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IRIS LEGAL OBSERVATIONS OF THE EUROPEAN AUDIOVISUAL OBSERVATORY

INTERNATIONAL

COUNCIL OF EUROPE

European Court of Human Rights: Case of Lionarakis v. Greece

In 1999 Nikitas Lionarakis, the presenter and co-ordinator of a radio programme broadcast live by the Hellenic Broadcasting Corporation ERT, invited the journalist E.V. to debate various aspects of Greek foreign policy. During the broadcast, E.V. raised the subject of "the Öcalan case". He referred to the fact that Öcalan, the ex-leader of the PKK who was prosecuted by the Turkish authorities for terrorism, had been helped by certain persons in Greece to illegally enter the country and to escape to Kenya. E.V. referred to F.K., a lawyer who had stood as a candidate in past legislative and European elections and who had been actively involved in the Öcalan case, being a contact for Öcalan after he escaped to Kenya. F.K. also had given several interviews in the press after Öcalan had been arrested by the Turkish authorities. According to the interviewed journalist, F.K. was, along with several others, to be considered as belonging to a "para-state", belonging to a network of "vociferous criminals of the press" and being "neurotic pseudo-patriots". In June 1999 F.K. brought an action for damages alleging insult and defamation by Lionarakis, ERT and E.V. The domestic courts found against Lionarakis and ordered him to pay EUR 161,408 for the damage sustained, an amount that was, after a settlement reached with F.K. in the domestic courts, reduced to EUR 41,067.48.

Lionarakis complained under Article 10 of a violation of his right to freedom of expression, arguing that he should not be held liable for remarks made by a third party during a radio programme of a political nature. The Court held unanimously that there had been a violation of Article 10 of the Convention, particularly when taking into account the fact that the insulting or defamatory statements were to be considered as value judgments, which had some factual basis. According to the Court, the domestic courts

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had failed to make a distinction between allegations of facts and value judgments. The Court also underlined the fact that these value judgments had been expressed orally, during a political type programme being broadcast live, while the programme also had a format that invited the participants to a free exchange of opinions. The Court considered, in particular, that the journalist and coordinator could not be held liable in the same way as the person who had made remarks that were possibly controversial, insulting or defamatory. It reiterated that requiring that journalists distance themselves systematically and formally from the content of a statement that might defame or harm a third party is not reconcilable with the press's role of providing information on current events, opinions and ideas. Finally, the Court referred to the fact that F.K. was not a "simple private" person, but a contemporary public figure and that the amount of damages the journalist was compelled to pay as compensation was rather arbitrary and possibly too high. As the interference in the freedom of expression of Lionarakis had not sufficiently and pertinently been justified by the Greek authorities, the Court concluded that the inference was not necessary in a democratic society and amounted to a violation of Article 10 of the Convention. The Court also found a violation of Article 6 § 1 in this case (right to a fair hearing), as Lionarakis had been denied the right of access to the Court of Cassation. ■

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• **Judgment by the European Court of Human Rights (First Section), case of Lionarakis v. Greece, Application no. 1131/05 of 5 July 2007, available at: http://merlin.obs.coe.int/redirect.php?id=9237**

FR

EUROPEAN UNION

Court of Justice of the European Communities: Public Broadcasters Considered as "Public Contracting Authorities"

If a broadcaster is financed indirectly through licence fees that have to be paid by the owners of receiving devices, it is considered to be "financed by the State" within the meaning of Art. 1(b) para. 2 of Council Directive 92/50/EC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (identical to Art. 1 para. 9 of the follow-up Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts). This opinion was expressed by the Advocate General in his conclusions submitted on 6 September 2007 following the request for a preliminary ruling filed by the *Oberlandesgericht Düsseldorf* (Düsseldorf Court of Appeal – OLG).

The key question was whether public broadcasters in Germany should be considered as "public contracting authorities" within the meaning of the EC public procurement directives and whether they are therefore obliged to carry out tendering procedures when awarding contracts.

The appellants in the original proceedings before the OLG were the regional broadcasting authorities represented by the *Arbeitsgemeinschaft der Rundfunkanstalten Deutschlands* (association of German broadcasting authorities - ARD), *Zweites Deutsches Fernsehen* (ZDF) and Deutschlandradio. Following an application by a cleaning company, the public procurement office of the Cologne regional government had decided that the joint *Gebühreneinzugszentrale* (fee collection office - GEZ) of the regional broadcasting authorities was a "public contracting authority" within the meaning of Art. 98 no. 2 of the *Gesetz gegen Wettbewerbsbeschränkungen* (Restraints of Trade Act - GWB). The public procurement office had, therefore, urged the GEZ to comply with the provisions of public procurement law (particularly by organising a Europe wide tendering procedure). The GEZ, which does not have its own legal personality, is a joint institution of the regional broadcasting authorities, Deutschlandradio and ZDF. It acts on the broadcasters' behalf as the official collector of licence fees.

The Advocate General decided that the public broadcasters were "financed, for the most part, by the State" within the meaning of Art. 1(b) para. 2 of Directive 92/50/EC. In response to the first and second questions referred, he stated that the fee had been introduced through public law instruments – the *Staatsvertrag über die Regelung des Rundfunkgebührenwesens* (Inter-State Agreement on Broadcasting Fees) and the *Rundfunkfinanzierungsstaatsvertrag* (Inter-State Agreement on the Financing of Broadcasting) – and anyone who owned a receiving device was obliged to pay. The fee was therefore tantamount to a tax; the funds levied by the GEZ were of a public law nature. Furthermore, the Advocate General explained that, in order to be categorised under Art. 1(b) para. 2, broadcasters did not need to meet any other criteria, such as a direct State influence on the awarding of contracts. No such requirement was laid down in the Directive. In addition, it made no difference whether the State collected the fees directly and then passed them on or whether it authorised another body to do so. Finally, the Court had already recognised the possibility of indirect State control in relation to another alternative to Art. 1(b) para. 2. The Advocate General rejected the broadcasters' argument that public funding only occurred when no specific service was provided in return (in this case, the right to receive programmes).

The income was not of a private law nature and there was no normal business relationship. He added that the public aspect of the subsidy was heightened by the fact that the generation of the funds did not depend on market conditions and therefore gave the broadcasters a degree of protection. Since income from licence fees represented the vast majority of the broadcasters' revenue, they were deemed to be "financed, for the most part, by the State".

Finally, responding to the third question referred, the Advocate General concluded that only the services listed in Art. 1(a) of the Directive (such as the acquisition, development, production or co-production of programme material by broadcasters and the broadcasting of programmes) were excluded from the scope of the Directive. ■

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• Conclusions in the case C-337/06 of 6 September 2007, available at:
http://merlin.obs.coe.int/redirect.php?id=10918 (FR)
http://merlin.obs.coe.int/redirect.php?id=10917 (DE)

FR-DE-ES-IT-NL-PT-FI-SV

Court of Justice of the European Communities: No Obligation to Pass On Traffic Data to Private Entities for Civil Court Proceedings Against Copyright Infringements

In her conclusions in case C-275/06, the Advocate General proposed that the Court of Justice of the European Communities (ECJ) should declare a Spanish law prohibiting the communication of traffic data to private entities, for civil court proceedings against copyright infringements, to be compatible with Community law.

The complainant in the original case is *Productores de Música de España* (Promusicae), a not-for-profit association of producers and publishers of musical and audiovisual recordings. It had instigated court proceedings against *Telefónica de España SAU* (Telefónica) in order to obtain from the company the names and addresses of certain Internet users. According to Promusicae, the users, who were identified from the IP addresses they had been using at the time, had infringed its members' copyright and licensing rights by swapping music files via so-called file-sharing networks. However, Telefónica refused to meet the request, citing Art. 12 of the *Ley de Servicios de la Sociedad de la Información y de Comercio Electrónico* (Act on information society services and e-commerce). The Act stated that the requested information only needed to be disclosed as part of a criminal investigation, or for the protection of public or national security.

The referring court believes that this interpretation of the law may be correct, but believes that the Spanish law violates Community law in this case. In particular, it claims that the Spanish law may be incompatible with Art. 15 paras. 2 and 18 of Directive 2000/31/EC on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (E-Commerce Directive), Art. 8 paras. 1 and 2 of Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society (Copyright Directive) and Art. 8 of Directive 2004/48/EC on the enforcement of intellectual property rights. These provisions state that, in certain circumstances, particularly where breaches of the law are suspected, information on the identification of individuals must be disclosed.

The Advocate General begins by noting that none of the three Directives that could give rise to such an obligation affect data protection provisions. This is clear from Art. 1 para. 5(b) of the E-Commerce Directive, Art. 9 of the Copyright Directive and Art. 2 para. 3(a) of Directive 2004/48/EC. It is therefore necessary to find a reasonable balance between the objectives of these Directives and data protection rules.

