CHAIRMAN

National Broadcasting Council

Maciej Świrski

Warsaw, October 25, 2023

DM.511.84.10.2023

Re: Concession no. 230/K/2013-T

TVN S.A.

Wiertnicza St. 166

02-952 Warsaw

DECISION NO. DM – 40 – 2023

Pursuant to Article 53(1) in conjunction with Article 16a(6)(1) of the Broadcasting Act of December 29, 1992 (consolidated text Journal of Laws of 2022, item 1722; hereinafter referred to as the "urt" or the "Law") and Article 104 and Article 107 of the Code of Administrative Procedure of June 14, 1960 (consolidated text J of L of 2023, item 775, as amended; the "kpa"), on the basis of the proceedings initiated *ex officio*,

I have decided

1. To declare that TVN S.A. with its registered office in Warsaw (hereinafter referred to as the "Broadcaster") violated Article 16a(6)(1) of the Broadcasting Act by interrupting the "Fakty" news service with a commercial advertisement on June 23, 2023;
2. To impose a fine of PLN 80,000 (in words: Eighty thousand zlotys) on the Broadcaster;
3. That the fine referred to in item 2 shall be paid within 14 days from the date of receipt of this decision to the account of the National Broadcasting Council at the National Bank of Poland, Regional Branch in Warsaw, Bank Acc. no. 13 1010 1010 0095 3722 3100 0000.

JUSTIFICATION

I.

By way of a letter dated June 26, 2023, no. DM.511.84.2023, the Broadcaster was requested to submit the following materials regarding the "TVN" program in question:

- recordings of the program broadcast on June 23, 2023, from 18:00 to 20:00;
- recordings of advertisements and self-promotional messages broadcast on the aforementioned date containing the data specified in § 11(2) of the National Broadcasting Council's Regulation of June 30, 2011, on the manner of conducting advertising and teleshopping activities in radio and television programs (i.e. Journal of Laws of 2014, item 204);
- recordings of sponsored advertisements broadcast on the above date;
- records of sponsored broadcasts or other messages aired on the aforementioned date in accordance with the instruction specified in § 5(2) of the National Broadcasting Council's Regulation of July 6, 2000, on the manner of sponsoring broadcasts or other transmissions (i.e. Journal of Laws of 2014, item 203);
- records of broadcasts containing product insertion as of the aforementioned date, prepared in accordance with the instruction specified in § 4(2) of the National Broadcasting Council's Regulation of June 30, 2011, (Journal of Laws No. 161, item 977) on detailed conditions of product insertion.

Together with the letter sent to the National Broadcasting Council's office on July 6, 2023, the Broadcaster sent the aforementioned recordings and time records of commercials aired on June 23, 2023, recordings of sponsorship references, a list of sponsored programs aired on that date, and records of programs containing product insertion. The letter in question also stated that during the broadcast of the "Fakty" news service program on that day, at 19:07, there was an *(...) accidental triggering of an advertising block by the broadcast operator, which resulted in an erroneous airing of the display board starting the advertising block and a fragment of the commercial spot.* It was emphasized that this was the first such incident in the history of the "Fakty" news service program, and the Broadcaster immediately undertook all necessary measures to clarify the situation and prevent such events from occurring in the future. The Broadcaster also reported that the indicated *"commercial clip airing"* was not included in the scheduling and billing systems with its advertisers, and therefore was not included in the advertising records submitted to the Authority, *(...) and the Broadcaster has not received and will not receive any compensation for the erroneous commercial airing.*

After reviewing the materials submitted by the Broadcaster, including the recording of the program, the Chairman of the National Broadcasting Council (hereinafter also referred to as the "Authority") determined that on June 23, 2023, the aired "Fakty" news program was interrupted mid-sentence with the broadcast of a 'Lidl' commercial from 19:07:02 until

19:08:22. This commercial advertisement airing was preceded by the displaying of a display board which separates out the commercial advertisement spot from the rest of the program material (a display board with the word "*REKLAMA*" (Eng.: "COMMERCIAL") thereby interrupting the program presenter's text who was leading the program, and who during this time began the announcement of the next part of the program. After a 30-second interruption due to the airing of this commercial advertisement, the recording showed a return to the program airing, without any display board or information, to the ending of the previously announced report dedicated to the Titan submarine tragedy. As a result of the disruption to the service caused by the commercial communication, viewers were unable to become familiar with the first part of the above-mentioned news service. Only after the end of this part of the news service airing did the presenter of this broadcast refer to the situation, stating: *a minor explanation for our viewers – during the presentation of the initial announcement for the material on the implosion... a small technical error occurred, for which we apologize.* Immediately after the news service broadcast ended, at 19:27:42, the airing of an advertising block begins preceded by the same display board (with the word "REKLAMA") that was aired during the interruption of the news service, and the first of the advertisement in the commercial communication was the same advertising spot for the Lidl store chain.

In view of the above, by letter dated July 10, 2023, no. DM.511.84.3.2023, the Broadcaster was notified to initiate *ex officio* proceedings to impose a financial penalty under Article 53(1) in conjunction with Article 16a(6)(1) of the Broadcasting Act, due to the interruption of the news service with a commercial communication. It was further stated that following the broadcast of the advertisement in question, the rules-mandated limits on the amount of time broadcasters may allocate to advertising and teleshopping, pursuant to Article 16(3)(2) of the "urt", may also have been exceeded. The above letter was delivered on July 17, 2023.

By letter dated July 24, 2023 (delivered on July 26, 2023), the Broadcaster responded to the notice of initiation of penalty proceedings, requesting that they be discontinued, on the grounds that, in its view, there was no violation of the law. In addition, in the letter in question, the Broadcaster resubmitted the records of advertising and teleshopping dated June 23, 2023, as proof that on that day the rules-mandated limits for broadcasting commercial communications were not exceeded. After analyzing the submitted material, the Authority found the explanations as concerns a possible violation made by the Broadcaster regarding Article 16(3)(2) of the "urt" as being sufficient.

