

## **DESCRIPTION OF THE LEGAL SITUATION OF LUX VERITATIS FOUNDATION**

### **IN THE PROCEEDINGS CONCERNING THE EXTENSION OF THE DIGITAL TERRESTRIAL TELEVISION BROADCASTING CONCESSION**

Upon the application of 4 March 2011, LUX VERITATIS Foundation – the broadcaster of TRWAM Television (hereinafter as “**TRWAM Television**”) applied to the National Broadcasting Council (hereinafter “**the NBC**” or “**Licensing Authority**”) to extend the concession of 13 March 2003 to broadcast TV programme from a satellite by granting the right to the digital terrestrial television broadcasting in DVB-T standard. The application was declared complete, that is consistent with the formal requirements defined by the Licensing Authority. In considering the application, the NBC acknowledged that TRWAM Television did not meet the financial requirements posed to the broadcasters seeking to extend the concession. Consequently, on 29 July 2011 under a decision No DK-137/2011, TRWAM Television as well as ten other applicants were refused the concession. The concession was extended to four other entities. The only argument which the NBC provided to justify its refusal to extend the concession of TRWAM Television was the failure to meet the economic criteria. Such an assessment is unfounded and inconsistent with the contents of the documents attached to the application.

On 23 August 2011, TRWAM Television, acting in accordance with the provisions of administrative procedure, appealed to the same body (the NBC) for a change of the unfavourable decision, but after the period of six months, the Licensing Authority upheld its decision by issuing the second (final) decision, No DR-018/2012 on 17 January 2012. This decision was appealed to the regional administrative court. The date of the hearing before the Regional Administrative Court in Warsaw was set for 25 May 2012.

The complaint lodged at the Regional Administrative Court consisted of thirteen extended objections which defined a number of errors of the challenged decision. The objections refer both to the violation of procedural provisions to such a crucial extent that they influenced the issuance of the challenged decision as well as the violation of the substantive law.

The most significant objections are as follows:

- 1) To support the thesis that the economic situation of TRWAM Television is unsatisfactory and thus cannot guarantee to bear the costs of the digital terrestrial TV broadcasting, the NBC has posed only one argument for its decision, namely a too high

rate of long-term debt. On the other hand, however, when analyzing the applications of the remaining fifteen applicants, the NBC did not assess long-term debt of any other applicant. In its appeal to the Regional Administrative Court, TRWAM Television calculated the long-term debt ratio of those applicants whose concessions were extended and proved that only one of the four entities has a lower (more favourable) debt ratio than the one calculated for TRWAM Television. The remaining three (3) entities had a far higher (and consequently, worse) debt ratio, which was not verified by the NBC, because if the Licensing Authority had made such calculations, it would have had to admit that TRWAM Television was in a better economic situation than the other applicants;

- 2) A selective recourse by the NBC to the criterion of a long-term debt was the result of its failure to define any economic requirements that were necessary to meet for the applicants. Simply put, prior to the commencement of the administrative procedure, the Licensing Authority had not determined any requirements in this respect, and therefore the assessment of 11 applications was based on as many as 99 arbitrary economic and quasi-economic indicators, the vast majority of which has been used only once – when assessing one application. A failure to define the assessment criteria precluded the possibility of objective proceedings aiming at a comparison of the applications which were submitted in the course of the proceedings concerning the modification of the concession. Such a situation can be regarded as a violation of procedural provisions which ensure a fair resolution of the case and provide an equal treatment for all the applicants interested in being granted rationed goods, as stipulated in the articles 6, 7, 8, 77 paragraph 1, 80 and 107 paragraph 3 of the Code of Administrative Procedure;
- 3) The Licensing Authority negatively assessed the fact that TRWAM Television was supplied with a loan by the Catholic Church and on this basis it formulated a thesis that the long-term debt ratio was exceeded by the applicant. On the other hand, when assessing other applications, the NBC considered it as proper and acceptable that the applicants may be in the future financially supplied by their parent companies (also in the form of loans) due to a lack of the applicants' own assets. As a result, the NBC evaluated the financial situation of parent companies and not that of the applicants whose financial situation was incomparably worse than the financial standing of TRWAM Television;
- 4) The Polish regulations require from the Licensing Authority to organize a tender in the situation when the initial assessment of the applications concerning the concession shows that the number of businesses applying for a grant or an extension of the concession exceeds the number of concessions, provided they meet the statutory criteria (under article 52 of the Act on Freedom of Business Activity as of 2 July 2004 in reference to paragraph 19 of the Regulation of the National Broadcasting Council of 4 January 2007 (referred to here as "the Regulation of the NBC")). The proceedings in

question aimed at the extension of the concessions for 4 (four) entities and the Licensing Authority has ultimately extended the concessions for 4 (four) entities, yet as a result of supplementing the list of concession holders, because one of the entities which was selected for extending the concession withdrew its application. Therefore, the NBC supplemented the list by adding the fifth entity, which was considered to have met the conditions to extend the concession. This confirms the fact that prior to granting the concessions, the Licensing Authority assessed that at least five entities may be granted the concession, and therefore it was necessary to organize the tender. A failure to follow this procedure constituted a violation of the statutory requirement for granting / extending concessions;

