



**KL&MLAW**

Kobyłańska · Lewoszewski · Mednis

# European Electronic Communications Code (EECC) implementation in Poland

Warsaw, 15 July 2024

# **IMPLEMENTATION OF THE EECC TO THE POLISH LEGAL FRAMEWORK**

This publication is for educational and informational purposes only and is not a substitute for professional legal advice.

The purpose of this publication is to outline changes in the Polish legal system with reference to the implementation of the Directive (EU) 2018/1972 of the European Parliament and of the Council of 11 December 2018 establishing the European Electronic Communications Code (“EECC”). In particular, the text aims to highlight some possible new obligations to electronic communications undertakings.

© Copyright by Kobyłańska Lewoszewski Mednis sp. j., 2024 r.

## 1. IMPLEMENTATION OF THE EECC

Polish lower Chamber of Parliament (Sejm) enacted an Act on Electronic Communications Law ("**ECL**") which will implement Directive (EU) 2018/1972 of the European Parliament and of the Council of 11 December 2018 establishing the European Electronic Communications Code ("**EECC**"). The ECL will replace the existing Act of 16 July 2004 Telecommunications Law ("**TL**") and certain provisions of the Act of 18 July 2002 on the Provision of Electronic Services ("**PES**"). Apart from that, most provisions of the new Act on Counteracting Abuse in Electronic Communications ("**CAEC**") have come into force.

Below, we present what we believe are the most important changes for telecommunications business resulting from the ECL draft and CAEC. This analysis has been carried out based on the CAEC of the 28<sup>th</sup> of July 2023 and the draft of ECL, which was passed by the Sejm on 12<sup>th</sup> of July 2024.

Should you have any questions, please do not hesitate to contact me.



**Marcin Lewoszewski**

Partner

[Marcin.Lewoszewski@KLMLAW.PL](mailto:Marcin.Lewoszewski@KLMLAW.PL)

## **2. EXPANSION OF SUBJECT AND OBJECT SCOPE UNDER ECL**

One of the most significant resulting from the ECL is the extension of the material scope of this act to providers of electronic communications services, while the TL applied to providers of telecommunications services only.

### **2.1. Electronic communications service**

Electronic communications service will be defined as a service provided via a telecommunications network, usually for remuneration, excluding services related to the provision or exercise of control over content transmitted using telecommunications networks or electronic communications services (Article 2 (76) of ECL). It follows from the above, that a service may be deemed as an electronic communications service regardless of being provided for remuneration.

The provisions of ECL state that electronic communications services include are: internet access service, interpersonal communications service, and services consisting wholly or mainly of the transmission of signals (in particular sending signals in interpersonal communication regardless of technology used, as well as transmission service used in order to provide communications services between machines and for broadcasting).

### **2.2. Electronic communication service providers**

Based on the ECL draft, the term/concept? of electronic communication service providers is understood firstly as providers of publicly available telecommunications services and secondly as entities providing publicly available interpersonal communication services not using numbers (Article 2 (6) of ECL).

### **2.3. Interpersonal communication service**

The term interpersonal communication service pertains to a service that enables direct interpersonal and interactive exchange of information over a telecommunications network among a finite number of persons, where/in which the persons initiating or participating in the call determine the recipient or recipients of the call, excluding services in which the interpersonal and



interactive communication is solely a subordinate function to another primary service (Article 2 (78) of ECL).

In addition, the ECL draft indicates that interpersonal communication services are both interpersonal communication services that use numbers (i.e., services that enable calls to be made to numbers from the national numbering plan or international numbering plans) and interpersonal communication services that do not use numbers (i.e., services that do not enable the aforementioned calls).

## **2.4. Applicability of ECL**

Until now, the TL provisions applied to providers of telecommunications services which were understood as service "consisting primarily of the transmission of signals over a telecommunications network". However, the provisions of the ECL will also cover services that enable interpersonal and interactive exchange of information. Thus, the transmission of signals over a telecommunications network will not be relevant to the applicability of the ECL if the service enables interpersonal and interactive exchange of information.

In practice, the regulations of ECL will apply to services such as email, instant messaging, and group chats. Providers of such services will need to comply with certain obligations imposed under the ECL.

As in TL, only undertakings which carry out telecommunications activities are subject to the obligation of being entered into the Telecommunications Undertakings Register. Electronic communications providers, who are not telecommunications undertakings (e.g., interpersonal communication services providers) are not subject to that obligation (Article 5 (1) of ECL).

