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European Court of Human Rights: Case of Sdruženi Jihočeské Matky v. Czech Republic

The European Court of Human Rights has, on several occasions, recognised "the right of the public to be properly informed" and "the right to receive information", but until recently the Court was very reluctant to derive from Article 10 of the European Convention on Human Rights a right to have access to public or administrative documents. In the cases of Leander v. Sweden (1987), Gaskin v. United Kingdom (1989) and Sîrbu v. Moldova (2004)), the Strasbourg Court has indeed recognised "that the public has a right to receive information as a corollary of the specific function of journalists, which is to impart information and ideas on matters of public interest". However, the Court was of the opinion that the freedom to receive information basically prohibits a government from restricting a person from receiving information that others wish or may be willing to impart to that person. It was decided in these cases that the freedom to receive information as guaranteed by Article 10 could not be construed as imposing on a State a positive obligation to disseminate information or to disclose information to the public.

In a recent decision (10 July 2006) on an application's admissibility, the European Court of Human Rights has, for the first time, applied Article 10 of the Convention in a case where a request for access to administrative documents was refused by the authorities. The case concerns a refusal to grant an ecological NGO access to documents and plans regarding a nuclear power station in Temelin, Czech Republic. Although the Court is of the opinion that there has not been a breach of Article 10, it explicitly recognised that the refusal by the Czech authorities is to be considered as an interference

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with the right to receive information as guaranteed by Article 10 of the Convention. Hence, the refusal must meet the conditions set out in Article 10 para. 2. In the case of Sdruženi Jihočeské Matky v. Czech Republic, the Court refers to its traditional case law, emphasising that the freedom to receive information "aims largely at forbidding a State to prevent a person from receiving information which others would like to have or can consent to provide". The Court is also of the opinion that it is difficult to derive from Article 10 a general right to have access to administrative documents, The Court, however, recognises that the refusal to grant access to administrative documents, *in casu* relating to a nuclear power station, is to be considered as an interference in the applicant's right to receive information. Because the Czech authorities have reasoned in a pertinent and sufficient manner the refusal to grant access to the requested documents, the Court is of the opinion that there has been no breach of Article 10 para. 2 of the Convention in this case. The refusal was justified in the interest of protecting the rights of others (industrial secrets), national security (risk of terrorist attacks) and public health. The Court also emphasised that the request to have access to essentially technical information about the nuclear power station did not reflect a matter of public interest. For these reasons, it was obvious that there had not been an infringement of Article 10 of the Convention, thus, the Court declared the application inadmissible.

The ruling in the case of Sdruženi Jihočeské Matky is nonetheless important as it contains an explicit and undeniable recognition of the application of Article 10 in cases of a rejection of a request for access to public or administrative documents. The right to access administrative documents is not an absolute one and can indeed be restricted under the conditions of Article 10 para. 2, which implies that such a rejection must be prescribed by law, have a legitimate aim and must be necessary in a democratic society. The Court's decision of 10 July 2006 gives additional support and opens new perspectives for citizens, journalists and NGOs for accessing administrative documents in matters of public interest. ■

Dirk Voorhoof
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● Decision by the European Court of Human Rights (Fifth Section), case of Sdruženi Jihočeské Matky v. Czech Republic, Application no. 19101/03 of 10 July 2006, available at:
http://merlin.obs.coe.int/redirect.php?id=9237
FR

EUROPEAN UNION

Council of the European Union: Common Position on Services Directive

On 24 July 2006, the Council of the European Union adopted a common position on the proposal for a Directive on Services in the Internal Market. Presented by the Commission in early 2004, the proposal sets out a general legal framework to reduce barriers to cross-border provision of services within the European Union (see IRIS 2005-4: 3). The Council largely follows the amended Commission proposal of 4 April 2006 which is based on the legislative resolution adopted by the European Parliament in first reading on 16 February 2006 (see IRIS 2006-4: 8).

First of all, the Council agrees with Parliament upon excluding a long list of services from the proposed Directive. It for instance confirms the exclusion of "audiovisual services, including cinematographic services, whatever their mode of production, distribution and transmission, and radio broadcasting". The Council also takes on board the cultural safeguard clause that was introduced by Parliament according to which the future Directive shall not affect measures taken at Community or national level to protect or promote cultural or linguistic diversity or media pluralism. Finally, it confirms the rule that, in case of conflict between the proposed Directive and other sectoral Community rules, such as the Television Without Frontiers Directive, these other rules shall prevail.

The Council also adopts most of Parliament's substantial changes to the original proposal such as the introduction of a social safeguard clause, the replacement of the country of origin principle by a pragmatic principle as the regulatory basis for cross-border service provision in the EU and the exclusion of services of general economic interest from major parts of the proposed Directive. However, the Council's common position differs from Parliament's opinion for instance by modifying the wording of the excluded services (e.g. social services) and by introducing a new screening process for national provisions governing temporary provision of services.

Because of these remaining differences, the European Parliament is now dealing with the proposed Directive in second reading, which is scheduled to be finalised by November 2006. Internal Market Commissioner, Charlie McCreevy, has warned that it would be "very dangerous, even naive, on the broad, big issues to start upsetting that fragile compromise arrived at in the European Parliament and which got through the Council of Ministers". ■

Wouter Gekiere
Legal Adviser, European Parliament

● Common Position Adopted by the Council with a View to the Adoption of a Directive of the European Parliament and of the Council on Services in the Internal Market, available at:
http://merlin.obs.coe.int/redirect.php?id=10372
CS-DA-DE-EL-EN-ES-ET-FR-HU-IT-LV-LT-MT-NL-PL-PT-FI-SK-SL-SV

IRIS LEGAL OBSERVATIONS
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European Commission: Ongoing Review of the EU Regulatory Framework for Electronic Communications

The EU regulatory framework for electronic communications of 2002 is currently undergoing its first review by the European Commission. On 29 June 2006, the Commission kicked off the review by reporting on the functioning of the framework and launching a public consultation. It published a Communication on the review of the regulatory framework for electronic communications, a Staff Working Paper and an Impact Assessment, which include several policy proposals for boosting competition and completing the Single Market. At the same time, it published a draft Recommendation on Relevant Product and Service Markets within the electronic communications sector susceptible of ex ante regulation, also open for public consultation. On 27 August 2006, it made public three studies that should serve as "food for thought" in the ongoing review. These studies deal with growth and investment in the EU electronic communications sector, regulatory reform, and the state of competition in the electronic communications markets respectively.

The existing framework, consisting of five directives, regulates all electronic networks and communication services that are transmitted electronically, whether fixed or wireless, data or voice, Internet-based or circuit switched, broadcast or personal. Although content explicitly falls out of the scope of the framework, infrastructure, conditional access and must-carry-obligations for cable television fall within, and affect the audiovisual sector directly or indirectly (See IRIS plus 2003-2).

The Commission is positive about the progress made since 2002 in opening up national telecom markets to competition. With this review, it aims to ensure that the framework continues to serve the needs of the sector for the next decade. Over this period of time, the main trends are expected to be a migration to "all Internet Protocol" networks, growing use of wireless communications and access platforms, deployment of fibre in the local access network, and the transition to digital television. The Commission proposes to phase out ex-ante regulation in some of the existing market segments. For those markets where competition is not yet effective, such as the broadband supply market, the Commission wants EU rules applied more effectively. The plea for "regulatory holidays" made by incumbent operators is explicitly rejected.

On the issue of radio spectrum, the Commission advocates moving towards a common, more flexible and market-based approach for allocation of the radio spectrum needed for innovative services and for devices to work EU-wide. To accomplish that, the Commission intends to give spectrum usage right holders substantially more freedom to choose radio network and access technologies used (technology neutrality) as well as services offered (service neutrality).

The public consultations will end on 28 October 2006. The revised Recommendation on relevant markets is scheduled for the first quarter of 2007. Early in 2007, the Commission intends to propose legislative measures amending the regulatory framework for electronic communications. ■

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- **"Telecoms: Commission tables plans to boost competition among telecoms operators and build a single market for services that use radio spectrum", press release of 29 June 2006, IP/06/874, available at: http://merlin.obs.coe.int/redirect.php?id=10388**

DE-EN-ES-FR-IT-NL-PT

- **"EU telecoms reform: Commission continues debate with three studies", press release of 25 August 2006, IP/06/1123, available at: http://merlin.obs.coe.int/redirect.php?id=10391**

DE-EN-FR

European Commission: Communication on the Application of Articles 4 and 5 of the "Television without Frontiers" Directive

In August 2006, the European Commission issued a Communication containing the first post-enlargement progress report on the promotion of European works (for the period 2003-2004). Two Articles in the "Television without Frontiers" Directive, adopted in 1989 and amended in 1997, prescribe quotas for European works which broadcasters are required to observe in their transmission time. Article 4 of the Directive calls upon Member States to ensure, where practicable and by appropriate means, that broadcasters reserve the majority of their transmission time for European works. Article 5 sets a 10% minimum of either transmission time or programming budget for European works, in particular recent ones, created by producers independent of the broadcasters.

