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2009 - 1

# INTERNATIONAL

## COUNCIL OF EUROPE



## EUROPEAN UNION



# NATIONAL



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### European Court of Human Rights: Case of Petrina v. Romania

In 1997, during a television programme that focused on the problems with access to administrative documents stored in the archives of the former Romanian State security services, C.I., a journalist with the satirical weekly '*Caţavencu*', alleged that a politician, Liviu Petrina, had been active in the secret police Securitate. A few weeks later, the same journalist published an article reiterating his allegations. Similar allegations of collaboration by Petrina with the Securitate under the regime of Ceauşescu were also published by another journalist, M.D. Petrina lodged two sets of criminal proceedings against the journalists, C.I. and M.D., for insult and defamation, but both journalists were acquitted. The Romanian Courts referred to the European Court's case law regarding Article 10 of the Convention, guaranteeing the right of journalists to report on matters of public interest and to criticise politicians, esp. as the allegations expressed by the journalists had been general and indeterminate. A few years later, however, a certificate was issued by the national research council for the archives of the State Security Department Securitate, stating that Petrina was not among the people listed as having collaborated with the Securitate.

Following the acquittal of the two journalists by the Romanian Courts, Petrina complained in Strasbourg that his right to respect for his honour and his good name and reputation had been violated, relying on Article 8 of the Convention (right to respect for private and family life). The Court accepted that the acquittal of the journalists could raise an issue under the positive obligations of the Romanian authorities to help with ensuring respect of Petrina's privacy, including his good name and reputation.

The objective of IRIS is to publish information on all legal and law related policy developments that are relevant to the European audiovisual sector. Despite our efforts to ensure the accuracy of the content of IRIS, the ultimate responsibility for the truthfulness of the facts on which we report is with the authors of the articles. Any opinions expressed in the articles are personal and should in no way be interpreted as to represent the views of any organizations participating in its editorial board.

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The European Court recognised that the discussion on the collaboration of politicians with the Securitate was a highly sensitive social and moral issue in the Romanian historical context. However, the Court found that, in spite of the satirical character of *Catavencu* and in spite of the mediatisation of the debate, the articles in question were intended to offend Petrina, as there was no evidence at all that Petrina had ever belonged to the Securitate. It also found that the allegations were very concrete and direct, not "general and undetermined", and were devoid of irony or humour. The Court did not believe that C.I. and M.D. could invoke, in this case, the right of journalists to exaggerate or provoke, as there was no factual basis at all for the allegations. The journalists' allegations overstepped the bounds of acceptability , accusing Petrina of having belonged to a group that used repression and terror to serve the regime of Nikolai Ceauşescu.

Accordingly, the European Court was not convinced that the reasons given by the domestic courts for protecting the journalists' freedom of expression (Article 10) were sufficient to take precedence over Petrina's reputation, as protected under Article 8 of the Convention. The Court found unanimously that there had been a violation of Article 8 of the Convention. Petrina was awarded EUR 5,000 in non-pecuniary, moral damages. ■

**Dirk Voorhoof**
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**● Judgment by the European Court of Human Rights (Third Section), case of Petrina v. Romania, Application no. 78060/01 of 14 October 2008, available at: http://merlin.obs.coe.int/redirect.php?id=9237**

**FR**

## Council of Europe: Guidelines Protecting Human Rights on the Internet

On 3 October 2008, the Council of Europe published two sets of guidelines aiming to encourage respect and to promote privacy, security and freedom of expression within the context of internet access and internet games. These guidelines therefore cover a series of online activities, such as e-mail use, chat or blog participation and online game playing. The guidelines are the product of close cooperation of the Council with European online game designers and publishers and with Internet Service Providers (ISPs).

The Human Rights Guidelines for Online Game Providers were developed by the Council of Europe in coordination with the Interactive Software Federation of Europe (ISFE) and provide a benchmark for online games providers and developers. While stressing the important positive role that games can play in the lives of individuals, the guidelines underline a concern that games designers and publishers take into account the rights and freedoms, values and dignity of gamers.

The games guidelines urge developers and providers to consider how game content may impact on human dignity, thereby recommending that they pay specific attention to the risks connected with content which displays gratuitous violence, which advocates criminal or harmful behaviour and which conveys messages of racism or intolerance. Included in the guidelines is a stress on promoting and applying independent labelling and rating systems to games to help inform gamers of sensitive content, encouragement to develop in-game parental control tools, as well as mechanisms for the automatic removal of game generated content after a certain time of inactivity. The guidelines also underline the importance of providing gamers with clear information about the presence of advertisements or product placement within games.

The Human Rights Guidelines for Internet Service Providers, developed by the Council in cooperation with the European Internet Service Providers Association (EuroISPA), recommend that ISPs ensure that information is available to end-users concerning the risks of privacy, security and freedom of expression. The guidelines emphasise the important role played by ISPs in delivering key services to users, such as access, e-mail or content services, and they take note of the considerable potential for ISPs to promote the exercise of and respect for human rights and fundamental freedoms. One of the ISP guidelines' main objectives is to complement the work already carried out by operators in helping to protect children from harmful or illegal content and other risks, such as grooming. The guidelines also cover risks for data integrity, such as viruses or worms, and for privacy, for instance the collection of personal data without the consent of users or the use of such data for promotional or marketing purposes without such consent. The ISP guidelines also warn providers about cutting individual customer accounts, which can constitute a restriction on a user's right to access the benefits from the information society and to exercise their freedom of expression and information.

Both sets of guidelines are without prejudice to and must be read in conjunction with the obligations applicable to ISPs and online games providers respectively and their activities under national, European and international law. ■

**Hilary Johnson**
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**● "Human Rights Guidelines for Online Games Providers", Council of Europe in co-operation with the Interactive Software Federation of Europe, available at: http://merlin.obs.coe.int/redirect.php?id=11508**

**EN-FR**

**● "Human Rights Guidelines for Internet Service Providers", Council of Europe in co-operation with the European Internet Services Providers Association (EuroISPA) available at: http://merlin.obs.coe.int/redirect.php?id=11510**

**EN-FR**

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## Venice Commission: Blasphemy, Religious Insult and Incitement to Religious Hatred

In October 2008, the European Commission for Democracy through Law (the Venice Commission) issued a Report on the relationship between freedom of expression and freedom of religion: the issue of regulation and prosecution of blasphemy, religious insult and incitement to religious hatred.

The Report was adopted by way of follow-up to the Parliamentary Assembly of the Council of Europe's (PACE) Resolution 1510 (2006) entitled "Freedom of expression and respect for religious beliefs" (see IRIS 2006-8: 3). Shortly after adopting Resolution 1510, the PACE requested that the Venice Commission "prepare an overview of national law and practice concerning blasphemy and related offences with a religious aspect in Europe".

The Report begins with a brief account of its own history, before providing a summary overview of international standards applicable to its key focuses. It then marks trends in the Council of Europe Member States' national criminal legislation on blasphemy, religious insults and inciting religious hatred (detailed legislative provisions are catalogued in supplementary documents). In that context, it emerges that the following specific offences are recognised in national legislation: the disturbance of religious practice, blasphemy, religious insult, negationism, discrimination (including on religious grounds) and incitement to hatred.