## **3. OBLIGATIONS OF ELECTRONIC COMMUNICATIONS UNDERTAKINGS**

Below we identify the key new obligations or changes in the obligations of electronic communications undertakings. Some of the obligations will apply only to telecommunications undertakings, while others will also apply to electronic communications undertakings (*inter alia* providers of interpersonal communication services).

Note that when the obligations described below apply to electronic communications undertakings, it means both telecommunications undertakings and providers of interpersonal communications services.

## **3.1. CARRYING OUT TELECOMMUNICATIONS ACTIVITY UNDER ECL**

### **3.1.1. Obligation of responding to inquiries**

Until now, under the TL provisions, only telecommunications undertakings or entities that have obtained a radio license were subject to the obligation of responding to inquiries of the President of the Office of Electronic Communications ("UKE"). Under the ECL, all providers of electronic communications services (excluding government users) will be required to respond to inquiries from the President of UKE. Therefore, providers of interpersonal communication services will also be subject to this obligation. The scope of the obligation will be to provide the President of UKE with information necessary for the President of UKE to enact rights and fulfil obligations, while such information will include in particular financial information, information on planned development of networks or services and information about the existing telecommunications infrastructure (Article 19 (1) of ECL).

Moreover, when the aforementioned information is insufficient, the President of UKE will be entitled to obtain necessary information from other entities operating in the electronic communications market or other closely related markets (Article 19 (2) of ECL).

The request for information shall be proportionate to the pursued objective and should include all necessary elements listed in ECL. The request will most probably be made on special forms prepared by the UKE (Article 19 (4-5) of ECL).

## **3.2. STATE DEFENSE AND SECURITY OBLIGATIONS UNDER ECL**

Important changes in state defence and security obligations of telecommunications undertakings include:

- introducing priority rule for key service operators and critical infrastructure operators in terms of restoration of provision of public telecommunication networks or of publicly available telecommunication services (Article 40 (1) (2) of ECL);
- new premises for the President of UKE to impose restrictions as a result of the CRP alert level, as well as restrictions on the use of radio equipment in the event of permanent or cyclic interference with a radio device used directly for defence, state security and public safety and order (Article 40 (2) of ECL);

- new regulation allowing the President of UKE to potentially restrict, upon request of certain authorities, the use of resources allocated to a telecommunications undertaking, and transfer them for use for a period of time determined by the entity (Article 40 (1) (3) of ECL);
- adding obligation to make available to the authorized entities location data arising or transmitted on the telecommunications network of another telecommunications undertaking under national roaming, as well as location data in their possession, in a manner that ensures the current and up-to-date location of the device in the territory of the Republic of Poland, regardless of the technology of the service provided. The sharing of location data should begin without undue delay after receiving the request and last for the period specified in the request. (Article 45(2) of ECL);
- indication that electronic communications undertakings shall “provide technical conditions for the recording and release of communications and data by the entity designated in the court or prosecutor's order” rather than “record and make available communications and data” (Article 43 (1) of ECL);
- exemptions from the obligation to provide conditions for recoding communications and data (Article 43 (2) of ECL).

Additionally, an electronic communications undertaking will be required to provide technical conditions for recording and sharing of electronic messages and other data, at their own expense, to courts and the public prosecutors and to provide technical and organizational conditions for access and recording that allow simultaneous and mutually independent acquisition of information by the authorities transmitted or created as part of the publicly available telecommunications service provided. (Article 43 (1) (1 and 2) of ECL).

### **3.2.1. Data retention obligation**

Data subject to the retention obligation must be made available to the authorities in a specific and uniform electronic format (Article 47 (1) (2) of ECL).

Also, in case the telecommunications undertaking takes over the users of the telecommunications undertaking which has ceased operations, the telecommunications undertaking is also required to accept the data subject to the retention obligation. In case there is no undertaking taking over the users or in case of insolvency of the undertaking, the data are accepted by the President of UKE (Article 48 of ECL).

The scope of the data subject to the retention obligation has been extended to include data necessary to uniquely identify the end user (Article 49 (1) of ECL). Such data may include the

number of communications port or the IP address. An executive regulation will be enacted which will specify the type, structure and means of saving the data subject to the retention obligation (Article 49 (2) of ECL).

### **3.2.2. Execution of obligations**

Certain obligations, including the obligation to provide conditions for access and saving of data, providing access to the processed data as well as the obligation to retain the processed data, may be fulfilled by another electronic communications undertaking (Article 50 (1) of ECL). These obligations may also be fulfilled jointly by two or more electronic communications undertakings (Article 50 (2) of ECL).