The Advocate General concludes that the communication of personal data to a third party represents an intrusion on the basic right to privacy enshrined in Art. 8 of the European Convention on Human Rights (ECHR). Directives 95/46/EC (Data Protection Directive) and 2002/58/EC (Directive on privacy and electronic communications) broaden the circle of parties bound by data protection rules and oblige private entities – such as Telefónica – to respect their provisions. Art. 5 para. 1 and Art. 6 para. 1 of the Directive on privacy and electronic communications prohibit the storage of traffic data. The only relevant exemptions under Art. 15 para. 1 of the Directive on privacy and electronic communications in conjunction with Art. 13 para. (c) (public security) and 1(d) (prevention, investigation, detection and prosecution of criminal offences) of the Data Protection Directive only provide for personal data to be passed on to State bodies, not to private entities. In the current case, however, the information requested did not even need to be communicated to State bodies because the conditions for such exemptions had not been met. Under Spanish law, copyright infringements were only punishable if they were carried out in order to make a profit. However, no grounds had been presented to suggest this was the case. The Advocate General was also unable to identify a risk to public security. It was even debatable whether file-sharing actually damaged the music industry at all. She thought that this decision should be left to the legislative body, which had never previously placed the interests of copyright protection above those of data protection at Community level. ■

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• Conclusions of the Advocate General in the case C-275/06 of 18 July 2007, available at:
http://merlin.obs.coe.int/redirect.php?id=10928 (FR)
http://merlin.obs.coe.int/redirect.php?id=10927 (DE)

ES-DA-DE-DE-FR-EE-IT-PT-SI-FI-SV

Court of First Instance: Microsoft vs European Commission

On September 17, the Court of First Instance (CFI) issued its judgment in the antitrust case of Microsoft Corporation vs Commission of the European Communities.

The CFI essentially confirmed the Commission's 2004 Decision (see IRIS 2004-5: 4), in which it found that Microsoft had abused a dominant position (1) in the market for Workgroup Server Operating Systems, by refusing to supply interoperability information to competitors, and (2) in the market for Client PC Operating Systems, by tying the Windows operating system with Windows Media Player functionality. However, it annulled article 7 of that Decision, which provided for an independent trustee to monitor compliance with the Decision.

The first abuse concerned a refusal to supply interoperability information for Microsoft's Workgroup Server Operating Systems to its competitor Sun and others. This is widely regarded as the most important aspect of the ruling, as it affects the circumstances under which a dominant firm may be required to share intellectual property with competitors. Due to the refusal to supply interoperability information, and because interoperability with the dominant Microsoft-standard was a key feature for workgroup server products, Sun was unable to create competing products and risked being eliminated from that market. Consequently, innovation was impeded to the prejudice of consumers. Furthermore, there was no objective justification for the refusal. The court confirmed the applicability of the four-factor test developed by the Court of Justice (ECJ) in the cases of Magill and IMS Health, although it interpreted one of these factors – namely, the requirement that it can be shown that the emergence of a new product can be prevented – more broadly than in previous case law. Thus, the CFI upheld the Commission's order to have Microsoft supply the interoperability information to its competitors.

The second abuse of a dominant position related to the tying of Windows Media Player functionality with the Windows Operating System. The Commission had found, and the CFI confirmed this, that the operating system and the media player constituted two different products and that the tying product (the operating system) was not offered without the tied product (the media player). The combination risked eliminating competition, with Windows Media Player eventually emerging as the only platform for digital content. This could give Microsoft significant control over digital content distribution in general. Thus, the Commission's order to have Microsoft offer a version of Windows without Media Player, named Windows XPn, was upheld.

Microsoft can claim only a minor victory in this case. Article 7 of the original Decision required Microsoft to submit a proposal for an independent monitoring trustee who should have access to Microsoft's documents, employees, premises and source code independently of the Commission. The trustee's duties entailed more than a mere obligation to report on Microsoft's behaviour. The CFI held that, as the authority responsible for compliance with the Communities' competition laws, the Commission could not delegate these powers to an independent third party. Moreover, it could not order Microsoft to bear the costs of the trustee.

Although the CFI's ruling may still be appealed before the Communities' highest court, the Court of Justice, it is nonetheless regarded as a landmark judgment. For one, the CFI's extensive analysis of the facts of this case is final and will not be reviewed by the Court of Justice. Moreover, whereas Microsoft had originally indicated its intention to appeal any negative ruling by the CFI, their language was more nuanced about this point in a press conference following the CFI's ruling. ■

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• **Judgment of the Court of First Instance, T-201/04, Microsoft Corp. v. Commission of the European Communities, 17 September 2007, available at: http://merlin.obs.coe.int/redirect.php?id=10943**

EN-FR

European Commission: Media Related Aspects in the White Paper on Sport

The White Paper on sport opens with the following statement: "Sport is a growing social and economic phenomenon which makes an important contribution to the European Union's strategic objectives of solidarity and prosperity". The document is described by the European Commission as its first attempt to address sport related issues in a comprehensive manner. It asserts the "threats and challenges" which have emerged in European society (commercial pressure, exploitation of young players, doping, racism, violence, corruption and money laundering) have served as catalysts for this initiative. The Paper focuses on the societal role of sport, its economic dimension and its organisation in Europe. Media related aspects of sport are also discussed. The Commission cites television in particular when it observes that "the relationship between the sport sector and sport media have become crucial as television rights are the primary source of income for professional sport in Europe" and points

out that "conversely, sport media rights are a decisive source of content for many media operators".

The Commission sees sport as a driving force behind the emergence of new media and interactive television services and states it is bent on continuing to support the right to information and wide access for citizens to broadcasts of sport events as they are events of major importance to society. The section on media related aspects of sport closes with a suggestion as to the practice of selling sport media rights collectively through a sport association on behalf of individual clubs (rather than clubs offering the rights individually): although competition-sensitive, joint selling of media rights has been condoned by the Commission because it can be important for the redistribution of income. Such a practice can be a mechanism to achieve solidarity within sports. It is precisely this solidarity that should be sought and maintained.

The Commission recommends that sports organisations, whether they opt for joint selling of sports media rights or whether a system of individual selling by clubs is retained, take steps to incorporate solidarity mechanisms which allow a fair redistribution of income between clubs (including the smallest ones), and between professional and amateur sport. ■

Mara Rossini
Institute for Information Law (IViR), University of Amsterdam

• **White Paper on sport, 11 July 2007, COM(2007) 391 final, available at: http://merlin.obs.coe.int/redirect.php?id=10940**

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

European Commission: Prolongation of Belgium's Tax Shelter Approved

On 16 July 2007, the European Commission decided to approve the prolongation of Belgium's tax incentive scheme for audiovisual productions (known as the 'tax shelter') until 31 December 2009. The Commission's previous authorisation was due to expire on 30 June 2007.

Before this decision, the Commission had already reviewed the Belgian tax shelter twice. In 2003, it declared this scheme compatible with Article 87(3)d of the EC Treaty until 31 December 2004. On 30 June 2004, this authorisation was extended for a further three years.

Introduced in 2002, the tax shelter aims at supporting audiovisual productions in Belgium (see IRIS 2004-10: 5). The scheme allows resident firms and Belgian subsidiaries of non-resident companies to exempt part of their taxable profits through investments in approved Belgian audiovisual productions. Companies can thus deduct 150% of the amount invested, subject to the limit of EUR 750,000 (which corresponds to an investment of EUR 500,000). However, the tax-deductible amount may not exceed 50% of the company's taxable profits in a given accounting period.

The beneficiaries of such investments must be Belgian production companies. The exemption is subject to certain strict conditions set out in Article 194 *ter* of Belgium's Income Tax Code (*Code des Impôts sur les Revenus*, or "CIR"), and also to a 'framework agreement' being signed between the Belgian audiovisual production company and the investor(s).

Since its inception, the Belgian tax shelter has helped to increase the amount invested in audiovisual productions in Belgium. According to the figures provided to the Commission, investment in audiovisual productions in Belgium, which were EUR 3 million in 2003, increased to EUR 11 million in 2004 and EUR 16 million in 2005. Between 2007 and 2009, the Belgian authorities estimate that the tax shelter will result in a total investment of EUR 40 to 80 million for the audiovisual sector. This corresponds to a burden of EUR 10 to 20 million for the Belgian budget in the same period.

While approving the extension of the application of the tax shelter, the Commission reminded the Belgian authorities that they have the obligation to present a yearly report on the implementation of the tax shelter, as well as to inform the Commission of any eventual draft modification of this scheme. ■

Hasan Bermek
European Audiovisual Observatory

• **Commission Decision of 16 July 2007, published on 28 August 2007, JOCE C/200/2007, N 121 / 2007 - *Mesures fiscales en faveur de la production d'oeuvres audiovisuelles (régime tax-shelter)* BE, available at: http://merlin.obs.coe.int/redirect.php?id=10912**

FR-NL

NATIONAL

BE – Amendments to Decrees on Broadcasting and on the RTBF

On 17 July 2007 the Parliament of the French-speaking Community adopted two decrees amending, in the first instance, the Decree of 27 February 2003 on broadcasting and, in the second instance, the Decree of 14 July 1997 on the statute of the public-sector broadcasting company (RTBF). In both cases the amendments concern advertising.