**Tarlach McGonagle**
*Institute for Information Law (IViR), University of Amsterdam*

In the section entitled, "General Remarks", the Report seeks to address three main questions:
- Is there a need for specific supplementary legislation in this area?
- To what extent is criminal legislation adequate and/or effective for the purpose of bringing about the appropriate balance between the right to freedom of expression and the right to respect for one's beliefs?
- Are there alternatives to criminal sanctions?

Answers to those questions are provided in the Report's Conclusions. As regards the first question, the Commission finds that incitement to hatred, including religious hatred, is properly the object of criminal sanctions in almost all European States. It finds that "it is neither necessary nor desirable to create an offence of religious insult (that is, insult to religious feelings) simpliciter, without the element of incitement to hatred as an essential component". It finds that the offence of blasphemy should be abolished and not be reintroduced.

As to the second question, the Commission takes the view that "criminal sanctions are only appropriate in respect of incitement to hatred (unless public order offences are appropriate)" and that "criminal sanctions are inappropriate in respect of insult to religious feelings and, even more so, in respect of blasphemy".

In answering the third question, the Commission refers to a "new ethic of responsible intercultural relations in Europe and in the rest of the world" and values such as tolerance, diversity, mutual understanding and open debate. It points to the relevance of dialogue, education and relevant PACE Recommendations and those of the European Commission against Racism and Intolerance (ECRI) for the promotion of such values. ■

● **European Commission for Democracy through Law (Venice Commission), Report on the relationship between freedom of expression and freedom of religion: the issue of regulation and prosecution of blasphemy, religious insult and incitement to religious hatred, 17-18 October 2008, Doc. No. CDL-AD(2008)026, available at: http://merlin.obs.coe.int/redirect.php?id=11512**

**EN**

## Parliamentary Assembly: Indicators for Media in a Democracy

On 3 October 2008, the Parliamentary Assembly of the Council of Europe (PACE) adopted Resolution 1636 (2008) and Recommendation 1848 (2008), both of which are entitled "Indicators for media in a democracy" and are based on an identically-named report.

The Resolution emphasises the importance of freedom of expression, information and the media in democratic society and it puts forward a list of 27 "basic principles" which it regards as a suitable basis for analyses of the media situations in Council of Europe Member States. This (check-)list comprises a wide range of media and journalistic freedoms guaranteed or promoted by other Council of Europe standard-setting texts.

Many of the basic principles concern safeguards for the effective exercise of journalism, including rights and protections for journalists: protection against physical threats or attacks; no undue registration or other such State-imposed requirements as preconditions for working in journalistic capacities (including refusals of entry or work visas for foreign journalists); respect for confidentiality of journalistic sources; freedom to disseminate content in the language of their choice; freedom of association (including trade union activities and the possibility of collective bargaining); adequate working conditions (including social security). Relatedly, other "basic principles" focus on the accessibility and availability of information, in particular the need to prevent undue restrictions on information due to privacy and state secrecy laws or exclusive reporting rights.

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The importance of access to the media is also stressed, e.g. for political parties. Likewise, the need for the media themselves to enjoy "fair and equal access to distribution channels" is underscored. So, too, is the importance of transparency in media ownership structures and sources of funding; in regulatory and licensing processes and in journalistic activities. The need to prevent political or financial interference with editorial content (especially in respect of public service broadcasters) is also a recurrent concern in the Resolution. Self-regulatory mechanisms and journalistic codes of conduct are encouraged in the media sector.

The Recommendation, for its part, is more concise and calls on the Committee of Ministers to: endorse the basic principles set out in the Resolution; take them into account when assessing "the media situation in member states", and "establish indicators for a functioning media environment in a democracy which is based on this list, and draw up periodical reports with country profiles of all member states concerning their media situations". ■

- **Indicators for media in a democracy, Resolution 1636 (2008), Parliamentary Assembly of the Council of Europe, 3 October 2008**
- **Indicators for media in a democracy, Recommendation 1848 (2008), Parliamentary Assembly of the Council of Europe, 3 October 2008**
- **Indicators for media in a democracy, Report, Parliamentary Assembly of the Council of Europe, Committee on Culture, Science and Education (Rapporteur: Mr Wolfgang Wodarg), Doc. 11683, 7 July 2008 all available at: http://merlin.obs.coe.int/redirect.php?id=11532**

**EN-FR**

# EUROPEAN UNION

## Council of the European Union: New Legislative Proposals for Telecoms Reform

The legislative package on EU Telecoms Reform continues to wind its way through the article 251 co-decision procedure necessary for its official adoption as European law. Following the European Parliament's vote earlier this autumn (see IRIS 2008-10: 4), the European Commission, on 5 and 6 November 2008, brought forth its revised legislative proposals. The new texts took into consideration the amendments adopted by Parliament and aimed at paving the way for agreement on identical terms between the European Parliament and the Council of Ministers. The Council itself deliberated the drafts on 27 November 2008, a process described by EU Telecoms Commissioner Viviane Reding as a "constructive crisis". She nevertheless applauded the resulting political agreement as "an improvement compared with the initial text", but warned that room for further progress still exists.

The main source of debate emanates from amendments 138 and 166, adopted by plenary vote in Parliament. These asserted that any restriction on end-users' access rights to content, services and applications must be proportionate and rest on a court ruling, in accordance with the Charter of Fundamental Rights of the European Union. The Commission had accepted amendment 138, expressly noting its respect for the nine-tenths majority with which it was passed, and remarking in its revised proposal that the amendment ensures "a fair balance [...] between the various fundamental rights protected by the Community legal order, in particular, the right to respect for private life, the right to protection of property, the right to an effective remedy and the right to freedom of expression and information". Amendment 166, on the other hand, fared less fortunately, having been discarded in the new Commission proposals. Nevertheless, a similar fate eventually awaited amendment 138 as well, although at a later date; Concern had been consistently expressed that the Council would not accept Parliament's amendment, in view of its incompatibility with the French plans to introduce a legislative system of «graduated response» to copyright infringement (see IRIS 2008-10: 10). In the event, the controversial amendment was indeed dropped from the Council's proposals. This was despite initial objections voiced by Austria and Denmark.

It is worth mentioning that recital 14(b) to the Universal Service Directive, inserted by Parliament, remains in place. The recital indicates that, in the absence of relevant Community provisions (such as those that the aborted amendments would have introduced), the legislative treatment of unlawful content, applications and services is to be regulated on a local level by the Member States, in accordance with due process and the rule of law.

A second major amendment put forth by Parliament had involved the introduction of BERT (Body of the European Telecoms Regulators), a much smaller, in both size and competences, authority than the one initially envisioned by the Commission and one that will also remain separate from ENISA (The European Network and Information Security Agency), a body with which it was, according to the Commission's first proposal, to merge. Now, according to the Council's proposals, the new body will be named GERT (Group of European Regulators in Telecoms), while its powers are to be further curtailed in favour of national regulatory independence.

