**Standpoint of the National Broadcasting Council
of 26 February 2013
on the classification of pay-per-view services
in the light of the Audiovisual Media Services Directive**

Being aware of the fact that once the transposition 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 Member States concerning the provision of audiovisual media services (OJ **L 95 of 15.04.2010)** [hereinafter referred to as the “Directive”] into the Act on radio and television broadcasting dated 29 December 1992 (Journal of Laws of 2011 No. 43, item 226, as amended) [hereinafter referred to as the “Act”] is completed, the service providers may have doubts as to the legal qualification of the new media services such as *pay per view* [hereinafter also referred to as “PPV”], below please find the National Broadcasting Council’s standpoint with interpretation of the matter in question.

**Classification of *pay per view* services**

The *pay per view* service involving transmission, against additional charge, of audiovisual communication (such as a sporting event, a music concert or a feature movie) in its entirety, for simultaneous viewing of that communication by the audience on the basis of a programme schedule determined by the service provider (composed for instance of the following: a trailer announcing the sporting event, a spot with autopresentation of the sports federation, a show with the sporting event transmission including verbal comments, a commentary summing up the sporting event by sport commentators, and commercial communication), where the editorial responsibility for the communication rests with the provider – should be qualified as a programme in the light of the Directive, and the service provider – as a broadcaster.

It is worthwhile to be reminded that in the light of Article 1 (a) and (c) – (f) of the Directive:

- the “audiovisual media service” means:

(i) service within the meaning of Articles 56 and 57 of the Treaty on the Functioning of the European Union, for which the editorial responsibility rests with the media service provider, and the basic objective of which is to provide the general audience – via electronic communication networks within the meaning of Article 2 (a) of Directive 2002/21/EC – with programmes carrying information, entertainment or education messages. Such audiovisual media service constitutes television broadcasting within the meaning of letter (e) of this section or an on-demand audiovisual media service within the meaning of letter (g) of this section;

(ii) audiovisual commercial communication;

- “television broadcasting” or “television broadcast” (i.e. linear audiovisual media service) means audiovisual media service provided by a media service provider for simultaneous viewing of the programmes on the basis of a programme schedule;

- “editorial responsibility” means the exercise of effective control both over the selection of the programmes and over their compilation - either in a chronological order for television broadcasts or in a catalogue for on-demand audiovisual media services. Editorial responsibility does not necessarily imply legal liability under the national law for the content or for the services provided;

- “media service provider” means a natural or a legal person who has editorial responsibility for the choice of audiovisual content of the audiovisual media service, and who decides on the compilation of that content;

- “broadcaster” means a media service provider of television broadcasts.

After the transposition of the Directive into the Act, it has been consistently provided in Art. 4 points 1 and 3 – 7 of the Act that:

- “media service” means a programme service for which the editorial responsibility rests with the service provider, and the basic objective of which is to provide the general audience with programmes carrying information, entertainment or education messages via telecommunication networks; commercial communication constitutes media service, too;

- “programme” means media service in the form of a structured compilation of shows, commercial and other communication, broadcasted in its entirety for simultaneous viewing by the audience on the basis of a programme schedule determined by the broadcaster;

- “broadcasting” means transmission of a programme by wireless means or via cable for viewing by the audience;

- “editorial responsibility” means the exercise of effective control both over the selection of shows and over their compilation within a programme or a catalogue; the above shall be without prejudice to the legal liability governing the content or the service provision;

- “broadcaster” is a natural person, a legal person or a commercial partnership which creates and compiles a programme and broadcasts it or provides it to third parties for broadcasting;

- “media service provider” means a natural person, a legal person or a commercial partnership who is a broadcaster and who has editorial responsibility for the choice of media service content, and who decides on the compilation of that content;

In the light of the pro-European law interpretation, the terms used in the Act that transpose the Directive provisions should be interpreted in accordance with the Directive; interpreting the terms provided in the national law in a manner that represents a specific way of understanding those terms within the local law is not justified.

An essential factor speaking for classifying PPV as a programme is the fact that *pay per view* is broadcast at a fixed time chosen by the service provider rather than the user. It is media service, and its basic objective is to provide the general audience with programmes for information, entertainment or education purposes via electronic communication networks.[[1]](#footnote-1) PPV is a service where a mass viewer receives access, via the media, to entertainment and information programmes occasionally carrying some educational value (e.g. sport education).

The exercise of effective control both over the selection of shows and over their compilation in a chronological order, as part of the broadcasting service offered by the PPV service provider is of importance as well. If this criterion can be proved to have been met under the actual state of facts, the service provider will be deemed to carry editorial responsibility for the transmitted content.

