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# **Selected Instruments for Protecting Consumer Rights in Contracts for the Provision of Telecommunications Services Concluded in Unusual Circumstances**

## **Abstract**

In contractual practice, the contract for the provision of telecommunications services is sometimes concluded in circumstances unusual for the consumer (outside of business premises or at a distance). This fact justifies an attempt to gauge the impact of the Consumer Rights Act as of 2014 on the application of the provisions of the Telecommunications Act that govern contracts for the provision of telecommunications services. This requires, above all, a determination of the relation of these two acts of law, in particular, the criteria for their mutual separation. The settlement of this issue is an introduction to further discussions devoted to the analysis of the selected problems (due to the frames of this study) arising from the application of the Consumer Rights Act to the contracts for the provision of telecommunications services. They relate, among others, to the implementation of the obligation on the part of the telecommunication operator to provide information, as well as to the rules of changing the terms of a contract for the provision of telecommunications services.

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**Keywords:** subscriber, consumer, contract for the provision of telecommunication services, contract concluded in unusual circumstances.

**JEL Classification:** K12, K15.

## 1. Introduction

Telecommunication services have today become one of the main factors influencing the shaping the information society (Maziarz 2011, p. 73–75). Dissemination of new ways of communication does not, at the same time, remain without effect on the changes in the mode of concluding contracts by telecommunication companies. The development of e-commerce entails the reduction of fixed points of sale, and, consequently, the number of contracts concluded “traditionally” in business premises. In addition to the many advantages, the conclusion of contracts in unusual circumstances (off-premises or at a distance) entails a number of threats which are of particular importance for the consumer, who is the most exposed party and the economically weakest market participant<sup>1</sup>. Recognising these threats, the Community legislator (now the EU legislator) in the 1980s undertook certain legislative measures aimed at providing consumers with effective instruments for the protection of their interests. They resulted in two Directives: 85/577/EEC on the protection of consumers in respect of contracts negotiated away from business premises<sup>2</sup>, and the Directive 97/7/EC on the protection of consumers in respect of distance contracts<sup>3</sup>. These acts were repealed with effect from 14 June 2014 by the Directive 2011/83/EU on consumer rights<sup>4</sup>. In the national law, the originally binding Act of 2 March 2000 on protection of consumer rights<sup>5</sup> (implementing, among others, the said Directive 85/577/EEC and the Directive 97/7/EC) has been replaced by a new Act of 30 May 2014 on consumer rights<sup>6</sup>. In order to analyse consumer rights in contracts for the provision of telecommunications services concluded in unusual circumstances, it is essential to take into consideration the Act of 16 July 2004 – Telecommunications

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<sup>1</sup> These threats have been repeatedly pointed out in the literature (in relation to distance contracts, see, for example, Kocot 2004, p. 159 ff).

<sup>2</sup> Official Journal of the EC of 31 December 1985, series L 372/31 (repealed).

<sup>3</sup> Official Journal of the EC of 4 June 1997, series L 144/19 (repealed).

<sup>4</sup> Official Journal of the EU of 22 November 2011, series L 304/64.

<sup>5</sup> Unified text: Journal of Laws of 2012, item 1225 (repealed); hereinafter “the Consumer Rights Protection Act”.

<sup>6</sup> Journal of Laws, item 827, as amended; hereinafter referred to as “the Consumer Rights Act”. According to art. 55 of the Consumer Rights Act, this Act came into force after six months from the date of publication, i.e. on 25 December 2014.

Act<sup>7</sup>, which implements into Polish law, among others, Directive 2002/22/EC on universal service<sup>8</sup>.

This article explores the impact of the Consumer Rights Act on the application of the provisions of the Telecommunications Act governing the contracts for the provision of telecommunications services. This first requires an examination of the relationship of these two Acts of law, in particular the criteria for their mutual separation. This issue is of importance not only in theory but also practice, as clearly evidenced by the doubts raised by the participants of the telecommunications market even prior to the entry into force of the Consumer Rights Act<sup>9</sup>. Due to the frames of this article, the subject of the discussion has been limited to the selected specific issues. In particular, the issue of withdrawing from the contract for the provision of telecommunications services is not addressed.

## **2. The Scope of the Regulation – the Mutual Relationship between the Provisions of the Telecommunications Act and the Consumer Rights Act**

The provision of telecommunications services to end-users is based on a contract for the provision of telecommunications services governed by art. 56–80 of the Telecommunications Act.

