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OF THE EUROPEAN AUDIOVISUAL OBSERVATORY

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IRIS LEGAL OBSERVATIONS
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European Court of Human Rights: Case of Meltex Ltd. and Mesrop Movsesyan v. Armenia

In a judgment of 17 June 2008 the European Court of Human Rights held unanimously that the refusal by the Armenian authorities, on several occasions, to grant the Meltex television company requests for broadcasting licences amounted to a violation of Article 10 of the European Convention on Human Rights. The Court firstly recognized that the independent broadcasting company Meltex was to be considered as a "victim" of an interference with its freedom of expression by the Armenian public authorities: by not recognising the applicant company as the winner in the calls for tenders it competed in, the NTRC (National Radio and Television Commission) effectively refused the applicant company's bids for a broadcasting licence and such refusals do indeed constitute interferences with the applicant company's freedom to impart information and ideas. The Court also made clear that States, however, are permitted to regulate by means of a licensing system the way in which broadcasting is organised in their territories, particularly in its technical aspects, and that the grant of a licence may also be made conditional on matters such as the nature and objectives of a proposed station, its potential audience at national, regional or local level, the rights and needs of a specific audience and the obligations deriving from international legal instruments. The compatibility of such interferences must be assessed in light of the requirements of paragraph 2 of Article 10 of the Convention, which means *inter alia* that the interference must be prescribed by law in a way that guarantees protection against arbitrary interferences by public authorities. Indeed, the manner in which the licensing criteria are applied in

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the licensing process must provide sufficient guarantees against arbitrariness, including the proper reasoning by the licensing authority of its decisions denying a broadcasting licence (see IRIS 2008-1: 3, ECtHR 11 October 2007, Glas Nadezhda EOOD and Elenkov v. Bulgaria).

The Court noted that the NTRC's decisions had been based on the Broadcasting Act (2000) and other complementary legal acts defining precise criteria for the NTRC to make its choice, such as the applicant company's finances and technical resources, its staff's experience and whether it produced predominately in-house Armenian programmes. However, the Broadcasting Act had not explicitly required at that time that the licensing body give reasons when applying those criteria. Therefore, the NTRC had simply announced the winning company without providing any explanation as to why that company, and not Meltex, had met the requisite criteria. There was no way of knowing on what basis the NTRC had exercised its discretion to refuse a licence. On this point, the Court noted that the guidelines adopted by the Committee of Ministers of the Council of Europe in the broadcasting regulation domain call for open and transparent application of the regulations governing the licensing procedure and specifically recommend that "all decisions taken ... by the regulatory authorities ... be ... duly reasoned" (Rec. (2000)23 - See also Declaration of the Committee of Ministers of 26 March 2008 on the independence and functions of regulatory authorities for the broadcasting sector). The Court further took note of the relevant conclusions reached by the PACE in its Resolution of 27 January 2004 concerning Armenia, where it stated that "the vagueness of the law in force had resulted in the NTRC being given outright discretionary powers". The Court considered that a licensing procedure whereby the licensing authority gives no reasons for its decisions does not provide adequate protection against arbitrary interferences by a public authority with the fundamental right to freedom of expression. The Court therefore concluded that the interference with Meltex's freedom to impart information and ideas, namely the seven denials of a broadcasting licence, had not met the requirement of lawfulness under the European Convention and hence violated Article 10 of the Convention. ■

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● Judgment by the European Court of Human Rights (Third Section), case of Meltex Ltd. and Mesrop Movsesyan v. Armenia, Application no. 32283/04 of 17 June 2008, available at:
http://merlin.obs.coe.int/redirect.php?id=9237

EN

EUROPEAN UNION

European Court of First Instance: Ruling on Government Aid to RTP

On 26 June 2008, the European Court of First Instance ruled that Articles 1 and 2 of Commission Decision 2005/406/EC of 15 October 2003 on ad hoc measures implemented by Portugal for RTP should be annulled. The Commission's decision had considered that government measures in favour of RTP, the Public Service Broadcaster, developed in the late 1990s had been under the scope of Public Service and did not constitute state aid.

The court has found that (67) "the Commission – since it did not examine whether, despite its selective nature, the exemption from notarial charges did not constitute State aid on the ground that the recourse to a legislative instrument which entailed that exemption was not chosen with the aim of enabling public undertakings to escape those charges, but was merely part of the logic of the Portuguese legal system – failed to state grounds in law for its finding to the effect that the exemption from notarial charges did not constitute State aid". Furthermore, it found that (254) "the Commission, in not requiring the Portuguese Republic to disclose the contractual external audit reports, failed to fulfil its obligation to undertake a diligent and impartial investigation". That being the case (255) "the Commission failed to place itself in a position in which it had information which was sufficiently reliable available to it to determine the public services actually supplied and the costs actually incurred in supplying them. In the absence of such information, the Commission was unable to proceed subsequently to a meaningful verification of the proportionality of the costs of the public services and was unable to make a valid finding that there had been no overcompensation of the public service costs".

This decision results from an action brought on 31 December 2003 by SIC (*Sociedade Independente de Comunicação, S.A.*) against the Commission of the European Communities. According to the applicant, the authorisation of the official registration without notarial deed of RTP's transformation into a public limited company accorded an advantage to RTP which was denied to other economic operators in the market. ■

Luís António Santos
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● Decision of the ECJ of 26 June 2008, Case T-442/03 SIC – Sociedade Independente de Comunicação, SA v Commission of the European Communities, available at:
http://merlin.obs.coe.int/redirect.php?id=11320

● Commission decision of 15 October 2003 on ad hoc measures implemented by Portugal for RTP (2005/406/EC), available at:
http://merlin.obs.coe.int/redirect.php?id=11323

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

European Commission: Proposal for an Extension of the Term of Protection in Phonograms

On 16 July 2008, the European Commission adopted a proposal to amend Directive 2006/116/EC on the term of protection of copyright and related rights. This proposal aims at extending the term of protection of related rights in phonograms and in performances fixed thereon from 50 to 95 years. The term extension should apply to all performances and sound recordings that are still protected at the moment of the proposal's entry into force, but will not extend to performances that have already fallen into the public domain at the time of the amended Directive's adoption. The Commission believes this should benefit performers and phonogram producers alike. To begin with, should bring performers' rights more into line with those of authors, thereby guaranteeing the former a proper income throughout retirement. In addition, the proposal is intended to help phonogram producers generate additional revenue from sales both on and off-line, which the Commission claims they would need so as to adapt to the rapidly changing trade environment, as well as to continue their investments in new talent.

Christina Angelopoulos
Institute for Information Law (IViR), University of Amsterdam

The proposal includes accompanying measures for the benefit of session musicians, in the form of a compensation fund financed by 20% of record companies' revenues resulting from the extended period of protection. In addition, a "return of rights" rule is envisioned for performers that have assigned all their rights to record producers. Hereby, a "use it or lose it" clause in contracts between performers and phonogram producers should prevent producers from "locking up" those phonograms that are not commercially interesting and enable performers to either find another producer or release the sound recording independently, e.g. through the Internet. Recordings not marketed at all would loose protection and enter the public domain. The proposal also includes a "clean slate" for contracts concluded before the amending Directive's entry into force for the extended period beyond that at which the rights would, under the previous regime, have ceased.

Finally, the same initiative concentrates on harmonising the criteria for calculating the term of protection of copyright in co-written musical works. Currently, the criteria vary between the different Member States, something which may lead to difficulties in the administration of rights and the distribution of royalties in case of a cross-border exploitation of these works. The Commission aims at removing these difficulties by establishing a uniform method of calculation, according to which the term shall expire 70 years after the death of the last surviving author, be it the lyricist or the composer.

Neither of these topics is uncontroversial. This becomes apparent, in particular, from the differing responses to the consultation based on the Commission's Staff Working Paper on Copyright Review (see IRIS 2004-8: 4), as well as from an independent academic study that was commissioned by the Commission's DG Internal Market in 2006.

The proposal has now been transmitted to the Council and the European Parliament for further consideration. ■

• Proposal for a European Parliament and Council Directive amending Directive 2006/116/EC of the European Parliament and of the Council on the term of protection of copyright and related rights, Brussels, 16 July 2008, COM(2008) 464 final, 2008/0157 (COD), available at:
http://merlin.obs.coe.int/redirect.php?id=11335
DE-EN-FR

• Institute for Information Law (IViR), "The Recasting of Copyright & Related Rights for the Knowledge Economy", report to the European Commission, DG Internal Market, November 2006, available at:
http://merlin.obs.coe.int/redirect.php?id=11338
EN

European Commission: Green Paper on Copyright

On 16 July 2008, the European Commission announced the adoption of a Green Paper on Copyright in the Knowledge Economy. This Green Paper aims at fostering a debate on how research, science and educational materials can best be disseminated to the public in the online environment. It queries whether knowledge is freely circulating in the Internal Market, whether the existing Community framework on copyright and related rights is sufficiently robust to protect knowledge products and whether it provides sufficient incentives for authors and publishers to create and disseminate digital versions of their works. With this approach the Commission endeavours to ascertain whether the balance provided by the current Community framework on copyright and related rights is still in line with the rapidly changing environment.

