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2007 Joint Declaration by the Four Special Mandates for Protecting Freedom of Expression

This note reviews the Joint Declaration adopted by the four special mandates for protecting freedom of expression – the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media, the OAS Special Rapporteur on Freedom of Expression and the ACHPR Special Rapporteur on Freedom of Expression – on 12 December 2007. This year's Joint Declaration, unlike many of the past, which focused on multiple themes, centres around just one key issue: diversity in broadcasting.

With the assistance of ARTICLE 19, Global Campaign for Free Expression, the three special mandates at the UN, OSCE and OAS have adopted a Joint Declaration every year since 1999. Since 2006 they have been joined by the Special Rapporteur on Freedom of Expression of the African Commission on Human and Peoples' Rights (see IRIS 2006-3: 3, IRIS 2005-2: 2 and IRIS 2004-2: 6). Each year, the Joint Declaration focuses on different thematic issues. In the past, it has promoted such issues as defamation, broadcast regulation, access to publicly-held information, secrecy laws, the Internet, anti-terrorism measures, openness of national and international public bodies and freedom of expression and cultural/religious tensions. This year, for the first time since 2002, the mandates actually met together in person, along with a number of leading experts, to discuss the focus issue, diversity in broadcasting.

The 2007 Joint Declaration starts by noting the importance of diversity in the media in relation to a number of important social values, including democracy, social cohesion and broad participation in decision-making. It also recognises the dual role of media diversity, both in giving voice to, and in satisfying the information needs of everyone, as protected by international guarantees of freedom of expression,

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which include the right to seek and receive, as well as to impart, information and ideas. The preamble also notes different kinds of diversity – of outlet (type of media), of source (ownership) and of content – which then serves as the organisational framework for the substantive part of the Declaration.

There is some tension between the imperative of promoting media diversity and the somewhat intrusive regulatory tools that this requires, on the one hand, and the potential these tools create for political interference with media freedom, on the other. This is something freedom of expression advocates have long been aware of and concerned about. The Declaration tries to resolve this tension by stating, in its first substantive point, that regulation of the media with a view to promoting diversity is legitimate only if undertaken by bodies that are protected against political and other forms of unwarranted interference. While valid as a principle, in practice this trade-off can be very difficult to achieve. The Declaration seeks to further bolster protection against interference by calling for transparency to be a "hallmark of public policy efforts" in the area of broadcasting, including specifically with respect to regulation, ownership and public subsidy schemes. Finally, the Declaration calls for measures to prevent government advertising being used as a vehicle for political control.

The main thrust of the section of the Declaration on diversity of outlet is to promote policy vehicles which support the availability of different types of broadcasters – commercial, public service and community – on different communications platforms. Specific recommendations to this end include the allocation of sufficient space on different platforms to broadcasting uses and the equitable allocation of space to different types of broadcasters. The Declaration also calls for the importance of diversity to be taken into account in planning for the digital switchover, and for public interest uses to be protected instead of simply allowing market imperatives to dominate decision-making. Specific policy recommendations include ensuring that the costs of digital transition are not prohibitive for community broadcasters, protecting at least part of the spectrum gain for broadcasting uses, even when these are not able to outbid other users, and reserving part of the spectrum for analogue radio, at least for the medium term.

Specific recommendations for public service broadcasters include the need for diversity to be stipulated as part of their core mandates, including in the sense of giving voice to different sections of society, and ensuring adequate public funding for PSBs, in order to enable them to deliver this aspect of their mandate in practice. The Declaration also calls for the explicit recognition in law of community broadcasting as a distinct broadcasting sector, and for the adoption of licensing rules which are tailored to the particular needs of this sector.

The Declaration calls for special measures to be put in place to prevent undue concentration of media and cross-media ownership, both horizontal and vertical. The need for transparency of ownership is reiterated here, along with calls for specific measures such as taking concentration of ownership into account as a licensing criteria and granting the power to regulators to prevent media combinations from taking place where necessary to preserve ownership diversity. To combat concentration of ownership, the Declaration also recommends that consideration be given to providing support, based on objective criteria, to those wishing to establish new media outlets.

The Declaration is somewhat conservative when it comes to promoting diversity of content, calling simply for measures to be considered that are consistent with international guarantees of freedom of expression. As with ownership, the Declaration recommends that consideration be given to putting in place positive measures, in the form of supporting the production of diverse media content.

The Joint Declarations are not formally legally binding. However, as statements by leading official freedom of expression mandates, appointed by intergovernmental organisations, they provide authoritative interpretation of the scope of international guarantees of freedom of expression in different thematic areas. As such, they have proven invaluable to campaigners, lawyers, judges and decision-makers, when addressing freedom of expression issues. ■

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● Joint Declaration by the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media, the OAS Special Rapporteur on Freedom of Expression and the ACHPR Special Rapporteur on Freedom of Expression, 12 December 2007, available at:
http://merlin.obs.coe.int/redirect.php?id=11186

EN

COUNCIL OF EUROPE

European Court of Human Rights: Cases of Voskuil v. the Netherlands and Tillack v. Belgium

In two recent judgments, the European Court of Human Rights has given substantial protection to journalists' right of non-disclosure of their sources under Article 10 of the Convention. The case of Voskuil v. the Netherlands concerns Mr Voskuil's allegations that he was denied the right not to disclose his source for two articles he had written for the newspaper Sp!ts and that he was detained for more than two weeks in an attempt to compel him to do so. Voskuil had been summoned to appear as a wit-

ness for the defence in the appeal proceedings concerning three individuals accused of arms trafficking. The court ordered the journalist to reveal the identity of a source, in the interests of those accused and the integrity of the police and judicial authorities. Voskuil invoked his right to remain silent (*zwijgrecht*) and, subsequently, the court ordered his immediate detention. Only two weeks later, the Court of Appeal decided to lift the order for the applicant's detention. It considered that the report published by the applicant was implausible and that the statement of Voskuil was no longer of any interest in the proceedings concerning the arms trafficking. In Strasbourg, Voskuil complained of a violation of his right to freedom of expression and press freedom, under Article 10 of the Convention. The European Court recalled that the protection of a journalist's sources is one of the basic conditions for freedom of the press, as reflected in various international instruments, including the Council of Europe's Committee of Ministers Recommendation No. R (2000) 7. Without such protection, sources might be deterred from assisting the press in informing the public on matters of public interest and, as a result, the vital public-watchdog role of the press might be undermined. The order to disclose a source can only be justified by an overriding requirement in the public interest. In essence, the Court was struck by the lengths to which the Netherlands authorities had been prepared to go to learn the source's identity. Such far-reaching measures cannot but discourage those who have true and accurate information relating to an instance of wrongdoing from coming forward in the future and sharing their knowledge with the press. The Court found that the Government's interest in knowing the identity of the journalist's source had not been sufficient to override the journalist's interest in concealing it. There had, therefore, been a violation of Article 10.

The other case concerns the journalist H.M. Tillack, who complained of a violation, by the Belgian authorities, of his right to protection of sources. Tillack, a journalist working in Brussels for the weekly magazine Stern, was suspected of having bribed a civil servant, by paying him EUR 8,000, in exchange for confidential information concerning investigations in progress in the European institutions. The European Anti-Fraud Office OLAF opened an investigation in order to identify Tillack's informant. After the investigation by OLAF failed to unmask the official at the source of the leaks, the Belgian judicial authorities where requested to open an investigation into an alleged breach of professional confidence and bribery involving a civil servant. On 19 March 2004, Tillack's home and workplace were searched and almost all his working papers and tools were seized and placed under seal (16 crates of papers, two boxes of files, two computers, four mobile phones and a metal cabinet). Tillack lodged an application with the European Court of Human Rights, after the Belgian Supreme Court rejected his complaint under Article 10 of the Convention. The European Court emphasised that a journalist's right not to reveal her or his sources could not be considered a mere privilege, to be granted or taken away depending on the lawfulness or unlawfulness of their sources, but was part and parcel of the right to information and should be treated with the utmost caution - even more so in the applicant's case, since he had been under suspicion because of vague, uncorroborated rumours, as subsequently confirmed by the fact that no charges were placed. The Court also took into account the amount of property seized and considered that although the reasons given by the Belgian courts were "relevant", they could not be considered "sufficient" to justify the impugned searches. The European Court accordingly found that there had been a violation of Article 10 of the Convention. ■

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● **Judgment by the European Court of Human Rights (third section), case of Voskuil v. the Netherlands , Application no. 64752/01 of 22 November 2007 and judgment by the European Court of Human Rights (second section), case of Tillack v. Belgium, Application no. 20477/05 of 27 November 2007, available at http://merlin.obs.coe.int/redirect.php?id=9237**

EN-FR

Committee of Ministers: Declaration on Protecting the Dignity, Security and Privacy of Children on the Internet

On 20 February 2008 the Committee of Ministers of the Council of Europe adopted a Declaration on protecting the dignity, security and privacy of children on the Internet. This Declaration focuses on the content that children can create about themselves on the Internet, including all forms of traces that they can leave online (logs, records and processing). "We are determined to ensure that our children can use the Internet safely, and that the Internet cannot be used against them", said Maud de Boer-Buquicchio, Deputy Secretary General of the Council of Europe.

