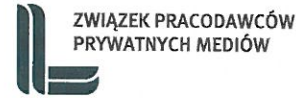




KRAJOWA IZBA GOSPODARCZA



Warsaw, dated April 14, 2017

205/PIKE/2017

**Dear Mr Giuseppe Abbamonte**  
**Director of the Media and Data Directorate**  
**at Directorate General for Communications Networks,**  
**Content and Technology of the European Commission**

**REQUEST FOR INTERPOSITION**  
**WITH RESPECT TO DRAFT NATIONAL REGULATIONS POTENTIALLY**  
**INFRINGING EU LAW**

*Dear Sir,*

Acting on behalf of the National Chamber of Commerce (KIG), the National Chamber of Commerce of Electronic Industry and Telecommunication (KIGEiT), the National Chamber of Ethernet Communication (KIKE), the Association of Electronic Media and Telecommunications Employers (Mediakom), the Polish Chamber of Information Technology and Telecommunications (PIIT), the Polish Chamber of Electronic Communication (PIKE), the Union of Private Media Employers (ZPPM), we kindly ask you as the Director of the Media and Data Directorate at Directorate General for Communications Networks, Content and Technology of the European Commission to interpose with respect to regulations drafted by the Polish government that potentially infringe European Union law.

We represent chambers of the economic self-government associating, inter alia, operators distributing television programmes. Our attention has recently been directed at the draft act amending the Act of 21 April 2005 on Licence Fees (draft act of 3 March 2017) proposed by the Polish government. Having read the proposed regulations, we conclude that the proposed amendments:

- a) infringe Article 2 of the Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union as the drafter *a priori* reserves that it will not submit the draft act to the

Commission in order to make a relevant decision, whereas this draft act stipulates the implementation of new state aid into national law according to EU law;

b) infringe the principle of technological neutrality defined in Article 8 (1) of the Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive) as they provide for more disadvantageous regulatory and competitive conditions (implementation of new obligations that make the services less attractive) imposed only on certain providers of electronic communication services;

c) infringe Article 7(e) and Article 6(1)(b) of the Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data as they stipulate the processing of personal data of subscribers of television services in violation of the requirement set forth in this article whereby it is necessary to process and disclose data to an official authority / an entity that carries out a task in the public interest, as well as they assume the inadmissible change to the purpose of the subscriber's personal protection data processing;

d) infringe the Directive 2002/20/EC of the European Parliament and of the Council of 7 March 2002 on the authorisation of electronic communications networks and services (Authorisation Directive), including Article 6(1) and the Annex thereof as they provide certain telecommunication companies with additional obligations not directly connected with the services set forth in this Directive and not specified in the Annex thereto.

In view of the scale of the identified infringements of the legal regulations and of the common values assumed by the EU Member States, we have decided to take any and all protection measures available to us, including the request for your urgent interposition. Please note that this case is exceptionally urgent and we cannot wait until those amendments are implemented and then quashed by the Commission. To the best of our knowledge, the entry into force of the act is only a matter of time due to the strong political and economic motivation (the purpose of the draft act is to improve the financing of public service broadcasters). According to most recent government representatives' declarations, described modifications are supposed to be introduced as fast and *vacatio legis* made as short as possible (the current draft act provides for six (6) months, whereas it is unofficially said that this period will be shortened to 1.5-2 months). In the meantime, the consequences of the entry into force of the proposed regulations would have an

irrevocable influence on an entire Polish media market. The draft act version being publicly consulted assumes that within sixty (60) days from its entry into force, the television service providers would be obliged to divulge their subscribers' personal data to the Polish postal operator in order to collect licence fees. The disclosure of those data will result in a series of infringements, including the illegal state aid to public service broadcasters, the infringement of the protection of the subscribers' personal data, and the infringement of the proper competition conditions in the telecommunication industry, that are detailed below.