To achieve a fair balance between the interests of rightsholders and users exceptions and limitations to copyright and related rights are considered of paramount importance. Therefore, the Green Paper first looks into some general issues relating to the closed set of – mostly non-mandatory – exceptions and limitations provided for in the 2001 Directive on Copyright in the Information Society. The Green Paper questions, *inter alia*, whether an approach based on a list of non-mandatory exceptions is adequate in the light of evolving Internet technologies and the prevalent economic and social expectations and whether certain categories of exceptions should be made mandatory to ensure

more legal certainty and better protection of beneficiaries of exceptions.

Subsequently, the Green Paper focuses on particular exceptions and limitations which the Commission thinks are most relevant for the dissemination of knowledge. These include particular exceptions for the benefit of libraries and archives (i.e. the exception for the purpose of preservation, the exception for the making available of digitised works on dedicated terminals and a possible exception for orphan works); the exception for the benefit of people with a disability; the exception allowing dissemination of works for teaching and research purposes; and a possible exception for user-created content. The Commission wonders whether these exceptions should evolve in the era of digital dissemination and formulates specific questions to that purpose.

With this Green Paper the Commission attempts to organise and structure the debate on the long-term future of copyright policy in the given fields. All stakeholders are therefore invited to submit responses to the different policy questions it formulates. ■

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Institute for Information Law (IViR), University of Amsterdam

● **European Commission, Green Paper on Copyright in the Knowledge Economy, Brussels, 16 July 2008, COM(2008) 466 final, available at: http://merlin.obs.coe.int/redirect.php?id=11340**

DE-EN-FR

● **"Intellectual Property: Commission adopts forward-looking package", Press Release of the European Commission of 16 July 2008, IP/08/1156, available at: http://merlin.obs.coe.int/redirect.php?id=11343**

DE-EN-FR

European Commission: Collecting Society Practices that Limit the Freedom of Music Authors and Users Banned

On 16 July 2008, the European Commission adopted an anti-trust decision intended to prohibit copyright-handling practices that create artificial barriers to the provision of music across European borders. These involve clauses in reciprocal representation agreements between collecting societies (all of which operate under the umbrella of CISAC – the International Association of Collecting Societies of Authors and Composers) that have been deemed to infringe the European rules on restrictive business practices (Article 81, EC Treaty and Article 53, EEA Agreement; see also the European Court of Justice's Tournier and Lucazeau judgements). Reciprocal representation agreements are agreements concluded between collecting societies so as to enable each other to grant licences for the copyright of all signatory societies' members (i.e. music authors). These agreements are, for the most part, based on CISAC's non-mandatory model contract for reciprocal representation agreements and reflect its language.

More specifically, collecting societies are now obliged to review their reciprocal representation agreements in order to remove any a) "membership clauses", which prevent music authors from choosing between collecting societies; and b) territorial restrictions that prevent collecting societies from offering licences to users outside their domestic territory. The latter are embodied in the reciprocal representation agreements in "exclusivity clauses", whereby one collecting society authorises another to administer its repertoire on an exclusive basis within a certain territory, and corresponding concerted practices. The result is a segmentation of the European market along national borders.

The investigation leading up to the decision was opened following complaints from the broadcasting group RTL and Music Choice, a British online music provider. Companies such as these, desiring to offer transnational music services, are limited by the inability to obtain multi-territorial licenses rather than negotiate with 24 separate collecting societies. CISAC itself has already removed such anti-competitive clauses from its model contract as of November 2004 and for this reason is not an addressee of the decision. Nevertheless, they continue to survive in a number of specific agreements concluded by its members.

The Commission had initially attempted to reach an amicable solution. In this context CISAC and 18 collecting societies submitted commitments, which were then market-tested. Nevertheless, the results, on the basis of the observations submitted both by market players and the collecting societies themselves, were negative and it was therefore concluded that effective competition could not be introduced through a negotiated procedure.

The decision is intended to encourage collecting societies to improve the quality of their services and administrative costs through competition to attract authors free to choose the collecting society that caters best for their needs. The Commission is requiring that collecting societies inform it of modifications to their agreements and practices within a deadline of 120 days, but has not imposed any fines. The decision does allow collecting societies to maintain their current system of bilateral agreements and to retain the right to set the levels of royalty payments due within their domestic territory. It has drawn criticism from both CISAC and ECSA (the European Composer and Songwriter Alliance). ■

Christina Angelopoulos
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● **"Antitrust: Commission prohibits practices which prevent European collecting societies offering choice to music authors and users", IP/08/1165, Brussels, 16 July 2008, available at: http://merlin.obs.coe.int/redirect.php?id=11332**

DE-EN-FR

IRIS LEGAL OBSERVATIONS
OF THE EUROPEAN AUDIOVISUAL OBSERVATORY

NATIONAL

AT – Father Not Liable for Daughter's File Sharing Activities

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The *Oberste Gerichtshof* (Supreme Court - OGH) in Austria ruled in its recently published decision of January 2008 that a father was not responsible for copyright infringements committed by his daughter, a minor, through her file sharing activities.

While the owner of the Internet connection was away on holiday his 17-year old daughter had uploaded 1,627 music files to a file sharing site. He had been unaware of the possible copyright problems linked to the use of file sharing systems and had never discussed these issues with his daughter. The court decided that the father was not liable. It accepted that the father had made the subsequent copyright breaches possible by making the computer, with its Internet connection, accessible to his daughter. However, he had not had any grounds to suspect that his daughter would break the law.

Finally, the court added that not all adults could be expected to know how Internet file sharing systems worked. The father had therefore not been under any obligation to monitor his daughter's online activities in advance. ■

● Ruling of the OGH of 22 January 2008 (case no. 4Ob194/07v), available at: http://merlin.obs.coe.int/redirect.php?id=11352

DE

AT – Agreement to Revive Press Council

Robert Rittler
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For four decades, the non-governmental *Presserat* (Press Council) monitored compliance with journalistic standards in Austrian newspapers. In 2002, the *Verband Österreichischer Zeitungen* (Association of Austrian Newspapers - VÖZ) withdrew because it felt the Press Council had too much influence. Since then, the Press Council, although legally still in existence, has been inactive.

In July 2008, the *Gewerkschaft der Privatangestellten Druck, Journalismus, Papier* (Journalists' Union), the VÖZ and the *Verein der Chefredakteure* (Editors' Association) reached a fundamental agreement. The *Österreichische Zeitschriften- und Fachmedienverband* (Austrian Association of Newspapers and Specialist Media), the Presseclub Concordia and the *Verband der Regionalmedien Österreichs* (Association of Austrian Regional Media) are to be invited to become members of the Press Council's support body from the outset. It is hoped that the Press Council's decisions will be accepted by all newspapers, including free ones.

The plan is to set up two decision-making bodies, each with six members and each chaired by a lawyer. The legal significance of the Press Council's decisions will be increased.

The system for checking editorial content through a self-monitoring process operated by the Press Council will be supplemented by ombudspersons responsible for dealing with simple complaints from readers. ■

BG – Draft Law on Conflict of Interests

Rayna Nikolova
Council for Electronic Media, Sofia

In June 2008 the Council of Ministers submitted to the Parliament the draft of the Law on Conflict of Interests ("Draft Law").

According to the Draft Law a conflict of interests may exist if:

1. there are private interests of a person who occupies a state position or the interests of persons related to this person, which contradict his/her powers and duties;
2. a person who occupies a state position or persons related to him/her are interested in the results of his/her activities as a person occupying state positions and this may affect the performance of the state officials' powers and duties;
3. there is reason for distrust in the impartiality and objectivity of the person occupying a state position in performing his/her powers and duties.

Pursuant to the text of the Draft Law the main goals of the new act are the following ones:

1. to ensure that the state and public interests are not influenced by private ones;
2. to prevent state officials from being influenced by their private interests and by the interests of persons related to them;
3. to enhance the public trust in the state institutions;
4. to create conditions for preventing and limiting corruption.

The Draft Law explicitly enumerates the persons occupying high positions who are subject to the rules governing the conflict of interest. Among those persons are the general directors of the Bulgarian National Television and the Bulgarian National Radio. The members of the Council for Electronic Media and the Communications Regulation Commission shall also comply with the conflict of interests rules. ■

BY – New Media Law Adopted

Despite protests from national and international human rights and freedom of expression organisations, a new Statute on Mass Media (*О средствах массовой информации*) was signed into effect on 4 August 2008 by Belarusian President Aleksandr Lukashenko. The Statute will come into effect six months after publication. It will replace the current Statute on the Press and Other Mass Media.

Articles 11 through 16 of the Statute regulate questions of registration and re-registration of media, the need for which has repeatedly aroused serious doubts on the part of international organizations. Article 34 para 2 of the Statute testifies to a considerable shortening of the list of journalists' rights. As a result, the journalist is deprived of many legal and social guarantees of his or her activities to the benefit of society.

Chapter 9 of the Statute envisages liability for violating the legislation on the media. In accordance with this, the initial form of liability is a written warning to media editors, which may be made on a variety of grounds, including for "disseminating inaccurate information that might cause harm to state and public interests", "distribution of information not complying with reality and defaming the honour or business reputation of individuals or the business reputation of legal entities" (Article 49 para 1).

