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of the European Audiovisual Observatory

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COUNCIL OF EUROPE

European Court of Human Rights: Magyar Helsinki Bizottság v. Hungary

On 8 November 2016, the Grand Chamber of the European Court of Human Rights (ECtHR) delivered a landmark judgment on the right of access to public documents. It found that the Hungarian authorities' refusal to provide the Hungarian Helsinki Committee, Magyar Helsinki Bizottság (MHB), with information relating to the work of ex officio defence counsels was in breach of Article 10 of the European Convention on Human Rights (ECHR), which guarantees the right to freedom of expression. The Court noted that the information requested from the police by MHB was necessary for it to complete the study on the functioning of the public defenders' system MHB was conducting in its capacity as a non-governmental human-rights organisation, with a view to contributing to discussion on an issue of obvious public interest. In the Court's view, by denying MHB access to the requested information the Hungarian authorities had impaired the NGO's exercise of its freedom to receive and impart information, in a manner striking at the very substance of its Article 10 rights. The Grand Chamber's judgment is a victory for journalists, bloggers, academics, and NGOs, who rely on access to public documents in order to conduct investigations as part of their role as "public watchdogs".

Article 10 ECHR stipulates that "everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers (04046)". This article does not mention a right of access to public documents, nor a right to seek information. Neither is there a self-standing right of access to State-held information under the ECHR, nor a corresponding obligation for public authorities to disclose such information. Nonetheless, since 2009 the Court in its case law recognises that such a right or obligation may be instrumental and necessary for effective protection of the rights under Article 10 (see Társaság a Szabadságjogokért v. Hungary (IRIS 2009-7/1), Kenedi v. Hungary (IRIS 2009-7:Extra), Gillberg v. Sweden (IRIS 2011-1/1 and 2012-6/1), Youth Initiative for Human Rights v. Serbia (IRIS 2013-8/1), Österreichische Vereinigung zur Erhaltung, Stärkung und Schaffung eines Wirtschaftlich gesunden land- und forstwirtschaftlichen Grundbesitzes v. Austria (IRIS 2014-2/2) and Roşiianu v. Romania (IRIS 2014-8/4)). Apart from these developments in its case law, the Court also referred to national and international sources of law recognising a right of access to public documents. This lead the Court to consider a right of access to information as a crucial instrument for the exercise of the right to receive and impart information as guaranteed by Article 10 of the Convention: "For the Court, in circumstances where access to information is instrumental for the exercise of the applicant's right to receive and impart information, its denial may constitute an interference with that right. The principle of securing Convention rights in a practical and effective manner requires an applicant in such a situation to be able to rely on the protection of Article 10 of the Convention". The Court further concentrated on the role of civil society and participatory democracy, and emphasised that access to public documents by the press and NGOs can contribute to "transparency on the manner of conduct of public affairs and on matters of interest for society as a whole and thereby allows participation in public governance". It considers "that civil society makes an important contribution to the discussion of public affairs", and that "the manner in which public watchdogs carry out their activities may have a significant impact on the proper functioning of a democratic society. It is in the interest of democratic society to enable the press to exercise its vital role of "public watchdog" in imparting information on matters of public concern 04046 just as it is to enable NGOs scrutinising the State to do the same thing. Given that accurate information is a tool of their trade, it will often be necessary for persons and organisations exercising watchdog functions to gain access to information in order to perform their role of reporting on matters of public interest. Obstacles created in order to hinder access to information may result in those working in the media or related fields no longer being able to assume their "watchdog" role effectively, and their ability to provide accurate and reliable information may be adversely affected".

Before Article 10 can come into play, however, the information requested should not only be instrumental for the exercise of the right to freedom of expression: the information to which access is sought must also meet a "public-interest test" for the disclosure to be considered necessary under Article 10. In addition, whether the person seeking access to the information in question does so with a view to informing the public in the capacity of a public "watchdog" and whether the information requested is "ready and available" are also an "important consideration" for the Court.

After finding that the denial to give MHB access to the requested information was an interference with MHB's rights under Article 10, the Court explained why this amounted to a violation of Article 10. First, it considered that the information requested by MHB was "necessary" for it to exercise its right to freedom of expression. Second, the Court does not find that the privacy rights of the public defenders would have been negatively affected had the MHB's request for information been granted. Although the information request by MHB concerned personal data, it did not involve information outside the public domain. According to

the Court the relevant Hungarian law, as interpreted by the domestic courts, excluded any meaningful assessment of MHB's freedom-of-expression rights under Article 10. Therefore the Court considered that the arguments advanced by the Hungarian Government, although relevant, were not sufficient to show that the interference complained of was "necessary in a democratic society". By 15 votes to two the Grand Chamber comes to the conclusion that there has been a violation of Article 10 of the Convention.

• Judgment by the European Court of Human Rights, Grand Chamber, case of Magyar Helsinki Bizottság v. Hungary, Application no. 18030/11, 8 November 2016
http://merlin.obs.coe.int/redirect.php?id=18262 EN FR

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EUROPEAN UNION

Court of Justice of the European Union: DTS v. European Commission

On 10 November 2016, the Court of Justice of the European Union (CJEU) delivered its judgment in DTS v. European Commission, on whether the financing of the Spanish public broadcaster RTVE is compatible with EU rules on state aid. At issue were amendments introduced under Law No 8/2009 on the funding of RTVE (Ley 8/2009 de financiación de la Corporación de Radio y Televisión Española), which provided that advertising, teleshopping, sponsorship and pay-per-view services would no longer be sources of funding for RTVE. Instead, the only commercial revenue that would be available would be income which RTVE derived from the provision of services to third parties and from sales of its own productions. In order to offset RTVE's loss of funding, Law No 8/2009 introduced a new tax of 1.5% on the revenues of pay-television operators established in Spain, and a new tax on the revenues of telecommunications services operators established in Spain. In addition, if the funding proved insufficient to cover the whole of RTVE's costs of fulfilling its public service mandate, the State would be required to make good the shortfall, "thus transforming RTVE's dual funding scheme into an almost entirely publicly funded scheme."

In 2010, the European Commission adopted a decision (2011/1/EU), declaring that the change to RTVE's funding under Law No 8/2009 was compatible with the internal market, and that the new system precluded any overcompensation of RTVE. In that context, the Commission considered that the fiscal measures at issue were not an integral part of the aid scheme instituted in favour of RTVE, and therefore, any incompatibility of those fiscal measures with EU law did not affect the assessment of the funding scheme's compatibility with the internal market.

A company operating a digital satellite pay-television service in Spain (DTS) asked the General Court to annul the Commission's decision. However, in 2014, the General Court dismissed the application. DTS appealed to the CJEU, which had now upheld the judgment of the General Court. First, the Court reiterated that in order for a tax to form an integral part of an aid, it must be "hypothecated" to the aid, "in the sense that the revenue from the levying of the tax must necessarily be allocated to the financing of the aid and have a direct impact on the amount of the aid." In this regard, the Court recalled that the amount of aid is determined on the basis of the net costs of fulfilling the public service mandate, the revenue from the fiscal measures therefore having no direct impact on the amount or the grant of the aid to RTVE. Thus, the Court held there was no "hypothecation between the fiscal measures and the aid", because the amount of the aid is not directly dependent on revenue from the fiscal measures at issue.

Moreover, the Court rejected DTS's argument that "the obligation to pay that tax causes DTS an additional competitive disadvantage on the markets on which it operates in competition with RTVE, since the latter is not liable to pay such a tax." The Court held that the question of whether a tax is an integral part of an aid financed by a tax does not depend on the existence of a competitive relationship between the person liable to pay the tax and the beneficiary of the aid, but only on whether that tax is hypothecated to the aid in question. Finally, the Court stated that "in principle, taxes are not subject to the rules on State aid", and accepting DTS's argument would mean "any tax levied at sectoral level and imposed on undertakings in competition with the beneficiary of the aid financed by the tax falls within the rules on State aid."

• Judgment of the Court (First Chamber) in Case C-449/14 P DTS Distribuidora de Televisión Digital SA v. European Commission, 10 November 2016
http://merlin.obs.coe.int/redirect.php?id=18263 DE EN FR
CS DA EL ES ET FI HU IT LT LV MT
NL PL PT SK SL SV HR

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Court of Justice of the European Union: Soulier and Doke v. Premier ministre

On 16 November 2016, the Court of Justice of the Eu-

ropean Union (CJEU) delivered a judgment concerning compliance of French legislation with the Copyright Directive (Directive 2001/29/EC), namely the right of reproduction under Article 2 and the communication to the public under Article 3(1) in the case of "out-of-print books". The CJEU examined whether the consent to authorise acts regulated in Article 2 and 3(1) of the Copyright Directive can be expressed not only by author but also by approved Collective Management Organisations (CMOs) with regard to commercial exploitation of books that are not published anymore. The case was initiated by writers Ms Doke and Mr Soulier and, later on, several institutions and other 35 natural persons intervened in the proceeding.

According to the Intellectual Property Code (the Code) an "out-of-print book" is a book published in France before 1 January 2001, which is no longer commercially distributed or published in print or digital format. The Code provisions established the legal framework for digital and commercial exploitation of those books that are laid down in the Decree No. 2013-182. Provisions of the Decree allowed approved CMOs to give an authorisation for reproduction and digital exploitation after a period of six months of registration in the database of "out-of-print books". The author or publisher of such a book may oppose in advance the authorisation given by CMOs within a period of six months after the date of registration. Following the expiration of that period, the author's written work will be available in a digital format for commercial exploitation. All incomes collected in this manner will be used to support cultural and creative initiatives in accordance with the Decree. The applicants claimed that the Decree should be annulled because it is not in accordance with the Copyright Directive.

After the national court dismissed all pleas that were not related with Articles 2, 3, and 5 (exceptions and limitations), the Court concluded that examination of the case depends on the interpretation of those articles. Therefore, the Court requested a preliminary ruling on whether a Member State is precluded from establishing a system which gives approved CMOs the right to authorise reproduction or communication to the public of the "out-of-print books" while allowing authors or successors to oppose such a practice.

The CJEU firstly stated that current case does not fall within the scope of any of exceptions and limitations since the list of exceptions in the Copyright Directive is exhaustive in nature. Thereby, the CJEU stated, Member States may not adopt additional exceptions other than those listed in the Article 5.

The CJEU noted that in principle the rights of reproduction and communication to the public are exclusive rights, preventive in their nature in the sense that prior consent of the author is required for any use of his or her work, within the meaning of Article 2 and 3(1). These rights are not only limited to enjoyment but also extend to the exercise and should be broadly interpreted. The Copyright Directive does not prohibit granting certain rights and benefits to third parties, such as publishers, on the condition that this does not cause harm to authors' exclusive rights.