### **1. Overview of current legislation and proposed amendments**

Polish law provides for the common collection of the licence fee for receiving public service broadcasting. Currently, this fee is paid by **the users of registered radios and televisions**. The basis for this obligation is the assumption that the possession of a radio or television in a condition that enables the immediate reception of broadcasting services means that this equipment is used. This leads to the obligation to register the radio or television and pay the licence fee. Such defined users are obliged to **individually register their radios or televisions via the postal operator**. The licence fee is due and collected only **after such registration**.

The draft amendment considerably changes the aforesaid assumptions. The draft regulations stipulate a new assumption under which each **subscriber of pay-television services** is automatically considered as the user of the television and, consequently, this user is requested to register the television and pay the licence fee. However, the aforesaid provisions will **only apply to television services provided by selected providers**, i.e. cable television operators, operators of digital television platforms, providers of program distribution services via xDSL network and IPTV services. At the same time, it is assumed that the provider of such services is obliged to **disclose its subscribers' data to the designated postal operator** in order to ascertain the existence of the obligation to pay the licence fee, and to collect and enforce it. In addition, the postal operator may request the television service provider to disclose any data on its subscribers at any subsequent date also in order to ascertain the existence of the obligation to pay the licence fee, and to collect and enforce it. The television service providers that infringe their obligations will be subject to severe fines.

### **2. New aid subject to notification to the Commission.**

Pursuant to Article 2 of the Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union: *"Save as otherwise provided in regulations made pursuant to Article 109 TFEU or to other*

relevant provisions thereof, any plans to grant new aid shall be notified to the Commission in sufficient time by the Member State concerned. The Commission shall inform the Member State concerned without delay of the receipt of a notification. In a notification, the Member State concerned shall provide all necessary information in order to enable the Commission to take a decision pursuant to Articles 4 and 9 (“complete notification”).” At the same time, Article 1(c) lays down that: *““new aid” means all aid, that is to say, aid schemes and individual aid, which is not existing aid, including alterations to existing aid.”* The aid shall not be put into effect before the Commission has taken, or is deemed to have taken, a decision authorising such aid (Article 3).

In our opinion, the discussed draft act provides for this “new aid” according to the Regulation 2015/1589. As a minimum, the assumptions of this draft act will considerably change the existing aid in the form of the licence fee provided to public service broadcasters (or even a completely new aid with respect to the present one). The catalogue of persons obliged to pay the licence fee will significantly change (considerably extended) - a considerable change to the source of financing.

The current catalogue of persons obliged to pay the licence fee includes those users of radios and televisions who registered them. When the draft act enters into force, this catalogue will be significantly modified as it will additionally include the subscribers of pay-television services.

The current regulations (the current Article 2(2) of the Act on Licence Fees):

*“It is assumed that a person who has the radio or television in a condition that enables the immediate reception of broadcasting services uses this radio or television.”*

The draft regulations (new Article 2(2a) of the Act on Licence Fees):

*“The end user bound by the contract for providing pay-television services shall be assumed to have a television that enables the immediate reception of broadcasting services.”*

It is worth noticing that it is completely impossible to challenge the drafter’s assumption (that being bound by the contract for providing pay-television services is synonymous with the use of the radio or television). As a matter of principle, it is impossible to prove the negative fact (the fact of not using the radio and television). **In fact, this assumption constitutes a legal fiction, the consequence of which is the new (much broader) catalogue of entities obliged to pay the licence fee determined by the legislator. Each subscriber of pay-television services will *de facto* be obliged to pay the licence fee, irrespective of whether the radio or television is actually used or**

**not** (e.g. the user's promotional contract is about to expire, the user leases an apartment with the purchased television service to third parties, the user has purchased the service in the package).

