

**Standpoint of the National Broadcasting Council of 26 February 2013
after the investigation procedure conducted in connection with the last year’s transmission of the national football team matches delivered for a fee by some entrepreneurs operating on the electronic media market**

1. **Actual state of facts**

The football matches of the Polish national team with the Montenegro and Moldavia teams, played as part of the eliminations to the 2014 World Cup in football took place on the 7th and 11th September 2012. The firms which had signed contracts with Sportfive Sp. z o.o., holder of the television rights, transmitted the matches on a pay-only basis.

1. **Legal status**

The legal regulations concerning direct television transmissions of matches organised with the participation of the Polish national football team are provided in the Act on radio and television broadcasting dated 29 December 1992. These regulations are aimed at ensuring that the audience has general and free access to transmissions of events of substantial social importance known as *important events.* Due to the broad interest of the public, important events include, but are not limited to, *semi-finals and finals of world and European championships in football as well as all other matches played as part of those events with the participation of the Polish national team, including elimination games and other matches with the participation of the Polish national football team played as part of official tournaments* (Art. 20b section 2 points 2 and 3 of the Act).

The matches played by the Polish team with Montenegro and Moldavia were important events within the meaning of the Act. A television broadcaster may directly transmit an important event only via a *national programme within the meaning of the Act or the concession, which is available in its entirety without a fee, save for subscription fees within the meaning of the Act on subscription fees and basic charges collected by cable television operators, dated 21 April 2005* (Art. 20b section 1 of the act). This obligation may be waived only if none of the broadcasters meeting the statutory requirements *expressed their willingness to sign a contract for the transmission* (Art. 20b section 6 of the act). It is, therefore, the assessment of the terms of the negotiated contract that is of essential importance in establishing whether the offer was or was not an apparent action.

1. ***Pay-per-view –* paid media service**

Despite the postulates submitted during the legislation work conducted in relation to the transposition of the Audiovisual Media Services Directive, the paid media service – *pay-per-view* has not so far been defined in the Act on radio and television broadcasting dated 29 December 1992. With the development of new media service delivery methods, more and more doubts arise as to their legal qualification. For this reason the National Broadcasting Council has presented a separate interpretation on classifying *pay-per-view* services in the light of the Audiovisual Media Services Directive.

1. **Council’s investigation procedure**

During the investigation procedure the following companies presented their standpoints: Telewizja Polska, Cyfrowy Polsat, Telewizja Polsat, TOYA, two operators of the TELE-TOP network belonging to the Multimedia Polska Sp. z o.o. group and TV ASTA Sp. z o.o. (the two latter operators informed that they had not provided the transmission on a paid basis).

The Council Chairman requested the President of the Office of Competition and Consumer Protection (UOKiK) that she investigate whether some of the broadcasters acted in line with the Act on competition and consumer protection dated 16 February 2007. The communication of 14 November 2012 emphasised that the *UOKiK President* *instituted* *an antimonopoly procedure which should resolve the issue whether any competition-restricting arrangement had been in place. Apart from the holder of the transmission rights – Sportfive, the law might have been breached by eleven firms: UPC Polska (Warsaw), Cyfrowy Polsat (Warsaw), Vectra (Gdynia), Multimedia (Gdynia), Toya (Łódź), Inea (Poznań), Echostar Studio ZTS Tele 4 (Poznań), SGT (Gliwice), ZUA Antserwis (Piła), TK Antserwis (Wałcz) and Asta-net (Piła)*.

The Management Board President of Telewizja Polska SA informed that during negotiations with Sportfive, *the TVP Sport’s Management had been emphasizing that TVP was very keen to acquire the rights in question. It had also clearly pointed out, however, that the licence value had been significantly overestimated and unrealistic from the market point of view*.

The National Broadcasting Council could not, however, evaluate the terms of the negotiated contract and ascertain whether the rights’ purchasing offer was or was not an apparent one, due to the parties’ confidentiality obligation under the Licence Agreement.

