of the principle of legal certainty and the principle of equality and non-discrimination.⁵ At the same time, the situation in which an entrepreneur fails to register as a telecommunications entrepreneur, despite the obligation to do so, and the situation in which they enter a particular activity into the register, although there is no obligation to do so, have negative consequences. They are not only faced by those entrepreneurs alone but also regulatory authorities, which are obliged to create equal conditions of competition, as well as by competitors operating on the same market.⁶

2. STATE CONTROL OVER TELECOMMUNICATIONS ACTIVITY

In accordance with Article 10 of the Act of 16 July 2004: Telecommunications Law,⁷ a telecommunications activity that is a business activity is subject to state control and entry to the register of telecommunications entrepreneurs. The obligation to register occurs when a given activity matches two features: it is a business activity and it constitutes a telecommunications activity. The definition of a business activity is laid down in Article 3 of the Act of 6 March 2018: Entrepreneurs' Law,⁸ in accordance

⁴ Directive (EU) 2018/1972 of the European Parliament and of the Council of 11 December establishing the European Electronic Communications Code (Recast) (OJ L 321/36, 17.12.2018); hereinafter Directive 2018/1972.

⁵ For more on the issue of basic rules of conducting business activity, see M. Zdyb, *Podstawowe zasady (standardy) ładu gospodarczego w świetle ustawy z 6.3.2018 r. – Prawo przedsiębiorców*, *Monitor Prawniczy* 13, 2018, p. 1005 et seq.

⁶ The negative impact on competitors concerns in particular such situations in which an entrepreneur fails to register, despite the obligation to do so and, as a result, he is subject to less strict obligations within the requirements connected with the conducted activity (e.g. within the scope of reporting, obligations to provide information to customers, or the content of contracts for the provision of services), and he is exempt from considerable legal burdens (e.g. he does not have to pay a telecommunications fee and fulfil duties connected with defence, state security, public security and public order).

⁷ Consolidated text, Dz.U. 2019, item 2460, as amended; hereinafter TL.

⁸ Consolidated text, Dz.U. 2019, item 1292, as amended.

with which it is an organised income-generating activity performed on one's own behalf and in a continuous manner.

On the other hand, in accordance with Article 1 para. 1 TL, a telecommunications activity is an activity consisting in the provision of telecommunications services, telecommunications networks or associated services. Each of the above-mentioned types of telecommunications activities has its legal definition laid down in Article 2 TL. At the same time, Article 2(27) TL stipulates that a telecommunications entrepreneur having the right to conduct an activity consisting in the provision of telecommunications services is called a service provider, and an entrepreneur having the right to conduct the activity consisting in the provision of public telecommunications networks or related services is called an operator.

Particular types of telecommunications activities require specification of the features that distinguish and, at the same time, oblige an entity conducting a given activity to obtain authorisation to do it. It should be emphasised that such classification is an entrepreneur's duty because entry to the register of regulated business activities is not subject to the substantive assessment but only to the formal and legal one.⁹ Frankly speaking, Article 43 para. 7 of the Act: Entrepreneurs' Law lays down a possibility of checking the fulfilment of all the legal conditions by an entrepreneur in order to conduct a regulated activity but the provision does not determine when this inspection can take place.¹⁰ Taking into account a short time limit that the President of the Office of Electronic Communications has to enter an entrepreneur into the register of telecommunications entrepreneurs,¹¹ it does not seem probable that the inspection can be performed before the entry and, as a rule, it will be subsequently performed.

The entry into the register of telecommunications entrepreneurs is a substantive and technical activity that is declarative in nature.¹² It is worth emphasising that there is an established opinion in case law that a telecommunications entrepreneur status does not depend on the actual business activity conducted but only on the formal entry into the register of telecommunications entrepreneurs.¹³ This leads to the situation in which an entity that actually does not conduct such an activity or has stopped to conduct it but is registered as a telecommunications entrepreneur is entitled to the telecommunications entrepreneur status. On the other hand, the entity that has failed to register but actually conducts a business activity that consists in a telecommunications activity is not entitled to this status.

⁹ Compare M. Etel, *Kontrola i odpowiedzialność jako problemy charakteryzujące regulowaną działalność gospodarczą (analiza z uwzględnieniem działalności telekomunikacyjnej)*, Prace Naukowe Uniwersytetu Ekonomicznego we Wrocławiu 495, 2017, p. 22.

¹⁰ Thus, rightly, M. Etel, *Reglamentacja działalności gospodarczej na gruncie przepisów ustawy z 6.3.2018 r. – Prawo przedsiębiorców*, Monitor Prawniczy 13, 2018, p. 31.

¹¹ Seven days of the date of an application made (Article 10 para. 8 TL).

¹² M. Strzelbicki, *Wpis do rejestru działalności regulowanej*, Ruch Prawniczy Ekonomiczny i Socjologiczny 4, 2005, p. 74; and A. Treła, *Aspekty materialnoprawne wpisu do rejestru przedsiębiorców telekomunikacyjnych – zagadnienia wybrane*, Prace Naukowe Uniwersytetu Ekonomicznego we Wrocławiu 495, 2017, p. 161 and case law referred to therein.

¹³ Thus, the Supreme Court judgments of 20 September 2011, III SK 55/10, LEX No. 1106752; and of 4 March 2014, III SK 35/13, LEX No. 1463898.

3. PROVISION OF TELECOMMUNICATIONS NETWORKS

In accordance with Article 2(4) TL, the provision of telecommunications networks is an activity consisting in the preparation of a telecommunications network so that services can be provided via it, it can be exploited, controlled and it can make telecommunications access available. On the other hand, a telecommunications network itself is defined (Article 2(35) TL) as transmission systems and switching and routing equipment, as well as other resources, including inactive elements of the network that make it possible to broadcast, receive and transmit signals with the use of wires, radio, optical and other means of conveying electromagnetic energy irrespective of their type. Both these definitions are based on definitions laid down in Article 2 Framework Directive.

It should be emphasised that the definitions are technologically neutral in nature,¹⁴ which is in conformity with Recital 5 Framework Directive¹⁵ and Recital 7 Directive 2018/1972¹⁶ that stipulate striving for uniform regulation of any telecommunications networks, regardless of which technology a given network operation is based on,¹⁷ what transmission medium is used in a given network¹⁸ and what information (services) is transmitted with the use of this network¹⁹.

The definition laid down in the Framework Directive has a few components. It lists elements that compose an electronic communications network, the function that the elements play, example electronic communications networks, and it indicates the object of transmission performed in those networks. The scope of the definition in the Telecommunications Law is narrower and it partially departs from the definition laid down in the Framework Directive.

The elements that compose an electronic communications network are transmission systems²⁰ and, in suitable cases, switching or routing equipment as well as other resources, including inactive elements of the network. In the case of this part of the definition, one can speak about a network which within the substantive meaning covers particular objects that altogether make up the concept of a telecommunications network.

The definition laid down in the Telecommunications Law differs from the definition provided in the Framework Directive as it does not indicate the optional

¹⁴ Compare A. Flanagan, [in:] *Telecommunications Law and Regulation*, I. Walden, J. Angel (eds), 2nd edn, Oxford 2006, p. 176.

¹⁵ 'The convergence of the telecommunications, media and information technology sectors means that all transmission networks and services should be covered by a single regulatory framework [...].'

¹⁶ 'The convergence of the telecommunications, media and information technology sectors means that all electronic telecommunications networks and services should be covered to the extent possible by a single European Electronic Communications Code established by a single Directive [...].'

¹⁷ For instance, xDSL, GPON, or DOCSIS.