The Committee is aware that children will use the Internet as an important tool in their day-to-day activities. The ways in which children can leave relevant personal data on the Internet (such as the recently emerged so-called 'networking' websites) are increasing and children are often unaware of the consequences of their usage. As a result, children's activities become traceable and this may expose them to criminal activities by others, such as the solicitation of children for sexual purposes or otherwise illegal or harmful activities, e.g. discrimination, bullying, stalking and other forms of harassment. Furthermore, the Committee is aware of the tendency of several types of institutions, such as educational establishments and prospective employers, to seek

information about children and young people when deciding on important issues concerning their lives. As a result, children have to be protected against the possibility of their private information becoming permanently traceable by others on the Internet.

Therefore, the Committee has invited the Contracting States to explore the feasibility of removing or deleting such content, including its traces, within a reasonably short period of time. The Committee has also declared that there should be no lasting or permanent accessible record of content created by children on the Internet, which challenges their dignity, security and privacy. The Committee is aware that in some cases content may become damaging only after the individual has reached adulthood. That is why the Committee has declared there should be no accessible record that renders them vulnerable either now or at a later stage. However, this declaration does not preclude the existence of an accessible record for use in the context of law enforcement.

The Declaration took note of two World Summits on the Information Society (Geneva, 2003 – Tunis, 2005), which reaffirmed the commitment to effective policies and frameworks to protect children and young people from abuse and exploitation through information and communication technologies. It also noted the mandate of the United Nations Internet Governance Forum, in particular, to identify emerging issues regarding the development and security of the Internet and to help find solutions to issues that arise from the use and misuse of the Internet and which are of concern to everyday users.

The Declaration also makes reference to the need to inform and educate children of the enduring presence and risks presented by the content they create online. This matter is specifically dealt with by Recommendation Rec (2006) 12 of the Committee of Ministers on empowering children in the new information and communications environment. This Recommendation asks Contracting States to promote children's skills, well-being and related information literacy. Finally, the Council of Europe has devised the interactive game 'Wild Web Woods'. With this educational tool, children can learn to identify and resist virtual threats, whilst surfing the web in security. ■

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- **Declaration of the Committee of Ministers on protecting the dignity, security and privacy of children on the Internet, adopted on 20 February 2008, available at: http://merlin.obs.coe.int/redirect.php?id=11173**

EN-FR

- **Recommendation Rec(2006)12 of the Committee of Ministers on empowering children in the new information and communications environment, adopted on 27 September 2006, available at: http://merlin.obs.coe.int/redirect.php?id=11175**

EN-FR

Committee of Ministers: Declaration on Digital Dividend and Public Interest

On 20 February 2008, the Council of Europe's Committee of Ministers (CM) adopted a Declaration on the allocation and management of the digital dividend and the public interest. The digital dividend is described as the "radio spectrum freed as a result of the switchover from analogue to digital broadcasting".

The Declaration's preamble points out the need to safeguard essential public interest objectives in the digital environment and to ensure that strategies for digital switch-over and for spectrum allocation and management strike a balance between economic objectives and public-interest objectives (e.g. the promotion of pluralism, cultural and linguistic diversity, and public access to audiovisual services). The Preamble recognises that the digital dividend presents an opportunity for broadcasters to "significantly develop and expand their services". It also acknowledges "the importance of stepping up efforts to ensure effective and equitable access for all persons to the new communications services, education and knowledge, especially with a view to preventing digital exclusion and to narrowing or, ideally, bridging the digital divide".

The Declaration builds on the CM's Recommendation Rec(2003)9 on measures to promote the democratic and social contribution of digital broadcasting and Recommendation Rec(2007)3 on the remit of public service media in the information society (see IRIS 2007-3: 5). It is aware that individual States have different policies for digital switch-over, as is their right, and that efforts at the international level to harmonise approaches to the digital dividend can therefore prove difficult to realise in practice.

The substantive part of the Declaration focuses on the need to acknowledge the public nature of the digital dividend and to manage it in the public interest. It also focuses on the promotion of "innovation, pluralism, cultural and linguistic diversity, and access of the public to audiovisual services in the allocation and management of the digital dividend", while taking into account the needs of different types of broadcasters and other media (i.e., public service and commercial), as well as the needs of other existing or new spectrum users. The Declaration's third and final substantive focus concerns the societal benefits that can accrue from the digital dividend: "an increased number of diversified audiovisual services, including mobile services, with potentially improved geographical coverage and interactive capability, as well as services offering high definition technology, mobile reception, or easier and more affordable access". ■

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- **Declaration of the Committee of Ministers on the allocation and management of the digital dividend and the public interest, 20 February 2008, available at: http://merlin.obs.coe.int/redirect.php?id=11184**

EN-FR

European Commission against Racism and Intolerance: Media Provisions in New Country Reports on Racism

The European Commission against Racism and Intolerance (ECRI) recently published four country reports adopted in its third monitoring cycle of the laws, policies and practices intended to combat racism in the Member States of the Council of Europe. Each of the country reports, which examine the situation in Andorra, Latvia, the Netherlands and Ukraine, contains specific recommendations concerning the media.

As in earlier ECRI country reports (see IRIS 2005-7: 3), a number of recommendations are recurrent. For example, national authorities are called upon to encourage media/journalistic initiatives that provide training on human rights issues generally and on "issues concerning racism and racial discrimination in particular" (Andorra (para. 71); Ukraine (para. 104)). There are also repeated calls for the establishment of independent (non-judicial) bodies with a remit to receive complaints about the media (Andorra (para. 71); Ukraine (para. 104)). In the case of the Netherlands, ECRI recommends that the Dutch authorities continue to support the work of the Complaints Bureau for Discrimination on the Internet (para. 99). A potential role for media self-regulatory mechanisms in dealing with intolerant speech is identified in the report on Latvia (para. 106).

Another recommendation, made in respect of Latvia and Ukraine, is a tried and trusted ECRI formula. It encourages the national authorities to "impress on the media, without encroaching on their editorial independence, the need to ensure that reporting does not contribute to creating an atmosphere of hostility and rejection towards members of any minority groups" (Latvia (para. 108); Ukraine (para. 104)). In respect of Latvia, such groups are taken to include "members of the Russian-speaking population, as well as immigrants – particularly newcomers – asylum seekers and refugees, certain ethnic groups such as Roma, and religious minorities such as Muslims or Jews" (para. 108). In respect of the Ukraine, the formula reads differently and more restrictively: "members of any ethnic minority group or [...] asylum seekers, refugees and immigrants" (para. 104). There is an important second prong to this recommendation in respect of Latvia, *viz.*, that the State authorities "engage in a debate with the media and members of other relevant civil society groups on how this could best be achieved" (para. 108). Although formulated differently, the same recommendation is also made in respect of the Netherlands, with the Muslim communities singled out for special mention (para. 97).

The Report on Andorra recommends that the authorities "ensure that the new broadcasting law includes provisions prohibiting racial discrimination" (para. 71) and the Report on Latvia insists on the need to ensure "an effective implementation of the existing legislation against incitement to racial hatred" (para. 106). The Report on the Netherlands recommends that the authorities support the monitoring of racism and xenophobia in the media, as well as initiatives designed to improve levels of representation of ethnic minorities in the media profession and of cultural diversity in media output. It also encourages the authorities to promote media awareness among the population generally, "with a particular emphasis on promoting critical thinking among young people and equipping them with the necessary skills to become aware of and react to racist or stereotyping material" (para. 98). ■

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● ECRI Third Reports on Andorra, Latvia, the Netherlands and Ukraine, all adopted on 29 June 2007 and available at: http://merlin.obs.coe.int/redirect.php?id=1478

EN-FR

EUROPEAN UNION

Court of Justice of the European Communities: Permissibility of National Requirements for Examining and Labelling Films

Against the background of a procedure for a preliminary ruling requested by the Koblenz District Court (see IRIS 2006-9: 5), the Court of Justice of the European Communities (ECJ) has decided that Article 28 of the EC Treaty does not stand in the way of domestic provisions that prohibit the sale and delivery of picture storage media that have not been examined and classified for youth protection purposes by the relevant body. However, this does not apply when the legal procedure for examining, classifying and labelling picture storage media is difficult to access, or is not concluded within a reasonable time, or when the decision to turn down the application cannot be challenged.

In the legal dispute concerned, Dynamic Medien Vertriebs GmbH is demanding that Avides Media AG cease the Internet distribution of Japanese cartoons imported from the United Kingdom. The films carry a British Board of Film Classification (BBFC) age rating but have not been examined by the German *Freiwillige Selbstkontrolle der Filmwirtschaft* (Voluntary Self-Regulation Body for the Film Industry – FSK) to determine their age classification.

For the Koblenz District Court, the main question was whether domestic rules making the distribution of DVDs and videos in the mail-order market dependent on their bearing labels confirming that they have been examined by a national body with regard to their suitability for young people, are compatible with the principle of the free movement of goods.

In its judgment, the ECJ states that, in its opinion, the domestic rules at issue in the dispute do not constitute mere selling arrangements but a measure that

has an effect equivalent to a quantity restriction within the meaning of Article 28 of the EC Treaty and, accordingly, constitute interference with the free movement of goods (unlike Advocate General Mengozzi's final motions, see IRIS 2007-10: 4). In the ECJ's view, the interference is justified in order to safeguard the effective protection of young people. Since the rules relating to this protection have not been harmonised, it is up to the member states to determine their own level of protection and the relevant examination mechanisms. However, their discretion is limited by the obligations for member states that arise under Community law, so that the German provisions must be examined with regard to their proportionality. They are, the ECJ says, proportionate if the examination procedure is readily accessible to the supplier and can be completed within a reasonable period and, if it leads to a refusal, the decision can be challenged before the courts.