There is, therefore, no doubt that the draft amendments will constitute at least a considerable change to the existing state aid or even they will be considered as a new kind of aid provided to public service broadcasters. The source of financing aid to public service broadcasters will significantly change and, consequently, their income will considerably increase, which is indicated by the drafter in the statement of reasons. In the meantime, the Communication from the Commission on the application of state aid rules to public service broadcasting 2009/C 257/01 unambiguously indicates that (paragraph 31):

*"In its decision-making practice the Commission has generally examined: (a) whether the original financing regime for public service broadcasters is existing aid in line with the rules indicated in paragraphs 26 and 27 above; (b) whether subsequent modifications affect the actual substance of the original measure (i.e. the nature of the advantage or the source of financing, the purpose of the aid, the beneficiaries or the scope of activities of the beneficiaries) or whether these modifications are rather of a purely formal or administrative nature; and (c) in case subsequent modifications are substantial, whether they are severable from the original measure, in which case they can be assessed separately, or whether they are not severable from the original measure so that the original measure is as a whole transformed into a new aid."*

In the light of the foregoing there is no doubt that according to the Communication from the Commission, the proposed regulations will be considered as new aid that needs to be notified. Firstly, (paragraph 1 above) - the financing regime for public service broadcasters undoubtedly constitutes state aid under EU law. Secondly, (paragraphs 2 and 3 above) - the draft modifications affect the actual substance of the original measure. Primarily, the source of financing the benefits indicated by the Commission changes as there occurs a new category of persons obliged to pay the licence fee that will generate much higher income compared to the previous one (it is estimated that presently as many as 47.2% of the currently registered radios and televisions are used by persons exempted from the licence fee)<sup>1</sup>. Instead of the users of the registered radios and televisions only (presently, about 6,940,922 entities<sup>2</sup>), this category may include as many as 11 million subscribers of pay-television services (the number of the Polish subscribers of pay-

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<sup>1</sup> 2015 Activity Report of the National Broadcasting Council.

<sup>2</sup> *Ibidem*.



television services estimated by the company PMR Ltd sp. z o.o.)<sup>3</sup>. Therefore, the number of the entities obliged to pay the licence fee will double and new entities subject to this obligation will generate higher incomes. This revolutionary modification cannot be regarded as the modification of a purely formal or administrative nature to which the Commission refers.

Besides, the considerably different nature of aid (compared with the previous regulations) is proved by the remaining provisions of the same draft act. For example, it is envisaged to stop collecting any amounts due under the previous regulations and discontinue any enforcement proceedings already initiated to this extent. Furthermore, the involvement of the television service providers in the determination of persons obliged to pay the licence fee, including the registration of radios and televisions that determines the amount of the fee also proves that a completely new aid system is planned (this issue is discussed further in detail). The foregoing confirms that the Polish legislator intends to depart from the previous system of financing public service broadcasters by means of the licence fee and replace this system with a new one. The new system constitutes new aid that needs to be previously notified to the Commission according to the Regulation 2015/1589.

To sum up, the draft act provides for the implementation of new aid in the form of the new system of financing public service broadcasters from the licence fees. Pursuant to the Regulation 2015/1589 this new aid needs to be notified to the Commission that makes a decision on its implementation. We would like to point out that before publishing the draft act, the representatives of the Polish government indicated that they were working on such amendment to the Act on Licence Fees that would allow them to omit the procedure for the notification of new aid to the Commission (any previous proposals, e.g. the proposal to include the licence fee in the electricity bill, were blocked due to this reason). At the same time, it was pointed out that that task was extremely difficult, which confirms that the proposed regulations may be a result of the actions taken to circumvent the provisions of the Regulation 2015/1589 only to increase income from the licence fee.<sup>4</sup> Considering the fact that the drafter has straightforwardly confirmed in the statement of reasons that it does not intend to notify the Commission, we kindly ask you to interpose in this case.