The modified proposals reaffirm the introduction of the remedy of functional separation, the need for telecoms operators to notify about security breaches

and reinforced consumer rights, including better access for the disabled, a more reliable 112 emergency number, the ability to switch fixed or mobile operators within one working day while retaining the old number, as well as more transparency and better information for users.

The UK, Sweden and the Netherlands abstained from the political agreement in the Council. The Council is now expected to adopt its common positions on all the Commission proposals by the end of 2008. These will then serve as a basis for negotiations with the European Parliament, so as to enable a second reading agreement between the two institutions by spring 2009. Commissioner Reding has invited the French Presidency to call a meeting of all three institutions in early December, to facilitate compromise. ■

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

**● Relevant press pack, including all official documents of the new EU Telecom Package, available at:**
**http://merlin.obs.coe.int/redirect.php?id=11533**

**EN**

## European Commission: Consultation on the Modernised Draft Broadcasting Communication

Following on from the first public consultation launched earlier this year on the appropriateness of revising the Broadcasting Communication (see IRIS 2008-2: 6) and on the basis of the results this generated, the Commission initiated, on 4 November 2008, a new consultation process, this time on the draft for the revised Communication it has published. The review, like that of the Cinema Communication, was initially announced in 2005, as part of the EU's State Aid Action Plan. However, in contrast to the Cinema Communication, whose re-examination is now being postponed till 2012 (see IRIS 2009-1: 6), in the field of broadcasting, case practice (e.g. see IRIS 2008-4: 7 and IRIS 2008-3: 7) and the regulatory framework have significantly evolved since the Communication's initial adoption in 2001 and prompt consolidation is thus required.

The fundamental principles underpinning the Communication are to be found in article 86(2) EC Treaty and are elaborated upon in the Amsterdam Protocol on the system of public broadcasting in the Member States. These principles establish the importance of public service broadcasting for the preservation of media pluralism, the enrichment of cultural and political debate and a widened choice of programmes. At the same time, the importance of adhering to EU rules, so as to ensure that trading conditions and competition in the Community are not affected to an extent which would be contrary to the common interest is also established. The proposed draft seeks to apply these principles to the new, fast-paced media environment, whether analogue or digital.

The draft Communication affirms that the definition of the public service remit falls primarily within the competence of the Member States, who should assess, through a transparent and accountable process, the needs of society, the value for the public of new services and their impact on the market. The Commission's contribution is limited to checking for manifest error in the adopted definitions. The draft also suggests increased flexibility for public service broadcasters, in order to enable them to respond more effectively to the challenges of the modern internet society. Finally, it requires effective supervision on the part of Member States in the form of appropriate national authorities or appointed body monitors, so as to avoid overcompensation and the cross-subsidisation of commercial activities.

Comments must be submitted by interested parties by 15 January 2009. The Commission estimates that the new, modified Communication should be adopted within the first half of 2009. ■

**Christina Angelopoulos**
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**● Draft Communication from the Commission on the application of State aid rules to public service broadcasting, Brussels, 4 November 2008, available at:**
**http://merlin.obs.coe.int/redirect.php?id=11503**

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

## European Commission: Consultation on Three-Year Extension to the 2001 Cinema Communication

Pursuant to the joint declaration issued in May this year by the Competition Commissioner Neelie Kroes and Information Society and Media Commissioner Viviane Reding (see IRIS 2008-7: 5), the European Commission launched, on 24 October 2008, a public consultation on plans to extend the state aid assessment criteria of its 2001 Cinema Communication. Two previous extensions have taken place in 2004 and 2007 (see IRIS 2007-7: 4), while an extensive study on the economic and cultural impact of territorial spending obligations imposed in film support schemes was commissioned in 2006.

As the Commission notes in the proposed communication on the extension, the study's findings were inconclusive. As a result, the current assessment criteria should continue to be applied, although further reflection is called for on the possibility of future modifications and refinements, in view of a number of different trends that have emerged since the initial publication of the Cinema Communication. These include support directed to areas other than film and TV production (e.g. film

distribution and digital projection), more regional film support schemes and inter-state competition, through the use of state aid, for inward investment from large-scale, particularly US, film production companies. Like the modernisation of the Broadcasting Communication (see IRIS 2009-1: 6), the review of the Cinema Communication was envisioned as part of the State Aid Action Plan initially announced in 2005.

The assessment criteria as laid out in the 2001 communication are based on the "culture derogation" to the general prohibition of article 87(1) EC on state aid with distortive effects on competition. According to article 87(3)(d) EC, aid dedicated to the promotion of culture is compatible with the common market, so long as it does not adversely affect trade between Member States. The criteria were initially established in the Commission's June 1998 decision on the French automatic aid scheme to film production.

The proposed extension of the validity of the Cinema Communication's assessment criteria would be for a period of three years, until 31 December 2012. Interested parties are invited to submit their comments by 30 November 2008. ■

**Christina Angelopoulos**
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● **State aid: Commission consults on three year extension of film support criteria, IP/08/1580, Brussels, 24 October 2008, available at: http://merlin.obs.coe.int/redirect.php?id=11504**
**DE-EN-FR**

# NATIONAL

## AT – Government Programme Includes New Media Law Plans

At the end of November 2008, the Austrian Social Democratic Party (SPÖ) and the Austrian People's Party (ÖVP) agreed to form a coalition government. They also adopted a government programme for the five-year parliamentary term. The Government is hoping to achieve the following media policy objectives between now and 2013:

1. The KommAustria media authority will be strengthened further. Rather than acting monocratically as it has up to now, its decisions will be taken in future by a media committee, a public broadcasting committee and two telecommunications committees. Additional committees may be created where necessary.
2. As well as its existing responsibilities for State aid (TV fund, press and journalism aid, digitisation fund), the Rundfunk- und Telekom-Regulierungs-GmbH (RTR) is responsible for managing the new State aid scheme for private media providers. The funding available through the *Fernsehfilmförderungsfonds* (TV film support fund) will be increased in order to strengthen the Austrian film industry and improve Austria's competitiveness as a centre of film and media production. In order to strengthen the dual broadcasting system, consideration is being given to the introduction of support for private commercial and non-commercial broadcasters. If this is introduced, it will be administrated by the RTR. In addition, the RTR is broadening its areas of responsibility to include the fields of media research, support for basic and further education and ICT development (Internet offensive).
3. The Federal Government recognises the key role played by *Österreichische Rundfunk* (Austrian broadcasting corporation - ORF) in terms of democratic and social policy. ORF will be protected as a content provider with a clear public service remit that is active nationally and internationally and partly funded through the licence fee, including by means of financing systems that conform to EC law. If required by EC funding guidelines, consideration will be given to stepping up State supervision of ORF.
4. The Directive on audiovisual media services and market transparency will be transposed into Austrian law in 2009. As part of this process, the advertising rules applicable to Austrian broadcasters will be reviewed.
5. Legal principles will be established for the licensing of digital radio.
6. Media law provisions protecting the personality rights of individuals, particularly victims of crime, will be improved. The relevant system of sanctions will be made more effective. Protection of identity will be broadened to include relatives of both victims and perpetrators, as well as witnesses in criminal proceedings.
7. An advertising tax of 5% is currently levied on the revenue generated from certain forms of advertising. The Federal Government would like to negotiate the abolition of this tax with the Austrian *Länder*, which also receive some of the proceeds from this tax. ■

**Robert Rittler**
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● **Government programme for the XXIV parliamentary term, available at: http://merlin.obs.coe.int/redirect.php?id=11520**
**DE**

## BA – The RAK Is Expanding its Mandate

The Communications Regulatory Agency (RAK) has expanded its mandate on SMS broadcast via TV stations. In 2007, having experienced cases of hate inciting SMS in the form of chain laters, or so-called cyrons, RAK supplemented its Code of Conduct with

regards to public and commercial broadcasters. Article 3 of the General Principles also regulates SMS, however RAK have not, thus far, imposed any sanctions.