The Koblenz District Court now has to reach a decision on the dispute on the basis of these criteria. ■

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● **Judgment of the Court of Justice of the European Communities, case C-244/06, 14 February 2008, available at: http://merlin.obs.coe.int/redirect.php?id=11187**

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

European Commission: Funding of Austrian Broadcasting Corporation Examined

On 31 January 2008 the European Commission called on Austria, in accordance with Article 88(2) of the EC Treaty, to make its position clear on the funding of the *Österreichischer Rundfunk* (Austrian Broadcasting Corporation –ORF) (see IRIS 2005-9: 6).

ORF is largely funded by the licence fees, the amount of which it is free to determine, which it receives from all viewers and listeners. With reference to its communication of 2001 concerning the application of the rules on state subsidies to public service broadcasting, the Commission is of the opinion that the funding might involve a prohibited subsidy for the following reasons:

- the remit under public law to provide an online service (available at www.orf.at) in connection with the television and radio programmes is not sufficiently clear. The ORF Act does not indicate what democratic, social and cultural demands that would need to be met by the services to be provided in order to justify funding from the licence fees.
- ORF is obliged to broadcast a sports theme channel by satellite. Here, the Commission says there is no programming plan that sets out the tasks laid down by law. Such a plan should state why the population's needs cannot be met with the other television programmes put out by ORF and what criteria are applied in the selection of the sports events that are broadcast.
- The Commission also doubts that the supervisory authority, the *Bundeskommunikationssenat* (Federal Communications Office – BKS), or the ORF organs are in a position to provide a sufficient guarantee that the remit under public law will be satisfied.
- In addition to its remit under public law, which it has to carry out on a non-profit-making basis, ORF is allowed to engage in commercial activities within certain limits, but the Commission does not believe there is a guarantee that these services are provided under market conditions.

The recent decision to raise the licence fees (see IRIS 2008-2: 8 and IRIS 2008-3: 7) is not connected to the investigation. ■

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European Commission: Investigation into the Funding of National Public Service Broadcasters

The Commission has closed its investigation into the financing of the *Vlaamse Radio- en Televisieomroep* (Flemish Radio and Television Broadcasting – VRT). After complaints from several private competitors were received in 2004, a preliminary investigation on behalf of the Commission had found the VRT financing regime to be in breach of EC Treaty state aid rules. These rules declare subsidies liable to distort competition to be incompatible with the common market (Article 87).

The VRT's funding measures pre-existed the entry into force of the EC Treaty and, therefore, amounted to "existing aid" under Article 88(1). As a result, the Commission could not take action against aid already paid, but was able to demand that "appropriate measures" be taken to ensure future compatibility. The Belgian authorities undertook a series of legal modifications in 2005 and 2006. However, in a preliminary view issued in July 2006, the Commission requested that Belgium provide further clarification, in particular as regards the definition of the public service remit (also in relation to new media services); effective supervision and control and adequate mechanisms to prevent overcompensation for public service activities (see IRIS 2006-8: 8).

Since then, the Belgian authorities have undertaken a number of commitments to alleviate the Commission's concerns. These aim at outlining the limits of the public service remit and entrustment of public service obligations. They include safeguarding measures, such as an *ex ante* evaluation by an independent advisory body and third parties for new services; a Framework for merchandising and related activities; supervision by an independent body; a public service consultation carried out every five years and corrective measures to avoid overcompensation.

The Flemish authorities now have 12 months to implement the proposed amendments, under Commission supervision.

A similar story unfolded over the Irish public service broadcasters *Radio Teilifís Éireann* (RTÉ) and *Teilifís na Gaeilge* (TG4) (see IRIS 2005-4: 4). The investigation begun in March 2005 was closed, after Ireland submitted commitments in January 2008 guaranteeing precise public service remits; explicit entrustment of new activities; independent supervision; transparency of accounts and enhanced controls. Ireland has until December to implement the new measures.

Investigations into state funding of public broadcasters in Germany were closed in April 2007, while others are still ongoing in several Member States, notably the Netherlands and Austria (see IRIS 2008-3: 7).

All the above assessments of state aid measures in the broadcasting sector are made in the light of the requirements set out in the Commission's 2001 Communication on the application of state aid rules to public service broadcasting. ■

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● "State aid: Commission closes investigation into financing of Flemish public service broadcaster VRT", Brussels, Press release of 27 February 2008, available at: http://merlin.obs.coe.int/redirect.php?id=11179

DE-EN-FR-NL

European Commission: Third Fine on Microsoft

On 27 February 2008, the European Commission imposed another EUR 899 million fine on Microsoft for non-compliance with its 2004 Decision (see IRIS 2004-5: 4). In that Decision, Microsoft was found to be in abuse of a dominant position in the market for computer operating systems, by refusing to supply interoperability information to its competitor, Sun Microsystems. The Commission's latest action follows a recent statement by Microsoft, in which it announced improved availability of interoperability information.

The Commission's 2004 Decision was upheld by the Court of First Instance in September 2007. Microsoft chose not to appeal that judgment before the Court of Justice.

The latest fine brings the total amount paid by Microsoft for the abuse to nearly EUR 1.7 billion. For the abuse itself, Microsoft was originally fined EUR 497 million. On the basis of a EUR 1.5 million fine for each day of non-compliance after the issuance of the Decision, Microsoft was subsequently, in July of 2006, fined another EUR 280.5 million. In that Decision, the Commission also raised the daily fine for further non-compliance to EUR 3 million. The latest fine, of 27 February 2008, was calculated on that basis.

The controversy relates to Microsoft's refusal to make available, in accordance with Article 5(a) of the 2004 Decision, interoperability information that enables competitors to create workgroup server operating systems compatible with Microsoft's software. The language used in the Decision – namely, "the complete and accurate specifications for all the Protocols implemented in Windows Work Group Server Operating Systems" – appears to have been open to varying interpretations.

A valid question at this point would concern the identity of the beneficiary of the vast penalties paid by Microsoft. In its list of Frequently Asked Questions that accompany the February 27 fine, the Commission replies: "The penalty payment is paid into the EU Budget. It does not increase the budget, but reduces the contribution from Member States and so from taxpayers". However, for those anticipating an EU budget fully sponsored by Microsoft's non-compliance penalties, the FAQ may contain some disappointing information: Microsoft is now, more than three years after the 2004 Decision, in full compliance. ■

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● Commission Decision and case history, available at: http://merlin.obs.coe.int/redirect.php?id=11201

EN

European Commission: First Monitoring of the 2005 Online Music Recommendation

On 7 February 2008, the European Commission published a report summarising the results of the first monitoring of the Commission Recommendation 2005/737/EC of 18 October 2005 on collective cross-border management of copyright and related rights for legitimate online music services (see IRIS 2005-10: 5). The Commission based this report on 89 replies received from collecting societies, publishers, users and Member States, in response to a call for comments, issued on 17 January 2007.

The aim of the monitoring was, firstly, to assess whether the Recommendation produced a positive impact on the market for EU-wide licensing of music for online services. To this end, the report provides an overview of a series of EU-wide licensing initiatives that were launched or announced since the adoption of the Recommendation. In addition, the report takes note of the signing of the first EU-wide end-user licensing contract and anticipates the conclusion of more agreements of this kind in the near future. Finally, the report sums up a number of obstacles with which stakeholders may be confronted, in setting up EU-wide licensing arrangements. The Commission concludes that, at present, a European online music market is emerging and that the Recommendation appears to have made a contribution to this development.

Furthermore, the monitoring aimed at disclosing whether the Recommendation was supported by stakeholders having an interest in the licensing of music for online services accessible across the EU. To begin with, the report touches upon the question of whether it would be preferable if the Recommendation, being a non-binding instrument, should be replaced by legally binding rules on licensing, trans-

parency and governance, assignment and withdrawal of online rights. Secondly, stakeholders were asked to reflect upon the question as to whether the Recommendation, which is limited to certain predefined 'online' rights, correctly sets out these rights or whether they should be further defined, according to the form of exploitation. Also, it was asked whether it should be mandatory for EU-wide licences to include 'niche repertoire'. Finally, the report enquired as to whether the Recommendation provided for adequate safeguards on 'governance and transparency' or whether the rules (e.g. on dispute resolution) should be strengthened. Although the responses to these questions diverged, both between and within the different groups of stakeholders, the Commission holds the opinion that the Recommendation was in general endorsed by collecting societies, music publishers and users.

Thus, the first monitoring of the Online Music Recommendation reveals the Commission's satisfaction that the Recommendation has contributed to the development of Europe's online music sector. Nevertheless, the report closes with the assurance that further developments will be followed closely and, if necessary, that a second monitoring of the Recommendation will be undertaken. ■

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● **European Commission, Monitoring of the 2005 Music Online Recommendation – Summary Report, Brussels, 7 February 2008, available at: http://merlin.obs.coe.int/redirect.php?id=11172**

EN

NATIONAL

AT – Licence for Mobile Television Granted

At the end of February, the *Kommunikationsbehörde Austria* (Austrian Communications Authority – KommAustria) granted the German company Media Broadcast GmbH a ten-year licence to operate a multiplex platform for mobile terrestrial broadcasting.