¹⁸ For instance, copper wires, optical fibre cables or a radio band.

¹⁹ For instance, voice services, access to the Internet, TV services, location services or packages of the above-mentioned services.

²⁰ For more on the concept of transmission systems, see S. Piatek, *Prawo telekomunikacyjne. Komentarz*, Legalis 2019.

nature of switching or routing equipment and other resources but lists them as an obligatory element of each telecommunications network. In the majority of cases, the issue will not be really important because most telecommunications networks, apart from transmission systems, are equipped with other devices such as routers, signal amplifiers or other similar devices or inactive elements of telecommunications infrastructure such as wires or cables. However, a problem may concern telecommunications networks that are limited to transmission systems and do not have the remaining elements indicated in the definition laid down in Article 2(35) TL. Such a situation can take place especially in cases in which for the implementation of the transmission an operator uses the services of leased lines provided by other telecommunications entrepreneurs. Taking into account the necessity of pro-Union interpretation of the provisions of law, it seems that the purposefulness requirements prescribe the assumption that also in case of such networks, an entrepreneur is obliged to notify about the activity of providing a network.

Another element refers to the functionality of a telecommunications network and it indicates the conveyance of signals by wire, radio, optical or other electromagnetic means. As far as this is concerned, the definition laid down in the Telecommunications Law does not depart from the definition in the Framework Directive as it covers broadcasting, receiving and transmitting signals with the use of wires, radio waves and optical or other means making use of electromagnetic energy. It is worth emphasising that the definition does not require that the signal be sent or received within a given network. Also networks that transmit a signal sent from one network and switched to another network where it is to be received match the element of the definition laid down in the Telecommunications Law. In addition, the definition does not require that broadcasting take place between a transmitter and a receiver. It is sufficient to limit a network functionality to broadcasting or receiving a signal.²¹

Both the Framework Directive and the Telecommunications Law emphasise that a type of a transmitted signal is insignificant for the classification of a given network as a telecommunications one. However, the Framework Directive refers to the information transferred within a network and the Telecommunications Law to the type of signal. The use of the term 'signal' is closer to the terminology used in telecommunications where an analogue signal and a digital signal are distinguished as the object of transmission.²² On the other hand, the concept of information seems to refer to the content that is transmitted, e.g. images, sound or files. Neutrality of the object of transmission for the classification of a network results from the assumption made in the Framework Directive that there is a need to ensure uniform legal norms for all types of networks. That is why, the definition laid down in the Framework Directive lists example networks that should be recognised as electronic communications networks. The lack of such a list in the Telecommunications Law is insignificant because based on this law each of the example types of networks listed fulfils the requirements laid down in the definition of a telecommunications network.

²¹ Similarly S. Piątek, *Pravo telekomunikacyjne Wspólnoty Europejskiej*, Warszawa 2003, p. 111.

²² Compare G. Smillie, *Analogue and Digital Communication Techniques*, Newnes 2002, pp. 2-4.

The definition of an electronic communications network laid down in the Directive 2018/1972 is to a great extent based on the one laid down in the Framework Directive. The only important change introduced in the Directive 2018/1972 concerns the determination of transmission systems, which can be based on a permanent infrastructure or centralised administration capacity. The above-mentioned change is explained in Recital 14 Directive 2018/1972, which provides that: 'Definitions need to be adjusted so as to conform to the principle of technology neutrality and to keep pace with technological development, including new forms of network management such as through software emulation or software-defined networks.' Therefore, the amended definition stipulates that also systems based on centralised administration of resources should be treated as transmission systems.²³

Having defined the telecommunications network, it is necessary to establish in what situations an entrepreneur conducts activities consisting in the provision of this network. In accordance with the legal definition, it is an activity consisting in the preparation of a telecommunications network so that it will be possible to provide services within it, use it, supervise it or provide telecommunications access. According to the definition laid down in the Polish language dictionary, 'preparation' means activities, endeavours, efforts made in order to achieve something intended.²⁴ In line with such a definition, a doubt may be raised whether the provision of a network also covers building it. It is unanimously indicated in the legal doctrine that building a telecommunications network alone does not constitute telecommunications activities within the meaning of the Telecommunications Law.²⁵ The above opinion should be approved of because at the stage of building a telecommunications network, which undoubtedly constitutes the stage of a telecommunications network preparation within the meaning of the above-mentioned definition, the aim of the preparation indicated in the definition has not been fulfilled yet. The provision indicates that preparation is to be done in the way making it possible to implement: the provision of services, use and supervision of a network or availability of telecommunications access. At the same time, it is sufficient to prepare a network to fulfil one of the above-mentioned aims, which is confirmed by the use of a conjunction 'or'. As far as this is concerned, the Telecommunications Law introduces some changes in comparison with the definition laid down in the Framework Directive, which defines providing a telecommunications network access as the establishment, operation, control and making available of such a network. Thus, each of the elements must be fulfilled to provide access to a network. Undoubtedly, the weakness of both definitions consists in the fact that they use indefinite concepts, which can raise interpretational doubts. Moreover, the definition in the Framework Directive is an example of a circular definition (*idem per idem*) indicating that the provision of access to a network means, inter alia, the provision of access to a network.

²³ For instance, in a situation when various entities share the same resources.

²⁴ *Słownik języka polskiego*, <https://sjp.pwn.pl/sjp/przygotowanie;2512060.html> (accessed 10.8.2020).

²⁵ Compare S. Piątek, 2019, *supra* n. 20; and M. Rogalski, Art. 2, [in:] M. Rogalski, K. Kawalek, *Prawo telekomunikacyjne. Komentarz*, LEX 2010.

The above-mentioned drawbacks of the definition laid down in the Framework Directive have not been eliminated by the definition laid down in the Directive 2018/1972. This directive substitutes the concept of the provision of a network for the concept of making available of a network used in the Telecommunications Law, but in the remaining scope it copies a definition laid down in the Framework Directive, also using a circular definition, but this time the provision of a network is defined as the 'provision of this network'.

Stanisław Piątek points out that the provision of a network takes place only when the aim of the activity is to provide services and, as a result, the preparation of a network for the purpose of using it for one's own needs does not constitute the provision of a network.²⁶ It seems that there are no grounds for the above conclusion. Firstly, as it has been indicated above, the definition of the provision of a network, apart from the provision of services and making telecommunications access available, alternatively lists the operation and control thereof. As a result, it seems that an activity in which an operator uses a network for his own needs connected with the business activity, e.g. needs connected with the provision of other services, should be treated as the provision of a network that must be disclosed in the register.²⁷ At the same time, it is not important that the activity consisting in the provision of a network does not generate profits directly or it is not provided for remuneration if, in such a situation, a telecommunications network is used by an entrepreneur to conduct his main activity, e.g. one connected with the distribution of electricity. Thus, it seems that also an entrepreneur using a telecommunications network for the needs connected with a business activity that is not the provision of services in a telecommunications network should register telecommunications activity consisting in the provision of a telecommunications network.

Finally, it is also worth pointing out that apart from the definition of a telecommunications network, the Telecommunications Law also lays down the definition of a public telecommunications network, i.e. a telecommunications network mainly used to provide publicly available telecommunications services. Telecommunications activity means the provision of a public telecommunications network as well as the provision of a telecommunications network that is public in nature. This is confirmed in Recital 4 Authorisation Directive, which explicitly states that it covers authorisation of all electronic communications networks and services whether they are provided to the public or not.²⁸

4. PROVISION OF ASSOCIATED SERVICES

The provision of associated services is another type of telecommunications activities that gives an entrepreneur the status of an operator. In accordance with Article 2(44a) TL, 'associated services' means 'services connected with a network

²⁶ S. Piątek, 2019, *supra* n. 20.