The purpose of the first Decree is to adapt the 2003 Decree (which forms the foundation for broadcasting in the French-speaking Community) to the new realities of the advertising market. The draft of

the Decree was tabled by the Government; it is based on the European Commission's interpretative communication of 23 April 2004 and on the EBU's memorandum of 25 May 2000 on virtual advertising. In addition to relaxing the rules for sponsorship, the new Decree also liberalises advertisements using a split screen, interactive advertising and virtual advertising, while it lays down a framework for regulating these.

Another Decree amends RTBF's statute by removing the ceiling for advertising revenue. Previously, public-sector broadcasting was not allowed to earn more than 25% of its total income from advertising. It is not the actual ceiling that has disappeared, however, but only its determination by the legislator. A ceiling remains in the management contract concluded on 13 October 2006 between the RTBF and the Government, but there are plans to increase it gradually from 27% in 2007 to 30% from 2010 onwards. RTBF's management contract, signed in 2006, does however, already include provision for the various legislative amendments that were made this summer.

The Decree amending the Decree of 14 July 1997 on RTBF's statute was gazetted (published in the *Moniteur Belge*) on 5 September 2007. The Decree amending the Decree of 27 February 2003 on broadcasting was published on 20 September 2007. ■

François Jongen
Catholic University of Louvain

• ***Décret du 19 juillet 2007 modifiant le décret du 14 juillet 1997 portant statut de la Radio-Télévision belge de la Communauté française*** **(Decree adopted on 19 July 2007 amending the Decree adopted on 14 July 1997 on the statute of the RTBF), available at:**
http://merlin.obs.coe.int/redirect.php?id=10949

• ***Décret du 19 juillet 2007 modifiant le décret du 27 février 2003 sur la radiodiffusion*** **(Decree adopted on 19 July 2007 amending the Decree of 27 February 2003 on broadcasting), available at:**
http://merlin.obs.coe.int/redirect.php?id=10950

DE-FR-NL

BG – Media Coverage of Local Elections

On 28 October 2007 local elections will be held in Bulgaria. The main legislative act that regulates the media coverage of local elections is the *Закон за местните избори*, published in the State Gazette No. 66 of 25 July 1995 (Local Elections Act). On 3 August 2007 major changes to the Act were passed by the Parliament (published in the State Gazette, No. 63 of 3 August 2007).

The Act provides that all candidates who are registered for participation in the elections shall have equal access to the mass media during the election campaign. The election programmes of the radio and television broadcasters shall commence 30 days before the election date and shall end 24 hours before that day. The election campaign, to be covered by the Bulgarian National Television ("BNT") and the Bulgarian National Radio ("BNR"), may take the form of video clips, debates, news in brief and other formats.

The management of the BNT and the BNR is obliged to observe the principles of equality and objectivity during the election campaign. The teams and topics of each debate are to be determined by the directors general of BNT and BNR and designated representatives of the candidates. The teams and topics shall be approved by the Central Elections Commission (CEC) not later than 31 days before the election day.

The public operators shall guarantee the political parties and coalitions access to television and radio time necessary for holding at least three debates lasting at least 180 minutes each. At least half of that time shall be allocated to the political parties and coalitions, which are represented in the Parliament, while the rest of the time shall be reserved for all other parties and coalitions, who have no elected representatives in Parliament. The election campaigns at BNT and BNR shall start and end using a format of video clips from the political parties and coalitions, having a duration of not more than one minute each.

The regional radio and television centres of BNR (in the towns of Blagoevgrad, Varna, Plovdiv, Sofia, Stara Zagora and Shumen) and those of BNT (in the towns of Blagoevgrad, Varna, Plovdiv and Ruse) shall allocate at least 60 minutes of their programme time for political debates. The order of participation in the election campaign of the candidates shall be determined by the CEC (for national programmes) or the regional election commissions (for regional programmes), decided by the drawing of lots not later than 31 days before the election day.

The debates, video clips and news in brief broadcast by BNT, BNR and their regional centres shall be paid for by the candidates in accordance with a tariff to be adopted by the Council of Ministers at least 40 days before the election day.

The other radio and television broadcasters, including cable channels, may offer broadcasting time to the candidates under equal terms. The owners of these broadcasters and their representatives shall publish the terms and conditions for coverage of the election campaign in writing. The terms and conditions shall be submitted to the CEC (for national broadcasters) and to the regional election commissions (for regional broadcasters) not later than 10 days before the commencement of the election coverage via broadcasting.

When the reputation and public prestige of a candidate are damaged by a broadcaster the candidate has the right of reply. Any request for the right of reply shall be submitted to the radio and television operators not later than 24 hours after the re-

spective programme has been broadcast.

The candidates may file claims if there is a violation of the procedure for carrying out the election campaign coverage by the radio and television broadcasters. The claims shall be asserted within 24 hours after the relevant broadcasting event and reviewed by the CEC (for national broadcasters) or by the regional election commissions (for regional broadcasters) within 24 hours after their submission. The decision of the competent commission is final and is not subject to further appeals. ■

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Council for Electronic Media, Sofia

• ***Закон за местните избори*** **(Updated version of the Local Elections Act), available at: http://merlin.obs.coe.int/redirect.php?id=10929**

BG

CZ – Consumer Protection in Intra-Community Cross-Border Situations

In July 2007, the Parliament of the Czech Republic approved law No. 160/2007 Coll. implementing the EC Regulation No. 2006/2004. Part of this law involves an amendment of the broadcasting law No. 231/2001 Sb.

The aim of the Regulation 2006/2004 on co-operation between national authorities responsible for the enforcement of consumer protection laws is to protect the collective interest of consumers against dishonest traders in intra-Community, cross-border situations. The Regulation sets out two objectives: (1) to facilitate co-operation among public authorities responsible for the enforcement of consumer protection laws in cross-border cases (intra-community infringements), and (2) to contribute to the smooth functioning of the internal market; the quality and consistency of enforcement of consumer protection laws and the monitoring of the protection of consumers' economic interests. More generally, the aim is to enable national authorities to exchange information and co-operate with counterparts in other Member States as easily as with other authorities in their own country, removing the barriers to effective co-operation that exist between national enforcement authorities when dealing with traders targeting consumers across internal EU borders. The provisions on mutual assistance apply only to cross-border breaches of EU consumer protection laws (intra-Community infringements) and not to domestic problems. The scope is defined by the 15 legal instruments in the Annex. The new EU Directive on unfair commercial practices will also fall within the scope of the above-mentioned Regulation. The Regulation establishes a network of public authorities responsible for the enforcement of consumer protection law and provides for mutual assistance arrangements between them. Article 6 of the Regulation provides for an exchange of information in order to establish whether an intra-community infringement has taken place. Article 7 is designed to provide a type of rapid alert warning of intra-Community infringements. When a competent authority becomes aware of an intra-Community infringement or has a reasonable suspicion that such an infringement may occur, it shall notify the competent authority of other Member States. Where an intra-Community infringement has occurred, the requested authority is obliged, on request from an applicant authority to act to bring about the cessation or prohibition of the infringement without delay. Article 9 sets out a general requirement for co-ordination at all stages, even possibly involving the Commission. Competent authorities (CA) are the key actors in relation to the Regulation. They are to be designated by the Member States among public authorities with specific responsibilities to enforce EU consumer protection laws. Only CAs can request information and request enforcement action. Each CA shall have the investigation and enforcement powers necessary for the application of the Regulation. The Broadcasting Council of the Czech Republic is one of these authorities. It obtained new competencies in the area of consumer protection: it is empowered to ban the broadcasting of programme items that infringe the laws that protect consumer interest. ■

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• ***Zákon č. 160/2007 Sb. o změně některých zákonů v oblasti ochrany spotřebitele*** **(Law Nr. 160/2007 Coll. amending some laws in the area of the consumer protection)**

CS

DE – Fixing of Licence Fees Unconstitutional

In a ruling of 11 September 2007, the *Bundesverfassungsgericht* (Federal Constitutional Court - BVerfG) decided that the fixing of broadcasting licence fees by the legislative bodies of the German *Bundesländer* had infringed the broadcasting freedom of the public service broadcasters under Art. 5.1.2 of the *Grundgesetz* (Basic Law - GG), and was therefore unconstitutional.

In their appeals to the Constitutional Court, the regional broadcasting authorities that make up the ARD, along with ZDF and Deutschlandradio, had argued that the fixing of the licence fees for the period from 2005 to 2008 breached their freedom to broadcast (see IRIS 2005-10: 10 and IRIS 2006-4: 11). The decision on the fees had been prepared by the Minister-Presidents in the *8. Rundfunkänderungsstaatsvertrag* (8th Amendment to the Inter-State Broadcasting Agreement) of October 2004 and adopted in the form of *Land* laws and resolutions. The dispute centred on the fact that the Minister-Presidents had decided not to follow the recommendation of the *Kommission zur Ermittlung des*

Finanzbedarfs der Rundfunkanstalten (Committee for the establishment of the financial needs of the broadcasting authorities - KEF) when determining the future level of the fees, but to propose instead a smaller increase.