The report on the implementation of these provisions in the 25 EU Member States shows that the average transmission time for European works across the Union decreased slightly from 2003 to 2004, sliding from approximately 65% to 63%, but that the current trend suggests it stabilised at above 60%. As for the average share of independent producers' works, it is around 30%, well above the 10% quota. For recent works by inde-

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pendent producers, the average hovers at slightly more than 20%.

● "European works' share of TV broadcasting time now stable at over 60%, says Commission", IP/06/1115, press release of 22 August 2006, available at: http://merlin.obs.coe.int/redirect.php?id=10378

DE-EN-ES-FR-HU-IT-PL-SW

● Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - Seventh communication on the application of Articles 4 and 5 of Directive 89/552/EEC "Television without Frontiers", as amended by Directive 97/36/EC, for the period 2003-2004 {SEC(2006) 1073}, of 14 August 2006, available at: http://merlin.obs.coe.int/redirect.php?id=10381

CS-DA-DE-EL-EN-ES-ET-FR-HU-IT-LV-LT-MT-NL-PL-PT-FI-SK-SL-SV

The Commission proposal of December 2005 to reform the Television without Frontiers Directive does not alter Articles 4 and 5, nor does it extend their application to non-linear audiovisual media services (see IRIS 2006-1: 5). The proposal currently awaits the outcome of its first reading by the European Parliament. ■

NATIONAL

BA – Broadcasters in Pre-election Activities

General elections for all state levels in Bosnia and Herzegovina were held on 1 October 2006. Before the pre-election campaign had started on 1 September the Communications Regulatory Agency (CRA) remineded in writing all public and private broadcasters of their obligation to cover pre-election activities, strictly respecting the BiH Election Law and Rulebook on Media Representation of Public Subjects during the Election Period, issued by the *Centralna izborna komisija* (BiH Election Commission - CIK).

In covering pre-election activities broadcasters shall comply with the principles of balanced, fair and impartial reporting. Also, broadcasters are obliged to publish announcements and information issued by CIK in full and free of charge. Private broadcasters that have no informative or related programmes may submit a request to be excluded from the obligation to cover the election campaign.

Dusan Babic
Media researcher and analyst, Sarajevo

Public broadcasters are obliged to provide political subjects, i.e. candidates, with equal time (3 minutes per presentation) on air for direct addressing of the public free of charge. Such obligation does not apply to private broadcasters, but if they decide to include such presentations in their programmes, they should do so in accordance with the Rulebook.

Paid political advertisements are limited to 30 minutes per political subject per week for public broadcasters, and 60 minutes for private broadcasters.

Any results of research into public opinion relating to the election shall not be published in the period of 48 hours prior to the opening, and until the closure of the polling stations.

The period of "election silence" starts 24 hours prior to the opening of the polling stations within the BiH territory and lasts until the closure of the polling stations.

Broadcasters are, generally, obliged to keep their programme recordings for 15 days after broadcasting; this time, exceptionally, they should keep it from 1 September 2006, until further notice from the CRA. In particular, broadcasters both public and private shall not allow any hate inspired or the like language in political media representations, including paid political advertising. ■

● Information on the CIK, available at: http://merlin.obs.coe.int/redirect.php?id=10335

BH

DE – Reference for a Preliminary Ruling on Age Labelling of National Self-Regulation Bodies

In the dispute between Dynamic Medien Vertriebs GmbH and Avides Media AG, the *Landgericht Koblenz* (Koblenz District Court) lodged with the ECJ on 31 May 2006 questions on the preliminary ruling under Art. 234 of the EC Treaty (Case no. C-244/06).

The question referred concerns in particular whether and to what extent national provisions that make mail order sales of image storage media (DVDs, videos) dependent on their being labelled as having been examined by a national body as to their availability to young persons are incompatible with the principle of the free movement of goods. In particular, do such national prohibitions constitute measures having equivalent effect within the meaning of Article 28 of the EC Treaty?

If so, the ECJ is asked to rule whether such a prohibition is justified under Art. 30 of the EC Treaty, having regard to the E-Commerce Directive

2000/31/EC, particularly if the items have already been examined and labelled by another member state.

In the legal dispute concerned, Dynamic Medien Vertriebs GmbH is demanding a ban on the sale of Japanese cartoons which are being sold on the Internet on DVD and video by Avides Media AG. The films, imported from Great Britain, have been certified as suitable for young people (15+) by the British Board of Film Classification (BBFC) and carry the corresponding BBFC label. However, the German *Freiwillige Selbstkontrolle der Filmwirtschaft* (Voluntary Self-Regulation Body for the Film Industry - FSK) has not examined and labelled the films, as required under Art. 14 of the German *Jugendmedienschutzgesetz* (Act on the Protection of Young People in the Media).

In a judgment of 21 December 2004 (case no. 4 U 748/04), the *Oberlandesgericht Koblenz* (Koblenz Appeal Court) had already ruled in appeal proceedings brought against the decision of the *Landgericht* that mail order sales of image storage media were anticompetitive on account of a breach of Art. 12.3 of the *Jugendschutzgesetz* (Youth Protection Act) if the media only carried a BBFC age label, and ruled that Art. 28 of the EC Treaty had not been breached.

However, due to doubts concerning conformity with European law, the First Chamber of Commerce of the *Landgericht Koblenz* has now submitted this question to the ECJ. ■

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● **OJ C 178/25 of 29 July 2006, available at: http://merlin.obs.coe.int/redirect.php?id=10352**
DE

DE – OLG Hamburg Rules on Heise Forum Judgment

In a ruling of 22 August 2006, the *Oberlandesgericht Hamburg* (Hamburg Appeal Court - *OLG*) decided that an Internet forum operator must monitor its forum for illegal content if it has been alerted to infringements that have already taken place in the forum.

The dispute concerned a case in which a user had posted on the online forum of the Heise magazine publishing company an appeal for people to block the servers of an Internet service provider. The *Landgericht Hamburg* (Hamburg District Court - LG) had decided in the first instance that Heise was liable for this content, even if it had been unaware of it, and demanded that all online forums be monitored in advance of publication. The Heise publishing company had appealed against this decision.

In its ruling, the OLG Hamburg explained that the publishing company could not be considered to be either the perpetrator of or a participant in the publication of the offending content. It thought that contributions to Internet forums could not be compared to readers' letters in the print media. In the light of the principles laid down by the *Bundesgerichtshof* (Federal Supreme Court - BGH) concerning live TV broadcasts, the court held that, as long as an Internet forum did not create the impression that its content represented the views of its operator, the operator could not, as a rule, be held liable, insofar as it was only the posting of the content by a third party that was at issue.

The publishing company had fulfilled its duty to remove the unlawful content within a few hours of being alerted to its presence on the forum. However, it was duty-bound, as the operator, to continually monitor the content of the forum in order to see whether it contained any further appeals of this nature. It was reasonable to monitor an individual forum if there was a risk of further infringements.

In summary, the OLG Hamburg considered it reasonable to expect an operator to monitor a forum if the operator had either provoked foreseeable illegal postings by third parties through its own actions, or if it had been alerted to at least one fairly serious infringement on its forum and there was a real danger of further breaches being committed by individual users. Furthermore, it was more reasonable to expect a commercially operated forum to be monitored than privately run forums. ■

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● **Ruling of the *OLG Hamburg*, 22 August 2006, case no. 324 O 721/05, available at: http://merlin.obs.coe.int/redirect.php?id=10341**
DE

DE – Ruling on "onlinetvrecorder.com"

In a ruling of 4 August 2006, the *Landgericht Leipzig* (Leipzig District Court - LG) confirmed its decision to grant an application by Sat.1 Satellitenfernsehen GmbH for a temporary injunction against the Internet service "onlinetvrecorder.com", which functions as a virtual video recorder. On 27 March 2006, the LG had granted the temporary injunction, under which the domain operator had been prohibited, *inter alia*, from storing, making available to third parties, transmitting via so-called online streaming or uploads (ie via the Internet) and/or copying or making available for copying the TV programmes broadcast by Sat.1 or parts thereof. The operator was also prohibited from "making available

to children and/or teenagers Sat.1 television programmes or parts thereof, which are broadcast between 8 pm and 6 am and are likely to harm the development of children and teenagers into independent, sociable individuals". After the defendant had exercised its right of appeal, the court confirmed the legality of the provisions of the temporary injunction. It ruled that the recording of TV programmes breached the right of the producing and broadcasting body to determine who should copy its programmes and make them available to the public. Since the service provider rather than the viewer stored the programmes on its servers and made them available from there, this was not a case of producing a copy for private use, which was permitted under Art. 53 of the *Urheberrechtsgesetz* (Copyright Act). Furthermore, the operator made money through advertising. The court rejected the defendant's claim that German copyright law did not apply because the servers were located in the Netherlands. The important thing was that the service was aimed at German Internet users. The court also ruled that the *Jugendmedienschutz-Staatsvertrag* (Inter-State Agreement on the Protection of Young People in the Media) had been breached, since the virtual video recorder did not have the required age verification system. It considered the defendant's argument that it had transferred the domain to a foreign company to be irrelevant, since it had owned the domain in the past and could offer the service again at any time. Since the defendant refused to offer a legally binding undertaking to cease and desist, there was a risk that it might repeat the offence.