²⁷ For example, a telecommunications network used to manage an electricity network and provide electricity.

²⁸ For more, compare S. Farr, V. Oakley, *EU Communications Law*, 2nd edn, London 2006, p. 185.

or telecommunications services that enable or support the provision of services via those networks or services, or have the potential to do so, and include number translation systems or systems offering equivalent functionality, conditional access systems and electronic programme guides, as well as other services such as identification, localisation and presence service.’ Article 2(e) Framework Directive provides a similar definition of associated services.²⁹ Associated services constitute a form of associated facilities, which Article 2(44) TL defines as follows: ‘associated services, physical infrastructure and other equipment or elements connected with a telecommunications network or telecommunications services that enable or support the provision of services via those networks or services, or have the potential to do so, and include buildings, entrances to buildings, building wiring systems, antennae, towers and other supporting structures, canals, cables, masts, wells and lockers.’ It should be emphasised that among the above-mentioned associated facilities, only the provision of associated services is explicitly indicated as a telecommunications activity. Stanisław Piątek is right to point out that a common feature of all associated services is their immaterial nature, which distinguishes them from other associated facilities.³⁰ Some associated services have their legal definitions laid down in the Telecommunications Law: an electronic programme guide (Article 2(7) TL), and a conditional access system guide (Article 2(39) TL). On the other hand, number translation constitutes one of the forms of a telecommunications access indicated in Article 2(6)(d) TL. Number translation is mainly connected with appropriate direction of connections to numbers where behind a given call number, e.g. an emergency call number 112, there is a secondary emergency number of the appropriate emergency service.³¹ In the case of other associated services, an operator must establish whether a given functionality matches the features indicated in the definition laid down in Article 2(44a) TL. A localisation service is an example of such an additional functionality, which is not separately defined. Such a service will be recognised as an associated service when it is connected with a telecommunications network or service.³² The connection must consist in making the provision of a service available or supporting it. Sometimes, a few associated services may be connected with one telecommunications service as it happens in the case of the above-mentioned emergency connections. In order to properly perform an emergency connection, it is necessary to establish location of an end user making a call and then switch

²⁹ In accordance with the definition laid down in the Framework Directive, ‘associated service’ means a service associated with an electronic communications network and/or an electronic communications service which enables and/or supports the provision of services via that network and/or service, or has the potential to do so, and includes number translation or systems offering equivalent functionality, conditional access systems and electronic programme guides, as well as other services such as identity, location and presence.

³⁰ Compare S. Piątek, 2019, *supra* n. 20.

³¹ Translation rules of three-digit numbers AUS and the emergency number 112 into the secondary emergency numbers are laid down in § 4 of Annex no. 1 to the Regulation of the Minister of Administration and Digitisation of 12 December 2014 concerning detailed requirements for addressing rules for the purpose of appropriate direction of connections (Dz.U. 2015, item 15).

³² Article 2(47) TL stipulates that a telecommunications service requiring the processing of location data constitutes a value added service.

the connection (number translation) to an appropriate emergency service and the transmission of their location data.

It is worth emphasising that associated services are practically never subject to an independent service, which directly results from their accessorial nature of supporting services or ones making it possible to provide telecommunications networks or providing telecommunications services. The CJEU adopted the same stance in relation to a conditional access system and pointed out that: 'Due to its additional nature, a conditional access system can be associated with an electronic communications service that aims to broadcast radio or television programmes; however, the service does not lose its nature of an electronic communications service. The confirmation of this conclusion can be found in Article 2(e) Framework Directive in accordance with which conditional access systems are services connected with a network or electronic communications services, which enable the provision of services via those networks or services.'³³

5. PROVISION OF TELECOMMUNICATIONS SERVICES

The provision of telecommunications services is the last category of telecommunications activities within the meaning of the Telecommunications Law provisions. The legal definition of a telecommunications service laid down in Article 2(41) TL, which defines it as the provision of services via an operator's own network, with the use of another operator's network or selling a telecommunications service offered by another provider in one's own name and on one's own behalf. On the other hand, a telecommunications service alone is defined in Article 2(48) TL as a service consisting in the transmission of signals in a telecommunications network. The Telecommunications Law, unlike the Framework Directive, does not list a case when a service consists exclusively in the transmission of signals.³⁴ Another difference concerns a negative aspect of the definition laid down in the Framework Directive, which directly excludes services connected with ensuring of or performance of control over the content transmitted via a network or electronic communications services from the scope of electronic communications services. As Recital 5 Framework Directive stipulates, it is necessary to separate the regulation of transmission from the regulation of content, which is not covered by this framework.³⁵

³³ The CJEU judgment of 30 April 2014, C-475/12, LEX No. 1466236.

³⁴ Definition laid down in Article 2(c) Framework Directive stipulates: "“electronic communications service” means a service normally provided for remuneration which consists wholly or mainly in the conveyance of signals on electronic communications networks, including telecommunications services and transmission services in networks used for broadcasting, but exclude services providing, or exercising editorial control over, content transmitted using electronic communications networks and services; it does not include information society services, as defined in Article 1 of Directive 98/34/EC, which do not consist wholly or mainly in the conveyance of signals on electronic communications networks;”.

³⁵ Recital 5 Framework Directive stipulates: 'It is necessary to separate the regulation of transmission from the regulation of content. This framework does not therefore cover the content

Another exclusion covers information society services,³⁶ provided that they do not wholly or mainly consist in the transmission of signals via electronic communications networks. This means that, as a rule, information society services do not constitute telecommunications services, unless the essence of such a service consists wholly or mainly in the transmission of signals. The distinction between information society services that are telecommunications services and those that are not is explained in Recital 10 Framework Directive, which points out that: ‘Most of these activities [i.e. information society services – W.K.] are not covered by the scope of this Directive [i.e. Framework Directive – W.K.] because they do not consist wholly or mainly in the conveyance of signals on electronic communications networks. Voice telephony and electronic mail conveyance services are covered by this Directive. The same undertaking, for example, an Internet service provider, can offer both an electronic communications service, such as access to the Internet, and services not covered under this Directive, such as the provision of web-based content.’

As a result, information society services should be divided into two groups, i.e. information society services that are also telecommunications services and information society services that do not constitute telecommunications services. At the same time, as the Framework Directive indicates, the same entrepreneur can in general provide each of those services and be subject to a separate legal regime in this field, i.e. within the scope of services constituting telecommunications services subject to the provisions of the Telecommunications Law and within the scope of information society services mainly subject to the provisions of the Act of 18 July 2002 on the provision of electronic services.³⁷ At the same time, most problems concerning appropriate classification of a given service occur when there is a concurrence of the provisions of those two legal acts. To a great extent, it results from the lack of precise criteria for a borderline between information society services constituting telecommunications services and those of them that do not have this nature.

The issues concerning the classification of services of broadcasting radio and television programmes are best examples of problems arising in the field of classification of the above-mentioned exclusions from the Framework Directive. In its judgment of 7 November 2013 in case C-518/11³⁸ the CJEU came to a conclusion that the service of supplying basic radio and television packages via cable, the charge for which includes transmission costs as well as payments to broadcasters and royalties paid to copyright collecting societies in connection with the transmission

of services delivered over electronic communications networks using electronic communications services, such as broadcasting content, financial services and certain information society services, and is therefore without prejudice to measures taken at Community or national level in respect of such services, in compliance with Community law, in order to promote cultural and linguistic diversity and to ensure the defence of media pluralism.’