The next sanction is suspension of media activities for a period of up to three months by resolution of the Ministry of Information on a variety of grounds, including for failing to provide, in due time, information on remedying offences with the necessary evidence (Article 50 para 1).

Finally, the harshest sanction is termination of the activities of a media outlet (Article 51). A decision on this shall be taken by a court at the demand of the Ministry of Information or prosecutor's office on the condition that, during a year, the media outlet or its founder (founders) have been issued two or more written warnings. Such termination of activities is accompanied by a prohibition on the founders of the given media outlet to establish new ones for a period of three years (Article 10 para 3.3).

A major innovation of the Statute is the establishment of a Public Coordination Council which would make recommendations in the sphere of the media (Article 28). Its composition and activities are to be determined by the Council of Ministers.

Article 3 para 2 of the Statute applies only to the distribution of existing printed and television and radio media via the Internet. Moreover, these Internet outlets do not fall under the requirement of state registration of the media. Dissemination of information on the Internet is thus not subject to registration or, apart from the above-mentioned Internet outlets, to regulation by the Statute on the Mass Media. At the same time, the norm of the Statute comes into collision with Article 11 para 1.2 which establishes a possibility and procedure for registration of media disseminated via the Internet by the Council of Ministers of the Republic of Belarus.

On 18 June, the Representative on Freedom of the Media of the Organization for Security and Cooperation in Europe (OSCE) submitted a review of the draft law on the Mass Media, detailing the shortcomings of the draft and offering ways of correction. ■

Andrei Richter
Media Law and Policy Centre

- **Statute of the Republic of Belarus *О средствах массовой информации* of 17 July 2008, No. 427-3, available at: http://merlin.obs.coe.int/redirect.php?id=11313**

BE

- **Comments on the Draft Law of the Republic of Belarus «On the Mass Media» of the Office of the Representative on Freedom of the Media of the OSCE, available at: http://merlin.obs.coe.int/redirect.php?id=11314**

EN

CH – Audiovisual Pact Renewed for a Further Three Years

The Swiss radio and television broadcasting company "SRG SSR idée Suisse" (SSR) and the six associations in Switzerland's cinematographic and audiovisual sector that are partners in the Audiovisual Pact have renewed their cooperation agreement for a further three years (2009 to 2011). The Audiovisual Pact represents in concrete form the statutory obligation incumbent on the SSR to support Swiss independent production; its aim is to reinforce collaboration between the SSR and the audiovisual industry in Switzerland (see IRIS 2005-8: 10). Under this system, the SSR has invested almost 200 million Swiss francs since 1998 in financing more than 1,000 fiction films, documentaries, animated films and short films.

The new Audiovisual Pact, signed in Berne on 16 July 2008, retains most of the provisions of the previous version. The SSR's annual contribution will amount to a total of CHF 21.3 million in 2009, compared with 19.8 million in 2008. This commitment will be increased gradually in 2010 and 2011, to take the total amount of the investment provided by the SSR to CHF 22.3 million in 2011. In 2009, CHF 8.4 million will be allocated to cinematographic production, while television films will receive a total amount of CHF 7.9 million, and CHF 500,000 will be earmarked for financing animated films. The 2009-2011 Audiovisual Pact also makes provision for the allocation of a new annual credit of CHF 500,000 intended to support the promotion on SSF's channels of cinema films when they are first shown in cinema theatres. A regulation will lay down the conditions for allocating this amount.

Another new feature is support for fiction series. This is a pilot project that will enable Télévision Suisse Romande (TSR), a component part of the SSR, to finance the production of new television series. The funds for financing these series will have to

come out of the budget for television films. The TSR has also committed itself to investing at least as much in each series from financial resources outside the Audiovisual Pact. The series benefiting from this new scheme may last no more than twenty episodes and no more than a total of 520 minutes.

The 2009-2011 Audiovisual Pact also confirms the SSR's right to use audiovisual works in a video-on-demand service on the test platform created in 2007 (see IRIS 2007-10: 7). This use is limited to the territory of Switzerland and is not exclusive. Furthermore, independent producers retain the exclusive right to exploit cinema films as video-on-demand before their first airing on SSR's channels. Lastly, the new agreement now authorises the SSR to offer Audiovisual Pact works as video-on-demand for a period of seven days following the broadcasting of the productions concerned on SSR's television channels (catch-up TV). ■

Patrice Aubry
Télévision Suisse Romande (Geneva)

• Audiovisual Pact for 2009-2011 between the Swiss radio and television broadcasting company (SRG SSR idée suisse) and the Swiss independent production sector

DE

CH – New Legal Provisions on Anti-copy Protection

The aim of the partial revision of the national legislation on copyright and neighbouring rights (LDA) which came into force on 1 July 2008 is to adapt copyright to the new communication and digital transmission technologies, and more particularly to reinforce the fight against piracy (see IRIS 2006-5: 9). By making it easier to produce and circulate copies, the digital environment increases the vulnerability of works protected by copyright. These new arrangements transpose into Swiss law the requirements of the Performances and Phonograms Treaty (PPT) of the World Intellectual Property Organisation (WIPO).

The new Article 39a of the LDA prohibits circumventing technical means of preventing or limiting the unlawful use of content protected by copyright. This means preventing users from obtaining unauthorised access to digital content or copying it without the originator's agreement. These measures include access control, anti-copy protection, encryption, and scrambling. Thus all the activities (production, distribution, advertising, rental, etc) and services concerning the devices, products or components aimed at circumventing technical protective measures are prohibited.

Protection against circumventing technical measures is however aimed only at preventing the unauthorised use of protected works or services. Consequently, the lawful exceptions to copyright protection, which limit copyright protection in the interests of the group (more particularly private use), take precedence over protection of technical measures. In other words, circumventing a protection measure is not prohibited if it is done exclusively for the purpose of lawful use.

Moreover, Article 39c of the LDA prohibits deleting or amending the information on the scheme of copyright and neighbouring rights. This provision protects firstly the electronic information that makes it possible to identify the protected content or defines the conditions and methods for use, and secondly the numbers and codes representing this information. This protection is granted when this information (a) is shown on a phonogram, a videogram or a data medium or (b) appears in connection with the communication with no physical medium of a protected work.

To preserve the balance of interests between the originators and the users of protected works, the Swiss Government has appointed an observer to detect any problems the implementation of these new statutory provisions could cause. The law on copyright has opted for auto-regulation by the parties concerned. However, if there are indications that the technical protective measures are being misused, the observer may propose his mediation to the parties involved with a view to promoting concerted solutions. He will not, however, have authority to make decisions or issue guidelines. ■

Patrice Aubry
Télévision Suisse Romande (Geneva)

• *Arrêté fédéral portant approbation de deux traités de l'Organisation Mondiale de la Propriété Intellectuelle et modification de la loi sur le droit d'auteur* (Revision of national legislation on copyright and neighbouring rights transposing into Swiss law the requirements of two WIPO Treaties and modifying the Copyright Act), 5 October 2007, available at:
http://merlin.obs.coe.int/redirect.php?id=11346 (FR)
http://merlin.obs.coe.int/redirect.php?id=11347 (DE)

DE-FR-IT

CZ – Supreme Administrative Court Rules on Danger to Minors Caused by Reality Shows

The Broadcasting Council of the Czech Republic has frequently had to deal with the principles of youth protection on television, particularly in relation to "Big Brother"-type formats and has imposed fines on many occasions.

The programmes concerned are accused of infringing the provisions of the Youth Protection Act. The Broadcasting Council's main criticisms of the new formats concern the systematic flouting of social standards and the deliberate attempts to encourage participants to break taboos.

As far as common social values are concerned, these programmes are considered particularly problematic for children and young people. Compared to adults, these groups have far less developed personalities and values and are dependent on role models. As well as people from their close social environment (parents, teachers, friends), role models are increasingly being found in the media and have a

formative influence on children and young people. The Broadcasting Council has found that television companies have deliberately crossed boundaries in such programmes in order to achieve greater public attention. For example, participants have been subjected to undignified tests of courage and "challenges", placed in situations of extreme fear or stress and made to compete against each other. These programmes often show vulgar behaviour, obscenity and tobacco and alcohol addiction, which have a negative impact on the development of children and young people.

The Broadcasting Council imposed numerous fines for the transmission of such programmes in 2006. The television companies appealed against all of these fines. The Prague Municipal Court rejected some of the broadcasters' complaints, but quashed many of the Broadcasting Council's decisions which it considered to be based on insufficient grounds.

The Broadcasting Council lodged an appeal against these rulings of the Prague Municipal Court. The Supreme Administrative Court upheld this appeal, quashed the rulings and referred them back to the Prague Municipal Court for a new procedure, in which the Municipal Court is obliged to follow the legal interpretation of the Supreme Administrative Court. The Court upheld the Broadcasting Council's argument, concluding that broadcasting such programmes can be harmful to minors and that the Broadcasting Council can fine those responsible. ■

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● Ruling of the Supreme Administrative Court of the Czech Republic (case no. 7 Ca 144/2008) of 15 May 2008, available at:
http://merlin.obs.coe.int/redirect.php?id=11353

CS

DE – Supreme Court Rejects Copyright Fee on Duplicators

In a ruling issued on 17 July 2008, the *Bundesgerichtshof* (Federal Supreme Court - BGH) decided that CD/DVD duplicators were not subject to a copyright fee.