Since mid-2005, various German courts have issued temporary injunctions banning such recordings of TV programmes. ■

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● Ruling of the *Landgericht Leipzig* (Leipzig District Court - LG), 4 August 2006, case no. 05 O 1058/06

● Press release of the *Landgericht Leipzig*, available at: http://merlin.obs.coe.int/redirect.php?id=10342

DE

DE – Federal Network Agency Notifies Market No. 18 Analysis

On 31 July 2006, the *Bundesnetzagentur* (Federal Network Agency - BNetzA) notified the European Commission of its proposed market definition and analysis for the field of broadcasting transmission services (market no. 18 in the Commission Recommendation), pursuant to Art. 7.3 of the Framework Directive (2002/21/EC). In Recommendation 2003/311/EC on relevant product and service markets within the electronic communications sector susceptible to *ex ante* regulation, the European Commission had recommended that national regulatory authorities analyse the definition of various markets, including a relevant market for broadcasting transmission services to deliver broadcast content to end users (market no. 18).

The notification document reports that there are 30 markets in Germany which relate to the transmission of broadcast signals via cable, satellite and terrestrial means or functionally similar media. This number comprises 13 cable markets and 17 terrestrial markets, distinguished according to objective and spatial criteria. No market was distinguished for satellite broadcasting, since the BNetzA considers this to be a supranational market, for which the European Commission is responsible. In the opinion of the BNetzA, only 14 of these markets are susceptible to regulation, ie all the cable markets and one terrestrial market (the market for analogue terrestrial FM radio transmission, where T-Systems has significant market power). According to the notification document, undertakings have significant market power in only seven markets, ie six cable markets and the aforementioned terrestrial market.

The cable markets are subdivided into markets for feeding broadcast signals into cable networks und signal delivery markets. The first category involves the feeding of broadcast signals into a broadband cable network, which the relevant level 3 cable network operator makes available to a content provider. Signal delivery markets are peculiar to Germany, resulting from the existence of a network level 4, whose operators reply on signals delivered by level 3 operators.

Prior to notification, a national consultation procedure had been launched on 22 February 2006. The results of the consultation were published.

In a letter of 31 August 2006, the Commission wrote that, on account of the very particular situation in the German markets, it had no comment on the proposed market definition pursuant to Art. 7.3 of the Framework Directive. The regulatory authorities of the other member states had one month in which to submit an opinion on the market analysis. Under Art. 7.5 of the Framework Directive, the BNetzA may now (taking into account any opinions submitted) adopt the draft measures and communicate them to the Commission. ■

Carmen Palzer
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● Notification of the BNetzA and letter of the Commission of 31 August 2006, available at: http://merlin.obs.coe.int/redirect.php?id=10353

● Documents relating to the preceding national consultation, available at: http://merlin.obs.coe.int/redirect.php?id=10354

DE

DE – Broadcasting Fee for Internet PCs

In the continuing debate over the level of the broadcasting fee to be introduced for Internet PCs on 1 January 2007, the ARD directors decided at their general meeting in Schwerin to propose that owners of an Internet PC or a UMTS mobile telephone be charged a monthly fee of EUR 5.52 from 1 January 2007. Private households which already pay a TV or radio licence fee are exempt from the new regulation. The amount to be charged is based on the sum paid by owners of devices capable of receiving radio transmissions, known as the "*Grundgebühr*". The *ARD* directors wish to take account of the fact that the Internet does not yet provide a comprehensive television service, but is used extensively for radio and podcasts. In the *8. Rundfunkänderungsstaatsvertrag* (8th amendment to the Inter-State Broadcasting Agreement) adopted in autumn 2004, it was originally laid down that the television licence fee of EUR 17.03 per month should apply to Internet-enabled PCs.

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The *Bundesländer*, who will now make the final decision, have responded positively to the ARD directors' decision, despite some fierce resistance from politicians and businesses to the idea of a broadcasting fee for PCs. Associations representing businesses and industry have criticised the decision to apply the fee to devices that are not primarily used to receive broadcasting services, and see no sense in charging a fee for services that are not used. They do not think that the compromise proposal resolves the fundamental problem of device-related fees. The industry and some politicians are therefore calling for the broadcasting fee to be replaced by a media tax levied on each household or individual.

The reduced basic charge will apply just once to any company premises, no matter how many PCs there are. Under the proposal, there will be no additional fee for a PC if a payment is already made for a company car radio. At present, 90% of broadcasting fee revenue comes from private households. So far, the European Commission has not taken part in the current discussions about the future financing of public service broadcasting. ■

• ARD press release, available at:
http://merlin.obs.coe.int/redirect.php?id=10340

DE

ES – Government Approves a New Decree on Cable TV

On 29 July, the Spanish Government approved a new Decree which regulates cable broadcasting and which also deals with other issues related to broadcasting, such as the introduction of Digital Terrestrial TV (DTTV) or the obligations for broadcasters to provide accurate information about the programme planning of their TV channels.

As regards cable broadcasting services, their provision was fully liberalised by Acts 32/2003 (see IRIS 2004-1: 11) and 10/2005 (see IRIS 2005-7: 11), but the entry into force of these Acts was conditional upon the approval by the Government of an implementation Decree.

This Decree has now been adopted, and cable broadcasting is therefore no longer a public service only to be provided by concessionaires, but an activity which can be freely provided by anyone who gets a simple authorisation.

The Decree establishes, among other things, the procedure to be followed in order to obtain those authorisations, as well as the obligations imposed on their holders (i.e., identification of the persons bearing editorial responsibility for the channels; obligation to offer adult-content channels on stand-alone basis; introduction of parental control systems; reservation of channels for independent broadcasters; must-carry rules for analogue terrestrial TV concessionaires, etc...).

The Decree does not only deal with cable broadcasting:

- It obliges national terrestrial TV concessionaires to present a plan to extend the coverage of DTTV in accordance with some goals set out in the Decree;
- It regulates the possible implementation of a new DTTV multiplex for mobile DTTV;
- It modifies some articles of Decree 1462/1999 which regulates the right of users to receive accurate information on the programme planning of TV broadcasters.

This obligation was set up by Act 22/1999, and was implemented at national level by Decree 1462/1999. This Decree imposed upon TV operators the obligation to provide information about their programme planning 11 days in advance. Once they communicate their programme planning, they are not allowed to change it unless there are external and objective reasons which justify it.

Some Autonomous Communities (which regulate regional and local broadcasting within their territories) approved measures which set that obligation at only three days in advance, and several Autonomous Communities did not implement this provision of the 22/1999 Act at all, thus

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Entidad publica empresarial RED.ES

rendering this obligation void for TV broadcasters within their jurisdictions.

The national Government is now reducing this obligation for anticipated communication of programme planning from eleven to three days. The Decree will enter into force one month after its publication in the Official Journal, that is, on 2 October 2006. ■

● ***Real Decreto 920/2006, de 28 de Julio, por el que se aprueba el Reglamento General de prestación del servicio de difusión de radio y televisión por cable, Boletín Oficial del Estado, n. 210, de 2 de septiembre de 2006, pp. 31532 y ss.*** **(Decree 920/2006, of 28 July 2006, on the approval of the Regulation on the provision of radio and TV broadcasting services, Official Journal n. 210, 02.09.2006, pp. 31532 and ff.), available at:**
http://merlin.obs.coe.int/redirect.php?id=10394

ES

FR – CSA Looks to the Protection of Minors

According to Articles 1 and 15 of the Act of 30 September 1986, as amended, one of the duties of the *Conseil Supérieur de l'Audiovisuel* (audiovisual regulatory body - CSA) is to guarantee the protection of children and young people in respect of programmes that are broadcast.