The characteristics of “the telecommunications services” should be preceded at least by a brief presentation of the telecommunications services themselves. Their definition is in fact of fundamental importance for the interpretation of many terms used in the Telecommunications Act (Piątek 2013, p. 103). According to art. 2 point 48 of the Telecommunications Act, the telecommunications service stands for a service consisting mainly in the transmission of signals in a telecommunications network. Contrary to a literal interpretation, the Act in many cases does not restrict its scope only to the transmission of a signal (using electromagnetic energy) in a telecommunications network, by including in the scope of this concept also the provision of services of a material character (e.g. the installation of the network terminal) or of information character (e.g. service on inquiry about numbers)

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<sup>7</sup> Unified text: Journal of Laws of 2016, item 1489 as amended; hereinafter “the Telecommunications Act”.

<sup>8</sup> Official Journal of the EC of 24 April 2002, series L 108/51, as amended.

<sup>9</sup> In order to settle these doubts, a position has been prepared, among others, by a joint working group appointed by the Office of Electronic Communications and the Office of Competition and Consumer Protection: The position regarding the relation between the Telecommunications Act and the Consumer Rights Act (version of 10 December 2014; hereinafter referred to as “the Position 2014”).

which accompany the strictly understood telecommunications services (Piątek 2013, p. 104–105). The word “mainly” used in the above definition, allows at the same time for telecommunications services to be distinguished from other services based on telecommunications transmission, in which, apart from the telecommunications service, there are provided different other services of an informative, commercial, financial or audio-visual character. The qualification of the service as a telecommunications service (and, consequently, a service which is subject to the regulation of the Telecommunications Act) is based on the determination that its main element is the provision of transmission (Piątek 2013, p. 105). A special type of telecommunications service is a “publicly available telecommunications service”, understood as a telecommunications service available to the general public (art. 2 point 31 of the Telecommunications Act).

The provider of telecommunications services (and thus also a party to a contract for their provision) is a telecommunications undertaking, a term which, according to art. 2 point 27 of Telecommunications Act stands for a trader (entrepreneur) (within the meaning of art. 4 of the Freedom of Economic Activity Act<sup>10</sup>) or any other entity authorised to pursue an economic activity on the basis of separate provisions, which carries out the business of supplying telecommunications networks, providing accompanying services or providing telecommunications services. The said Act of law divides the telecommunications companies (depending on the type of their business activity) into two categories: “service providers” authorised to provide telecommunications services and “operators” authorised to provide public telecommunications networks or to provide accompanying services (art. 2, point 27, letter a and b of the Telecommunications Act). A dualistic division of telecommunications companies, resulting from the above definition, is not disjunctive. It is therefore not excluded that the same entity carries out both of the indicated types of economic activity, acting – on case-by-case basis – as service provider or as operator.

In order to label recipients of telecommunications services the legislator uses different terms. The broadest term is that of “user”, which stands for the entity using publicly available telecommunications services or requesting the provision of such services (art. 2 point 49 of the Telecommunications Act). The definition of the user partially overlaps with the definition of “end-user” (art. 2 point 50 of the Telecommunications Act), which stipulated, however, that the use by the end-user of publicly available telecommunications services or requiring its provision by the end-user is designed to meet the end-user’s own needs. A special category of end-user is a “consumer”, namely a natural person applying for the

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<sup>10</sup> The Act of 2 July 2004 on Freedom of Economic Activity (consolidated text: Journal of Laws of 2015, item 584, as amended; hereinafter referred to as “Freedom of Economic Activity Act”).

provision of publicly available telecommunications services or using such services for purposes not directly related to his trade or profession (art. 2 point 18 of the Telecommunications Act). In contrast to end-users, the status of the consumer is restricted only to the individuals (natural persons) who use telecommunications services (or only apply for their provision) for purposes not related directly to their business or profession. In the case where the end-user or consumer is a party to the contract for the provision of telecommunications services concluded with the provider of publicly available telecommunications services, he has the attribute of a “subscriber” within the meaning of art. 2 point 1 of the Telecommunications Act.

The need to establish a mutual relationship between the provisions of the Telecommunications Act and the Consumer Rights Act will arise at the moment when the contract for the provision of telecommunications services is concluded with the subscriber who simultaneously meets the criteria for recognising it as the consumer.

Art. 1 of the Consumer Rights Act provides that in the subjective scope, this Act of law is applied only to the relations between the trader and the consumer. These concepts should be, at the same time, assigned with the meaning resulting, respectively from art. 43<sup>1</sup> of the Civil Code and from art. 22<sup>1</sup> of the Civil Code. If, as has been shown in earlier remarks, the telecommunications trader is an entrepreneur within the meaning of art. 4 of the Freedom of Economic Activity Act, due to the similarity (in spite of the mutual autonomy) of civil law and public law definition of an entrepreneur, it can be assumed that telecommunications entrepreneur, within the meaning of art. 2 point 27 of the Telecommunications Act, is also an entrepreneur within the meaning of art. 43<sup>1</sup> of the Civil Code.