The BVerfG essentially granted the appeal. It accepted that most of the arguments submitted by the *Länder* to explain their deviation from the KEF's proposal did, in principle, justify the action taken by their legislative bodies. However, the grounds for these arguments given by the *Länder* were either insufficient or inaccurate. The BVerfG therefore declared the corresponding *Land* laws and resolutions to be incompatible with Art. 5 GG, but not invalid. The latter scenario would have nullified the legal basis for the (reduced) fee increase – a consequence that would have made the situation even more unconstitutional. The new fee period is likely to start on 1 January 2009 and the process for fixing the licence fee has already begun following the broadcasters' notification of their financial requirements. In view of the time it would take for the *Länder* to reach an agreement on the matter – in the form of a new Inter-State Agreement, which would also require the approval of the *Land* parliaments – the BVerfG did not consider that an immediate revision was necessary. This means that, for the current fee period, the part of the increase that was unlawfully rejected cannot be reclaimed. In the Court's opinion, compensation for the lost revenue can only be considered in areas other than programming, such as necessary investments. This should be taken into account in the current process of establishing the broadcasters' financial requirements.

The Court used its decision to express a number of important opinions on fundamental media policy issues. Firstly, it clearly indicates that the development of communication technology and media markets does not affect in any way the requirements it has laid down for the legal structure of the broadcasting system and the need to protect the freedom to broadcast. The Court makes this clear in the context of its interpretation of Art. 5.1.2 GG, confirming its established precedents. Secondly, it highlights the potential dangers to the plurality of opinion in broadcasting. It begins by referring to the influence of advertising income on programming structure, which it says is strongly determined by programmes enjoying mass popularity and is becoming increasingly standardised. It also mentions the risks posed by unbalanced news reporting and the influence that this can have, as well as the dangers resulting from the development of media markets and the strong tendency towards concentration in private broadcasting. The Court mentions in general terms the activities of joint-stock companies in which international investors play a major role, the involvement of telecommunication companies as operators of platforms for broadcast programmes and the continuing trend towards horizontal and vertical integration. It says that this frequently creates the potential for mutual strengthening of editorial influence and economic success, and therefore for the use of economies of scale and scope, including through cross-media marketing (see also IRIS 2006-2: 9).

Thirdly, the BVerfG confirms its fundamental position on the dual broadcasting system. This particularly applies to the correlation between the fulfilment of the traditional remit of public service broadcasting and the reduced demands for plurality made by the legislator in relation to private broadcasting. The dual system, in its current form, is only compatible with the freedom to broadcast if the public broadcasters are able to meet the stricter requirements that apply to them. In this connection, the Court also considers the definition of a constantly changing remit of public service broadcasting in the digital age. Since programming must remain open to new content, formats and genres as well as new forms of dissemination, public broadcasters should not be restricted to the current phase of development from the programming, financial and technical points of view. This should be reflected in an appropriate funding structuring.

Fourthly, the BVerfG confirms its previously expressed view that the freedom of public broadcasters includes programming autonomy. The broadcasters themselves should be able to decide how to fulfil their remit. Nevertheless, legal restrictions on programme quantities are not necessarily unlawful; but neither should a broadcaster receive funding for every programming decision. Broadcasters are forbidden from extending the scope of their programming and the indirectly linked financial requirements beyond what is necessary for the fulfilment of their remit. Elsewhere in its ruling, the BVerfG refers to the aforementioned relationship of tension between public and private broadcasting. It emphasises that the legislative body can define the function of public service broadcasting in an abstract way (and thus limit its financial requirements). However, the freedom to broadcast means that the State cannot lay down detailed provisions. In this context, the BVerfG refers to the voluntary self-obligation system (see IRIS 2003-1: 8). This represents a means of co-operation, basically compatible with the freedom to broadcast, which the broadcasters believe is necessary for the fulfilment of their remit. These obligations can help to guarantee the financing required while also protecting the broadcasters' programming autonomy.

Fifthly, the Court points out the advantages of licence fee-based funding. This type of funding should mean the broadcaster is largely independent of market forces and ensure that programmes are orientated towards editorial objectives, particularly plurality of opinion, rather than viewing figures and advertising contracts. The Constitution does not exclude the pos-

sibility of funding from other sources, such as advertising and sponsorship. However, it is necessary to check continuously whether it remains justified to assume that partial financing from these sources will increase the independence of public service broadcasting from the State. The BVerfG stresses the dangers, particularly the gearing of programmes to mass popularity and the erosion of the identifiable characteristics of public service channels.

Finally, the Court repeats that the licence fee should be fixed independently of any media policy objectives. This should be guaranteed by an appropriate procedure. ■

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• **Ruling of the *Bundesverfassungsgericht* (Federal Constitutional Court), 11 September 2007 (case nos. 1 BvR 2270/05, 1 BvR 809/06 and 1 BvR 830/06), available at:**
http://merlin.obs.coe.int/redirect.php?id=10919

DE

DE – Contergan Film May Be Broadcast

In the dispute over the television film commissioned by *Westdeutsche Rundfunk* (WDR) about the Contergan scandal of the 1950s, the *Bundesverfassungsgericht* (Federal Constitutional Court – BVerfG) decided, on 5 September 2007, as the final instance court in the urgent procedure, that the film could be broadcast on television in the autumn.

In July 2006, the former manufacturer of Contergan, Grünenthal GmbH, and a lawyer who had represented the interests of victims of the drug Contergan since 1961, had obtained temporary injunctions from the *Landgericht Hamburg* (Hamburg District Court – LG) preventing the broadcast of the film (see IRIS 2006-8: 12). The LG had regarded several parts of the script as a distortion of the historical facts and, accordingly, a violation of the privacy rights of the applicants. However, following an appeal by the defendants, the *Oberlandesgericht Hamburg* (Hamburg Court of Appeal) set aside these temporary injunctions at the beginning of 2007 (see IRIS 2007-7: 9). It considered the film to be a work of art that did not claim to portray all the details of the events at that time in documentary form. Now the BVerfG has supported this view. The complainants had appealed against the decision to set aside the temporary injunctions and, at the same time, asked the Court to prohibit the planned broadcast of the film on the 50th anniversary of the release onto the market of the Contergan drug in November. In its assessment, the BVerfG took into account the fact that a sensible viewer would not interpret the events portrayed in the film as a factual account of the behaviour of various parties at the time. References in the opening and final credits emphasised that the film was not meant to be an accurate portrayal. Therefore, the Court considered that the broadcast of the film did not pose a serious threat to the privacy rights of the complainants. Instead, the BVerfG thought that a serious intrusion on the broadcaster's freedom to organise and transmit its programmes would arise if it was prevented from broadcasting the film for the first time on the date it had chosen, on account of its historical significance and in the context that had been chosen from a media point of view. Rather, the Court stressed that broadcasting the film on an important anniversary could contribute to the formation of public opinion. ■

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• **Ruling of the BVerfG, 5 September 2007 (case nos. 1 BvR 1223/07 and 1 BvR 1224/07), available at:**
http://merlin.obs.coe.int/redirect.php?id=10920

• **Ruling of the BVerfG, 5 September 2007 (case nos. 1 BvR 1225/07 and 1 BvR 1226/07), available at:**
http://merlin.obs.coe.int/redirect.php?id=10921

DE

DE – Federal Cartel Agency Approves DVB-H Consortium

The *Bundeskartellamt* (Federal Cartel Agency - BKartellA) has given the green light to the creation of a joint venture between the three mobile network operators T-Mobile, Vodafone and O2 for the construction and operation of a platform for mobile television broadcasting based on the DVB-H standard. It does not believe that the companies involved are likely to create or strengthen a dominant position in the markets concerned.

The company was founded in connection with the call for tenders for DVB-H frequencies and for the use of these frequencies, issued by the *Bundesnetzagentur* (Federal Networks Agency) and the *Landesmedienanstalten* (*Land* media authorities) (see IRIS 2007-3: 12). It will provide the technical services required for the production and transmission of digital TV signals, purchase programme content and bundle content into programme packages for mobile TV based on the DVB-H standard. Marketing to end customers will be carried out individually by the three parent companies and possibly by other shareholders in the joint venture.

On the one hand, the BKartellA assessed the markets that are directly linked to mobile TV broadcasting (end customer market, wholesale market, market for the acquisition of marketing rights). It does expect the new joint venture or its parent companies to acquire significant shares in these markets. However, these are newly emerging technology markets that are still in their experimental phase. The market shares likely to be held by companies that have so far barely, if at all, been active in these markets are therefore not stable enough to constitute a dominant market position.

The Cartel Agency also considered whether the

creation of the joint venture might have an effect on the parent companies' positions in the mobile communications end customer markets for data services and telephony (including SMS). It investigated whether, in view of the high market shares held by T-Mobile, Vodafone and O2, the merger would result in the creation or strengthening of an oligopoly. However, it decided that the mobile data services market was still a young, rapidly developing market, so there was very little reason to engage in oligopolistic practices. In the mobile telephony market, the strategic importance of mobile television for narrowband telephony services was so small that there was no cause for concern in this area either.

Following this decision of 13 August 2007, the BKartellA now plans to conclude a separate examination of the merger from the point of view of the competition between the three companies involved. According to the BKartellA, the co-operation will harm competition, especially in the newly emerging mobile broadcasting market. However, it believes that the commitments entered into by the companies are sufficient to dispel any current concerns over competition. These particularly include undertakings not to link DVB-H services with television/video services via mobile phone (e.g. UMTS) or with mobile phone contracts, to allow platform customers to select channels and channel packages (in compliance with binding media law provisions), to ensure that DVB-H end devices are compatible with other mobile TV standards (such as DMB) and to allow DVB-H services to be received via devices other than mobile phones.