In justifying its position regarding the lack of violation of the law by the emission of the commercial communication, the Broadcaster pointed out, during the broadcast, that not every interruption of the news service constitutes a violation of Article 16a(6)(1) of the "urt" justifying the imposition of a penalty, since the norm of Article 53(1) of the "urt" allows the imposition of a penalty only for a "*violation by the Broadcaster,"* i.e., *(...) the intentional conduct of the Broadcaster's activity in a manner contrary to the Broadcasting Act, and not*

for any, even if independent of the Broadcaster, contradiction of the program with this legal act.

According to the expressed position under this discussion, when interpreting Article 53(1) of the "urt", Article 19(1) and Article 3 of the "urt" should be taken into account, according to which the activity of the Broadcaster in creating and compiling its program is carried out in the form of a redaction within the meaning of the provisions of the Press Law of January 26, 1984, and the provisions of the Press Law apply in matters not regulated by the Law. In turn, Article 7 of the Press Law implies, among other things, that the editor is a journalist who decides or co-decides on the publication of press materials, and an editorial office is a unit that organizes the process of preparing (collecting, evaluating, and developing) materials for publication in the press. According to the Broadcaster, this reference means that a violation of Article 16a(6)(1) of the "urt" can justify the imposition of a sanction only if the interruption of the news service is the result of an editorial decision and was planned, whereas *the purpose of the introduction of Article 53(1) of the "urt" was not and is not to penalize Broadcasters for events resulting from technical incidents, as was the case here.*

A further argument raised in the letter in question is that no remuneration was received for the airing of this commercial communication during the "Fakty" news service on the day in question since, as the Broadcaster argued, remuneration is an element of the definition of an "advertisement" in the Broadcasting Act. Therefore, as the Broadcaster did not receive any remuneration for the airing of the material broadcast during the news service – in its view – this broadcasted material could not be considered advertising within the meaning of Article 4(16) and (17) of the "urt."

In addition, the letter referred to the concept of "interrupting" the news service with a commercial. According to this position, an interruption within the meaning of Article 16a(6)(1) of the "urt" could only occur *in a situation where the integrity of the program is violated by stopping the program before its end (e.g., in the middle) and resuming it after the commercial advertising block. In the present case, however, (...) there was an "overlap" of the newscast with unplanned material, so that they were effectively broadcast in parallel.* This conclusion by the Broadcaster is in clear contradiction with Article 16a(5) of the "urt", which states that any insertion of advertising or teleshopping during a broadcast is considered an interruption of the broadcast. As stated by the Court of Appeal in Warsaw in its judgment of December 21, 2022, ref. no. VII AGa 657/22, the *above prohibition is absolute for news service programs, programs containing religious content and programs for children.*

From the point of view of the statutory prerequisites, only the broadcasted program is relevant, and the fact that a news service was running in parallel on the broadcaster's internal system is irrelevant to the consideration of the case. In addition, it should be noted that in the case of so-called splitting of the service, the Broadcaster is liable for each of the resultant program version, without making a distinction between the main service and the side services, as no such distinction is provided for in any of the standards

defining the Broadcasters' obligations. The fact that, according to the Broadcaster, there was no advertising in the side services is therefore irrelevant to the present case. Other arguments relating to the issue of the basis of the Broadcaster's liability are discussed below, while issues relating to the establishment of the prerequisites for the infringement and the amount of the fine are the subject of the next part of the grounds of this decision.

By way of a letter of 31 July 2023, No. DM.511.84.7.2023, the Broadcasterer was informed - in accordance with Article 10 of the Code of Civil Procedure - of the right to comment on the evidence and materials collected and claims within 7 days from the date of receipt of the notification and that a decision on the case would be taken after this period. The Broadcaster exercised this right and the file was made available to its lawyer on August 3, 2023.

In a subsequent letter dated August 11, 2023, the Broadcaster pointed out that there had been no developments in the case since the submission of its reply to the opening of the procedure, in particular that the Authority had not reacted to the party's previous position and had not received any new evidence.

When analyzing the occurrence of the premise for the Broadcaster’s liability, it is also necessary to consider the need to refer to the arguments raised in the letter of July 24, 2023, whereby the reasoning for the present decision has been formulated in such a way that, while discussing the premise for the decision, it also refers to the arguments of the party to the proceedings. The fundamental issue for the resolution of the case was to determine the nature and basis of the Broadcaster’s liability under Article 53(1) of the “urt”. Furthermore, the Authority considered it necessary to refer to the specific conditions for the application of Article 16a(6)(1) of the “urt” in the present case. However, the basic question was whether the commercial spot broadcast during the “Fakty” news service program constituted advertising within the meaning of the Act – which the Broadcaster questioned – since a finding, that in the present case the news program was not interrupted by a commercial spot would be tantamount to a finding that there were no grounds for concluding the proceedings with a substantive decision.

According to Article 4(16) of the “urt” a commercial communication shall mean any broadcast, including images with or without sound or sounds only, which is designed to promote, directly or indirectly, the goods, services or reputation of an entity pursuing a business or professional activity, accompanying or included in a programme or user-created video, or incorporated therein, in return for payment of a fee or similar consideration or for self-promotional purposes, in particular advertising, sponsorship, teleshopping and product insertion. Advertising is one of the types of a commercial communication, so in the absence of a specific provision in the text of the law, elements of the definition of a commercial communication should also be considered in determining which messages constitute advertising. In the case of the broadcast under consideration here, there is no doubt that all the legal elements of the concepts of a commercial communication and advertising are present, and the Broadcaster’s claims relate only to the premise of remuneration.

When interpreting this premise, it is necessary to bear in mind the need to read it in the context of relevant European Union standards. However, according to recital 31 of Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in the member states concerning the provision of audiovisual media services (Audiovisual Media Services Directive): *This Directive should adopt a broad definition of audiovisual commercial communication, which, however, should not include public service announcements or charity events broadcast free of charge.* It is clear from the wording of this recital that the role of the remuneration requirement is to distinguish commercial advertising content from announcements of a social nature, with the concept of a commercial communication being understood in a broad sense.