It is also worth noting that the definition of the consumer set forth in art. 2 point 18 of the Telecommunications Act constitutes *lex specialis* in relation to the definition contained in art. 22<sup>1</sup> of the Civil Code. Somewhat paradoxically, a clear indication in art. 2 point 18 of the Telecommunications Act of a natural person, not only using publicly available telecommunications services, but even only requesting their provision (and thus not yet bound by the contract with the telecommunications entrepreneur) properly reflects the intention of the European legislator expressed in the consumer directives (see, for example, the definition of the consumer provided in art. 2 point 1 of the Directive 2011/83/EU). The statutory definition of the consumer set forth in art. 22<sup>1</sup> of the Civil Code, exposing the fact of “undertaking an act of law”, is often accused, somehow rightly, of not directly covering by its scope a natural person acting still in a pre-contract stage, which precedes the conclusion of the contract. Meanwhile, the European Union legislator refers generally to the aim of the actions taken by an individual (Gnela 2013, p. 123). When analysing (in subjective terms) the mutual relationship between the regulations contained in the Telecommunications Act and in the Consumer

Rights Act, it is easy to see that in the case of a contract for the provision of telecommunications services the protected entity is usually the end-user, not the consumer. The above conclusion is justified even by the very name of Chapter III of the Telecommunications Act (“Protection of end-users and the general service”). The consumer as a recipient of specific rights (other than those enjoyed by other end-users) is mentioned only in several provisions. As aptly noted by S. Piątek (2013, p. 54), many of the provisions of this Act of law concern the protection of the collective interests of consumers, rather than the rights and obligations of individual consumers of telecommunications services.

In determining the relationship of the analysed regulations, fundamental importance should be attributed to the interpretation of art. 3 paragraph 1 point 6 of the Consumer Rights Act which excludes (in full) the application of the Consumer Rights Act to the contracts concluded with the service provider using a public phone device in order to make use of such a device or concluded in order to perform a single connection by telephone, Internet or fax by the consumer. This provision implements art. 3 paragraph 3 point m of Directive 2011/83/EU, according to which this Directive does not apply to contracts concluded with telecommunications operators through public payphones for their use or concluded for the use of one single connection by telephone, Internet or fax established by a consumer. The use in the content of the said provisions of the conjunction “or” justifies the adoption that the exclusion covers two types of contracts. The first category includes contracts concluded by the consumer (within the meaning of art. 22<sup>1</sup> of the Civil Code) with the service provider through public phone device in order to use it. “Public phone device”, according to the legal definition contained in art. 2 point 2 of the Telecommunications Act, stands for publicly available telephones, in which the connection is paid for automatically, in particular, by means of coins, tokens, calling card or credit card. The guidelines of the European Commission to Directive 2011/83/EU (Wytyczne... 2014, p. 12) indicate that the phrase, used in art. 3 paragraph 3 point m of the Directive, referring to the contracts concluded “with the use of public payphones” (respectively: “using the public phone device” in art. 3, paragraph 1 point 6 of the Consumer Rights Act) covers the situations in which a contract is concluded by inserting coins or using a credit card (payment card). In the opinion of the Commission, the exception “should not apply to contracts concluded with operators of public payphones, for example, through a prior purchase of prepaid calling card”. In the literature (Lubasz 2015, p. 79) this position was considered too strict, not grounded in the Directive.

The second category of exclusion includes contracts concluded by the consumer in order to perform a single connection by telephone, Internet or fax. Unlike with contracts concluded through the public phone device, the legislator removed the requirement that the party (aside from the consumer) needs to be

a service provider within the meaning of the Telecommunications Act. The legal qualification of the provider of such services is therefore neutral. The condition of “the connection being single” should not be at the same time interpreted literally. The scope of the exclusion should be extended to calls made by the consumer occasionally, without the intention of regular or continuous repetition (in this way: Bar 2014, p. 41)<sup>11</sup>. The Consumer Rights Act (following Directive 2011/83/EU) determines the types of calls (telephone, Internet or fax). However, while the term “phone call” has an established meaning under the legal definition contained in art. 2 point 26 of the Telecommunications Act (it is the connection established by means of a publicly available telecommunications service, allowing for two-way voice communication), the concepts of “internet connection” and “fax connection” (in the absence of such definitions) should be assigned the meanings which they have in everyday language (Bar 2014, p. 42).