³⁶ In the present legal state, the definition of ‘information society service’ is laid down in Directive (EU) 2015/1535 of the European Parliament and of the Council of 9 September 2015 laying down a procedure for the provision of information in the field of technical regulations and of rules on Information Society services.

³⁷ Consolidated text, Dz.U. 2020, item 344.

³⁸ LEX No. 1383206.

of programme content shall be recognised as an ‘electronic communications service’, provided that the service consists of the transmission of television content on a cable network to the end-users’ receivers. Such classification of services by the CJEU also caused a change in the stance of the President of the UKE (the Office of Electronic Communications) concerning the classification of cable or satellite television services.³⁹ Case law of common⁴⁰ and administrative⁴¹ courts has adopted an analogous stance.

However, in literature, Stanisław Piątek questioned the CJEU opinion and pointed out that in the case of the provision of television programme packages, the main element of the service provided is not the conveyance of a signal in a telecommunications network but providing access to the content of programmes, which are transferred with the use of those signals because the content of those programmes constitutes the biggest part of the value of this service and is the main reason for the purchase of the whole service by end users.⁴² Adjudicating on the case, the CJEU did not evaluate which elements of a television service are most important and based its judgment on the purposefulness approach, which aimed to ensure that television service users have the right to the same protection as the users of telecommunications services.⁴³ With regard to the above opinion, it is necessary to admit that, on the one hand, the main element of a television service is really the access to its programme content. However, it seems that the CJEU analysed that aspect in its judgment and unanimously pointed out that the relevant directives, in particular the Framework Directive, the Competition Directive and the Audiovisual Media Services Directive, make a clear distinction between the production of content, which involves editorial responsibility, and the transmission of content, which does not entail any editorial responsibility because content and transmission are covered by different measures without referring to customers of the service supplied or to the structure of the transmission costs charged on them. In the present case, it is apparent from the order for reference and the written and oral submissions made before the Court that UPC’s principal business is the transmission of radio and television programmes via cable to its subscriber customers. UPC confirmed at the hearing before the Court that it does not produce those programmes itself and that it does not exercise any editorial responsibility over their content.⁴⁴ As it seems, the CJEU was right to recognise that since the programme content is not the object of this service offered by the provider and it is not responsible for this content, it cannot be recognised that it is the main element of the service offered

³⁹ Compare S. Piątek, *Rozprowadzanie programów jako usługa telekomunikacyjna*, internetowy Kwartalnik Antymonopolowy i Regulacyjny 7(4), 2015, pp. 79–80.

⁴⁰ For example, the judgment of the Competition and Consumer Protection Court of 8 November 2013, XVII AmA 5/12, LEX No. 1720256.

⁴¹ For example, judgments of the Voivodeship Administrative Court in Warsaw of 13 April 2016, VI SA/Wa 4267/14, Legalis No. 1584495; and of 9 April 2018, VI SA/Wa 1282/17, LEX No. 2746463, as well as the judgment of the Supreme Administrative Court of 13 March 2019, II GSK 5374/16, LEX No. 2732504.

⁴² S. Piątek, 2015, *supra* n. 39, p. 79.

⁴³ *Ibid.*, p. 79.

⁴⁴ The CJEU judgment of 7 November 2013 in case C-518/11, LEX No. 1383206.

by the provider because the main element of the service consists in the conveyance of television signal to end users concerned. Stanisław Piątek himself believes that in general there are no obstacles in the way of telecommunications services providers formally dividing a television service into two services: one of which would exclusively contain the transmission element, and the other that would only consist of the content.⁴⁵ As a result, it must be acknowledged that if both services are separated and constitute different services, a situation in which a service provider combines them in order to avoid classification of its services as telecommunications services should be recognised as groundless. It, therefore, seems that combining the two components of a service concerns such cases when a service provider is wholly responsible for both the element connected with transmission and the element of content, e.g. a financial service or content supplied to an end user.

Nevertheless, also in those cases, establishing when one deals with a telecommunications service will not be a simple task. The above-mentioned definition laid down in the Telecommunications Law indicates that an element of signal transmission and others can compose a particular service in different proportions. It is not clear how to establish whether in a given case an element of a signal transmission constitutes the major element of a service.⁴⁶ Neither of the above-mentioned CJEU judgments resolves the problem. To tell the truth, the CJEU referred to this element of the definition in its judgment in case C-138/19 (Recitals 34–35 and 37) and pointed out that:

It is common ground that the provider of a web-based service, such as Gmail, conveys signals. [...] Nonetheless, it cannot be thus concluded that the operations performed by Google to ensure the functioning of its web-based email service constitute an ‘electronic communications service’ within the meaning of Article 2(c) of the Framework Directive, since that service does not consist wholly or mainly in the conveyance of signals on electronic communications networks. The fact that the supplier of a web-based email service actively participates in the sending and receipt of messages, whether by assigning to the email addresses the IP addresses of the corresponding terminal devices or by splitting those messages into data packets and uploading them to, or receiving them from, the open internet for the purpose of transmitting them to their recipients, does not appear to be sufficient to enable that service, on the technical level, to be regarded as consisting ‘wholly or mainly in the conveyance of signals on electronic communications networks’ within the meaning of Article 2(c) of the Framework Directive.

The above-mentioned Recitals do not explain, however, how to make a distinction between services that mainly consist in the transmission of signals and those that do not. In the doctrine, Stanisław Piątek pointed out that such evaluation may be done either based on the criterion of costs of particular elements of a service,⁴⁷ or based on usefulness-related features of a service and the needs it satisfies.⁴⁸ Undoubtedly, the subjectivity of the evaluation is a drawback of both approaches, especially the former

⁴⁵ S. Piątek, 2015, *supra* n. 39, p. 79.

⁴⁶ There is no problem like this in the case when the transmission of signals constitutes an exclusive element of a service.

⁴⁷ Where the proportions of cost elements indicate the nature of a given service.

⁴⁸ S. Piątek, 2015, *supra* n. 39, p. 78.

one. In the case of evaluation through the prism of costs, there is another difficulty connected with the problems concerning the establishment of the above-mentioned cost proportion. A considerable proportion of costs incurred by entrepreneurs is general in nature and it is not possible to allocate them directly to a given service or it is necessary to establish the key to the system of their allocation. What is important, within the scope of retail costs that are not subject to regulatory control within the obligations imposed *ex ante*,⁴⁹ no supplier of telecommunications services is obliged to apply regulatory accounting and, thus, checking if the classification is proper may be difficult or even impossible for it, but first of all for all authorities (the President of the UKE, courts) controlling the correctness of its operations. Moreover, such an approach might lead to a different classification of the same services by different entrepreneurs if the structure of their costs were different and led to different proportions of the element of transmission and others.

It seems that the examination of a service from the point of view of its usefulness for a customer and functionality that a given service provides is a better solution. According to the definition laid down in the Polish language dictionary, the word 'mainly' means 'especially, first of all, mostly'.⁵⁰ As a result, evaluating a given service, it is necessary to examine whether the attribute of this service is mainly the conveyance of signals in a network or they are different in nature and 'the telecommunications aspect' is only secondary (incidental). Nevertheless, carrying out this evaluation, it is necessary to take into account whether a supplier of services is responsible for the entire service, including other elements thereof, e.g. for the content of the transmission, or if its responsibility is limited to transmission elements as it happens in the case of broadcasting television programmes. In order to explain this relationship, the following example can be used:

- A service supplier provides an end user with access to technical teleservices where responsibility covers both the element of transmission and the element connected with vehicle diagnostics;
- A service supplier provides an end user with access to technical teleservices where its responsibility does not cover the element of vehicle diagnostics because this is the responsibility of another entity.