In addition, it should be emphasized that the definition in Article 4(16) of the "urt" refers to the broadcast itself, i.e. the content of Lidl's advertising commercial, and not to its individual airings. This conclusion is confirmed in particular by the definition of advertising in Article 4(17) of the "urt", according to which advertising *is a commercial communication originating from a public or private entity, in connection with its business or professional activity.*

Stating that the broadcasting of the same spot constitutes a commercial communication in one case and not in another would be contrary to the colloquial understanding of the concept of advertising, and consideration of the commonly accepted meaning of statutory terms is always an important matter of interpretation. This concept is not changed by the provisions of the law. As an aside, it should be added that the Broadcaster, in its letters, also distinguished between the message itself (using the terms film or commercial spot) and its transmission.

It is worth noting the consistency of the legislator regarding the need to objectively assess the commercial nature of the transmission, since the premise of the promotional aspect of these messages was formulated in a similar way – according to Article 4(16) of the "urt", it is sufficient to state that we are dealing with a message "intended to serve" a promotion. The assessment of whether this condition is met is also objective, and there is no need to determine whether the message has an effect in this respect. Therefore, the Authority does not need to determine separately for each case of airing the same commercial communication (spot) whether the individual elements in Article 4(16) of the "urt", i.e., a promotional purpose, and remuneration are present. Nor is there any reason to argue that the lack of payment for each individual airing means that a message with the same content constitutes advertising in one case and not in another. On the contrary, differences in the qualification of the same transmission airing depending on whether it would be distributed for a fee or not could lead to the phenomenon of circumvention of the rules established for the protection of viewers (see: *Prawo Reklamy i promocji* [The Advertising Law and Promotions], ed. Elżbieta Traple, published by LexisNexis 2007, p. 273).

Given that the legal definition of advertising refers to the content of the message and not to its individual airings, systemic issues should also be discussed. Restrictions on the amount

of time that can be devoted to advertising airing and the principle of the inviolability of the integrity of broadcasts under Articles 16 and 16a of the "urt" are designed to protect viewers from overexposure to commercial messages and constitute fundamental principles of the advertising law that seek to ensure a balance between the needs of Broadcasters, the interests of advertisers and the welfare of viewers and their right to an undisturbed reception of the categories of programs designated by the legislator. For this reason, too, it should be recognized that the nature of the message must be determined by its content, and the assessment in this regard should be made not from the perspective of the Broadcaster's intentions, but from the perspective of the viewer, i.e., by adopting the point of view of a person who is not aware of the technical conditions, intentions or declarations of the Broadcaster, but observes only the objective content of the program (see the judgment of the Warsaw Court of Appeals of 20 August 2014, ref. VI ACa 1740/13). In this case, not only did the viewer have no reason to doubt the nature of the message, but moreover, he/she was informed of its nature by a special display board with the inscription '*Reklama*' [Eng.: "Commercial"], which the Broadcaster uses to separate out the advertisement from the broadcasted editorial material. Hence, the Authority can see no reason why the issues of the Broadcaster's settlements with advertisers, in particular in the form of the lack of receipt of remuneration for one of the broadcasts, be considered a relevant circumstance in the present case.

It is undisputable that the commercial communication spot in question originated from a company operating a store chain, was provided to the Broadcaster under a paid contractual agreement with reciprocal features and was aired to promote the advertiser, or its products or services. It therefore meets all of the requirements to be considered an advertisement under the relevant statute. This is not altered by the fact that there was an unscheduled additional broadcast of this message on June 23, 2023 during the newscast. If the Broadcaster – as it asserts in its letter dated July 5, 2023 – did not receive compensation for this particular airing, it is because it failed to properly perform its contract with the advertiser, not because of the non-commercial nature of the broadcast.

We would reach analogous conclusions in a hypothetical situation where a Broadcaster is paid for, say, twenty spread out over time and agreed-upon airing dates for a particular commercial advertisement, agreed with the advertiser, but because of an error the last of the ordered airings was aired twice in the same commercial block. Even in such a case, we would have no doubt that even if the Broadcaster would not be paid for the last commercial airing, the repeated message is still an advertisement.

Although the linguistic and systemic interpretations provide the same result, it is also worth considering the question of the desirability of the relevant provisions of advertising regulations in the subject Law. In this context, it should be emphasized that outside the Authority's cognizance lie commercial settlements with advertisers, and the Authority does not have, among others, the actual legal means to verify the statements made by the

Broadcaster in this regard. Regardless of the powers granted, the Authority also has no real means of verifying the veracity of claims of technical errors, let alone claims of errors on the part of the Broadcaster's employees.

If the view is taken that the receipt of payment must be confirmed for each individual transmission airing of the same message, Broadcasters would be able to circumvent Article 16a(6) of the "urt" and other prohibitions on disclosing the content of a commercial communication or the time allocated to it under the pretext of not receiving payment by raising the claim that the messages in question do not constitute advertising because they are unpaid for and thus do not constitute a commercial advertisement. To this end, Broadcasters could enter into contracts with advertisers that would not provide for a specific number of broadcasts of a given commercial message or by deliberately drafting the terms of the contract in such a way that payment for certain elements of an advertising campaign could not be determined.

In view of this, and notwithstanding the circumstances of the currently considered case, in which there is no reason to doubt the Broadcaster's assertion that the interruption of the news service was due to an error, the recognition of the principle according to which the Authority must verify the contractual provisions and perform them each time, and in particular whether payment is made for individual commercials, would lead to unacceptable results. Indeed, the adoption of the interpretation proposed by the Broadcaster, which would require consideration of such circumstances, would in fact mean the impossibility of monitoring compliance with the law in terms of advertising time limits, program integrity protection and other legal advertising-scope regulations. Indeed, a Broadcaster who challenges only remuneration for a given advertisement airing could escape liability for any violation of the rules designed to protect the viewers.

In summarizing the above, under the current state of the law, there is no need to charge for individual airings of commercial content, and such an airing can be distinguished from other program content, including social or charitable announcements or government information, based on its objective characteristics. Such doubts as to the commercial content of the message are certainly not present in this case since the same advertisement was also aired immediately after the news service. There is also no doubt (and the Broadcaster does not dispute this) that the commercial advertising spot in question was provided to the Broadcaster for inclusion in the program as part of a contract of a paid nature within the meaning of Article 4(16) and (17) of the "urt". All the above arguments lead to the conclusion that the lack of payment for one of the airings does not change the nature of the broadcast itself.

