LEGAL POSITION OF THE DEPUTY CHAIRMAN OF THE NATIONAL BROADCASTING COUNCIL

[a] TOMASZ ZDZIKOT

Institute of Law Studies of the Polish Academy of Sciences
Nowy Świat St. 72, Warsaw, Poland
email: [a]tzdzikot@tlen.pl

Abstract: In accordance with the will of the Polish legislator, a mandatory member of the National Broadcasting Council (KRRiT), pursuant to the provisions of the Constitution of the Republic of Poland being an authority upholding freedom of speech, the right to information and public interest in radio broadcasting and television, is the deputy Chairman of the National Council. Formulating in the Broadcasting Act the requirement to elect the deputy Chairman out of the members of the National Council, the legislator did not define clearly the mode of their election and dismissal, nor their applicable competences and the position within the collegiate body in which they function. Taking into consideration the statutorily mandatory character of the function of deputy Chairman of the National Council, the said questions require legal analysis.

Keywords: KRRiT, radio broadcasting, television, substitution

1 Introductory remarks

Pursuant to the provisions of the Constitution of the Republic of Poland (hereinafter referred to as: "the Constitution RP"), the National Broadcasting Council (hereinafter referred to as: "KRRiT") was included, along with the Supreme Audit Office and the Human Rights Defender, in the group of national audit and protection of rights institutions (Chapter IX of the Constitution RP), upholding freedom of speech, the right to information and public interest in radio broadcasting and television. KRRiT is a collegiate body whose members are appointed by the Sejm, Senate and the President of the Republic of Poland. With respect to the principles and mode of operation as well as organization and detailed rules regarding appointment of the members of KRRiT, the Constitution RP refers to the applicable Act.

In accordance with the provisions of the Broadcasting Act of 29th December 1992 (hereinafter referred to as: "u.r.t."), KRRiT is a national authority competent with regard to radio broadcasting and television issues (Art. 5 of u.r.t.), the members of which include five appointed members: 2 by the Sejm, 1 by the Senate and 2 by the President, out of the persons standing out by their knowledge and experience with regard to mass media (Art. 7 Section 1 of u.r.t.). By the will of the legislator, the members of KRRiT elect from among themselves the Chairman of KRRiT (Art. 7 Section 2b of u.r.t.). On the motion of the Chairman, the deputy Chairman of KRRiT is also elected from among the members of KRRiT (Art. 7 Section 3 of u.r.t.). One ought to notice that Art. 7 Section 3 of u.r.t. is, in fact, the only legal regulation referring to the person performing the function of deputy Chairman of KRRiT.

2 Appointing and dismissal

In accordance with the already quoted Art. 7 Section 3 of u.r.t., the deputy Chairman of KRRiT is elected by the members of KRRiT from among themselves. However, it is important to notice that only the Chairman of KRRiT is entitled to put forward a candidate for this function. As it is observed in the doctrine, the legislator intends to guarantee in this way that the person elected for the position of the deputy Chairman shall „enjoy the trust, or, at least, the support of the Chairman"[1]. The construction of the provision of Art. 7 Section 3 of u.r.t., in which the term "the National Council elects" was used, and not "may use", in an unequivocal way indicates that appointing deputy Chairman of KRRiT has a mandatory character. The legislator does not define the majority required for executing the election. It seems that the general principle included in Art. 9 Section 1 and 2 of u.r.t. shall be applicable in this respect, in accordance with which on the basis of acts and in order to execute them, KRRiT issues ordinances and resolutions, whereas resolutions are enacted by the majority of 2/3 of votes of the statutory number of members. Therefore, one ought to assume that in the current factual condition, appointing deputy Chairman may take place by virtue of the resolution enacted with the votes of at least four members of KRRiT. In the above-mentioned context, it is worth noticing that the fulfilment of the statutory obligation regarding the election of deputy Chairman is conditioned by the KRRiT Chairman's presentation of applicable motion, to which they are, as already mentioned, exclusively authorized. What then in a situation in which the Chairman of KRRiT would make it impossible to execute election of their deputy by not submitting the required motion? One ought to think that long-term maintenance of the state non-compliant with the unequivocal requirement of the Act may and should raise the responsibility of the Chairman before KRRiT, which entrusted them with managing its works and representing it, and also with executing tasks defined in the Act (Art. 10 Section 1 of u.r.t.) and pursuant to Art. 7 Section 2b of u.r.t. has the possibility to dismiss them from the held position. Obviously, failure to obtain the required majority by all the candidates for deputy put forward by the Chairman of KRRiT, may lead to an analogous situation. The Act does not specify the appropriate mode of proceedings in such a case, apparently relying on the capabilities of the Chairman elected from among KRRiT to gather sufficient majority required to elect their deputy.