TV OBN, a Sarajevo-based and country-wide commercial TV station, was the first to be fined to the amount of BAM 30,000 (about EUR 15,000), for violation of Article 4 "Hate Speech" of the Broadcasting Code of Practice and concerning the content of SMS broadcast in the programme "*Mimohod*" on 30 August 2008, the topic of which was the first Queer Festival held in Bosnia and Herzegovina in Sarajevo. It also concerned the program "*Telering*", a very popular talk-show, broadcast on 18 September 2008. Dragan Covic, the President of the ruling political party of BiH Croats (HDZ), was a guest on this show and the topic under discussion was: "Should the Croats be minority?".

The RAK did not object the broadcast programme itself, but only the SMS, which were "inappropriate and incited discrimination, hatred and violence".

Despite being in accordance with European media standards, this case has, at the same time, raised the possibility of further expanding the role and mandate of RAK with regards to communications in cyberspace. So far, RAK has been reluctant to enter this very complex media regulation field, but recent cases of hate inspiring speeches spread via the Internet, brought it to RAK´s attention. The key problem to be solved is the global medium and local law dichotomy.

Currently, domestic ISPs are only responsible for content relating to child pornography. Obviously, it has to be expanded to hate inciting speech too, since the message matters, not the medium. ■

**Dusan Babic**
*Media researcher and analyst, Sarajevo*

● **Decision of the RAK, available at:**
**http://merlin.obs.coe.int/redirect.php?id=10734**

**BS**

## BE – New Draft Media Decree and Product Placement

The draft of a new Flemish Media Decree introduces, for the first time, a regulation on product placement. As the law currently stands, product placement is submitted to the common advertising regulation of the *Omroepdecreet* (Flemish Decree on Radio-broadcasting and Television). The relevant provision is article 105, which prohibits advertising in audiovisual programmes, unless unavoidable. Advertisements belonging to "the ordinary living environment or ordinary streetscape", presented unintentionally and without any emphasis, are to be considered as being unavoidable (§1). The same holds true of advertisements in reporting sports competitions or cultural events, if these are displayed neither more often, longer or larger than is necessary for competent reporting of the event (§2). Furthermore, revealing products or services with the intention of making them available as a prize is permitted, if no unwarranted attention is paid to them (§§3 and 4). Finally, mentioning names or trademarks is acceptable, if this is justified and necessary for the content of the programme (§5). Article 109 (sponsoring) adds that sponsored programmes may never be influenced in such a way so as to affect the responsibility and editorial independence of the broadcasting company nor may these programmes encourage the purchase or hire of products and services.

The *Vlaamse Regulator voor de Media* (Flemish Regulator for the Media - monitoring and enforcement of media regulation), when testing against article 105, does use the term product placement. Despite the wording of article 105, no advertisement (which normally implies a financial or other compensation or a promotional effect) has to occur in order that this principle be applied (see VRM vs. VRT 14 December 2007 (2007/065); VRM vs. VMMa 14 December 2007 (2007/064)).

The final draft of a new Flemish Media Decree (4 December 2008) allows product placement in the programmes and under the conditions stipulated in the Audiovisual Media Services Directive (art. 95-97). Nevertheless, some slight differences appear. Unlike the Directive, the draft does not articulate a basic prohibition on product placement, although the *Raad van State* (Council of State) did encourage doing so, in order to bring both texts closer together (advice of 10 September 2008). The provision of goods or services on a free of charge basis, such as production props or prizes, with a view to their inclusion in a programme, is prohibited in the children's programmes of the public broadcasting corporation (VRT). In the future, the Flemish Government can expand this prohibition to all children's programmes (art. 95, 2). Finally, only programmes produced or commissioned by the media service provider itself or a company affiliated to it must clearly inform viewers about product placement (art. 96, §1, 4). The new regulation will be applicable to television services only (art. 94) and to programmes (linear and on-demand) produced after 19 December 2009 (art. 96, §2).

The Flemish Government approved this draft on 5 December 2008. The next step will be sending the draft to the Flemish Parliament. The final approvalby the Parliament should take place before the regional elections (June 2009), although the recent replacement of the Minister of Media may cause some delay. ■

**Hannes Cannie**
*Researcher Department of Communication Sciences / Center for Journalism Studies Ghent University*

## BG – Prohibiting Misleading Advertisement

**Rayna Nikolova**
*Council for Electronic Media, Sofia*

On 6 October 2008 the Consumer Protection Commission banned the broadcasting of an advertisement, aired by TV operators in Bulgaria.

The advertisement states that the only way to get high quality digital signal is to subscribe to the services offered by Bulsatkom (a Bulgarian HD operator).

In the opinion of the Bulgarian Consumer Protection Commission such a statement contradicts Article 38, para 2, item 1, sentence 1 of the Law on Consumer Protection since high quality signal is also available through DVD. ■

● ***Zakon za Zashtita na Potrebitelite*** **(Act on Consumer Protection), available at: http://merlin.obs.coe.int/redirect.php?id=11498**

**BG**

## BY – Information Law Adopted

**Andrei Richter**
*Media Law and Policy Centre*

The bill of the Republic of Belarus "On Information, Informatization and Protection of Information" was introduced by the Council of Ministers of Belarus in 2007, adopted by the parliament and signed by the President on 10 November 2008. It comes into force in May 2009.

It will replace the law "On Informatization", passed on 6 September 1995.

The statute divides all information into "fully accessible" and "restricted" (such as professional and state secrets) (Art. 15-17); and regulates relations in the sphere of information exchanges. It provides for the establishment of a State Register of Information Resources (Chapter V) and State Register of Infor-mation Systems (Chapter VI), the latter to involve mandatory registration of all private systems. It speaks at length on defense of information networks and in particular on protection of personal information.

The statute fails to make substantive improvements in the regulation of information exchanges to the law "On Informatization". Moreover, because of the breadth of its scope, the ambiguity of a number of its provisions and its effects on citizens' information rights, the statute introduced several elements of potential concern and has been criticised by the OSCE Representative on Freedom of the Media. ■

● **Comments by the OSCE Representative on Freedom of the Media on the Draft Law of the Republic of Belarus on Information, Informatization and Protection of Information available at: http://merlin.obs.coe.int/redirect.php?id=11507**

**EN**

● ***Об информации, информатизации и защите информации*** **(Statute of the Republic of Belarus "On Information, Informatization and Protection of Information")**

**RU**

## CY – Supreme Court Rules on CRTA

The Supreme Court (Revisional Jurisdiction) decided on 5 November 2008 that "The Radio Television Authority (CRTA) is obliged to request the views of the Radio Television Advisory Committee before issuing its verdict only where such an action is imposed by the Law and not in all cases or on all issues". The requirement to seek advice was not deemed compulsory in the case examined (Case Dias Publishing House LTD v. Radio Television Authority, Appeal no. 54/2006) and the appeal was dismissed by the five-member, with one justice dissenting.