The Commission’s guidelines (Wytyczne... 2014, p. 13) indicated that the said exclusion also applies to some contracts concluded with suppliers of premium rate services in the event that the conclusion of such contracts, and thus their full implementation, takes place upon the performance by the consumer of a single phone call with a premium rate number or upon sending an SMS to this number (e.g. telephone voting). The analysed exception does not cover cases in which a similar connection initiated by the consumer aims only at the conclusion of a contract which is actually performed after its completion (e.g. service subscription). The doctrine (Lubasz 2015, p. 80) aptly noted that due to the definition of a telephone call based on the requirement of two-way voice communication, the Commission’s explanations raise doubts in relation to contracts for the provision of premium services initiated by sending an SMS.

To summarise this section, it must be assumed, therefore, that the provisions of the Consumer Rights Act apply to the contracts for the provision of telecommunications services concluded by the consumer with the service provider within the meaning of art. 2 paragraph 27 point a of the Telecommunications Act, with the exception of the contracts referred to in art. 3 paragraph 1 point 6 of the Consumer Rights Act (see also the Position 2014, p. 3).

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<sup>11</sup> Cf. the guidelines of the Commission (Wytyczne... 2014, p. 13), which indicated that “this exception does not apply to contracts for electronic communications services (which in the EU telecommunications directives constitute the equivalent of the telecommunications services) concluded for a specified period of time or providing a certain extent of their use” (e.g. contracts using prepaid SIM card purchased in order to access mobile services).

### **3. Selected Issues Arising from the Application of the Consumer Rights Act to the Contracts for the Provision of Telecommunications Services**

#### **3.1. Preliminary Remarks**

The Consumer Rights Act, following Directive 2011/83/EU, grants to the consumer special powers to ensure genuine freedom of contracting in its relations with the entrepreneur. Exercising them remains at the same time closely related to the stage of the activities related to the conclusion and the execution of the contract concluded in unusual circumstances, which may be understood as the legislator's reaction to the potential dangers which the consumer may be exposed to (Litwiński 2007, p. 264).

At the pre-contractual stage, those dangers stem mainly from the deep information asymmetries caused by a deficit of information or by the limited ability of the consumer to process them (Mikłaszewicz 2008, p. 248). The use by entrepreneurs in the marketing activities of certain means of distance communication can, in turn, threaten consumer privacy, understood (in a negative aspect) as the freedom from unwanted commercial contacts. These threats can be mitigated by a complex information obligation imposed on entrepreneurs (art. 12–26 of Consumer Rights Act), as well as the requirement to obtain prior consent from the consumer to use certain means of distance communication for direct marketing purposes (art. 172 of Telecommunications Act).

After the conclusion of the contract, consumer protection is achieved primarily by means of a right of withdrawal from the contract (art. 27–38 of Consumer Rights Act), which in the legislator's assumption enables the consumer to re-examine – independently and without any external pressures – both the purpose of concluding the contract as well as the potential benefits arising from it (Kukuryk 2016, p. 167). This problem, as noted in the introduction, has been left aside in this study.

The legal position of the consumer is also indirectly strengthened by the semi-imperative nature of those provisions, which precludes the admissibility of a contractual waiver of the rights vested in the consumer (art. 7 of Consumer Rights Act).

#### **3.2. The Method of Implementing the Information Requirement in Contracts for the Provision of Telecommunications Services Concluded in Unusual Circumstances**

The consumer's right to information in the contracts concluded in unusual circumstances is regulated in Chapter 3 of the Consumer Rights Act. In determining



its scope, essential importance should be attributed to art. 12 paragraph 1 of the Consumer Rights Act which in 21 points formulates a catalogue of information required to be provided by the entrepreneur. Pursuant to the formula used by the legislator, it follows that this obligation has a pre-contractual nature, since its implementation should take place “at the latest at the time when the consumer expresses its will to be bound by the contract” (art. 12 paragraph 1 *ab initio* of Consumer Rights Act), whereas this moment should be determined taking into account the specificities of the different modes of concluding a contract. The obligation to provide information by the entrepreneur should be implemented in advance and its fulfillment is independent of whether the contracting procedure initiated by one of the parties will ultimately lead to the conclusion of the contract. Accordingly, A. Krasuski (2015, p. 669) aptly notes that the condition of the implementation of this obligation “is not (...) a conclusion of a contract for the provision of telecommunications services, but the very fact of the consumer’s interest in the services until the point of time when the consumer expresses his willingness to conclude a contract”. The manner of implementing the obligation to provide information is important vis-à-vis contracts for the provision of telecommunications services, because of the common practice of the telecommunications companies to use standard contracts when concluding the latter, which determines the adhesion nature of these contracts. It needs to be determined whether the information which the trader is obliged to provide under art. 12 paragraph 1 of the Consumer Rights Act may be included in the standard contracts it draws up<sup>12</sup>. In the above provision, the legislator limited itself only to determining the moment of the implementation of this obligation and, at the same time, introduced the requirement of “clarity” and “intelligibility” of the information addressed to the consumer. The freedom left to the entrepreneur with respect to the placement of the required information (naturally while maintaining its transparency) justifies the assumption that to the extent to which the content of pre-contractual obligations to provide information is consistent with the terms of the contract for the provision of telecommunications services concluded in a written or electronic form referred to in art. 56 paragraph 3 point 1–21 of the Telecommunications Act, the service provider is exempted