Based on the above example, it seems justified to assume that in the former case an end user makes use of all additional functionalities (elements of content) provided by the supplier, where a telecommunications service constitutes only a carrier for the provision of the main service, i.e. the conveyance of telediagnosics data. In the latter case, the end user is also interested in obtaining telediagnosics data but the service supplier is not responsible for this element and its service is mainly limited to the conveyance of transmission data. The situation is analogous when the service provider offers other services the additional, secondary element of which is data transmission as in the case of the service of electronic mail. The functionality of emergency connections provided by a series of contemporary devices may be another example, e.g. vehicles or lifts which let a user make an

⁴⁹ Which is practically a rule within the whole EU.

⁵⁰ *Słownik języka polskiego*, <https://sjp.pwn.pl/sjp/glownie;2462027.html> (accessed 10.8.2020).

emergency call or make it on their own in specific situations. It seems there are no doubts, however, that a user decides to buy a vehicle or use a lift not because of the possibility of making such an emergency call but because of another main functionality. It seems, at the same time, that the evaluation should be made in an objective way, i.e. by examining a given functionality from the point of view of all users and not an individual customer.

Another important aspect connected with evaluation when an entrepreneur provides telecommunications services and should register this business operation, and be subject to control over the activity of transmission of signals in a network. In accordance with the legal definition, the provision of telecommunications services takes place in three situations, i.e.:

- (1) The provision of services with the use of the provider's own network;
- (2) The provision of services with the use of another operator's network;
- (3) Another supplier's telecommunications services are sold in the provider's own name and on its own behalf.

With reference to (1) above, i.e. the provision of services with the use of the provider's own network, the case seems to be relatively obvious and should not create any problems with proper classification of a telecommunications service because the service supplier is also an entity conveying signals in its own network (and thus its activity covers the provision of a network).

As regards (2) above, the case of providing services with the use of another operator's network is a relatively more complicated situation. It is so because it may happen that in such a case more than one entity will be a telecommunications service provider to an end user, and both entities will be responsible for the provision of a telecommunications service. Such a situation took place in case C-142/18, where in the actual state analysed, Skype Communications Sàrl made available software that enabled users who installed it on their terminal device, i.e. a computer, a tablet or a smartphone, to use the voice telephone and teleconference service between individual devices. At the same time, an internet connection was necessary to use the service, which was provided to a user by a different service supplier. The service provided by Skype Communications Sàrl was OTT (over-the-top) in nature,⁵¹ and the transmission of signals was to a great extent performed by other entities.⁵² Nevertheless, the CJEU recognised that the above-described service constitutes an electronic communications service. The justification of the CJEU judgment provides four important conclusions that help to classify a given service as a telecommunications one:

⁵¹ For more on the definition and nature of OTT services, see S. Żyrek, *Status usług over-the-top w prawie telekomunikacyjnym*, Europejski Przegląd Sądowy 10, 2019, pp. 46–47.

⁵² The CJEU judgment indicates that: 'at the technical level, the transmission of the voice calls made through SkypeOut is in practical terms carried out, first, by the ISPs on the internet, the first segment going from the internet connection of the user making the call to the Gateway between the internet and the PSTN and, second, by the telecommunications service providers on the PSTN, the second segment going from that Gateway to the mobile or fixed connection point of the user receiving the call, the fact remains that such transmission occurs pursuant to agreements between Skype Communications and those telecommunications service providers and that it could not be made without the conclusion of such agreements.'

- the fact that users access the OTT service by an internet access provided by another service provider, which in itself constitutes an electronic communications service, does not imply that that OTT service cannot be classified as an ‘electronic communications service’;⁵³
- the fact that given software provides a bundle of services, which are not connected with the conveyance of signals, cannot have impact on the classification of a given functionality if particular functionalities appear clearly distinct in their purpose and remain entirely autonomous in their operation;⁵⁴
- contractual terms of exclusion of responsibility for the transmission of signals to users cannot have any bearing on the classification of the service as an electronic communications service;⁵⁵
- the fact that a given service is also covered by the definition of ‘information society service’ within the meaning of Directive 98/34 in no way implies that it cannot be classified as an ‘electronic communications service’.⁵⁶

Undoubtedly, such an approach to the classification of electronic communications services broadens the scope of activities that can be recognised as telecommunications activities. In the case of the service provided by Skype Communications Sàrl analysed, it is worth taking into account the fact that if a user does not ensure access to the Internet on their own (provided by an entity that has no links with this company), the functionality of SkypeOut will not work at all and, therefore, it will not enable the conveyance of signals in a telecommunications network; nevertheless, it can still be recognised as a telecommunications service. Secondly, when it is analysed whether a given service wholly or mainly consists in the conveyance of signals, it is also necessary to examine whether a given service may constitute a separate and independent functionality for a user, which is especially important when a bundle of services is sold, in which most of them do not require the transmission of signals in a network. Such a bundle, as a whole, certainly does not fulfil the requirements laid down in the definition of a telecommunications service, but if particular elements of that bundle may function independently and meet those requirements, a given functionality may be recognised as a telecommunications service, as it happened in the case analysed.

When it comes to the situation (3) above, i.e. selling of a telecommunications service provided by another service supplier in the provider’s own name and on its own behalf, an entrepreneur is not independently involved in operations that consist in the conveyance of signals in a telecommunications network, either their own or other operators’ ones, and only resells a service provided by another service supplier. Model examples of this kind of activities are virtual operators which sell telecommunications services offered by another entity as their own brand.⁵⁷ The reselling of telecommunications services which raise doubts concerning their classification as telecommunications services may create more serious problems. The

⁵³ Recital 37 of the CJEU judgment in case C 142/18.

⁵⁴ Recitals 42–43 of the CJEU judgment in C 142/18.

⁵⁵ Recital 44 of the CJEU judgment in case C 142/18.

⁵⁶ Recitals 46–48 of the CJEU judgment in case C 142/18.

⁵⁷ In Poland, inter alia, retail networks (e.g. Carrefour) or banks as separate companies (e.g. mBank) carried out such operations.

above-mentioned services connected with the provision of functionalities offered in vehicles, where a vehicle producer buys a telecommunications service from a service supplier and the service constitutes an element of a vehicle functionality, e.g. the above-mentioned telediagnosics services, can be an example of that. One cannot exclude a situation in which the functionalities of the vehicle will include such services which will raise no doubts that they constitute telecommunications services, e.g. a given vehicle ensures a possibility of making telephone calls to any national numbers. In such cases, if the transmission of signals is ensured by a vehicle producer,⁵⁸ it should be recognised as the reselling of another service provider's telecommunications service in its own name and on its own behalf, and all the obligations of a service provider would burden it.

The Directive 2018/1972 introduces considerable changes to the definition of an electronic communications service and defines it in Article 2(4) as a service normally provided for remuneration via electronic communications networks, which encompasses, with the exception of services providing, or exercising editorial control over, content transmitted using electronic communications networks and services, the following types of services:

- internet access service defined in Regulation (EU) 2015/2120 of 25 November 2015 laying down measures concerning open internet access and setting up a new retail pricing mechanism for Union-wide regulated roaming services, and amending Directive 2002/22/EC and Regulation (EU) No 531/2012 (OJ L 310/1, 26.11.2015);
- interpersonal communications service (defined in Article 2(5) Directive 2018/1972);
- services consisting wholly or mainly in the conveyance of signals such as transmission services used for the provision of machine-to-machine services and for broadcasting.