The plaintiff, the Wort collecting society, which collects copyright fees for literary works, had demanded that the defendant, which sells such duplicators, pay a fee of EUR 1,227.10 per device sold. Duplicators can be used to copy data from CDs, CD-ROMs or DVDs without the use of a PC, but using burners. The plaintiff based its demand on Art. 54a para. 1 sentence 1 of the old version of the *Urheberrechtsgesetz* (Copyright Act - UrhG), since the case was to be judged according to the legal situation that applied until the end of 2007 (concerning the new law, see IRIS 2006-5: 11).

The BGH rejected this argument. It ruled that, under the disputed provision, the author of a work was entitled to compensation from manufacturers, importers and sellers of devices that were designed to duplicate the work through photocopying or a similar process. However, a duplicator could not be used to carry out such photomechanical duplication.

The Court also held that duplicators, which could be used to copy digital originals, did not perform a process similar to photocopying, which only concerned the duplication of analogue printed documents.

The Court also ruled out the possibility of extending the scope of the provision to include duplicators. Due to their high purchase price, duplicators were normally only used for commercial purposes and were only used to make copies for private use in exceptional cases. As a rule, such copies were made using photocopiers, which was why the legislature had applied a copyright fee to such devices. To extend this to duplicators under Art. 54a para. 1 sentence 1 of the old version of the UrhG was disproportionate to the extent to which these systems were actually used to copy protected works. ■

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● Press release no. 137/2008 on the BGH ruling of 17 July 2008 (case no. I ZR 206/05), available at:
http://merlin.obs.coe.int/redirect.php?id=11354

DE

DE – Liability Issues Related to Internet Use

German courts have recently dealt repeatedly with various aspects of liability in relation to Internet use.

For example, according to a ruling of the *Landgericht (LG) München I* (Munich District Court I) of 19 June 2008, parents are responsible for copyright infringements committed by their children (who are minors) in connection with Internet use if they have failed to properly fulfil their supervisory and educational obligations. A 16-year old girl had uploaded videos consisting of copyright-protected photographs onto two web portals. In the court's opinion, her parents had failed to meet their supervisory and educational obligations. The court ruled that parents should do everything necessary, bearing in mind the age, character and personality of the child and the actual situation, to prevent the violation of legally protected rights of third parties. This included a responsibility to educate their children. Considering the potential dangers of the Internet, the court held that a PC connected to the Internet was a "dangerous object". The court was not satisfied with the parents' claim that their daughter knew more about computers and the Internet than they did themselves.

According to a ruling of the *Oberlandesgericht* (Provincial Appeal Court - OLG) in Frankfurt am Main of 1 July 2008, the operator of a WLAN only became

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liable once he was aware of actual abuses, rather than because of the abstract danger of illegal use by a third party. The court stressed that the WLAN only needed to be secured in a way appropriate to the situation.

In two rulings of 16 July 2008, the *Landgericht (LG) Düsseldorf* (Düsseldorf District Court) explained that Internet connection owners who operated a WLAN could be expected, at the very least, to take standard measures to encrypt the WLAN. Otherwise, the connection owner would objectively create the opportunity for third parties to commit copyright infringements (for a report on the decision of the Austrian Supreme Court in a similar case, see IRIS 2008-8: 6). ■

- **Press release of the LG München I, 25 June 2008, concerning its ruling of 19 June 2008 (case no. 7 O 16402/07), available at: http://merlin.obs.coe.int/redirect.php?id=11355**
- **Ruling of the OLG Frankfurt of 1 July 2008 (case no. 11 U 52/07), available at: http://merlin.obs.coe.int/redirect.php?id=11356**
- **Rulings of the LG Düsseldorf of 16 July 2008 (case no. 12 O 195/08 and 12 O 232/08), available at: http://merlin.obs.coe.int/redirect.php?id=11357**

DE

DE – VG Berlin Objects to "Promotion" Label for Infomercial

In a ruling of 26 May 2008, the *Verwaltungsgericht Berlin* (Berlin Administrative Court – VG) rejected an application by the TV broadcaster ProSieben for interim legal protection against an objection lodged by the *Medienanstalt Berlin-Brandenburg* (Berlin-Brandenburg media authority - mabb) concerning an infomercial.

At the start of the broadcast on 30 November 2007, the programme was labelled as a "*Dauerwerbesendung*" (infomercial) and, during the broadcast, as "*Q.-Promotion*". The mabb complained that this breached the programme labelling obligation set out in Art. 7 para. 5 of the *Rundfunkstaatsvertrag* (Inter-State Broadcasting Agreement - RStV) in connection with para. 8.2 of the mabb advertising guidelines, according to which an infomercial must be denoted as such before it begins and for its entire duration. According to ProSieben, the mabb issued a decision on 28 December 2007 in its role as broadcasting regulator, requiring the broadcaster not to repeat the infringement in future.

ProSieben appealed the decision on 28 January 2008 and applied for interim legal protection on 29 January 2008. ProSieben argued that it had not breached Art. 7 para. 5 RStV, since this provision did not stipulate that the term "*(Dauer-)Werbesendung*" had to be shown. It also referred to Art. 49 para. 1 no. 5 RStV, under which failure to label the programme as an infomercial was punishable but the use of a different label was not. It claimed that the word "*Promotion*" was a common synonym for "Advertising" and that labelling the programme as an infomercial might cause advertisers to use other media instead. The objection put ProSieben at a disadvantage compared to the print media and public service broadcasters, which were subject to less stringent advertising rules, it argued.

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The VG's decision essentially concurred with the arguments put forward by the mabb. It stated that the wording of Art. 7 para. 5 sentence 2 RStV suggested that infomercials must be labelled *as such*. A viewer who selected the programme while it was being broadcast should be able to recognise its commercial character immediately. However, the editorial structure of the infomercial had the potential to mislead viewers, particularly if the vague label of "*Promotion*" was used. The weakness of this label was confirmed by the broadcaster's own admission that it feared losing advertising customers if the term "*(Dauer-)Werbesendung*" was used. The reference to Art. 49 para. 1 no. 5 RStV did not hold water, since an inadequate or incorrect label should be considered the same as the absence of a label for the purposes of the provision.

The VG did not believe that ProSieben had been unfairly discriminated against. Print media were not comparable because their impact on consumers was much less intense. There was no evidence that ARD and ZDF had been allowed to label infomercials as "*Promotion*" and, in any case, they were not under the mabb's jurisdiction. The use of the term "Promotion" constituted a breach of the rules on programme separation and labelling. ■

- **Ruling of the VG Berlin of 26 May 2008 (case no. VG 27 A 37.08), available at: http://merlin.obs.coe.int/redirect.php?id=11361**

DE

DE – Kurdish Satellite TV Channel Banned

On 13 June 2008, the Federal Minister for Home Affairs issued a ban on organisations active in Germany, as a result of which a German-based television production company was closed down. The measure was taken in order to prevent the transmission of Kurdish television channel Roj TV in Germany.

The broadcaster, licensed in Denmark, is said to be a mouthpiece of the Kurdish Workers' Party (PKK), which is banned in Germany, and was accused of propagating violence as a means of achieving independence. It had also encouraged viewers to become so-called guerrilla fighters in the armed conflict with Turkey.

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Like the British and French authorities, which banned or refused to award licences to broadcasters linked to the PKK and its successor organisation in 1999 and 2004 respectively, the German authorities hope that the ban will prevent the channel from reaching viewers in Germany, particularly via cable networks. ■

● **Notice of the ban issued against Mesopotamia Broadcast A/S METV and Roj TV A/S, Federal Gazette no. 90 of 19 June 2008, p. 2142**

DE

DE – 11th Inter-State Broadcasting Agreement Adopted

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On 12 June 2008, the Minister-Presidents of the *Länder* held their concluding discussions and signed the *11. Staatsvertrag zur Änderung rundfunkrechtlicher Staatsverträge* (11th Inter-State Agreement Amending Inter-State Broadcasting Agreements - RÄStV).

The new text mainly serves to incorporate the increase in broadcasting licence fees. It also prolongs the financing structure of the jugendschutz.net institution for a further four years.

It is probable that this Inter-State Agreement will no longer include any revised regulations governing the internal income redistribution system within the ARD, which could extend beyond the compromise reached between the Directors General. For the time being, the report of the *Kommission zur Ermittlung des Finanzbedarfs der Rundfunkanstalten* (Commission for Establishing the Financial Requirements of Broadcasters - KEF) is awaited.