The case was brought to the Supreme Court by the Dias Publishing House LTD following the dismissal of its first instance recourse against the CRTA's decision to fine its broadcaster Radio Proto for breaching the Law on Radio and Television Broadcasting, 7(I)/1998. The breach related to provisions on the duration of advertisement. The appellant asked the Court to repeal the CRTA's decision and questioned, in essence, the latter's legal status; it claimed that the CRTA 'chose the most unfavorable procedure', by becoming prosecutor, investigator and 'judge', by being the party that imposed the sanctions and cashed the product of the punishment at the same time. A more objective and less unfavorable approach would be the opening of a penal case, so that the Court could decide as a 'tiers' judge.

In its verdict, the Supreme Court recalled that the issues raised were given full and final answers in an earlier decision (2004), when the Supreme Court examined 26 appeals (Sigma Radio TV LTD v. CRTA and Dias Publishing House LTD v. CRTA). According to the decision, it is justifiable, under the auspices of state policy, to entrust an independent public authority with the power to rule on issues related to the sensitive field of broadcasting. It further added that the fact that the decisions of the CRTA are subject to judicial review guarantees respect for the rules of natural justice.

An additional reason for the cancellation of the CRTA's decision, the appellant claimed, was its failure to seek advice from the Radio Television Advisory Committee. Deliberating on the issue, the Supreme Court upheld the view of the first instance Court, which noted that the involvement of the Radio Television Advisory Committee was not mandatory in the examination and eventual punishment for breaches

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of the relevant provisions of the law. Neither the law nor the regulations make the advice of the Advisory Committee to the CRTA a requirement before the latter reaches a decision. Seeking advice is compulsory only where such an action is imposed by law, the Supreme Court concluded. ■

**● Decision of the Supreme Court of 5 November 2008, Case 54/2006, Dias Publishing House LTD v. Radio Television Authority.**

**EL**

## DE – Parliament Votes for Amendment of Film Subsidies Act

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On 13 November 2008, the *Bundestag* (lower house of parliament) voted in favour of the draft amendment of the *Filmförderungsgesetz* (Film Subsidies Act - FFG). The amendment aims to improve the structure of the German film industry, to strengthen the German film industry as an economic and cultural asset and to further develop quality and diversity. Film subsidies are an important means of achieving these objectives.

The reforms particularly reflect a desire to optimise financial provision, especially by increasing sales promotion, and to bring the Act into line with technical advances, primarily by adopting the measures outlined below.

- Film exploitation will be accelerated as a result of the shortening of blocking periods between cinema release and use via other platforms. For example, Art. 20 FFG reduces the minimum periods for pay-TV exploitation from 18 months to 12 and that for free-to-air television from 24 months to 18.
- Furthermore, Arts. 56 and 56a FFG require a significant increase in the funding available for sales promotion. Film lending and rental will be particularly supported as a result of this measure.
- In order to take into account rapid technical advances, particularly where the Internet is concerned, from next year video-on-demand providers will be required, under Art. 66a para. 2 FFG, to pay film subsidy contributions, as is already the case for traditional forms of exploitation. ■

**● Draft fifth amendment of the *Filmförderungsgesetz* (Film Subsidies Act), available at: http://merlin.obs.coe.int/redirect.php?id=11521**

**DE**

## ES – Analogue Switch-Off Receives Additional Funding

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On 17 October 2008, the Spanish government approved an agreement formalising the criteria for the distribution of funding through credits amongst the Autonomous Communities, so as to finance the necessary activities for the completion of the first of the three phases established by the National Plan for the Transition to Digital Terrestrial Television.

Consensus between the different levels of the administration had been reached in July in the *Conferencia Sectorial de Telecomunicaciones y Sociedad de la Información* (Telecommunications and Information Society Conference), in the form of a collaboration protocol between the regions and the Ministry of Industry, Tourism and Trade. The aim is to provide EUR 8.72 millions in credits, so as to enable the extension and completion of DTT coverage through the transition projects, due to be completed within the first semester of 2009.

The ongoing timetable implies that switch-off will take place progressively, in phases organised through a total of 90 transition projects. The 32 projects included in the first stage, with 30 June 2009 as the deadline, will affect 12.6% of the total population of Spain (more than 5.5 million inhabitants).

The distribution of these additional resources will benefit the following Communities most: Galicia (EUR 1.657.750), Castilla-León (EUR 1.650.500) and Castilla-La Mancha (EUR 1.157.750). ■

***● Acuerdo del Consejo de Ministros por el que se aprueba destinar 8,72 millones a extender y completar la cobertura de la TDT en los proyectos de transición que finalizan durante el primer semestre de 2009, 17 de octubre de 2008* (Agreement of the Cabinet of Ministers to destine EUR 8.72 millions to extend and complete DTT coverage for the transition projects due to be completed through the first semester of 2009, 17 October 2008), available at: http://merlin.obs.coe.int/redirect.php?id=11491**

**ES**

## FR – Appeal Against Authorisation Prohibiting Showing of a Violent and Pornographic Film to Anyone under the Age of 18 Years

On 4 November the *Conseil d'Etat* rejected the application made by a cinematographic distribution company for the cancellation of the classification certificate issued one year earlier by the Minister for Culture for the film *Quand l'Embryon Part Braconner* that required that the film was not to be shown to anyone under the age of 18 years. The applicant felt that the decision, based on the violent and pornographic nature of the film, was disproportionate and flawed by a manifest error of appreciation. Backed by the national federation of film distributors, the

applicant claimed that "the use of sadistic violence and the misogyny on the part of the male character had a political meaning that was accepted by the director and that was perfectly clear in the characters' speech", an interpretation that was evidently not shared by either the Minister for Culture or the film classification board, which had given its opinion at an earlier stage. In the end the *Conseil d'Etat* upheld the certificate as it was. It held that the Minister had not committed any error of interpretation since the preparatory investigation had demonstrated that the film did indeed contain "numerous scenes of torture and sadistic behaviour of great physical and psychological violence and presented an image of inter-gender relations based on the illegal confinement, humiliation and degradation of the female character, produced in such a way as to be likely to be disturbing to minors". Returning to the violation of Article 10 of the European Convention on Human Rights referred to by the applicant, the *Conseil d'Etat* recalled that the broadcasting ban was based on objective, foreseeable criteria laid down in Article 3-1 of the Decree of 23 February 1990 and met a legitimate, necessary purpose in a democratic society, within the meaning of the stipulations of Article 10 referred to, since it only restricts broadcasting of the film and does not prohibit it. ■

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● ***Conseil d'Etat*** **(litigation section, 9th and 10th sub-sections together), 6 October 2008: the company Cinéditions v the French State, available at: http://merlin.obs.coe.int/redirect.php?id=11540**

