

STATEMENT OF THE POLISH CHAMBER OF ELECTRONIC COMMUNICATION [PL: STANOWISKO POLSKIEJ IZBY KOMUNIKACJI ELEKTRONICZNEJ]

Warsaw, July 14, 2021

Head of the Commission of Culture and Mass Media

Piotr Babinetz, the Sejm of the Republic of Poland

ul. Wiejska 4/6/8, 00-902 Warsaw

Re: the deputy draft of the act on amending the National Broadcasting Act (Sejm's paper no. 1389 – draft dated July 7, 2021)

To Whom It May Concern,

Acting on behalf of the Polish Chamber of Electronic Communication (hereinafter: "PIKE", the "Chamber"), I would like to present this stance concerning the draft amendment to the National Broadcasting Act, included in Sejm's paper no. 1389 dated July 7, 2021 (hereinafter: the "Draft"). The draft aims to deeply interfere with the structure of the Polish media market. However, this Draft was filed as a deputy draft, because of which no public consultations were held, which would allow all interested parties to provide their stances. The manner of processing the Draft ought to be assessed in a particularly negative way, in view of the works on the governmental draft (UC54) concerning the implementation of the amendment of the Audiovisual Directive 2018/1808, which have already been underway for many months and which involved extensive public consultations. However, said draft did not include any proposition of changes in terms of Article 35 of the National Broadcasting Act of 29 December 1992 (hereinafter: the "Act").

In view of the above, as a Chamber uniting operators and broadcasters, we hereby provide the Head of the Commission of Culture and Mass Media of the Sejm of the Republic of Poland and the other listed authorities and institutions with a list of critical comments concerning the Draft and we postulate the Draft's rejection in its entirety.

I. The lack of need to limit the possibility of investment in the Polish media market

The draft intends to introduced changes to Article 35 of the Act. The reasons for the Draft indicate that changes are aimed at ensuring a specific interpretation of this provision. In particular, the authors of the Draft would like for the limitations in terms of a holder of a Polish broadcasting license to include also the case of direct subsidiarity of a broadcaster to a foreign entity which has its seat outside of the EEA. For that purpose, it is postulated that the following words ought to be added in Article 35 Section 2 of the Act: "direct or indirect" before "capital share of foreign entities in the company" and before "participation of foreign entities in the share capital of the company". *(In terms of the definition of a foreign entity, Article 4 Section 11) of the Act refers to Article 3 Section 5 of the Act of 6 March 2018 on the rules of participation of foreign entrepreneurs and other foreign entities in business transactions within the territory of the Republic of Poland (Journal of Laws of 2019, items 1079, 1214, 1495, and 1655): "The terms used in the act mean: (...) 5) foreign entity: a) a natural person who does*

not have Polish citizenship, b) a legal entity with its seat abroad, c) an organizational unit which is not a legal person but which has legal capacity, with its seat abroad”).

Above all, the change in the interpretation of Article 35 Section 2 of the Act, through an amendment of this act, is redundant, because, up until now, both the licensing body – the Chairman of the National Broadcasting Council, and administrative courts, have been uniformly interpreting Article 35 of the Act, as including only the case of a direct capital share of a foreign entity.

Expanding the scope of the prohibition, to also include indirect ties, while also removing Article 35 Section 3 in its current wording, would lead to a limitation of the possibility to invest in entities operating on the Polish media market, which is in no way justified. The proposed wording results in a risk that it will become impossible for an entity from another EU (EEA) country to acquire more than 49% of shares of a Polish broadcaster, if a minority (even at the level of 1%) shareholder of that investor is an entity from outside of the EEA. Such solution drastically contradicts treaty freedoms, which the Republic of Poland undertook to comply with then entering the European Union. The defectiveness of the proposed provisions arises primarily from removing the following current wording from Article 35 Section 3 of the Act: “without applying the limitations specified in Section 2 above”.

PIKE fails to find any justification for the proposed solutions. In our opinion, the Draft seems to have been written for a single case and it does not seem to be a well-thought general norm, which would be necessary for the pluralism of the media market and for ensuring the possibility to receive financing to exist on this highly competitive market. In this regard, the Draft seems even counter-productive, as it may lead to limiting pluralism and blocking investments in the television market.

The Draft will not in any way even out the chances of Polish broadcasters and operators in confrontation with giant foreign entities operating in the field of on-demand audiovisual media services (OTT services). It would, however, be a fundamental mistake to disregard the significance of these services for the media market and, more widely, for the telecommunications market. The ever-increasing volume of data transferred as part of OTT services results in an increase of the costs of operation of operators, which are not in any way compensated by OTT service providers. On the contrary, on-demand services compete with television (linear) services, which puts in danger also the revenue of broadcasters and operators. It negatively affects the possibility for operators to invest in the development of broadband networks which, after all, are so valuable for the proper functioning of the entire economy.