Two applicants had been competing for the licence: Media Broadcast GmbH, which is owned by Télédiffusion de France, and Mobile TV Infrastruktur GmbH, which belongs to a group of Austrian publishers. KommAustria had to make the selection on the basis of six legal criteria that were set out in more detail in the *MUX-Auswahlgrundsätzeverordnung 2007* (2007 Multiplex Selection Criteria Decree). Under the *Privatfernsehgesetz* (Private Television Act), priority must be given to the applicant that provides a better guarantee of the following:

"1. the rapid achievement of a high digital-signal penetration rate;
2. the excellent technical quality of digital signals;
3. the employment of the broadcasters' expertise in the development and operation of the digital platform;
4. a user-friendly approach for the consumer;
5. a plan for promoting the distribution of digital-signal reception devices;
6. a range of digital channels presenting a diversity of opinions, with priority given to channels containing material relating to Austria."

In all these respects, KommAustria regarded Media Broadcast GmbH as being better suited to meeting these criteria than Mobile TV Infrastruktur GmbH. It also stated that the new licence-holder's business plan was more convincing. Moreover, Media Broadcast GmbH was able to identify two mobile network operators as programme aggregators, while Mobile TV Infrastruktur GmbH had no comparably efficient company under contract.

The two other applicants from the original four were eliminated early on because they did not meet the statutory conditions. ORS made its application without being able to present a programme aggregator. Its appeal to the *Bundeskommunikationssenat* (Federal Communications Office – BKS) was dismissed. Telekom Austria named Mobilkom Austria as a programme aggregator but the latter, a sister company, did not meet the precondition that it be independent of the applicant. Telekom Austria decided not to appeal, so that both exclusions from the licence procedure are final.

However, the decision to award the licence to Media Broadcast GmbH could still be challenged. The work to launch the operation is due to begin soon, and it is planned to provide services as early as the Euro 2008 football championships. A penetration rate of 50 percent of the Austrian population must be reached within ten months of the date on which the award of the licence becomes final. ■

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● **KommAustria's decision of 29 February 2008 concerning the award of a licence to Media Broadcast GmbH for the operation of a multiplex platform for mobile terrestrial broadcasting, available at: http://merlin.obs.coe.int/redirect.php?id=11190**

DE

BA – Penalty for Unauthorised Distribution of a TV Channel Confirmed

This case emerged after a lawsuit was lodged by the Mostar-based cable operator MONET CATV with the aim of annulling a decision issued by the Council of the Communications Regulatory Agency (RAK). The Council had confirmed an initial RAK decision from 2005 whereby a financial penalty in the amount of BAM 18,000 (around EUR 9,000) was imposed on MONET CATV due to unauthorised distribution of the Zagreb-based commercial network's Nova TV channel.

On two occasions, the Court of Bosnia and Herze-

govina has concluded that the RAK decisions were correct and legitimate and that no violations of the law had taken place, which would influence the regularity of the decisions. The Council thereby confirmed the main findings of the RAK, i.e. that cable distributors are responsible for obtaining the copyright licences for channels distributed at any time. It also emphasised that the Law on Copyright relates exclusively to the protection of rights of authors and other holders of copyrights, which is under the exclusive jurisdiction of regular courts.

The Court's ruling confirmed RAK's discretion to apply executive measures and to issue sanctions as prescribed by the Law on Communications. It also confirmed that the amount of the fine was appropriate with respect to the severity of the breach of the law.

Furthermore, the second instance Court denied allegations made by the cable distributor that RAK had abused its legislative, judicial and executive authorisations. RAK has no legislative and judicial powers, but only executive authority as derived from the Law on Communications.

Regarding the background, the general legal framework relating to the communications sector was completed in May 2005 when the Parliament of BiH ratified the European Convention on Transfrontier Television designed to facilitate transmission and retransmission of television channels between the Council of Europe member countries, and establishing basic rules related to programme requirements, including copyright issues.

Any further moves to appeal the findings of this case would be before the Constitutional Court of Bosnia and Herzegovina. ■

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BG – Plan for Implementation of DVB-T Adopted

On 31 January 2008, the Council of Ministers adopted a Plan for the implementation of digital terrestrial television broadcasting (DVB-T) in Bulgaria. Two main goals are set out in the plan:

1. To ensure audience reception of television channels via terrestrial means, while there is also the possibility to use the cable or satellite reception of channels;
2. To attract a new audience and thus prevent the emergence of a monopoly of cable and satellite digital broadcasting.

Pursuant to the plan the transition from analogue to digital terrestrial shall be accomplished in two stages:

1. The first stage (start of the transition) will cover the period from June 2008 to December 2012. During this period three national MFN (SFN) networks and twelve regional SFN networks should start operating.
2. The second stage covers the period from July 2010 to June 2015. During this stage three national MFN (SFN) networks and fifteen SFN networks should become operational.

By December 2012, all transmitters for terrestrial analogue television broadcasting should stop working ("Switch–off").

After the adoption of the plan, a number of legislative acts and other documents will need to be amended or supplemented:

- Radio and Television Act;
- Sector Telecommunications Policy of the Republic of Bulgaria (published in State Gazette No. 104 of 2004);
- National plan for allocation of the radio frequency spectrum for radio frequencies for civil purposes, for the needs of the national security and defence. ■

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Council for Electronic Media, Sofia

DE – Artistic Freedom versus Personality Rights

Following its decision on principle of 13 June 2007 in the case of the novel "Esra" (see IRIS 2007-10: 8), the Federal Constitutional Court again expressed an opinion on 12 December 2008 on the relationship between personality rights and artistic freedom, but this time ruled that personality rights had not been violated in either of the cases concerned.

In one case, the complainant had filed a complaint against the performance of the play "Ehrensache" ("A Matter of Honour", the plot of which is based on the events surrounding the killing of the complainant's 14-year-old daughter) known as the "Hagen girl murder case". The complainant complained about a violation of her daughter's so-called "post-mortal personality right". In the other case, the constitutional complaint was directed against the publication of the autobiographical novel "Pestalozzis Erben" ("Pestalozzi's Heirs"). The complainants, both teachers, considered that their honour had been offended due to the portrayal in the novel of certain teachers who were in some ways similar to them.

The Federal Constitutional Court refused to admit the complaints.

According to the "Esra" decision, in order to be able to assess the seriousness of a personality right infringement the real-world reference suggested in a specific plot by a work (a play or novel) to the viewer or reader must be examined from the point of view of art. A work must primarily be regarded as fiction if it lays no claim to be based on facts. In the cases concerned, the court did not consider this assumption to have been refuted. Even if the complainants had clearly served as models for the figures portrayed, that did not mean that the works suggested that the viewer or reader should ascribe all the actions and characteristics of these figures to the actual persons concerned. A literary work based on actual events typically blended together real and fictitious representations. Moreover, in the "Ehrensache" case, the court did not consider that the daughter's privacy had

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been invaded as a result of the portrayal of actions of a sexual nature. When assessed against the criteria of the "Esra" decision, it would only be possible to affirm that a violation had taken place if the obvious question arose as to whether the actions described should be understood as reports on actual events. That was, for example, the case when an author gave a realistic and detailed account of his own experiences.

In this case, the Federal Constitutional Court ruled that the daughter's personality rights should not be subject to the special protection given to young people since the reason for the increased protection was to guarantee the continued development of the personality of minors, and that notion could not be transferred to people who have died. ■

- **Decision of the Federal Constitutional Court of 12 December 2007 (1 BvR 1533/07), available at: http://merlin.obs.coe.int/redirect.php?id=11191**
- **Decision of the Federal Constitutional Court of 12 December 2007 (1 BvR 350/02, 1 BvR 402/02), available at: http://merlin.obs.coe.int/redirect.php?id=11192**

DE

DE – Online Search and Monitoring of the Internet Unlawful

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According to a Federal Constitutional Court judgment of 27 February 2008, computers owned by people who are suspected of committing a criminal offence may only be tapped using spying software if this is necessary for the protection of extremely important general interests.

The judgment was in response to a constitutional complaint made by a female journalist who is a member of the North Rhine-Westphalia Regional Association of the *Die Linke* party and by three lawyers, against provisions of the *Verfassungsschutzgesetz des Landes Nordrhein-Westfalen* (Constitutional Protection Act of the *Land* of North Rhine-Westphalia – VSG) adopted on 20 December 2006 by the *Land* of North-Rhine Westphalia. The provisions of that Act concerning secret access to information systems ("online search") and Internet surveillance were declared unconstitutional and void.