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<sup>3</sup> <http://www.money.pl/gospodarka/wiadomosci/artukul/rynek-platnej-telewizji-w-polsce-bedzie,120,0,2089848.html>

<sup>4</sup> <http://wyborcza.pl/1,155287,20829236,szef-rady-mediow-narodowych-chce-powszechnego-abonamentu-bez.html>

### 3. Technological neutrality and competition rules

The principle of technological neutrality is one of the fundamental principles of the European legislation with respect to telecommunication. The EU legislator primarily sets forth this principle in the Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive). Pursuant to Article 8(1) thereof: *“Member States shall ensure that in carrying out the regulatory tasks specified in this Directive and the Specific Directives, in particular those designed to ensure effective competition, national regulatory authorities take the utmost account of the desirability of making regulations technologically neutral.”*<sup>5</sup> Those regulations arise from the general assumption that the state should not create any legal conditions restricting the freedom of competition and it should be concluded that particularly detrimental are especially those norms that improve the condition of selected enterprises with respect to them.

In the meantime, the discussed Polish draft act assumes that **only a group of selected entrepreneurs will be subject to an obligation to disclose subscribers’ data and the licence fee will be paid by selected subscribers.** Pursuant to the proposed new Article 2(8):

*“Within the meaning of this Act the pay-TV providers shall be operators distributing television programs in packages available to end users under contracts: cable television operators, operators of digital television platforms, providers of program distribution services via xDSL network and IPTV services.”*

In consequence, the aforesaid services will become less attractive to the end users as they will be required to pay an additional licence fee for these services (besides the fee due to the service provider) and their personal data and privacy will be less protected (this is discussed further below). It is proposed, therefore, to impose less favourable regulatory conditions on the providers of these services compared with the providers of services not listed in the aforesaid catalogue (e.g. providers of on-line streaming, mobile television, terrestrial television, including attractive coded television that is not included in the proposed catalogue of television service providers). Notably, **the legal status of individual groups of service providers is diversified on the basis of their technology, not on objective criteria independent from the criteria applied.**

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<sup>5</sup> However, pursuant to recital 18 the technological neutrality should be considered as the desirability of making regulation technologically neutral. The principle of technological neutrality assumes that any and all legal provisions of the Member States should be made in such a way that does not create any more favourable environment.

Considering the above, this draft act may infringe the principal of technological neutrality and affect the EU rules of genuine competition.

#### **4. Subscriber's personal data protection**

The draft act assumes that the act will oblige the pay-television service providers to provide the designated postal operator with personal data of the subscribers of this service. Pursuant to Article 3(3) of the draft act:

*“The pay-television service provider shall - only with a view to determine by the operator appointed under the Act of 23 November 2012 on Postal Law the entity obliged to pay the licence fee, and to collect or enforce such fee - provide the operator within sixty (60) days from the entry into force of this Act with the following data on each end user who is bound by the contract for providing pay-television services with the provider at the date of the entry into force of the Act:*

- 1) full name or business name;*
- 2) place of residence or address of registered office or address for service;*
- 3) address where pay-television services are made available;*
- 4) Polish Resident Identification Number (PESEL), National Official Register of Business Entities (REGON), Tax ID Number or National Court Register Number - if held by the pay-television service provider;*

and Article 3(6):

*“When performing the tasks as referred to in Article 7 (1) the operator appointed under the Act of 23 November 2012 on Postal Law may on an ongoing basis request from the pay-television service provider the following data on the end user of this service only with a view to determine the entity obliged to pay the licence fee, and to collect or enforce such fee:*

- 1) full name or business name;*
- 2) place of residence or address of registered office or address for service;*
- 3) address where pay-television services are made available;*
- 4) date of commencing this service 5) Polish Resident Identification Number (PESEL), National Official Register of Business Entities (REGON) or National Court Register Number - if held by the pay-television service provider.”*

In the meantime, pursuant to Article 7(e) of the Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (binding upon the Polish



legislature):“Member States shall provide that personal data may be processed only if: [...] processing is necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller or in a third party to whom the data are disclosed.”