### **3.2.3. Obligation to provide information to the President of UKE**

An electronic communications undertaking will be required to provide the President of UKE with information on: the organizational unit or a person with registered office or place of residence in the territory of Poland authorized to represent the undertaking in matters related to the performance of certain obligations, as well as on an electronic communications undertaking which will carry out obligations for that undertaking on the basis of the relevant outsourcing agreement. (Article 51 (1) of ECL).

Each change of such information shall be provided to the President of UKE without undue delay (Article 51 (2) of ECL).

### **3.2.4. Blocking of calls and communications on request of authorized authorities**

Upon request of certain authorities, the President of UKE will be authorized to immediately impose, in an administrative decision, an obligation to block, no later than within six hours of receiving the decision, calls and electronic communications, if they may compromise defence, state security and public safety and order, or to enable such blockade by authorized entities. Such decision may be announced verbally and delivered to the party in writing within 14 days of its announcement. Such decision is immediately enforceable (Article 53 ECL).

## **3.3. TELECOMMUNICATION ACCESS**

The main change regarding the telecommunication access comes down to the change of a form of an agreement for telecommunications access. It will have to be concluded in a documented form under pain of nullity, rather than in writing (Article 168 ECL).



### **3.3.1. Obligation of providing access to wiring of the building**

New provisions, regulating the obligation of providing access to wiring of a building has been introduced in ECL. A telecommunications undertaking, as well as the owner of the building's wiring, between the ends of networks in a building and a closest point of distribution (except for the government user), upon a request of a telecommunications undertaking, will be required to provide access to such wiring, if the duplication of such wiring is economically unviable or technically unfeasible (Article 173 (1) of ECL).

### **3.3.2. Conditions of access**

The President of UKE will be allowed to define, by issuing a decision, objective, transparent, proportionate, and indiscriminatory conditions under which an access to the wiring in question should be made available, as well as conditions for the extended access to wiring (regulated under Article 177 of ECL) (Article 174 (1) of ECL).

In certain circumstances, a telecommunications undertaking will be required to provide the President of UKE with an agreement on providing telecommunication access on a durable medium, within 14 days of the conclusion of such an agreement (Article 175 (1) of ECL), as well as in case of a change of the agreement (Article 175 (2) of ECL). Such agreements, except for the company secrecy included in the agreement (information on the settlements from providing telecommunications access cannot constitute company secrecy), are publicly available and will be made available to interested parties by the President of UKE upon request (Article 175 (3) of ECL).

### **3.3.3. Symmetrical access obligations**

ECL introduced provisions regulating symmetrical access obligations which pertain to certain situations when the President of UKE may require telecommunications undertakings to provide different types of telecommunications access, described in the ECL. Details on symmetrical access obligations have been set out in Articles 176 – 181 of ECL.

### **3.3.4. Coordination of the telecommunications access**

Implementation of EECC provisions has introduced in the ECL provisions which allow the President of UKE to settle the dispute on telecommunications access between telecommunications undertakings or between a telecommunications undertaking and an entity required to provide telecommunications access, by decision, upon request of a party, within 60

days of the request (Article 182 (1) of ECL). Details on the request and this proceeding before the President of UKE have been provided in the following provisions (Article 182 (2) – (13) of ECL).

When settling a dispute, the President of UKE will be able to either:

- determine the content of the contractual relationship replacing the access agreement;
- amend in whole or in part the access agreement or the decision on telecommunications access;
- require the parties to amend the access agreement;
- terminate the access agreement (Article 185 (1) of ECL).

The President of UKE, when settling the dispute will also be able to impose a symmetrical access obligation (Article 186 (1) of ECL) or an obligation to share frequency with the undertaking required to provide access on a specific territory, as well as assess conditions of such sharing (Article 187 (1) of ECL).

In cases when it is justified with a need of providing protection of end-users, effective competition or providing interoperability of services, The President of UKE will also be able to amend the access agreement or decision on telecommunications access by decision (Article 188 (1) of ECL).

### **3.3.5. Territorial decisions on telecommunications access**

In certain cases, indicated in ECL (e.g., in a decision on conditions of telecommunications access or in a decision on extended telecommunications access), the President of UKE will be able to issue a decision pertaining to a specific location and unspecified number of entities, taking into account the rule of indiscriminate (Article 192 (1) of ECL).

The President of UKE will be able to issue a territorial decision only for a period of no longer than seven years (Article 194 (1) of ECL) and it will not revoke individual decisions, unless stated otherwise in the territorial decision (Article 192 (2) of ECL).

Prior to the proclamation of the territorial decision, the President of UKE will publish information on:

- acceding to develop a draft territorial decision, its amendment or repeal, together with information on its subject matter and assumptions;
- how to get acquainted with the case files and the place where they are available for inspection;
- the right to submit position on the matter, including the manner, place and time limit (Article 195 (1) of ECL).