In the view of the CJEU, consent can be given either explicitly or implicitly, since the Copyright Directive does not specify the way in which consent should be expressed. The implicit consent must be defined narrowly in order "not to deprive of effect the very principle of author's prior consent". Additionally, every author must be informed of the usage of his work and means to prohibit it. A mechanism of informing authors does not follow from the French legislation in question and "a mere lack of opposition on their part cannot be regarded as the expression of their implicit consent to that use". Having regard to the principles, the CJEU concluded that national legislation is precluded from conferring a right to approved CMOs to authorise reproduction and communication to the public of the "forgotten" books, while allowing authors to oppose such a practice. This particular context precludes Member States from presuming that lack of opposition is a mark in "favour of the resurrection" of works in terms of their commercial use in digital format.

• Judgment of the Court (Third Chamber) in Case C-301/15 Marc Soulier and Sara Doke v Premier Ministre, Ministre de la Culture et de la Communication, 16 November 2016
http://merlin.obs.coe.int/redirect.php?id=18264 DE EN FR
CS DA EL ES ET FI HU IT LT LV MT
NL PL PT SK SL SV HR

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UNITED NATIONS

Special Rapporteur on freedom of opinion and expression: New report

On 6 September 6 2016, a new report by the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression was submitted to the General Assembly of the United Nations. This report gives an explanation of some of the critical contemporary challenges for freedom of opinion and expression throughout the world. The context for this explanation is the legal framework set by international human rights law. Moreover, the report shows positive trends for freedom of opinion and expression and finishes providing recommendation for restraining attacks on and promoting those fundamental rights.

The report observes that there are different types of actors who are having their freedom of opinion and

expression diminished in different countries: journalists, political critics, opposition members, cartoonists, bloggers, and photojournalists, among others. Moreover, this report shows that attacks on freedom of expression come by physical means, but also by administrative or judicial means, among others. Furthermore, unlawful interferences with those rights are seen both in analogue and digital environments.

In order to analyse the types of attacks on freedom of expression and opinion, the report explains the main legal framework for freedom of expression at UN level, with special emphasis on Article 19 of the Universal Declaration of Human Rights and Article 19 of the International Covenant on Civil and Political Rights. The report refers to different resolutions from the Human Rights Council and the General Assembly of the UN that have recognised the relevance of freedom of expression and opinion in modern democratic societies (see for example IRIS 2016-10/11).

Online restrictions on freedom of expression and opinion are highlighted in this report. For example, the report refers to surveillance and individual security online. The report explains that bulk collection and targeted attacks on specific individuals or communities constitute a direct interference with privacy and security, which are necessary for freedom of expression and opinion. In addition, the Rapporteur states his concerns about the frequent lack of evaluation of those interferences under Article 19. As a way of illustration, the Rapporteur refers to the legal requirements of decryption in Russia and proposals from the United Kingdom and France to provide law enforcement and intelligence officials with the authority to request access to encrypted communications.

The Rapporteur also expresses concern about the disruption of internet and telecommunication services based on national security and public order. The report makes reference to cases in Turkey, Uganda, Malaysia, Nauru, Tajikistan, the Democratic Republic of the Congo, Burundi, India, Bangladesh, Brazil, and Pakistan. Furthermore, it is recalled that, in 2016, the Human Rights Council of the UN condemned measures to prevent or disrupt access to or dissemination of information online and called upon States to refrain from and cease those measures.

The report also refers to interferences with freedom of expression and opinion based on illegitimate aims, such as the criminalisation of criticism, "assault on reporting", restrictions on expression relating to religion and belief, and singling out of groups.

Finally, among the recommendations given in the report, it must be recalled that the Rapporteur urges States to be mindful of the context of digital rights, the integrity of digital communications and the roles of intermediaries. Moreover, the Rapporteur recommends support for independent media and civic space, and for States to avoid imposing restrictions on reporting or research that may be seen as critical to the government or other stakeholders.

• United Nations General Assembly, Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, A/71/373, 6 September 2016
http://merlin.obs.coe.int/redirect.php?id=18265 EN FR ES RU

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NATIONAL

BA-Bosnia And Herzegovina

Public TV services start digital broadcasting

On 14 October 2016, digital TV signal started being delivered through terrestrial transmitters after several postponements (see IRIS 2016-10:1/5). However, this so-called "test broadcasting" covers only the Sarajevo-, Banja Luka-, and Mostar regions, and is only related to Public Broadcasting Services (PBS) which operate in Multiplex A. This completes the first phase of the digitalisation of transmission and emission equipment. In the next stage, it is planned that the digital signal will cover the remaining six digital areas, i.e. the whole territory of Bosnia-Herzegovina.

Citizens who have older generation TV sets are being advised not to buy receivers for the reception of the digital signal until the matter of funding and procurement of suitable receivers is resolved. PBS will continue with analogous broadcasting of their programmes, so that citizens whom the digital signal does not reach in this phase of digitalisation will not be left without reception.

The Communications Regulatory Agency, in charge of overseeing the operation of electronic media, has said that in addition to the continuation of digital broadcasting by PBS, particular attention should be given to resolving the matter of digital broadcasting by other TV stations. Therefore, the adoption of relevant decisions by the Council of Ministers on the transition to the DVBT2 standard and on the further use of Multiplex A and other frequencies intended for digital broadcasting is important.

Bosnia-Herzegovina is the only country in Europe that does not have digital TV broadcasting for the whole territory. It even missed the deadline of 15 June 2015 set by the International Telecommunication Union (ITU) and the United Nations (UN) as the final date for the switch to digital broadcasting worldwide. Activities in preparation for the switch to digital broadcasting in Bosnia-Herzegovina started in 2009.

However, due to numerous technical, procedural, and political problems, the process is not yet completed. Clients of telecom and cable operators have HD signals for a large number of televisions, so for digitization through the transmitter only interested citizens in rural areas.

However, digitalisation is not the only problem that the public broadcast system is facing. The PBS lost the possibility to efficiently collect the TV tax fee after the Parliament did not extend the current model of collecting the tax fee (see IRIS 2016-9:1/8).

• *Počelo testno emitiranje digitalnog signala u BiH* (Further information on the start of the digital broadcasting)
http://merlin.obs.coe.int/redirect.php?id=18273 BS

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BG-Bulgaria

Procedure for selection of General Directors of the national public service broadcasters

On 18 October 2016, the Council for Electronic Media (CEM) approved a procedure for the selection of the General Directors of the national public service broadcasters. The provision of Article 32 paragraph 1 subparagraph 2 of the Radio and Television Act (RTA) provides CEM the authority to choose a General Director of both national public broadcasters. The legislator has not identified the procedure for the selection yet. In its permanent practice, the Supreme Administrative Court decided that if an explicit provision in the law is missing, CEM could identify the rules on its own.

Guided by the principles of publicity and transparency, and in execution of the general requirements according to Article 66 of the Administrative Procedure Code for adopting an administrative act, on 1 August 2016 the Council announced to the public the initiation of proceedings for issuing a procedure for the selection of the General Directors of the public service broadcasters.

Within the identified period - until 09 September 2016 - only three letters from citizens were submitted, but they do not comment on the provisions of the procedure in essence. After several discussions were held, CEM assumed that all facts and circumstances that are important for the issuance of the deed were clarified, and approved a procedure for the selection of the General Directors of the national public service broadcasters - Bulgarian National Radio (BNR) and Bulgarian National Television (BNT).

The procedure consists of four steps. First, CEM formally considers the documents and admissions for the participation of candidates in the procedure. In the second step, CEM considers in essence the documents of the candidates who are allowed to participate. Therefore, CEM evaluates the candidates according to the following criteria: (1) professional competence, familiarisation with the activities of the radio (for the candidates for General Director of the BNR), and familiarization with the activities of the television (for the candidates for General Director of BNT); (2) managerial competence (capability of establishing goals, means for their achievement and expected results; capability of solving problems, capability of taking managerial decisions and decision for grounding means for their realisation); (3) organisational competence (capability of planning and organizing the activity of BNR and BNT and accomplishing the tasks by priority). After giving due consideration of the candidates' competence, CEM decides which candidates to invite for a hearing. At the fourth and final step, CEM selects the General Director.

CEM provides transparency for the procedure. The Supervisory Body allows journalists to be present during the candidates' hearing. On the first workday after the hearing, CEM identifies the candidate selected to be the General Director of BNR or BNT. The candidate who has received at least three votes is selected. In case a General Director is not selected during three consecutive meetings, the procedure is terminated.

• Решение за приемане на Процедура за избор на генерален директор на националния обществен доставчик на радиоуслуги , съответно на генерален директор на националния обществен доставчик на аудио - визуални медийни услуги е достъпно на адрес (Decision for approving a procedure for the selection of the General Directors of the national public service broadcasters)
http://merlin.obs.coe.int/redirect.php?id=18274 BG

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CZ-Czech Republic

Digital Audio Broadcasting

On 24 August 2016, the Government of the Czech Republic approved Decision no. 730 on the Terrestrial Digital Broadcasting of the public service broadcaster Czech Radio. The Decision allocates frequencies to Czech Radio for the period 2016-2021 in accordance with the rules of procedure under the Electronic Communications Act (Act no. 127/2005 Coll.). Furthermore, the Decision states that Czech Radio has to start a regular digital broadcast. It establishes an advisory body within the Ministry of Culture for coordinating the evaluation process and the preparation of other decisions on the digitisation of radio broadcasting within 6 months of the implementation of the reg-

ular digital broadcast. The Ministry of Culture, in cooperation with Czech Radio and the Broadcasting Council, should evaluate the ordinary terrestrial broadcasting of Czech Radio and prepare a Development Strategy of terrestrial broadcasting including the regulatory and legislative framework.

The development of digital audio broadcasting in the Czech Republic remains relatively uncoordinated, being composed of various experiments and test broadcasting. Apart from the public Czech Radio, the main drivers of digitisation are the operators of public communications networks for radio broadcasting, existing and new radio stations. In the current situation, almost all available FM frequencies are being used for broadcasting. Presently, Czech legislation provides no comprehensive solution for the digital broadcasting in force. The current developments confirm the plans for the allocation of available capacity networks needed to disseminate programmes and services of Czech Radio. It is necessary to prepare a Development Strategy for radio broadcasting in the country, including analysis and solutions for financing, possibly a parallel provision of analogue and digital broadcasting, and the political adoption of policies on the coordinated introduction of digital radio broadcasting - most likely in 2021, with the resolution of analogue FM broadcasting after 2025.

• *Usnesení vlády České republiky ze dne 24. srpna 2016 č. 730 k návrhu rozvoje zemského digitálního vysílání Českého rozhlasu* (Decision of the Goverment of the Czech Republic of 24 August 2016 No. 730 on the Terrestrial Digital Broadcasting of the Czech Radio)
http://merlin.obs.coe.int/redirect.php?id=18300 CS

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Cologne Appeal Court finds Tagesschau app unlawful

In a ruling of 30 September 2016, the Oberlandesgericht Köln (Cologne Appeal Court - OLG Köln) decided that the Tagesschau app, in its version available on 15 June 2011, was unlawful (case no. 6 U 188/12) and banned the public service broadcasters from distributing it in this form. Several German newspaper publishers had applied for an injunction against the association of German public broadcasters, ARD.

