

**THE CURRENT ISSUES IN LEGAL REGULATION OF MOBILE
NETWORK CONNECTION SERVICES**

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In modern conditions of economic management the sustainable development of telecommunications and constant quality of mobile and Internet communication is the most important prerequisite for integration of Ukraine into the global information society. One of the priority direction of the state policy identified by the state is the development of information society in Ukraine and adoption of the newest information and communication technologies in all spheres of public life.

A. Granaturova, S. Vorobiyenko, E. Ivanov, S. Kazantsev devoted their works to the analysis of the market of the ukrainian telecommunication development, but the specific problems of legal regulation of mobile services are not considered in these works.

The aim of the research is to analyse the legal regulation of legal relations between the subjects of mobile communications and to identify the most acute problems in this field. A detailed analysis of the market dynamics will allow identifying its characteristics and proposing the effective methods of legal market regulation and relations arising from the mobile services providing.

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The relations concerning with mobile service providing, like all others, have its structure with the following elements: subjects, objects and content. The subjects of considered legal relations are operators of mobile communication network and subscribers. In accordance with the article 1 of the Law of Ukraine «On telecommunications» № 1280-IV dated November 18, 2003, with subsequent amendments [1], and paragraph 3 of the Resolution of the Cabinet of Ministers «On approval of the Rules of the providing and receiving the telecommunication services» № 720 dated August 9, 2005, [2] the subscriber is a consumer of telecommunication services who receives the telecommunication services under the contract, that provides the connection to the telecommunications network of terminal equipment that belongs to the subscriber; mobile network operator - an economic entity that has the right to pursue activities in the telecommunications field, including the maintenance and operation of telecommunication networks.

Thus, the mobile network operator is an economic entity created in accordance with Ukrainian legislation in the form of a legal person that provides mobile services for mobile phone subscribers.

A separate problem is to determine the legal status of subjects of mobile service providing: operators and subscribers. There are several variants of mobile service providing in Ukraine: on the basis of a written contract or implied-in-fact contract, contract where the subscriber is personified or not. Mobile services provided on the basis of a written contract between the mobile operator and the subscriber. The contract concludes with a particular person (individual or legal). Mobile services could be provided on the basis of the purchasing of the cards for mobile communications (sim-cards and other). In this case there is no written contract, and

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mobile services provides upon the existence of account balance on the card. The subscriber is not personified.

According to the p. 3 of the Rules of providing and receiving the telecommunication services approved by the Cabinet of Ministers of Ukraine dated April 11, 2012 № 295, service contract (hereinafter - contract) - a contract between the consumer and the operator (service provider), where the operator (service provider) should on the consumers' request provide the service and the consumers should pay for them (if otherwise provided for by the contract) [3].

It should be noted that for the beginning of the mobile services providing operator should not only conclude the contract. There are also some inseparable and necessary conditions:

1) the subject to become a subscriber, in the case of a postpaid subscription to the mobile service provider, should conclude a written contract with the representative of the operator;

2) the subject should buy a mobile phone card (sim card) of individual mobile operator on the basis of different conditions (sometimes even free);

3) the subject should buy an end user equipment - mobile phone that should conform to the standards of the selected operator and be in health.

In the case of connection to the service provider through the implementation of petty daily transactions (namely the purchasing of 10-15 grivnas sim card), the legal status of the subscriber is not specified. The Civil code of Ukraine defines the petty daily transaction in par. 1 p. 1 article 31: the transaction is considered as petty daily, if it satisfy the everyday needs of the person, if it in conformity with her / his physical, spiritual or social development and related with the low cost subject [4].

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Concerning with general rule all pre-paid communication contracts should be public and unlimited. The operator's representative should inform the subscribers about the conditions of such contract during the distribution of such cards. But in fact, not the representatives of the operator, but third parties effect the sales of the cards. Some operators (not all!) posts on their websites the conditions of such contract under the head "Terms and conditions of the tariff plan for pre-paid subscribers". The pre-paid subscribers rules should be a public proposal to conclude the contract on conditions stated in the rules. But does everyone have the opportunity to familiarize themselves with these rules?