As long as all ratification documents are submitted by 31 December 2008, the Agreement should enter into force on 1 January 2009. ■

● **Draft *11. Rundfunkänderungsstaatsvertrag* (11th Amendment to the Inter-State Broadcasting Agreement), available at: http://merlin.obs.coe.int/redirect.php?id=11358**

DE

DE – 12th Inter-State Broadcasting Agreement Under Discussion

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On 12 June 2008, the Minister-Presidents of the *Länder* discussed and drew provisional conclusions concerning the draft *12. Staatsvertrag zur Änderung rundfunkrechtlicher Staatsverträge* (12th Inter-State Agreement Amending Inter-State Broadcasting Agreements - RÄStV).

Particular attention was paid to the definition of the remit of public service broadcasting, particularly in the field of new media. This was triggered by the need to implement the compromise reached with the European Commission last year as part of the procedure for monitoring state aid to ARD and ZDF (see IRIS 2007-6: 3). There is particular debate over the opportunities that should be open to public broadcasters in the field of telemedia, especially questions relating to the period of time for which content is made available, the type of content and the need for content to be programme-related. Other new rules concern the practical implementation and monitoring of the remit, the actual assignment of responsibilities and the financial conditions of the broadcasters' activities (commercial activities, shareholdings).

The Inter-State Agreement will also contain a series of new definitions, which are designed to help clarify the definition of the remit itself as well as form the first steps in implementing the Audiovisual Media Services Directive.

The draft was submitted to the Directorate General for Competition of the European Commission by the Broadcasting Commission of the *Länder* and jointly discussed on 24 July 2008. According to the Rhineland-Palatinate State Chancellery, which is currently chairing the Commission, the Directorate General has no fundamental objections to the proposed text. A final discussion with the DG is due to be held in late September/early October. ■

● **Draft 12th RÄStV of 12 June 2008, available at: http://merlin.obs.coe.int/redirect.php?id=11359**

DE

DE – Contract Between GEMA and Sony/ATV on EU-wide Licensing

On 16 June 2008, the American music publisher Sony/ATV Music Publishing concluded an agreement with the *Gesellschaft für musikalische Aufführungs- und mechanische Vervielfältigungsrechte* (Association for Musical Performance and Mechanical Duplication Rights - GEMA), under which the English-language music titles owned by the publisher will be made available for mobile and online use throughout Europe via a single licence.

As a result, licensees will no longer have to reach individual agreements with the respective collecting societies in every European country. In accordance with the wishes of the parties, consumers will benefit from the accompanying extension of existing mobile and online services, as well as the strengthening of new music platforms. Sony/ATV songwriters and composers will benefit from the legal exploitation of their works, which will be strengthened by the new agreement. The agreement is also seen as a further step to bring exploitation rights into the digital age, against the background of the amended

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Copyright Act. The GEMA is responding to a European Commission recommendation calling for stronger competition between collecting companies involved in online music rights (see IRIS 2008-8: 5).

Critics fear that direct Europe-wide licensing without territorial limits will harm cultural diversity in Europe. It remains to be seen what the actual consequences of the agreement will be.

The agreement entered into force on 1 July 2008 and is initially valid for three years. ■

● GEMA press release, 16 June 2008, available at:
http://merlin.obs.coe.int/redirect.php?id=11360
DE

FR – CSA Authorises Cross Promotion on Private Channels

Aurélie Courtinat
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After years of claims made by the private channels, the *Conseil Supérieur de l'Audiovisuel* (national audiovisual regulatory authority – CSA) has now put an end to the monopoly on cross promotion held by France Télévisions in accordance with its specifications. In its decision of 22 July 2008, the CSA now authorises French private editors to cross-promote television channels, both free and pay channels, belonging to the same group. For years the private channels have been claiming the right to be able to promote the programmes of their affiliated channels on their channels, as France Télévisions does – until now, it was the only editor authorised to do so. Previously, the CSA had refused to accept applications from private groups on the grounds that cross-promotion activities could work to the disadvantage of the independent channels or those linked to small groups, and hence to the disadvantage of the objective of plurality, which needed to be protected. In this period of reform, the CSA has finally agreed to their request, supported by the European Commission, which has recalled on numerous occasions that the facilities granted to the public-service channels must not result in distortions of competition, which was the argument put forward by the private channels in the present case. The private channels will henceforth be able to promote the programmes broadcast on the channels controlled by the same group within the meaning of Article L. 233-3 of the Commercial Code.

The CSA has nevertheless set restrictions on this new possibility open to private editors by limiting the authorisation of cross promotion to promotion of an informative nature. It uses this expression to designate any advertisement for a programme by means of a trailer that mentions its title, the television service on which it is to be broadcast, and the date and time of broadcasting, without mentioning the name of the distributor. If the trailer is not informative in nature, it would be subject to the regulations on advertising on television. ■

● Decision adopted by the CSA on 22 July 2008, available at:
http://merlin.obs.coe.int/redirect.php?id=11348
FR

FR – CSA Deliberation

On 17 June 2008, the *Conseil Supérieur de l'Audiovisuel* (national audiovisual regulatory authority – CSA) published a deliberation on the exposure of tobacco products, alcoholic beverages and illegal drugs on the airwaves. Faced with the increased presence of tobacco, drugs and alcohol on television and radio, the CSA, as part of its mission to preserve public health and with the support of the *Mission Interministérielle de Lutte contre la Drogue et la Toxicomanie* (inter-ministerial mission to combat drugs and drug addiction – MILDT), has laid down the conditions for representing these substances on the air, aimed more particularly at preventing any propaganda and any incitement to their consumption.

In application of the Public Health Code, it lays down specific provisions for the audiovisual sector it regulates. Thus it prohibits images of people consuming drugs, recalling the definition given in the Public Health Code, and any positive or ambiguous description of the consumption of drugs, except for information programmes, documentaries and fiction programmes, in which the CSA indeed requires there to be no incitement, although it respects the authors' freedom of creation. The declared aim is to prevent any trivialisation of the use of illegal drugs. The CSA therefore enjoins television services, when they broadcast risky programmes, to include a warning that "the use of drugs is a health hazard and breaks the law" and to give the telephone number of a drug help-line (*Drogues Info Service*). The CSA is also considering the application of suitable signing, in application of its recommendation of 7 June 2005 on signing for young people and programme classification.

The CSA went on to recall that it will not tolerate any reference to tobacco in advertising and sponsoring, except for campaigns to counter tobacco misuse. Applying the Evin Act [which restricts the places where smoking is allowed], the CSA recalls that smoking is not allowed in enclosed covered areas, which therefore includes on sets and in studios. Beyond these warnings on the prohibition of incitement in images of or references to tobacco, the CSA pays particular attention to tele-reality broadcasts, "in view of their considerable impact on a young

audience". It therefore asks that the broadcasting of images of participants smoking in open areas be avoided, and also takes the opportunity to recommend that participants do not consume alcohol excessively or regularly.

As far as alcohol is concerned, the CSA recalls that advertising is not allowed on television and is only tolerated on radio at certain times of day, on condition that it is followed by a health warning. Whereas fiction works, documentaries and information programmes have the benefit of a specific regime, in the light of the need for information and respect for the freedom of creation, the CSA is still tempted by the use of signing for young people and is proposing that the television channels keep to appropriate times of day for broadcasting video clips carrying a risk of trivialising the consumption of alcohol. ■

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● Deliberation of 17 June 2008 on exposure of tobacco products, alcoholic beverages and illegal drugs on the airwaves, available at:
http://merlin.obs.coe.int/redirect.php?id=11350

FR

FR – Digital Dividend

On 23 July the committee on the digital dividend delivered to the Prime Minister its report on the reallocation of the terrestrial frequencies that will gradually be released by the ceasing of analog broadcasting by 2011, the date of the switchover to all-digital. Following the recommendations put forward by the *Conseil Supérieur de l'Audiovisuel* (national audiovisual regulatory authority – CSA) in its contribution delivered a month ago, the committee is in favour of a "reservation of all the necessary broadcasting frequencies, i.e. most of the digital dividend, to enrich the offer of digital audiovisual services". As the CSA had remarked, the strong penetration of terrestrially-broadcast television is a feature of the scene in France. Extending the coverage of digital television, "the mass vector for broadcasting television to the population", should therefore be given preference above all other reception modes in the allocation of the frequencies that have been released. The distribution of the digital dividend indeed raises the question of the primacy of certain services over others – the frequencies released are firstly intended to meet all the needs of the audiovisual sector, which include not only the development of digital television but also the development of new services such a personal mobile television, high definition, and digital radio. The digital dividend also provides an opportunity to encourage local television stations and keep them in place. There are currently 18 free channels and 11 pay channels available on TNT covering 85% of the population. Four channels are available in HD in France – France 2, TF1, M6 and Arte – and three more channels are expected in HD before the end of the year.

On the radio side, the CSA put out a first call for applications on 28 March 2008 for digital radio, thereby covering 30% of the population.

Lastly, on 27 May, the CSA selected from among 36 applicants the first 13 personal mobile television services, including private terrestrially-broadcast channels (TF1, M6 and Canal+) and several TNT channels (BFM TV, Direct 8, i-Télé, NRJ 12, NT1, Virgin 17 and W9), joined by Eurosport and two new channels – EuropaCorp, a company owned by Luc Besson, and Orange Sport, owned by a newcomer to the television sector, the incumbent telecom operator Orange. Thus the personal mobile television scene illustrates the new power struggle the sector is experiencing.