Turning to the discussion of other issues, it should be recalled that pursuant to Article 53(1) of the "urt", if a Broadcaster violates its obligations under, *inter alia*, Article 16a, the Chairman of the National Broadcasting Council shall issue a decision imposing a fine on the Broadcaster. It should be noted that the only condition for imposing a fine under Article 53(1) of the "urt"

envisions a violation of one of the provisions listed therein. Liability for the aforementioned infringements is objective in nature, i.e., it is independent of the existence of fault on the part of the Broadcaster, as well as its degree. Therefore, in this regard, the Authority could not consider the question of whether the interruption of the news service was intentional or not, or whether it was due to the fault of the Broadcaster or its employees.

The Authority also does not share the arguments raised in this regard in the Broadcaster's position of July 24, 2023, based on reference to the Press Law contained in Article 19(1) and Article 3 of the "urt". In fact, it should be noted that the provisions of the Press Law cited in this letter contain legal definitions, e.g., in the formulation of the concept of editorial work, the obligations for the preparation of press materials were indicated. However, the nature of the responsibility is not defined by these provisions, which is the purpose of the legislation – thanks to this it is possible to determine the responsibility of the editorial staff according to the rules adopted for the given area of law, as it is explicitly stated, among others, in Article 37 of the Press Law. Liability under Article 212 of the Criminal Code (kk) and for violation of personal rights by a particular publication will be different. Neither the provisions of the Press Law itself, nor their juxtaposition with regulations of the "urt", does not change the principles of editorial responsibility for violations of the norms of the respective law; in particular, it cannot be concluded from these provisions that a Broadcaster can be held liable under the Broadcasting Act only for intentional acts.

On the other hand, a claim expressing directly the opposite position is justified because, according to Article 4(3) of the "urt", editorial responsibility is *the exercise of actual control over the selection of broadcasts and the way they are compiled in the program or catalog; this does not violate the principles of legal responsibility for the content of the broadcast or the provision of the service.* On the other hand, pursuant to Article 13(1) of the "urt", *the Broadcaster, within the scope of the tasks specified in Article 1(1), independently creates the program and is responsible for its content.* The Broadcaster is responsible for the content of the aired program and not merely for its plans or intentions in this regard, and the legislature has not indicated in this or any other provision any limitations on the scope of this responsibility.

In particular, the conclusion relied upon by the Broadcaster cannot be derived from the wording of Article 53(1) of the "urt", according to which the basis for liability is when "the Broadcaster fails to comply with" one of the provisions listed therein. The claim contained in the letter of July 24, 2023, that this wording indicates the need to establish fault on the part of the Broadcaster in question is clearly incorrect. This statutory language in no way suggests that any particular type of awareness of the violation on the part of the Broadcaster or program editor is required to establish a violation. Rather, it denotes a situation in which the conduct (action or omission) of a given entity is inconsistent with its legal obligation – and the determination of such a condition is made objectively, by comparing the conduct of a given Broadcaster with the condition normatively postulated by the relevant regulation, subject to

an analysis in a given case (cf. the judgment of the Provincial Administrative Court in Poznań of July 7, 2021, ref. IV SA/Po 162/21; judgment of the Provincial Administrative Court in Warsaw of June 19, 2019, ref. no. IV SA/Wa 427/19). However, it is not necessary to examine the question of whether the act was committed intentionally or because of negligence or recklessness. At the same time, as explained by the Court of Appeal in Warsaw in its verdict of 8 October 2008, ref. no. VI ACa 332/08, when imposing a pecuniary penalty provided for in Article 53(1) urt, criminal liability principles do not apply and its imposition does not depend on ascertaining guilt within the meaning of criminal law.

Based on the provisions relevant to this case, it is not possible to conclude that there is a requirement for the Authority to establish the existence of a certain degree of awareness of the infringement on the part of the Broadcaster. It should be noted that in other areas of the law, the requirements for liability under the principles of fault derive directly from the relevant principles. Article 1 § 3 of the Criminal Code (kk) clearly states that the perpetrator of an offence is not guilty if guilt is not imputable to him/her at the time of the offence, while Article 9 of the same Code lays down specific rules for qualifying the various forms of guilt, and in the provisions of the special part of the Code defining the various types of offence, the legislator lays down specific requirements for the so-called subjective side. In civil law, on the other hand, the principle of fault is directly provided for in Article 417 of the Civil Code regarding liability for tortious acts, and in Article 471 regarding liability for non-performance or improper performance of obligations, and whenever the legislator wishes to modify these principles, it does so in subsequent specific provisions of this Code.

On the other hand, the doctrine and jurisprudence of public law accept that the principle is an objective liability, i.e., linked to the infringement of the provision in question itself. *The relationship between an administrative sanction and an administrative tort is accompanied by the assumption that a (pecuniary) administrative sanction is imposed on the wrongdoer without any connection to his/her fault, since liability for the tort is objective in nature. In this regard, it should be noted that the Constitutional Court, in its judgment of 25 March 2010, P 9/08, stated that fines are measures aimed at mobilizing entities to fulfil their obligations towards the State in a timely and correct manner, are applied automatically by law and have a preventive character. By foreshadowing the negative consequences that will follow in the event of a breach of the obligations set out in the law or in an administrative decision, they motivate the fulfilment of legal obligations, and the basis for the application of penalties is the objective breach of the law itself. On the other hand, in its ruling of 31 March 2008, SK 75/06, the Constitutional Court clarified that an administrative fine is not a consequence of the performance of a prohibited act, but a consequence of the occurrence of an unlawful condition, and that the process of imposing fines should be viewed in the context of the application of instruments of administrative authority. This position is in line with the view expressed in the judgment of October 15, 2013 in case no. P 26/11, in which the Constitutional Court stated that a sanction plays an important role in administrative law because, by announcing the negative consequences that will follow in the event of a breach of the*

obligations arising from administrative directives, it ensures their respect and effective implementation. The purpose of an administrative sanction is to enforce compliance with orders and prohibitions. In this way, the sanctioning norm motivates the addressees of the sanctioned norms to respect the law. The mere legal threat of the imposition of a fine, disciplines the obligated entities, thereby contributing to the goals served by the performance of the sanctioned duties and strengthening the sense of the rule of law (Decision of the Supreme Administrative Court of May 16, 2016, ref. II GPS 1/16).