The plaintiffs had claimed that the app infringed Article 11d of the Rundfunkstaatsvertrag (Inter-State Broadcasting Agreement - RStV), which prohibits public service broadcasters from using telemedia to offer "press-type services that are not related to a specific programme". The ban is, at least partly, designed to protect publishing houses by limiting the Internet-based activities of public service broadcasters. After the OLG Köln had initially rejected the claim on the grounds that the responsible NDR Broadcasting Council had not classified telemedia as a press-type service and had therefore allowed the app, the BGH (Federal Supreme Court) had held that the Broadcasting Council's decision was not binding on the Appeal Court and had asked the OLG Köln to decide for itself whether the app should be considered press-like. The BGH also explained that the app should not be primarily characterised by written text and still images, but by radio- and television-like content (see IRIS 2015-7/6).

In its assessment, the OLG Köln decided that the content of the app on 15 June 2011 should be considered press-like. It held that the paper copies of the app's content submitted by the plaintiffs were sufficient to justify the examination requested by the BGH. The judges found that the home page of the app, which users saw first, consisted entirely of text and still images. It mainly contained links to pages of text, some of which contained images. Virtually all of these articles took the form of self-contained news reports. Since written text and still images were therefore primary elements of the app, it was press-like according to the BGH's definition. The Tagesschau app had therefore infringed Article 11d RStV and was unlawful in its version available on 15 June 2011.

• *Pressemitteilung des Oberlandesgerichts Köln vom 30. September 2016 (Az.: 6 U 188/12)* (Press release of the Cologne Appeal Court of 30 September 2016 (case no. 6 U 188/12)) DE

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No broadcasting licence fee exemption on religious grounds

In a ruling issued on 20 September 2016 (case no. 5 K 145/15.NW), the Verwaltungsgericht Neustadt (Neustadt Administrative Court - VG Neustadt) decided that exemptions from the obligation to pay the broadcasting licence fee cannot be granted on religious grounds because the licence fee is not connected to any ideological belief.

Since 1 January 2013, the broadcasting licence fee has been charged per household rather than solely to owners of reception devices. A free church pastor had previously had a complaint about the fee rejected. He had claimed that the new regulation was unconstitutional and infringed his freedom of conscience. The judges at the VG Neustadt had rejected this complaint on 24 February 2015 (case no. 5 K 713/14.NW). The clergyman's application to appeal against this ruling had also been rejected by the Oberverwaltungsgericht Rheinland-Pfalz (Rhineland-Palatinate Admin-

istrative Court of Appeal - OVG) on 16 November 2015 (case no. 7 A 10455/15). The OVG judges had found that the licence fee did not breach either the principle of equal treatment or the freedom of religion and conscience guaranteed under Article 4(1) of the Grundgesetz (Basic Law).

However, in June 2014, the pastor applied once again for an exemption from the licence fee obligation for reasons of conscience. He argued that the content of numerous programmes transmitted by public service broadcasters was incompatible with his values and he did not want to help finance them. A large proportion of programmes, he claimed, depicted an unacceptable, ungodly, immoral and destructive lifestyle that was incompatible with biblical Christian values. However, he based his application on hardship rather than religious grounds. His family did not own either a TV set or a radio. Family members obtained most information from the Internet and DVDs. However, Südwestrundfunk (SWR) rejected his application. After the pastor's appeal was also rejected, he lodged a further appeal with the VG Neustadt. This was also dismissed.

In the latest ruling, the judges referred, among other things, to the OVG decision, according to which the conditions for a licence fee exemption were not met.

The VG Neustadt held that the licence fee had no connection with any ideological belief. The public service broadcasters' work was characterised by the obligation to guarantee diversity and broadcasters' programming freedom, which were enshrined in constitutional law. The financing guarantee enabled the public service broadcasters to meet these requirements and to remain independent from the state. Besides, according to the Bundesverfassungsgericht (Federal Constitutional Court), a decision based on conscience did not, in principle, exempt someone from paying taxes and duties. In view of the diversity of programmes offered by public service broadcasters, the plaintiff could not deny that there were a whole host of programmes that were fully consistent with his values.

• *Urteil des Verwaltungsgerichts Neustadt vom 20. September 2016 (Az.: 5 K 145/15.NW)* (Ruling of the Neustadt Administrative Court of 20 September 2016 (case no. 5 K 145/15.NW))
http://merlin.obs.coe.int/redirect.php?id=18284 DE

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Licensing agreement signed by GEMA and YouTube

According to media reports, following years of legal discussions and negotiations, the German collecting society for music rights, GEMA, and the company Google reached an agreement on 1 November 2016 on remuneration for music content on the Google-owned YouTube video portal.

GEMA represents approximately 70,000 musicians and publishers, assisting them with the commercial exploitation of their works. It negotiates tariffs for the different types of use of music, issues licences, verifies the analogue and digital use of works and collects licence revenue on its members' behalf.

Founded in 2005, the YouTube video portal has been a subsidiary of Google Inc. since 2006. YouTube makes video clips available to its users free of charge for them to watch, rate and comment on, as well as enabling them to upload videos themselves.

Under the new agreement, GEMA members will receive a fee for the use of copyright-protected works via the online platform. The agreement applies not only to future use, but also retrospectively as far back as 2009, when the previous agreement between Google and GEMA ended. After that agreement expired, all videos containing copyright-protected material that should have been licensed via GEMA were blocked on the online portal.

Google is now thought to be prepared to pay a currently unknown fee to GEMA for each video view. YouTube will inform GEMA about the number of times each video is viewed and make the corresponding payments. The agreement will cover not only YouTube's traditional advertising-funded service but also its new subscription service, which is already available in the USA and should soon be launched in Europe.

• *Pressemitteilung der GEMA vom 1. November 2016* (GEMA press release, 1 November 2016)
http://merlin.obs.coe.int/redirect.php?id=18304 DE

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ES-Spain

Supreme Court decision on private copying

By judgment of 10 November 2016, the Spanish Supreme Court cancelled Royal Decree 1657/2012, which regulates the procedure of compensating rightsholders for acts of private copying. This Decree was itself a continuation of the derogation by Royal Decree Law 20/2011 of the private copying levy and the introduction of a new system whereby fair compensation for acts of private copying is paid to rightsholders

from the state budget (see IRIS 2012-8/19, IRIS 2011-5/20, IRIS 2011-4/23 and IRIS 2010-10/7).

The Supreme Court decision follows the judgment delivered on 9 June 2016 by the Court of Justice of the European Union (CJEU) in Case C-470/14, EGEDA v. Administracion del Estado, following a request for a preliminary ruling on the interpretation of Article 5(2)(b) of Directive 2001/29/EU (the "InfoSoc Directive") referred by the Spanish Supreme Court (see IRIS 2016-7/3). Article 5(2)(b) provides that Member States may provide for exceptions or limitations to the reproduction right "in respect of reproductions on any medium made by a natural person for private use and for ends that are neither directly nor indirectly commercial, on condition that the rightholders receive fair compensation". The CJEU considered that, in the Spanish scheme, the payment of the fair compensation is financed from all the budget resources of the general state budget, and therefore also from all taxpayers. According to the CJEU, such a scheme was not a guarantee that the cost of that compensation is ultimately borne solely by the users of private copies. The Court concluded that Article 5(2)(b) of the InfoSoc Directive precludes a fair compensation scheme financed from the general state budget in such a way that it is not possible to ensure that the cost of that compensation is borne by the users of private copies.

Based on this preliminary ruling, the Supreme Court considers, in its judgment of 10 November 2016, that the Spanish regulation on private copying compensation is incompatible with the judgment of the CJEU and with EU law. The Supreme Court also rejects the request of the State Attorney to suspend the procedure until the Constitutional Court pronounces itself on the appeal presented against Article 1 of the Intellectual Property Law as revised in 2014, when it incorporated the Royal Decree Law 20/2011 which introduces the new system of private copying compensation. The Supreme Court establishes that when a national legal provision is contrary to EU law, it must be declared as inapplicable, independently from it being declared also as unconstitutional, due to the primacy of EU law over national law. The Supreme Court considers that, as the Intellectual Property Law 21/2014, as well as the Royal Decree Law 20/2011 are inapplicable in accordance with the CJEU judgment of June 2016, the Royal Decree of 2012, which regulates the procedure for paying the compensation from the general state budget must be declared null as it stays without any effective legal basis.

The Spanish Government is now preparing a working document for the future system of private copying compensation that would be based again on a levy on carriers, equipment and devices and that would be used for the negotiations with the main stakeholders concerned.

• *Tribunal Supremo, Sala de lo Contencioso-Administrativo, Seccion Cuarta, Sentencia num. 2394/2016* (Judgment of the Supreme Court, no. 2394/2016, 10 November 2016)
http://merlin.obs.coe.int/redirect.php?id=18266 ES

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FR-France

Publication of the Act strengthening media freedom, independence and pluralism

The Act of 14 November 2016 "strengthening media freedom, independence and pluralism" has been published in the Official Gazette. Under the new Act, all journalists now have the right of refusal, which was previously only held by journalists working for public service broadcasters. To this end, a new Article 2bis has been added to the Act of 29 July 1881. Journalists will be entitled to "refuse to yield to any form of pressure, refuse to divulge their sources and refuse to endorse an article, programme, part of a programme or contribution whose form or content has been modified without their knowledge or against their will". They cannot be forced to act contrary to their "professional beliefs" formed in accordance with the ethical charter of their employer. Such a charter must now be adopted by all media service providers, drafted jointly by management and journalists' representatives. Any breach of a journalist's right of refusal will be punished with the total or partial suspension of public funding for the company concerned.

The Act also requires all television companies who broadcast "political and general news programmes", as well as mainstream radio services, to appoint "committees to monitor the integrity, independence and pluralism of information and programmes". These committees can act on their own initiative or be consulted at any time by the governing bodies of the company concerned or by any individual. Particular attention is paid to the independence of committee members, which must be established prior to their appointment, and to the modus operandi of the committees themselves.

Furthermore, the national audiovisual regulatory authority (Conseil Supérieur de l'Audiovisuel - CSA) is given greater responsibility to ensure integrity, independence and pluralism. For example, it will be required to ensure that the agreements that it signs with media service providers include measures to guarantee respect for the principles enshrined in the new Article 2bis of the Press Act. Companies that infringe these principles over a period of several years will be excluded from the simplified broadcasting licence renewal system. The CSA will also have to ensure, a

posteriori, that the agreements that it signs with media service providers guarantee respect for the right of refusal. It will need to ensure adherence to the logical numbering system of "national free-to-air terrestrial television services and the fair, transparent, consistent and non-discriminatory numbering of other television services in the programme lists of service distributors".

Finally, the Act contains a section concerning the transparency obligations of companies in the press and audiovisual sectors. It states that, each year, such companies must make the readers of their publications or online news services fully aware of the composition of its capital if any legal or natural person owns a holding of 5% or more, and of its governing bodies. The company must mention the identity and shareholding of each of its shareholders.

The Constitutional Council decided that the Act's provisions on reforms to the protection of the confidentiality of journalists' sources were unconstitutional.