First of all, it should be pointed out that the definition in the Framework Directive encompasses an introduction and subsection 3 from the definition laid down in para. (1) in Directive 2018/1972, with the difference consisting in the fact that the negative aspect of the new definition does not concern information society services but exclusively services connected with ensuring or exercising the control over the content transmitted with the use of electronic communications networks or services. Secondly, there are two new categories that occur within the scope of electronic communications services. In fact, it can be recognised that both these categories are covered in the former definition. There are no doubts that the service of access to the Internet is usually provided for remuneration via an electronic communications network and wholly consists in the conveyance of signals.

Similarly, interpersonal communication services⁵⁹ may also wholly or mainly consist in the transmission of signals. As a result, as it is rightly indicated in the

⁵⁸ As a rule, in such a case, a vehicle is equipped with a SIM card ensuring transmission of signals and car users do not have to ensure transmission on their own, e.g. with the use of their own telephones connected to a vehicle.

⁵⁹ In accordance with Article 2(5) Directive 2018/1972, "interpersonal communications service" means a service normally provided for remuneration that enables direct interpersonal

doctrine, the new definition of an electronic communications service does not eliminate the former essential doubt connected with the interpretation of the phrase: 'wholly or mainly consists in the transmission of signals in a network', and introduces additional doubts connected with the classification of interpersonal communication services, including their division into services making use of numbers and those not doing that.⁶⁰ In consequence, one can expect that the above-mentioned problems with classification of services will not be eliminated and may additionally intensify, especially if it is taken into account that general authorisation is not required in case of other than number-independent interpersonal communications services (Article 12 para. 2 Directive 2018/1972).

6. CONCLUSIONS

Summing up the above discussion concerning the classification of activities as a telecommunications activity requiring entry into the register of telecommunications entrepreneurs, it is worth quoting the introduction to the opinion of the Advocate General, Maciej Szpunar, in case C-347/14⁶¹ concerning audio-visual media services, in which he stated: "We all know what a horse is." That was one of the definitions contained in the first Polish encyclopaedia, published in the eighteenth century. The problem of defining an audio-visual media service in the internet context, which is the subject of the present case, might seem similar and intuitively everyone is capable of identifying such a service. However, when it comes to describing it in legal language, it is difficult to find terms which are at the same time sufficiently clear-cut and comprehensive.' The opinion fully translates into the problem of proper and clear definition of telecommunications services and their separation from other services, in particular information society services (services provided via electronic media) and audio-visual services. However, the above problem is to a great extent connected with the issue of state control over telecommunications activities and risks that entrepreneurs have to face in this respect.

It must be remembered that being involved in telecommunications activities within the scope that is not covered in the application for the entry to the register of telecommunications entrepreneurs may result in the imposition of a fine of up to 3% of that entrepreneur's revenue obtained in the prior calendar year (Article 209 para. 1(2) in conjunction with Article 210 para. 1 TL). On the other hand, the entry to the register regardless of the fact that there is no such obligation is connected not only with the necessity to comply with the regimes related to, e.g. the content of a contract on the provision of telecommunications services but also potentially

and interactive exchange of information via electronic communications networks between a finite number of persons, whereby the persons initiating or participating in the communication determine its recipient(s) and does not include services which enable interpersonal and interactive communication merely as a minor ancillary feature that is intrinsically linked to another service'.

⁶⁰ Compare J. Woźny, *Europejski kodeks łączności elektronicznej – kategoryzacja usług łączności elektronicznej*, internetowy Kwartalnik Antymonopolowy i Regulacyjny 1(9), 2020, pp. 53–54.

⁶¹ Legalis No. 1281174; ECLI:EU:C:2015:434, <http://curia.europa.eu/juris>.

additional burdens such as the necessity to pay a telecommunications fee (Article 183 para. 1 in conjunction with Article 183 para. 1a TL), or contribute to the net cost of common service provision by an assigned operator (Article 97 TL). At the same time, at the stage of reporting telecommunications operations, only a telecommunications entrepreneur is to evaluate whether the activities require entry to the register or not. The correctness of this evaluation will be verified by the registering authorities after the entry to the register and in the case of many types of activities, an entrepreneur cannot be sure if the evaluation has been right.

BIBLIOGRAPHY

- Etel M., *Kontrola i odpowiedzialność jako problemy charakteryzujące regulowaną działalność gospodarczą (analiza z uwzględnieniem działalności telekomunikacyjnej)*, Prace Naukowe Uniwersytetu Ekonomicznego we Wrocławiu 495, 2017.
- Etel M., *Reglamentacja działalności gospodarczej na gruncie przepisów ustawy z 6.3.2018 r. – Prawo przedsiębiorców*, Monitor Prawniczy 13, 2018.
- Farr S., Oakley V., *EU Communications Law*, 2nd edn, London 2006.
- Piątek S., *Prawo telekomunikacyjne Wspólnoty Europejskiej*, Warszawa 2003.
- Piątek S., *Rozprowadzanie programów jako usługa telekomunikacyjna*, internetowy Kwartalnik Antymonopolowy i Regulacyjny 7(4), 2015.
- Piątek S., *Prawo telekomunikacyjne. Komentarz*, Legalis 2019.
- Rogalski M., Kawalek K., *Prawo telekomunikacyjne. Komentarz*, LEX 2010.
- Smillie G., *Analogue and Digital Communication Techniques*, Newnes 2002.
- Strzelbicki M., *Wpis do rejestru działalności regulowanej*, Ruch Prawniczy Ekonomiczny i Socjologiczny 4, 2005.
- Telecommunications Law and Regulation*, Walden I., Angel J. (eds), 2nd edn, Oxford 2006.
- Trela A., *Aspekty materialnoprawne wpisu do rejestru przedsiębiorców telekomunikacyjnych – zagadnienia wybrane*, Prace Naukowe Uniwersytetu Ekonomicznego we Wrocławiu 495, 2017.
- Woźny J., *Europejski kodeks łączności elektronicznej – kategoryzacja usług łączności elektronicznej*, internetowy Kwartalnik Antymonopolowy i Regulacyjny 1(9), 2020.
- Zdyb M., *Podstawowe zasady (standardy) ładu gospodarczego w świetle ustawy z 6.3.2018 r. – Prawo przedsiębiorców*, Monitor Prawniczy 13, 2018.
- Żyrek S., *Status usług over-the-top w prawie telekomunikacyjnym*, Europejski Przegląd Sądowy 10, 2019.

CLASSIFICATION OF ACTIVITIES SUBJECT TO ENTRY IN THE REGISTER OF TELECOMMUNICATIONS ENTREPRENEURS

Summary

The article aims to present the issue concerning the classification of entrepreneurs' activities consisting in a telecommunications activity within the meaning of the provisions of the Act of 16 July 2004: Telecommunications Law. Despite the legal definitions of specific types of activities, determining the legal status of many services provided with the use of telecommunications networks poses significant practical problems and, consequently, increases risks for

entrepreneurs as they lack the appropriate authorisation to conduct telecommunications activities required by regulations or obtain entry into the register of telecommunications entrepreneurs for an activity that is not telecommunications. The emergence of new activities and the development of new communication techniques only increase the above-mentioned problem. Partial explanation and additional guidance on the interpretation of legal definitions of specific types of telecommunications activities are provided by case law of the Court of Justice of the European Union. However, in many cases, it is an entrepreneur who eventually has to make the appropriate decision regarding notification of his activity to the registry of telecommunications entrepreneurs. New categories of electronic communications services introduced by the regulations on the European Electronic Communications Code do not solve the problem and even increase it due to definition-related ambiguities left unresolved. The article makes an attempt to clarify interpretative doubts in order to allow defining a demarcation line between regulated activities requiring entry into the register of telecommunications entrepreneurs and activities remaining outside the scope of the provisions of the Telecommunications Law. The author applied a dogmatic approach when analysing literature and the national and also EU case law.