The draft regulations will potentially be in violation of the aforesaid assumptions. Firstly, there are doubts as to the completion of the requirement of the “necessity” of data processing. The postal operator may determine the entities obliged to collect those licence fees and may collect those fees without using personal data databases of television service providers. This state of affairs (fees collection without using personal data databases of television service providers) is applied in Poland, which clearly indicates that the criterion of necessity has not been sufficiently justified (what is more, it shows again that the drafter intends to implement a new and completely different system of aid to public service broadcasters). It was also indicated by the Polish Government Legislation Centre in paragraph 3 of its comments made as part of the inter-ministry consultations, arguing that: *“The adopted solution (...) seems (...) to refer to the drafter’s assumption whereby **the correct performance of licence fee collection activities does not require the provision of data of all the persons bound by contracts for providing pay-television services to the appointed postal operator.**”* Secondly, the requirement as set forth in Article 7 under which the entity to which the personal data are disclosed exercises the official authority / carries out tasks in the public interests is not observed. The subscribers disclose their personal data to the television service provider. However, the entity that exercises the public authority / carries out tasks in the public interests is the postal operator, not the television service provider. Further, the subscribers disclose their personal data to the television service providers for the purposes of this service. Whereas, the entry into force of the draft regulations will modify the purpose of the subscriber’s personal data processing in an impermissible way, which is in violation with Article 6(1)(b) of the Directive 95/46/EC: *“Member States shall provide that personal data must be: [...] collected for specified, explicit and legitimate purposes and not further processed in a way incompatible with those purposes.”*

It follows from the above that the draft regulations - contrary to the obligations arising under Article 7 (e) of the Directive 95/46 - provide for the personal data processing in breach of the required criterion of necessity and the disclosure of the personal data to the entity that exercises the public authority / carries out tasks in the public interests. At the same time, contrary to Article 6(1)(b) of this Directive those regulations entail the illegal modification of the purpose of the subscriber’s personal data processing.

## 5. New obligations of television service providers.

The draft regulations also raise concerns as to the new obligations imposed on television service providers (forwarding of applications for registration of televisions and radios and disclosure of subscribers' personal data to the postal operator). According to recital 9 of the Directive 2002/20/EC of the European Parliament and of the Council of 7 March 2002 on the authorisation of electronic communications networks and services (Authorisation Directive): *"It is necessary to include the rights and obligations of undertakings under general authorisations explicitly in such authorisations in order to ensure a level playing field throughout the Community and to facilitate cross-border negotiation of interconnection between public communications networks."* Pursuant to Article 6 (1) thereof: *"The general authorisation for the provision of electronic communications networks or services and the rights of use for radio frequencies and rights of use for numbers may be subject only to the conditions listed respectively in parts A, B and C of the Annex[...]"* The list of those obligations should be uniform in all the Member States, which means that the requirements set forth in the Appendix are exhaustive. This is confirmed by the Court of Justice of the EU (CJEU) which has frequently stated that the Member States cannot levy any charges or fees in relation to the provision of networks and electronic communication services other than those provided for by that directive (see judgment No C-346/13 Base Company, paragraph 16, judgment C-55/11, C-57/11 and C-58/11 Vodafone España and France Telecom España, paragraph 28, C-256/13 and C-264/13 Belgacom and Mobistar, paragraph 30 – and the case-law cited).

Therefore, the obligation to forward the applications and the subscribers' personal data to the postal operator in order to collect the licence fee is not legally tenable in the unified list of the obligations as set forth in the Directive 2002/20. It is impossible in any way to assign it to any of the categories of the obligations listed in the Appendix to this Directive. In addition, this obligation does not also comply with the requirements set forth in Article 6(1): *"Such conditions shall be objectively justified in relation to the network or service concerned, non-discriminatory, proportionate and transparent."*