As to the choice of shows and their compilation in a chronological order, even in a hypothetical situation where the PPV communication would involve only one show such as for instance transmission of a sporting event only without advertisements, sponsor information, autopresentation of the sports federation, this service could still be qualified as a programme. The show compilation may comprise a number, a few or just one element depending on the circumstances the specific case and the needs. What is important is the fact whether that element has been chosen by the provider (choice of the media content) and whether it is broadcast in its entirety at the time determined by the service provider. The size of the show compilation is the service provider’s free decision.

The definition of television broadcasting interpreted in the light of the Directive and therefore also in the light of the Act, where the latter should be construed under European law transposed by the Act to the national law, is flexible and technologically neutral. With the new linear services coming into being that meet the definition criteria, the definition should also embrace those services even if they were not known on the market at the time the Directive came into being. As clearly described in point 27 of the Directive recitals, television broadcasting includes, but is not limited to, live streaming, webcasting and near-video-on-demand. When analysing the nature of *near-video-on-demand* and PPV, PPV may be regarded as modification of the *near-video-on-demand* service.

**PPV vs. implementation of Article 14 of the Directive (transmission of important events)**

In order to secure the society’s right to information and a wide access to television coverage on domestic or foreign events of significant importance to that society, such as the Olympic games, world and European championships in football, the Directive, following Art. 11 and 17 of the Charter of Fundamental Rights of the European Union and Art. 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950, provided for the possibility for Member States to define means consistent with the European law and aimed at regulating the exclusive rights to the transmission of such events by television broadcasters who are subject to such rights. Restricting the free enjoyment of the ownership right is justified by the protection of important public interest. The Directive refers here to the situation where broadcasters exercise their transmission rights on the exclusive basis (see Article 14 of the Directive and also points 49 and 51 of the Directive recitals).

Article 14 (1) of the Directive states in this context that: “Each Member State may take measures compliant with European law to ensure that broadcasters falling under its jurisdiction do not broadcast on an exclusive basis any events which are regarded by that Member State as being of major importance for the society in such a way as to deprive a substantial proportion of the public in that Member State of the possibility of viewing such events through live coverage or deferred coverage on free television. (…)”

Article 14 (3) of the Directive states additionally: “Member States shall ensure through appropriate means in their legislation that broadcasters falling under their jurisdiction do not exercise exclusive rights that they purchased after 18 December 2007 in such a way that a substantial proportion of the public in another Member State is deprived of the possibility of viewing any events which have been designated by that other Member State in accordance with paragraphs 1 and 2, by way of full or partial live coverage or - where necessary or appropriate for objective public interest reasons – full or partial deferred coverage on free television as determined by that other Member State in accordance with paragraph 1.”

Please note that the term “exclusive rights” has not been defined in the Directive. Following the European Commission’s *Working Document: Implementation of Article 3a of Directive 89/552/EEC, as modified by directive 97/36/EC* (CC TVSF (97)9/3) footnote 1, a broadcaster may be regarded as having exclusive transmission rights to a specific event within a given territory if no other broadcaster is entitled to provide the community living within the given territory with a full TV transmission of the specific event. And speaking about “exercising” exclusive rights, as pointed out in Article 14 (3) of the Directive, a broadcaster is deemed to exercise its exclusive rights to an event within a given territory if TV programmes comprising the transmission of that event for viewing within that territory are transmitted with the broadcaster carrying the editorial responsibility for them.

Article 14 of the Directive defines two categories of broadcasters: a free access broadcaster (i.e. a broadcaster of a programme available to the viewers without charge other than that resulting from transmission financing programmes as may be widely used in each member State, such as licence fee or basic tier subscription fee to a cable network, where the programme broadcasting method or the ownership of such a programme are of no importance[[2]](#footnote-2)), and broadcaster who do not fulfil those criteria (non-qualifying broadcasters).

In a situation where a non-qualifying broadcaster has purchased exclusive transmission rights for a specific domestic territory, that broadcaster should offer the transmission rights to the event to free access broadcasters (sublicense of rights). A non-qualifying broadcaster, upon purchasing the exclusive transmission rights to an important event within a specific territory from their owner, should ensure that the contract provides for the possibility of granting a sublicence to a free access broadcaster who is interested in purchasing the transmission right against a fair price.

