

Directive 1/2014

Exercise of the right to news extracts and the use of images subject to exclusive television broadcasting rights

Lisbon, 21 May 2014

Regulatory Board of the Regulatory Authority for the Media (ERC)

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The Regulatory Authority for the Media (hereinafter called ERC) has been asked to resolve an increasing number of conflicts associated to exercising the right to news extracts and use of images subject to exclusive rights. The theme is complex and requires utmost care in its treatment. The issue at stake is how to ensure just consideration and balance between two fundamental, constitutionally protected rights: the right to information, on the one hand, and the right to property, on the other.

Consecrated in article 37 of the Constitution of the Portuguese Republic, the right to inform is included within the range of rights, freedoms and guarantees whose respect is directly postulated, in a binding manner, for public and private entities, by Article 18, no. 1 of the Fundamental Law. Under the terms of Article 18, no. 2, ordinary law cannot restrict the scope of this right beyond that which is strictly necessary to safeguard other constitutionally protected rights and interests.

Considering this constitutional imperative, and also considering, on the other hand, that other constitutional values include the right to property and to private initiative and the general principle against unjust enrichment at the expense of others; and also taking into account the provisions of Directive 2010/13/EU of the European Parliament and Council of 10 March 2010,

Considering also the need to encourage standards of good practice that allow use of news extracts of events subject to exclusive television broadcasting rights in the applicable legal framework,

Having consulted the television broadcasters - who were notified to give their views on the draft version of this directive, adopted on 15 January 2014 - and having analysed all the contributions received in this context,

The Regulatory Council of the ERC, in the exercise of the powers conferred on it by Article 63 of its Statutes, hereby adopts the following Directive:

1. Concept of performances or other public events, for the purposes of article 33 of the Television and Audiovisual Media Services Law

1.1. For the purposes of application of article 33 of the Television and Audiovisual Media Services Law, a performance or other public event is an autonomous public event, organised or produced in Portuguese territory or in the territory of another Member State of the European Union whose exclusive television broadcasting rights are physically and legally capable of being individually appropriated and assigned.

1.2. In the case of an event that is divided into several, simultaneous or successive games, trials, episodes, daily competitions, stages, qualifiers or sessions, each game, trial, episode, daily competition, stage, qualifier or session is an independent event, provided that the respective television broadcasting rights may be autonomously appropriated or transferred.

1.3. The public spectacle or event which is the subject of exclusive rights only includes that set of facts that is usually offered in return for the payment made by the spectators of the live event, or by the acquirer of exclusive rights to performances or events of a similar nature, with express exclusion of exceptional incidents that lie outside the normal framework initially foreseen for the event, and are not included in advance in its organisation, implementation or production, for which it is not possible to acquire exclusive rights.

1.4. In no case may the acquisition of exclusive television broadcasting rights restrict the essential core of the right to inform, and it is always permissible to broadcast information related to events that are subject to exclusive rights through other multimedia content, using sound and image, in particular photos, photo galleries, infographics, graphics, reports or audio reports.

1.5. If there are no grounds for restricting the right to news extracts to events occurring in the territory of the Member States of the European Union, the legal regime established in Article 33 of the Television and Audiovisual Media Services Law shall apply, *mutatis mutandis*, to events occurring outside the territory of the Member States of the European Union, provided that the other conditions for application of the said legal provision have been met.

2. Concept of General News Programme for the purposes of Article 33 (4) (b) of the Television and Audiovisual Media Services Law

2.1. A general news programme means an individual programme or autonomous set of programmes, which, regardless of its theme and the editorial criteria used, aims to disseminate current news.

2.2. News sections included within general programmes – in particular, autonomous or autonomisable news sections, integrated within morning programmes in generalist or thematic news services – shall be considered, for the purpose of exercise of the right to news extracts, as autonomous and individual programmes, provided that there is an interval of at least sixty minutes between the beginning of each news section, and any repetition of news items is not solely restricted to news extracts relating to events that are subject to exclusive broadcasting rights.

2.3. Without prejudice to the rules on abuse of legal rights, and taking into account recital 55 of Directive 2010/13/EU, the general informational nature of a programme is not excluded by the fact that the programming is of a thematic nature, in particular sports programming, wherein it is sufficient, to ensure the legitimacy of broadcasting

of the news extract, that it be included in current news programmes (in particular sports news), under the terms mentioned in the previous number.

3. Limitation on the duration of extracts for the purposes of Article 33 no. 4, paragraph a) of the Television and Audiovisual Media Services Law

3.1. Without prejudice to the rules on the abuse of legal rights, the duration that is strictly indispensable to the perception of the essential content of events subject to exclusive broadcasting rights shall be defined by each broadcaster, in use of its editorial freedom, with a maximum limit of 90 seconds, established by law.

3.2. The limit on the duration of extracts imposed by Article 33 no. 4, paragraph a) of the Television and Audiovisual Media Services Law refers to the unedited images transferred by the owner of the exclusive broadcasting rights, or recorded on the basis of images broadcast by the latter, or collected by the secondary broadcaster, and not to the duration of the overall news item, which may contain one or more repetitions of the images transferred by the right holder, or include the broadcaster's own images, wherein the total time of the respective news item may exceed 90 seconds.

3.3. Without prejudice to the provisions of the previous paragraph and point 2.2, it is not considered to be lawful to repeat the same images subject to exclusive broadcasting rights, in the same programme.

4. Interpretation of article 33 no. 4, paragraph c) of the Television and Audiovisual Media Services Law

4.1. For the purposes of application of article 33 no. 4, paragraph c) of the Television and Audiovisual Media Services Law, the concept of "event" specified in point 1.1 of this Directive shall apply.

4.2. News extracts may only be broadcast after the event has ended.

4.3. Without prejudice to the rules regarding abuse of legal rights, the determination of the current event that justifies the inclusion of the news extract in reports broadcast 36 hours after the event itself has ended shall be defined by each broadcaster, in use of their editorial freedom.

4.4. In any case, it is considered to be abusive to include images subject to exclusive broadcasting rights, more than 36 hours after the end of the respective event, if maintenance of such images in the news agenda is artificially created, and is not based on another distinct event that maintains or reinstates the event subject to exclusive broadcasting rights as a topical news subject.

4.5. The above rules apply even if the news extract concerns an event that was not broadcast by the broadcaster in the 36 hours after it ended.

5. Interpretation of article 33 no. 4, paragraph d) of the Television and Audiovisual Media Services Law

5.1. Identification of the source of the images broadcast on the basis of the signal transmitted by the owner of the exclusive right, shall be carried out with respect for

the principle of good faith, and any viewer must be clear of the source of the images that are the object of exclusive broadcasting rights.

6. Extension to other platforms

6.1. In view of the spirit of Article 33 (5) of the Television and Audiovisual Media Services Law, it is considered that news extracts may only be broadcast on other platforms when embedded in programmes that have been previously broadcast by the same broadcaster and can never be made available through isolated access or a programme specifically created for this purpose.

6.2. Digital platforms are considered to be entitled to exercise the right to broadcast news extracts only if they are previously registered as television broadcasters, under the terms of law.

7. Principle of reciprocity

No television broadcaster or television programme service may rely on any of the provisions of this Directive in breach of the principle of reciprocity, claiming for itself the exercise of the right to news extracts on more favourable terms than those normally required in the assignment of news extracts relating to events for which it holds exclusive broadcasting rights.

Lisbon, 21 May 2014

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