The consortium involving T-Mobile, Vodafone and O2 is competing, inter alia, with a joint venture established by MFD Mobiles Fernsehen Deutschland GmbH and Neva Media. Publishing houses Hubert Burda Media and Holtzbrinck hold stakes in Neva Media. MFD offers a service based on the rival DMB standard in Germany. ■

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• **BKartellA press releases of 18 July 2007, available at: http://merlin.obs.coe.int/redirect.php?id=10924**

• **BKartellA press releases of 14 September 2007, available at: http://merlin.obs.coe.int/redirect.php?id=10925**

DE

DE – Second Report on Youth Protection in Broadcasting and Telemedia

In its second report on the implementation of the provisions of the *Staatsvertrag über den Schutz der Menschenwürde und den Jugendschutz in Rundfunk und Telemedien* (Inter-State Agreement on the protection of human dignity and youth in broadcasting and telemedia - JMStV), the *Kommission für Jugendmedienschutz der Landesmedienanstalten* (Youth Protection Commission of the regional media authorities - KJM) stressed that the protection of young people in the media must be given greater prominence (for the KJM's first report see IRIS 2005-6: 12). It concluded that the ever-increasing quantity of problematic Internet content and new challenges such as youth protection in mobile communications and online gaming need to be effectively dealt with.

The report covers the period from April 2005 until March 2007. It describes the structure and remit of the KJM. The international dimension of youth protection in the media, which is referred to in the foreword of the document, is particularly reflected in the section on the KJM's activities at European level. The report also includes a chapter on the KJM's experiences with approved voluntary self-monitoring bodies and their decisions. It states that, in most of the cases submitted to the *Freiwillige Selbstkontrolle Fernsehen* (voluntary self-monitoring body for television - FSF) – which published its annual report for 2006 in June – there were no significant differences as far as the evaluation of youth protection was concerned. The report concludes with a section containing ideas for the improvement of youth protection. In that section and in the press release issued in connection with the report, the KJM expresses particular concern about the sharp increase in the number of suggestive images of young people on the Internet. ■

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• **KJM's second report on the protection of young people in broadcasting and telemedia, available at: http://merlin.obs.coe.int/redirect.php?id=10922**

• **FSF annual report 2006, available at: http://merlin.obs.coe.int/redirect.php?id=10923**

DE

DE – New Services Must Be Checked

At their annual general meeting in September 2007, the directors and chairmen of the internal bodies of the broadcasters that make up the ARD agreed to apply for the first time the so-called three-stage approval procedure for new services offered by public broadcasters.

This procedure was introduced as part of the agreement reached between the European Commission and Germany, under which the preliminary examination of the compatibility of the remit and funding of public service broadcasting with state aid regulations was provisionally discontinued in April 2007 (see IRIS 2007-6: 3 and IRIS 2007-2: 5).

The German Government had promised the Commission that it would introduce an approval procedure for new services, including new media services. This involved checking whether the service formed part of the public service remit and met the demo-

cratic, social and cultural needs of a society, whether it contributed to media competition from a qualitative point of view, and whether the required expenditure had been accurately calculated.

The *Länder*, which are responsible for enacting broadcasting law, have until April 2009 to adopt the necessary legislation. They will need to bear in mind that petitions from third parties concerning the market-related effects of new or amended services must be taken into account by the public broadcasting authorities. As regards telemedia, Germany has agreed to define in law, which services are part of the public remit, and which are not.

It appears that the details of the examination procedure have not yet been worked out, either by the *Länder*, or by the broadcasters. Differences resulting from the structure of the ARD on the one hand and ZDF on the other will need to be taken into account.

In this sense, the ARD's initiative can be considered a test run, which should provide information on the internal responsibility for the different parts of the examination process and its practical implementation. The examination will focus on the ARD's *Mediathek*, a centralised online service offered by the regional broadcasters enabling users to download content wherever and whenever they choose. These experiences will be used to draw up a proposal with a more precise description of the approval procedure, to be presented to decision-makers in the media policy field. ■

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FR – Public Funding for the Cinema Is only Available for European Productions

In a decision delivered on 6 July, the *Conseil d'Etat* upheld the position adopted by the administrative court of appeal (see IRIS 2005-1: 13) according to which the film "*Un long dimanche de fiançailles*" could not claim the financial support granted by the *Centre national de la cinématographie* (National Cinematographic Centre – CNC). Regarding the background to this case, on 23 October 2003, the CNC gave its approval to the company 2003 Productions for the new full-length film by Jean-Pierre Jeunet, the director of the famous "Amélie Poulain". However, an association and a syndicate of independent producers, considering that the beneficiary company was controlled by American capital, appealed to the courts for the approval to be withdrawn. The applicants claimed that 2003 Productions was merely a "Trojan horse" being used by Warner Bros France to divert French funding to Hollywood, which under normal circumstances was excluded from this advantage because of its non-European nationality. Under Article 7 of the Decree of 24 February 1999, eligibility for receipt of financial support is dependent on the production company not being controlled by one or more natural persons or legal entities from States other than those in the European Union. The court of appeal confirmed that 2003 Productions was controlled by the French subsidiary of Warner Bros, with 97% of its capital being held by a multinational under American law, with a registered office in the United States. The production company was therefore controlled by a legal entity from a non-European State within the meaning of the provisions of the 1999 Decree, and could not claim public funding for the cinema. ■

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• ***Conseil d'Etat* (10th and 9th sub-sections jointly), 6 July 2007; the company 2003 Productions**

FR

FR – Discussions involving Broadcasting Rights for the Rugby World Cup

The *Conseil Supérieur de l'Audiovisuel* (audiovisual regulatory authority – CSA) was asked this summer for its opinion on the draft regulations drawn up by the company Rugby World Cup Limited (RWC), the organiser of the rugby World Cup, on "the conditions for stadium access for representatives of written and audiovisual information companies during the competition". Article L. 333-6 of the Sport Code provides the framework for access to sports venues by journalists and television professionals. The first paragraph lays down the principle of free access by all journalists to sports venues "subject to the constraints directly connected with both the security of the public and the participants and the crowd capacity". The second paragraph provides that those television services that do not hold broadcasting rights "may only film images separate from those of the event or sport competition *stricto sensu*".

It transpires from the regulations submitted by the RWC that the places in the area reserved for the media ("media area") inside the stadiums where the matches are to be played will be allocated in the first instance to the representatives of the television services (TF1) and radio services that hold audiovisual rights. The representatives of audiovisual communication services that do not hold rights will also be allowed access to the venues and their media areas on a "first come, first served" basis, within the limit of available space. The first paragraph of Article L. 333-6 of the Sport Code thus appears to have been respected. The CSA has, nevertheless, added a reservation to its favourable opinion, in that it transpires from the IRB regulations that the representatives of those audiovisual media that do not hold rights will not under any circumstances be allowed access to the venues or any other controlled area on match days with cameras and/or any type of visual or sound recording system. The CSA held that this provision does not comply with the principle of free access for

journalists to sports venues, except for mentioning specifically that this restriction on visual and/or sound recording equipment must be justified by "constraints directly connected with both the security of the public and the participants and the crowd capacity".

Despite this favourable opinion from the CSA, the journalists (reporters, photo- and video- journalists) of forty press entities, including the major worldwide agencies (including AFP, Reuters, AP and Getty), announced their intention to boycott coverage of the competition just 24 hours before the opening match, in protest at the conditions imposed by the IRB for the use of photos and videos. The IRB regulations intended restricting to fifty stills per match (twenty per half plus 2x5 in the event of extra time) the number of photos that the agencies could circulate to their clients, and to three minutes per day the total length of videos of behind the scenes of the competition on the Internet (extracts from press conferences, dressing room interviews, etc). The media felt that these measures imposed by the IRB hampered their freedom to inform. On 7 September, two hours before the opening match, the boycott was finally lifted as the IRB and the media coalition had reached an agreement authorising the use, on the Internet, of 200 photos per match (including extra time). The restrictions concerning video were lifted. The Minister for Culture immediately welcomed the agreement, which she had encouraged. The parties have agreed to resume discussions after the World Cup, to "discuss the means of ensuring the future satisfaction of the requirements of both the media and the rightsholders". ■

Amélie Blocman
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• Opinion No. 2007-7 of 17 July 2007 on the draft regulations on the conditions for access to stadiums for representatives of written and audiovisual information companies during the 2007 Rugby World Cup; published in the *Journal Officiel* (official gazette) of 14 August 2007

FR

FR – Assessment of Unlimited Cinema Season Tickets

Seven years ago, the company UGC launched the first annual cinema season ticket. This cost FRF 98.00 (15 euros) a month and gave unlimited access to the 350 cinemas in the company's network (see IRIS 2000-8: 9). Its competitors (Pathé, Gaumont in conjunction with MK2) were very quick to follow, launching their own unlimited annual season tickets.