• *Loi n°2016-1524 du 14 novembre 2016 visant à renforcer la liberté, l'indépendance et le pluralisme des médias* (Act no. 2016-1524 of 14 November 2016 strengthening media freedom, independence and pluralism)
http://merlin.obs.coe.int/redirect.php?id=18306 FR

• *Conseil constitutionnel, décision n°2016-738 DC du 10 novembre 2016* (Constitutional Council, decision no. 2016-738 DC of 10 november 2016)
http://merlin.obs.coe.int/redirect.php?id=18307 FR

Amélie Blocman
Légipresse

Ban on advertising in children's programmes on public TV finally adopted

On 7 December, the Senate finally adopted, by 213 votes to 0, the bill tabled by a Green Party MP banning commercial advertising in children's programmes on public television.

Article 1 of the bill supplements Article 14 of the Act of 30 September 1986 and states that advertising in these programmes will be regulated under a Council of State decree. It also gives the national audiovisual regulatory authority (Conseil Supérieur de l'Audiovisuel - CSA) a monitoring and advisory role. Each year, the CSA will have to submit to parliament "a report evaluating the actions taken by audiovisual communication services to ensure that commercials broadcast during programmes aimed at young people respect public health objectives and the fight against high-risk behaviour, and making recommendations to improve self-regulation of the advertising sector".

Article 2, which amends Article 53 of the 1986 Act, provides for a ban, from 1 January 2018, on commercial advertising during public television programmes aimed at children under 12, and for 15 minutes before and after such programmes. This ban also applies to all messages transmitted on the websites of national television services that offer this type of programme.

Noting that, with 8.3 million youngsters aged between 4 and 14, France now has the largest "children's" market for television advertisers, ahead of the United Kingdom and Germany. The bill's authors plan to "strictly limit the effects of advertising in programmes aimed at young people broadcast on public television channels", especially its impact on childhood obesity. However, the ban does not concern private channels which, for their part, are self-regulated under the CSA's supervision.

The resulting loss in revenue for France Télévisions (EUR 17 million of advertising income plus EUR 3 million to produce programmes to replace the advertising windows) is accounted for in the France Télévisions draft contract of objectives and means for 2018 onwards.

• *Loi n°2016-1771 du 20 décembre 2016 relative à la suppression de la publicité commerciale dans les programmes jeunesse de la télévision publique* (Act no. 2016-1771 of 20 december 2016 banning commercial advertising in children's programmes on public television)
http://merlin.obs.coe.int/redirect.php?id=18308 FR

Amélie Blocman
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CSA adopts guidelines on audiovisual coverage of terrorist acts

On 20 October 2016, following a number of meetings with representatives of audiovisual media, journalists and victims, as well as the Paris public prosecutor, the national audiovisual regulatory authority in France (Conseil Supérieur de l'Audiovisuel - CSA) adopted a set of guidelines on audiovisual coverage of terrorist acts. Under the Act of 21 July 2016 extending the application of the State of Emergency Act of 3 April 1955, the CSA had been asked to draw up a code of conduct for audiovisual coverage of terrorist acts. This request followed complaints about inappropriate coverage of the Paris and Nice terrorist attacks last July, which had resulted in formal demands being issued to some television channels. Complaints had also been lodged against BFM TV by victims' families.

In the new guidelines, which go beyond the legal framework applicable to media coverage of such incidents (Art. 1 of the Act of 30 September 1986 and CSA recommendation 2013-04 of 20 November 2013 on coverage of international conflicts, civil wars and terrorist acts by audiovisual communication services), the CSA assesses current issues linked to the coverage of terrorist acts that cannot be dealt with under

mandatory and general rules on account of the diversity of situations met, and suggests how these issues should be approached.

These guidelines should enable the media, in relation to coverage of terrorist acts, to reconcile the need to protect freedom of information with other general interest requirements such as the proper running of judicial investigations, protection of the activities of security forces, protection of victims and their families, and respect for human dignity.

As far as general guidelines are concerned, audiovisual media service providers are urged to adopt a more stringent internal monitoring and validation process that should be followed prior to any broadcast when a terrorist act occurs. They are also asked to consider setting up a procedure through which broadcasts are slightly delayed.

With regard to judicial investigations and the activities of security forces, the CSA reminds service providers that they must not make any contact with terrorists or hostages. They must also be very careful not to endanger the safety of victims or witnesses. Broadcasters are free to decide whether to disclose the identity of individuals who carry out terrorist acts. The CSA recommends that everything possible is done to avoid the broadcast of propaganda and that, if it is broadcast, it is accompanied by suitable editorial comment. It suggests that amateur footage of terrorist attacks should only be paid for in exceptional circumstances. Among the precautions that should be taken to increase the reliability of information broadcast, it is suggested that "experts" who are invited to speak on air are introduced in a systematic and regular manner, along with information about their personal background that could influence what they say.

Media service providers are encouraged to continue evaluating their procedures, taking into account any recommendations in the document that they do not already follow.

• *Précautions relatives à la couverture audiovisuelle d'actes terroristes* (Guidelines on audiovisual coverage of terrorist acts)
http://merlin.obs.coe.int/redirect.php?id=18285 FR

Amélie Blocman
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CSA receives complaints about "Touche pas à mon poste" programme

On 23 November 2016, the national audiovisual regulatory authority in France (Conseil Supérieur de l'Audiovisuel - CSA), having received numerous complaints from viewers, issued a warning and formal notice to the TV channel C8, owned by the Canal Plus group, concerning two excerpts from "Touche pas à mon poste", a programme presented on C8 every evening by Cyril Hanouna. A third excerpt is the subject of pending proceedings and could result in a sanction being imposed.

The warning concerns the edition broadcast on 27 September 2016, in which Cyril Hanouna yelled at a panellist: "Who was it who came into my office whining in July, eh? Shut up! What a fool he is!" The CSA considered that this verbal assault showed a lack of restraint likely to humiliate its victim. It was also seriously concerned about the repeated nature of this type of incident and how it might be imitated by young viewers.

The formal notice concerns part of the programme "Les 35 heures de Baba", broadcast on 14 October 2016, in which another panellist, egged on by the presenter, kissed a female guest on the chest despite twice being told very clearly that she did not want to be kissed. The CSA ruled that this behaviour contravened Article 3-1 of the Act of 30 September 1986, in particular by depicting sexism and a degrading image of women.

Finally, the CSA received a huge number of complaints from viewers (who can now complain via an online form) about a third programme, broadcast on 3 November 2016, in which a crime attributed to the first panellist was re-enacted. Noting that the channel was already the subject of a formal notice with regard to respect for human dignity, the CSA director general submitted the file to the independent rapporteur responsible for instituting proceedings and the investigation of cases likely to result in sanctions. Sanctions can range from on-air apologies to fines.

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Analysis of the effects of regulation on on-demand AVMS

The national audiovisual regulatory authority in France (Conseil Supérieur de l'Audiovisuel - CSA) has published a study, conducted by French media research institute IDATE, on the economic effects of Decree no. 2010-1379 of 12 November 2010 concerning on-demand audiovisual media services (AVMS). The study assesses the current range of pay-per-view video-on-demand (VoD) and subscription video-on-demand (SVoD) services available in France (economic models and consumption) in order to weigh up the decree's effects on the development of the video-on-demand market in France.

The study analyses the Decree's impact on the prominence given to and financing of audiovisual and cinematographic works by on-demand AVMS. The Decree

(Art. 13) requires such services to ensure that European works and works made originally in the French language are present and given prominence on their home page and in their catalogue. These obligations apply to AVMS with catalogues containing at least 20 cinematographic or audiovisual works. However, the study found that, in contrast to SVoD, the real impact of these obligations on the actual consumption of European and French-language content is questionable where pay-per-view VoD services are concerned, since very few users access these services through the relevant home page. As a result, the viewing choices of only a small minority can be influenced by what is displayed there. The decrees' provisions on the proportion of European (60%) and French-language works (40%) in catalogues appear to be having a satisfactory effect, although ensuring and monitoring fulfilment of the obligation to respect these quotas "at all times" seems unrealistic, since the content of these catalogues changes very frequently in accordance with commercial agreements and the availability of works.

The CSA study also analyses how the Decree has affected the industry's contribution to audiovisual and cinematographic production, with on-demand AVMS that generate net annual turnover of more than EUR 10 million subject to investment obligations. According to the IDATE, the Decree's impact in this area is debatable for several reasons. First, the number of services that exceed the turnover threshold is very small (only 4 out of 124 in 2012). Secondly, providers of on-demand AVMS who are subject to production obligations meet their obligations solely by purchasing rights. To date, no French-based provider of on-demand AVMS has become involved in prefinancing since this is heavily linked to exclusivity, which is not part of the current business model of pay-per-view VoD services.

Therefore, the study concludes that the Decree does not seem capable of producing any visible effects on the prefinancing of French and European audiovisual and cinematographic production.

Finally, after a comparison with other European markets, the study describes a trend scenario based on legal perimeters remaining constant, as well as a number of variants that could result from the amendment of one or more aspects of the legal framework governing on-demand AVMS.

• *Effets économiques du décret n°2010-1379 du 12 novembre 2010 relatif aux services de médias audiovisuels à la demande, novembre 2016* (Economic effects of Decree no. 2010-1379 of 12 November 2010 concerning on-demand audiovisual media services, November 2016)
http://merlin.obs.coe.int/redirect.php?id=18305 FR

Amélie Blocman
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GB-United Kingdom

Government proposes powers to block websites which do not put into place age verification

The UK Government has introduced amendments to the Digital Economy Bill which will enable the blocking of pornographic websites which do not put into place age verification measures to ensure that they are not accessed by persons under 18.

The Digital Economy Bill contains measures to require that pornographic sites include age verification measures. If these are not in place, pornographic content made available on a commercial basis will constitute "offending material". The system will be supervised by the British Board of Film Classification, which is responsible for the age classification of films, videos and DVDs. In the original draft of the bill the sanction for making available offending material was the power to withdraw payment services such as Visa and PayPal from offending sites. There was also provision for fines of up to £250,000 or five percent of the operator's qualifying financial turnover. The amendments introduced by the Government go further through giving the Board the additional power to request an internet service provider to take steps or make arrangements so as to prevent persons in the UK from being able to access the offending material. The power also includes steps or arrangements which will have the effect of preventing persons in the UK from being able to access "material other than the offending material" using the service provided by the internet service provider, which gives the Board a potentially wide power to restrict content. The duty will be enforceable by the Board through the courts. The Government has stated that the Board will have flexibility as to which sanction it chooses to use, but once action has been taken, it will prevent access to the whole pornography site.

This requirement to block access is stated to apply to all sites in the UK and overseas. Where websites originate in the EU the process will be compatible with country of origin rules.