In the court's opinion, an online search constitutes interference with the general personality right protected by Article 2(1) in conjunction with Article 1(1) of the Basic Law. On this point, it stated that the use of IT systems, especially personal computers, had become extremely important for the development of the personality in many social classes. Moreover, the importance for that development increased when such IT systems were networked. The Internet was vitally important for the development of the personality as it not only made a huge amount of information available but also a large number of communication services with the help of which the user could actively build up and maintain social contacts. At the same time, however, that led to new dangers for the general personality right because the monitoring of the use of such systems and the evaluation of the data gathered could enable far-reaching conclusions to be drawn concerning the user's personality. The court concluded from the importance of the use of IT systems for the development of the personality and from the risks to the personality associated with that use that there was a considerable need for basic rights to be protected and declared that there was a "basic right to a guarantee of the confidentiality and integrity of IT systems" as a particular manifestation of the general personality right. It emphasised that, although interference with this right might be justified both for the prevention and prosecution of crimes, the VSG did not in the case being examined meet the constitutional requirements for a legal basis for such interference. For example, the secret infiltration of an IT system to monitor the use of the system and read its storage media is only permissible when there is actual evidence of a concrete danger to a very important legally protected interest (such as life and limb and individual freedom). In addition, the court called, *inter alia*, for the secret intrusion into IT systems to be subject to a judicial order and for precautions to protect the core sphere of private life.

The court held that the provision concerning the secret surveillance of the Internet was a breach of Article 10(1) of the Basic Law, which protects the privacy of telecommunications, when access-protected content is monitored by using access keys that have been obtained without the consent or against the will of the person engaged in those telecommunications. Here too, the court considered that the principle of proportionality was not observed since the Act permitted large-scale intelligence-gathering measures (including *vis-à-vis* third parties) in advance of any concrete danger and without taking into account the seriousness of possible violations of legally protected interests. ■

- **Federal Constitutional Court judgment of 27 February 2008 (Cases 1 BvR 370/07 and 1 BvR 595/07), available at: http://merlin.obs.coe.int/redirect.php?id=11196**

DE

DE – Media Commission's Statement on Local and Regional Television

On 29 February 2008, the Media Commission of the *Landesanstalt für Medien Nordrhein-Westfalen* (North Rhine-Westphalia Regional Media Authority – LfM) reached decisions on new licences to broadcast local and regional television and awarded seven ten-year licences for regional general-interest channels.

While taking these decisions, the LfM also adopted a declaration on its strategy for avoiding the formation of local monopolies of influence on opinion-forming.

According to section 33(2) of the *Landesmediengesetz Nordrhein-Westfalen* (North Rhine-Westphalia Regional Media Act), press undertakings with a dominant position in the newspaper and magazine market in a particular circulation area must not exert a dominant influence, either directly or indirectly, on broadcasters. As the Act does not lay down any actual limits, the LfM's Media Commission considers its task to be to act as soon as the procedure to award licences is launched in order to prevent the formation of local monopolies of influence on opinion-forming and, consequently, safeguard the diversity of media offerings and/or suppliers as well as editorial independence.

In the Media Commission's opinion, local media diversity must be achieved both via the number of providers and the number of services. Accordingly, it says, the general rule is that the more competition and providers there are the more likely it is that there will be a wide range of services in the case of local television too. However, since usually only one provider is in fact capable of surviving at the local level for economic reasons, television diversity can only come about through competition between public and private services, so that media diversity is of particular importance, i.e., the availability of different media (such as television and newspapers). However, the Media Commission points out that there is a risk of the development of a predominant power to influence public opinion if television providers and publishers form a joint company. Unlike in other markets, in the case of television, as a cultural and economic asset, an ex-post check should not be the first mechanism. A particular undesirable development of concern is that when public access is threatened by economic and/or media influences.

As a concrete mechanism for ensuring diversity and independence, the Media Commission first mentions the possibility of ruling out direct influence by introducing specific company-related measures (such as a limit on the size of a shareholding in the company) as an integral part of the broadcasting licence. The question of indirect influence (such as editorial links between the channel and the press undertaking) needs to be examined both in the licensing procedure and after the licence has been awarded, in particular with reference to the programmes that are actually broadcast. If such an examination reveals the possibility of a predominant power to influence public opinion, then, in the Media Commission's view, four instruments are in principle available: the establishment of an independent advisory committee on programming, the reservation of up to 60 minutes per week for independent third programmes, the establishment of editorial statutes and, finally, the withdrawal of the licence. ■

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● **Press release on the Media Commission's sitting of 29 February 2008, available at: http://merlin.obs.coe.int/redirect.php?id=11195**

DE

DE – No Fee for Electronic Programme Guide

According to press reports, the collective society *Gesellschaft zur Verwertung der Urheber- und Leistungsschutzrechte von Medienunternehmen mbH* (VG Media) and *Zentralverband Elektrotechnik- und Elektronikindustrie e. V.* (ZVEI), an association that represents the electrical engineering and electronics industries, have been able to agree on a common position in the dispute concerning royalties on set-top boxes.

On 14 August 2007, VG Media published a scale of fees for the use of images and text employed for announcing and advertising television programmes in electronic programme guides (EPGs) and stated its intention to implement this from 1 January 2008. The fees include an amount in respect of royalties for device manufacturers that operate an EPG. The amount is a one-off charge of EUR 3 per device sold.

There was considerable opposition to the fee requirement, especially on the part of the industry, and it was not clear whether all device manufacturers would be obliged to pay the fee in the future.

The associations have now agreed that only those manufacturers that are themselves "operators" of an EPG have to pay a fee. However, ZVEI points out that this does not apply to most manufacturers, who either use EPG systems based on the SI (service information) data broadcast together with the video signal, or EPGs that they have purchased. ■

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● **VG Media tariffs available at: http://merlin.obs.coe.int/redirect.php?id=11193**

DE

ES – New Cinema Act

On 28 December 2007, the Spanish Parliament finally approved the *Ley 55/2007 de 28 de diciembre, del Cine* (Cinema Act).

After many discussions and negotiations, this controversial act has been passed by general consensus, including five of the six amendments introduced by the Senate. The final text includes most of the changes that were introduced in the proposed law.

The most controversial amendment requires that, in order to be considered a Spanish production, 75% of a film's cast must be either Spanish or from another EU member state, and that, in any case, the director must be Spanish or European. This last requirement has been the subject of discussion, as, previously, a film could be considered to be a Spanish production as long as 75% of the cast were Spanish or European, independent of the director's nationality.

It is also worth highlighting some of the other amendments, such as the screen quotas, which impose the screening of a specific percentage of European films, but also introduce a measure of flexibility, as they are to be calculated on the basis of schedules and not of days.

Laura Marcos & Enric Enrich
Enrich Advocats, Barcelona

Another measure that can be noted, is the fact that TV channels shall be obliged to invest only 5% of their gross income into the production of European films, and not 6%, as had been initially proposed.

Finally, it is worth mentioning the rule requiring the creation, in 2009, of a specific fund for cinema in the co-official Spanish languages. The maximum funds for this project will be 11 million euro per year, provided by the General Budget, as well as those of each Autonomous Community with its own language. ■

***Ley 55/2007, de 28 de diciembre, del Cine; Boletín Oficial del Estado nº.312, 29 de diciembre de 2007* (Act 55/200, of 28 December 2007 on Cinema; Spanish Official Gazette nº 312, 29 December 2007), available at: http://merlin.obs.coe.int/redirect.php?id=11183**

ES

FR – Concept of Reality TV under Threat?

On 12 February 2008 the court of appeal in Paris established that a document, the "participants' regulations", which had been signed between the three complainants in the proceedings, who were participants in the *L'Ile de la Tentation* reality TV broadcast, and the production company Glem, a subsidiary of TF1, had constituted a permanent employment contract. The production company held that the concept of the programme, consisting of "filming the day-to-day existence of several couples on a paradise island, to test the strength of their love", did not involve more than entertainment, excluding any manual, artistic or intellectual work, in return for the participants following a few simple rules. The court of appeal did not share this view; it held that "the involvement of cameras in the participants' private lives, even if this was with their consent, was not merely entertainment and did not exclude constraint" since the action consisted of "putting people to the test" and the work they were required to do was covered by the "regulations" agreed by the parties, which required the participant's continuous availability for filming and prevented them from leaving the site or communicating with the outside world. The court also qualified the nature of this provision of work as subordinate, as participants were under the authority of the producer and had to follow his rules. On the matter of remuneration, the court found that the EUR 1,525 paid under the participants' regulations did not in fact constitute a guaranteed minimum in respect of the royalties to be received under a licence contract, but rather a salary in return for the work undertaken. The court also upheld the request for the payment of back pay and overtime, in compensation for irregular, wrongful dismissal, and even for "hidden work". On the other hand, it turned down the complainants' claim for application of the collective agreement for performing artistes involved in television programmes. At the end of the proceedings, the production company was ordered to pay more than EUR 27,000 to each of the three participants, and it has announced that it will appeal this decision. The consequences of the decision for this type of production will therefore not be immediate, but if the appeal court were to uphold this jurisprudence, *Star Academy* or the *Secret Story* game, for example, would obviously be seriously affected, in view of the round-the-clock filming that is the very core of the concept. ■

Amélie Blocman
Légipresse

Court of appeal in Paris (18th chamber), 12 February 2008, Glem S.A.S. vs. A. Laize and al. (3 cases)

FR

FR – Liability of Video Share Sites – More Definite Jurisprudence

The commercial court recently confirmed the trend in jurisprudence (see IRIS 2007-8: 10) in favour of qualifying video share sites as hosts, although it continued to find that they were liable if they put protected works on-line with no filtering, despite having received notification from the economic beneficiaries.

In the case at issue, Google Vidéo had been summoned in counterfeit proceedings by the producers of the film "Le monde selon Bush", following the presence on the site of three links allowing the film to be downloaded or viewed (streaming). Despite a notification from the economic beneficiaries on 6 October 2006 of the unlawful nature of the links, the film could still be accessed on the disputed site, as proved by certified reports drawn up in November 2006 and March, April and May 2007.