To sum up, the Draft does not properly identify the factual threats existing in the media market and the solution proposed in it will actually worsen the current situation on the market. In view of the above, PIKE believes that the Draft ought to be rejected in its entirety.

II. The unprecedented and groundless violation of related interests and a *vacatio legis* that is not long enough

PIKE believes that the interim provision proposed in Article 2 of the Draft constitutes an example of a retroactive provision which, up until now, was unprecedented when amending the Act. According to said provision, entities which on the day the Draft comes into force, will be holders of a license for broadcasting radio and television programs, will also need to adjust

their capital structure and their Articles of Association or Statutes to the limitations indicated in Article 35 Section 2 and 3 of the Act (in the wording specified in the Draft), within 6 months from the day the Draft enters into force.

It is, therefore, worth mentioning that Article 35 of the Act has already been subject to a few changes and that the entry into force of an amendment of this provision has never been linked to any obligations for the broadcasters already holding a license. As an example, one may refer to the Act of 25 June 2009 on amending the National Broadcasting Act (Journal of Laws no. 155, item 965) or the Act of 2 April 2004 on amending the National Broadcasting Act (Journal of Laws no. 91, item 874), both of which modified Article 35 of the Act, yet without formulating an obligation to change in any way the capital structure or the Articles of Association or the Statutes of the entities already holding a license. It is worth noting that Article 35 of the Act only states who a license may be granted to and not who may hold a license. Changes in ownership within the duration of a license are regulated in another provision (Article 40a of the Act), which the Draft does not change. Based on Article 36 Section 3 of the Act, a broadcasting license is granted for a definite period of time (10 years). In view of the above, there exist no grounds for formulating in the Draft obligations towards other entities which have already been granted a license. Especially since Article 38 of the Act, which is already in force, allows for a license to be revoked whenever national security or defense are actually in danger. Such decision is, however, subject to judicial control.

It ought to also be noted that the planned *vacatio legis* and the deadline for the broadcaster to adjust their capital structure and their Articles of Association or Statutes is drastically short – it equals only 7 months. This creates the risk for the broadcaster of suffering a significant loss when selling their shares in order to adjust their capital structure to the requirements indicated in the Draft. Such short deadline may even render the resale of shares impossible, as the potential buyers will not have relevant investment expenses planned for a given year. It is worth to mention that, in the reasons for the abovementioned Act of 2 April 2004 on amending the National Broadcasting Act (Journal of Laws no. 2213, dated November 7, 2003), a direction of liberalizing the participation of foreign capital in electronic media for persons and entities from outside of EU countries was set forth. At that time (18 years ago), it was decided that 49% will be an appropriate level, given the circumstances and the level of development of the Polish media market at that time. The authors of that act clearly referred to Poland's international obligations in terms of the gradual liberalization of the movement of capital. In view of the above, the current Draft ought to be seen as a step in a direction completely opposite to that correctly chosen on the day preceding the date of Poland's entry into the European Union. For that reason also, the Draft ought to be rejected as one that does not take into consideration the long-term strategy adopted by the Republic of Poland, constituting the fulfillment of international obligations, and supporting foreign investments in the highly competitive and resource-intensive media market.

III. Alternative propositions

Notwithstanding the above, PIKE is pleased to see the proposed liberalization of the media market, which includes limiting the licensing obligation only to terrestrial broadcasting. For a while now, PIKE has been postulating the solution where, to broadcast within telecommunications networks (in particular cable networks), it is sufficient to file an application – which is the case when it comes to broadcasting within a tele-information system (Internet). However, for PIKE to positively assess also the draft of the act liberalizing the

requirements of launching operation on the media market, it is necessary for the application procedure to not allow for discretionary refusals to grant consent to commence broadcast. The conditions to be met by a broadcaster should be specified in detail and they should not exceed the scope of what is currently required to obtain a license (unless additional conditions are intended to ensure balance in the relationship between the broadcaster and the operator). Certainly, an expansion of the conditions arising out of Article 35 of the Act, to cover also the application procedure – through the wording specified in the Draft – would be met with a negative assessment of PIKE.