• Department for Culture, Media and Sport: New Blocking Powers to Protect Children Online, 20 November 2016
http://merlin.obs.coe.int/redirect.php?id=18292 EN
• Digital Economy Bill
http://merlin.obs.coe.int/redirect.php?id=18293 EN
• House of Commons, Notices of amendments given up to and including Wednesday 23 November 2016, Digital Economy Bill, as amended
http://merlin.obs.coe.int/redirect.php?id=18268 EN

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Legal Observations
of the European Audiovisual Observatory
OBSERVATOIRE EUROPÉEN DE L'AUDIOVISUEL
EUROPEAN AUDIOVISUAL OBSERVATORY
EUROPÄISCHE AUDIOVISUELLE INFORMATIONSSTELLE

Claim for damages against the BBC for libel in respect of a broadcast fails

On 28 October 2016, the English High Court held that the comments made by a BBC interviewer during a live broadcast to the effect that the claimant, the Chief Imam of Lewisham Islamic Centre, "is an extremist speaker" who has "promoted and encouraged religious violence" were "substantially true", i.e., the defence to the libel action which succeeded was "justification" (meaning that the words complained of are substantially true). The complainant first used the BBC's complaints procedure before applying to the Court for relief.

The Court held that the words complained of meant that the complainant is "an extremist Islamic speaker who espouses extremist Islamic positions" and that Mr Begg had "recently promoted and encouraged religious violence by telling Muslims that violence in support of Islam would constitute a man's greatest deed". The BBC relied on speeches, a document, invitations to speakers, and a PR release extending back to 2006. Responding to the claimant's points about his inter-faith work, work with the police and general standing in the community, the Court concluded that Mr Begg "was something of a 'Jekyll and Hyde' character: he presented a (benign) face to the local Lewisham and inter-faith community and another (extremist) face to receptive Muslim audiences on chosen occasions".

Perhaps the key matter of legal interest is the timing of the remarks relied on by the BBC. However, the judge rejected an argument that an error of fact as to the timing of the claimant's remarks was of "sufficient significance to undermine the BBC's case on justification". The BBC had stated that the claimant "is an extremist speaker (i.e. in the present tense" and "had recently" told Muslims that violence would "constitute a man's greatest deeds". The judge held that the "substance of the charge by the BBC" remained "substantially true", and there had also been no disavowal of the position expressed in the statements by the time of the November 2013 broadcast, and the most egregious 2009 speech remained available online.

- Shakeel Begg v BBC [2016] EWHC 2688 (QB)
http://merlin.obs.coe.int/redirect.php?id=18267 EN
- Judiciary of England and Wales, Press Summary - Shakeel Begg v BBC, [2016] EWHC 2688 (QB)
http://merlin.obs.coe.int/redirect.php?id=18291 EN

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IE-Ireland

Comedian's comment on "Eucharist" did not breach broadcasting code

The Executive Complaints Forum of the Broadcasting Authority of Ireland (BAI) has rejected a complaint against the broadcaster TV3 that a comedian's comment about the "Eucharist" infringed general community standards and respect for persons and groups in society. A complaint had been made over the March 2016 broadcast of the comedian Tommy Tiernan's Crooked Man programme by TV3, in which he referred to the "Eucharist" as "that f****** thing".

Under section 48 of the Broadcasting Act 2009, individuals may make a complaint to the Authority that a broadcaster failed to comply with the broadcasting codes. The complainant stated that while one "expected" Tommy Tiernan to use "coarse and offensive language, the comedian "went beyond the limits of acceptability" with this reference. The complainant was of the opinion that the comedian's comment "amounted to blasphemy" and asserted that "while satire and mockery are part of the comedian's routine, blasphemy, profaning the sacred, is an entirely different matter." The complainant further contended that "it was an offence under the Defamation Act to broadcast it."

In response to the complaint, TV3 stated that Tommy Tiernan is a comedian and that "comedians typically use material that may not to be everyone's liking". The broadcaster contended that "Satire and mockery is part of Mr. Tiernan's routine" and it was "quite clear" that the comedian's "comment was a joke and not meant in the literal sense."

The BAI Executive Complaints Forum, in adjudicating the complaint, observed that the reference to the Eucharist in the programme "was made in the context of a comedy routine and that "one of the functions of comedy is to push the boundaries of acceptable speech." The Forum acknowledged that comedy content "may be offensive to some viewers or listeners" and as such, the Forum was concerned with the question of "whether the content was offensive in a manner that would infringe general community standards and infringe respect for person and groups in society."

In reaching its decision, the Forum had regard, in particular, to the fact that "the programme was broadcast at 10pm," after the watershed, "when it is accepted that content of a more adult nature can be broadcast". The Forum also considered "the fact that Mr. Tiernan's comedic style is well-known and the content of his stand-up regularly includes coarse and offensive language and addresses various aspects of modern society, including religion." In terms of the

"specific remarks", the Forum found that while the comedian made reference to the Eucharist, "the focus of the remarks was not on this religious practice but rather on the comedian's personal reflections on his own upbringing in a Catholic country, his own experience as an altar boy and the manner in which Irish society and its social and religious beliefs have changed."

The Forum unanimously agreed that the programme did not violate the requirements of the Broadcasting Code with regard to respect for community standards and persons and groups in society. Accordingly, the Forum rejected the complaint.

• Broadcasting Authority of Ireland, Broadcasting Complaint Decisions, 30 November 2016, pp. 18-20
http://merlin.obs.coe.int/redirect.php?id=18270 EN

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Live programme discussion containing "highly offensive" comments about children with disabilities violated broadcasting code

The Compliance Committee of the Broadcasting Authority of Ireland (BAI) has held that the broadcaster FM 104 violated a number of broadcasting rules during a live phone-in programme which featured a discussion on the issue of "special needs children and their exclusion from summer camps." A complaint had been made over a July 2016 broadcast on "The FM 104 Phone Show" that is broadcast each weekday night and covers a wide range of topics. The complainant claimed inter alia that the broadcasting comments by one caller who referred to an autistic child as "having no mind of their own; not being 'all there' and calling them the abusive term 'mongos'" was "irresponsible" and in breach of the broadcasting rules on respect for community standards, protection from harm, and respect for persons and groups in society.

The broadcaster contended that "as with any topic, some listeners will be ignorant in respect of a topic" and this was "displayed by one caller who made the remarks regarding people with special needs". The broadcaster asserted that the show "contains views and opinions that not everyone agrees with, but these views are always challenged on air" and the presenter called his views "'idiotic', 'insulting' and 'ignorant' and [the caller] was eventually cut off". It maintained that "the topic as a whole "highlighted the need for more acceptance for children with special needs in summer camps and the ignorance they face." The broadcaster also stated that the show "was broadcast after the watershed" and carried "a warning before and during the programme". Notwithstanding this, FM104 "unreservedly apologised for any upset caused to the complainant by the views of their listeners".

The Committee stated that audiences "do not have an automatic right not to be offended by content". However, the BAI Code of Programme Standards "sets out certain limits in respect of acceptable content" which includes "an obligation on broadcasters to ensure content is in line with general community standards, including standards related to public attitudes to language." The Committee added that "while robust debate is permissible, as is the challenging of assumptions, programming should not stigmatise, support or condone discrimination against persons or groups in society, including on the basis' of disability." Furthermore "the Code recognises that the use of terms and references of an abusive nature in respect of person or groups in society, including those with disabilities requires justification."

In the case of this programme, the Committee highlighted that the programme included a caller who made "repeated use of offensive terms in respect of person and groups in society, in particular individuals with a disability". The Committee observed that while the comments of this caller were challenged throughout the programme, the comments were "extremely offensive." The Committee recognised that while a "broadcaster cannot always predict what a caller will say once on-air during a live broadcast, it was evident from early on in this caller's contribution, that his views were "highly offensive" and the "caller was given repeated opportunities" to air such views." In addition, the "feedback from listeners" also indicated that the caller was causing "significant offense". The caller was "permitted to make the offensive remarks for a considerable period of time before his comments were strongly challenged by the presenter and there was no evidence from the broadcaster that the presenter or the programme makers ended the call."

In conclusion, the Committee unanimously upheld the complaint as being in breach of the Code.

• Broadcasting Authority of Ireland, Broadcasting Complaint Decisions, 30 November 2016, pp. 4-7
http://merlin.obs.coe.int/redirect.php?id=18270 EN

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Advertising Standards Authority upholds complaints against Sprite advert as being "exploitative of sexuality" and "causing grave offence"

The Advertising Standards Authority of Ireland (ASAI) has upheld a number of complaints regarding an advertisement that was part of (Coca Cola) Sprite's "#BrutallyRefreshing" campaign. The advert appeared on two Irish websites, Joe.ie, a men's lifestyle website, and WaterfordWhispers, a popular Irish satirical news website.

The ASAI received ten complaints in relation to the campaign. The advert featured bottles of Sprite Zero and regular Sprite alongside the following captions; "she's seen more ceilings04046 than Michelangelo" "you're not popular04046you're easy" "a 2 at 10 is a 10 at 2". All of the complainants considered the advertising to be "sexist, degrading to women, offensive and insulting" with several of the complainants deeming the advertisement "misogynistic." In response to the complaint, Coca Cola stated that they strived to "deliver the highest standards of advertising" and acknowledged that "on this occasion the content had not met with their or their consumers' expectations." The advertiser asserted that when they became aware that their advertising was "causing concern, they immediately had it removed and issued a public apology for any offence caused."

The ASAI Complaints Committee considered the details of the complaints and Coca Cola's response, including their withdrawal of the advert and issuing of a public apology. The Complaints Committee observed that Rule 3.16 of the ASAI Code acknowledged that "humour is acceptable in advertising". However, that rule also states that "the portrayal of people should not be likely to cause grave or widespread offence or to cause hostility, contempt, abuse or ridicule". The Committee further noted the obligation in Rule 3.20 of the Code for advertisers to "avoid the exploitation of sexuality and the use of coarseness and undesirable innuendo" and that "offensive or provocative copy or images should not be used merely to attract attention." In finding that the advertising had "caused grave offence, had been exploitative of sexuality and had used coarse and undesirable innuendo", and had also "used offence and provocative copy", the Complaints Committee considered the advertising to be in breach of the Code.

The ASAI however found that as the advertisement had been withdrawn, no further action was required in this case.

• Advertising Authority of Ireland, Complaints Bulletin 16/6, Reference 26575, 3 November 2016
http://merlin.obs.coe.int/redirect.php?id=18269 EN

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IT-Italy

Online newspaper cannot publish "entertainment videos" without consent of the rightholder

The Court of Rome handed down an interesting judgment in a case involving Reti Televisive Italiane S.p.A. ("RTI") - the major Italian private broadcaster - and Gruppo Editoriale L'Espresso S.p.A. ("L'Espresso") - an Italian publisher, which publishes, among other things, the online version of the national newspaper "La Repubblica" ("Repubblica").

Starting from 2012, several excerpts of RTI TV programmes have been published in a specific section of the website of Repubblica without the authorisation of the broadcaster. RTI then filed a legal action against L'Espresso. The plaintiff sought a declaratory judgment that L'Espresso had infringed upon RTI copyright on the said TV programmes and that the publication of that content constituted unfair competition. Additionally, RTI asked the Court of Rome for an injunction ordering L'Espresso to stop using RTI content and to remove the same from its servers.