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<sup>12</sup> The legal character of the standard contract is in particular attributed to: a contract for the provision of publicly available telecommunications services which requires a written or electronic form (art. 56 paragraph 3 of the Telecommunications Act), the regulations of the provision of publicly available telecommunications services (art. 59 of the Telecommunications Act), the price list of the telecommunications services (art. 61 of the Telecommunications Act) and the conditions for promotional offers. By concluding a contract for the provision of telecommunications services, the subscriber at the same time makes a statement that it has received and accepted the contents of other documents which form (except for consensus) the content of the newly created legal relationship (cf. Rogalski 2014, p. 24).

from the requirement of providing it again to the subscriber<sup>13</sup>. Although it follows from art. 22 of the Consumer Rights Act that the information referred to in art. 12 paragraph 1 of the Consumer Rights Act constitutes an integral part of the distance or off-premises contracts, it need not, however, form a part of the contract in the technical sense (Kaczmarek-Templin 2014, p. 140).

Placing the information required by art. 12 paragraph 1 of the Consumer Rights Act in the standard contract does not affect the change of the pre-contractual nature of the entrepreneur's obligation. As a result (as mentioned above), the standard contracts containing this information should be made available to the consumer at the latest at the time the consumer expresses his consent to be bound by the contract. It should be noted, however, that art. 59 paragraph 1 of the Telecommunications Act imposes on providers of publicly available telecommunications services who incorporate into their regulations the elements of the contract for the provision of telecommunications services referred to in art. 56 paragraph 5 of the Telecommunications Act the obligation to publish the regulations on their website and, additionally, these regulations should be delivered free of charge to the subscriber, together with the contract to provide telecommunications services. Also in relation to the price list, the legislator has introduced in art. 61 paragraph 4 of the Telecommunications Act the requirement on the part of the provider of telecommunications services to publish the price list for the attention of the public (e.g. through publication in the press, posting on the website, etc.). The content of the standard contracts developed by telecommunications companies is available for viewing on their websites before initiating contracting procedures.

The manner of providing the consumer with the information referred to in art. 12 paragraph 1 of the Consumer Rights Act should also take into consideration the disposition of art. 14 of the Consumer Rights Act that introduces in this regard additional requirements. The common element to both forms of contracts concluded in unusual circumstances is the duty to provide the required information in a clear way, expressed in plain language, which corresponds to transparency obligation under art. 12 paragraph 1 of the Consumer Rights Act (Lubasz 2015,

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<sup>13</sup> In accordance with art. 56 paragraph 5 of the Telecommunications Act, the service provider may, under express provisions of the contract for the provision of telecommunications services which requires a written or electronic form, transfer the data referred to in art. 56 paragraph 3 points 6–8 and 10–21 of the Telecommunications Act, to the regulations of the provision of publicly available telecommunications services. These are mainly provisions of an informative nature, which define the issues contained in them in a uniform manner for general subscribers (see Piątek 2013, p. 416). The use by the service provider of the regulations of service provision is in the above case optional, excluding the provision of the universal service or the individual services comprising the latter – art. 91a of the Telecommunications Act.

p. 179)<sup>14</sup>. While in the case of off-premises contracts the legislator requires that they should be recorded in writing or, if the consumer agrees, in another durable medium (art. 14 paragraph 1 of the Consumer Rights Act) in respect of distance contracts, this obligation is limited to a general statement that the transfer of information should take place in a manner consistent with the type of the applied means of communication at a distance (art. 14 paragraph 2 of the Consumer Rights Act), which makes it possible to assess the correctness of the implementation of this requirement, taking into account the technical specificities of the different means of communication at a distance.

Art. 19 of the Consumer Rights Act remains normatively connected with art. 14 paragraph 2 of the Consumer Rights Act. The former authorises the trader, when the technical characteristics of the means of communication at a distance used limit the size of the information that can be transferred or the time of their provision, to limit the scope of the information provided to the consumer prior to the conclusion of the contract to at least such information that relates to the main features of the provision of the services by the trader, the indication of the trader, the total price or remuneration, the right of withdrawal from the contract, the duration of the contract and, if the contract was concluded for an indefinite period, the manner and the conditions for its termination. Other information required pursuant to art. 12 paragraph 1 of the Consumer Rights Act shall be in such case provided to the consumer by the entrepreneur in accordance with art. 14 paragraph 2 of the Consumer Rights Act. With regard to the contracts for the provision of telecommunications services, practical significance of art. 19 of the Consumer Rights Act is noticeable, for example, in contracts concluded by telephone. During a telephone call, the entrepreneur may limit itself to providing the consumer only with the basic information required by that provision, referring the consumer in the remaining scope, for example, to the trader's web page (Position 2014, points 41–42). Additional pre-contractual information requirements for certain distance contracts are formulated in art. 17–18 of the Consumer Rights Act.