On 04 July 2006, as part of this mission, the CSA set up a framework for the presentation and promotion on television (apart from cinema channels and pay-per-view schemes) of cinematographic or audiovisual works and their spin-off videograms, video games and telephone and telematic services and Internet sites to which minors are not allowed access. In its recommendation, the CSA recalls that when broadcasting an excerpt or trailer for a film or video game subject to classification on the basis of age, the choice of images shown should always take account of the scheduling context, broadcasting times, and the likelihood of young people watching. Moreover, the public must always be informed clearly and intelligibly if the content is subject to classification on the basis of age, whether it is a broadcast, an advertisement or sponsorship. This Recommendation follows on from two others issued on 7 June.

Amélie Blocman
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One was intended to set a framework for programming animation and fiction works directed at minors which, by making use of characters used for separate commercial activity, could contribute to promoting the products or services that used the image of these characters, by causing confusion in the minds of young viewers between what was advertising and what was part of the programme. The Recommendation draws a distinction between two eventualities. Firstly, if the fiction or animation work has given rise to spin-off products or services, it may not be interrupted, preceded or followed by advertising on behalf of products or services that use the image of the characters involved. In the case of a work that uses characters derived from pre-existing products or services, the CSA considers that the promotional nature of this practice is tantamount to unlawful advertising, which is prohibited by the Decree of 27 March 1992. It therefore wants the first airing to take place outside the period during which the products or services in question are being launched commercially nationwide. Furthermore, the advertisements should be broadcast at least forty-five minutes before or after the work in question.

Lastly, the CSA recalled the ban on advertisements for SMS services that could exploit the credulity or inexperience of minors. There were in fact a number of advertisements during advertising slots that promoted services offering, in return for sending an SMS, an analysis of the sexual affinity of two people on the basis of their first names, the probability of becoming rich in the future, or the name of the person one was supposed to have been in a previous life, etc. Recalling the terms of Article 7 of the Decree of 27 March 1992, as amended, the CSA recommends that young people should not be exposed to advertising encouraging them to use such services, which, moreover, involve a substantial financial outlay. It therefore calls on all television services to stop broadcasting advertisements of this kind. ■

● **CSA Recommendation of 04 July 2006 on the presentation on television of cinematographic or audiovisual works, video games, telephone and telematic services, and Internet sites that may not be accessed by minors, available at:**
http://merlin.obs.coe.int/redirect.php?id=10384

● **Recommendation of 07 June 2006 to editors of television services on advertising practices in connection with the broadcasting of animated and fiction works directed at minors, available at:**
http://merlin.obs.coe.int/redirect.php?id=10385

● **Recommendation of 07 June 2006 on advertisements for SMS services that could exploit the credulity or lack of experience of minors, available at:**
http://merlin.obs.coe.int/redirect.php?id=10386

FR

FR – CSA Opinion on Draft Legislation on the Television of the Future

As the *Autorité de Régulation des Communications Électroniques et des Postes* (regulatory body for electronic communications and postal services - ARCEP) had done a few days earlier, and bolstered by the recommendations issued by the Conseil d'Etat (see IRIS 2006-7: 12), on 11 July the *Conseil Supérieur de l'Audiovisuel* (audiovisual regulatory body - CSA) issued its opinion on the Bill concerning "the modernisation of audiovisual broadcasting and

the television of the future".

While the CSA approved the main points of the Bill, it said it was "guided mainly by the observance of pluralism" and, in this respect, asked that "a balance be found so that the measures aimed at promoting the development of digital terrestrial television did not result in a strengthening of the position of the most powerful players". More particularly, concerning the schedule for phasing out analog television, the final date of which was fixed as 30 November 2011, the CSA deplored the importance of the advantages granted to the nation-wide analog channels, particularly the allocation of an additional channel to TF1, Canal + and M6 in order to encourage them to transfer to digital mode. This allocation of a "bonus channel" for the incumbent editors after analog mode has been phased out is the main stumbling block. Newcomers to digital terrestrial television have denounced this "arbitrary and biased decision that reinforces further the importance of groups that are already in an ultra-dominant position".

Another advantage granted to the nation-wide analog channels in the Bill is the five-year extension of their authorisation, which could even be extended for up to ten years if the editors of the channels subscribe further undertakings concerning national coverage and if they accept an early abrogation of the authorisation to broadcast in analog mode in certain areas.

This accumulation of possible extensions could result in pushing the expiry date for the non-charging channels' authorisations as far as 2027, i.e. beyond the expiry dates for the authorisations of other non-charging channels using digital terrestrial technology. The CSA considers that maintaining the same agreement for twenty-five years would not allow the necessary adaptation of the obligations incumbent on the channels to the evolutions taking place in their environment, and suggests that this arrangement be amended. It also approves the arrangements provided for in Article 3 of the Bill that enable it to terminate authorisations earlier than anticipated in areas where they would be needed for deploying digital terrestrial television.

With regard to "the television of the future" (high definition TV and mobile reception TV) and the method for issuing authorisations, the CSA approves the fact that the Bill does not alter the principle contained in Article 30-1 of the Act of 30 September 1986, which provides for the issue of authorisations by editor and not by distributor. It believes this approach to be the best way of ensuring pluralism in the offer of services, given the context of rarity which will continue to exist until the analog mode ceases to exist. And it welcomed the Government's choice to set aside the principle of a licence fee for the new television services (HD and mobile) in favour of an increase in the contribution to the COSIP (*Compte de Soutien à l'Industrie des Programmes* – programme industry support fund). Lastly, the CSA approves the decision to reserve, in the proportions it has determined, a share of the resources allocated to personal mobile television (Article 22) for audiovisual communication services other than television. The Bill was presented at the Cabinet meeting held on 26 July and is scheduled for discussion in Parliament in the autumn. ■

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● Opinion No. 2006-4 of 11 July 2006 on the Bill concerning the modernisation of audiovisual broadcasting and the television of the future, available at: http://merlin.obs.coe.int/redirect.php?id=10387

FR

GB – Regulator Revokes Television Service Licence

The UK broadcasting regulator, the Office of Communications (Ofcom) has revoked the television licensable content service licence of One TV, a teleshopping service. Under the Communications Act 2003, ss. 232-40, all providers of broadcasting services for reception by members of the public must have such a licence; if licence conditions are breached, Ofcom may issue a direction to take remedial action, impose financial penalties or revoke the licence. Condition 4 of the licence requires the licensee to pay Ofcom fees determined under Ofcom's tariff.

On 6 June 2006, Ofcom sent a final reminder to One TV for payment of the annual licence fee of GBP 2000 (approximately EUR 3000), and notified the company that unless the fee was paid within 14 days it would be in breach of the licence which would be revoked. No fee was paid; on 7 July 2006, Ofcom gave the company a final week to pay the fee, and reminded it that no service could be provided if the licence was revoked. Once more no fee was paid, and the licence was thus revoked for breach of condition 4.

Proceedings had also been commenced against One TV for failure to comply with a direction from the Advertising Standards Authority to which Ofcom has delegated television advertising matters. The Authority had found the company to be in breach of the Television Advertising Standards Code, and had directed it to resolve outstanding issues concerning the processing of orders and refunds and to ensure that adequate procedures were in place to meet reasonably foreseeable demands for goods, to fulfil orders within 28 days, to provide refunds promptly and to handle enquiries. The company failed to do so, and Ofcom was thus investigating whether a statutory sanction should be imposed for failure to comply with the direction. This proceeding was discontinued when the licence was revoked and One TV ceased to provide the service. ■

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● Ofcom, "One TV Licence Revocation", 22 August 2006, available at: http://merlin.obs.coe.int/redirect.php?id=10334

EN

GB – Regulator Reviews Public Service Broadcasting after Digital Switchover

Ofcom, the UK communications regulator, has issued a paper on the future of public service broadcasting (PSB) after digital switchover takes place in 2008. This supplements its earlier three-stage review of public service broadcasting (see IRIS 2004-6: 12, IRIS 2004-10: 12 and IRIS 2005-4: 10) and prepares the way for the second PSB review required by 2009 under the Communications Act 2003.

The paper notes that the British system of PSB has worked on the basis of increasing the number of PSB providers. However, the move to fragmented markets after digitalisation may mean that it is no longer realistic to expect commercial broadcasters to deliver significant PSB obligations, especially as digital take-up has been well in excess of that forecast in the earlier review. From 2014, it is proposed that broadcasters will be charged for spectrum (see IRIS 2006-8: 15). As a result of these changes, it will be necessary to "re-imagine the delivery of PSB for a post-switchover world".