Everybody is allowed to submit positions on the matter, within a date specified by the President of UKE, no shorter than 30 days (Article 196 (1) of ECL). The President of UKE will be required to publish a report, which will include comments on submitted positions (Article 196 (2) of ECL).

The territorial decision shall be published in the Official Journal of the Office of Electronic Communications (Article 197 (1) of ECL). It will be possible to appeal from the decision within two months of the announcement of the decision (Article 197 (2) of ECL) and the court will hear all cases concerning such decision jointly (Article 197 (3) of ECL). It should be noted that a request for restoration of the deadline for submitting the appeal will be inadmissible (Article 197 (4) of ECL).

### **3.4. REGULATING ELECTRONIC COMMUNICATIONS MARKET**

Analysing the electronic communications market is a main tool and competence allowing the the President of UKE to regulate the electronic communications market. The provisions on analysing the market already existed in the TL. The new provisions in this regard mainly implement the provisions of EECC.

The President of UKE will analyse the market within the scope of products and services of electronic communications (Article 198 of ECL).

A significant change in relation to proceeding on assessing a relevant market after the analysis, is that the President of UKE will have to take into account the level of competition in the scope of infrastructure in these locations and the results of geographical analysis (Article 200 (1) (1) of ECL). New provisions also introduce criteria for imposing regulatory obligations, including:

- occurrence of insurmountable and non-transitory legal or economic barriers to market access;
- the structure of the market is not conducive to the achievement of effective competition in an appropriate time span, taking into account the state of competition, including in the field of telecommunications infrastructure,
- competition laws are insufficient to adequately counteract the identified market failures (Article 200 (2) of ECL).

When carrying out the market analysis, the President of UKE will have to examine the development of the situation on the market with an assumption that no regulatory obligations have been imposed on the market and taking into account elements specified in the ECL (Article 201 of ECL).

Under this provision, the President of UKE will have to assess whether the market may become competitive in the future, even though the regulatory obligations have not been imposed.

Other provisions regarding the assessment of markets are essentially the same as in the current provisions from the TL, with some minor changes introduced by the EECC. The changes which are worth noting with regard to regulating the electronic communications market include:

- granting the President of UKE the right to submit, jointly with an authority of another Member State relevant for electronic communications, an application to BEREC for an analysis of a potential supranational market, encompassing the European Union or its significant part and located in more than one Member State (Article 199 (1) of ECL);
- introducing for the President of UKE the right to analyse, jointly with an authority of another Member State and relevant for electronic communications, a market deemed as supranational by the European Commission (Article 199 (2) of ECL);
- introducing for the President of UKE the right to, together with one or more regulatory authorities of another Member State, turn to BEREC with a request to conduct a supranational demand analysis for certain products and services among end-users (Article 199 (5) of ECL),
- introducing for the President of UKE the right to impose regulatory obligations mentioned in Article 212 and 214 of ECL (obligations related to providing telecommunications access) on an electronic communications undertaking of significant market power, which does not provide electronic communications services to end-users on the territory of the European Union and does not plan to provide such services in this territory (Article 205 (1) of ECL),
- introducing criteria for assessing a significant market power – an electronic communications undertaking is of significant market power if, on the relevant market, it has an economical position corresponding to domination within the meaning of the EU law (which may be understood as having such market power, so that the undertaking make take actions in a significant amount independently of consumers and competitors) (Article 207 (1) of ECL);
- introducing regulations on assessing a significant power of electronic communications undertaking on another relevant market (Article 208 (1) of ECL),
- introducing right of the President of UKE to amend the imposed regulatory obligations in case of changes on the market, which do not justify carrying out another analysis of the market (Article 210 (1) of ECL).

Potential regulatory obligations have been divided into obligations that may be imposed on the wholesale market (Article 211 – 230 of ECL), migration from infrastructure (Article 231 – 235 of ECL) and to restrictions on retail markets (Article 236 – 237 of ECL).

ECL also introduced provisions regulating specific regulatory conditions (Article 238 – 241 of ECL) as well as specific investing conditions (Article 242 – 257 of ECL).

There were no significant changes introduced in provisions related to the regulatory accounting and calculation of costs (Article 258 – 263 of ECL).

## **3.5. PUBLICLY AVAILABLE ELECTRONIC COMMUNICATIONS SERVICES**

### **3.5.1. Rights of end users**

One of the most significant changes regarding the rights of end-users is the remodelling of concluding an agreement on provision of publicly available electronic communications services.