Unlike in the case of the Chairman of KRRiT, who, in accordance with Art. 7 Section 2b of u.r.t., can be dismissed by the members of KRRiT, the legislator did not regulate the mode of dismissal of deputy Chairman of KRRiT. However, the subject gap in the provisions of the law should not, in my opinion, dispose KRRiT of the ability to undertake applicable resolutions in the above-mentioned respect. Taking into consideration the character of the competences of deputy Chairman, which shall be discussed in more detail in further part of the article, it seems purposeful and justified to assume that KRRiT may dismiss deputy Chairman enacting a resolution in the mode analogous to their election[2].

3 Competences

What one's attention is drawn to in the doctrine is that the Act "does not grant the deputy with their own competences, nor does it indicate which of the competences of the Chairman and under what circumstances may be executed by them"[3]. In this situation, one claims that "they may only substitute the Chairman in situations in which the latter does not perform their function. It seems doubtful whether KRRiT could cede to the deputy, in the form of an ordinance, resolution or regulation, a part of the functions granted by the Act to the Chairman. Similarly, it seems unacceptable to cede to the deputy a part of their functions by the Chairman"[4]. Likewise, S. Piątek points out that "the Act does not clearly define the functions of the deputy Chairman. Therefore, one must assume that their tasks are limited to substituting the Chairman during a period when the Chairman cannot fulfil their functions"[5].

Undertaking an attempt at estimating the possible substitution of the Chairman of KRRiT by deputy Chairman, one ought to, in my opinion, differentiate the functions and tasks performed by the Chairman as the primus inter pares member of a collegiate body, who, in accordance with Art. 10 Section 1 of u.r.t. directs

[1] Dziomdziora Wojciech (in:) Piątek Stanisław, Dziomdziora Wojciech, Wojciechowski Krzysztof, The Broadcasting Act. Commentary, Warszawa 2014, p.91

[2] also: Dziomdziora W. (in:) Piątek S., Dziomdziora W., Wojciechowski K., The Broadcasting Act, op.cit., p.92

[3] Dziomdziora W. (in:) Piątek S., Dziomdziora W., Wojciechowski K., The Broadcasting Act, op.cit., p.91

[4] Sobczak Jacek, Radio Broadcasting and Television. Commentary to the Act, Kraków 2001, page 159

[5] Piątek Stanisław, The Broadcasting Act. Commentary, Warszawa 1993, page 31

the works of KRRiT and represents it outside, from the tasks of the Chairman of KRRiT as the entity competent with respect to concession issues (Art. 33 Section 2 of u.r.t.), or also the authority in custody of the registry of television programmes distributed in the ICT system and distributed programmes (Art. 41 Section 3 of u.r.t.).

As long as substituting of the Chairman by the deputy is possible and acceptable with regard to the tasks arising from the chairmanship of the collegiate body, an acknowledgment of the fact that the Chairman could also be substituted with regard to the tasks assigned to him by virtue of the law as an independent state authority is highly doubtful.