As stated in the mobile operators' Rules, the contract with pre-paid subscriber concludes in the oral form by taking implicative actions, at the moment of activation the subscriber starter pack. For starter package activation the subscriber should unpack starter pack, take the SIM card, and insert it to the end use equipment (mobile phone) and carry out the first paid transaction (call to anyone, except to the service, send messages, using GPRS, WAP, etc). Starter package activation means the subscriber's consent with the conditions of Rules and conditions of the chosen tariff plan. The purchasing of such a start package from the third parties (for example, sales outlet of the end use equipment, mobile phones and all sorts of gadgets), not from the representative of the operator, does not give the opportunity to familiarize with the rules of mobile service rendering not in printed form or at the operator's web-site.

In connection with the fact that prepaid subscribers receive the services impersonal, the subscriber (party to the contract) is the person who physically owns the SIM card. In the case if a person, who activate the starter package, give to the operator their personal data, such a person become the party of the contract.

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Another type of connection to a mobile operator is the conclusion of a written contract. Such treaties could be different.

The contract with contract subscribers is public, fixed term contract of adhesion. The conditions of such contract provided for by the Rules and the standard forms of the operator. Contract with corporate subscribers is not a public contract. The parties may depart from the standard form of the operator contract and establish the conditions that will differ from the Rules.

The contract with contract subscribers concludes in writing form between the subscriber and the representatives of the operator. The authorized representative of the operator until the conclusion of the contract introduce to the subscriber the conditions of the contract, with the rules, and gives answers to the subscriber's questions about the operator's services. The subscriber should have the opportunity to familiarize with the information on the operator's network coverage and the additional services of the operator [3].

The legal status of mobile service operator hasn't defined clearly in the legislation of Ukraine. The concept of «mobile operator» described in the Law of Ukraine «On telecommunications» through the definition of «telecommunications operator»: an economic entity that has the right to pursue activities in the field of telecommunications, including maintenance and operation of telecommunications networks [1].

Thus, the mobile network operator is a business entity created in accordance with Ukrainian legislation in the form of a legal person that provides mobile services to mobile phones of their subscribers, carries out maintenance service of the network. In accordance with paragraph 7 of the Rules of providing and receiving the

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telecommunication services, operators independently defines the list of mobile communications services provided to consumers.

It's necessary to pay attention to the fact that mobile operators unlawfully take advantage from p. 12 article 38 of the Law of Ukraine «On telecommunications», that provides the rights of telecommunications operators. Under this paragraph, namely: «another rights provided for by legislation and agreements on the telecommunication services providing», the operators added to the contract conditions the condition about the operators' ability unilaterally make changes in the contract. But such condition contradicts with the current legislation of Ukraine and even with the other provisions of that article. Such interpretation of the operators' rights puts the subscriber in an unequal position with him.

The next most painful issue for the subscribers is the problem of the unilateral contract conditions changing by the mobile operator.

Frequently, the mobile companies change the contract conditions. Such mobile operators' actions are unlawful. The law of Ukraine «On telecommunications» in a greater degree protect operators' interests rather than subscribers.

Under such conditions, the operators illegally carry out unilateral changing of the essential contract's conditions, particularly changing of tariffs. The unilateral changing of the contract conditions by the operator is illegal, because it contradicts with the provisions of the Civil code and special Laws of Ukraine «On telecommunications» and «On consumers' rights protection».

According to the article 1 of the Law of Ukraine «On telecommunications», a telecommunications service is the telecommunication operator's and/or provider's

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product of, aimed at the satisfaction of consumers' needs in the field of telecommunications [1].

According to the article 1 of the Law of Ukraine «On protection of consumers' rights», consumer is an individual person, who purchases, orders, uses or intends to acquire or order products for personal needs, not directly related to business activities or duties of the employee [5].

The article 37 of the Law of Ukraine «On telecommunications» specifies the priority of the consumers' interests that corresponds to the general sense of the consumers' protection legislation.

This provision should be interpreted in connection with the rights of operators and providers. Particularly, with the right of setting tariffs for telecommunications services, except the tariffs on those services that regulated by the state in accordance with this Law (par.5 p. 1 art. 38 of the specified law).

Taking into account that the right to impose a tariff for telecommunication services is not absolute in the sense that the operator unilaterally at any time could change the tariffs defined in the mobile services contract.

