SOME RELEVANT ASPECTS OF THE LEGAL DISPUTE IN PUBLIC ADMINISTRATION – COMMUNICATIONS LAW IN HUNGARY

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Abstract

The concept of legal dispute is established both in civil law and administrative law. Legal dispute as such has a different meaning in civil law as opposed to that prevalent in public administration, and, further, even within administrative law it denotes differing meanings and forms of interest enforcement. The concept of dispute has evolved in the context of civil law and administrative law and thus comprises the particularities of these two branches of law in a special manner. In terms of public service, legal dispute, however, stands for the dispute settlement procedure whereby the public operators seeks to settle, primarily within the framework of the general contract terms and conditions, the complaint of a user with whom it has entered into a contract. The dispute settlement procedure applicable to a clearly defined range of public services is different from the above in that the user may also have recourse to certain mediation procedures which are carried out by conciliation bodies designated in legislation. Such mediation procedures cover for example consumer protection disputes or disputes concerning healthcare services. The primary goal of these mediation-type dispute-solving arrangements is to protect generally defenceless obligees against alleged or actual infringements committed by a public operators, which is in a stronger legal position. Conciliation bodies act as quasi-mediators in such disputes. In many cases, appropriately advising the complainant during the procedure proves to be sufficient. The dispute belongs to the scope of the so-called quasi-judicial activities of the administrative body, whereby the state assigns the judgment of certain forms of illegal conduct to the competence of public administration. By involving administrative bodies and with a view to protecting certain legal institutions of some branches of law, the legislator has intended to accelerate the decision-making process in matters of fact issues in contrast with lengthy due processes in court. The branches of law impacted are infringement law, civil law and family law. In cases of civil law and family law disputes, where the claims of the parties require prompt judgment, it is high priority for the sake of legal protection and for promoting regulatory bodies that public

administration reacts and adjudges such claims as shortly as possible. Here we refer to those powers of the authority which concern the judgment of property protection cases and family law disputes of guardianship courts. Accordingly, quasi-judicial proceedings also feature some criteria of judicature.

Key words
Communications law in Hungary, legal dispute, administrative law, quasi-judicial proceedings, litigation procedures, litigation procedure rules in communications law, cross-border legal disputes

The development of the litigation procedure and the regulation

The first act on communications – Act II of 1964 on postal services and telecommunications – still did not define the institution of legal dispute. The following act, Act LXXII of 1992 on telecommunications already refers to the term of legal dispute, but this act uses the term legal dispute in the context of the enforcement of the consumers' rights referred to earlier and refers to the term only in the court resolutions related to the Act and not among the provisions of the Act.

Act XL of 2001 on communications (hereinafter referred to as 'Hkt.') was the first to introduce the institution of litigation procedure. Article 88 h) of Hkt. provides that the authority shall conduct a procedure upon request or ex officio in cases of legal dispute related to network service fees or in legal disputes where a service provider objects to the fact that a general service provider's general fee package was not generated exclusively with the aim of ensuring the affordability of the general telecommunications service. I do not wish to enter into details regarding the institution of legal dispute according to the Hkt., but rather highlight the changes – in relation to the current regulation - that furthered the litigation procedure into a more efficient law enforcement mechanism. Two weeks ago a first instance court made its decision regarding the reconsideration of the decision of the last legal dispute made by the Arbitration Committee in 2002. To present a full picture it should be mentioned that the Arbitration Committee did not play a role in the hindrance of the case, and generally it is extreme for a lawsuit to take 5 years in the field of communications, as resolutions in communications cases made by the Arbitration Committee and its successor the Board –

unlike the decisions made in standard, official public administration cases – are reconsidered by the court by way of an instant proceeding.

Current regulation of the institution of legal dispute

The features of litigation procedures, being the special legal institution of communications law

a.) Quasi judicial activity of the Board

Eht. reregulated the institution of the litigation procedure. Unlike Hkt.'s provisions that united the authority and responsibilities related to legal disputes, Act C of 2003 on electronic communications (hereinafter referred to as 'Eht.') first mentions the institution of legal dispute in the list of powers of the Board, being the major body of the National Communications Authority (Article 10 h) of Eht.), then in Articles 49 to 51 it specifies its detailed rules. Additionally, there are scattered provisions in Eht. where Eht. explicitly makes a reference to the fact that the concerned party (parties) may initiate a litigation procedure to enforce its rights granted in the given phase or to ensure the execution of a public administration decision (SMP resolution, reference offer) adopted in connection with a specific Board procedure. In the majority of cases, the Board receives requests for the latter in connection with network agreements concluded or to be concluded on the basis of reference offers. In most cases these are connected to the alleged or actual infringement of the obligation of cooperation stipulated by the basic principles of Eht.