The conclusion of the contract in unusual circumstances obliges the trader to confirm its content to the consumer. In respect of contracts concluded away from business premises, the source of this obligation is art. 15 paragraph 1 of the Consumer Rights Act, which prescribes that the consumer shall be provided

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<sup>14</sup> Assuming the admissibility of placing the information referred to in art. 12 paragraph 1 of the Consumer Rights Act in the standard contracts developed by the service provider (and also in the contract for the provision of telecommunications services), it is worth stressing that the requirement of the transparency of information referred to in art. 12 paragraph 1 of the Consumer Rights Act and art. 14 of the Consumer Rights Act corresponds with the obligation to formulate the terms and conditions of the contract for the provision of publicly available telecommunications services requiring written or electronic form in a clear, comprehensive and easily accessible form (art. 56 paragraph 3 of the Telecommunications Act).

with the contract document or with the confirmation of its conclusion in a written form or, upon the consumer's consent, in another durable medium (see the definition in art. 2 point 4 of the Consumer Rights Act). Although (in principle) the choice between providing the contract document or only the confirmation of its conclusion has been left to the trader, it is nevertheless necessary to bear in mind the restrictions under art. 56 paragraph 2 of the Telecommunications Act as to the form of the contract for the provision of telecommunications services, introducing (in case the party fails to use other forms of its conclusion permitted by law) the requirement of a written form. Art. 15 paragraph 3 of the Consumer Rights Act also stipulates that the condition for the trader to commence the provision of the service before the deadline to withdraw from the contract is that the consumer submits (in a durable medium) a clear statement containing such a request. The commencement of the performance of the contract in the situation of the absence of such a request releases the consumer from incurring the costs of the services provided before the exercise of the right of withdrawal (art. 36 point 1 letter b of the Consumer Rights Act).

In relation to a distance contract, the obligation to confirm its contents in a durable medium within a reasonable time thereafter, at the latest at the time of delivery of the goods or before the commencement of the provision of services, has been introduced by art. 21 paragraph 1 of the Consumer Rights Act. The confirmation provided to the consumer by the trader shall include all the information referred to in art. 12 paragraph 1 of the Consumer Rights Act (unless the trader has provided it to the consumer on a durable medium before the conclusion of the contract), as well as the information about the consumer's consent to the delivery of digital content in the circumstances resulting in the loss of the right of withdrawal (defined in art. 38 point 13 of the Consumer Rights Act). Accordingly, if the trader complies with the pre-contractual obligation to provide information, as referred to in art. 14 paragraph 2 of the Consumer Rights Act in conjunction with art. 12 paragraph 1 of the Consumer Rights Act, with the use of durable media, it releases the trader from the requirement of providing the said information again in the confirmation of a distance contract. In analogy to art. 15 paragraph 3 of the Consumer Rights Act, the condition for the commencement of the provision of the service by the trader before the lapse of the deadline to withdraw from a distance contract is the submission by the consumer of a clear statement containing such a request (see art. 21 paragraph 2 of the Consumer Rights Act). Also in this case, the abovementioned limitations in respect of the contract for the provision of telecommunications services should be taken into consideration.

### **3.3. Changing the Terms of the Contract for the Provision of Telecommunications Services**

An issue of great practical importance is the problem of changing the conditions of the contract for the provision of telecommunications services with the use of remote communication, in particular a phone. The source of the existing problems in this regard are the controversies associated with the mutual normative relation of art. 56 paragraph 6 of the Telecommunications Act and art. 20 of the Consumer Rights Act.

In accordance with art. 56 paragraph 6 of the Telecommunications Act, the service provider may allow a subscriber who is party to the contract concluded in writing or electronically to change the terms of the contract, as referred to in art. 56 paragraph 3 points 2 and 4–7 of the Telecommunications Act<sup>15</sup>, by means of distance communication, in particular by telephone or by e-mail or fax. This provision requires the service provider to preserve the declaration of the subscriber submitted in the above manner, keep it until the end of the validity of the contract under the changed conditions, and to provide the content of the subscriber's declaration at his request, filed in particular in the course of the complaint procedure. In case of a change of the terms of the contract concluded by telephone, the entire telephone conversation is recorded rather than only the mere moment of submitting the declarations of intent by the parties (Piątek 2013, p. 418)<sup>16</sup>. In addition, the service provider should confirm to the subscriber (within the deadline agreed with the latter, yet not later than within one month from the date of requesting the change) the fact of making a statement about the change of the terms of the contract and its scope, as well as the timing of implementing

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<sup>15</sup> This concerns a change of the scope of the services provided; of the period for which the contract was signed (including the minimum period required to benefit from promotional terms); of the tariff package, if there are different tariff packages valid for the respective provided services; of the form of submitting orders for tariff packages and additional service options; as well as of the methods of payment.