The paper concentrates on three major issues related to these developments. The first is that of new media forms of PSB provision, and in particular the possible establishment of a new Public Service Publisher to compete with the BBC in creating content for delivery over a wide range of systems, including broadcasting. The second is that of the future of news; what services will be provided after switchover, and what are the implications of developing markets for ensuring plurality of news provision and/or maintaining its quality. The third issue is that of the continuing viability of Channel 4, which has played a key role in providing plurality in PSB provision since 1982. The regulator is to conduct a full financial review of the Channel. These three issues will be Ofcom's main focus, although other important issues include the potential risk to arts and children's programmes on public service channels. ■

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• Ofcom, "Digital PSB: Public Service Broadcasting Post Digital Switchover", Issues Paper, 27 July 2006, available at: http://merlin.obs.coe.int/redirect.php?id=10355

EN

GB – Cartoons not Suitable for Children if Smoking is Glamorised

A viewer has complained to the UK regulator, Ofcom, about certain scenes in cartoons featuring Tom and Jerry ("Texas Tom" and "Tennis Chumps"). In both, the issue is smoking, either to impress or to glamorise it. Rule 1.10 of Ofcom's Broadcasting Code states:

The use of illegal drugs, the abuse of drugs, smoking, solvent abuse and the misuse of alcohol:

- must not be featured in programmes made primarily for children unless there is strong editorial justification;
- must generally be avoided and in any case must not be condoned, encouraged or glamorised in other programmes broadcast before the watershed, or when children are particularly likely to be listening, unless there is editorial justification;
- must not be condoned, encouraged or glamorised in other programmes likely to be widely seen or heard by under eighteens unless there is editorial justification.

On receipt of the complaint, Turner, the licensee for the affected channel, Boomerang, conducted an internal review to determine the context of smoking scenes in the "Tom and Jerry" library. 56% of Bommerang's audience is composed of 4-14 year olds. Turner has proposed editing out all scenes in which smoking is apparently "condoned, acceptable, glamorised or where it might encourage imitation…"

Ofcom, in its adjudication, stated that it is required to have regard for those under eighteen years old and, in particular, the very young. Whilst Ofcom states that it is unaware of "…evidence from research in the UK that shows a direct correlation between children who see smoking on television with a greater propensity to take up smoking", it nonetheless accepts that there are concerns that "smoking on television may normalise smoking". Thus, pre-watershed programming should generally avoid showing such scenes, especially as, whilst when the cartoons were made, they tended to be watched by families, it is now more likely that they will be watched by children alone.

The decision is that the matter is "Resolved", given "…Turner's commitment to adopt a precautionary approach [and] its review of archive material and action taken to minimise the possibility of harm." ■

David Goldberg
deeJgee Research/Consultancy

• Ofcom Broadcast Bulletins Issue number 67, available at: http://merlin.obs.coe.int/redirect.php?id=10356

• Ofcom Broadcasting Code Protecting under 18s, available at: http://merlin.obs.coe.int/redirect.php?id=10357

EN

GR – New Law on the Protection of Privacy in Electronic Communications

On 28 June 2006, Act no. 3471/2006 for the protection of personal data and privacy in electronic communications was adopted. It implements, with significant delay, Directive 2002/58/EC and amends Act no. 2472/1997 for the protection of personal data. The new law includes provisions for the security and confidentiality of communications, as well as for the processing of personal data, including traffic and location data. It should be mentioned that even before this implementation, the Greek legal framework contained mechanisms to guard against the unlawful processing of electronic communications' data. This was achieved primarily by the aforesaid law for the protection of personal data, since the Independent Authority (i.e. the Authority for the Security and Confidentiality of Communications) declared it considered traffic and location data to fall within the definition of personal data and should therefore be protected by the laws governing privacy.

As far as the rights of subscribers are concerned, the new law adopts a number of obligations for the providers of publicly available electronic communications services, such as itemised billing, protection against unsolicited communication, presentation and restriction of calling and connected line identification, automatic call forwarding and directories of subscribers, all in conformity with the provisions of Directive 2002/58/EC. For the fulfilment of these obligations, the Greek legislator has in addition adopted provisions establishing the civil and penal responsibility of the persons involved and sets the possible pecuniary compensation at a minimum of EUR 10,000.

Furthermore, in order to solve the common conflict of the joint competency of the independent regulatory Authorities, the new law goes beyond the strict provisions of the implemented Directive and clearly sets out the field of operation of the two independent Authorities concerned, namely the Authority for the Protection of Personal Data and the Authority for the Security and Confidentiality of Communications. In this regard, further assistance will be provided after the implementation of Directive 2006/24/EC for the preservation of data, produced or processed in the provision of publicly available electronic communications services or networks, since Article 9 of the new Directive provides for each Member State to appoint one or more competent Authorities to secure the enforcement of its regulations, as far as the security of preserved data is concerned. ■

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• Act no. 3471/2006 for the protection of personal data and privacy in electronic communications.

GR

HR – Rules for Croatian Audiovisual Works

Pursuant to Section 26, para. 3 of the Electronic Media Act ("Official Gazette" No. 122/03) which refers to television quotas, the Council for Electronic Media adopted, on 30 May 2006, Rules for Croatian Audiovisual Works.

The above rules stipulate that Croatian audiovisual works are any audiovisual works originally produced in the Croatian language, or any works made for national minorities in their own languages, as well as works of Croatian cultural heritage.

Audiovisual works are only such works if they consist of a series of sequenced images which give the impression of motion, fashioned as individual intellectual creations in the domains of literature, science and art, such as films and dramas, cultural and artistic shows, light entertainment shows, documentaries, educational and other audiovisual works.

Croatian audiovisual works are works in which only the Croatian language is used in the original version, or the Croatian language is used in the major part of the original version, except in cases of justified exceptions, when, due to artistic or other reasonably justified circumstances, the Croatian language is not used or when there are no spoken parts at all.

Croatian audiovisual works are works that originate from the Republic of Croatia. Works originating from Croatia are works generally made by authors and other staff resident in the Republic of Croatia, provided that they meet the following requirements:

- the producers of those works are incorporated or registered in the Republic of Croatia,
- the particular work has been produced under the control of one or more producers from the Republic of Croatia, or
- the co-producer from Croatia makes a majority contribution in relation to the total cost of the co-production, and the co-production is not controlled by one or more producers incorporated outside Croatia.

Works originating from other countries shall also be considered as Croatian audiovisual works if they are realised in the co-production of producers incorporated and registered in the Republic of Croatia and producers incorporated and registered in one or more other countries that have executed audiovisual and similar agreements with the

Republic of Croatia, provided that the major part of such works is made by authors and other staff resident in the Republic of Croatia.

Any works not considered Croatian works, if made based on bilateral co-production agreements existing between the Republic of Croatia and other countries, shall be deemed Croatian works under the following conditions: (1) the dominant part of the total cost of production is borne by the co-producers from the Republic of Croatia and (2) the production is not under the control of one or more producers registered outside the Republic of Croatia. These works shall be deemed Croatian works in proportion to the corresponding contribution of co-producers from the Republic of Croatia to the total cost of production.

Croatian audiovisual works include cinematographic or television feature films, documentaries, animated films, commercial films or other films and other audiovisual works of recent Croatian cultural and artistic production. Croatian audiovisual works also comprise works which, based on their content, are derived from literary works, scientific facts or achievements, artistic practice or other sources providing the basis for the direct copyrighted realisation of an audiovisual work, such as original scripts or the like. ■

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● ***Zakon o elektronickim medijima*** **(Electronic Media Act), Official Gazette No. 122/03, and** ***Pravilnik o hrvatskim audiovizualnim djelima*** **(Rules for the Croatian Audiovisual Works), Official Gazette No. 66/06, available at: http://merlin.obs.coe.int/redirect.php?id=9658**

HR

HU – "Must Offer" Obligation Imposed by the Competition Council

In a decision issued on 28 August 2006 the Hungarian Competition Council (*Versenytanács*) authorised a merger involving Chellomedia Programming B.V. and Sport1 TV Műsorszolgáltató Zrt. The authorisation is subject to a "must offer" obligation.

Chellomedia Programming B. V. is an undertaking linked to Liberty Global Inc. and its affiliates provide, *inter alia,* cable programme distribution services for approximately 30.5 million households in 19 countries. There are two affiliates of Liberty Global present in the Hungarian media market:

UPC Magyarország Kft., the largest cable television company with 731,000 subscribers, and Monor Telefon Társaság Rt., distributor of the digital satellite DTH service called "UPC Direct", available to approximately 150,000 Hungarian households.