Eht. practically laid down only one limit regarding the initiation of a litigation procedure: only the service provider that believes that another service provider infringed its electronic communications related rights or its rightful interest laid down in the communications regulation or a contract concluded on the basis of such regulation, may initiate a legal dispute. In this way, the Eht. grants quasi court powers to the Board by enabling the service provider to select whether the legal dispute should be judged by the Board or the court (or under an arbitration contract by an arbitration court).

Adjudication by the Board of a legal dispute follows the classical "contra-dictorial" procedure. This means that upon receipt of a request of initiating a litigation procedure, the

Board – after verifying that it has the powers and competence in the given case – calls on the other party to state its case.

b.) The basic principles regarding to the legal disputes

Article 24 of the Eht. provides that the authority shall enforce in all its activities, including litigation procedures, the basic principles of legality, equal treatment, objectivity, transparency, proportionality, publicity, reasonable and justified action, impartiality and efficiency.

Of those listed, the most important is the basic principle of impartiality. The Board shall deliver its decision impartially in this procedure by comparing the specific situation to the prevailing decrees and assessing this on the basis of sufficiently clarified facts. All other facts (e.g. violation of law established earlier against one of the parties, which is not related to the given case) and officially disclosed data, which cannot be linked directly to the resolution of the specific case, shall not be taken into consideration. For example the size, revenue, SMP status of a company can only be taken into consideration in a litigation procedure if this generates an obligation ensuing from laws, decrees or the resolutions of an authority, but it may not influence the position of the party in the given case. However, according to Article 42 (3) of Eht. if, in the course of the procedure, the Board obtains knowledge of any violation of law committed by the Requesting Entity in addition to that revealed earlier, the Board may act ex officio in respect of these issues as well prior to the decision. The facts related to the newly revealed violation of law shall be communicated either in writing or at the hearing to the parties entities concerned, whereupon they shall be provided the opportunity to express their view and opinion regarding the issue. Impartiality of decisions is also guaranteed by the relevant provisions of the Act on public servants.

Another key basic principle that is connected to the previous basic principle, and should guarantee this principle, is objectivity. According to the statutory justification of this provision of Eht. „decisions shall be adopted impartially on the basis of facts and laws. Public servants shall act objectively and impartially, which is guaranteed, among others by the legal institution of exclusion defined under Article 19 of Áe. (Act on the general rules of state administration procedure) (at present already under Articles 42 and 43 of Ket.), and the legal institution of general incompatibility and occasional exclusion laid down in the Act (Article

26 of Eht.)". This means that an officer and his/her supervisor may not be involved in administering his/her case or that of his/her relative. Additionally, the person involved in the first instance adoption or preparation of a decision subsequently contested, or the person who testified in the given case, or acted as a mediator of the authority, or a representative of the client, or as an expert, may not be involved in the preparation and adoption of the second instance decision. Finally, no person may be involved as officer in the procedure who cannot be expected to make an objective judgement in the case. Eht. Has already provided special stipulations in connection with the latter provision, considered to be a framework rule. The most important rule in Eht. in this respect is Article 26 (1) of Eht. stipulating that – in addition to those defined in Ket. – no person may be involved in the actual management of the case, who was employed by or had a contractual relationship with the client or its supervisory organization in the one-year period preceding the commencement of the procedure, or whose relative is employed by or performs contractual work for or is a member or senior officer of the client, or has an ownership share in the client's business.

c.) Parallel powers

Since as per Article 49(1) of the Electronic Communications Act the wronged operators has the option to take the dispute case to court, an arbitration court or the Authority, the legislator found it necessary to solve the issue of parallel powers of the aforementioned bodies. The establishment of parallel powers was chiefly due to the specificities of the legal relationships that were to be resolved and the features of network agreements since, in the majority of cases, operators file an application with the Authority in connection with disputes pertaining to network agreements they have concluded or wish to conclude with each other (see the obligation to cooperate). A basic feature of network agreements is that although they are subject to the provisions of civil law, elements of public law are also applicable to them. In other words, with regard to certain elements of network agreements, the main rule of the Civil Code on the freedom of contract does not apply: instead, such elements are regulated by the Electronic Communications Act on the one hand, and one of its implementing decrees (Network Agreements Decree) on the other hand. These restrictions are also relevant to the freedom of contract type, the free choice of partners and the essential components of the contents of a contract (fees, terms and elements of service).

Thus, as the above-mentioned network agreements and, in certain cases, the associated obligation to cooperate – highlighted both in the Civil Code and the Electronic Communications Act – equally contain elements of civil and public law, the legislator granted quasi-judicial powers not only to civil courts but also to the Authority to deal with related dispute applications. Furthermore, the parties may take their dispute cases to an arbitration tribunal provided that they have agreed upon an arbitration clause.