Only as a last resort – should the Draft not be rejected in its entirety – a proposition to extend the scope of Article 35 of the Act may be considered, to include equal treatment of Polish entities and foreign entities not only from the European Economic Area, but also from **the area of OECD – Organization for Economic Co-operation and Development** (*Currently there are 36 countries in the OECD: Australia, Austria, Belgium, Chile, the Czech Republic, Denmark, Estonia, Finland, France, Greece, Spain, the Netherlands, Ireland, Iceland, Israel, Japan, Canada, South Korea, Lithuania, Latvia, Luxembourg, Mexico, Germany, Norway, New Zealand, Poland, Portugal, Slovakia, Slovenia, USA, Switzerland, Sweden, Turkey, Hungary, Great Britain, and Italy*). Undoubtedly, Poland has strong commercial ties with countries, and these are countries which do not pose any threat to the Polish defense. However, the reasons for the Draft indicate that the proposed changes are allegedly necessary, due to the recently observed increase in threats for the country's interests, arising out of the so-called hybrid actions of third countries. However, among these countries, indicated by the press, there were no countries belonging to the EEA or the OECD.

It ought to be highlighted that excessive solutions may cause the complete loss of the regulator's (National Broadcasting Council) control over broadcasting television channels in Polish. The Republic of Poland is subject to international agreements and EU law, which feature the country of origin principle and guarantee the freedom to broadcast channels on the territory of Poland also from outside of its territory. Therefore, in practice, the broadcasters who are worried about excessive regulations, may, completely legally, move their operation to another EU Member State and provide their services in the territory of Poland from there. It ought to be, only briefly, noted that such situation would have negative consequences for the national budget, in the form of lower tax influx. It is not, therefore, in the interest of Poland, to discourage broadcasters to have their seat in our country, and, unfortunately, this is the direction the Draft is heading in.

IV. The issue of TVN24

PIKE is not a party in the administrative proceedings concerning the granting of a broadcasting license to TVN24 for of time, which is why it only possesses the publicly available information about the course of these proceedings. In view of said information, it is impossible not to link the Draft with the over one-year-long waiting time for the broadcaster of the relevant channel to obtain a decision allowing for satellite broadcast within another 10-year period. In PIKE's opinion, it is an unambiguously bad practice to prepare draft acts for single cases, without taking into consideration the consequences for all participants of the market, whose possibility to obtain capital – now or in the future – may also be significantly limited. Beginning works on the Draft may, however, prove that there exist no *de lege lata* grounds allowing the Chairman of the National Broadcasting Council to refuse to extend the broadcasting license for satellite broadcasting of the TVN24 channel. Such grounds would only be introduced in the

Draft. Such approach to regulating the media market must be met with a definitely negative assessment. One of the most important values in business is stability of regulation. If, as a result of changes in the law occurring days before the decision is issued, the issuance of a license for a subsequent period was to be refused, Poland would become an unreliable partner for foreign investment, including those within the areas of the European Union and the European Economic Area. The consequences of the Draft for the media market would, therefore, be catastrophic and would not be limited only to one broadcaster. In view of the above, the Draft ought to be rejected in its entirety.

In conclusion, it is important to refer to the assumption expressed in the reasons for the Draft, according to which "adopting the proposed solutions will not result in additional budget spending". The authors of the draft did not take into consideration the risk of potential compensation which the Republic of Poland would need to cover, should the Draft be deemed as violating international obligations (in particular, the Business and Economic Relations Treaty between the Republic of Poland and the United States of America, drawn up in Washington D.C. on March 21, 1990). And such risk would be real, in particular given Article 35 Section 2 of the Act, according to which „a refusal to grant a broadcasting license for another period is possible only if any of the circumstances indicated in Article 38 Section 1 or 2 of the Act apply to the broadcaster” – introducing other grounds for refusal to grant a license for another period or for revoking a license could be seen as expropriation or nationalization of investment. According to Article VII Section 1 of the abovementioned Treaty: "Investments shall not be expropriated or nationalized either directly or indirectly through measures tantamount to expropriation or nationalization ("expropriation") except for a public purpose, in a nondiscriminatory manner, upon payment of prompt, adequate and effective compensation (...)". Notwithstanding the abovementioned legal grounds for potential compensation, entrepreneurs who suffered losses as a result of an amendment of Article 35 of the Act, could also demand for the Treasury of State to redress the damage suffered as a result of a so-called legislative tort. The risk of compensation and the potential violation of the Constitution by adopting the Draft was pointed out also by the Ombudsman, in his stance dated July 12, 2021 (VII.716.24.2021.ST). We ought to fully agree with his comments.

In view of the above, PIKE is asking for the Draft to be rejected in its entirety.

Jerzy Straszewski

President of the Management Board of PIKE