The possible forms of the agreement have remained unchanged. It is worth noting that the agreement shall not be concluded with a service provider off-premises, in a household, during an unscheduled visit to the consumer's residence – such agreement will be deemed void (Article 284 (4) of ECL).

Another change worth noting is a new right of the President of UKE, regarding cases in which obligations regarding the agreement for provision of publicly available electronic communications services are breached (including obligations regarding the agreement, as well as obligation information prior to the conclusion of the agreement). The authority may impose an immediately enforceable decision with a public warning, indicating the person responsible for the breach of law and the character of the breach, as well as prohibiting the provider from carrying out telecommunications activity for a period up to five years (Article 284 (5) of ECL).

A new change is also the obligation to provide a consumer, prior to the conclusion of the agreement for provision of electronic communications services, with information relevant to those services, which will need to be transferred on a durable medium (Article 285 (1) of ECL). The scope of information subject to this obligation is indicated in the ECL and varies depending on the type of the agreement to be concluded.

New provisions introduce as well:



- rules regarding the method on presentation of pre-contractual information (Article 286 of ECL);
- obligation to provide a concise summary of the terms of the agreement (Article 287 of ECL);
- new obligatory elements for the agreement with a consumer (Article 288 of ECL);
- rules on concluding pre-paid agreements (Article 289 of ECL);
- rules on using tariff packages or option of a service (Article 290 of ECL);
- rules on providing information to consumers with disabilities (Article 291 of ECL);
- provisions on extension of consumer's rights on other entities (micro and small undertakings as well as on non-governmental organisations; Article 292 of ECL);
- rules on termination of the agreement concluded in a documented form (Article 295 of ECL);
- introducing stricter rules on registration of services and authorization of the subscriber (Article 296 of ECL);
- obligation for a provider of Internet access service or publicly available interpersonal communication service to publish up to date information about provided services (Article 300 of ECL);
- provisions on the duration of the agreement (Article 301 of ECL);
- rules on automatic contract renewal (Article 302 of ECL);
- rules on claiming compensation for an early termination of the contract by a subscriber (Article 304 of ECL);
- rules on the provision of services in bundled offers (Article 305 of ECL);
- rules on unilateral changes to the terms of the contract and for non-acceptance of such changes by a subscriber (Article 306 of ECL);
- rules on changing conditions of the agreement concluded for a definite period of time and for an indefinite period (Articles 307 and 308 of ECL);
- rules on returning the costs of end-devices with different rules applicable to consumers, micro- and small undertakings and non-governmental organizations (Articles 309 and 310 of ECL);
- rules on the provision of an independent tool for comparison of services (Articles 313 – 315 of ECL);
- changes in rules on reporting on the quality of provided services (Article 316 of ECL);
- rules on providing a tool for monitoring the services in use (Article 317 of ECL);
- rules on maintaining continuity of the Internet services in case of a change of the provider (Articles 318-321 of ECL);
- minor changes in rules on the change or transfer of numbers (Article 322-327 of ECL);

- exercising right to transfer numbers (Article 329 of ECL);
- rules on subscriber's motions to exercise rights (Article 330 of ECL);
- rules on the return of the prepaid funds (Article 331 of ECL);
- changes related to the subscriber list and sharing of the list (Article 333 of ECL);
- rules concerning location for the purpose of emergency calls (Article 336 – 337 of ECL);
- changes related to the provision of premium services (Article 341 – 348 of ECL).

The important new provisions in the ECL regarding the rights of end users include protection against abuse using telecommunications networks. Service providers shall:

- prevent the use of stolen or lost telecommunications end-devices;
- transmit information identifying such devices to other operators of mobile public telecommunications networks (Article 343 of ECL).

New regulations have also been introduced with regards to direct billing. Direct billing will require prior consent of a subscriber to launch the service and the provider of an electronic communications service shall record the subscriber's consent and deliver it to the subscriber on a durable medium (Article 349 (1) of ECL).

Another crucial change is an introduction of rules on authorization in each case of direct billing, similar to the rules on strong authorization under provisions of the PSD2 directive. They include three categories: knowledge of something that only the subscriber knows about; possession of something that only the subscriber possesses; key characteristics of the subscriber - unless separate regulations provide for a higher level of authorization (Article 350 (1) of ECL).

Other changes include:

- A requirement of introduction of a prior consent in case of providing access to a public telecommunications network through a local radio network, using devices located where the end user is (Article 353 of ECL);
- A prohibition of limiting or preventing the use of access to public telecommunications network through a local radio network chosen by the end-user and of sharing the local radio network for purpose of using access to telecommunications network on behalf of end-users (Article 354 of ECL).