As a main rule, pursuant to Article 49(1) of the Electronic Communications Act, it is the wronged party that is entitled to select from among the three available forums of due process. Nonetheless, the Electronic Communications Act contains some restrictions as to the initiation of proceedings if the aforementioned party, on the same legal ground, wishes to launch more than one proceeding at the same time at two or more of the three forums listed above. The reason behind this is that parallel proceedings in respect of a given dispute should be avoided, and that the bodies in question should not make two possibly contradicting decisions. The basis of this stipulation is equally required by the constitutional principle of legal security and by the general principle of res judicata under procedural law.

Article 49 (2) of Eht. regulates the specific case of preventing parallel procedures where a party submits its request for a litigation procedure to the court or the Permanent Communications Arbitration Court.

In this case both the court and the Permanent Communications Arbitration Court shall immediately notify the authority on the commencement of the procedure. Pursuant to Article 49 (4) of Eht. in this case the Requesting Party may not initiate another procedure with the authority in the same matter. This regulation complies with Article 30 of Act CXL of 2004 on the general rules of public administration procedure and service (hereinafter referred to as ’Ket.’) providing that a request may be rejected without actual examination in the event the authority has already adjudicated the case and another request has been submitted for the enforcement of the same right with unchanged underlying facts and with the same legal regulation.

Several factors justified the allocation of power to the Board for adjudication litigation procedures. After Hungary’s accession to the EU various directives on communications were also gradually transposed into Hungarian laws. During this process Directive 2002/21/EC of

the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (hereinafter referred to as 'Framework Directive') was also transposed. Article 20 of the Framework Directive provides for the issues of the resolution of legal disputes between companies, and the rules applicable to litigation procedures laid down in Eht. were elaborated in harmony with these. This means that in compliance with the Directive, Eht. allows for the widest scope of cases the initiation of litigation procedures before the Board.

In addition to complying with the Framework Directive, the allocation of quasi court powers to the Board was also justified by the following factors:

- In the majority of litigation procedures the adoption of a lawful and appropriately justified resolution requires, in addition to sufficient in-depth knowledge of communications laws, technical and economic expertise. Since the Authority possesses this expertise, it is reasonable to allocate the powers of resolving legal disputes to the Authority. For this reason, civil courts can resolve the majority of legal disputes only with the involvement of an expert, which could increase the length and costs of the court procedure. To say nothing of the fact that the Authority applies, in line with the basic principles of procedural guarantees listed in Article 24 of Eht., the principles of equal treatment, objectivity and most important of all impartiality, which, in case of an expert invited by a court, can rarely be guaranteed .
- A procedure conducted by the Board is relatively inexpensive for the service providers. The Requesting Party pays an administration service fee for the procedure conducted by the Board.
- The litigation procedure is fast since the Board is bound by the administration period regulated by Eht. This is 45 days counted from the receipt of the request, at the end of which period a resolution must be adopted. In justified cases the 45-year period may be extended by not more than 15 days. Incidentally, these two periods are identical with the administration periods determined as a primary rule in Article 44 (1) of Eht., i.e. maximum 45 (+15) days.

Litigation procedure rules in communications law

a.) Period available for initiating the litigation procedure

An essential modification versus Hkt. is that Article 40 (1) removes the adjudication of legal disputes from its own scope, i.e. since the entry into force of Eht. the party is not bound by a

subjective deadline (60 days according to Article 91 (5) of Hkt.) or objective deadline (120 days according to Article 91 (5) of Hkt.) for the submission of request for a litigation procedure. Hkt., on the other hand, stipulated subjective and objective deadlines, after the expiry of which litigation procedures could not be initiated. As a result of the change in the binding period brought by the entry into force Eht., the question arose: how should the binding period be calculated in a litigation procedure initiated after the entry into force of Eht. where the procedure is based on an infringement of law committed during the effective period of Hkt. In this case – with regard to the prohibition of retroactive force of laws – it should be examined whether the 120-day objective binding period identified earlier has expired by the date of entry into force of Eht.

b.) Scope of requests within the powers of the Board in a legal dispute

Since Eht. allows for the initiation of litigation procedures for the widest scope of issues in the event of the infringement of rights or rightful interests concerning communications, primarily the Board, and subsequently - during a potential court revision - the court is responsible for identifying the scope of issues where a legal dispute may be initiated. The law enforcement practice of the Board and courts is consistent since the entry into force of Eht. in that the Board does not investigate, for lack of competence, issues related to invoicing between the parties and financial settlements regulated by civil law. In the course of legal disputes related to network agreements the Board does not take a position for lack of competence, regarding issues of the agreement regulated exclusively by civil law.

c.) Brief description of the procedure of the Board in legal disputes

Pursuant to Article 39 (2) of Eht. in litigation procedures the Board does not act at a plenary meeting, but is represented in the procedure by a panel of three members that adopts its resolutions with a simple majority of votes. If the Chairman of the Board is of the opinion that the specific issue is of minor importance in respect of its adjudication, one Board member shall act in these cases of minor importance. The criteria to be applied in considering the assignment are the following:

- magnitude of the relevant case,
- nature of the case,
- identical or similar cases adjudicated earlier,

- urgency or the large number of cases.