**FR**

## FR – On-line Digital Video Recorder Forced to Suspend its Activity

Wizzgo, the service for recording television programmes on-line, has suffered a number of legal blows, the most recent of which has been financially fatal. With successive cases brought against it by M6 and W9 (see IRIS 2008-9: 9), France Télévisions (6 and 14 November 2008), NT1 (10 November 2008) and TF1 (14 November 2008), the service was first refused the benefit of the exception for making a private copy and prohibited from reproducing or making available the programmes of the channels in question, before the court held that the reproduction of the channels' logos constituted brand counter-feiting and unfair competition, as the channels concerned also offer similar television-on-demand services. Right from the first case, Wizzgo felt that such decisions could compromise the viability of its service, and had M6 and W9 summoned to appear so that a court could acknowledge the lawfulness of its activity. TF1 and NT1 joined forces with the other channels in calling on the courts to order Wizzgo to pay them compensation for the prejudice they had suffered as a result of the service Wizzgo provided to their viewers. The regional court in Paris adopted the arguments developed by the judge in the urgent proceedings and held that the service was unlawful, and went on to find against Wizzgo on the grounds of infringement of copyright. On the basis of Article L. 331-1-3 of the *Code de la Propriété Intellectuelle* (Intellectual Property Code– CPI) resulting from the Act of 29 October 1977 intended to combat counterfeiting, which allows an estimate of damages awarded in compensation for the infringement of copyright on the basis of the amount of the fee that the rightsholder would have received if the counterfeiter had applied for authorisation to use the work (in the present case, the equivalent of EUR 1.60 euro per programme recorded), the court ordered the on-line recording service to pay such a punitive amount of compensation that it would be forced to close down. Wizzgo will in fact have to pay M6 and W9 compensation of 240,478 euros each, and has been obliged by the court to supply the necessary elements for determining any compensation that may be due to the parties joined to the case (TF1 and NT1). As a result, Wizzgo announced that it was suspending its site pending possible appeal against the judgment. ■

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● **Regional Court of Paris (1st section of 3rd chamber), 25 November 2008: Wizzgo v M6, W9, TF1 and NT1, available at: http://merlin.obs.coe.int/redirect.php?id=11539**

**FR**

## FR – Persistence Pays Off for Comedian Bringing Cases against Video Share Sites

In recent months a French comedian has brought a number of cases against video share sites showing extracts of his DVDs. The cases were always rejected, but he continued his crusade and his perseverance has finally paid off – two recent decisions leave a glimmer of hope of effective recourse for beneficiaries against platforms of this type. Based not on counterfeiting but on the reactivity of hosts, which was made an obligation by the Act of 21 June 2004 on confidence in the digital economy, the decision in the case of Lafesse v YouTube delivered on 14 November 2008 concluded that the platform

was liable as it had not been prompt in withdrawing content being broadcast unlawfully on its site after it had been alerted by the comedian a number of times, and ordered it to pay him 60,000 euros in damages. Thus the share site was acknowledged as a host and not an editor, with correspondingly less liability. On the same day, however, the regional court in Paris reminded YouTube – although without finding against it in this case – that as a host it had an obligation to collect data on Internet users editing content on its site. Five days later, deliberating under the urgent procedure, it found against Dailymotion on this basis, in favour of Jean-Yves Lafesse. ■

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**● Regional court of Paris (2nd section of 3rd chamber), 14 November 2008: J.-Y. L., known as Lafesse, et al. v YouTube et al., available at: http://merlin.obs.coe.int/redirect.php?id=11537**

**● Regional court of Paris (urgent procedure), 19 November 2008: J.-Y. L., known as Lafesse, et al. v Dailymotion, available at: http://merlin.obs.coe.int/redirect.php?id=11538**

**FR**

## FR – France 2's *Les Infiltrés* Programme Makes Headline News

*Les Infiltrés* is a discussion programme based on reporting carried out exclusively using concealed cameras aimed at "gaining access to information revealing dysfunctions of French society that are being kept secret, by means of 'infiltration' by a journalist" that has a keen following among the public but is less appreciated by professionals. After the national syndicate of journalists had been disparaging about the method used, recalling the specific features of public-sector audiovisual services and the ethical principles that require journalists to make use of this type of procedure only on an exceptional basis, a celebrity magazine applied to the courts for a ban on broadcasting one of the *Les Infiltrés* programmes made on its premises. The magazine invoked invasion of privacy and violation of the right to their image of its employees filmed by a journalist claiming to be a trainee on placement, and referred the matter to the regional court in Paris under the urgent procedure. The court rejected the application, not on the merits of the case but because the applicants did not provide proof of any manifest danger resulting from the broadcasting of these images that would cause them irreversible prejudice that could not be made good by their being awarded damages at a later date. The court was therefore unable to act on the application under the urgent procedure. Thus there is still no unanimous response to the sensitive issue of the systematic use of concealed cameras in television programmes. ■

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**● Regional Court of Paris (urgent procedure), 12 November 2008: L. Pieau et al. v the company Chabalier & Associates Press Agency et al.**

**FR**

## FR – CSA Opinion on Draft Legislation on the Public-sector Audiovisual Scene

On 7 October 2008, the *Conseil Supérieur de l'Audiovisuel* (national audiovisual regulatory authority – CSA) delivered the opinion requested by the Government on draft legislation to modernise the public-sector audiovisual scene currently being discussed in Parliament, which raises a number of issues. The CSA was concerned about the France Télévisions holding company becoming a single company – a move it had not been consulted about in advance – and commented on the importance of the company's lists of missions and duties guaranteeing respect for the identity of each of the channels, the absence of deliberate uniformity of the editorial lines they adopted, the diversity of the people responsible for new programmes, and the constitutional requirement of diversity in the information field. Affirming that it was not required to pronounce on the appointment of the chairmen of the France Télévisions channels, the CSA nevertheless advocated limiting the removal from office of the companies' chairmen to the sole case of their seriously failing in their duties. Declaring itself in favour of abolishing advertising on the public-sector channels, the CSA recalled that the State would have to provide the channels with the financial means of carrying out their public-service obligations and duties, which would involve attractive programming. The CSA approved all the arrangements for transposing the Audiovisual Media Services Directive included in the bill, and stressed the value of proceeding with the obligations and contributions of on-demand services as far as possible on the basis of inter-professional agreements, more particularly with a view to avoiding any delocalisation of the Internet sites concerned. ■

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**● Opinion no. 2008-7 of 7 October 2008 on the draft legislation to modernise the public-sector segment of audiovisual communication and on the new audiovisual services, available at: http://merlin.obs.coe.int/redirect.php?id=11536**

**FR**

## FR – Change to Conditions for Broadcasting Cinema Films on Television

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The Decree of 17 January 1990 laying down the general principles for television service editors broadcasting cinematographic and audiovisual works was amended on 28 November 2008. The text, which prohibited the showing of cinematographic works on Wednesday and Friday evenings, all day Saturday, and after 8.30 pm on Sunday, in order to protect exploitation in cinema theatres, has been rendered more flexible. Those television channels other than cinema or pay-per-view services whose agreements or lists of missions and duties provide that they are to devote a proportion of their turnover to expenditure that contributes to the development of the production of European cinematographic works which is at least equal to 3.4% in 2008 and in 2009 and 3.5% from 2010 onwards, with the annual investment in the production of cinematographic works reaching a minimum amount that still remains to be determined, may now broadcast full-length art films that have achieved a certain level of box-office sales in France or that were first screened more than twenty years ago after 11 p.m. on Saturday, and full-length cinema films which were first screened more than thirty years ago before 3 a.m. on Sunday.