The Government is expected to give its opinion on the use of the digital dividend in the autumn. ■

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● Report by the committee on the digital dividend to the Prime Minister with a view to adopting the national scheme for reusing the frequencies released by the end of analog broadcasting, July 2008; available at:
http://merlin.obs.coe.int/redirect.php?id=11351

FR

FR – Summer Reforms

A number of important changes have been made to the law governing the audiovisual sector over the summer in the form of non-specific legislation, including an act on modernising the economy, referred to as the LME.

Article 142 of the Act of 4 August 2008 on modernising the economy has raised the anti-concentration thresholds applicable to audiovisual undertakings, thereby amending Article 39 of the Act of 30 September 1986 on the freedom of communication. Henceforth no single natural person or legal entity, acting alone or jointly, may hold directly or indirectly more than 49% of the capital or voting rights of a company that holds an authorisation in respect of a nationwide television service broadcast terrestrially in analog mode for which the average annual audience using a network of electronic communications, in both analog and digital mode, exceeds 8% of the total audience for television services, compared with 2.5% previously. This relaxation is the result of the success of digital terrestrially-broadcast television in France. Several channels belonging to audiovisual groups are in fact dangerously close to the figure of 2.5% of the audience which, with no changes in the legislation, would have obliged their owners to dispose of shares in company capital or voting rights in order to comply with the 49% rule. Whereas the audience thresholds

were originally intended to protect pluralism and the diversity of the private-sector players and their access to the audiovisual scene in France, the LME encourages and rewards those French audiovisual groups that have invested in digital terrestrially-broadcast channels and enables them to continue their development with no fear of having to give up anything if audience figures are good.

For the cinema sector, the LME adds a Chapter III to Heading II of the Cinematographic Industry Code that lays down the general principles for the cinematographic organisation of the country, including requirements in terms of diversity of the cinematographic offer, and the cultural organisation of the country taking into account the specific nature of cinematographic works. The creation, extension and re-opening of large-capacity cinema theatre establishments are subject to authorisation. This authorisation is issued on the basis of these general principles – thus commercial organisation committees for each *département* deliberating on cinematographic matters will assess the potential effect of these structures on the stated objectives. These arrangements will enter into force no later than 1 January 2009.

The Act on modernising the economy provides that the *Conseil Supérieur de l'Audiovisuel* (national audiovisual regulatory authority – CSA) shall publish a list of the geographical areas to receive terrestrially-broadcast digital television services, with a view to achieving the level of 95% coverage of the population, and, for each area, a provisional schedule for implementation, all before 31 December 2008. It organises the method for ceasing analog broadcasting, thereby gradually making it compulsory to incorporate an adapter allowing digital reception in television sets on sale after 1 December 2009.

On the radio front, the LME provides that the State may "directly or indirectly" hold the entire capital of Radio France International (RFI). ■

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• Act No. 2008-776 of 4 August 2008 on modernising the economy, available at: http://merlin.obs.coe.int/redirect.php?id=11349

FR

GB – BBC Ends Sponsorship of On-air Events After Complaints from Commercial Rivals

The BBC trust has found breaches of editorial guidelines and weaknesses in fair trading rules in relation to the sponsorship of BBC-organised events. As a result, the BBC management has decided to end such sponsorship.

The BBC does not carry any advertising in its public service broadcasting nor may its programmes be sponsored. However, it has permitted commercial sponsorship of BBC events, notably "Sports Personality of the Year", and its website offered "rights packages" for such events. After the December 2007 broadcast of this programme, its commercial rival ITV and the organisation representing private radio broadcasters complained that there had been breaches of editorial guidelines through the prominence of the sponsor's logo and through on-air mentions. They also alleged that there had been unfair trading through offering sponsorship at below market rates and a breach of the BBC's Charter and Agreement, as there was no statement of policy for the use of alternative finance in place with the Secretary of State and the event was really a programme which could not be sponsored.

The BBC rejected the complaints, which were then appealed to the BBC Trust. The latter decided that editorial guidelines had been broken and that this had compromised the editorial integrity of the BBC. Fair trading guidelines had not been broken, but they needed to be tightened to make clear that they apply to the sponsorship of events. There had been a technical breach of the BBC Agreement, as there was no policy for the use of alternative finance in place with the Secretary of State; more seriously, when one was later agreed, the programme would not have been compliant.

The Trust required much tighter controls over events sponsorship, with strengthening of the editorial guidelines and closure of the sponsorship website. There should also be consideration of how to handle complaints raising both editorial and fair trading issues. In the event the BBC management went further, deciding to end sponsorship by commercial companies for any on-air BBC event, at a cost of around GBP 1.5 million per annum. ■

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• BBC Trust, "Fair Trading and Editorial Appeals: Sports Personality of the Year 2007", July 2008, available at: http://merlin.obs.coe.int/redirect.php?id=11316

• BBC, "BBC Management Statement: BBC Trust Finding and Conclusion on Sports Personality of the Year". 21 July 2008, available at: http://merlin.obs.coe.int/redirect.php?id=11317

EN

GB – Decision in "The Great Global Warming Swindle" Case

Ofcom, the UK communications regulator, has considered a large number of complaints about lack of factual accuracy and lack of impartiality in relation to "The Great Global Warming Swindle", a programme broadcast by Channel 4 which sought to challenge the theory that human activity is the major cause of climate change and global warming. In a separate investigation, it considered complaints of unfairness by scientists referred to or contributing to the programme and by the Intergovernmental Panel on Climate Change.

In the first case, the allegation was that the programme presented facts in a misleading way and omitted facts, issues or alternative views in breach of the requirement in the Broadcasting Code that that factual material "must not materially mislead the audience." Ofcom's guidance restricts this to material which does so in a way which causes harm or offence. Ofcom noted that it was not a fact-finding tribunal, but considered four aspects of the programme; the use of graphs in a misleading way, the "distortion" of the science of climate modelling, the argument that the theory of man-made global warming is promoted as a means to reverse economic growth by environmentalists and exaggeration of the credibility of contributors; it also considered omissions from the programme. Ofcom considered that it is reasonable for programme makers to assume a basic understanding of mainstream global warming theory on the part of viewers and that the programme was clearly trailed so there would be an expectation of controversial content. Against this background, none of the alleged inaccuracies or omissions would be materially misleading so as to cause harm and offence. It was important, in line with freedom of expression, that broadcasters were able to challenge current orthodoxy.

The Code requires that due impartiality is observed on matters relating to current public policy and that an appropriately wide range of significant views is included. This requirement did not apply to most of the material in the programme, but did do so in relation to the discussion of policies alleged to result from mainstream global warming theory. Here no wide range of views had been included, as programmes presenting other opinions were not sufficiently timely or linked to the programme in question.

Ofcom's Fairness Committee upheld a complaint of unfair treatment made by the former Government Chief Scientific Advisor in that views had been attributed to him which were distorted and which called into question his credibility as a scientist; he had been given no opportunity to respond as the Code requires. It also upheld in part a complaint by the Intergovernmental Panel of Climate Change about allegations made in the programme, notably that its conclusions were "politically driven". Once more there had been unfairness as no adequate opportunity had been given to the Panel to respond. Finally, the Committee also upheld in part a complaint by a scientist who had participated in the programme that he had not been warned that it was a polemic and that the impression had been given that he agreed with its premise. Channel 4 was required to broadcast a summary of the adjudications in the fairness cases, but no other penalty was imposed. ■

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● **Ofcom, Broadcast Bulletin 114, 21 July 2008, available at:**
http://merlin.obs.coe.int/redirect.php?id=11318

EN

LT – New Requirements for Publishing of Political Advertising

On 10 June 2008 the *LR Seimas* (Parliament) adopted amendments to the Law on Financing and Control of Financing of Political Parties and Political Campaigns. The amendments came into force on 21 June 2008.

The amendments are mainly concerned with the regulation of the publishing of political advertising in radio and television programmes.

The amended law states that broadcasters under Lithuanian jurisdiction shall refrain from broadcasting video and audio advertising clips and films about political parties in their radio and television programmes. Furthermore, the provisions of the law forbid free (unpaid) publishing of political advertising in the broadcast programmes. This is in complete contrast to the former rule, which allowed free political advertising as well as clips and films about political parties.

It is worthwhile noting that forms other than video and audio advertising clips and films, e.g. debates and discussions forums on political issues and parties have not been forbidden.

The amended law provides for another new provision, according to which political parties can themselves order political advertising in radio and television programmes, except during the campaigning period. When the Central Electoral Committee announces the beginning of the campaigning period this possibility expires. The Central Electoral Committee decides on political advertising in the programmes of broadcasters with a national scope as well as determines the amount of finances for the advertising for each particular political party. The former law did not prevent the political parties from ordering political advertising during the campaigning period in radio and television programmes.

The new regulation of political advertising raised a lot of discussion, because the opponents of the amendments argued, that the amount of surreptitious advertising on political issues would increase on the one hand, and the right to disseminate important information for the electors would be restricted on the other.