This obligation shall only be imposed on certain telecommunication companies (television service providers rendering services in the field of selected technologies). Moreover, this obligation is not transparent as it stipulates the possibility to further request the television service provider to disclose the subscribers' personal data without precisely specifying any circumstances under which such request may be made. Furthermore, it was not clarified how the postal operator

should indicate the subscriber whose personal data it requests as this is the television service provider which provides the operator with the subscriber's full name or business name. The discussed obligation is not also indispensable and necessary as it is possible to implement a vast array of other solutions which would not be burdensome for telecommunication companies and which would result in the effective collection of the licence fee. What is more, it is not proportional in the strict sense of the term as potential losses that may be suffered by some telecommunication companies providing pay-television services are very high. As an example, there is a strong likelihood that a part of the subscribers will resign from this television service covered by the draft act in favour of, for example, the television services exempt from this regulation. Moreover the principles of the correct competition in the telecommunication market may be infringed through discriminating a selected group of companies. Those consequences are completely disproportionate to potential profits to be generated by the public service broadcasters. Benefits acquired by one entity (public service broadcasters) may adversely affect the structure of the media and telecommunication market in Poland for a long time and may permanently and considerably deteriorate competition conditions of some companies. Importantly, the drafter states that the proposed regulations will apply for a transitional period only, whereas their consequences will be permanent and irreparable.

Additionally, it is worth mentioning that there is no State in Europe with the obligation of that kind imposed on television service providers in order to heighten the amount of collected licence fees. The tendency is just opposite. In the States where system of licence fees seems to be obsolete or ineffective, it is abolished and substituted by public funds (e.g. Finland in 2013, Serbia in 2014 and Israel in 2015). It was even noticed by the EBU in its report that in the Eastern Europe and the Baltic region there is less of a licence fee tradition, so the most common source of funding are public funds. In view of the above, Poland shall consider a replacement of licence fees with public funds, instead of imposing additional obligations on television service providers in order to patch the ineffective current system.

As a conclusion, within this scope the proposed regulations will also violate EU law as they will impose inadmissible and additional obligations only on a selected group of telecommunication companies. Consequently, they will lead to the permanent and irreparable impact on nature of the market despite the fact the official assumption provides for the temporary nature thereof.

## 6. Summary

To sum up, we wish to point out that the telecommunication milieu, the most part of which is hereby represented expresses deep concern and serious doubts as to the compliance of the discussed draft act with legal regulations and common values assumed by the Members States of the European Union. We have also notified the drafters of our reservations as we are involved in public consultations as part of the legislative process. The scale of potential threats and infringements, relating to this project require the European Commission's action. We hope that you as the Director of the Media and Data Directorate at Directorate General for Communications Networks, Content and Technology of the European Commission express your interest in our opinion and take appropriate actions to this extent.

The entire draft act in the original language version is attached. We also provide you the link to the official website of the draft act: <https://legislacja.rcl.gov.pl/projekt/12296000> . We also send the electronic version of this opinion to the following e-mail address: [Giuseppe.Abbamonte@ec.europa.eu](mailto:Giuseppe.Abbamonte@ec.europa.eu) and [CNECT-I1@ec.europa.eu](mailto:CNECT-I1@ec.europa.eu). We also inform you that due to the important nature of the case the analogous opinion was also provided to Unit C-4: State Aid, Information, Communication and Media in Directorate-General for Competition, including Mr Ewoud Sackers (Head of Unit) and Ms Monika Serrazin. The copy of this opinion is provided to Ms Małgorzata Krusiewicz (Desk Officer for Poland from Directorate-General for Informatics).

### Appendix:

- Draft act in the original language version



**Marek Kłoczko**  
KIG



**Stefan Kamiński**  
KIGEIT



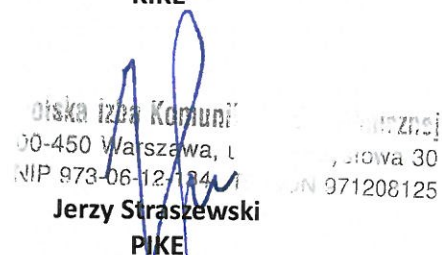
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ETHERNETOWEJ**  
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