The CSA had been asked for its opinion on the draft decree opening up the slot starting at 11 p.m. on Saturday and ending at 3 a.m. on Sunday for broadcasting cinematographic works in return for an increase in the contribution made by the channels to the production of European cinematographic works, and it delivered this on 22 July 2008. Declaring itself in favour of this relaxation of programming for broadcasting such works, made necessary by the multiplication of media for showing cinema films, including the Internet, the CSA had however recommended withdrawing the provisions concerning the programming of these works, which it considered were too restrictive and not favourable for the future evolution of the inter-professional agreements bar any change in the regulations. The CSA made its opinion public on the same day the Decree was published. ■

**• Decree No. 2008-1242 of 28 November 2008 amending Decree No. 90-66 of 17 January 1990 adopted for the application of Act No. 86-1067 of 30 September 1986 and laying down the general principles for the broadcasting of cinematographic and audiovisual works by the editors of television services, gazetted on 30 November 2008, available at:**
**http://merlin.obs.coe.int/redirect.php?id=11534**

**• Opinion No. 2008-4 of 22 July 2008 concerning two draft Decrees, one amending Decree No. 90-66 of 17 January 1990 laying down the general principles for the broadcasting of cinematographic and audiovisual works by the editors of television services, and the other amending the lists of missions and duties of the companies France 2 and France 3, and on a draft order, gazetted on 30 November 2008, available at:**
**http://merlin.obs.coe.int/redirect.php?id=11535**

**FR**

## GB – Regulator Proposes Wholesale Price Controls on Sky's Premium Content

Ofcom, the UK communications regulator, is consulting on access to premium content. This follows complaints from four operators about the operation of the UK pay-TV sector. The regulator proposes that Sky premium content should be made subject to a wholesale must-offer requirement and price control.

Ofcom set out a set of criteria to assess the pay-TV sector; consumer choice, innovation and pricing. It defined premium content as that which is likely to be most effective in driving pay-TV subscriptions, through a significant appeal to a broad audience and limited free-to-air availability. Live top-flight sports and first-run Hollywood movies fall into this category. Ofcom decided that there is a narrow economic market for the wholesale provision of premium sports channels, specifically those containing live Premier League matches; there is also a narrow market for the wholesale supply of channels which include movies from the major six Hollywood studios shown in their first pay-TV window. Particularly relevant characteristics of these premium content markets included that content is aggregated through the collective selling of rights and price discrimination is exercised in downstream markets through content bundling.

The regulator decided that Sky has market power in the wholesale of core premium sports channels; it has consistently won the rights to televise premier league matches since 1992, its market share remains high and there are significant barriers to entry. Similarly, it has market power in the wholesale of premium movies. This gives it the ability to affect competition through distributing its premium content in a manner which favours its own platform and its own retail business, through denying content to others or making it available on unfavourable terms. It can also set high wholesale prices for content in order to maximise wholesale profits. There is evidence to support the suggestion that Sky is restricting the supply of premium content to other retailers; for example, current terms made it unprofitable for Virgin Media to sell premium channels to existing subscribers. The result is a lack of choice to consumers in relation to available content and the terms of platforms available to them.

The possible remedies identified by Ofcom were to restrict the ability of Sky to aggregate content, to require Sky to separate its wholesale business from its downstream platform and retail business or to require it to provide wholesale access to particular channels on regulated terms. Ofcom proposed the latter through placing a wholesale must-offer obli-

gation on Sky, with detailed terms and conditions including an ex ante pricing rule, applying on a retail-minus basis with a cost-based analysis as a cross-check. This would be implemented using Ofcom's powers in section 316 of the Communications Act 2003 to impose licence conditions relating to competition matters. For the moment, Ofcom would not refer Sky to the general competition authorities for a more far-reaching competition investigation. ■

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● **Ofcom, "Pay TV Second Consultation", 30 September 2008, available at: http://merlin.obs.coe.int/redirect.php?id=11492**

**EN**

## HR – Rulebook on TV Broadcasters for the Purpose of the Protection of Minors

The Council for Electronic Media adopted a Rulebook on TV broadcasters for the purpose of the protection of minors in April 2008 (see IRIS 2008-7: 14). Implementaion of the Rulebook by TV broadcasters was to commence subsequent to the receipt of standard graphic marks by the Council.

After receiving the graphic marks, broadcasters on the national level (commercial) notified the Council that they could not start with the implementation of the Rulebook because of technical deficiencies and aesthetically unacceptable suggested graphic marks.

To overcome the implementation problems, the Council for Electronic Media adopted a new Rulebook on TV broadcasters for the purpose of the protection of minors, on the basis of Article 15, paragraph 5, of the Law on Electronic Media. In this Rulebook visual symbols are changed as follows:

The graphic marks refer to the following programme content categories and are to be implemented accordingly:

1. Category 18: This programme content should not be broadcast between 7 a.m. and 11 p.m. During the entire broadcast the following mark must be visible: a transparent circle with the number "18" written in red.
2. Category 15: This programme content should not be broadcast from 7 a.m. to 10 p.m., and the complete broadcast must be marked with a transparent circle with the number "15" written in orange.
3. Category 12: This program content should not be broadcasted between 7 a.m. and 9 p.m., and must carry, for the duration of the broadcast, a transparent circle with the number "12" written in green.

The graphic symbols should be in the right upper corner of the screen, and the broadcasters have to design them according to their usual design. The symbols shall not be smaller than the usual broadcaster logo.

Every rerun of programme content is included by the Rulebook. Other provisions remain unchanged. ■

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● **Rulebook on television broadcasters conduct for protection of minors, *Narodne novine* (Official journal) number 130/08 available at: http://merlin.obs.coe.int/redirect.php?id=9658**

**HR**

## HU – No Legal Obstacles to the Commencement of Digital Terrestrial Broadcasting Services

This summer the *Nemzeti Hírközlési Hatóság* (National Communications Authority - NHH) and the parliamentary committee as designated by the Act LXXIV of 2007 on the rules of broadcast transmission and digital switchover (Digital Switchover Act) has completed two tendering procedures by deciding on the licences granting the right to operate terrestrial broadcasting networks. Subsequently the representatives of the authority and the incumbent transmission company Antenna Hungária (AH) have signed the corresponding agreements (see IRIS 2008-9: 14).

However, the decisions closing the tenders were challenged by two actors:

- The KTV Hírtech Kft, a cable TV operator, ini-tiated a legal action against the NHH on the basis of the principle of technological neutrality. It claimed that the obligations of the winner to contribute to the promotion of the digital switchover on the terrestrial platform, as prescribed by the call for tenders, distorted the competition between the various television platforms.