With these two companies Liberty Global has a 35% share of the Hungarian cable and satellite programme distribution market. Liberty Global is also present in the Hungarian media market as a television programme service provider via its thematic channels such as Reality TV and Romantica Channel.

Sport1 TV Zrt. is the provider of two thematic channels (Sport1, Sport2). According to the findings of the competition authority the Sport1 TV Zrt. has an approximately 70% share in the market of thematic sports channels available in the Hungarian language.

In April 2006 Chellomedia acquired control over Sport1 TV. However, under the rules of Act LVII of 1996 on the Prohibition of Unfair and Restrictive Market Practices (Competition Act) the transaction was subject to authorisation by the Competition Council.

In its related enquiry the competition authority found that the merger created a vertically integrated structure in the Hungarian media market. As a consequence of this integration Sport1 TV Zrt. might be uninterested in granting access to its programmes for enterprises who are competitors of the Liberty-affiliate UPC in the Hungarian market. Since there are a number of new broadcast distribution services, (i.e. IPTV) expected to be introduced into the Hungarian market in the foreseeable future such a restrictive policy might have negative effects in terms of competition.

As a response to this concern Chellomedia B.V. agreed to grant access to the channels of Sport1 TV to third party broadcast distributors on a non-discriminatory basis until 2010. Under this condition the Competition Council authorised the merger of Chellomedia B.V. and Sport1 Zrt. in its concluding decision.

The decision of the Competition Council is a landmark in the development of Hungarian media regulation, since this is the first legal instrument of Hungarian law that imposed a "must offer" obligation on a broadcaster. ■

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● **Decision No. Vj-61/2006/26, available at: http://merlin.obs.coe.int/redirect.php?id=10337**

HU

IE – New Defamation Bill

Ireland's current defamation law is largely common law (judge-made law), partly codified and updated in the Defamation Act 1961, which was modelled on the British Act of 1956. Successive Irish governments had promised to modernise defamation law and finally a new Bill has been

published. The Bill follows many of the recommendations made by the Law Reform Commission in 1991 and reconsidered by a Legal Advisory Group established by the Minister for Justice in 2003. Some of the provisions are essentially tidying-up measures and clarifications of uncertainties that had developed. Others involve more fundamental changes to the existing law. Among the most salient provisions of the new Bill are the introduction of a new defence of "fair and reasonable publication on a matter of public importance" along with a list of factors (in a similar way to the *Reynolds* defence in the UK) that the court "shall" take into account in determining the fairness and reasonableness of the publication (s.24); the abolition of common law offences of criminal libel and their replacement by a new offence of publication of gravely harmful statements (s.35); provision for directions to be given to the jury in assessing damages, again with a list of factors to which the court "shall" have regard in making an award of damages (s.29); and provision for alternative remedies to damages, for example declaratory orders (s.26) and correction orders (s.28). Despite its being a Defamation Bill, it includes a provision for the establishment of a Press Council and Press Ombudsman (s.43, Schedule 2). The framework for the establishment, composition, independence, role and *modus operandi* of the Council and Ombudsman are set out in the Bill and it is then to be left to the print media to set up and fund the scheme in accordance with the legislative provisions. The Bill is due to be debated in the Senate in the next parliamentary session. ■

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- **Draft Text of Defamation Bill, 5 July 2006, available at: http://merlin.obs.coe.int/redirect.php?id=10362**
- **Defamation Bill, Explanatory Memorandum, 5 July 2006, available at: http://merlin.obs.coe.int/redirect.php?id=10363**

EN

IE – New Privacy Report and Bill

In 2005, the Government decided that in tandem with new defamation legislation it would bring in new privacy legislation. To that end a working group, consisting of a senior lawyer and three civil servants, was set up in July 2005 and reported in March 2006. Its terms of reference required it to consider Articles 8 and 10 ECHR and prepare proposals on a general tort of violation of privacy, and identification of specific offensive forms of invasion of privacy. The group concluded that the arguments in favour of the introduction of a clear statutory cause of action outweighed the arguments against it. The Group drafted the heads of a Bill and the full text of a Bill was subsequently drafted and published. The Bill provides for a tort, actionable without proof of special damage, for a person wilfully and without lawful authority to violate the privacy of another person (s.2). Violation includes surveillance, disclosure of information obtained by surveillance, use of a person's name or likeness for advertising or financial gain, disclosure of a person's personal documents and harassment (s.3). Defences include lawful defence of person or property, conduct authorised by law or by a court, conduct by a public servant acting in the course of his or her duties, installation in good faith of closed circuit television or other surveillance system, newsgathering for a newspaper or broadcasting (s.5). Various circumstances in which disclosure would not amount to a violation are also set out, for example disclosure made in good faith or for the public benefit (s.6). Among the remedies envisaged are injunctions, damages and delivery up of documents (s.8). Provision is made also for actions to be heard otherwise than in public (s.13). ■

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- **Draft Text of Privacy Bill, 5 July 2006, available at: http://merlin.obs.coe.int/redirect.php?id=10365**
- **Privacy Bill, Explanatory Memorandum, 5 July 2006, available at: http://merlin.obs.coe.int/redirect.php?id=10366**
- **Report of Working Group on Privacy, 31 March 2006, available at: http://merlin.obs.coe.int/redirect.php?id=10367**

EN

IE – New Draft Television Advertising Code

At the beginning of August 2006, the Broadcasting Commission of Ireland (BCI) launched the second phase of a two-phase consultation process in relation to its new general code on television advertising. The BCI is required by section 19 of the Broadcasting Act 2001 (see IRIS 2001-4: 9) to provide advertising and other codes. The current code of advertising dates from 1995 and was amended slightly in 1999 to give effect to certain changes contained in the Television without Frontiers Directive. Phase 2 of the consultation process involves commenting on the draft code. The draft code modernises the existing code by including, for example, definitions (s.2) and rules regarding product placement (s.3.3.9), virtual advertising, interactive advertising and split-

screen advertising (s.5). The underlying requirement is that all "commercial communication" (which is also defined) be legal, honest, decent and truthful, that it be prepared with a sense of responsibility to citizen/consumers and to society and that it not prejudice their interests (s.3.1). It must not prejudice human dignity, cause harm or serious or widespread offence (s.3.2), must be identifiable and separate from programme content and not affect the editorial integrity and value of programming (s.3.3, s.4). As in the existing code, surreptitious and subliminal advertising are prohibited (s.4.9, 4.10). So, too, is product placement, except where it is incidental or is included in programmes acquired outside of Ireland or in films made for cinema, provided that no broadcaster regulated in the State and involved in the broadcast of that programme or film directly benefits from it (s.3.3.9). Factual descriptions of betting services are permitted provided they do not encourage people to bet (s.8.7), while advertisements for premium rate telecommunications services must clearly state all charges involved in terms that do not mislead (s.8.8). The ban on product placement in particular has given rise to some disquiet in light of the proposal of the European Commission to permit it in the revised Television without Frontiers Directive. ■

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- **Text of the draft code and of the consultation document, 28 July 2006, available at:**
http://merlin.obs.coe.int/redirect.php?id=10364

EN

IE – Draft Code of Programme Standards

At the beginning of September 2006, the Broadcasting Commission of Ireland (BCI) launched the third and final phase of the consultation process in the development of a new code of programme standards, as provided for by section 19 of the Broadcasting Act 2001 (see IRIS 2001-4: 9). The draft code includes provision for audience information and guidance by issuing prior warnings for programme material which has the potential to offend, by using the watershed or by implementing an evaluative or descriptive classification system (s.2.2). There are special provisions for the protection of children, for whom "broadcasters share a responsibility with parents". Children for the purposes of the code are those under 18 and particular care must be taken in relation to children's programming (s.3.6) but also to the scheduling of programmes either side of programmes that children are likely to watch, as well as during school-run times and school holidays (s.2.4). Regard must be had to the appropriateness or justification for the inclusion of violence in programmes generally and greater justification is required for graphic violence, sexual violence, self-harm including suicide and violence against children (s.3.1). Other provisions relate to the inclusion of sexual conduct (s.3.2), the portrayal of persons and groups in society (s.3.4), the portrayal of drugs, alcohol and solvent abuse (s.3.7) and standards for factual programming, i.e. news, current affairs and documentaries. ■

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- **Text of the draft code and of the consultation document, 5 September 2006, available at:**
http://merlin.obs.coe.int/redirect.php?id=10358