Thus, the formation of liability on an objective basis is justified by the fact that administrative sanctions were introduced due to the existence of a special public interest in the establishment of the sanctioned norms in question.

The above conclusion is confirmed by the provisions of Chapter Iva of the Code of Administrative Procedure (kpa) (Articles 189a *et seq.* of the Code of Administrative Procedure). According to Article 189b therein, the prerequisite for the imposition of a penalty is a violation of the law consisting in failure to fulfill an obligation or a violation of a prohibition incumbent on a natural person, a legal entity, or an organizational unit without legal personality. However, the wording of this provision does not refer to the question of culpability; nor is this premise included in Article 189f, which defines the conditions for waiving the penalty.

Even if, by way of interpretation, the need to establish public law culpability were to be accepted, it would be necessary to consider the norms of individual prohibitions or obligations and, in this respect, above all, the specific nature of regulated economic activity. It should be noted that the legislator grants several rights in connection with the concession, but also imposes certain obligations. Concessioned, commercial activity must be carried out considering its professional nature, with special areas of public importance, and entities that decide to engage in them must take this into account. A concessioned activity involves, therefore, liability for failure to exercise due diligence: ordinary diligence and diligence related to the specific type of activity for which the licensee itself has applied for the right to carry out. Finally, the activity also includes liability for failure to prevent the occurrence of situations that the concessionaire had the duty to prevent.

In this regard, however, it should be emphasized that the Broadcaster had a specific legal obligation to prevent the effect of violating the integrity of a particular broadcast (news service), as is clear from Article 53(1) of the “urt”, which defines the provisions listed therein, including Article 16a – as the Broadcaster’s obligations. The obligation regulated by Article 16a(6)(1) of the “urt” is one of the specific forms of implementation of the prohibition on violating the integrity of a broadcast regulated by Article 16a(1) of the Broadcasting Act. It includes, among others, the prohibition of any interruption of certain types of broadcasts, including news services, since, according to paragraph 5 of this provision, *any insertion of advertising or teleshopping during a broadcast is considered an interruption of the broadcast.*

Summarizing the above issue, it should be noted that it is generally accepted in public law that liability for violation of a sanctioned norm is objective in nature, i.e., the prerequisite for the imposition of such liability is not to establish fault or degree of culpability, but only to establish that a specific norm has been violated. Even assuming the possibility of modifying this rule, it would be necessary to consider that the Broadcaster acts based on a concession granted to it, which implies the need to consider the highest professional standards of the licensee's performance. Moreover, the Broadcaster would be liable for the occurrence of events which it had a specific legal duty to prevent. In this situation, also taking under consideration a different, non-objective standard of liability being applied, it would have to be considered that the Broadcaster would be liable for its failure to do so, and the occurrence of the effect that the Broadcaster should have prevented is related to its failure to take appropriate measures to exclude the possibility of such an event.

With the above in mind, it is worth interpreting the specific grounds for finding a violation of Article 16a (6.1) of the "urt". According to this provision, news services, among others, may not be interrupted for the purpose of broadcasting advertising or tele-shopping. On the other hand, according to 16a(5) of the "urt", any insertion of advertising or teleshopping during a program is considered to be an interruption of the program. The prohibition of interrupting broadcasts "for the purpose" of broadcasting advertisements or teleshopping seems to suggest an intentional act; a similar doubt can be expressed about the term "insertion" used by the legislator in paragraph 5. However, in the light of the foregoing considerations regarding the general principles of liability under administrative law and the principles of liability of the Broadcaster under the law in question, such doubts cannot be considered as justifying the need to consider the premise of the Broadcaster's fault in the application of these provisions.

With reference to the previous considerations, it is worth noting that in the provisions of civil law, questions of fault are clearly recorded, while in criminal law, as is well known, the fact that the marking of purpose is related to the perpetrator's intention is known because it occurs in the context of the regulation of the issue of determining guilt. In the "urt", (as well as in the case of other regulations of administrative law), not only is there no such context, but, on the contrary, it does not result from the general principles of liability in public law. Moreover, the legislator clearly formulates the premises proving that the principle of objective liability applies in this area of law.

For this reason, the thesis that these formulations refer to the establishment of prerequisites for liability based on fault is not supported. In this regard, the example of the similarly worded term "dissemination" in Article 18(1) of the "urt" should be cited – this expression also seems to imply a targeted action with a specific intent, and yet jurisprudence has established the view that this premise should be understood in an objective way (see the judgment of the Court of Justice of the Supreme Court dated July 2, 2013, ref. III SK 42/12). The same conclusions were confirmed regarding the similarly formulated premise of

"directing" certain broadcasts to children (see the judgment of the Warsaw Court of Appeals of February 26, 2021, ref. no. VII Aga 2267/18). Therefore, when interpreting such concepts, it should be considered that the systemic premise of the law is that the Broadcaster's liability is objective in nature and, regardless of the wording of the norm in question, it refers not to the Broadcaster's intentions but to the objective content of a broadcast. The introduction of fault-based liability in Article 16a(6)(1) of the "urt" would constitute an exception to the general principles of the law in question, which would have to be clearly formulated.

When analyzing the terms "insertion" and "purpose", it is also necessary to consider their mutual relationship, i.e. according to Article 16a(6) of the "urt", the interruption of the service is always for a specific "purpose", whereas in paragraph 5 the legislator understands by the term "interruption" any insertion of an advertisement. In addition to the systemic context mentioned above, it should be noted that according to the dictionary definitions, the expression "insertion" means "to put, place or hang something in a place." An item can be considered "placed" in a given place regardless of whether it is the result of a planned action or a work of chance. Similarly, the expression "purpose" may imply a certain directionality of action, but in fact the scope of this concept is broader, and it can also mean the occurrence of a causal relationship, and thus "what something is intended to serve". Both expressions can, and given the different results of interpretation, they must therefore be understood objectively, from the point of view of the content of the broadcast, and in the present case there is undoubtedly a functional link between the interruption and the airing of the advertisement.