The Management Board President of Cyfrowy Polsat SA informed that a significant element of the negotiations had been the fact that Sportfive *…made a clear statement saying that (1) it had submitted an offer for the purchase of transmission rights to the abovementioned matches to all Polish television programme broadcasters transmitting free national programmes within the meaning of Art. 20b section 1 point 1 of the Act of radio and television broadcasting, (2) none of those broadcasters expressed their willingness to sign a licence agreement for the transmission of the abovementioned matches on the arm’s length basis and acceptable to Sportfive, (3) at the agreement conclusion date there is no possibility of purchasing rights to the matches from any of the broadcasters referred to above, pursuant to Art. 20b section 1 point 2 of the Act on radio and television broadcasting, and Sportfive remains the sole holder of the rights to those matches. The above statements were included in § 5 of the licence agreement dated 5 September 2012 concluded between the Company and Sportfive Sp. z o.o.*

TOYA informed that it had signed the agreement as it had received an offer for the match transmission along with the Sportfive’s statement saying that none of the national broadcasters had been prepared to sign an agreement except for Telewizja Polska SA, which expressed its interest but on terms which would not afford cost return to Sportfive.

1. **Nature of transmitted message**

According to the Act on radio and television broadcasting, *a media service is a* *programme if composed of a structured sequence of shows, commercial messages and other communication, which is distributed in its entirety for simultaneous viewing by the audience according to the schedule determined by the broadcaster* (Art. 4 point 6 of the Act).

Cyfrowy Polsat distributed the programme in its entirety for simultaneous viewing by the audience according to its own schedule of shows (i.e. the match broadcasting studio, first half of the match, the match broadcasting studio, second half of the match, the match broadcasting studio) and other transmitted messages including advertisements - identically as is the case in the daily distribution practice of an editorially structured show sequence being distributed in line with any agreed scenario and event schedule, and paying for the programme has no relevance for the above qualification. The programme contained the host’s comments made in the company’s name, which could be qualified as the broadcaster’s announcement (Art. 16 section 4 of the Act).

Pursuant to the Act on radio and television broadcasting, a broadcaster is a natural person, a legal person or a commercial partnership which creates and compiles a programme and distributes it or provides it to other persons for distribution (Art. 4 point 5 of the Act). Cyfrowy Polsat met those criteria as it took the exclusive editorial responsibility for the compiled and distributed programme (Art. 4 point 3 of the Act). Therefore, Cyfrowy Polsat acted as a media service provider (Art. 4 point 4 of the Act).

1. **Legal actions**

Treating the compilation of shows and other transmitted messages distributed by Cyfrowy Polsat as a programme leads to the conclusion that the distribution took place with violation of the law without concession (Art. 52 section 1 of the Act). In this situation, the Polish Code of Criminal Procedure requires that a State agency notifies the Prosecutor’s Office of a potential offence. Stating that the shows and other transmitted messages distributed by Cyfrowy Polsat constituted a programme that was distributed without concession has its consequence for the National Broadcasting Council who now needs to meet its obligation under the Polish Code of Criminal Procedure.

1. **Legislative postulates**

The National Broadcasting Council wishes to bring forward urgently the need to introduce a statutory definition of the paid media service – *pay-per-view*. A legal definition of the term ‘national programme’ is necessary to be established, too. The Council deems reasonable the postulate of introducing a statutory power to determine, by way of regulation, the mode of procedure in the event of waiving the requirement to transmit important events via a national programme available at no charge. The request to modify Art. 20b sections 1 and 6 seems justified, the modification to occur through a regulation stating that the rules provided therein and the penalty option under Art. 53 of the Act will apply to all entities operating on the media service market and not just to broadcasters within the meaning of the definition in Art. 4 point 5 of the Act. Art. 36 section 3 of the Act stating that concession is granted for 10 years needs to be reconsidered.

The Council’s standpoint containing interpretation dated 26 February 2013 on classifying *pay-per-view* services in the light of the Audiovisual Media Services Directive can be treated as complementary to the above comments.

The National Broadcasting Council is expressing its willingness to participate in the legislative work.

Jan Dworak

Council Chairman