L'Espresso argued that the publication of the RTI videos on Repubblica was legitimate under the exceptions and limitation to copyright provided also for journalistic activities under Articles 65 ff. of the Italian Copyright Law (Law of April 22, 1941 no. 633, as amended).

After extensive evidentiary proceedings - which also included a court expert report to assess the pecuniary damages suffered by RTI - the Court partially upheld RTI's claims. L'Espresso was found liable for copyright infringement and parasitic, unfair competition towards RTI. The Court ordered L'Espresso to pay RTI EUR 250,000 for pecuniary damages and established liquidated damages of EUR 1,000 accruing for each further infringement of RTI's rights and for each day of delay in the enforcement of the decision. Also, the Court of Rome ordered the publishing of an excerpt of the decision in two leading national newspapers and on the homepage of the Repubblica website.

In this decision the Court has preliminarily indicated that the exemptions from liability established, as far as hosting providers are concerned, by Articles 16 and 17 of the E-Commerce Decree (Legislative Decree no. 70 of April 9, 2003 implementing in Italy the E-Commerce EU Directive 2000/31/EC) were not applicable to L'Espresso while operating the website of Repubblica. According to the Court of Rome, L'Espresso directly selects and manages the content made available on Repubblica. Accordingly, it cannot be deemed a hosting provider.

Furthermore, the Court ruled that the limitation and exceptions provided under the Italian Copyright Law shall be interpreted in a restrictive way and are not applicable to the activity carried out by L'Espresso. Indeed, on one hand, those published on Repubblica were entertainment videos, having no connection with economic, political, or religious matters as required by Article 65 of the Italian Copyright Law in order for the freedom of information exceptions to be applicable. On the other hand, L'Espresso made use of such videos to pursue an economic goal (this circumstance has been confirmed by the L'Espresso

when it maintained that the advertising revenues collected in connection with the publication of the said videos amounted to EUR 17,000). The Court held that the existence of an economic purpose is a sufficient basis to exclude that L'Espresso, by publishing the videos, was exercising the freedom of the press guaranteed by the Italian Constitution.

This crucial point of the decision has been further substantiated by the Court: "There is not a direct link between the (unauthorised) use of the RTI videos and the exercise of the journalistic activity by L'Espresso that, to make its editorial product more appealing from a commercial point of view, provides to its readers a service which is additional to the merely journalistic one. The circumstance that the videos are published in a separate sub-section of the website of Repubblica confirms that the video service is separate from the informative activity carried out through the digital version of the newspaper "La Repubblica"".

The decision of the Court of Rome, which is still subject to appeal by L'Espresso, follows a judgment released on a similar subject matter by the Court of Justice of the European Union (see IRIS 2015-10/3) and is the first decision on this specific issue in Italian case law.

• *Tribunale di Roma, 18413/2016, 13/07/2016* (Rome Court of First Instance, decision no. 18413/2016, adopted on 13 July 2016, published on 5 October 2016) IT

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Franceschini Law on cinema and audiovisual sector

On 26 November 2016 the new statute on cinema and audiovisual sector, called the "Franceschini Law" after the name of the current Minister of Cultural Heritage and Activities, has been published in the Official Journal of the Italian Republic.

The Franceschini Law provides four key elements: first, the creation of a fund aimed at financing the cinema and audiovisual industry. Such a fund will be funded by a quote equal to the 11 percent of the VAT and IRES tax paid by the companies operating in the communications industry (in a broad sense). The amount of the fund will be no lower than EUR 400 million per year.

Second, there will be a reduction in the percentage of selective contributions and introduction of automatic contributions, in favour of production companies and companies distributing Italian cinematographic or audiovisual works abroad. Selective contributions will be between 15 percent and 18 percent of the fund mentioned above and will be devoted to debut films, second films, films by young directors, etc. Third, six different kind of tax credits will be provided, in order to incentivize cinematographic and audiovisual production and distribution, post-production companies, etc. Fourth, the development of movie-theatres and digitalisation of artistic heritage. Restructuring existing movie-theatres and new openings will be funded by an extraordinary plan of EUR 120 million in five years. There is also a plan for the digitisation of the cinematographic and audiovisual heritage.

Moreover, in relation to regulatory reform, the Government is delegated to pass new rules on the public film registry, on film review (with cancellation of the State rating system, so called prior censorship) and on the promotion of European works by audiovisual media service providers. Finally, there will be the creation of the "Superior council of cinema and audiovisual" made up by eleven members, with an advisory and supporting role in regulations and policies in these sectors, as well as in the preparation of guidelines and general criteria for the allocation of public resources.

• *Legge 14 novembre 2016, n. 220 - Disciplina del cinema e dell'audiovisivo. (16G00233) (GU Serie Generale n.277 del 26-11-2016)* (Law no. 220 of 14 November 2016, Regulation of cinema and audiovisual works)
http://merlin.obs.coe.int/redirect.php?id=18295 IT

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The Guidelines of Italian regulatory Authority (AGCOM) about "hate speech".

On 2 November 2016, with decision n. 424/16/CONS, the Italian Regulatory Authority for Telecommunication (Autorità per le garanzie nelle comunicazioni - AGCOM) approved a decision concerning "guidelines about the respect of human dignity and the principle of non-discrimination within news programmes, news outlets and entertainment programmes". With this decision, AGCOM wants to issue interpretative criteria for the activity of broadcasting services monitoring, for which it has responsibility, and to interpret the application of articles 3, 32 paragraph 5 and 34 of the Italian Audiovisual and Radio Media Services Code (legislative decree no. 177/2005) on the main principles regulating audiovisual media services and the protection of minors in the broadcasting field. The decision represents the way Italy intends to adopt measures against "hate speech" as other States have (see, for example, IRIS 2016-615) and recommended by the European Commission (IRIS 2016-54).

The decision explains how the information reported by media services about events such as international terrorism and migration patterns, that fill the current

news reports, if given in a false and misleading manner, could encourage instances of discrimination in violation of the rights of individuals and of human dignity. Moreover, AGCOM claims that what is reported by news outlets and entertainment programmes is often a matter of discussion on the Internet, especially on social media. This technology, if used in an abusive way, could promote "hate speech", the particular kind of "hate crime" which consists of spreading opinions based on hateful reasons and that brings about a genuine breach of human rights.

In addition, AGCOM emphasises the issue of bullying and cyber-bullying and the guidelines of the competent Ministry of Education's Commission. According to these guidelines, these violations are the result of prejudices about ethnic, religious, sexual, physical, or family diversity, especially in regard to cyberbullying.The guidelines also underline its exponentially harmful extent and how it is necessary, according to the studies carried out by the competent bodies, to adopt preventive strategies to address the spread of discrimination based on diversity.

The decision also reiterates the role of the media in the education of minors and protection of minors from discrimination perpetrated by broadcasting: the first article of the decision consists of an inclusion of respect, from all the audiovisual and radio media providers, to ensure the highest application of the principles to protect users (Article 1 of decision n. 424/16/CONS).

AGCOM specifies that in news programmes, information has to respect the criteria of truth, concision, and objectivity, as well as the appropriateness of language and behaviour, avoiding giving space to discriminatory opinion based on hate, that could create an atmosphere of prejudice or that could interfere with the peaceful psychological and moral development of minors (Article 2 of decision n. 424/16/CONS).

With special regard to migration patterns, such events have to be shown in an objective and truthful manner, and also regarding the way in which images and news are spread, aiming to raise awareness about "hate speech", fight against racism and discrimination by the media (Article 3 of decision n. 424/16/CONS).

Audiovisual and radio media services providers are asked to be careful, especially during live events, organising the order of speeches and choosing the guests avoiding the risk of violating the principles of human dignity and non-discrimination and other inviolable rights, and ensuring that the transmission employees make all the necessary actions to stop any situations that could degenerate or assume an offensive tone (Article 4 of decision n. 424/16/CONS).

Finally, the decision establishes that the guidelines have an interpretative value for the provisions of the Articles 3, 32 paragraph 5 and 34 of the Italian Media Services Code about the main principles regulating audiovisual media services and about the protection of minors in the broadcasting field: therefore the guidelines in addition act as criteria to verify the effective compliance by the providers of the principles of human dignity, non-discrimination and the protection of minors, are relevant, especially with regard to minors, for the monitoring activity, because they have to be used to interpret the conducts punished by the sanctions provided by Article 35 of the Code. This provision provides for a fine of between EUR 25,000 and 350,000 or, for serious cases, the suspension of the broadcasting authorisation for a period between three and 30 days (Article 5 of decision n. 424/16/CONS).

• *Delibera Agcom n. 424/16/CONS recante "atto di indirizzo sul rispetto della dignità umana e del principio di discriminazione nei programmi di informazione, di approfondimento informativo e di intrattenimento"* (Agcom decision n. 424/16/CONS, "guidelines about the respect of human dignity and the principle of non-discrimination within the news programmes, news outlets and entertainment programmes")
http://merlin.obs.coe.int/redirect.php?id=18294 IT

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LV-Latvia

Media policy basic principles adopted

On 8 November 2016, the Latvian Cabinet of Ministers approved Basic Principles of the Latvian Media Policy (the Principles), a new policy document providing the general targets and tasks for media policy within the years 2016 to 2020. The Ministry of Culture will have to prepare an interim assessment of the fulfilment of the Principles by 1 July 2018 and submit it to the Cabinet of Ministers.

The Principles are a policy-planning document, which sets the basic principles of Latvian media policy, its targets, priorities and tasks to be accomplished within this period. Various public institutions, including the Ministry of Culture and the national media regulator, are appointed as bodies responsible for promoting the Principles. The structure of the Principles includes the general target of policy, five directions of action, the planned perspective, results and indicators, specific tasks, and an assessment on the impact of state and municipal budgets. The general target of policy is to create a positive environment for the activities of media, through the following five strategies:

1. Securing and developing plurality of media;

2. Ensuring quality and responsibility of media;

3. Improving professional education in the media sector;

4. Promoting media literacy;

5. Promoting a secure media environment for individuals and the public.

With respect to the five directions listed above the Principles provide a detailed action plan. For instance, in order to develop media plurality, the Principles provide for a clear separation of national remit and funding for public and private media. The attachment to the Principles provides a more detailed description of the status quo and the aims of the Principles.

With respect to the national remit, it is noted that currently private media receive only 8 percent of the public funding for the national remit. There should be clear principles and fair competition for this funding. On the other hand, although public media receive the largest part of the funding for the national remit, generally their budget is one of the smallest in Europe. On average, the public service media receive a funding in the amount of 0.2 percent of the Gross domestic product (GDP), whereas Latvian media get only 0.1 percent of the GDP. It is planned that the public service media could exit the advertisement market if their public funding is appropriately increased. This, in turn, would increase advertising revenue for private media, including regional media, which would promote media plurality. The Principles provide various quantitative indicators for measuring the results of the actions. For example, it is provided that the public funding for public service broadcasters should increase from 0.11 percent of the GDP in 2016 to 0.19 percent in 2020.