It should be understood that the par. 12 p.1 of abovementioned article (telecommunications operators are entitled to other rights provided for by the legislation and telecommunication services contracts) should not be considered as a normative resolution to formalise the contract conditions restricting the rights of other party- subscriber.

The condition that the operator has the right of unilaterally changing of the tariffs is invalid, such as restricts the rights of consumers.

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According to the p.1 art. 203 of the Civil code, the contest of transaction cannot contradict the Civil code, other acts of civil legislation and the moral foundations of society. Part 1, art. 215 of the Civil code of Ukraine established that the ground for the invalidity of the transaction is the failure of the requirements established by paragraphs one - third, fifth and sixth of article 203 of this Code.

However, according to the article 217 of the civil code of Ukraine, the invalidity of one part of a transaction should not entail the invalidity of its other parts, if it can be assumed that the transaction would be concluded without the inclusion of an invalid part. The article 18 of the Law of Ukraine «On protection of consumers' rights» prescribes the order and grounds for invalidation of the terms of contracts restricting the rights of the consumer. So, according to the p. 2 of this article, the contract conditions are unfair if they establishes a significant imbalance of contractual rights and obligations of the consumer. Such contract provides for the parties the unequal legal status, because it gives to operator the right of unilaterally changing of the conditions, that should be qualified as significant, because they relates to the subject matter of the contract and to its price.

In accordance with par. 11, 12 p, 3 art. 18 of the Law of Ukraine «On consumers' rights protection» the unfair conditions, as follows: 1) granting to the seller (contractor, manufacturer) the right of unilaterally changing of the contract conditions on his discretion or on the basis of conditions that are not specified in the contract; 2) granting to the seller (contractor, manufacturer) the right of unilaterally changing of the characteristics of the product that is the subject matter of the contract.

Thus, the contract clause concerning with the unilateral tariffs changing is unfair and should be recognized as invalid.

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We believe that the operator has the right to change the services tariffs, and its list, including the right to provide new services not specified in the contract, and modify the services' conditions only with the prior written consent of the subscriber. The previous edition of this provision should be invalidated, and should not be considered as a lawful basis for the unilateral changing of the essential conditions of the disputed contract.

It's possible to file a lawsuit in a court, if it's impossible to achieve a consensus about the corresponding changes.

The conclusion of the mobile service contract carries out on the basis of a public agreement. The conditions of such agreement developed by the operator. Despite this, we can confirm that the operator dictates its own conditions, because the consumer is not involved to the development of the contracts' provisions.

But the agreement (contract) is uniquely signed by the subscriber. At the same time, after the contract signing, the operator receives substantial rights to change its conditions. The subscriber, who obligated not to terminate the contract during a year or other specified period, have to agree to the new conditions.

To reject the new contract conditions, you should give consideration to the additional contract conditions of the contract or turn to the laws. Any contract can be terminated on the grounds defined by the laws, or under the conditions that are specified in the contract.

There is an exhaustive list of contracts that could be broken unilaterally. There are the purchase and sale contract, gift contract, storage contract, service delivery contract and others, However there are a number of limitations. For example, the buyer could withdraw from the purchase and sale contract, only if the seller refused

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to deliver the goods. Thus, there are a few situations when one party can safely withdraw from the contract.

It is necessary to foresee the possibility of amendments to the contract and in advance take care about the right of its refusing. You can specify the right of one of the parties to terminate the contract unilaterally. If the bringing of such a condition is impossible, as for example, in the case with mobile operators, it is necessary to prove that the contract conditions' changing is the essential changing of circumstances.

The Civil code of Ukraine allows refusing from the implement of the contract, avoiding all the penalties, if the circumstances changed essentially (article 652 of the Civil code of Ukraine « Contract modification or termination concerning with essential change of circumstances»).

In this case, the issue involves in the recognition of tariffs changing as a substantial changing of circumstances for a number of subscribers. Here we mean not only the tariffs changing, but the changing of the way of providing services.

It's necessary to establish not only the list of grounds for termination of the contract or refusal of the contract implementation, but also legal consequences for both parties in the case of its termination. For example, a service delivery contract (art. 907 of the Civil code of Ukraine «Termination of the service delivery contract ») could contain a party's right to withdraw from the contract at any time, but paying a penalty. The absence of this information will be the basis for litigation.