- 5) The Licensing Authority decided, on unfounded basis, that three (3) out of four (4) applicants whose concessions have been extended, provided the highest assurance of implementing the extended concession, while these entities obtained their concessions for television broadcasting only a few days before the deadline to submit the applications for the modification of the concession and they even did not have a concession on the day when the Announcement of the Licensing Authority concerning the possibility of modifying the concession was published. TRWAM Television has broadcasted its programme continuously since 2003. Accordingly, the assessment made by the Licensing Authority does not withstand the criticism based on the principles of logic and life experience;
- 6) When issuing the contested decision, the Licensing Authority violated the statutory principle of the pluralist nature of the media by extending the concession for two (2) entities from the same capital group, in addition, having the same offer (music programmes broadcast);
- 7) On account of the negative assessment of the financial capacity of 2 (two) applicants who were granted the concession, the Licensing Authority focused on assessing the financial capacity of the parent company which is the shareholder of two applicants. Yet, the concession is to be implemented by the applicants rather than by their shareholders, so it is their financial standing that should have been analysed in terms of the economic requirements determined by the Licensing Authority. This position is consistent with the administrative courts case law (the Supreme Administrative Court judgment of 4 April 1996, case citation II SA 676/95);
- 8) The fair procedure rules were violated by accepting significant errors in the financial records of the applicant who has been granted the concession. In deciding that the requirement for documenting the sources of funding the project were satisfactorily met, the Licensing Authority based its assessment solely on the loan commitment provided by the bank, while the bank made the loan to the applicant in the amount of around 4 million euro conditional on obtaining a collateral in the form of assigning the deposit

in the amount corresponding to the value of the loan. The applicant has not demonstrated to have the adequate resources needed to obtain the security, yet the Licensing Authority considered that the condition for documenting the sources of funding was duly satisfied. The unusual tolerance of the Licensing Authority in comparison with the extremely restrictive approach to the application submitted by TRWAM Television can be seen as an unacceptable breach of the administrative procedure which aims at ensuring equal treatment of the parties. Such a position resulted in issuing an improperly grounded decision;

- 9) The contested decision violated the rules governing the completion of documents (article 18 paragraph 2 of the Regulation of the NBC). The relevant provision stipulates that the applicants should submit all the documents relating to their programme and economic-financial situation by the strictly determined date for filing such documentation. Documents submitted after the deadline should not be taken into account. The Licensing Authority did not follow this requirement in respect of 3 (three) entities whose concessions were extended. Consequently, the Licensing Authority made it possible for the applicants to submit the missing documents and on this basis made the assessment of the applications. The errors in the procedure concern both the information about the programme as well as the economic-financial situation, namely the aspects in relation to which documentation could not be supplemented;
- 10) The applications of all 4 (four) entities who were granted the extension of the concession had formal defects because the applicants did not provide bank certificate evidencing the bank turnover for the period of last twelve months, as required by the proceedings. The documents attached to the application covered shorter periods, namely 3 (three) and 1 (one) month respectively;
- 11) When analysing the economic situation of the entities whose concession was extended, the Licensing Authority in an unauthorized manner accepted the announcement of spreading the payment of the licence fee into instalments during the period from 3 to 10 years. The approval to spread the licence fee into instalments was an unacceptable action of the Licensing Authority. The latter should have determined whether the applicants would be able to cover the expenses connected with the digital terrestrial television broadcasting if the fee were to be paid in a lump sum (as it was declared by TRWAM Television). By issuing the contested decision, the Licensing Authority contradicted its actions, because it ultimately determined that the licence fee should be paid as a lump sum (this is the amount of 2 to 2.5 million Euro for each entity), although it failed to assess whether the selected entities will be able to bear the costs;

The National Broadcasting Council, as a public authority, should aim at improving citizens' confidence in the state, what should be evidenced by the need to duly gather the evidence in the case and then provide an objective and verifiable assessment thereof. The party whose application has been dismissed should be able to familiarize with the justification of the negative decision. Both decisions issued by the Licensing Authority, despite their extensive justification, do not satisfactorily explain the motives of the final resolution. Licensing Authority refers to its power to take decisions based on the principle of administrative discretion. The objections posed in the complaint to the Regional Administrative Court prove that the National Broadcasting Council made numerous errors which do not fall within the category of administrative discretion, but they constitute the evidence of an unacceptable breach of the rules of procedure for distributing rationed goods in the form of television broadcasting concession.

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