The scheme immediately caused an outcry on the part of both the independent operators and the beneficiaries, who feared serious distortion in competition and a loss of earnings from the remuneration granted to distributors, producers and authors. The public authorities therefore intervened to regulate this new mode of cinema attendance. Thus the Act of 15 May 2001 supplemented the Cinematographic Industry Code (Article 27), by providing that a cinema operator setting up, or joining, an unlimited cinema season ticket scheme was to be subject to prior authorisation from the Director General of the national cinematographic centre (*Centre National de la Cinématographie* - CNC). Last July, the CNC authorised UGC to extend the scope of its "UGC Illimité" scheme to cinemas in the MK2 chain, thereby representing 70% of the market in Paris. At the same time, the CNC approved a new scheme, called "UGC Illimité à 2", which offers the season ticket holder the possibility of being accompanied by another person. The CNC noted, however, that the two new schemes were likely not only to be of distinct advantage for UGC in comparison to any other unlimited season ticket scheme in the inner Paris area, but also to cause repercussions on the operation and distribution market in Paris, with the real risk of creating competitive tension. This was the reason that the authorisation was only granted for a fixed length of time, to end on 14 March 2009. Meanwhile the CNC asked for the Paris market to be monitored, to make sure that the cinema chains concerned were not abusing their dominant position. Despite this reservation, several professional organisations in the cinema sector, greeted this authorisation "with much uncertainty and questioning", and issued a warning to the Minister for Culture. The SACD and the ARP believe that "this new season ticket scheme cannot but make independent cinemas even more fragile and destabilise commercial relations between UGC and MK2, and the other professionals in the cinematographic sector". They are also indignant "that UGC and MK2 have obtained the possibility of a 10% increase in the price – paid by the cinemagoer – for their unlimited access card, thereby increasing profitability, while maintaining and confirming the freeze on the reference price, which is used as the basis for the remuneration granted to distributors, producers and authors". In response, the Minister emphasised the importance of the season ticket schemes, which made it possible to stimulate cinema attendance and to promote the diversity of choice available to cinemagoers. She nevertheless stressed the need for these schemes, like other special price offers, to observe the essential principles of copyright, and fair remuneration for creative work. Thus the Minister considers that the time has come to assess the impact of the arrangements applicable to the unlimited season ticket schemes so that they can be improved, particularly as regards their transparency. This assessment has been entrusted to the Chairperson of the CNC's Committee for authorising unlimited season tickets, Marie Picard, who is also legal adviser at the Conseil d'Etat. ■

Amélie Blocman
Légipresse

• Reaction by Christine Albanel on 1 August 2007 to the authorisation granted by the *Centre National de la Cinématographie* (national cinematographic centre – CNC) to a new unlimited season ticket scheme, available at: http://merlin.obs.coe.int/redirect.php?id=10946

FR

FR – Government Becomes Involved in Combating Unlawful Downloading

In the letter of instruction sent by the French President Nicolas Sarkozy to Christine Albanel, the new Minister for Culture and Communication, on 1 August, he sets out the "priority objectives" that he intends to pursue in order to keep the promises made during the presidential campaign. These include the setting up of a plan to rescue the music industry and to protect the cultural industries that benefit from copyright. On 5 September, the Minister officially entrusted Denis Olivennes, chairman and managing director of FNAC, with the task of "combating unlawful downloading and developing lawful offers of musical, audiovisual and cinematographic works". With a billion pirated files (music and films) exchanged in 2006, a corresponding drop of more than 40% in the market for discs over the past five years, and with on-line sales being significantly lower in France than in its main neighbouring countries, "it is an urgent matter", according to Christine Albanel. Recalling that the "DADVSI" Act of 1 August 2006 had created comprehensive arrangements for dealing with the editors of peer-to-peer software, as well as the "pirates" who find themselves committing the offence of counterfeiting, the Minister noted that "repression does not provide all the answers. It is also necessary to offer Internet users a real alternative to fraud". This includes providing a more attractive offer of lawful downloading, with extensive, diversified catalogues and better adjusted prices, and overcoming the problems of interoperability. The Minister has therefore asked Denis Olivennes to begin by hearing all the parties involved (creators, producers, Internet professionals and Internet users) and a number of qualified specialists (economists, engineers, legal experts). The purpose of this is to encourage the conclusion of an agreement between the professionals concerned, dissuading large-scale unlawful downloading, and allowing the development of an attractive lawful offer. If no agreement can be reached, the conclusions of the mission "should give rise to legislative and regulatory measures, for which the Government would take the initiative", according to the Minister. The results of work on the mission are to be submitted to the French President some time after 31 October 2007. ■

Amélie Blocman
Légipresse

• Presentation of the mission entrusted to Denis Olivennes on combating unlawful downloading and developing lawful offers of musical, audiovisual and cinematographic works, available at:
http://merlin.obs.coe.int/redirect.php?id=10945
FR

GB – BBC Loses Court Battle over Programme's Exposure of Woman's Identity

The English High Court recently ruled against the BBC in a case in which it undertook the "ultimate balancing exercise": weighing the claimant's Article 8 right not to have her privacy invaded against the Corporation's Article 10 right to freedom to broadcast.

The BBC planned to broadcast one of a series of programmes on the topic of adoption. The programme in question dealt with the issue of a woman (T) whose two-year old daughter was being handed over to a couple for adoption, the authorities believing this to be in the best interests of the child. It was planned that footage would be broadcast of the mother's final meeting with her daughter before being transferred to her adoptive parents.

The Court heard that T, the mother, has an IQ of 63. She was represented by the Official Solicitor because she suffers from a mental disorder under the Mental Capacity Act.

The judge stated that "without the capacity to consent, and without the capacity to understand what the programme is about, let alone its potential consequences, T has apparently permitted herself to be portrayed in the most intimate circumstances and, in one instance, in circumstances which can only be described as harrowing (primarily for her but also for ordinary viewers)...[T]here are few things more intimate, or engaging of Article 8 rights, than portraying a mother's last meeting with a much loved daughter, whom she will not be permitted ever to see again – at least until she grows up."

The Court was in no doubt that "the value of the broadcaster's expression in terms of Article 10 simply cannot be proportionate to the exposure of T's raw feelings and of her treatment of, or relationship with, her small daughter..."

The programme was permitted to go ahead as the Court's sole interest was "to prevent the further infringement of T's Article 8 rights by her being identified in the context of this programme". However, it was not the role of the Court to prescribe how the BBC would ensure the anonymity of T's identity: "It is for the BBC to decide whether, and in what form, the programme should be broadcast. It is not for the court to direct that any particular technique should be used, such as pixilation of features, the use of an actor's voice, or the deleting of names." ■

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• T (by her litigation friend the Official Solicitor) v The British Broadcasting Corporation, Case No: IHJ/07/0551, 11 July 2007, available at:
http://merlin.obs.coe.int/redirect.php?id=10914
EN

GB – Legislation to Permit Disclosure of Data to Assist Help in Digital Switchover

The Digital Switchover (Disclosure of Information) Act 2007 permits the Department for Work and Pensions and other public authorities to disclose information to the BBC and to any company that the BBC makes use of for the purpose of the Digital Switchover Help Scheme.

Digital switchover and the end of analogue television broadcasting will be implemented in the UK in stages between 2008 and 2012. The Government decided to assist this process by establishing the Digital Switchover Help Scheme to provide assistance to those aged 75 or over, those with a severe disability or those who are blind or partially sighted. The scheme will be administered by the BBC, which may appoint private companies to run it on the Corporation's behalf. The scheme will provide equipment to convert one TV set, help with setting it up and any work necessary to improve the TV aerial; it will be free of charge to those receiving certain state benefits, whilst others will pay a contribution of GBP 40 towards the cost.

As the administrator of the scheme will write to those who may benefit and offer help, it will obviously be necessary to identify them. A public authority cannot disclose personal information unless it has the legal power to do so. The Act creates this power for the disclosure of social security and war pensions information, and also for disclosure of information about those who are blind or partially sighted. The Act applies to the Department for Work and Pensions, its Northern Ireland equivalent, the Ministry of Defence and local authorities, and disclosure may be made to the BBC or to any company acting on its behalf. ■

Tony Prosser
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- **Digital Switchover (Disclosure of Information) Act 2007, available at: http://merlin.obs.coe.int/redirect.php?id=10910**
- **Explanatory notes on the Act, available at: http://merlin.obs.coe.int/redirect.php?id=10911**

EN

GB – Regulator Fines the Islam Channel for Breach of Ban on Election Candidates Presenting Programmes

The UK communications regulator, the Office of Communications (Ofcom) has fined the Islam Channel GBP 30,000 for a number of breaches of its Broadcasting Code. The Code prohibits candidates in UK elections from acting as news presenters, interviewers, or presenters of any type of programme during the election period. It also requires that due impartiality be observed and that a range of significant views be included in programmes relating to matters of major political controversy.