The Principles also provide that the functions of the national broadcasting regulator should be reviewed so that it is not simultaneously a general regulator and the supervisor specifically of public service media. The lack of media transparency is also indicated as a problem, as the beneficial owners of many media are not known. A reform of the media registry held by the Latvian Company Register is suggested. The Principles include many practical suggestions of actions to improve media literacy, including a suggestion to teach media in schools, and to promote life-long learning amongst media professionals.

• *Par Latvijas mediju politikas pamatnostādnēm 2016.-2020. Gadam* (Order by the Cabinet of Ministers No.667 as of 8 November 2016 "On Basic Principles of the Latvian Media Policy for year 2016-2020)
http://merlin.obs.coe.int/redirect.php?id=18275 LV

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NL-Netherlands

Injunction refused over broadcast using hidden-camera footage

In summary proceedings on 10 November 2016, the District Court of Amsterdam rejected a request to prohibit the Dutch broadcasting association BNN-VARA broadcasting an episode of "Rambam" containing hidden-camera footage from undercover journalists.

As stated on its website, the plaintiff "Dokteronline.com" is an online doctor service that informs consumers about health, symptoms and treatments, and facilitates contact with medical specialists and/or pharmacies. Rambam is a Dutch television programme, broadcasted by BNN-VARA, that investigates consumer issues by means of undercover journalism.

During the episode in question, Rambam aimed to show how the plaintiff allegedly sells prescription drugs to Dutch consumers, without having any fair knowledge of their medical history. Even though this service is legal due to the fact that Dokteronline.com is based in Curacao, it still can be considered controversial by the Dutch public.

In the episode, two undercover journalists flew to Curacao, because one of the journalists successfully applied for a job at the customer service of Dokteronline.com. On her "first day at work" she wore a hidden camera and recorded several conversations with employees of Dokteronline.com. Since the hidden camera footage features employees of Dokteronline.com, the plaintiff argued that broadcasting the episode would violate their employees' right to privacy.

The Court went on to balance the plaintiffs employees right to private life against BNN-VARA's right to freedom of expression, and examined the episode with the hidden-camera footage. The faces of the employees were blurred and their voices distorted. During the hearing, BNN-VARA additionally promised to block any footage that still showed names of the plaintiff's employees.

Considering the above, the Court eventually ruled that the broadcasting of the episode would not constitute a violation of the right to private life and therefore denied the plaintiff's request to prohibit BNN-VARA from broadcasting the episode.

• *Rechtbank Amsterdam, 10 november 2016, ECLI:NL:RBAMS:2016:7309* (District Court of Amsterdam, 10 November 2016, ECLI:NL:RBAMS:2016:7309)
http://merlin.obs.coe.int/redirect.php?id=18271 NL

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OBSERVATOIRE EUROPÉEN DE L'AUDIOVISUEL
EUROPEAN AUDIOVISUAL OBSERVATORY
EUROPÄISCHE AUDIOVISUELLE INFORMATIONSSTELLE

IRIS

Legal Observations
of the European Audiovisual Observatory

Parliament agrees on amendments to Media Act

On 25 October 2016, the Dutch Senate agreed on the final package of amendments of the Mediawet (Media Act). After some debate between the State Secretary of Education, Culture and Science, the House of Representatives and the Senate, the new Media Act can now enter into force.

After previous attempts to amend the Media Act 2008 (see for an earlier proposal IRIS 2013-4:1/22), the Senate passed the latest version of the bill on 15 March 2016 (IRIS 2016-5:1/25). However, the Senate still was not entirely satisfied with the proposed amendments. It requested, as a precondition for passing the bill, that the State Secretary submit an additional bill that would address the concerns of the Senate. Although this procedure received some criticism, State Secretary Sander Dekker started working on the additional bill.

The main concerns of the Senate concerned the political influence on the appointment of members of the Board of Directors and the Supervisory Board of the NPO (the National Public Broadcasting agency). The proposed amendment prescribed that the Minister of Education, Culture and Science would be in charge of these appointments. Under the new Media Act, these Boards would play a more important role than before, mainly in supervising the budget of the broadcasting organisations. The Senate feared that the political influence on the appointment of the board members would endanger the journalistic independence of the NPO, which is codified in Article 2 of the Media Act.

State Secretary Dekker sought to address these concerns. In the additional bill, Article 2.5 prescribes that for the appointment of new board members, the Supervisory Board will install an independent advisory committee. This committee advises the Minister on the selection of new candidates. The Minister has to follow the advice, unless there are important grounds to ignore it. In this way, the additional bill accentuates the self-regulatory character of the NPO and therefore guarantees its independency.

• *Wet van 26 oktober 2016 tot wijziging van de Mediawet 2008 in verband met aanvullingen bij het toekomstbestendig maken van de landelijke publieke mediadiens* (Act of 26 October 2016 to amend the Media Act 2008 in connection the future-proofing of the national public media service)
http://merlin.obs.coe.int/redirect.php?id=18298 NL

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New regulation on compensation for network failures

The Dutch Minister of Economic Affairs signed a new regulation on 24 October 2016 on a right of compensation for subscribers to public electronic communication services. These comprise subscribers to Internet, television, or telephone networks. Following the new rules, subscribers are entitled to compensation in case of full network failure. The new ministerial regulation follows after revision of the Dutch Telecommunications Act. The "Wet Versterking Telecommunicatiebeleid" (Reinforcement of Telecommunications Policy Act) provides a long-awaited reinforcement of the protection of subscribers.

The new ministerial regulation is meant to strengthen the position of end-users in case of network failures. Customers should be able to rely on the delivery of services that they buy. The minister stated that the bargaining position of consumers and small businesses is too weak to make private arrangements on compensation possible. Only a few service providers already offered compensation voluntarily. This was seen as a reason to implement mandatory compensation. These new rules are not meant to serve as compensation for damages following from the network failure. The compensation should be viewed as a general payment for the unavailability of the service. For compensation of damages, subscribers will have to rely on the general rules of the Dutch Civil Code.

The public electronic communications service provider is obliged to compensate the subscriber in the case of a complete network failure lasting more than 12 hours. This compensation will consist of one thirtieth of the total monthly subscription fee. The amount due rises by another thirtieth of the fee if the failure lasts for more than 24 hours. This amount increases incrementally for every 24 hours that the failure persists. The service provider can also organise alternative means of compensation, such as offering free data in the case of a mobile telephone subscription. However, this is only possible if the subscriber gives his explicit consent. Service providers are free to organise their own system of compensation. This includes the choice between automatic compensation or compensation after a request from the subscriber.

The new rules will commence on 1 July 2017. Until then, electronic communication service providers will have time to implement their systems for compensation or make alternative arrangements with their subscribers.

• *Regeling van de Minister van Economische Zaken van 24 oktober 2016, Regeling categorieën niet-automatisch voortrollende vergunningen, Stcrt. 2016, 56649* (Regulation of the Minister of Economic Affairs of 24 October 2016, nr. WJZ/16152571, Regulation categories non-automatic forward-rolling licenses, Stcrt. 2016, 56649)
http://merlin.obs.coe.int/redirect.php?id=18296 NL

• *Memorie van Toelichting Wet Versterking Telecommunicatiebeleid, Kamerstukken II 2014/15, 34271, nr. 3* (Explanatory Memorandum Reinforcement Telecommunications Policy Act, Parliamentary Papers II 2014/15, 34271, nr. 3)
http://merlin.obs.coe.int/redirect.php?id=18297 NL

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RO-Romania

Digital Switchover, postponed again

On 5 October 2016, the Romanian Senate (upper Chamber of the Parliament) adopted the draft Law on the approval of Government's Decree no. 21/2016 of 24 August 2016 on the extension of time limits provided by Government's Emergency Decree no. 18/2015 on establishing the measures necessary to ensure the transition from analogue terrestrial television to digital terrestrial television and the implementation of multimedia services at national level (see inter alia IRIS 2009-9/26, IRIS 2010-3/34, IRIS 2010-7/32, IRIS 2010-9/35, IRIS 2011-4/33, IRIS 2013-6/30, IRIS 2014-9/27, and IRIS 2016-2/26).

According to the draft Law, the terms established through the Government's Emergency Decree no. 18/2015 Article 1 (1) and (3) are extended until 31 December 2019. According to Article 1 (1) and (3), the terrestrial radio broadcasting of public service and private television channels in the analogue system, in the 174-230 MHz radio frequency band, was allowed to continue temporarily until 31 December 2016 under a technical agreement issued by the National Authority for Management and Regulation in Communications (ANCOM). The holder of the agreement was exempted from the obligation to pay the tariff for the use of the spectrum under Article 62 of the Audiovisual Law no. 504/2002, until 31 December 2016. At the same time, the terms provided by the Government's Emergency Decree no. 18/2015 Article 2 (1) was also extended until 31 December 2019. Article 2 (1) stipulated that the rights of use of radio frequencies granted according to the Audiovisual Law no. 504/2002 to provide through terrestrial radio broadcasting the public radio services was allowed to be extended, temporarily, until 31 December 2016. The Government's Emergency Decree no. 18/2015 was approved through Law no. 345/2015.

An exception to the new term provided by the Government's Decree no. 21/2016 can be made under the provisions of Article 26 (5) of Government's Emergency Decree no. 111/2011 on electronic communications, which stipulates that the term of 31 December 2019 can be reduced if, in order to reach objectives of general interest, the radio frequencies are granted directly, without a competitive or comparative selection procedure, to the public radio and television programmes providers, with the assent of the National Audiovisual Council (CNA).

The present extension of the terms for the digital switchover in Romania follows other extension of the previous term of 17 June 2015 to cease the analogue system broadcasting. The new extension, argued the Romanian Government, is necessary because the implementation of the electronic communications network for the provision of public services in digital terrestrial television is delayed, and because of the persistent financial difficulties faced by television and radio stations in Romania.

• *Ordonanța Guvernului nr. 21/2016* (Government's Decree no. 21/2016)
http://merlin.obs.coe.int/redirect.php?id=18276 RO

• *Proiect de Lege privind aprobarea Ordonanței Guvernului nr. 21/2016 pentru prorogarea unor termene prevăzute în Ordonanța de urgență a Guvernului nr. 18/2015 privind stabilirea unor măsuri necesare pentru asigurarea tranziției de la televiziunea analogică terestră la televiziunea digitală terestră și implementarea serviciilor multimedia la nivel național - forma adoptată de Senat* (Draft Law on approval of Government's Decree no. 21/2016 on the extension of time limits provided by Government's Emergency Decree no. 18/2015 on establishing the measures necessary to ensure the transition from analogue terrestrial television to digital terrestrial television and the implementation of multimedia services at national level - the form adopted by the Senate)
http://merlin.obs.coe.int/redirect.php?id=18277 RO

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Modifications of Audiovisual Law: promulgation vs rejection

On 19 October 2016, the Romanian President promulgated Law no. 187/2016, a modification of the Audiovisual Law no. 504/2002 with further modifications and completions (Legea Audiovizualului nr. 504/2002 cu modificările și completările ulterioare). The modification came into force on 20 October 2016. Another modification of the Audiovisual Law, with regard to prohibiting the advertising of medicinal products and pharmacies in audiovisual media, was finally rejected by the Senate (upper Chamber of the Romanian Parliament) on 15 October 2016 (see inter alia IRIS 2013-6/27, IRIS 2014-1/37, IRIS 2014-1/38, IRIS 2014-2/31, IRIS 2014-6/30, IRIS 2014-7/29, IRIS 2014-9/26, IRIS 2015-8/26, IRIS 2015-10/27, IRIS 2016-2/26, IRIS 2016-3/27, and IRIS 2016-10/24).