### **3.5.2. Universal service**

Universal service constitutes an implementation of the EECC. It is understood as the service of adequate broadband access to the Internet and voice communication service, provided with use

of any technology in mobile telecommunications network and in stationary telecommunications network, available in a good quality and fair price, available in a fixed location on the territory of Poland (Article 355 (1) of ECL).

In addition to the above/Moreover, a minimal scope of applications which should be available for use within adequate broadband Internet access has been introduced. It includes, among others, applications such as: electronic mail, information search engines or Internet banking/Netbanking/ Online banking (Article 355 (2) of ECL).

The President of UKE will be able to analyse availability and quality of the aforementioned services, taking into account the state of telecommunications market and planned or finished investment projects (Article 357 (1) of ECL). Details on rules of carrying out the analysis have been set out in the ECL.

A key change is the introduction of provisions pertaining to carrying out the contest for the selected undertaking (Article 360 (1) of ECL). The selected undertaking will be required to provide services on a specified territory, if in an analysis the President of UKE concludes that a service is not available or is not provided with good quality. In the conditions for the contest:

- the President of UKE will set out the subject of the contest by indicating obligations within the scope of a universal service or services, identified during the analysis, that needs to be exercised (Article 360 (3) (1) of ECL);
- the territory where those obligations will be exercised (Article 360 (3) (2) of ECL);
- general requirements for the execution of those obligations (Article 360 (3) (3) of ECL);
- the other required information, which will be set out in executive regulations (Article 360 (3) (4) of ECL).

A selected undertaking will be deemed, by a decision, as an undertaking selected for execution of the obligation set out in the decision. Details on carrying out and results of the contest have been set out in the ECL. It is worth noting that in case no undertaking applies for the contest, or no undertaking meets the set out requirement or ensures execution of the described obligations, the President of UKE is entitled to arbitrarily select an undertaking in a decision (Article 361 of ECL).

The selected undertaking may apply for a surcharge to the execution of the obligations, if such execution turns to be unprofitable (Article 369 (1) of ECL).

Surcharge applications shall be submitted within 6 months of the end of the calendar year, when, in the opinion of the selected undertaking, a net cost occurred (Article 370 (1) of ECL).

Rules and details on the surcharge are set out in ECL.

The selected undertaking will be able to cease or limit execution of the obligation to provide services or to offer a special price package or to change the execution of such obligations, if certain justified circumstances described in ECL occur. However, the undertaking will need to inform the President of UKE of reasons, and other key information pertaining to the execution of the obligations (Article 374 of ECL).

If a selected undertaking cannot execute obligations due to reasons beyond their control, they must inform the President of UKE of such reasons, of intent to cease the execution of given obligations and of activities ensuring the continuity of the execution of those obligations (Article 375 of ECL). However, the selected undertaking cannot cease the execution of the given obligations until another undertaking is selected in their place (Article 375 (2) of ECL).

### **3.5.3. Liability for non-performance or improper performance of electronic communications service**

Rules on liability for non-performance or improper performance of electronic communications service are similar to the current rules under TL, with a few changes introduced by ECL.

A new provision was introduced which directly provides that in case of significant permanent or frequent discrepancies between the actual performance of telecommunications services, excluding Internet access services and the terms and conditions stipulated in the contracts, the consumer, after exhausting the complaint procedure, may, in addition to the right to assert a claim for improper performance of the contract, terminate the contract due to the fault of the telecommunications service provider; and the provider will not be entitled to compensation for the premature termination of the agreement (Article 380 of ECL).

### **3.5.4. Electronic communications secrecy and data of end-users**

Electronic communications secrecy under ECL pertains only to publicly available electronic communications services (Article 387 of ECL).

As a rule, the scope of information subject to electronic communications secrecy remains the same as the scope of information subject to telecommunication secrecy under TL. The key change is that electronic communications secrecy pertains not only to telecommunications undertakings but also to providers of interpersonal communications services that do not use numbers (i.e. numbers in national or international numbering plans). This results from the fact that the scope of the provision was extended to entities involved in the performance of electronic

communication activities. This means that undertakings which provide such services will be subject to obligations such as, among others, complying with data retention periods.

Another important change is an introduction of a general need to collect consent from the end-user, in relation to provision of direct marketing or sending unsolicited commercial information. Previously, two consents were to be collected – one for direct marketing under TL and the other for sending commercial information by electronic means under PES. Now, it shall be prohibited to use automatic calling systems or telecommunications end-devices (in particular, the ones used for interpersonal communication), for the purposes of sending unsolicited commercial information by electronic means, including direct marketing, to the subscriber or end-user, unless they have given their prior consent (Article 398 (1) of ECL). This provision pertains not only to electronic communications undertakings or telecommunications undertakings but to every undertaking or entity which sends commercial information or direct marketing by electronic means to end users.