The Islam Channel is a specialist religious channel broadcasting on the Sky platform and it is directed at a largely Muslim audience in Britain and elsewhere. During the period of local elections in 2006, two current affairs series ("The Agenda" and "Politics and the Media") were presented by candidates standing for election, one as a local councillor and one as a mayor. Ofcom regarded the breaches of the rule against candidates acting as presenters as particularly serious, as it was designed to help secure the integrity of the democratic process through avoiding electoral advantage to any particular candidate. The rule was clear and unambiguous, but in the first case the presenter had been allowed to continue for three weeks during the election period, and in the second case three programmes had been broadcast by the candidate. The breaches were a direct result of management and compliance failures, and Ofcom concluded that they represented very serious breaches of the Code. In determining the penalty, Ofcom took into account the fact that the broadcaster is a small organisation with limited resources and faces particular compliance pressures as a religious channel; GBP 30,000 was the appropriate amount to cause some financial pain whilst not stifling diversity and debate in the channel's programmes.

The Islam Channel had also broadcast a programme entitled "Jerusalem: A Promise of Heaven" examining the position of the city from a Palestinian perspective. Ofcom considered that this breached the rules on due impartiality and failed to present a wide range of significant views. However, Ofcom considered that this breach was not in itself sufficiently serious to warrant the imposition of a statutory sanction such as a fine. ■

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- **Ofcom, "Adjudication of Ofcom Content Sanctions Committee – Islam Channel Ltd in Respect of its Service The Islam Channel", 31 July 2007, available at: http://merlin.obs.coe.int/redirect.php?id=10909**

EN

HR – Electronic Media Law Amended

The *Izmjene i dopune Zakona o elektroničkim medijima* (Law Amending the Electronic Media Law) came into force on 7 August 2007. The Law has introduced a series of amendments to the media legislation of the Republic of Croatia for the purpose of its alignment with EU legislation.

New provisions on the protection of minors have been introduced, stipulating that no programme

content that might seriously impair the physical, mental or moral development of minors shall be allowed, in particular content containing pornography or gratuitous violence. Programme content likely to impair the physical, mental or moral development of minors shall not be broadcast, except in cases where that it has been ensured, by the selection of time for their broadcast or by other technical measures, that minors in the broadcasting area cannot normally hear or see such programme content. When such programmes are broadcast in unencoded form, the broadcaster is obliged to ensure that they are preceded by an acoustic warning or that they may be identified by the presence of visual symbols throughout their duration. The Council for Electronic Media shall prescribe the procedure in such cases. Furthermore, advertising and teleshopping targeted at, or using minors, shall avoid anything likely to harm their interests. They shall have regard to their special susceptibilities and they shall not cause any moral or physical detriment to minors. Advertising and teleshopping shall not exhort minors to buy a product or a service by exploiting their inexperience and credibility, nor exhort minors to enter into a contract for the sale or rental of goods and services. It shall not directly encourage minors to persuade their parents or others to purchase the goods or services being advertised, exploit the special trust minors place in parents, teachers or other persons, nor unreasonably show minors in dangerous situations.

The Law has introduced also other new elements. Thus, it stipulates that freedom of expression and full programme freedom of the electronic media shall be guaranteed. It does not explicitly provide for the possibility of derogation from these principles by the Electronic Media Law or a special law. It defines the use of the Croatian language, in particular the possibility to promote creativity in the various dialects. Furthermore, the Law stipulates that any person regularly presenting news or current affairs programmes shall not be presented, visually or verbally, in advertising and teleshopping. It establishes the prohibition of advertising and teleshopping of medications, medical products and medical treatments, as well as the prohibition of advertising of alcohol and alcoholic beverages unless otherwise stipulated, for alcoholic beverages, by the Food Act. It sets the maximum duration of broadcasts dedicated to teleshopping spots, advertising spots and other forms of advertising to 12 minutes in one hour of programme for all broadcasters. The duration of advertising spots shall not exceed 15% of the entire daily transmission time. The Law also stipulates that broadcasters must endeavour to ensure that a major share of their programming consists of European audiovisual works, and that the share of such works produced by independent producers is at least 10% of the transmission time in their annual programme.

As regards the regulatory body, the Law establishes the Agency for Electronic Media as an autonomous and independent legal entity. The Agency consists of two departments: the Director of the Agency and the Council for Electronic Media, the regulatory authority in the electronic media sphere. ■

Nives Zvonarić
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• Law Amending the Electronic Media Law (*Izmjene i dopune Zakona o elektroničkim medijima*), Official Gazette, issue No. 79/07, and Electronic Media Law (*Zakon o elektroničkim medijima*), Official Gazette, issue No. 122/03, available at: http://merlin.obs.coe.int/redirect.php?id=9658

HR

LV – Supreme Court Confirms the Necessity of Reasoning in Decisions on Broadcasting Licenses

On 14 June 2007, the Administrative Department of the Supreme Court Senate of the Republic of Latvia confirmed the accuracy of the judgement of the Regional Administrative Court with respect to the decision of the National Broadcasting Council (for more detail, see IRIS 2007-3: 16). The Supreme Court agreed with the Regional Court that decisions on granting of broadcasting licenses and on the respective tender results must be sufficiently reasoned.

The National Broadcasting Council had appealed the judgement of the Regional Administrative Court as of 4 January 2007, which declared that the decision of the National Broadcasting Council on the results of a radio broadcasting license tender was invalid due to a lack of reasoning. The argumentation of the judgement applies equally to the radio and television broadcasting licenses. In its appeal, the National Broadcasting Council argued that the decision on the tender results had a basis, and that was the applicable section of the Radio and Television Law. The Radio and Television Law does not require such decisions to be reasoned, moreover, the decisions are adopted by a voting method, which excludes a possibility of joint reasoning.

The Supreme Court, in substance, approved the arguments of the Regional Court, nevertheless indicating certain legal peculiarities, which the Regional Court had failed to assess correctly. E.g., the Supreme Court explained that the decision on the results of a broadcasting tender is not in itself an administrative act, but rather a preliminary decision. However, as it is the final decision with respect to those persons who do not win the tender, it may be appealed in the court as an administrative act. The Supreme Court agreed with the arguments provided in the judgement of the Regional Court, namely, that the decisions on the results of broadcasting tenders must be sufficiently reasoned. This

will have the purpose of allowing any third party to understand if the National Broadcasting Council has used its powers correctly and if this decision is proportionate. The National Broadcasting Council has to evaluate all tender applications, taking into account criteria mentioned in the Radio and Television Law, such as the type of suggested programme, audience, language etc. The results of such an assessment must be indicated in the final decision. As regards voting, the Supreme Court pointed out that the voting is only a method for adoption the decision, and it does not abolish the necessity to provide the reasoning for the decision.

The judgement of the Supreme Court is final and cannot be appealed. ■

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Sorainen Law Office, Riga

• **Judgement of the Administrative Department of the Supreme Court Senate of the Republic of Latvia, 14 June 2007, available at: http://merlin.obs.coe.int/redirect.php?id=10930**

LV

MT – New Guidelines on Gender Equality and Portrayal in the Broadcasting Media

The Broadcasting Authority has recently approved Guidelines on Gender Equality and Gender Portrayal in the Broadcasting Media. These Guidelines apply to all programmes, including news and advertisements, broadcast on radio and television stations in Malta and are intended to sensitise the broadcasting media to gender equality and portrayal. They are directed towards the people in production, decision-makers at broadcasting stations and producers of advertisements.

These Guidelines direct producers to use gender inclusive vocabulary and images. They deal with gender role portrayal in television and radio programming and address the issue of stereotyping in the broadcast media. The Broadcasting Authority's Guidelines focus on the equal representation of men and women in the broadcasting media. The portrayal of men and women in the broadcasting media should reflect their actual social and professional achievement, career, interests and roles. These media should, moreover, reflect the continuous change in Maltese society with regard to the professional roles of men and women.

The Gender Equality and Portrayal Guidelines further provide that men and women should be portrayed in a wide range of roles, both traditional and non-traditional, in paid work, social, family and leisure activities. Men and women should both be seen as taking decisions to support the family and with regard to household tasks and home management. Television and radio programming should portray diversity in family structures, that is, not only marriages between woman and man but also the portrayal of single parenting and adopted children. Indeed, the portrayal of different family structures should be done in such a manner as to avoid "victimisation" of atypical structures. It is imperative that these are not depicted in a pitiful state.

Broadcasters should promote the recognition of tasks usually associated with women and portray them as being equally important to that of traditional male tasks, and which should be carried out by both genders. Certain subjects like family planning, welfare, health of the mother and the child, education and upbringing of children, should be directed at both men and women. In addition, broadcasters should eliminate negative gender role portrayal, that is, the representation that associates particular roles, types of behaviour and characteristics to people on the basis of gender without considering the characteristics of each individual.

Programmes should not reinforce the patriarchal power relation of society where men are seen to be more powerful. The broadcasting media should not overemphasise certain roles of women, mainly the domestic and sexual roles, and portray them as submissive. Men and women should be portrayed in both public and private spheres.

Women should appear more on the screen and should not be seen in limited roles. Women's thinking abilities and men's caring abilities should also appear on the screen as well. Women should not be segregated in one type of programme known as "women's programmes". Such programmes should also target men. Subjects of interest to women are also interesting for the fathers of children. Such programmes are to be categorised as "family programmes" rather than "women's" programmes.