Nevertheless, to exhaust the possible points of reference for the interpretation in question, it is worth noting that the term "insertion" also appears in other parts of the normative text of the law, so that one should note its meaning in a different context, which will allow one to determine how the legislator uses the expression. According to Article 16a (1) of the "urt", the *insertion of advertising or teleshopping during a broadcast must not violate the integrity of the broadcast, considering the natural breaks in the program airing, its duration and nature, nor the rights of Broadcasters.* This standard (norm) establishes a specific objective of the integrity of the broadcast and as recognized in the doctrine, this protection is also important from the viewers' perspective. There is no basis for assuming that the integrity of the Broadcast is protected only against intentional violations. On the contrary, although Article 16a of the "urt" is formulated as a set of prohibitions, the provision of Article 53(1) of the "urt", which contains the sanction for the violation of, *inter alia*, the provisions of Article 16a, refers to the violation of "obligations." Also for this reason, there is no doubt that the Broadcaster can be held liable for an involuntary violation, since Article 16a provides for the prohibition of certain violations of the integrity of the broadcast, while at the same time establishing the obligation of the Broadcaster to prevent situations of violation of this value, and failure to comply with this obligation – regardless of the circumstances not specified in the provision as its prerequisites – entails a specific sanction.

There is no definition in the law of the formulation – "insertion" of specific content, but according to Article 16(7)(1) of the "urt": *The National Broadcasting Council shall determine, by a regulation, the manner in which advertising and teleshopping may be conducted in radio and television program services, including: 1) the terms and conditions of broadcasting, including separation, marking and insertion of advertising and teleshopping in program services.* It was indicated in §1 of this regulation issued pursuant to this provision that it specifies the conditions for broadcasting, including the separation, marking and insertion of advertising and teleshopping in programs. According to this view, the insertion of an advertisement is a component of the broader concept of broadcasting, while which program was broadcast is always an objective circumstance. For the sake of argument, it is worth adding that the same term is used to describe the labeling of the content in question (see Regulation of the National Broadcasting Council on the manner of conducting activities in radio, television programs and teleshopping from June 30, 2011, Journal of Laws No. 150, item 895). The term insertions thus, should therefore be understood as any situation in which the content in question has taken its place in the program, regardless of the question of the intentionality of the Broadcaster's actions and claims to the contrary are not supported by the content of the law or the regulations issued on the basis thereof.

II.

During the proceedings, the Authority also analyzed the conditions for waiving the imposition of a fine set forth in Article 189f § 1(1) of the Code of Administrative Procedure (kpa). According to this provision, a public administration body shall, by decision, refrain from imposing an administrative fine and issue an instruction if the gravity of the violation of the law is negligible and the party has ceased to violate the law. The Authority shall refrain from imposing an administrative fine if both conditions set forth in the above provision are jointly met.

Regarding the first condition, i.e., the seriousness of the violation, it should be noted that one of the basic tasks of the National Broadcasting Council, as stipulated in Article 6(1) of the Broadcasting Act and Article 213(1) of the Constitution of the Republic of Poland of April 2, 1997 (Journal of Laws No. 78, item 483, as amended), is to safeguard the interests of viewers. One of the interests of viewers to be safeguarded by the National Broadcasting Council, as argued by representatives of literature in this regard, is *protection from an excessive number or harmful content in commercial messages* (S. Piątek, W. Dziomdziora, K. Wojciechowski, *The Broadcasting Act. Commentary,* C.H. Beck, Warsaw, p. 84); a special basis for liability is the violation of the principles of protecting the integrity of broadcasts. It should be noted that the Act in question, in Article 16a(6), provides for only a few types of broadcasts that are subject to special protection.

The inclusion of news services in this catalog is significant because of the character and importance of this category of programs for broad public debate, which is a condition for the

existence of a democratic state. Indeed, most citizens do not have the ability to keep abreast of social and political information, which is why the freedom of the press to gather and present relevant news or opinions to the public is of particular importance. News service broadcasts are not only the equivalent of the traditional press, which is subject to Press Law regulations, but the reach and therefore the importance of these broadcasts is usually much greater. In the discussed, factual situation, we are dealing with the news information service aired in the DVB-T standard, with nationwide coverage.

Considering the above, the Authority found that in the case considered, the gravity of the violation in question could not be described as negligible, which makes it unnecessary to analyze the second condition for waiving the imposition of a fine set forth in Article 189f § 1(1) of the Administrative Procedure Act (kpa). In the present case, the circumstance referred to in Article 189f § 1(2) of the Code of Administrative Procedure (kpa) does not apply, i.e., an administrative fine was previously imposed on the party by another authorized public administration body by a valid decision for the same conduct, or the party was validly punished for a misdemeanor tax offense or tax offense of a criminal nature, and the prior penalty meets the purposes for which the administrative fine would be imposed.

Pursuant to Article 189f § 2 of the Code of Administrative Procedure (kpa), in cases other than those mentioned in §1, if the fulfillment of the purposes for which the administrative fine would be imposed allows it to meet the objectives, the public administration body may, by means of a decision, set a time limit for the party to present evidence confirming: 1.) the elimination of the violation of the law, or 2.) notification of the competent bodies of the established violation of the law, specifying the time and manner of notification. According to § 3, if the party has provided evidence confirming the implementation of the order, the public administration authority shall refrain from imposing an administrative fine and stop issuing the order. The doctrine indicates that *this decision is possible only if the public administration body determines on the basis of the circumstances of the specific case, taking into account, in particular, the subjective characteristics of the party, that the very fact of initiating proceedings in the case and the fact that the party is in a situation of a real threat of imposing and imposing sanctions will lead in the specific case to the implementation of the goals established for a given sanction* (see: S. Gajewski, Code of Administrative Procedure (kpa). *Nowe instytucje. Komentarz do rozdziałów 5a, 8a, 14 oraz działów IV I VIIIa* [New Institutions. Commentary to chapters 5a, 8a, 14 and sections IV and VIIIa] in the kpa], Warsaw 2017).