<sup>16</sup> The wording of art. 56 paragraph 6 sentences 2 and 3 of the Telecommunications Act raises interpretative doubts. In particular, it is not clear whether the operator is obliged to provide, on the subscriber's demand, the recording (or transcript) of the entire conversation including his statement, or only the content of the subscriber's statement agreeing to the change of the terms of the contract. The content of the said provision, which speaks directly of recording, storing and making available the content of the subscriber's declaration justifies the adoption of the latter of the above interpretative options. Teleological considerations, including the need to protect the subscriber against a unilateral interpretation of the findings carried out by the operator, support, in turn, its broader interpretation requiring the operator to provide the recording of the entire conversation. It is at the same time pointed out that the possibility of playing the recording of the conversation or of reading its transcript should not result in undue hardship on the part of the subscriber (Styczyński 2016, p. C3).

the said changes. The content of the confirmation provided to the subscriber electronically or by similar means of distance communication is defined in art. 56 paragraph 6a of the Telecommunications Act. In the absence of the possibility of providing the confirmation in the above manner, or at the request of the subscriber, the provider of publicly available telecommunications services must provide the confirmation in writing (art. 56 paragraph 6b of the Telecommunications Act).

Specific requirements relating to the conclusion of the contract using the telephone have also been set forth in art. 20 of the Consumer Rights Act, which imposes the duty on the trader that contacts the consumer on the phone in order to conclude the distance contract to inform the consumer about this aim, as well as about the data that identifies it and the data identifying the person on whose behalf it calls. The said information should be communicated to the consumer at the beginning of the conversation (art. 20 paragraph 1 of the Consumer Rights Act), namely at the time of establishing telephone connection with the consumer (Kaczmarek-Templin 2014, p. 135).

According to art. 20 paragraph 2 of the Consumer Rights Act, the trader is required to confirm the content of the proposed contract on paper or on another durable medium. In addition, the condition of the effectiveness of the consumer's statement on the conclusion of the contract is the fact of recording this statement on paper or on another durable medium after receiving the confirmation from the trader. Accordingly, the possibility of concluding the contract with the consumer only using a telephone has been *de lege lata* excluded – see the comments of D. Lubasz (2015, p. 209–214).

In determining the mutual interrelations between art. 56 paragraph 6 of the Telecommunications Act and art. 20 of the Consumer Rights Act, it should first be noted that the subjective scopes of these two provisions are different. While the former defines the relations between the service provider and the subscriber, who, as shown, may, but need not have the attribute of the consumer, art. 20 of the Consumer Rights Act refers only to the relations that occur between the trader and the consumer within the meaning of art. 22<sup>1</sup> of the Civil Code. In subjective terms, the potential conflict of the above provisions may therefore be considered only when the subscriber referred to in art. 56 paragraph 6 of the Telecommunications Act is also a consumer within the meaning of art. 22<sup>1</sup> of the Civil Code. Even then, it may turn out that the scope of application of these two provisions is different. Apart from the fact that art. 56 paragraph 6 of the Telecommunications Act refers to the change of the conditions of the contract by, for example, only the indicated means of distance communication (amongst which, however, there has been included the telephone), whereas the provision of art. 20 of the Consumer Rights Act is limited only to the proposals of concluding the contract as submitted by telephone, it should be noted that art. 56 paragraph 6 of the Telecommunications