These guidelines ensure that non-sexist language, that is the exclusion of one sex on the basis of gender, is not used in radio and television programming. Sexist language reflects the idea that one sex is superior to the other. Such language contributes, promotes or results in the oppression of one of the sexes to the detriment of the other and exploits an unfair distinction between sexes. Sexist language imposes stereotypes. Again, radio and television productions should not use language that can be offensive, misrepresents or excludes women or men. Generic terms that include both sexes should be used with regard to the question of language in the media. Panels in all discussion programmes should be constituted of representatives of both genders.

Television and radio stations are advised to increase the participation and involvement of both sexes in broadcasting as producers or decision makers in the industry. Men and women should have equal responsibilities in the broadcasting industry. Broadcasters should ensure both sexes equal

access to all areas and levels of the broadcasting media. Finally, broadcasting stations are encouraged to recruit a gender-balanced staff, to adopt an equality policy and a structure for the employment of both sexes in key sectors and at managerial level and to involve both sexes in the decision-making process with regard to promoting an active and visible policy of mainstreaming a gender perspective in the broadcasting media. ■

Kevin Aquilina
Malta Broadcasting Authority

• **Guidelines on gender equality and gender portrayal in the broadcasting media, 3 July 2007, available at:**
http://merlin.obs.coe.int/redirect.php?id=10913
EN-MT

RO – New CNA Recommendation

On 6 June 2007, the *Consiliul Naţional al Audiovizualului* (national broadcasting authority – CNA) published a recommendation on the reporting of tragic events involving children and teenagers.

In the recommendation, the CNA states that the fate and problems of many young people currently represent "a sensitive issue, which Romanian society is not dealing with in a satisfactory way". According to the CNA, a lack of parental supervision and guidance in families in which both parents work abroad, and the poor upbringing offered by schools (where education is concerned more with the quantitative transfer of information than "care for the mind and soul") are causing many young people to find themselves in situations that they cannot handle without adequate support. In some cases, these situations have ended in tragedy. The CNA reports that television companies, in their desire for sensation, have exploited these tragic circumstances for commercial purposes. Individual cases have often been covered as if they were a national tragedy. The recommendation indicates that "the studies carried out by the CNA in the last three years have shown that television programmes form the main source of role models for young people". The CNA is therefore calling on broadcasters to report truthfully and responsibly on tragic events involving children and teenagers, to treat them as individual cases, and to avoid any tendency to generalise them. "Where such tragedies occur, broadcasters should, as far as possible, refrain from excessive broadcasting of images of bereaved family members, scenes from hospitals or funerals, close-ups of farewell letters, text messages and the like". Journalists are also urged, when reporting such tragic events, not to jump to conclusions when investigations are still under way and not to interview alleged witnesses whose identity and credibility have not been checked. "During broadcast debates on the fate of children and teenagers, programme makers should also refrain from asking members of the public to say whether they think the people involved were guilty or innocent". The CNA points out that the image rights of individuals, the protection of minors, and truthful reporting are principles that all broadcasters agree to respect when they apply for a broadcasting licence. It therefore urges all broadcasters to fulfil these obligations in their programming. ■

Mariana Stoican
Journalist, Bucharest

• ***Recomandarea CNA din 6 iunie 2007 privind prezentarea informaţiilor despre evenimentele tragice care au ca subiecţi copii şi adolescenţi* (CNA recommendation of 6 June 2007), available at:**
http://merlin.obs.coe.int/redirect.php?id=10926
RO

RS – Supreme Court Annuls SBA Decisions on RTV Tender

On 11 July 2007, the Supreme Court of Serbia published its decision on annulling the decisions of the Serbian Broadcasting Agency (SBA) with reference to national broadcasting coverage and broadcasting coverage for the region of Belgrade. The Court decided in favour of eight plaintiffs (radio and TV stations), the most prominent being the RTL Group, and ordered the SBA to reconsider its decision and to make a new one that would be fully correct and legal.

The reasoning of the Supreme Court decision shows that the court found that the SBA had breached the obligation of due process as provided for in the Broadcasting Act, and decided arbitrarily instead of on the basis of measurable criteria that it should have established. "The Council of the SBA had the duty to comprehensively, completely and clearly determine the facts and to point out concrete reasons, facts and circumstances on the basis of which it has granted broadcasting licences to each individual tender participant, and why the applications for broadcasting licences of all other tender participants were rejected", stated the Court in its decision. The Council of the SBA decided on the applications by means of a 'shortcut' – it determined that all the applicants fulfilled the conditions for a licence, as laid out in the Broadcasting Act, and simply voted on which of the applicants should get a licence, without even attempting to compare the submitted applications. The justification for that decision was simply "that is how we voted", and nothing else. The Supreme Court confirmed the positions of some lawyers that this approach and behaviour is in contravention of the Broadcasting Act, and annulled the SBA decisions.

The SBA is expected to pass a new decision on the national and Belgrade licences within 60 days. ■

Miloš Živković
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RU – Anti-extremism Amendments

On 24 July 2007, the State Duma of the Russian Federation adopted a statute to amend some legal acts (including the Mass Media Statute, the Criminal Code, the Administrative Code, the Anti-Extremism Statute and others) aimed at increasing liability for extremist activities.

The amendments refer directly to the media. Article 4 ("Inadmissibility of Abuse of Mass Communication Freedom") of the Statute of the Russian Federation *"О средствах массовой информации"* (On mass media) of 27 December 1991, No. 2124-1, was added with the provision that forbids the media from publishing information on the activity of organisations, whose functions are forbidden by a court decision, which has entered into force, and which are included in the Federal list of extremist organisations, without making the appropriate reference to such a decision. According to the amendments, the Federal list of extremist organisations shall be drafted and published on the official website of the government agency in charge of registration of non-commercial organisations (not yet available).

The newly adopted Statute has also amended the Code of the Russian Federation *"Об административных правонарушениях"* (On administrative offences) of 30 December 2001, No 195-Ф3. The newly enacted article 20.29 refers to the liability for the production and dissemination of extremism materials. It provides for serious fines for persons and organisations found guilty of this offence.

Federal Statute *"О противодействии экстремистской деятельности"* (On counteraction to extremist activity) of 25 July 2002, No 114-Ф3, was also amended. The new wording of Article 13 therein (which prohibits the production and disseminating of the extremist materials), in contrast to the previous wording, no longer provides any definite criteria for the recognition of the materials as extremist, although it establishes that the materials are extremist once the court decision on it enters into force. The new wording of Articles 9 and 10 contain the provisions on the federal list of extremist organisations. The decision to add an organisation to the list will be taken by the State agency in charge of the registration of non-commercial organisations and will be based on a court decision.

Also, some of the amendments were enacted into the Criminal Code of the Russian Federation (*Уголовный Кодекс Российской Федерации*) of 13 July 1996, No 63-Ф3 and the Criminal Procedure Code of the Russian Federation (*Уголовно-процессуальный Кодекс Российской Федерации*) of 18 December 2001, No 174-Ф3, in order to increase the liability for crimes committed with extremist and xenophobic motives. ■

Nadezhda Deeva
Moscow Media Law and Policy Centre

• **Federal Statute** ***О внесении изменений в отдельные законодательные акты Российской Федерации в связи с совершенствованием государственного управления в области противодействия терроризму*** **(On amending certain acts of legislation of Russian Federation with respect to the rationalisation of the state control in relation to the anti-extremist policy) of 24 July 2007, No 121-Ф3 was published in** ***Российская газета*** **(Rossyiskaya gazeta) official daily on 1 August 2007**

RU

SE – Inquiry Commission Proposes Heightened Responsibility for Internet Providers with Regard to Illicit File-Sharing

Cecilia Renfors (former Director of the Swedish Broadcasting Commission) was appointed to head a commission to examine certain issues regarding copyright on the Internet, and on 3 September 2007 her investigation was published.

The Commissioner has come to the conclusion that the existing online services for obtaining music and film do not meet users' demand for consumer friendly legal alternatives. Current online services, for example, often offer an insufficient range, are statically modelled and use partial (non-consumer friendly) contractual terms and technical protection (DRM protection). Also, the information provided on these websites is insufficient. According to the Commissioner, these factors have a negative effect on the willingness of the consumers to use the legal alternatives.

The Commissioner has considered measures to stimulate the development of consumer friendly legal options for obtaining copyright-protected material on the Internet, and to make sure that copyright holders are paid accordingly for use of their work.

According to the Commissioner the extensive copyright infringements committed through illicit file-sharing is a significant hindrance to the incentive to invest in, and the development of, legal alternatives for such services. The Commissioner therefore *inter alia* proposes that Internet providers should, under penalty of a fine, be obliged to terminate user subscription agreements when their service is frequently being used to infringe copyright and when it is likely that the infringement will continue. This should occur, provided, however, that such termination of a subscription is not unreasonable considering the circumstances. ■

Helene H. Miksche
Bird & Bird Stockholm

• **Government press release, 3 September 2007, available at: http://merlin.obs.coe.int/redirect.php?id=10915**

• **Summary of the Investigation, 3 September 2007, available at: http://merlin.obs.coe.int/redirect.php?id=10916**

SE

Preview of next month's issue:

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Copyright and Media Law Aspects of Videogames

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