Keywords: telecommunications activity, entry into the register of telecommunications entrepreneurs, provision of a telecommunications network, telecommunications service, provision of telecommunications services, associated facilities, associated services

KWALIFIKACJI DZIAŁALNOŚCI PODLEGAJĄCEJ OBOWIĄZKOWI WPISU DO REJESTRU PRZEDSIĘBIORCÓW TELEKOMUNIKACYJNYCH

Streszczenie

Przedmiotem artykułu jest omówienie zagadnienia kwalifikacji działalności przedsiębiorcy jako działalności telekomunikacyjnej w rozumieniu przepisów ustawy Prawo telekomunikacyjne. Pomimo prawnych definicji poszczególnych rodzajów działalności, określenie statusu szeregu usług świadczonych z wykorzystaniem sieci telekomunikacyjnych nastęrcza istotnych problemów praktycznych. Niesie to za sobą ryzyko dla przedsiębiorców związane z brakiem uzyskania stosownych uprawnień do prowadzenia działalności telekomunikacyjnej, pomimo istnienia takiego obowiązku, lub z uzyskaniem wpisu do rejestru przedsiębiorców telekomunikacyjnych dla działalności, która nie stanowi działalności telekomunikacyjnej. Pojawiające się nowe rodzaje działalności oraz rozwój nowych technik komunikacji jedynie pogłębiają powyższy problem. Częściowego wyjaśnienia oraz dodatkowych wskazówek w zakresie wykładni prawnych definicji poszczególnych rodzajów działalności telekomunikacyjnej dostarcza orzecznictwo Trybunału Sprawiedliwości Unii Europejskiej. W wielu przypadkach to przedsiębiorca jednak musi podjąć stosowną decyzję dotyczącą zgłoszenia swojej działalności do rejestru przedsiębiorców telekomunikacyjnych. Wprowadzenie nowych kategorii usług łączności elektronicznej w przepisach Europejskiego Kodeksu Łączności Elektronicznej, przy pozostawieniu dotychczasowych niejasności definicyjnych, nie tylko nie eliminuje powyższego problemu, ale może go nasilić. Celem artykułu jest próba wyjaśnienia wątpliwości interpretacyjnych, co pozwoli nakreślić linię demarkacyjną pomiędzy regulowaną działalnością wymagającą dokonania wpisu do rejestru przedsiębiorców telekomunikacyjnych a działalnością pozostającą poza zakresem przepisów ustawy Prawo telekomunikacyjne. W pracy zastosowano metodę dogmatyczno-prawną przy analizie piśmiennictwa i orzecznictwa krajowego, a pomocniczo również orzecznictwa sądów unijnych.

Słowa kluczowe: działalność telekomunikacyjna, wpis do rejestru przedsiębiorców telekomunikacyjnych, dostarczanie sieci telekomunikacyjnych, usługa telekomunikacyjna, świadczenie usług telekomunikacyjnych, udogodnienia towarzyszące, usługi towarzyszące

CALIFICACIÓN DE ACTIVIDAD SOMETIDA A LA INSCRIPCIÓN AL REGISTRO DE EMPRESARIOS DE TELECOMUNICACIÓN

Resumen

El artículo analiza la calificación de actividad de empresario como actividad relacionada con telecomunicación a la luz de la ley Derecho de telecomunicación. A pesar de numerosas definiciones legales de sectores de actividad económica, la determinación de estado de múltiples servicios prestados con el uso de red de telecomunicación ocasiona problemas importantes en la práctica. Esto conlleva riesgos para los empresarios relacionados con falta de obtener autorizaciones pertinentes para llevar a cabo la actividad de telecomunicación a pesar de que exista tal obligación o falta de conseguir la inscripción al registro de actividad de telecomunicación para la actividad que no constituya la actividad de telecomunicación. Los nuevos tipos de actividad que surgen y el desarrollo de nuevas tecnologías de comunicación sólo complican este problema. Una explicación parcial y pautas adicionales sobre la interpretación de definiciones legales de tipos particulares de actividad de telecomunicación están en la jurisprudencia del Tribunal de Justicia de la Unión Europea. Sin embargo, en numerosos casos es el empresario quien ha de tomar decisión relativa a la inscripción de su actividad en el registro de empresarios de telecomunicación. La introducción de nuevas categorías de servicios de comunicación electrónica en el Código Europeo de Comunicaciones Electrónicas, dejando al mismo tiempo las definiciones poco claras, no sólo no elimina el problema, sino puede intensificarlo. El artículo intenta explicar dudas interpretativas que permitan delimitar la actividad que requiere la inscripción en el registro de empresarios de telecomunicación y delimitar la actividad que está fuera del ámbito de aplicación de la ley Derecho de telecomunicación. El trabajo aplica el método dogmático analizando la literatura y jurisprudencia nacional y también la jurisprudencia de tribunales comunitarios.

Palabras claves: actividad de telecomunicación, inscripción al registro de empresarios de telecomunicación, suministro de red de telecomunicación, servicio de telecomunicación, prestación de servicios de telecomunicación, facilidades complementarias, servicio complementario

КВАЛИФИКАЦИЯ ХОЗЯЙСТВЕННОЙ ДЕЯТЕЛЬНОСТИ, ПОДЛЕЖАЩЕЙ ОБЯЗАТЕЛЬНОЙ РЕГИСТРАЦИИ В РЕЕСТРЕ ТЕЛЕКОММУНИКАЦИОННЫХ ПРЕДПРИЯТИЙ

Аннотация

Предметом статьи является обсуждение вопроса, какая хозяйственная деятельность должна квалифицироваться как деятельность в сфере телекоммуникаций в понимании Закона «О телекоммуникациях». Несмотря на существование юридических определений отдельных видов деятельности, определение статуса ряда услуг, оказываемых с использованием телекоммуникационных сетей, весьма проблематично. Для предпринимателей это влечет за собой

риски, связанные либо с отсутствием обязательных разрешений на осуществление деятельности в телекоммуникационной сфере, либо с регистрацией в качестве телекоммуникационного предприятия для осуществления деятельности, которая, собственно говоря, не является деятельностью в телекоммуникационной сфере. Появление новых видов деятельности и разработка новых методов коммуникации лишь усугубляют эту проблему. Частичное разъяснение и дополнительные указания по толкованию юридических определений отдельных видов деятельности в сфере телекоммуникаций предоставляет судебная практика Суда Европейского союза. Однако, во многих случаях решение об обращении за регистрацией в Реестр телекоммуникационных предприятий принадлежит самому предпринимателю. Внесение новых категорий услуг в сфере электронных коммуникаций в Европейский кодекс электронных коммуникаций в условиях, когда сохраняются прежние неясности относительно юридических определений, не только не устраняет описанную проблему, но может привести к ее усугублению. Цель статьи – попытаться прояснить сомнения в толковании определений с тем, чтобы провести разграничение между регулируемой деятельностью, требующей внесения в реестр телекоммуникационных предприятий, и деятельностью, не входящей в сферу действия Закона «О телекоммуникациях». В работе использован догматический метод с проведением анализа отечественной литературы и судебной практики и дополнительно – судебной практики ЕС.