The national legislation should provide, as part of the effective implementation of Article 14 (3) of the Directive, for the procedures of mutual lists acknowledgement, an expeditious dispute resolution system whenever it is necessary to assess if conditions have been met for a non-qualifying broadcaster to broadcast, on an exclusive basis, a transmission of an event included in the list of important events (see *Discussion Paper for the Contact Committee on Article 3a TWF Directive (CC TVSF (2000)6), p. 7 – 8*). This task rests with the competent regulatory body (having jurisdiction over the non-qualifying broadcaster), which should act in consultation with the regulatory body of a Member State which has adopted the list of important events as published in the Official Journal of the European Union. Although this solution is a necessary element for implementing Article 14 (3) of the Directive, i.e. with regard to the procedure of mutual acknowledgement of the lists of important events, this procedure would also be essentially purposeful in domestic relations. As stated in the abovementioned Commission document CC TVSF (97)9/3, p. 1, Article 14 (1) of the Directive does not provide for a fully comprehensive legal framework for the Member States to determine the exercise of exclusive transmission rights to important events. In strictly domestic relations, Member States may therefore (considering also Article 14 (3) of the Directive) determine for instance the rules of purchasing and using the exclusive transmission rights to sporting events and other events that evoke large interest of the public, provided such solutions are in line with European law.

The requirements agreed upon on the European level, concerning the correct implementation of Article 14 (3) of the Directive and providing for a quick and expeditious system to determine whether a non-qualifying broadcaster may, under specific circumstances, broadcast on an exclusive basis an event included in the list of important events, are also relevant for the implementation of Article 14 (1) of the Directive. One should bear in mind that a correct implementation of Article 14, also with respect to purely domestic relations (i.e. relations between broadcasters falling under the same national jurisdiction) should be proportionate and effective as well. The provisions pertaining to the important event transmission constitute restriction - for important public interest - to the ownership rights, therefore any systemic solutions applied must be proportionate in order to ensure compliance with European law. Both the valid interests of rights owners and the general public interests must be considered. The implementation should provide for a quick and expeditious system that is capable of resolving whether a specific sublicence price is fair and arm’s length.

Polish legislation provides for a uniform system solution in Art. 20b section 6 of the Act, which is to be read jointly with Art. 10 section 2 (“The Council Chairman may request a media service provider submit materials, documents and explanation as may be necessary for controlling the provider for its compliance with the Act, concession conditions or self-regulation as may be applicable to the provider.”), section 3 (“The Council Chairman may request a media service provider cease the provision of media services if it violates the Act, any Council’s resolutions or concession conditions.”) and section 4 of the Act (“Based on the Council’s resolution, the Council Chairman may issue a decision ordering a media service broadcaster to cease the activity provided in section 3.”).

Art. 53 section 1 of the Act may contribute to the efficient execution of the provisions transposed to the Act that guarantee to the general public the widest possible access to the transmission of important events.

In summary, PPV service providers, similarly to “traditional” broadcasters, must fulfil the obligations provided in Art. 20b of the Act concerning the possibility of broadcasting important events. Assessment of the conditions provided in Art. 20b section 6 (including the assessment of whether the price conditions offered to free access broadcasters by the qualifying broadcaster were arm’s length or if they were substantially overstated and the offer – an apparent one) rests, under Art. 10 and 53 section 1 of the Act with the Council Chairman. The Council Chairman, in exercising a Council’s resolution, may issue a decision requesting a media service supplier cease any actions that violate Art. 20b sections 1 and 6 of the Act.

Jan Dworak

Council Chairman

1. The media nature of the audiovisual services has been explained in point 22 of the Directive recitals: “For the purpose of this Directive, the definition of audiovisual media service should cover mass media in their function to inform, entertain and educate the general public, and should include audiovisual commercial communication, but should exclude any form of private correspondence such as e-mails sent to a limited number of recipients. That definition should exclude all services the principal purpose of which is not the provision of programmes, i.e. where any audiovisual content is merely incidental to the service and not its principal purpose. Examples include websites that contain audiovisual elements only for ancillary purposes, such as animated graphical elements, short advertising spots or information related to a product or with non-audiovisual service. For these reasons, games of chance involving a stake representing a sum of money, including lotteries, betting and other forms of gambling services, as well as on-line games and search engines, but not broadcasts devoted to gambling or games of chance, should also be excluded from the scope of the Directive.” [↑](#footnote-ref-1)
2. See point 53 of the Directive recitals: “For the purposes of this Directive, “free television” means broadcasting on each channel, either public or commercial, of programmes which are accessible to the public without payment other than that resulting from transmission financing programmes as may be widely used in each Member State (such as licence fee or basic tier subscription fee to a cable network).” [↑](#footnote-ref-2)