Act applies to the change of the terms of the contract carried out upon the initiative and at the request of the subscriber (in this way: Rogalski 2010, p. 420; Piątek 2013, p. 418), while art. 20 paragraph 1 of the Consumer Rights Act sets forth directly that the entity that initiates the telephone call, the aim of which is to conclude a contract, must be the trader. According to Kaczmarek-Templin (2014, p. 134–135): “the provision of art. 20 of the Consumer Rights Act applies only to situations where the entity that initiates the communication is the trader and upon its own initiative there takes place the initiation of the contact (telephone call) with the consumer. It does not include the situations where the consumer voluntarily communicates with the trader, since in such case the consumer has in his possession the data identifying the trader (the consumer knows whom he calls) and he himself sets the aim of the conversation”. While this view raises no doubt in relation to art. 20 paragraph 1 of the Consumer Rights Act, the provision of art. 20 paragraph 2 of the Consumer Rights Acts suggests that what is relevant from the legal point of view is not the fact of who initiated the telephone connection itself, but rather which of the parties made an offer to conclude the contract by phone. It seems, therefore, that when the consumer has initiated the call, while the proposal of concluding the contract (or the proposal of the change of its terms and conditions) was made by the trader, an effective conclusion of such a contract requires the compliance of the conditions referred to in art. 20 paragraph 2 of the Consumer Rights Act (Suski 2015, p. 51; Lehmann 2015). As is apparent from the above, the application of art. 56 paragraph 6 of the Telecommunications Act to the changes of the terms of the contract for the provision of telecommunication services requires a subscriber-consumer initiative not only in order to establish telephone contact with the service provider, but also in respect of the proposal to change the existing terms of the contract within the scope defined by art. 56 paragraph 3 points 2 and 4–7 of the Telecommunications Act.

#### **4. Conclusions**

The analysis presented in this paper shows that the need to establish the mutual interrelations between the provisions of the Telecommunications Act and the Consumer Rights Act will arise when a contract for the provision of telecommunications services is concluded with a subscriber who is at the same time a consumer within the meaning of art. 22<sup>1</sup> of the Civil Code. When differentiating between the scopes of application of these legal acts, art. 3 paragraph 1 point 6 of the Consumer Rights Act should be borne in mind. It excludes (in its entirety) the application of this Act of law to contracts concluded with service providers with the use of public phone devices in order to use such

a device or to contracts executed in order to perform a single connection by telephone, Internet or fax by the consumer. Apart from the scope of this exception, the provisions of the Consumer Rights Act are applied to other contracts for the provision of telecommunications services concluded by the consumer with the service provider.

In respect of the manner of implementing by the service provider the pre-contractual obligation to provide information, it should be deemed as acceptable that to the extent to which the content of the information provided to the consumer prior to the conclusion of the contract is consistent with the contract for the provision of telecommunications services concluded in a written or electronic form referred to in art. 56 paragraph 3 points 1–21 of the Telecommunications Act, the service provider is not obliged to repeat the process of providing the information to the subscriber. Including the information required under art. 12 paragraph 1 of the Consumer Rights Act in the standard contract does not affect the change of a pre-contractual nature of this obligation. As a result, the standard contracts that contain this information should be made available to the consumer at the latest at the time of expressing his consent to be bound by the contract. When implementing the pre-contractual obligation to provide information, the service provider is additionally required to comply with the other requirements under the provisions of Chapter 3 of the Consumer Rights Act.

A contentious issue is the mutual interrelation between art. 56 paragraph 6 of the Telecommunications Act and art. 20 of the Consumer Rights Act. It seems, however, that the application of art. 56 paragraph 6 of the Telecommunications Act to the changes of the terms of the contract for the provision of telecommunication services requires the initiative of the subscriber-consumer not only in respect of initiating telephone contact with the service provider, but also in relation to the proposal to amend the existing terms of the contract within the scope defined by art. 56 paragraph 3 points 2 and 4–7 of the Telecommunications Act. In other situations, the changes to the contractual terms and conditions shall be regulated by art. 20 of the Consumer Rights Act.

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### **Wybrane instrumenty ochrony praw konsumenta w umowach o świadczenie usług telekomunikacyjnych zawartych w okolicznościach nietypowych**

(Streszczenie)

W praktyce kontraktowej do zawarcia umowy o świadczenie usług telekomunikacyjnych dochodzi niekiedy w okolicznościach dla konsumenta nietypowych (poza lokalem przedsiębiorstwa lub na odległość). Powyższa konstatacja uzasadnia próbę udzielenia odpowiedzi na pytanie o wpływ uchwalonej w 2014 r. ustawy o prawach konsumenta na stosowanie przepisów Prawa telekomunikacyjnego regulujących umowy o świadczenie usług telekomunikacyjnych. Wymaga to w pierwszej kolejności ustalenia stosunku obu tych aktów prawnych, w tym zwłaszcza kryteriów ich wzajemnego rozgraniczenia.

Przesądzenie tej kwestii stanowi wstęp do dalszych rozważań poświęconych analizie wybranych problemów wynikłych na tle stosowania przepisów ustawy o prawach konsumenta do umów o świadczenie usług telekomunikacyjnych. Odnoszą się one m.in. do sposobu realizacji obowiązku informacyjnego przez przedsiębiorcę telekomunikacyjnego, a także zasad zmiany warunków umowy o świadczenie usług telekomunikacyjnych.

**Słowa kluczowe:** abonent, konsument, umowa o świadczenie usług telekomunikacyjnych, umowa zawarta w okolicznościach nietypowych.