The application of the above provision is subject to the determination that the objectives of the sanction will be achieved without the imposition of the monetary fee amount, particularly in the case of the elimination of the violation, or in a situation where the same violation may be the subject of proceedings in front of another body, within its competence. None of these circumstances are present in the present case, in particular, the Broadcaster did not eliminate the effects of the violation by rebroadcasting the interrupted material immediately after the advertisement or in another part of the aired program.

Most importantly, in the opinion of the Authority, considering the circumstances of the present case, it cannot be said that waiving the imposition of the penalty and being satisfied with an instruction would allow achieving the purposes for which the administrative penalty should be imposed. The imposition of a penalty for violating the integrity of the news information service is intended to serve not only a repressive, but also a preventive and disciplinary function (it is intended to prevent such violations in the future). Therefore, in the Authority's view, it is necessary to impose the penalty provided for by Article 53(1) of the Broadcasting Act on the Broadcaster. Accordingly, it cannot be considered that there are other circumstances that would justify not imposing the penalty pursuant to Article 189f of the Code of Administrative Procedure (kpa).

III.

In determining the amount of the financial penalty, the Authority was guided by the requirements set out in Article 53(1) of the Act, i.e. the scope and degree of harmfulness of the infringement, the Broadcaster's past activities and its financial capabilities.

Pursuant to Article 53(1) of the Act, if a Broadcaster violates an obligation arising, among others, from Article 16a of the "urt", the Chairman of the National Broadcasting Council shall issue a decision imposing – on the Broadcaster – a fine of up to 50% of the annual fee for the right to use the frequency designated for terrestrial broadcasting, and if the Broadcaster fails to pay the fee for the right to use the frequency, a fine of up to 10% of the Broadcaster's revenues attained in the previous fiscal year, taking into account the scope and degree of harmfulness of the violation, the Broadcaster's previous activities and its financial capabilities.

The extent and degree of harmfulness of the violation were determined by the Authority in connection with the nature and intensity of the violation, as well as its social consequences and possibly negative impact on the advertising market. In assessing the scope and degree of harm of the infringement, the Authority considered the fact that it consisted in interrupting the news service with an advertisement in such a way that the news service was disrupted, and part of the editorial material that was interrupted immediately after the advertisement was not repeated. Instead, viewers were presented with an advertisement. As explained above, the violation concerned the absolute ban on interrupting news services with advertising, i.e., a ban that serves primarily to protect viewers. The Authority thus found that the Broadcaster had violated the provisions of the Act not only to a significant extent (fundamental from the point of view of the obligations of each Broadcaster), but also to a degree of harmfulness of the violation that was higher than negligible.

Guided by the statutory guidelines for the assessment of penalties, the Authority also considered the fact that the Broadcaster had not been fined for the same or similar violations in connection with its previous activities, however, several decisions imposing fines for various types of violations of the Broadcasting Act, including provisions regulating the conditions of the broadcasting of commercial communications, for example:

1.) Decision No. 2/2015 of February 5, 2015 – violation of Art. 17a sec. 2 and 5, point 1 of the "urt" by excessively exposing the product placed in the broadcast *"O tym się mówi"* [" Talking about this"] in the TVN Style program;

2.) Decision No. 24/2015 of 22 December 2015 - violation of Art. 16b sec. 1 point 2 of the "urt" by broadcasting on 27 December 2014 a commercial message of an alcoholic beverage in the TVN program;

3.) Decision No. DM-9/2017 of September 14, 2017 - violation of Art. 17a sec. 5 point 1 of the "urt" - excessive exposure of the product insertion in the program entitled *"Mam talent"* ["I have a talent"] in the TVN program;

4.) Decision No. DM-10/2017 of September 14, 2017 - violation of Art. 16a sec. 6 point 4 of the "urt" by interruption in order to broadcast an advertisement for the children's program "Toy Story" in the TVN program;

5.) Decision No. DM-31-2018 of November 30, 2018 - violation of Art. 16b sec. 1 point 2 of the "urt" in connection with Art. 13 sec. 2 point 1 of the Act on Upbringing in Sobriety and counteracting alcoholism in connection with the broadcast of a beer advertisement at 18:18 on TVN 24 *"Biznes i Świat"* [Business and the World"];

6.) Decision No. 5/DPz/2019 of July 22, 2019 - violation of Art. 16a sec. 6 point 4 of the "urt" by interruption in order to broadcast advertisements for children's programs entitled *"Shrek 2"* in the TVN program;

7.) Decision No. 3/DPz/2020 of March 6, 2020 - violation of Art. 16c point 1 of the Act by broadcasting a hidden commercial message in the broadcast *"Co nas truje – żele i płyny do mycia*" ["What's poisoning us – gels and washing liquids"] on TVN Style;

8.) Decision No. DM-32-2020 of December 23, 2020 - violation of Art. 16b sec. 1 point 2 in connection with Art. 131 section 1, section 3, and section 4 of the "urt" on Upbringing in Sobriety and counteracting alcoholism by broadcasting a commercial message using the trademark and the same graphic shape with appropriate markings of an alcoholic beverage in the TVN 24 program;

9.) Decision No. DM-1-2021 of February 4, 2021 - violation of Art. 17a sec. 5 point 1 of the "urt" by excessive exposure of the placed product in the broadcast of "My way extra" on TVN Siedem;

10.) Decision No. 6/DPz/2021 of December 1, 2021 - violation of Art. 16 sec. 1 and 2 of the "urt" by broadcasting during the break of the series entitled *"Szpital"* ["Hospital"], regulations on advertising activities, consisting in the lack of appropriate marking of the commercial message in the TVN channel;

11.) Decision No. 6/DPz/2022 of July 5, 2022 - violation of Art. 16c point 1 of the "urt" by broadcasting a hidden commercial message on the TVN channel on the "Fakty" website;

12.) Decision No. DM-8-2023 of March 28, 2023 - violation of Art. 17a sec. 5 point 1 of the "urt" - excessive exposure of the product placed in the band entitled *"Dzień dobry wakacje"* ["Good morning, holidays" (the "Projekt plaża" series)] in the TVN program;