It should be noted, that the above-mentioned amendments do not apply in relation to the Internet. ■

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Commission of Lithuania

● ***Politinių partijų ir politinių kampanijų finansavimo bei finansavimo kontrolės įstatymas*** **(Law on Financing and Control of Financing of Political Parties and Political Campaigns), available at:**
http://merlin.obs.coe.int/redirect.php?id=11331

LT

MT – ECRI's Report

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Broadcasting Authority, Malta

The European Commission against Racism and Intolerance of the Council of Europe (ECRI) adopted its third report on Malta on 14 December 2007. This Report was released in Malta on 26 April 2008 by means of Government of Malta Department of Information Press Release No 577e. Although the Report discusses various issues regarding racism and intolerance, of particular relevance to IRIS readers is that part dealing with broadcast media, which reads as follows:

"86. As regards the broadcast media, ECRI welcomes the adoption by the Maltese authorities in April 2007 of requirements as to standards and practice that must be observed by broadcasters in order to respect and promote racial equality, the implementation of which is monitored by the Broadcasting Authority. ECRI notes that a fine has been imposed on a television channel for failure to comply with these requirements in July 2007 in connection with the broadcasting of views expressed by exponents of an extreme right-wing group. Prior to the entry into force of these requirements, the Broadcasting Authority had leveled another fine on the same channel in 2004 in connection with the broadcasting of speech by the leader of another extreme right-wing group, on the basis of Article 13 (2) (a) of the Broadcasting Act, combined with Article 82 A of the Criminal Code. ECRI understands however, that an appeal has been filed against this decision and is currently pending.

87. ECRI welcomes the fact that according to these requirements, media owners must raise awareness about the expected standards and practice including among editors and journalists and that the requirements should be a standard element of journalists' training. ECRI also notes that the Broadcasting Authority has planned to train broadcasters on gender equality in co-operation with the National Commission for the Promotion of Equality and believes that there is a real opportunity to extend such training to issues of race equality now that the mandate of the Commission has been extended accordingly."

The report refers to the adoption by the Broadcasting Authority of mandatory Requirements as to Standards and Practice on the Promotion of Racial Equality (see IRIS 2007-4: 18) and to a charge issued by the Chief Executive of the Broadcasting Authority in July 2007 against a private television station licensed by the said Authority. This station admitted to the charge without any contestation and paid the applicable administrative fine. In that instance irregular immigrants were, during the course of the programme, called criminals and racist terminology was used. Contrary to the 2004 case, no appeal to the court has been lodged from the July 2007 admission of guilt. In the meantime training of broadcasters both in the promotion of racial equality and gender portrayal was due to commence on 5 June 2008, with the first batch of training being provided to all employees of the Monitoring Department of the Broadcasting Authority and to all employees of broadcasting stations working in the Sales and Marketing Departments. Training of other categories of broadcasters (mainly to journalists and producers) will follow suit. ■

● **"Malta Rebuts Allegations Made in ECRI Monitoring Report", Department of Information – Malta, press release No 0577e, 23 April 2008, available at: http://merlin.obs.coe.int/redirect.php?id=11319**

EN

PT – Council of Ministers Approves Media Pluralism Bill

On 19 June 2008, the Council of Ministers of the Portuguese government approved a *Proposta de Lei do pluralismo e da não concentração nos meios de comunicação social* (Draft law on pluralism and non-concentration of the media). The draft law was sent to the national Parliament, where it will be discussed and most probably approved, as the government party has the majority of the votes.

According to the Council of Ministers, this law aims to promote pluralism and independence vis-à-vis political and economic powers and to avoid media concentration. In order to achieve these general goals, the proposed law prohibits the majority of public entities from owning media assets. With the exception of public service media (radio, TV, news agencies, scientific institutions) public entities such as regional and local governments are not allowed to get involved in the media.

The proposed law on pluralism also details the nature and scope of the *Entidade Reguladora para a Comunicação Social* (Regulatory Entity for the Media – ERC) intervention in matters of pluralism and concentration. The draft clarifies the relationship between the ERC and the *Autoridade da Concorrência* (Competition regulatory body) and states the new pluralism parameters (distinct state media, ownership diversity, editorial diversity, accessibility to distribution networks and accessibility to media professional markets), which should be monitored by regulatory bodies.

Furthermore, the proposed legislation determines when the ERC should act in order to ensure the safeguard of pluralism and independence regarding political and economic powers whenever new limits are not respected. The bill establishes that horizontal limits to concentration are exceeded when one company has more than 50% audience share in a given relevant market. In case of cross ownership, which is for the first time addressed by

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a legal text (since the 1976 Constitution), this proposal establishes limits (to one third of the audience) in the second relevant market. The proposal also addresses vertical integration, guaranteeing the access of producers to distribution networks exploited by operators with more than 50% of the market.

If the proposed bill is approved by Parliament and ratified by the President of the Republic, this will be the very first Pluralism Law in the country, despite the relevance given to the issue by all Constitutional texts since the establishment of the democratic regime in the mid-1970s. Up to this day, pluralism and concentration matters have been vaguely referred to in sectorial media laws. ■

- ***Proposta de Lei do pluralismo e da não concentração nos meios de comunicação social* (Law proposal on pluralism and non-concentration of the media), available at:**
http://merlin.obs.coe.int/redirect.php?id=11326
- ***Comunicado do Conselho de Ministros de 19 de Junho de 2008, Proposta de Lei do pluralismo e da não concentração nos meios de comunicação social* (Council of Ministers' public statement on the approval of the Law proposal on Media Pluralism) 19 June 2008, available at:**
http://merlin.obs.coe.int/redirect.php?id=11327

PT

RO – Second CNA Phare Programme Concluded

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Following the success of the 30% state-funded Phare project RO 0107.02, which was run by the Romanian audiovisual regulatory authority between 2002 and 2004 and concentrated particularly on technical support and assistance with purchases, the *Consiliul Naţional al Audiovizualului* (National Audiovisual Council – CNA) was able to organise a second Phare programme from 2007 to 2008, this time fully financed by the European fund (Phare 2004/016-772.03.15.01).

This second project aimed to deepen and broaden expertise in the Romanian audiovisual sector. The primary purpose was to develop the experiences of the CNA members and specialist staff, as well as their familiarity with the *acquis communautaire* in the audiovisual sector.

The project included an analysis of the audiovisual market in Romania, comprising four specialist studies: the behaviour, habits and satisfaction levels of TV viewers and radio listeners; the impact of television on children; the effects of advertising on children and the media's influence on voting behaviour.

The further education courses for CNA staff focused on the protection of minors, protection of human dignity, the right of reply, European quotas, freedom of opinion, public welfare, media pluralism and accurate information.

IT introductory seminars and English courses were also organised. Study visits to regulatory authorities in other European countries, specialist conferences and workshops were also held. The project also included the publication of four news bulletins on the latest international developments in the audiovisual sector. The programme reached a successful conclusion with a media campaign on the protection of minors in the audiovisual sector. ■

- **CNA press release, *Campania publică de conştientizare finanţată prin fonduri Phare*, available at:**
http://merlin.obs.coe.int/redirect.php?id=11363
- ***Proiecte Phare*, available at:**
http://merlin.obs.coe.int/redirect.php?id=11364

RO

RS – Supreme Court Rejected RTL TV Lawsuit

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On 1 July 2008 the Supreme Court of Serbia dismissed the complaint lodged by the plaintiff RTL TV d.o.o. Belgrade, a member of the RTL Group, against the decision of the Serbian Broadcasting Authority (SBA) dating from 16 July 2007. In July 2007 the application of RTL TV for a national TV coverage in Serbia was denied by the SBA. In the context of this adjudication the tender for national TV licences, announced in January 2006 (see IRIS 2006-3: 11) and decided upon for the first time in April 2006 (see IRIS 2006-5: 10 on the preliminary results) has become final.

This was the second time the Supreme Court had to decide on a lawsuit of RTL TV against the national TV coverage tender decision. The first claim, against the original SBA's decision from April 2006, was successful and the decision was annulled (see IRIS 2007-9: 18). The SBA deliberated on the tender again, came to the same decision on a different justification on 16 July 2007 and RTL TV filed a lawsuit again, but this time the court denied the claim and rejected it. In its decision the Supreme Court stated that it adjudged the SBA to have acted in accordance with the relevant laws concerning the re-deliberation of the tender applications, and therefore confirmed the SBA's decision.

Up to this point there was significant uncertainty among all national TV licence holders, because a successful RTL TV lawsuit would have meant that they, too, could loose their licences in the renewed deliberation.

There are no legal remedies of RTL TV up for negotiation, so the tender decision may be deemed final. ■

RS – RTS and SBA Row Ends in Changes within the SBA Leadership

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Following up the parliamentary elections in May 2008 and the forming of a new Government of Serbia in July 2008, which brought significant political changes, a dispute between the Serbian Broadcasting Authority (SBA) and Radio Televizija Srbije (RTS), the public service broadcaster, took place, and resulted in changes in the chairmanship and deputy-chairmanship of the SBA.