The new Law no. 187/2016 modifies the Audiovisual Law no. 504/2002 for the purpose of ensuring the information and education of the public, including from a scientific point of view. The draft law had been adopted by the Chamber of Deputies (lower Chamber) on 17 February 2016 and by the Senate (upper Chamber) on 19 September 2016.

Article 3 (1) (from Chapter 1 General Provisions) and Article 17 (1) d) 12 (with regard to the National Audiovisual Council's powers) were modified in the sense of including a reference to the scientific education of the public. The new form of Article 3 (1) provides that political and social pluralism, cultural, linguistic and religious diversity, information, education, including from a scientific point of view, and entertainment of the public are accomplished and ensured by the broadcasting and the retransmission of programme services with the observance of the freedoms and fundamental rights of the people. The words "including from a scientific point of view" were added to the original form of the article. The new form of Article 17 (1) d) 12 provides that the Council is authorized to issue regulatory normative decisions in order to achieve its objectives as expressly stipulated in the law and mainly in regard to cultural and scientific responsibilities of audiovisual media services providers. The words "and scientific" were added to the original form of the article.

On the other hand, a draft law intended to modify Law no. 148/2000 on Advertising and Audiovisual Law no. 504/2002 in the sense of prohibiting the advertising of medicinal products and pharmacies in audiovisual media, as well as the product placement of medical products and treatments, was finally rejected by the Romanian Senate on 15 October 2016. The draft law had been also rejected by the Chamber of Deputies on 8 June 2016, after a request for review filed in January 2016 to the Parliament by the President of Romania. The President considered the draft Law as discriminatory and contrary to the European Union's legislation.

• *Legea nr. 187/2016 - modificarea Legii audiovizualului nr. 504/2002* (Act no. 187/2016 on the modification of the Audiovisual Law no. 504/2002)
http://merlin.obs.coe.int/redirect.php?id=18281 RO

• *Propunere legislativă pentru modificarea şi completarea art. 17 din Legea nr. 148/2000 privind publicitatea şi pentru modificarea Legii nr. 504/2002 a audiovizualului - forma iniţiatorului* (Draft Law on the modification and completion of Article 17 of the Law no. 148/2000 on Advertising and for the modification of the Audiovisual Law no. 504/2002 - initiator's form)
http://merlin.obs.coe.int/redirect.php?id=17891 RO

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RU-Russian Federation

Supreme Court on extremism and terrorism

On 3 November 2016, the Russian Supreme Court amended two of its earlier resolutions that provided additional explanations to the judges in the country on the issues of court practice relating to crimes of terrorism and extremism.

The amendments were made in the resolutions "On Judicial Practice Relating to Criminal Cases on Crimes of an Extremist Nature" and "On Some Aspects of Judicial Practice Relating to Criminal Cases on Crimes of Terrorist Nature" (see IRIS 2012-3:1/32). While most of the amendments do not introduce new elements in the Supreme Court's interpretation of the use of media and telecommunications, most commentators pointed to a new paragraph in the former resolution.

The new paragraph 2 of point 8 of the Resolution "On Judicial Practice Relating to Criminal Cases on Crimes of an Extremist Nature" provides that: when deciding on the nature of actions of a person who placed any information or expressed one's attitude to it online - if related to incitement of hatred or hostility, as well as humiliation of dignity of a person or a group of persons - judges should be guided by the entirety of all the circumstances of this offense and, in particular, take into account the context, form, and content of the information made available, the existence and content of comments or other expression of attitude towards this information.

• О внесении изменений в постановления Пленума Верховного Суда Российской Федерации от *9* февраля *2012* года *№ 1* « О некоторых вопросах судебной практики по уголовным делам о преступлениях террористической направленности » и от *28* июня *2011* года *№ 11* « О судебной практике по уголовным делам о преступлениях экстремистской направленности » (Resolution of the Plenary Meeting of the Supreme Court of the Russian Federation of 3 November 2016 N 41 "On amending resolutions of the plenary meeting of the Supreme Court of the Russian Federation of 9 February 2012 N 1 "On Judicial Practice Relating to Criminal Cases on Crimes of an Extremist Nature" and of 28 June 2011 N 11 "On Judicial Practice Relating to Criminal Cases on Crimes of an Extremist Nature")
http://merlin.obs.coe.int/redirect.php?id=18283 RU

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SE-Sweden

Supreme Court rules iPhones are subject to copyright levy

In a dispute between the rights holder association Copyswede and operator Telia (also an importer of mobile phones) the Swedish Supreme Court has determined whether iPhones should be subject to a copyright levy according to the Copyright Act. The Act prescribes that technical devices that are "especially designated" for private copying are levied. The Supreme Court established that a technical device that to a high extent is suitable for private copying, and that in practice can also be expected to be used for such private copying, to an extent which is not extraneous/unessential, should be considered especially designated for private copying. To estimate whether or not a device is suitable for private copying or not the

Court considered features such as technical capacity and ease of use. The Court came to the conclusion that iPhones are especially designated for private copying according to the Act. The judgment only concerned the principal scope of the criteria in the law, not the level of the levy to be paid.

• *Högsta domstolen, Mål T 2760-15, 10/06/2016* (Mål T 2760-15, Supreme Court in Stockholm, 10 June 2016)
http://merlin.obs.coe.int/redirect.php?id=18299 SV

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UA-Ukraine

Court hearing on Russian broadcasts resumed

There have been several court rulings in Ukraine in relation to the suspension of Russian broadcasts that indicate that the court is now ready to consider the merits of the case for the first time since deliberations began in 2014 (see IRIS 2015-5:1/38).

At a hearing on 5 September 2016, the District Administrative Court of Kyiv announced that the "psychological and linguistic expertise" of the Russian programmes concerned in a lawsuit by the national regulator, the National Council for Television and Radio Broadcasting (NCTRB), has been completed. The lawsuit was filed against "Torsat, TOV", the distributor of several Russian channels (First Channel, RTR-Planeta, Russia-24 and Russian Channel by VGTRK, NTV-Mir), as well as cable TV distributor "Vertikal-TV, VAO", and Russian TV companies "TV-Tsentr, OAO" and "RBK-TV, ZAO". The expertise was assigned by the court on 3 March 2015 to an expert institution within the Ministry of Interior.

At the time of the lawsuit submission, retransmission of all Russian channels concerned was suspended as the interim restrictive measure. Thus on 29 September at the hearing the court moved to review whether the case will be considered further.

At the hearing the District Administrative Court of Kyiv took two decisions. First, the case was resumed. Second, the court took note of the expert opinion that "fragments of the text" in the programmes "contain calls to violate the territorial integrity of Ukraine, contain expressions that present propaganda of exclusiveness, superiority or inferiority of persons based on the criteria of their ideology, belonging to one or another nation."

The court took note that the lawsuit was aimed to regulate issues of protecting the national interests of Ukraine in the information sphere that included prevention of harm made to persons, public, and state through the dissemination of incomplete, untimely, and untrue information. Those issues are within the domain of the Office of the Prosecutor-General, Ministry of Interior, and Security Service of Ukraine. Therefore the court decided to demand from the three state institutions to "evaluate" the results of the expertise from the point of possible crimes committed and, if crimes are found to have been committed, to provide information as to what pre-trial criminal investigations were held by them in this regard. Once the information is obtained the court will resume the hearing of the case.

• ОКРУЖНИЙ АДМІНІСТРАТИВНИЙ СУД міста КИЄВА *01601*, м. Київ, вул. Болбочана Петра *8*, корпус *1* У Х В А Л А *05* вересня *2016* року м. Київ № *826/3456/14* (Decision of the District Administrative Court of Kyiv, case No 826/3456/14, 5 September 2016)
http://merlin.obs.coe.int/redirect.php?id=18282 UK

• ОКРУЖНИЙ АДМІНІСТРАТИВНИЙ СУД міста КИЄВА *01601*, м. Київ, вул. Болбочана Петра *8*, корпус *1* У Х В А Л А про поновлення провадження у справі *29* вересня *2016* року м. Київ № *826/3456/14* (Decision of the District Administrative Court of Kyiv, case No 826/3456/14, 29 September 2016)
http://merlin.obs.coe.int/redirect.php?id=18282 UK

• ОКРУЖНИЙ АДМІНІСТРАТИВНИЙ СУД міста КИЄВА *01601*, м. Київ, вул. Болбочана Петра *8*, корпус *1* У Х В А Л А *29* вересня *2016* року м. Київ № *826/3456/14asd* (Decision of the District Administrative Court of Kyiv, case No 826/3456/14, 29 September 2016)
http://merlin.obs.coe.int/redirect.php?id=18303 UK

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US-United States

Changes in the Digital Millenium Act

On 28 October 2016, the US Copyright Office issued a ruling that security researchers may circumvent technological measures that control access to copyrighted works if it is done in good faith, in furtherance of controlled research, and on a consumer device. The ruling allows security researchers to investigate and discover security vulnerabilities by reverse engineering or circumventing controls without fear of legal recourse. The ruling provides that such actions do not violate the Digital Millennium Copyright Act ("DMCA"), provided it does not violate other laws such as the Computer Fraud and Abuse Act (CFAA).

Under the ruling, a qualified research environment must meet six main requirements: (1) the computer programme, or any devices on which those programmes run, must be lawfully acquired; (2) during research, the device and computer programme

should operate solely for the purpose of good-faith testing, investigation and/or correction of a security flaw or vulnerability; (3) the research must be conducted in a controlled setting designed to avoid harm to individuals or the public; (4) the information derived from the activity is used primarily to promote the security or safety of the class of devices or machines on which the computer programme operates, or those who use such devices or machines; (5) the information is not used or maintained in a manner that facilitates copyright infringement; and (6) the research must not begin before 28 October 2016. It also notes that disclosure of the findings is a factor in determining whether the action was done in good faith, but does not explicitly require it.

The exemption covers all devices or machines primarily designed for use by individual consumers. It cited as examples; toothbrushes, home thermostats, connected appliances, cars, and smart TVs and medical devices that are not connected to humans during research. It also noted, however, that the exemption does not apply to "highly sensitive systems such as nuclear power plants and air traffic control systems."

• Ruling of the US Copyright Office of 28 October 2016
http://merlin.obs.coe.int/redirect.php?id=18301 EN

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Agenda

Book List