13.) Decision No. DM-11-2023 of June 5, 2023 - violation of Art. 17a sec. 5 point 1 of the "urt" - excessive exposure of the product placed in the band entitled *"Dzień dobry wakacje"* ["Good morning, holidays" (the *"Projekt plaża"* series)] in the TVN program;

In assessing the past activities of the Broadcaster, it should also be kept in mind that it is an entity that has been carrying out a wide range of activity on the Polish media market for many years, and the provision of Article 355 § 2 of the Civil Code requires special care from business entities, considering their professional nature. It follows that the Broadcaster is obliged to be more scrupulous, reliable, preventive, and anticipatory, and it is reasonable to expect it to know how to carry out its activities. It is also inherent in business to have specialized knowledge, which includes not only purely formal qualifications, but also experience derived from professional practice and established standards of requirements. The professionalism of a businessperson should be manifested in two basic features of his/her conduct: in accordance with the rules of professional expertise and diligence. The standard of due diligence must consider the increased expectations of the professional qualification, as to its knowledge and practical ability to use it (so the judgment of the Supreme Court of September 21, 2005, ref. IV CK 100/05 and the judgment of the Administrative Court (SA) in Warsaw of February 26, 2021, ref. VII AGa 2267/18). In the present case, in the opinion of the Authority, the Broadcaster did not meet the above criteria. The above comments are particularly relevant in the context of the fact that television and radio Broadcasters operate in a highly regulated market and apply for a license with the awareness of the social importance of the tasks they perform, among which the Act mentions the provision of information as the main purpose of their activity (Art. 1(1) of the "urt").

In 2022, according to the submitted report, the Broadcaster generated revenues of PLN 1,855,411,000 (in words: one billion eight hundred and fifty-five million four hundred and eleven thousand zlotys). The annual fee for the right to use the frequency within the second multiplex is PLN 986,010.00 (nine hundred and eighty-six thousand and ten zlotys). Pursuant to Article 53(1), in the present case, the Authority may impose a penalty of up to PLN 493,005.00 (four hundred and ninety-three thousand and five zlotys).

As was explained above, the fine is imposed regardless of fault, which means that the question of culpable acts or omissions of certain persons is in no way dependent on the Broadcaster and cannot influence the question of the application of the provision of Article 53(1) of the "urt", if, in the light of the facts of a particular case, the conditions provided therein for the imposition of a fine have been fulfilled.

Until now the Authority has so far accepted in its rulings that Broadcasters' liability for violations of the Act is objective in nature. It is worth bearing in mind that the Authority is bound by the need to apply a uniform interpretation to issues of the same kind. In view of the realities of behavior on the advertising market, the purpose of the Authority's action in the present case is also the desire to avoid the emergence of an unfavorable precedent, when lenient treatment of the error that occurred in the present case would be viewed as an incentive for Broadcasters to attempt to circumvent the provisions of this Act such as exceeding broadcast time limits or violating other provisions of the said Act, such as promoting alcohol during statutorily protected time slots, under the guise of an error. We would be dealing with the risk of a precedent situation described here if the Authority considered the Broadcaster's position and decided that the invocation of an error precluded the possibility of consequences or minimized them to a symbolic dimension.

In a judgement of September 26, 2018, ref. no. VII AGa 964/18, the Court of Appeal of

in Warsaw held that *(...) the lower limit of the penalty is determined by the criterion of minimum annoyance. In other words, the penalty imposed on the Broadcaster cannot be symbolic. It must be perceptible to the Broadcaster at least to a minimum degree, regardless of the other premises of the penalty's assessment, otherwise it will not fulfil its basic functions, including, in particular, in the aspect of individual prevention.*

In the circumstances of this case, for the reasons stated above, a fine of PLN 80,000 (in words: Eighty thousand zlotys) was imposed for violating Article 16a, Section 6, point 1 of the Broadcasting Act concerning the "TVN" program. When determining the amount of the fine, it should be considered that the fine is not high in relation to the annual revenues of the Broadcaster. According to the current advertising price list published by TVN Media's advertising bureau, the cost of a 30-second advertisement after the broadcast of "Fakty" is up to a net amount of PLN 86,500 (eighty-six thousand and five hundred zlotys), so the amount of the penalty corresponds to the rounded-off value of one advertisement airing. Considering the legal requirements for the imposition of a penalty and the amount of the Broadcaster's income, the penalty thus determined is appropriate under the circumstances of this case.

INSTRUCTION

Pursuant to Article 56(1) and (2) of the Broadcasting Act in conjunction with Article 47928(2) of the Act of November 17, 1964, Code of Civil Procedure (consolidated text in the

Journal of Laws of 2023, item 1550, as amended), a Party may appeal against this decision to the Regional Court in Warsaw – Commercial Court, through the Chairman of the National Broadcasting Council within one month from the date of notification of this decision.

Pursuant to Article 3(2)(9) in conjunction with Article 33 of the Act of July 28, 2005, on court costs in civil cases (consolidated text, Journal of Laws of 2023, item 1144), a fixed fee of PLN 3,000 (Three thousand zlotys) shall be charged for an appeal against the decision of the Chairman of the National Broadcasting Council.

Pursuant to Article 103 of the Act on Court Costs in Civil Cases, the court may grant an exemption from court costs to a legal entity or an organizational unit other than a legal entity to which the law grants legal capacity, if it has proven that it does not have sufficient means to pay the court costs. Pursuant to Article 105(1) of the Law on Court Costs in Civil Cases, a request for exemption from court costs must be made in writing or orally on the record of the court before which the case is to be brought or is already pending.

According to the wording of Article 117 § 1, 3 and 4 of the Code of Civil Procedure, a Party which is exempted from court costs in whole or in part may request the appointment of a lawyer or legal adviser. A legal entity or other organizational unit, to which the law grants legal capacity, and which is not exempted from court costs by the court, may request the appointment of a lawyer or legal adviser. A Party shall submit a request for the appointment of an attorney or legal counsel together with the request for exemption from court costs or separately, in writing or orally to the record, in the Court in which the action is to be brought to or is already pending.

Chairman

National Broadcasting Council

Maciej Świrski

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For the attention of:

1. Budget Department at the National Broadcasting Council Office

2. Regulatory Department at the National Broadcasting Council Office

3. To file