Initially, the court did not qualify Google as an editor. The fact that the company organises the presentation of the site, offers Internet users the means of listing and presenting their videos, and makes storage conditional on acceptance of general terms and conditions does not confer on it control over the content and the Internet users. Moreover, Google does not take any initiative in the choice and presentation of the works – by operating the Google Vidéo service the company is therefore acting as a host, according to the court. Under Article 6-1-2 of the Act of 21 June 2004 on confidence in the digital economy, the host's civil liability cannot be invoked because of the activities of, or the information stored

at the request of a party using its services if the host did not actually have knowledge of their unlawful nature or of facts or circumstances indicating this nature or if, as soon as they had such knowledge, they took prompt action to withdraw the data or make it impossible to access. However, in the opinion of the court, this limitation of the host's liability, which only applies in the cases specifically listed, should be interpreted restrictively so that, more particularly, there is no infringement of third-party rights. Thus "while the host is not bound by an obligation of general supervision, it is bound by an obligation of "special" supervision once it becomes aware of the unlawful nature of content". And, since Google had been informed by letter on 6 October 2006 of the unlawfulness of showing the film on its Google Vidéo site, the court found that it should have barred access to the film from that date, which evidently it did not do, thereby infringing third-party rights. Furthermore, the court held that Google could not claim that it was technically impossible to carry out such supervision, since it had increasingly sophisticated means at its disposal for identifying content that was declared unlawful; these were used more particularly to eliminate content of a paedophile nature and content supporting crimes against humanity or inciting hatred. The company was found guilty of counterfeiting and consequently ordered to pay EUR 150,000 in damages to the beneficiaries. ■

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● Commercial court of Paris (8th chamber), 20 February 2008, Flach Film et al. vs. Google France, Google Inc.

FR

FR – Commission Established to Develop a New Model of Public Service Television

Having announced the probable abolition of advertising on public service channels (see IRIS 2008-2: 12), the French President Nicolas Sarkozy has decided to create a commission to develop a new model of public service television. Commission members will include parliamentarians and professionals in the sector, and it will be chaired by Jean-François Copé. Its purpose will be to "propose a new identity for the public sector audiovisual scene in the digital age, and make proposals enabling the Government to draw up the new list of missions and specifications for the France Télévisions group. It will also propose methods for financing the new economic model for public service television".

Four working parties were set up at the first meeting on 27 February – on the cultural model for public service television in the future, on its economic model, on development and diversification, and on governance. The commission's first task will be to consider the financing of France Télévisions for 2008 and 2009, to compensate for the loss of income from advertising. Proposals will need to be put forward by mid-April. Advertising would be ended either by total abolition, starting on 1 January 2009, or by gradual abolition, starting with abolition after 8 p.m. Regarding future resources, Nicolas Sarkozy has asked the commission to look into the introduction of a mix of contributions from the private channels and telecom operators. Private radio and the press would not be taxed, however, in order to help them "cope with the digital revolution", according to the French President. He also wanted to reassure the employees of France Télévisions, by promising that "each euro of income from advertising" would be "compensated for by one euro of public resources, not only in 2009 but even in 2008" by means of a "capital endowment". Compensation for abolishing advertising should generate financing requirements amounting to EUR 1,147 million for 2009, according to sources close to France Télévisions. Although an increase in the licence fee seems to have been excluded as a possibility, a broader fee base is apparently under consideration.

Mr Copé also said that the commission was obviously intended to broach the issue of the method for appointing future managing directors of France Télévisions within the workshop on the "governance model", which will be considering relations between the State and France Télévisions, and between France Télévisions and the national audiovisual regulatory authority (*Conseil Supérieur de l'Audiovisuel* – CSA), and its internal organisation. The commission, which insists on its independence, will hear "everyone with anything to say", and an Internet site will be launched (www.matelepublique.fr) in order to give other professionals and viewers an opportunity to express their opinions. The commission is to submit an interim report on 16 April 2008, before its final report, expected on 31 May 2008. ■

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● Creation by the French President of a commission to develop a new model of public service television, Elysée press release dated 16 February 2008, available at: http://merlin. obs. coe. int/redirect. php?id=11197

● Composition of the Commission for new-style public-service television, Elysée press release dated 19 February 2008, available at: http://merlin. obs. coe. int/redirect. php?id=11198

FR

FR – CSA Calls for Simplified Relationships between Producers and Broadcasters

The *Conseil Supérieur de l'Audiovisuel* (national audiovisual regulatory authority – CSA) has entered the debate on overhauling the relationships between producers and broadcasters, which was launched by Christine Albanel at the end of 2007 (see IRIS 2007-10: 13). The CSA has drawn up a "contrasting" balance sheet of the relationships between producers

and broadcasters since 2001, when the Tasca Decrees regulating the production obligations of channels were adopted, and is calling for regulations that are "more straightforward and more lightweight, placing greater importance on inter-profession dialogue and regulation".

Thus, although the objectives of the mechanisms whereby broadcasters contribute to audiovisual production remain valid, they must, according to the CSA, be complemented by the growth of the audiovisual groups, a key condition for the development of the sector as a whole, and by a simplification of the rules. The CSA also says it is aware of the need to organise the obligations incumbent on linear services in order to take account of the new technical and economic context.

Regarding the matter of financing for the works and their "initial exploitation", the CSA noted that investments in new independent production (*production inédite indépendante*) had only increased by 17% between 2000 and 2006, whereas investments had doubled in new dependent production (*production inédite dépendante*) in the case of one broadcasting channel. Moreover, the performance of the independent production sector, which the legislator hoped would become solid and diversified, remains uneven and marked by profound contrasts (the production of animated works has shot up to third place in the world whereas the documentary sector is characterised by its fragmentation). Thus, the CSA feels it is desirable to amend the regulations in order to better link the broadcasters to the revenue generated by the exploitation of the independent works they finance. The proportion of the financing of the works assumed by the broadcasters entitles them to have the benefit of a share in the operating income.

Concerning the exploitation of works in the secondary market, the problem lies in reconciling two objectives that are partly paradoxical in view of the present rules, namely the circulation of the works, the improvement of which constitutes a permanent request on the part of producers, distributors and the independent themed channels, and the integration of the audiovisual groups and their presence on all the media. Thus the economic and financial balance sheet of the themed channels illustrates the trend – in 2006 their aggregate turnover represented 14% of the total turnover of authorised or approved broadcasters. Also, there is no real secondary market for audiovisual works. The capacity of themed channels to fill their programme schedules depends largely on the programmes financed by the editors of the original terrestrially-broadcast services, and this dependence conditions the capacity of these channels to meet the broadcasting quotas. In the light of these difficulties, the CSA believes it is worth clarifying the rules that apply to the circulation of works by seeking a fair balance between the objectives of constituting integrated groups and supplying the second market. Lastly, assessing the consequences of the current upheavals in trends, services and the nature of the players involved in the audiovisual scene, the CSA proposes a number of ways in which the regulations could evolve, including a simplification of the legal framework making it possible to absorb the difference in competitiveness that threatens broadcasters dealing with the new media and international competition. This simplified arrangement should ensure that the players are in a position to meet the obligations incumbent on them. A better proportionality between the contribution of the broadcasters to the financing of the works and the rights they acquire is also suggested, as is an improvement in the conditions for the circulation of works. ■

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● Relations between producers and editors of television services – the CSA's point of view, available at:
http://merlin. obs. coe. int/redirect. php?id=11199

FR

GB – Manhunt 2 Videogame Classification Saga Ends

Following a decision in June 2007 by the British Board of Film Classification not to give it a certificate (see IRIS 2007-7: 14), the videogame Manhunt 2, made by Rockstar Games for PS2 and Nintendo Wii consoles, could not be legally supplied within the United Kingdom. A revised version has also been refused a certificate.

The BBFC's main rationale was that the game depicted unremitting violence towards humans. However, as was pointed out in an article in the Times newspaper, there has been no difficulty in purchasing a copy online.

On 10 December 2007, the BBFC's decision was overturned by a decision of the Video Appeals Committee (VAC), according to which the game could be classified and, therefore, legally released. The VAC's decision was reached by a majority of four to three.

The BBFC next applied for leave to appeal for judicial review of the decision by the Video Appeals Committee, mainly on the grounds that the VAC's interpretation of harm in the context of the Video Recordings Act (1984) was incorrect. This was granted on 21 December 2007.

The High Court judge, Justice Wyn Williams, ruled that the BBFC had an arguable case, namely, that, although both sides agreed that Manhunt 2 was not suitable for children, giving it a certificate made it more possible that it would be viewed by minors: Justice Williams said "I have taken into account the high public interest in the possibility of harm to children". The position of Rockstar Games was that Manhunt 2 was "well within the bounds established by other 18+ rated entertainment".

On 24 January 2008, a High Court judge ordered

the VAC to reconsider its decision. In the opinion of the judge, the VAC had misinterpreted the law. The Committee had taken the phrase "harm that may be caused" in section 4A(1) to mean that there must be actual harm, as opposed to potential harm. But, in the judge's opinion, the clear meaning of the phrase captured harm that might be caused. If Parliament had intended that it be necessary to demonstrate that harm had actually been caused, the words "that may be" would not have been included. In the case of an unreleased video, the issue, therefore, was what harm might be caused in the future to potential viewers.