At this point, it would be interesting to compare the legal regulations of the Broadcasting Act with the regulations applicable in the governmental administration, in particular on the grounds of the Act on the Council of Ministers of 08th August 1996 (hereinafter referred to as: "u.R.M."). In accordance with Art. 37 Section 1 and 2 of u.R.M., the Minister performs their tasks with the help of the secretary and undersecretary of state, the political office of the minister and the general director of the office, and the scope of the activities of the secretary and undersecretary of state is established by the applicable minister, informing the Prime Minister. Furthermore, pursuant to Art. 37 Section 5 of u.R.M., the Minister is substituted by the secretary of state within the scope determined by the minister or the undersecretary of state, if the secretary has not been appointed. Yet another type of substitution is referred to in Art. 36 of u.R.M., on the basis of which, in case of the lack of the assignment regarding the position of the minister or temporary inability to perform the minister's duties, the minister is substituted by the Prime Minister or another member of the Council of Ministers indicated by the Prime Minister. As the Supreme Court (SN) pointed out in the decision adopted at full complement of SN on 14th November 2007, "the principal difference between substitution referred to in Art. 37 Section 5 and Art. 36 of u.R.M. and execution of tasks "with the help of" on the basis of Art. 37 Section 1 of u.R.M., consists in the fact that the persons enumerated in Art. 37 Section 1 of u.R.M. do not have any scope of freedom (autonomy) in relation to decision making. They do not perform the entitlement as deputies, but only under authorization, on behalf of and for the account of the minister by their previous approval. Therefore, as long as deputy ministers, on the basis of Art. 37 Section 5 of u.R.M. (if their scope of activities has been defined) and Art. 36 of u.R.M., have a range of freedom with regard to decision making and its content, the secretary or undersecretary of state, acting on the grounds of Art. 37 Section 1 of u.R.M., do not have such autonomy. In such a case, the secretary or undersecretary of state performing the minister's tasks is obliged to reveal that they act on explicit authorization of the minister and that the entity performing the tasks is the minister (it may arise from the letter heading or imprint of attached stamp). However, it is not the condition for validity of the undertaken decision, but in case of possible doubts, this makes it easier to say that the signature was assigned under authorization of the minister." In the analyzed factual state, the Supreme Court critically assessed the lack of direct indication regarding authorization to settle issues being the subject of consideration in the ordinance of the Minister of Justice containing authorization of the minister for the secretary and undersecretary of state regarding undertaking various activities in relation to issues subject to the department of governmental administration – justice. The Supreme Court declared that „It does not change the fact that these persons (the secretary of state, undersecretary of state) may sign acts on delegation under authorization of the Minister of Justice if only the Minister of Justice granted them applicable authorization in a way different from the content of the above-mentioned ordinance. They may also in a situation defined in Art. 37 Section 5 of u.R.M. act in place of the minister. This type of making use of other persons is referred to in the provisions of the Act on the Council of Ministers, namely a normative act of higher order than the above-mentioned ordinance." Therefore, one ought to emphasize that formulating an interpretation of the law allowing acting in place of the Minister of Justice by the secretary and undersecretaries of state, the Supreme Court saw the foundation of the said interpretation directly in the statutory regulations, here – in the Act on the Council of Ministers, which provide for such a possibility. What is important, as it has been already mentioned, the Broadcasting Act does not contain any equivalent of the above-mentioned regulations concerning governmental administration in reference to the person holding the position of deputy Chairman of KRRiT.

In the above context, one should perceive as outstandingly relevant the conditions arising from the principle of legality established in Art. 7 of the Constitution RP, in accordance with which "Public authority bodies act on the basis of and within the law." As the doctrine indicates, "In a democratic state in which the law governs, public authority bodies may only be established on the grounds of the law and legal norms must reflect their competences, tasks and mode of proceedings, thus defining the borders of their activity. The said bodies may only act within these borders. As long as an individual has freedom of acting pursuant to the rule that what is not forbidden by the law is allowed, public authority bodies may only act if the law authorizes them to do so and only within the limits defined by the law, whereby the citizen may always demand quoting the legal basis pursuant to which the body undertook specific action. It remains in compliance with the requirements arising from the principle of democratic, legal state."[6].

As a side note, one ought to observe that in the above-mentioned decision, the Supreme Court, referring to the views of the doctrine, on the grounds of Art. 37 Section 1 of u.R.M., pointed out that "It is thus an obvious thing that in a situation when the minister's office is shaped as monocratic, supreme state authority body (governmental), the person holding this position is not able to independently cope with all the tasks that they must face. Therefore, the person must use help and substitution in executing their competences, which is performed within the so-called decentralization of performed functions (principle of office management) and is necessary so that the organized single-person office could effectively act. The burden of the minister's tasks is, therefore, appropriately distributed among respective substantial employees of the ministry in accordance with their official hierarchy (H. Izdebski, Collegiality and Individuality in the Central Management of Modern State, Warszawa 1972, p. 153-204). One should also emphasize here that monocratic administrative bodies cannot be identified with the very person fulfilling the office."

