

Warsaw, 2015

**The Council's standpoint**  
**on the procedure concerning broadcasting of major events**  
**on a channel other than a national channel available free of charge**

In accordance with the regulations of the Broadcasting Act of 29 December 1992 (Journal of Laws 2011, No. 43, item 226, as amended), hereinafter referred to as: "the Act", direct (or deferred, in accordance with Article 20b paragraph 5 of the Act) transmission of events of fundamental social importance may be broadcast exclusively on a channel meeting the requirements, i.e. one which is, firstly - national in character, and secondly - available free of charge (Article 20b paragraph 1 subparagraph 1 of the Act). A transmission of a major event may also be broadcast if the same event is also being transmitted by the broadcaster of a programme service meeting the conditions laid down in subparagraph 1, pursuant to a contract with the broadcaster who had acquired the rights to provide the live coverage of the given event or with any other authorised party (Article 20b paragraph 1 subparagraph 2 of the Act). Pursuant to Article 20b paragraph 6 of the Act, the limitations described above shall not apply if the given broadcaster can demonstrate that no broadcaster of a programme service meeting the requirements laid down in paragraph 1 subparagraph 1 was ready to conclude a contract ensuring the coverage in accordance with Article 20b paragraph 1 subparagraph 2 of the Act.

As is widely indicated in the doctrine - "The burden of proof concerning a lack of readiness to conclude an appropriate contract by all broadcasters of programme services meeting the requirements lies on the broadcaster of the programme service not meeting the requirements in which the transmission of the major event was broadcast. This constitutes proof of a negative, which by nature is not easy to provide. It is usually done by demonstrating that a contract offer was made to broadcasters of programme services meeting the requirements, under conditions appropriate for the market value of the transmission within such services."<sup>1</sup> In the Council's standpoint of 5 September 2012, the National Broadcasting Council emphasised that "to evaluate an 'expression of readiness to conclude a contract' within the scope of transmission of matches by broadcasters of national channels available free of charge, in addition to the fact of a final lack of agreement, the assessment of the conditions of the contract under negotiation shall also be of major significance,

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<sup>1</sup> Wojciechowski Krzysztof [in:] Piątek S. (Ed.), Dziomdziora W., Wojciechowski K., Ustawa o radiofonii i telewizji. [The Broadcasting Act] Komentarz, Warszawa 2014, p. 252; correspondingly, see also: Czarny-Drożdziejko Elżbieta, Ustawa o radiofonii i telewizji. [The Broadcasting Act] Komentarz, Warszawa 2014, p. 274

which would allow one to determine whether the contract offer was spurious in nature.”

The circumstances indicated above are of particular significance in the context of Article 53 paragraph 1 of the Act, according to which violation by a broadcaster of the obligations laid down in Article 20b paragraphs 1 and 6 of the Act shall be grounds for the issuance of a decision by the Chairman of the National Broadcasting Council imposing a fine upon the broadcaster.

Administrative procedure in the case of violation of the regulations laid down in Article 20b paragraphs 1 and 6 of the Act shall be carried out on the basis of Article 10 paragraph 2 in conjunction with Article 53 paragraph 1 of the Act as well as the regulations laid down in the Code of Administrative Procedure (Journal of Laws 2013, item 267 and Journal of Laws 2014, item 183), hereinafter referred to as: the Code, including in particular Chapter 4. In accordance with Article 75 § 1 of the Code - “Anything which is not contrary to law and which is of assistance in clarifying a case shall be admissible as evidence. Evidence includes: documents, the evidence of witnesses, the opinions of experts and inspections.”.

In the case of receipt of information on the direct transmission of a major event in a programme service not meeting the requirements, the KRRiT Chairman, acting on the basis of Article 61 § 4 of the Code, shall inform the media service provider of commencement by the Council of proceedings to impose a fine, as stipulated in Article 53 paragraph 1 of the Act. In accordance with Article 10 paragraph 2 of the Act, the KRRiT Chairman may require the media service provider to: (1) provide a recording containing a copy of the transmission and (2) provide materials, documentation and information to the extent necessary for the purpose of supervising the provider’s compliance with the provisions of the Act.

During the proceedings, evidence of particular significance shall be that which demonstrates:

- that a contract permitting broadcasting of a transmission was offered to all broadcasters of national channels as defined by the Act or the broadcasting license, available in full free of charge, and none of the parties expressed readiness to conclude the contract,
- that the contract offer was not spurious in nature.

Establishment of the above circumstances shall be possible, in particular, through analysis of the evidence provided by the media service provider in the form of, inter alia:

- documentation that an offer to purchase the transmission rights was made to all broadcasters meeting the requirements,
- documentation of the conditions of the offer to purchase the rights that was negotiated with broadcasters meeting the requirements,
- a copy of the concluded contract, on the basis of which the provider acquired transmission rights.

When evaluating whether Article 20b paragraphs 1 and 6 of the Act were violated, which forms the basis for imposition of the fine stipulated in Article 53 paragraph 1 of the Act, the KRRiT Chairman shall take into account, in particular:

- the conditions of the offer to purchase the rights that was negotiated with broadcasters meeting the requirements,
- the conditions of the concluded contract, on the basis of which the provider acquired transmission rights,
- the value of the transmission rights with regard to: (1) the income potential of the transmitted event, (2) historical analysis of transactions connected with transmission rights for similar events on the Polish market and (3) transmission time,
- the situation on the market of programmes mentioned in Article 20b paragraph 1 subparagraph 1 of the Act.