## 4. OTHER KEY CHANGES IN THE ELECTRONIC COMMUNICATIONS FIELD

Other key changes in regard to telecommunications in Poland, in an introduction of the Act on Counteracting Abuse in Electronic Communications (“**CAEC**”) (the first provision of which came into force on 28<sup>th</sup> July 2023). CAEC introduces:

- rights and obligations of telecommunications undertakings related to the prevention and counteraction of electronic communications abuse;
- rules for filing objections against deeming a short text message (SMS) message as electronic communications abuse;
- obligations of electronic mail providers and public entities related to provision or use of electronic mail related to the prevention of the abuse of electronic communications;
- specific rules on processing information subject to telecommunications secrecy which are related to the prevention and counteraction of electronic communications abuse (Article 1 of CAEC).

CAEC introduces the key definition of electronic communications abuse which is understood as the provision or use of telecommunications service or use of telecommunications devices contrary to its purpose or to the law, the purpose or effect of which is to cause harm to the telecommunications company, the end-user or to gain undue benefits (Article 2 (8) of CAEC).



CAEC introduces a general rule, that electronic communications abuse is prohibited and that it may include in particular:

- sending or receiving electronic messages or voice calls on the telecommunications network using telecommunications equipment or programmes, the purpose of which is not to use the telecommunications service, but to register them at the point of connection of telecommunications networks or by billing systems (artificial traffic);
- sending short text messages (SMS) in which the sender impersonates another entity in order to induce the recipient of that message to perform a certain action, in particular, to hand over personal data, unknowingly dispose of property, redirect to a website, request a voice call or install software (smishing);
- unauthorized use or exploitation by a user or telecommunications company making a voice call of address information indicating a natural person, a legal person or an unincorporated organizational unit other than that user or telecommunications company, serving to impersonate another entity, in particular in order to cause fear, a feeling of threat or to induce the recipient of that call to perform a certain action, especially to transfer personal data, unknowingly dispose of property or installation of software (CLI spoofing);
- unlawful modification of address information that prevents or significantly impedes the determination, by authorized entities or telecommunications entrepreneurs involved in the delivery of the message, of the address information of the user sending the message (unauthorized modification of address information) (Article 3 (1) of CAEC).

Within this regard, a telecommunications undertaking is required to undertake proportionate technical and organizational measures, the purpose of which will be to prevent and counteract electronic communications abuse (Article 3 (3) of CAEC).

CAEC establishes CSIRT NASK as the authority responsible for monitoring smishing occurrences (Article 4 (1) of CAEC). CSIRT NASK, on the basis of the monitoring creates a smishing message template (Article 4 (2) CAEC). CSIRT NASK uses an ICT system to inform telecommunications undertaking about the smishing and to submit the applicable message pattern (Article 4 (3) CAEC). The message template shall also be made available on the CSIRT NASK website, not earlier than 14 days and not later than 21 days from the date of its submission to the telecommunications undertaking (Article 4 (7) CAEC).

A telecommunications undertaking that received information about the occurrence of smishing is be required to:

- immediately block short text messages (SMS) the content of which matches the smishing message template, using an information and communication system that allows automatic identification of short text messages (SMS);
- cease blocking short text messages (SMS) when the content of the message pattern does not bear the elements of smishing or it is inexpedient to continue blocking short text messages (SMS) with the content indicated in the message template (Article 6 of CAEC).

The initiator of the SMS can object to the President of UKE to deeming their message as smishing (Article 7 (1) of CAEC). Such objection must meet the requirement set out in the CAEC.

The President of UKE will have to consider the objection within 14 days of having received it and without delay inform the initiator of the message about the manner of consideration of the objection (Article 8 (1, 2) of CAEC). A positive outcome of the objection means that the President of UKE will order CSIRT NASK to immediately (no later than in 3 days) change the message template so that the message subject to the objection will not be blocked (Article 8 (3) CAEC).

Telecommunications undertakings may block short text messages with smishing content, other the content of the message template, using an information and communication system that allows automatic identification of such messages (Article 9 (1) of CAEC).

For the purpose of preventing and counteracting CLI spoofing, a telecommunications undertaking shall block voice communications or hide identification of the calling number for the end-user (Article 16 of CAEC).

The President of UKE maintains a record of telephone numbers used only to answer voice calls and publishes it online (Article 17 (1) of CAEC). Details and rules of maintaining the record are set out in CAEC.