In this context, one ought to notice, following Prof. B Banaszak, that "The Supreme Administrative Court (NSA) rightfully derived from Art. 7 of the Constitution RP that it implies the primacy of linguistic interpretation. If public authority bodies act on the basis of and within the law, in the opinion of NSA, interpretation of regulations cannot lead to assigning them meaning exceeding beyond conclusion arising from application of doubtless and methodologically correct interpretative directives. Furthermore, it should not be associated with undertaking generalizations or simplifications ignoring the linguistic and logical aspect of the given norm (resolution of NSA (7) of 22nd April 2002, FPS 5/02, ONSA 2002, No. 4 item 137). As a side note, one may add that both the Supreme Court (SN) and the Constitutional Tribunal (TK) in their judicial practice also acknowledge the primacy of linguistic interpretation, but do not derive it from Art. 7 of the Constitution and are not consistent in their attitude. As an example, one may refer to the resolution of SN in which it was stated that not denying (…) – as a matter of principle – the meaning of (…) postulate to use other interpretative methods only when linguistic interpretation does not lead to unequivocal results, one must say that indubitable grammatical and semantic explicitness of the content does not constitute an obstacle excluding considering rationality and functionality of its scope defined in the interpreted regulation (resolution of SN (7) of 20th January 2005, I KZP 28/04, OSNKW 2005, No. 2, item 1), and, thus,

[6] Skrzydło Wiesław, The Constitution of the Republic of Poland. Commentary, Warszawa 2009, page 16

does not exclude applying other interpretative methods. (…) The primacy of the linguistic interpretation cannot be absolute and ambiguous, its results lead to applying other interpretative methods – e.g. system, historical or functional one (see: resolution of NSA (7) of 17th January 2011, II FPS 2/10, ONSAiWSA 2011, No. 2, item 25). This position is shared by the legal science, standing for withdrawing from linguistic sense of the interpreted regulation, whereas linguistic interpretation leads to absurd, preposterous conclusion, because it undermines ratio legis of the regulation when it ignores an obvious legislative mistake and when it leads to dissonance with the fundamental constitutional values (see: The Principles of the Interpretation of Law, Toruń 2006, p. 78-79)."[7].

In the view of the above-mentioned remarks, undertaking interpretation of the provisions of the Broadcasting Act, including in particular Art. 7 Section 3 of u.r.t. serving as the constitutional basis for appointing deputy Chairman of KRRiT, in the context of limited possibilities of applying the linguistic interpretation, it is also possible to apply teleological and functional interpretation. Such interpretation may lead to the conclusion that if the intention of the legislator was, as it has already been mentioned, mandatory appointment of deputy Chairman of KRRiT, the purpose of such regulation is to provide full continuity of the execution of tasks assigned by virtue of the law to the Chairman of KRRiT. Such an interpretation finds confirmation in § 8 Section 2 of the Organizational Statutes of KRRiT Office adopted by the resolution of KRRiT No. 472/2011 of 28th September 2011, as amended, in which it is stated that "During the absence of the Chairman of the National Broadcasting Council, substitution is executed by the Deputy Chairman of the National Council or another Member of the National Council indicated by the Chairman of the National Council."

In this context, one ought to refer also to § 9 Section 1 of the Organizational Statutes, which defines the scope of documents requiring signature of the Chairman of KRRiT, indicating that the Chairman of KRRiT signs in particular:

1) ordinances arising from statutory delegations, resolutions of KRRiT, administrative decisions in accordance with statutory authorization as well as other normative acts arising from other provisions of the law;
2) correspondence addressed to: the President of the Republic of Poland, the Marshal (Speaker) and Deputy Marshals (Speakers) of the Sejm and Senate of the Republic of Poland, the Prime Minister and Deputy Prime Ministers, Ministers (Heads of Central Offices) and voivodes (provincial governors) as well as the President of the Supreme Audit Office;
3) letters addressed to diplomatic representatives of governments of other states;
4) correspondence concerning defence and national security.

One ought to notice that the above classification includes both documents arising from executing authorizations belonging to the Chairman of KRRiT in connection with their position within the collegiate body (e.g. resolution of KRRiT) and directly connected with executing tasks of an independent state authority (administrative decisions). Assuming the discussed manner of understanding "substitution", one should state that deputy Chairman shall be entitled also to sign documents in place of the Chairman, but only in respect of their tasks as defined by Art. 10 Section 1 of u.r.t. and not those restricted for the Chairman by virtue of Art. 33 Section 2, or Art. 41 Section 3 of u.r.t. In the judicial practice, it is indicated that the very fact of appointing a person holding an administrative body function for the position of the deputy is not synonymous to authorization to undertake actions within the scope reflecting authorization of the substituted body. As the Provincial Administrative Court in Gdańsk indicated in the verdict of 05th April 2007 (file reference number III SA/Gd 6/07), "Claiming that deputy of the national provincial sanitary inspector has the same competences as the body for substitution of which they have been appointed is incorrect. The said competences, in particular with regard to authorization to issuing decisions, must derive from authorization of the body to act on its behalf."