The VAC began reconsidering the case on 11 March and decided to uphold its original decision.

The BBFC has now classified the videogame "18" and "passed with no cuts made", though it supplies an "Extended Classification Information" on its classification decision page. The BBFC has been quoted as saying "…the Video Appeals Committee has again exercised its independent scrutiny. It is now clear, in the light of this decision, and our legal advice, that we have no alternative but to issue an 18 certificate to the game." ■

David Goldberg
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- **BBFC Classification Decision, available at: http://merlin.obs.coe.int/redirect.php?id=11200**
- **British Board of Film Classification, R (on the application of) v Video Appeals Committee [2007] EWHC 3198 (Admin) (21 December 2007), available at: http://merlin.obs.coe.int/redirect.php?id=11177**
- **The Law Gazette, R (on the application of British Board of Film Classification) v Video Appeals Committee: QBD (Admin), January 2008, available at: http://merlin.obs.coe.int/redirect.php?id=11178**

EN

GB – Regulator Announces New Consumer Protection Measures for Viewers Participating in Programmes

During 2007, the UK experienced a series of major scandals involving the participation of viewers in television programmes, mainly through the use of premium rate telephone services (see IRIS 2007-8: 11 and IRIS 2007-10: 15). As a result, Ofcom, the communications regulator, fined broadcasters a total of GBP 3.5 million; it also commissioned a report into the actions of broadcasters, which concluded that systemic problems exist in the use of such services. Ofcom has now decided on action to implement all the recommendations of the report.

In future, all TV broadcasters' licences will make the broadcasters directly responsible for all communication with the public, where the mechanism of communication features in the programmes. This will cover all means of communication, including telephony, email and other Internet-based communication and post.

Secondly, a system of third-party verification will be required, where premium rate telephone services are used for competitions or for voting schemes. According to Ofcom, in the past, broadcasters themselves have not fully understood the systems used in their programmes and have not anticipated potential problems. Verification by an independent third party will enhance public trust and alert broadcasters quickly to deficiencies in compliance.

Finally, Ofcom will publish new guidance for broadcasters covering, *inter alia*, the stage at which the short-listing or selection of winners should take place; the need to withhold results where significant failures of process are identified; further information for users of the 'red button' entry via a remote control and voting; the need to reveal puzzle methodologies and the need to improve pricing information.

Phonepay Plus, which regulates premium rate telephone services, is also introducing a requirement of prior permission for premium rate service providers who provide services to broadcasters; this will cover connectivity, conduct and coherence. Ofcom's measures will be implemented by varying the licences of broadcasters, in accordance with its powers under s. 3(4) of the Broadcasting Act 1990. Responsibility for communications from viewers will take effect immediately, whilst the verification requirement will probably take effect after a period of three months. For the first 12-18 months, Ofcom will operate a spot-checking programme, to ensure that the verification requirement is observed. ■

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- **Ofcom: "Participation TV Part 1: Protecting Viewers and Consumers", 19 February 2008, available at: http://merlin.obs.coe.int/redirect.php?id=11169**

EN

HU – Copyright Aspects of Network-based PVR

In January 2008, the *Szerzői Jogi Szakértő Testület* (Board of Experts on Copyright) delivered an opinion clarifying the qualification of the network-based personal video recorder service from the perspective of copyright.

The Board of Experts on Copyright is a professional body established by Act LXXVI of 1999 on Copyright (Copyright Act). Its role is to provide advice for courts, authorities and other interested parties on questions concerning copyright.

Personal video recorder solutions are provided by some service providers who offer digital television programme distribution. It is recognised that the recording of programmes on a set-top box offering PVR functionality by an individual may qualify as copying for private purposes and therefore may constitute private use. However, the question still remains as to how copying shall be evaluated if the programmes chosen by individual users are stored not on the hard drive of their consumer equipment, but on the server of the service provider (network PVR, NPVR).

The Board of Experts on Copyright examined the question of NPVR following the request of Artisjus, the Hungarian collecting society for authors.

In its opinion, the board found that, in the case of NPVR, service providers are actively involved in the process of copying. They are not just providing a technical framework, but also control the entire process of copying. As a consequence, the provision of NPVR cannot be regarded as mere assistance provided to copying for private purposes. Therefore offering such a service cannot constitute private use in terms of copyright.

The opinion of the Board of Experts on Copyright is in line with recent relevant judicial decisions in Germany and in the USA. However, it also highlights that technological neutrality is not a relevant principle for copyright. ■

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● **Opinion of the Board of Experts on Copyright No. SzJSzT-31/07/1, available at: http://merlin.obs.coe.int/redirect.php?id=11166**

HU

LT – Fine Imposed for Violation of the Law on Alcohol Control

On 25 February, the State Consumer Rights Protection Authority imposed a fine of EUR 580 on the national broadcaster TV3 for the violation of provisions of the Law on Alcohol Control.

The reason for the fine on TV3 was a live broadcast of a basketball match on 9 January 2008 at 7 p.m. The Law on Alcohol Control prohibits alcohol advertisements with the participation of athletes and provides watershed hours for alcohol advertising from 6 a.m. to 11 p.m. TV3 was deemed to have violated the mentioned provisions of the Law by showing basketball players wearing T-shirts with logos of the famous and very popular Lithuanian beer "*Švyturys*" during the live broadcast of the game. The same logos were also visible on the ground and in the stands around the basketball ground.

It should be noted for reasons of clarity that the logos of alcohol products were visible on the TV screen only within the scenery of the game, so that the broadcaster could not technically block them.

However, the State Consumer Rights Protection Authority, which is responsible for the control of the requirements on advertising of alcohol in the media, treated the described case as an infringement of the Law. According to the recent amendments of the Law on Alcohol Control (see IRIS 2007-8: 15) that came into force on 1 January 2008 alcohol advertising is prohibited from 6 a.m. to 11 p.m. in broadcast programmes of broadcasters under Lithuania's jurisdiction.

In fact, earlier in the year, when the aforementioned law came into effect, many debates were held concerning the broadcasting of logos of alcohol products during sports programmes. The main issue was whether the broadcasting of such logos placed within the sports field during live broadcasts of sports games could be equated with traditional advertising and whether the stricter requirements (compared to those before the amendments) should apply to such advertising.

A solution has not yet been found. The *Seimas* (Parliament) has formed a working group intended to work out the necessary amendments regarding this issue. A proposal should be prepared by 31 March 2008. ■

Jurgita Iešmantaitė
Radio and Television Commission of Lithuania

● **Information of the State Consumer Rights Protection Authority, available at: http://merlin.obs.coe.int/redirect.php?id=11167**

LT

LV – Competition Council of Latvia Rejects Broadcasters' Complaint

On 13 February 2008, the Competition Council of Latvia adopted a decision to reject the complaint submitted by the Latvian Broadcasters' Association (LBA) with respect to an alleged abuse of a dominant position on the part of the AKKA/LAA, the major copyright collective management society of Latvia.

LBA, a non-governmental body uniting the major TV and radio broadcasters of Latvia, complained that for several years it has had difficulties in concluding agreements with AKKA/LAA on the licence terms for the use of musical works in broadcasts. The ultimate source of the difficulties has been the disagreement with the tariffs offered by AKKA/LAA, which in the opinion of the LBA were excessively high. Thus, the LBA argued that AKKA/LAA is abusing its dominant position by imposing unfair selling prices and other unfair trading conditions, as well as applying dissimilar conditions to equivalent transactions (namely offering different tariffs for radio and TV broadcasters).

The Competition Council agreed that the AKKA/LAA is in a dominant position in the relevant market, which is characterised as the market for licences for the use of musical works of authors represented by AKKA/LAA within broadcasts in the territory of Latvia. As AKKA/LAA is the only copyright collective management society in Latvia authorised to issue licences for the broadcasting of musical works (legal monopoly), the Competition Council did not have much difficulty in establishing that it enjoys a dominant position. However, the Competition Council did not find that there was an abuse of this dominant position as alleged in the complaint.

After the analysis of the tariff documentation of the AKKA/LAA, the Competition Council established that the tariffs are clearly defined: the general rule being that the tariff is calculated as a certain percentage of the broadcaster's gross income. The tariffs are applied differently to different categories of broad-

casters (in general, smaller tariffs to local broadcasters, higher tariffs to national broadcasters), and take into account the proportion of musical works within the broadcasts. For example, according to the latest AKKA/LAA tariffs, a TV broadcaster with a national or cross-border coverage, using musical works during 30-40% of its broadcasting time, would have to pay a licence fee in the amount of 2% of its gross income. It is claimed that the tariffs have been established following the recommendations of the International Confederation of Authors and Composers Societies.

The Competition Council made a comparison between the tariffs applied by AKKA/LAA and those applied by similar copyright collective management societies in other EU member states. It found out that the tariffs applied by AKKA/LAA are among the lowest within the EU. This fact, together with the general assessment of the tariff structure and application terms, led the Council to the conclusion that the tariffs were justified.