EN

IE – New Guidelines for Media on Covering Suicide

On 20 June 2006, new guidelines for the media on covering suicide were issued by the National Office of Suicide Prevention, which is part of the Health Service Executive. Drawn up by experts in the field and support groups such as the Samaritans and the Irish Association of Suicidology, the guidelines aim to promote responsible coverage of suicide and to reduce the risk of "copycat" deaths, estimated in Ireland as 6% of all suicides. The key provisions are designed to prevent glamorising or sensationalising suicide, to ensure, in the words of the Minister of State for Mental Health, "that public discussion and media coverage of suicide and deliberate self-harm remains measured, well-informed and sensitive to the needs and well-being of psychologically vulnerable and distressed individuals in our society". The provisions of the guidelines urge the media to avoid including explicit technical details of suicide; to educate the public by challenging common myths about suicide; to remember the effect on survivors of suicide; to avoid simplistic explanations and help the public to understand the complexities, listing appropriate sources of help or support at the end of an article or programme on the subject. The Guidelines were launched simultaneously in Northern Ireland. ■

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- **Media Guidelines for the Portrayal of Suicide, available at:**
http://merlin.obs.coe.int/redirect.php?id=10360
- **Minister's speech at the launch of the guidelines, available at:**
http://merlin.obs.coe.int/redirect.php?id=10361

EN

LT – New Version of the Act on Provision of Information to the Public into Force

On 11 July 2006 the Lithuanian Parliament (*Seimas*) adopted a new version of the Act on Provision of Information to the Public, which came into force on 1 September 2006. The Act was first adopted in 1996.

The new version of the Act provides for the following new elements: announcements, information society media means, information society service, information regarding pornographic content, information regarding erotic content, information regarding violent content, news broadcasts.

The confidentiality of information sources was finally regulated by this Act. In Lithuania there were a lot of debates regarding this provision for a long time. At present, according to Art. 8 of the Act, producers, disseminators of public information and journalists have the right to keep the confidentiality of the source of information and not to disclose it, except in cases where the source of information is required to be disclosed by a decision of the court for particularly important public interests, and also in order to ensure that the constitutional rights and freedoms of a person are protected and that justice is administered.

Some other terms, such as opinion, radio, television programme, teleshopping windows, private life, etc. are specified and adapted to those of the Civil Code of Lithuania.

The Act partially changed the licensing rules of broadcasting and re-broadcasting activities. Currently, a person who wishes to engage in television programme broadcasting and/or re-broadcasting by electronic communications networks, the main purpose of which is not meant for broadcasting and/or re-broadcasting of radio and television programmes (e.g., by internet, mobile phones), has to obtain a broadcasting licence from the Lithuanian Radio and Television Commission (RTCL).

In accordance with the new version of the Act the broadcasting of radio programmes by electronic communications networks, the main purpose of which is not meant for broadcasting and/or re-broadcasting of radio and television programmes, as well as the broadcasting activity of natural persons, which is performed for non-commercial purposes by electronic communications networks, the main purpose of which is not broadcasting and/or re-broadcasting of radio and television programmes, shall not be licensed.

The Act also modified the method of establishing the licence fee. According to the former Act, the RTCL could determine the licence fee itself. Under the new Act the licence fee will be set together with the Ministry of Culture. This licence fee shall be designated for supporting audiovisual projects, as before.

Additionally, there were some amendments in the Act, which are related to the language of broadcast and re-broadcast programmes. The Act forbids the broadcasting of audiovisual works that were translated from an official EU language into a non-EU language. Re-broadcasters shall give priority to programmes in the official EU languages.

Under this Act the competence of the RTCL, which regulates and controls the activities of radio and television broadcasters and re-broadcasters, was expanded. The Act enabled the RTCL in certain cases to suspend the free re-broadcasting of radio and television programmes of foreign origin in the territory of the Republic of Lithuania. From now on the RTCL will also have the right to evaluate public information and, thus, to decide which information might have detrimental effects on the development of minors and to apply fines for infringements.

In addition, the Law expanded the competence of the RTCL in the field of the control of advertising. Now, the RTCL is authorised to control surreptitious advertising in radio and television programmes. Previously, the National Consumer Rights Protection Board had executed this function. ■

Jurgita Iešmantaitė
Radio and Television Commission of Lithuania

● **Act on Provision of Information to the Public, available at: http://merlin.obs.coe.int/redirect.php?id=10336**

LT

LV – EU Twinning Project Successfully Concluded

At the end of a six-month EU twinning project, funded to the tune of EUR 90,000 by the European Commission with the purpose of improving the supervision of broadcasting in Latvia, representatives of the *Nacionālā Radio un Televīzijas Padome* (National Broadcasting Council – NRTP) and its German partner, the *Landesanstalt für Kommunikation Baden-Württemberg* (Baden-Württemberg Communications Authority - LFK), discussed their interpretation of the legal framework with representatives of Latvian broadcasting in Riga on 22 August 2006.

The interpretation guidelines concern the protection of minors, general programming rules and human dignity, journalistic and ethical principles, European audiovisual works, advertising, teleshopping and sponsorship. The numerous broadcasting representatives present were given until 5 September 2006 to submit in writing their opinions on the draft guidelines.

The hearing was held in order to promote transparency and open exchange between regulators and broadcasters as part of a modern, co-operative administrative structure, so that future infringements may be prevented.

The interpretation guidelines are the centrepiece of the EU project, in which the *NRTP* and the *LFK*, as well as basic principles of broadcasting law, also developed concepts for programme evaluation and for the technical infrastructure required in order to implement legal provisions governing the supervision of broadcasting.

The *NRTP* monitors the programmes of two public service and 25 private TV channels, five public service and 30 private radio stations, as well as cable television and radio channels and one satellite radio station.

The legal framework is laid down in the Radio and Television Act of 8 September 1995, most recently amended on 16 December 2004 (see IRIS 2005-1: Extra), which transposes the provisions of the EC Television Without Frontiers Directive. In this respect, the project partners were able to refer to the extensive and detailed guidelines and comments on German broadcasting law. The criteria for interpreting the rules on fulfilling European quotas were of particular interest.

A round-table discussion provided a significant forum for the consideration of problematic Internet content and the need and potential for regulations extending beyond traditional broadcasting. ■

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MD – Audiovisual Code Adopted

On 27 July 2006 the Moldovan parliament adopted the *Codul Audiovizualului al Republicii Moldova*, No. 260-XVI (Audiovisual Code of the Republic of Moldova).

The Code replaces the earlier statutes "On Television and Radio" (of 3 October 1995) and "On Public National TV and Radio Organization Teleradio-Moldova" (of 26 July 2002) (see IRIS 2003-6: 10).

The Code regulates the activities of the Coordinating Council of the Audiovisual (regulatory authority - CCA), the national public broadcaster TeleRadio-Moldova and also orders the transformation of the existing local public TV and radio stations into "bureaux" of the national public broadcaster.

The Code consists of nine chapters dealing with both the general system of regulation of broadcasting, including advertising and sponsorship, and specifically that of the public broadcaster.

The Code establishes a regime giving preferable treatment to "European audiovisual works", or programmes produced in Moldova, EU Member States and/or parties to the European Convention on Transfrontier Television (ECTT) and a regime of language quotas in broadcasting (by 2010 european works must reach 80 % of airtime and 80 % of daily broadcasts must be in Moldovan). The Code establishes a general list of designated events which it considers to be of major importance for society.

The Coordinating Council of the Audiovisual consists of nine members appointed by the parliament from among candidates proposed by two parliamentary committees. Their term shall be for 6 years. The Council shall be funded from the national budget, license fees, special taxes on broadcasters and grants. Its functions include licensing and control over compliance with the law in public and private broadcasting.

Overseeing of the activities of the public broadcaster Teleradio-Moldova shall be executed by a brand new body - Supervisory Council, which is elected for 4 years by the Parliament from among the candidates selected by the Coordinating Council after a public competition. It gives approval to the candidates of the Chairman of the Teleradio-Moldova, as well as to directors of radio and television.

Licenses for private broadcasters shall be for 7 years for TV or radio programmes, and 6 years for cable TV and wired radio. ■

Andrei Richter
Media Law and Policy Centre, Moscow

- ***Codul Audiovizualului al Republicii Moldova*, No. 260-XVI (Audiovisual Code of the Republic of Moldova), *Monitorul Oficial* (N 131-133) of 11 August 2006, available in Russian at:**
http://merlin.obs.coe.int/redirect.php?id=10330

RU

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http://merlin.obs.coe.int/redirect.php?id=10333

EN

NL – Dutch Court Allows Media Bugging by Intelligence Service in Special Circumstances

In January 2006, reporters of the Dutch daily newspaper *De Telegraaf* received confidential information from an anonymous source about a drugs dealer. This information was leaked by a Dutch intelligence service (AIVD) insider to the underworld. Prior to publishing the story, the reporters informed the AIVD about the leak. Subsequently, the AIVD decided to spy on the reporters by tapping their phones and internet connections.