The researching of the special aspects of the mobile operators' unilateral refusal from the obligations' fulfilment under the mobile service contract led to the conclusion about the necessity of settling this problem, because the operator could refuse from the contract implementation only in the cases provided for by law.

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Therefore, in spite of complex and unregulated relationships of mobile service providing, such relationships are necessary in modern life. That is why the main task of the state should be the positive directions of the influence on the object of the regulation. Such direction should ensure: the presence of the proper legal base for the formation of a favourable competitive environment and the efficient functioning of the mobile communications market; the creation of equal activity conditions for the enterprises regardless their ownership form and capital origin; the elimination of the discriminatory conditions by the companies that occupy the monopolistic (dominant) position on the market; the encouraging the efficient investment in telecommunication infrastructure development; the stimulation of enterprises innovation activity; the providing of high dynamics of telecommunication networks development and the protection of the telecommunications services consumers' rights .

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**АКТУАЛЬНІ ПРОБЛЕМИ ПРАВОВОГО РЕГУЛЮВАННЯ ВІДНОСИН ІЗ
НАДАННЯ ПОСЛУГ МОБІЛЬНОГО ЗВ'ЯЗКУ**

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У статті розкрито найгостріші проблеми відносин із надання послуг мобільного зв'язку та їх правового регулювання. Зазначені питання розглядаються через призму структури правовідносин, елементами яких є суб'єкти, об'єкти та їх зміст, це, зокрема, питання визначення правового статусу суб'єктів, можливість односторонньої зміни умов договору тощо.

Ключові слова: мобільний зв'язок, послуги мобільного зв'язку, правове регулювання надання послуг мобільного зв'язку, договір про надання послуг мобільного зв'язку.

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**АКТУАЛЬНЫЕ ПРОБЛЕМЫ ПРАВОВОГО РЕГУЛИРОВАНИЯ
ОТНОШЕНИЙ ПО ПРЕДОСТАВЛЕНИЮ УСЛУГ МОБИЛЬНОЙ СВЯЗИ**

Ефремова Е. В.

В статье раскрыты острые проблемы отношений по оказанию услуг мобильной связи и их правовому регулированию. Автор рассматривает указанные вопросы через призму структуры правоотношений, элементами которых являются субъекты, объекты и их содержание, в частности рассматривается вопрос определения правового статуса субъектов, возможность одностороннего изменения условий договора и т. п.

Ключевые слова: мобильная связь, услуги мобильной связи, правовое регулирование предоставления услуг мобильной связи, договор о предоставлении услуг мобильной связи.

**THE CURRENT ISSUES IN LEGAL REGULATION OF MOBILE NETWORK
CONNECTION SERVICES**

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The article concerns with contentious issues of legal relations bears on providing mobile communications services and its legal regulation. The author examines abovementioned issues in the meaning of legal structure, which consists of subjects, objects and their contents. The research involves the determination of the legal status of the subjects, the possibility of a unilateral change of contract conditions, etc. Legal relations arising from the use of mobile devices and providing mobile service can be defined by their own structural elements – subjects, objects and content. Topical issues relating to mobile service providers and their abonents legal status determination has been researched by the Author. There are several ways of mobile service providing in Ukraine: based on written contract or non-written (implied contract) where abonent is identified or not identified. Very often mobile service companies revise contracts unilaterally. In this case operators change tariff illegally. It is necessary to anticipate possible contract changes and determine the abonent's right to terminate the contract. The questions of unilateral repudiation of the rights and obligations under the contract may also be discussed in advance. If some items to be included are not agreed prior to the signing of the contract (for example, in the case of mobile operators), it will be necessary to prove that terms of an agreement are substantially different from the original agreement. In spite of the complexity and abeyance, legal relations arising from the use of mobile devices and providing mobile service are fundamental part of social life. That is why the main task

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of the state is to provide a platform for dialogue between subjects of legal relations, mentioned above, and to ensure the benefit for the parties.

Keywords: mobile communications, mobile services, regulation of mobile services, contract for mobile services.