Ieva Bērziņa-Andersone
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Furthermore, the Competition Council examined whether it is justified to apply different tariffs to radio and TV broadcasters. The LBA had argued that these are equivalent transactions, thus different tariffs would constitute a discrimination and create a competitive disadvantage. However, the Competition Council established that the TV and radio broadcasters operate in different relevant markets, as their products are not substitutes for each other. Accordingly, the issuing of licences for the use of musical works in TV and in radio broadcasts cannot be considered as equivalent transactions, and the different tariffs are justified.

It could be hoped that the decision of the Competition Council will contribute to a final reconciliation and the conclusion of a licence agreement between the AKKA/LAA and the LBA. However, the decision may be appealed to the Administrative Court within one month after it comes into force. As a result, it is currently still not clear whether the broadcasters will be ready to live with the decision, or whether they will attempt to argue their case further up the judicial hierarchy. ■

● **Decision of the Competition Council, available at: http://merlin.obs.coe.int/redirect.php?id=11168**

LV

MT – Civil Court Confirms the Independence of the Broadcasting Regulator

In the context of the general elections of 8 March 2008, the Broadcasting Authority adopted a scheme for general election broadcasts, wherein the four political parties competing in the general elections would participate in debates and press conferences on the public service broadcaster, during the period from 11 February to 6 March 2008. No political broadcasts were to take place both on 7 and 8 March 2008.

On 23 February 2008, the Green Party requested that the Civil Court, First Hall, prohibit the Broadcasting Authority from effecting changes to its scheme of election broadcasts. On 25 February the Civil Court heard the case and delivered a written decree.

In its decree, the Civil Court referred to the provisions of articles 119(1) and 118(8) of the Constitution of Malta. Article 119(1) provides that it is the function of the Broadcasting Authority to ensure that, so far as possible, in such sound and television broadcasting services as may be provided in Malta, due impartiality is preserved in respect of matters of political or industrial controversy or relating to current public policy, and that broadcasting facilities and time are fairly apportioned between persons belonging to different political parties. Article 118(8) states that, in the exercise of the above-mentioned functions, the Broadcasting Authority is not subject to the direction or control of any other person or authority.

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In its decree, the Court held that, bearing in mind the above-mentioned Constitutional provisions, it is the Broadcasting Authority which has to ensure balance and impartiality in political broadcasting and that the Court's role in this respect is limited, in order to ensure that it does not substitute itself for the discretion exercised by the Authority in its constitutional function. The Court's function is to ascertain whether or not the Authority had in the relevant case acted beyond its lawful powers, whether it had observed the law and whether it acted in such an irrational way, so as to have executed its lawful duties in a wrongful manner.

The Court held that in order for it to be in a position to intervene, as requested by the Green Party, the latter would have to prove that there had been a serious breach of law on behalf of the Broadcasting Authority. However, such a breach could not be found to have taken place in the case under examination, as the Authority has based its decision on programming considerations and its reasoning could not be considered irrational under the circumstances; nor could it be proved to be in violation of the law. The Court held that the Authority did consider the relevant facts before arriving at its decision, and that its conclusions were not irrational. Hence, the Court refused to issue a warrant of prohibitory injunction to prevent the Authority from changing its general elections' programme schedule and found in favour of the Authority. By refusing to review the Authority's decision on the merits, the Court has recognised the independence of the broadcasting regulator when carrying out its lawful constitutional duties of ensuring balance and impartiality in political broadcasting. ■

● ***Mandat ta' Inibizzjoni: Alternattiva Demokratika vs Awtorita' tax-Xandir* (Warrant of Prohibitory Injunction: Democratic Alternative (The Green Party) v. Broadcasting Authority), available at: http://merlin.obs.coe.int/redirect.php?id=11170**

MT

PL – Controversial Awarding of Frequencies to TV Puls

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In 2007, *Krajowa Rada Radiofonii i Telewizji* (National Broadcasting Council - KRRiT) announced competitions for the last five free terrestrial television frequencies in Wrocław, Szczecin, Katowice, Nowy Sącz and Leszno. According to the announcement, the competition concerned only broadcasters with a licence for a general ("universal") programme service. The applications of TVN, TV4, TV Puls and TV Odra were accepted.

Just prior to this, in November 2006, TV Puls had filed an application concerning the changes of the terms of its licence as regards the nature of its channel: from a specialised programme to a general programme service. TV Puls is mainly owned by a Franciscan Order (60 percent) and Rupert Murdoch's News Corporation (35 percent). In 2004, TV Puls had been granted a licence for a specialised social-religious programme. According to the terms of its licence, it was obliged to devote 70 percent of the weekly transmission time for the programmes from "an area of specialisation". When applying for a "universal" licence it argued that such a licence similar to those of Polsat and TVN would help to offer a wider variety of programmes. Preserving the social-religious (family and Christian) character of the programme, a richer offer with news, commentary and entertainment programme services would allow it to reach a wider range of audience. In January 2007, KRRiT unanimously took a resolution approving the changes to the terms of the TV Puls licence.

As a result of the competitions for frequency assignment in 2007, KRRiT recently awarded the regional station TV Puls new terrestrial frequencies: on 15 January 2008, KRRiT decided to expand the TV Puls licence to the regions Wrocław and Szczecin, and on 7 February 2008, TV Puls received frequencies for Nowy Sącz and Katowice–Bytków. KRRiT justified its decision on the basis of a need to support the smallest television broadcasters. TVN for instance has its transmitters in Szczecin and Wrocław, and TV4 its transmitters in Szczecin, while TV Puls is not present in any of these areas.

TVN protested against KRRiT's decisions. It argued that the KRRiT resolution of January 2007 concerning the change to the terms of the TV Puls licence from a specialised programme to a "universal" constituted a "serious infringement of the law" because the statutorily required licence procedure had not been correctly applied. As frequencies should only have been granted to channels licensed to offer a general programme service, TV Puls would not have been authorised to take part in the competition and hence, of course, to be awarded new frequencies.

KRRiT does not share the position of TVN. TV Puls estimates that under the current situation with new transmitters it could reach 30 percent of the Polish audience (formerly it was only 16%). ■

PT – Digital TV Contests

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The rules for the allocation of Digital Terrestrial Television concessions, nº 207-A/2008, have been published in the Official Journal.

The document establishes that there are two distinct public calls for tender: the first deals with the award of a national coverage license, concerning Multiplex A, for the transmission of TV programmes with non-conditional access. The second covers the granting, to one sole entity, of five frequency usage rights to the transmission of TV channels with either conditional or non-conditional access (two of these corresponding to national coverage licenses, concerning Multiplexes B and C, and a further three on partial territorial coverage, concerning Multiplexes D, E and F). In essence, the Portuguese government has opted for the adoption of a two-tiered model, with both Free-to-Air and Pay TV options.

Candidates have 40 days (as of 25 February) to submit their applications and the winner of the Pay TV licenses will have 42 months to fulfil the following obligations: a) for Multiplexes B and C, coverage of 75 per cent of the national population, whilst ensuring balanced proportionality, in terms of all continental and insular districts; b) for Multiplexes D, E and F, coverage of 75 per cent of the existing population in a pre-determined (coastal) area (Annexe I). Licences will be valid for 15 years and can be renewed for similar periods. ■

Portaria n.º 207-A/2008 de 25 de Fevereiro, Diário da República, 1.ª série — N.º 39 — 25 de Fevereiro de 2008 **(Decree n.º 207-A/2008 of 25 February, Official Journal, 1st series — N.º 39 — 25 February 2008), available at: http://merlin.obs.coe.int/redirect.php?id=11171**

EN-PT

RO – CNA Creates Order in the Cable Network Operator Market

The territorial inspection teams of the *Consiliul Naţional al Audiovizualului* (National Audiovisual Council – CNA) have established in the last few months that a relatively large number of cable network operators, especially in rural areas, are distributing television channels without reaching a prior agreement with the programme providers. According to a recent CNA press release, a company in Voluntari, a locality close to Bucharest, is said to have set a rather dubious record with the illegal transmission of 54 television channels (piracy). Cable providers in the counties of Vrancea, Vâlcea and Buzău are said to have each fed 30 channels into their networks without the consent of the television companies concerned. For these breaches of the law, the CNA imposed in 2007 a total of 177 sanctions, consisting of 159 warnings and of 18 fines amounting to RON

125,000 (about EUR 33,532). Until the adoption of CNA Decision No. 36 of 22 January 2008 (see IRIS 2008-3: 17), cable network operators who had been found guilty of this type of piracy were obliged to ceased their transmissions after being penalised by the CNA until they had created a legal situation by concluding a contract with the relevant television provider. It was not necessary to inform the television viewers why the number of channels had been reduced. Based on the same obligations that have applied up to now to broadcasters, who have to inform the public about any penalties imposed by the CNA if they have breached the rules of *Legea audiovizualului* (Audiovisual Act) No. 504/2002 and the *Codul de reglementare a conținutului în audiovizual* (the CNA's Regulatory Code for Audiovisual Content), CNA Decision No. 36 now compels cable network and digital platform operators to inform the public or their own subscribers about the breach committed. The wording of the penalty received must be shown without interruption for one week on the channel on which the illegal broadcast was previously transmitted. The CNA hopes that it will in this way be able to counter such practices and provide the subscribers of the individual cable network operators with sufficient information about developments. ■

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● ***Informare de presă CNA: Ordine pe piața de cablu*** **(CNA press release) of 25 January 2008, available at:**
http://merlin.obs.coe.int/redirect.php?id=11194
RO

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AGENDA

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