In the court case that followed, *De Telegraaf* asked the judge to order the State to cease the tapping and to delete every record and every copy concerning the reporters. The court of first instance ruled that the government had no right to spy on the journalists and ordered the AIVD to stop the tapping. The Minister of Internal Affairs challenged the ruling stating that journalists must not break the law in the

course of their professional activities and are not shielded from investigation by the AIVD.

On 31 August 2006, the Court of Appeal in the Hague overruled part of the decision of the lower court. It stated that under certain circumstances the AIVD is allowed to use its powers not only on individuals who are labelled as targets, but also on those that have a connection to these targets. The judges acknowledged that spying on someone infringes the right to privacy (Art. 8 ECHR) and freedom of speech (Art. 10 ECHR), but said that this is allowed when this infringement is based on law and necessary in a democratic society, provided the principles of subsidiarity and proportionality are observed. The Court is of the opinion that the infringement by the AIVD of Article 10 of the European Convention on Human Rights is justified because the leak concerned national security and therefore important interests of the State.

Not long after the tapping began, the AIVD traced the identity of another person who could be linked to the leaks. According to the Court of Appeal, the principles of proportionality and subsidiarity demand that from that point on the AIVD should have stopped using its powers in regard to the journalists. Instead, it should have turned its full attention to this newly identified person.

Because the Court considered that it could not judge which data was obtained in an unlawful manner and would thus have to be destroyed, it ruled a special Commission, created by law, must make those judgments. As long as the Commission has not decided about the legality of the data, the Court has explicitly prohibited the use of it by the AIVD for purposes of further investigation. ■

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● ***Gerechtshof 's-Gravenhage*, 31 August 2006, *Staat der Nederlanden vs. De Telegraaf* (Dutch State v. De Telegraaf) *c.s., LJ number AY7004*, available at: http://merlin.obs.coe.int/redirect.php?id=10368**

NL

NL – Recommendations to Level the Dutch Commercial Television Playing Field

In May 2006, the Dutch Media Authority published its report on the regulation of the Dutch commercial television market. In this report, the Media Authority analyses the current highly competitive commercial television market and concludes that there is no level playing field as not all competitors are judged by the same standards. The reason for this is that one of the three competitors, RTL Nederland, operates under a Luxembourg broadcasting licence and as such falls under the jurisdiction of the Grand Duchy of Luxembourg, whereas the others are subject to Dutch regulation.

Even though both the Netherlands and Luxembourg have implemented the Television without Frontiers Directive, the Dutch authorities have set stricter rules with regards to some areas. This has led to a situation in which RTL, which exclusively targets the Dutch audience, can evade some of the obligations that are imposed on the Dutch competitors SBS and Talpa. An example of this is that RTL is not bound by the quota rules for Dutch-language programmes. Another important consequence of this difference in jurisdiction is that RTL has more options when it comes to advertising. Unlike the others, it can offer advertisers slogans on billboards within its programmes and can show more commercials during films. This gives RTL an economic advantage over its competitors.

In an attempt to level the playing field, the Media Authority recommends the inclusion of a number of provisions to ease the constraints in the Media Act for commercial broadcasters. By removing the stricter regulations on some points, the Act will reach the minimum standards of the Directive and will consequently be more like the system in Luxembourg. However, the Media Authority realises that adjusting the media legislation will not remove the differences in interpreting this legislation. Therefore, the Media Authority stresses the importance of revising the criteria relating to jurisdiction in the forthcoming revision of the Directive. As this problem exists in more than thirteen European countries, the Media Authority states that: "the European legislator could possibly see the necessity of adjusting the jurisdiction criteria now that it [is] increasingly clear that the matter at hand is not an isolated issue in Europe". ■

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● **Report of the *Commissariaat van de Media* (Dutch Media Authority), available at: http://merlin.obs.coe.int/redirect.php?id=10369**

NL

RO – CNA Proposes Improvements to Romanian Audiovisual Act

The *Consiliul Național al Audiovizualului* (regulatory authority for the electronic media in Romania – CNA) has submitted to the lower house of the Romanian Parliament a proposal to amend the current Audiovisual Act (*Legea audiovizualului Nr. 504 din 11 iulie 2002*). One of the key changes suggested by the CNA is an increase in the penalties laid down in the current Act, which range from ROL 50 to 500 million (RON 500 to 5,000), to penalties ranging from ROL 500 million to 1 billion (RON 5,000 to 100,000). EUR 1 is

currently worth RON 3.5.

According to Art. 90 of Act No. 504, these fines are imposed if, for example, cinema productions are broadcast outside the time periods agreed with the copyright owners, if subliminal techniques are used in TV advertising and teleshopping, if TV companies use frequencies other than those mentioned in their broadcasting licence, if the technical parameters laid down in such licences are breached, or if legal provisions on the right of reply are ignored.

The CNA is proposing that the current penalties of ROL 25 to 250 million be increased to between RON 100 and 500 million. These fines are currently imposed under Art. 91 of Act No. 504 for breaches of standards and rules laid down by the CNA or the *Autoritatea Naţională de Reglementare în Comunicaţii* (national regulatory authority for communication), if such infringements continue to be committed after warnings have been issued and deadlines set for broadcasters to comply.

The CNA believes the fines should be increased because the current level of fines is disproportionate to the advertising revenue of TV companies and to the fines imposed within the European Union. Another amendment proposed by the CNA concerns the possibility of punishing broadcasters by interrupting their transmissions. At present, such interruptions must last either 10 minutes or, in more serious cases, three hours. The CNA is suggesting that it should be able to vary within these two limits the duration of programme interruptions it imposes, taking into account its own evaluation and any preceding sanctions.

The CNA's proposals also include some amendments that broadcasters will welcome. For example, it is suggesting that current restrictions in the development of niche programmes, the digitisation process and satellite broadcasting be lifted. Whereas the current Audiovisual Act No. 504 provides that a natural person may hold a maximum of two similar licences for the same region without the possibility of holding exclusivity rights, the CNA is proposing that natural persons should in future be allowed to hold two national terrestrial radio licences, two national terrestrial television licences, one national digital radio licence (using the T-DAB system), one national digital television licence (using the DVB-T system) and two radio and/or television licences in the same region. Furthermore, in order to liberalise the market, the amount of share capital in an audiovisual communication company that a natural or legal person may own may be increased from 20% to 40%. The CNA's proposals also concern audiovisual regulations during election campaigns. The CNA is hoping to obtain the support of the Ministry for Culture and the Arts (*Ministerul Culturii şi Cultelor,* MCC), the Romanian Audiovisual Communications Association (*Asociaţia Română de Comunicaţii Audiovizuale,* ARCA) and various organisations from civil society in order to push through the amendment in Parliament this autumn. ■

Mariana Stoican
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TR – Classification System in Turkish Televisions

The Turkish Radio-Television Authority, RTÜK, initiated an "Intelligent Signs" (Akıllı İşaretler) system to protect children against the harmful effects of TV broadcasting in Turkey. A pursuant directive shall be designed after a certain test stage.

The aim of RTÜK is to develop a sign system "to protect children and youth against harmful media content which may contain bad language; stimulate smoking, alcohol and gambling; suicide; or negative behaviour".

The system is based on seven symbols: Four of them show the suitability of programmes according to different age groups (7+, 13+, 18+, or general audience) and three symbols describe certain types of harmful content (violence/horror, sex or negative behaviour). An evaluated television programme may contain symbols from both categories. The signs were determined by Commissions which work under the umbrella of RTÜK. Members of these Commissions were experts and scholars from university departments such as communication, psychology, and children's mental health.

As a consequence of the classification of programmes, those with a 13+ symbol shall be broadcast after 21.30 hours, those with an 18+ symbol after 23.00 hours.

Except in the case of news programmes, these symbols shall be shown for 5 seconds on full screen at the beginning of programmes.

Coders, who are graduates employed by the media institutions, decide on the application of these symbols after filling in a form designed by RTÜK. However, RTÜK, which provided training programmes to coders, controls the application and may make adjustments. In practice, for the filing an online-form is used available at the RTÜK's website giving access by pin numbers.

The approach of the system is contentious. Firstly, some question the objectivity of coders. Others complain that the broadcasters have to transfer their prime time programmes to a slot after 23.00 hours because of the classification system.

The actual policy will be determined after a negotiation process between broadcasters and RTÜK. ■

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OF THE EUROPEAN AUDIOVISUAL OBSERVATORY

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The Position of Broadcasters and Other Media under the proposed "Rome II" Regulation

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