Unlike a court procedure, the hearing of a litigation procedure conducted by the Board is not public, since in the majority of cases the submitted documents contain business secrets. In many cases the parties of the litigation procedure are in a contractual relationship with one another or at least one of the parties wishes to conclude an agreement, and in most cases it is not in the interest of either of the parties to allow other service providers to have an insight into their legal relationship. Accepting this notion the legislator decided that the hearings should be closed ones. Accordingly, the party, parties and others concerned who are not entitled to the business secret of the other party may only receive versions of the resolutions adopted in the course of the procedure and to be delivered to the parties and others concerned, and of the resolution to be published, which do not reveal the business secret of the other party, and the published resolution may not contain any business secrets. This could mean that in a legal dispute where both parties submit evidence containing business secrets and where neither of the parties consents to disclosing such data to the other party the Board has to word at least 4 versions of the resolution: one for the Requesting Party with the Requesting Party's business secrets, one for the Requested Party containing its business secrets and one for publication from which all business secrets have been deleted. Finally, a version containing all business secrets is also prepared. This version is prepared for a potential court revision of the legal dispute resolution, partly because in the course of a court procedure the judge may learn these business secrets as sanctioned by law, and partly because this version makes work easier for the judge by eliminating the need to compare two different versions. It should be mentioned here that business secrets are not only used in litigation procedures, but were first used at the time market analysis related Board resolutions were worded.

Pursuant to Article 45 (1) of Eht., in its resolution the Board may make two decisions:
The Board may either reject the unfounded request,or establish the violation of law. When the violation of a specific provision of law is established, in justified cases the acting Board may also request an obligation on the violator's part. In the event an agreement conclusion obligation is in effect between the parties on the basis of the rule pertaining to electronic communications, the Board may also establish the content of the agreement if this has not been agreed upon by the parties. Additionally, in the case of a legal dispute related to network service fees the Board may forbid the continued application of the fee, and simultaneously establish the legally recognized fee and call for the service provider to apply the legally

recognized price. If justified by the circumstances of the specific case and the general regulatory objective the Board may impose a fine or take measures proportional with the weight of violation, within the limits laid down by law.

Special type of litigation procedure, cross-border legal disputes

Eht. „Article 51 (1) If, in the course of a legal dispute between service providers the electronic communications regulatory authority of another member state is involved in addition to the authority, the authority shall, in the course of the procedure, invite the opinion of the electronic communications regulatory authorities of the other member state involved in the legal dispute. (2) To ensure the resolution of a legal dispute the authority shall cooperate with the electronic communications regulatory authority of other member states contacting the authority."

Article 51 of Eht. is based on the provisions of the Framework Directive referred to above. Article 21 of the Framework Directive (Resolution of cross-border disputes) includes the following:
„(1) In the event of a cross-border dispute arising under this Directive or Specific Directives between parties of different Member States, where the dispute lies within the competence of the national regulatory authorities of more than one Member State, the procedure set out in paragraphs 2, 3 and 4 shall be applicable.
(2) Any of the parties may refer the dispute to the relevant national regulatory authorities. The national regulatory authorities shall coordinate their efforts in order to bring about a resolution of the dispute, in accordance with the objectives set out in Article 8. In the course of resolving a dispute, the national regulatory authority shall observe the provisions of this Directive or the Specific Directives when imposing an obligation on a company.
(3) Member States may stipulate that the national regulatory authorities jointly decline the resolving of a dispute in the event other mechanisms, including mediation, exist, which would contribute more to the timely resolution of the dispute in compliance with the provisions of Article 8. They shall inform the parties thereof without delay. If, after four months the dispute is still not resolved, and if the dispute has not been brought before the court by the party seeking legal remedy, upon the request of any of the parties the national regulatory authorities shall coordinate their efforts in order to bring about a resolution of the dispute, in compliance with the provisions set out in Article 8.

(4) The procedure referred to in paragraph 2 shall not preclude either of the parties from initiating a court procedure."

Article 51 of Eht. is applicable as of 1 May 2004 and provides for the mode of resolution of cross-border legal disputes. Article 51 stipulates, with regard to the provisions of the Framework Directive, that the authority shall invite the opinion of electronic communications regulatory authorities of the member state also involved in the legal dispute. Eht. Also requires the authority to cooperate with the electronic communications regulatory authorities of other member states for the prompt resolution of legal disputes. Article 51 of Eht. has not been applied yet in the practice of the Board, and no service provider has as yet contacted the Board with such request.

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