Ключевые слова: деятельность в сфере телекоммуникаций; внесение в Реестр телекоммуникационных предприятий; предоставление доступа к телекоммуникационным сетям; телекоммуникационные услуги; предоставление телекоммуникационных услуг; сопутствующие устройства; сопутствующие услуги

DIE QUALIFIZIERUNG VON TÄTIGKEITEN, DIE DER EINTRAGUNGSPFLICHT IM REGISTER DER TELEKOMMUNIKATIONSBETREIBER UNTERLIEGEN

Zusammenfassung

In dem Beitrag wird die Frage erörtert, ob die Tätigkeit eines Unternehmens als Telekommunikationstätigkeit im Sinne der Bestimmungen des polnischen Telekommunikationsgesetzes zu qualifizieren ist. Trotz der gesetzlichen Begriffsbestimmung der einzelnen Wirtschaftszweige wirft die Bestimmung des Status einer Reihe von Diensten, die unter Nutzung von Telekommunikationsnetzen erbracht werden, erhebliche praktische Probleme auf. Dies birgt für Unternehmer Risiken im Zusammenhang dem Fehlen der entsprechenden Genehmigungen für Telekommunikationstätigkeiten trotz Bestehens dieser Pflicht oder der Eintragung in das Register der Telekommunikationsunternehmen für einen Gegenstand, der keine Telekommunikationstätigkeit darstellt. Durch die Entstehung neuer Wirtschaftszweige und die Entwicklung neuer Kommunikationstechniken verschärft sich das beschriebene Problem noch. Eine teilweise Klärung und zusätzliche Richtlinien zur Auslegung der Legaldefinitionen der einzelnen Arten von Telekommunikationstätigkeiten liefert die Rechtsprechung des Gerichtshofs der Europäischen Union. In vielen Fällen muss jedoch das Unternehmen eine entsprechende Entscheidung über die Eintragung seiner Geschäftstätigkeit im Register der Telekommunikationsunternehmen treffen. Die Einführung neuer Kategorien von elektronischen Kommunikationsdiensten in die Bestimmungen des European Electronic Communications Code (EECC) ohne Beseitigung der bestehenden Unklarheiten bei den Begriffsbestimmungen lässt das beschriebene Problem nicht nur weiterbestehen, sondern kann

dieses noch verschlimmern. Ziel des Artikels ist es, Erläuterungen zur Überwindung eventueller Interpretationsschwierigkeiten zu liefern und reglementierte Tätigkeiten, die im Register der Telekommunikationsunternehmen eingetragen werden müssen von Tätigkeiten abzugrenzen, die außerhalb des „Radars“ der Bestimmungen des Telekommunikationsgesetzes liegen. Die Arbeit bedient sich zur Analyse der Rechtsliteratur und der nationalen Rechtsprechung der rechtsdogmatischen Methode und zieht außerdem auch die Rechtsprechung der Unionsgerichte heran.

Schlüsselwörter: Telekommunikationstätigkeit, Eintragung im Register der Telekommunikationsbetreiber, Bereitstellung von Telekommunikationsnetzen, Telekommunikationsdienste, Erbringung von Telekommunikationsdiensten, zugehörigen Anwendungen, zugehöriger Dienst

QUALIFICATION DES ACTIVITÉS SOUMISES À INSCRIPTION AU REGISTRE DES ENTREPRISES DE TÉLÉCOMMUNICATIONS

Résumé

L'objet de l'article est de discuter de la question de la qualification de l'activité d'un entrepreneur comme activité de télécommunications au sens des dispositions de la loi sur les télécommunications. Malgré les définitions juridiques des différents types d'activité, la détermination du statut d'un certain nombre de services fournis avec l'utilisation des réseaux de télécommunications pose des problèmes pratiques importants. Cela comporte des risques pour les entrepreneurs liés à l'absence d'autorisations appropriées pour exercer des activités de télécommunications malgré l'existence d'une telle obligation ou à l'obtention d'une inscription au registre des entrepreneurs de télécommunications pour des activités qui ne constituent pas des activités de télécommunications. L'émergence de nouvelles activités et le développement de nouvelles techniques de communication ne font qu'exacerber le problème ci-dessus. La jurisprudence de la Cour de justice de l'Union européenne fournit une explication partielle et des indications supplémentaires sur l'interprétation des définitions juridiques de types particuliers d'activités des télécommunications. Cependant, dans de nombreux cas, c'est l'entrepreneur qui doit prendre la décision appropriée concernant l'inscription de son activité au registre des entrepreneurs de télécommunications. L'introduction de nouvelles catégories de services de communications électroniques dans les dispositions du Code européen des communications électroniques, tout en laissant les ambiguïtés de définition existantes, non seulement n'élimine pas le problème ci-dessus, mais peut l'aggraver. Le but de l'article est de tenter de clarifier les doutes d'interprétation qui permettent de tracer une ligne de démarcation entre l'activité réglementée nécessitant une inscription au registre des entrepreneurs des télécommunications et l'activité restant en dehors du «radar» des dispositions de la loi sur les télécommunications. L'étude utilise la méthode dogmatique-juridique pour analyser la littérature et la jurisprudence nationale, ainsi que la jurisprudence des tribunaux de l'UE.

Mots-clés: activité de télécommunications, inscription au registre des entrepreneurs des télécommunications, fourniture de réseaux de télécommunications, service de télécommunications, fourniture de services de télécommunications, facilités d'accompagnement, service d'accompagnement

QUALIFICA DI ATTIVITÀ SOGGETTA A REGISTRAZIONE OBBLIGATORIA NEL REGISTRO DELLE IMPRESE DI TELECOMUNICAZIONI

Sintesi

Oggetto dell'articolo è la discussione della questione della qualifica dell'attività di un'impresa come attività di telecomunicazioni, ai sensi delle norme della legge Diritto delle telecomunicazioni. Nonostante le definizioni giuridiche dei singoli tipi di attività, la definizione dello status di una serie di servizi forniti con utilizzo delle reti di telecomunicazioni suscita essenziali problemi pratici. Porta con sé il rischio per le imprese legato al mancato ottenimento delle necessarie autorizzazioni per la conduzione di attività di telecomunicazioni nonostante l'esistenza di tale obbligo, oppure all'ottenimento dell'iscrizione al registro delle imprese di telecomunicazioni per una attività che non costituisce attività di telecomunicazioni. I nuovi tipi di attività che si presentano e lo sviluppo di nuove tecniche di comunicazione approfondiscono il problema di cui sopra. Un parziale chiarimento nonché ulteriori indicazioni nell'ambito dell'interpretazione delle definizioni giuridiche dei singoli tipi di attività di telecomunicazioni sono forniti dalla giurisprudenza della Corte di giustizia dell'Unione europea. Tuttavia in molti casi è l'imprenditore stesso che deve prendere la decisione adeguata riguardante l'iscrizione della propria attività nel registro delle imprese di telecomunicazioni. L'introduzione di nuove categorie di servizi di comunicazioni elettroniche nelle norme del Codice europeo delle comunicazioni elettroniche, lasciando l'attuale poca chiarezza delle definizioni, non solo non elimina il problema di cui sopra, ma lo può aggravare. Lo scopo dell'articolo è un tentativo di chiarimento dei dubbi interpretativi che permetta di tracciare una linea di demarcazione tra l'attività regolamentata che richiede l'iscrizione al registro delle imprese di telecomunicazioni e l'attività che resta fuori dal "radar" delle norme della legge Diritto delle telecomunicazioni. Nel lavoro è stato utilizzato il metodo dogmatico-giuridico, analizzando la letteratura e la giurisprudenza nazionale, e ausiliariamente anche la giurisprudenza dei tribunali comunitari.

Parole chiave: attività di telecomunicazioni, iscrizione al registro delle imprese di telecomunicazioni, fornitura di reti di telecomunicazioni, servizio di telecomunicazioni, fornitura di servizi di telecomunicazioni, applicazioni correlate, servizi correlati

Cytuj jako:

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