According to the Serbian Broadcasting Act 2002, the RTS management board members are appointed and dismissed by the SBA. On 3 July 2008 the SBA invited nominations for the management board of the RTS in one national newspaper and two magazines. This call for nominations was surprising given the fact that the RTS board was appointed on 19 April 2006 for a term of five years, and was considered a political move against the general manager of RTS, who was originally nominated by a political party that lost power in the last elections.

In a fierce reaction to this invitation, the existing management board of RTS immediately brought a charge against an "unknown culprit" from the SBA, claiming that the invitation was issued even though the Council of the SBA did not pass an adequate decision. The RTS board alleged that the invitation was based on the sole decision of the SBA chairman, who had not consulted other members of the SBA Council as was legally required.

On 13 July the SBA annulled its invitation after public protests from journalists, the RTS trade union and even some of the members of the Council of the SBA. There was no reason provided for this annulment. Even though some members of the SBA Council claimed that it was an 'unintentional technical error', the chairman and his deputy were relieved from their duties, and a new chairman and deputy were elected at the first subsequent meeting of the SBA Council on 29 July 2008. The former chairman and deputy have, however, remained amongst the nine Council members. The outcome of this dispute is seen as a political victory for the RTS general manager and his supporters on the management board of the RTS. ■

RU – New Statute to Curb Foreign Investments in Media

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On 7 May 2008 the Federal Statute of the Russian Federation *О порядке осуществления иностранных инвестиций в хозяйственные общества, имеющие стратегическое значение для обеспечения обороны страны и безопасности государства* ("On the procedures of foreign investments in commercial joint-stock companies that present strategic importance for the defence and security of the nation") entered into force.

According to the new statute among such strategic commercial joint-stock companies are those that provide radio and television services, as well as printing and publishing of the mass media outlets.

A foreign investor shall inform a governmental agency on any contract that results in obtaining 5 or more percent of the stock of a strategic company (Article 14).

The procedure differs with repect to deals that provide a foreign investor with 50 percent or more, as well as those that give the foreigners rights to appoint the management of a strategic company. Such deals need a prior permission from the governmental agency (Article 7).

Prior permission becomes obligatory also for deals that provide foreign governments, international organisations, as well as entities under their control with a direct or indirect right to 25 percent of the stock of a strategic company or any other means to block decisions of its management, but no permission shall be granted for deals that lead to the majority of its shares (Articles 2 and 7).

The above restrictions to invest in strategic companies also apply to any Russian investing company with a foreign participation that results in the ability of foreigners to determine decisions made by its management.

Deals and contracts without necessary prior sanction will be declared null and void.

Among activities that have strategic importance for the defence and security of the nation are television and radio broadcasting over the territory where half or above of the population of any given province (subject) of the Russian Federation live, including cities of Moscow and St. Petersburg (Article 6 para 34 and 35).

Necessary changes have been made in other statutes and codes of the Russian Federation. On 6 July 2008 Vladimir Putin, Chairman of the Government, signed decree No. 510 appointing the Federal Antimonopoly Service as the governmental agency in charge of controlling foreign investments in strategic companies. ■

● ***О порядке осуществления иностранных инвестиций в хозяйственные общества, имеющие стратегическое значение для обеспечения обороны страны и безопасности государства*** **(Federal Statute of the Russian Federation "On the procedures of foreign investments in commercial joint-stock companies that present strategic importance for the defence and security of the nation"), No. 57-ФЗ, published in *Российская газета* official daily on 7 May 2008; available at: http://merlin.obs.coe.int/redirect.php?id=11315**

RU

SI – The Impact of the Co-regulatory System of Content Regulation in Television Programming

The Slovenian public is protected from potentially harmful content on television through the following measures:

1.) a legislative provision (article 84 of the Media Act on the protection of minors) and related measures, i.e. regulation guidelines according to the stipulation of visual and acoustic effects

during the broadcasting of TV programmes the contents of which are unsuitable to minors (*Pravilnik o določitvi vizualnega in akustičnega opozorila za programske vsebine, ki niso primerne za otroke in mladoletnike)*, issued by the Ministry of Culture (*Ministrstvo za kulturo*);
2.) content guidelines draft by expert platforms for the broadcasters´ internal ethical and esthetical rules (codex). These explain basic notions and suggest the optimal mode of content regulation (*Smernice za vsebinsko oblikovanje internih etičnih in estetskih pravil (kodeksov) izdajateljev televizijskih programov*) enacted by the independent Agency for Post and Electronic Communication (*Agencija za pošto in elektronske komunikacije* – APEK); and
3.) the self-regulatory mechanism of the broadcasters, i.e. the internal ethical and esthetical rules.

The existence of the latter is stipulated by the law, but but the codex may incorporate the expert guidelines or not – it is the broadcasters' decision to implement them within their codex - as long as there is no violation of the article no. 84 of the amended Media Act (2006) (see IRIS 2007-6: 19). According to the amended article 84, paragraph 3 and 4, it was the broadcasters' duty to hand in the respective internal ethical and esthetical rules to the Ministry of Culture and to the *Svet za radiodifuzijo* (Broadcasting Council) in due time to procure evidence.

Furthermore the Media Act states that broadcasters must treat complaints properly, and report on the implementation of the internal ethical and esthetical rules and on the handling of complaints to the Broadcasting Council and the Ministry of Culture annually until the end of February (paragraph 5 of the article 84). The Council must summarize the broadcasters' reports and prepare an annual revision for the *Državni zbor Republike Slovenije* (National Assembly) according to paragraph 9 of the article 84 of the Media Act.

As reported by the Inspectorate for Culture and Media, 44 broadcasters out of 61 had sent in their internal ethical and esthetical rules to the state authority to provide evidence as stipulated by the Media Act. The other 17 broadcasters had received admonitions and minutes with an accompanied ordinance to eliminate the irregularities.

Neither the Ministry of Culture nor the Broadcasting Council offered any official statistical or qualitative data on the implementation of internal ethical and esthetical rules by the broadcasters. The reason being that such data is to be provided by APEK, as stipulated by the first and second paragraph of article 109 of the Media Act. The interrelation of APEK, the Ministry of Culture and the Broadcasting Council regarding the survey is not formulated by the law. Consequently it is questionable why the annual report of the Broadcasting Council in 2006 and 2007 has not been sent to the National Assembly.

As there has been no report to the National Assembly, they have been deprived of the opportunity of recommending improvements in the co-regulatory mechanism to the Slovenian government. The only option for improvement of the Slovenian co-regulatory system in the TV broadcasting sector is a petition from some MPs or a parliamentary party. ■

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● ***Ministrstvo za kulturo, Strokovne komisije*** **(Ministry of culture, Expert commissions), 18 May 2008, available at:**
http://merlin.obs.coe.int/redirect.php?id=11328
SL

TR – Amendment to the Turkish Radio and Television Corporation Law

On 11 June 2008, Law no. 2954 regulating the principles and procedures regarding the duties, authorities and responsibilities of the Turkish Radio and Television Corporation (TRT), which was founded in 1964 to conduct public broadcasting, was amended. The most notable amendment made was enabling the TRT to broadcast in languages and dialects other than Turkish.

Previously, by a 2002 amendment to article 4 of the Law no. 3984 on the Establishment of Radio and Television Enterprises and their Broadcasts, both public and private radio and television had already been permitted to conduct broadcasting in different languages and dialects used by Turkish citizens in their daily lives. The detailed rules regarding such broadcasts were laid down by a "Regulation on Radio and Television Broadcasts In Different Languages and Dialects Used Traditionally by Turkish Citizens in their Daily Lives" issued by the Radio and Television Supreme Council (RTUK) on 25 January 2004.

As a result of this regulation, the objective of which was harmonization with EU legislation, radio and television enterprises which obtained permission from RTUK were given the right to conduct broadcasting in such languages and dialects, provided that certain time limits were not exceeded. These limits were 60 minutes per day and five hours per week for radios and 45 minutes per day and four hours per week for television corporations. According to these regulations, TRT has been broadcasting in Zaza, Bosnian, Arabic, Circassian and Kurmanji languages on TRT Radio1 and TRT3 since 2004.

After TRT began broadcasting in other languages and dialects, Gün TV and Söz TV which conduct broadcasting from Diyarbakır, and Medya FM Radio from Şanlıurfa have been permitted by RTUK, upon their application, to conduct broadcasting in Kur-

dish. However, currently only Gün TV continues such broadcasting.

This latest amendment affords the TRT the opportunity to extend the period of broadcasts which are made in the mentioned languages and dialects, and furthermore to dedicate a channel for these broadcasts. It has been announced that when the necessary preparations are completed, a TRT channel is to be dedicated to broadcasts in different languages and dialects such as Kurdish and Farsi which are being spoken in some regions of Turkey. This channel is to be accessible not only in Turkey but also in other foreign countries and especially in the Middle East.

In addition to the above, the recent changes made to the TRT Law have amended the central and provincial organization of TRT, and it has been made possible for TRT to sign contracts, agreements and protocols with radio and television enterprises in Turkey which conduct local, regional and national broadcasting, to sell news and videos and also to buy services from them. Furthermore, from now on TRT will be able to open foreign offices and hire foreign employees on a contractual basis. ■

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● **Law no. 2954, available at:**
http://merlin.obs.coe.int/redirect.php?id=11330
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