Providers with more than 50 000 subscribers are allowed to enter the agreement with the President of UKE, specifying the organizational and technical measures which they shall use in carrying out obligations set out in Article 16 of CAEC (Article 129(1) of CAEC) and compliance with the agreement will be deemed as undertaking proportionate measures for counteracting electronic communications abuse (Article 19 (3) of CAEC).

A key provision introduced by CAEC is that to protect the Internet users from websites that defraud data, including personal data, and lead Internet users to unintentional disposition of their property, an agreement may be made to maintain and keep an open warning list of the Internet domains that are used to defraud the Internet users' data and funds, and to prevent access to

such websites (Article 20 (1) of CAEC). Details on elements of the agreement and the way of concluding it are set out in CAEC.

It should be noted that a provider of an electronic mail for at least 500 000 users, public entity or handling at least 500 000 active accounts is to required to apply SPF (Sender Policy Framework), DMARC (Domain-based Message Authentication Reporting and Conformance) and DKIM (DomainKeys Identified Mail) mechanics (Article 24 (1) of CAEC).

Public entities can only use providers of electronic mails that meet the aforementioned requirements (Article 24 (2) of CAEC) and the President of UKE will be able to inspect the provider of electronic mail as well as the public entity using the services of such a provider (Article 24 (3) of CAEC).

Telecommunications undertaking is required to register data of the telecommunications services which were not provided by the undertaking due to blocking obligations or rights under CAEC, in the extent allowing for handling complaints (Article 25 (1) of CAEC) for a period of 12 months or when a complaint has been lodged – until the resolution of the dispute (Article 25 (2) of CAEC).

Telecommunications undertaking shall process and mutually share information, including information subject to telecommunications secrecy, excluding electronic communication, in order to identify, prevent and counteract electronic communications abuse (Article 26 (1) of CAEC). Electronic communication will also be allowed to be shared when the purpose of sharing is to identify, prevent or counteract to smishing (Article 26 (2) of CAEC).

In certain cases, a telecommunications undertaking will be allowed to process contents of short text messages and data regarding telecommunication services which were not provided due to blocking obligations or rights under CAEC, for the purposes of executing certain obligations set out in CAEC (Article 26 (3) of CAEC).

It should be noted that information obligation under Article 19 of GDPR and right of access under Article 15 of GDPR, will not be applicable to the extent necessary for identification, prevention, and counteraction of crimes against the undertaking (Article 26 (4) of CAEC).

CAEC also introduces criminal provisions related to electronic communications abuse as well as financial penalties (Articles 27 – 32 of CAEC).

Telecommunications undertakings are required to implement solutions allowing undertaking proportionate actions in order to prevent or counteract electronic communications abuse:

- in case of artificial traffic and smishing – within 6 months since CAEC enters into force;

- in case of CLI spoofing – within 12 months since CAEC enters into force (Article 38 of CAEC).

On the day the CAEC comes into force, current Agreement on Cooperation in Protecting Internet Users from Parties Extorting Data, Including Personal Data, and Leading Internet Users to Disadvantageously Dispose of Their Financial Resources during a State of Emergency, State of Epidemic or State of Epidemic Emergency in the Republic of Poland, concluded on March 23, 2020, shall become the Agreement within a scope of handling and maintaining public list of warnings pertaining to the Internet domains used to defraud data or funds of the Internet users and preventing access to such websites (Article 39 (1) CAEC).

Also, on the day CAEC enters into force, the Warning List of the Internet domains that are used to defraud the Internet users of their data and funds, maintained by the Scientific and Academic Computer Network - National Research Institute on the basis of the March 23, 2020 agreement on cooperation in the protection of the Internet users from parties defrauding data, including personal data, and leading the Internet users to unfavourable disposition of their funds during a state of emergency, state of epidemic or state of epidemic threat in the Republic of Poland, shall become the list maintained by CSIRT NASK on warning pertaining to the Internet domains (Article 39 (2) of CAEC).

## 5. About us

Our lawyers offer unique experience in the field of telecommunications law, having been involved in several hundred proceedings, including representation in regulatory disputes on behalf of the largest telecommunications companies and service providers.

We assist our Clients in legislative work, handling proceedings before authorities such as the Office of Electronic Communications or the Office of Competition and Consumer Protection, proceedings before administrative courts and the Court for the Protection of Competition and Consumers.

We offer support in cases relating to violation of telecommunications secrecy, advice on data exchange projects in the telecommunications sector, proceedings related to frequency allotment or other regulatory disputes with major public authorities.

More information:

**Marcin Lewoszewski – Partner**

Marcin.Lewoszewski@KLMLAW.PL

WWW.KLMLAW.PL