Substitution within legally acceptable range shall be executed when the Chairman is not able to perform their functions. In the view of the above-mentioned § 8 Section 2 of the Organizational Statutes of KRRiT Office, the principal circumstance implying the possibility to execute substitution shall be the absence of the Chairman of KRRiT. It seems that what is meant here is a situation in which the said absence shall have a sort of a "qualified character", i.e. it shall not be connected, for example, with the participation of the Chairman in a meeting or a conference outside the headquarters of KRRiT, but e.g. in connection with their illness or even a holiday journey.

Securing continuity of performance of tasks of the Chairman of KRRiT as a concession body and the authority in custody of the registry of television programmes distributed in the ICT system and distributed programmes, shall be possible with applying Art. 268a of the Act of 14th June 1960 – the Code of Administrative Proceedings (hereinafter referred to as: "k.p.a."), which states that public administration body may entitle, in the written form, employees serving this body to resolve issues on its behalf within the established range, and, in particular, to issue administrative decisions, rulings and certifications. As the doctrine indicates, "The authorizing body may freely select persons whom it grants authorizations to issue acts as well as conduct proceedings on its behalf. The legislator has implemented one limitation in this respect: the authorized person must be an employee of the office appointed as serving the said body."[8]. In this context, one ought to notice that by the verdict of 06th May 2009 (file reference number II PK 95/09), the Supreme Court unequivocally stated that appointing a member of KRRiT in accordance with Art. 7 of u.r.t. did not lead to the occurrence of employment relationship pursuant to Art. 68 of the Act of 26th June 1974 – the Labour Code – indicating that appointing to KRRiT did not lead to shaping principal signs of employment relationship referred to in Art. 22 of the Labour Code, in particular including submission of an employee to the employer. Therefore, the possibility of granting deputy Chairman of KRRiT an authorization referred to Art. 268a of k.p.a., which could, on the other hand, be certainly granted to an employee of the KRRiT Office constituting by virtue of Art. 11 Section 1 of u.r.t. an executive office of KRRiT, seems doubtful.

4 Summary

In conclusion, selecting from among the members of KRRiT deputy Chairman is mandatory and in the context of sole initiative of the Chairman of KRRiT authorized to present motion for appointing the deputy, requires that it is a person enjoying trust. Appointing for the position of deputy Chairman is not synonymous to general authorization to act in the scope restricted by the Chairman of KRRiT. There is no doubt that deputy Chairman of KRRiT may execute during the absence of the Chairman their tasks connected with managing the works of KRRiT and representing it outside. Nevertheless, approval of the possibility to undertake by deputy Chairman of KRRiT, in place of the Chairman, actions and to execute activities restricted for the Chairman of KRRiT as administrative body, seems highly doubtful. Within this context, one ought to observe that even in view of unequivocal regulations of the Act on the Council of Ministers, directly constituting the foundation for substituting minister by secretary or undersecretaries of state, resolving the existing legal dispute required undertaking resolution by the Supreme Court en banc.

[7] Banaszak Bogusław, The Constitution of the Republic of Poland. Commentary, Warszawa 2012, pages 79-80

[8] Jaśkowska Małgorzata, Updated Commentary to the Act of 14th June 1960 – the Code of Administrative Proceedings, Lex 2015

Literature:

1. Banaszak Bogusław, *The Constitution of the Republic of Poland. Commentary*, Warszawa 2012. ISBN 978-83-255-4095-1
2. Jaśkowska Małgorzata, *Updated Commentary to the Act of 14th June 1960 – the Code of Administrative Proceedings*, Lex 2015
3. Piątek Stanisław, *The Broadcasting Act. Commentary*, Warszawa 1993. ISBN 83-206-1079-6
4. Piątek Stanisław, Dziomdziora Wojciech, Wojciechowski Krzysztof, *The Broadcasting Act. Commentary*, Warszawa 2014. ISBN 978-83-255-5051-6
5. Skrzydło Wiesław, *The Constitution of the Republic of Poland.* Commentary, Warszawa 2009. ISBN 978-83-7601-629-0
6. Sobczak Jacek, *Radio Broadcasting and Television. Commentary to the Act*, Kraków 2001. ISBN 83-7333-010-0

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