The legal action was rejected by the Metropolitan Court of Appeal *Fővárosi Ítélőtábla* on 3 November 2008 on procedural grounds.

- The Hungarian public service radio Magyar Rádió (MR) also challenged the concluding of the contract in relation to the future provision of DAB services. In its appeal MR debated the legality of some of the provisions of the call for the tender and of the decision itself.

This legal action was also rejected by the Metropolitan Court of Appeal in a judgement delivered at the end of October.

Following the closure of these procedures no legal obstacles stand in the way of the commencement of digital terrestrial broadcasting services. According to the commitments made by AH, DAB and DTT broadcasting is due to start by the end of 2008. ■

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## IT – SIAE Sticker on CDs and DVDs: Italian Courts Divided over ECJ Schwibbert Ruling

Some recent judgments by the Italian *Corte di Cassazione* (Court of Cassation) have brought to the fore the division among Italian criminal courts over the interpretation of the judgment delivered by the European Court of Justice in case C-20/05 Schwibbert, dealing with the obligation to affix the SIAE marking to compact discs for the purposes of marketing them within the Italian territory.

The Italian Copyright Statute, Law No 633 of 22 April 1941, laid down the mandatory requirement of affixing a distinctive sign bearing the initials of the Italian *Società Italiana degli Autori ed Editori* (Society of Authors and Publishers - SIAE) to any medium containing protected works, as an authentification tool and a safeguard enabling legitimate products to be distinguished from pirated goods. In its Schwibbert judgment, however, the ECJ established that such a requirement constitutes a "technical regulation" which, if not notified to the Commission pursuant to Directive 98/34/EC as amended by Directive 98/48/EC, cannot be invoked against an individual.

Since the Italian Government actually failed to notify of that 'technical regulation', the ECJ findings in Schwibbert have had a significant impact on a number of criminal proceedings pending before the Italian courts. Both lower and higher courts seem to concur that, although the ECJ judgment dealt with the failure to affix the SIAE sign to compact discs of works of figurative art, the principles of law set out in that ruling also apply to other types of media (e.g. DVDs) and content, such as music, films and software programmes (see judgment no. 35562/08 of the Court of Cassation).

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- ***Corte di Cassazione, Sezione III Penale, Sentenza 12 febbraio 2008, n. 13810*** **(Court of Cassation, Third Criminal Chamber, Judgment 12 February 2008, no. 13810), available at:**
**http://merlin.obs.coe.int/redirect.php?id=11513**

- ***Corte di Cassazione, Sezione VII Penale, Sentenza 6 marzo 2008, n. 21579*** **(Court of Cassation, Seventh Criminal Chamber, Judgment 6 March 2008, no. 21579), available at:**
**http://merlin.obs.coe.int/redirect.php?id=11514**

- ***Corte di Cassazione, Sezione III Penale, Sentenza 24 giugno 2008, n. 35562*** **(Court of Cassation, Third Criminal Chamber, Judgment 24 June 2008, no. 35562), available at:**
**http://merlin.obs.coe.int/redirect.php?id=11515**

**IT**

Courts further agree that the unenforceability against individuals of the "technical regulation" at hand implies the inapplicability to defendants in criminal proceedings of those provisions of the Italian Copyright Statute, such as Article 171ter lit c) thereof, which punish the import, distribution, sale or possession of compact discs and DVDs not bearing the 'SIAE' sticker.

Conversely, there is no consensus as to other provisions of the Copyright Statute (e.g. Article 171ter lit d) thereof) that criminalize the distribution, sale or possession of unlawfully reproduced compact discs and DVDs. In most of the judgments delivered prior to the Schwibbert ruling, the absence of the 'SIAE' sign on a given medium was regarded by criminal courts as strong evidence of its unauthorised duplication.

Part of the case law, including judgment no. 13816/08 of the Court of Cassation, supports the proposition that, albeit the failure to affix the SIAE sign on a given medium cannot be regarded any longer as a criminal offence per se, it can still prove, along with other reliable, precise and consistent evidence, that such a medium was illegally reproduced.

Another school of thought (see, to that effect, judgment no. 21579/08 of the Court of Cassation) however, argues that recognising even a limited probative value to the absence of the SIAE sticker would be tantamount to giving effect to the aforementioned 'technical regulation', as if it had become inapplicable only as from the Schwibbert judgment onwards. In contrast, those rules should be regarded as being inapplicable from the beginning, hence they cannot yield any negative consequence for private parties who acted in breach of them even prior to the date on which the Schwibbert judgment was delivered.

According to Italian criminal procedural law, inconsistencies in the case law should be reconciled by a judgment delivered by the Chambers for criminal matters of the Court of Cassation sitting in plenary session. Nonetheless, judgments by the Joined Chambers of the Court of Cassation, albeit highly persuasive, are not binding on lower courts. Another solution would be to refer the unsolved questions to the ECJ for a preliminary ruling, which would be binding on every court in the European Union adjudicating on a similar matter. ■

## LV – New Audio and Audio-visual Media Services Law Submitted to the Parliament

The National Broadcasting Council of Latvia (NBCL) has finalised the process of drafting a new Audio and Audio-visual Media Services Law (Draft Law), which is planned to replace the Radio and Television Law currently in force (see IRIS 2008-6: 13).

The Draft Law applies to providers of audio and audio-visual media services under the jurisdiction of Latvia who provide their services in public electronic communication networks, notwithstanding the mode of transmission. The Draft Law uses substantially different terminology from the existing Radio and Television Law. The terminology corresponds to that one used by the Audio-visual Media Services Direc-

tive (2007/65/EC), as well as to the regulations of the electronic communication services. In addition, the Draft Law provides definitions of concepts previously undefined in Latvian law, such as split-screen advertising, free to air television, on-demand services, product placement, editorial responsibility and interactive advertising. Otherwise, the Draft Law is structurally and content-wise quite similar to the existing Radio and Television Law, with mostly minor differences, clarifications, and certain modernisations.

The Draft Law maintains similar categories of media service providers as the current categories of broadcasters; however, in addition to public and commercial media services providers, it introduces non-commercial media services providers. These are not public broadcasters (as those are defined as exclusively Latvian Radio and Latvian Television), but rather persons who act without a profit intention and target a special auditorium, e.g., religious organisations, educational institutions, etc. As regards public media, the Draft Law suggests their status be re-established as "derived public persons" instead of their current transitional status as non-profit commercial companies. The public media retain their eligibility to become involved in commercial activities, such as advertising.

Broadcasting licences to private (commercial and non-commercial) broadcasters, as previously, will be granted on the basis of a tender. The procedure is very similar to the current one, so it may be argued that the Draft Law does not solve the problems caused by the current procedure, such as lack of transparency, predictability, and clarity. The only innovation is that the Draft Law provides the main criteria for the assessment of the tender applications. However, the criteria are defined rather vaguely: the creative, financial and technical basis of the tender offer.

The section on advertising has been expanded by adding more detailed rules with regards to the contents of advertising, sponsorship and other commercial announcements broadcast in the media. The Draft Law also provides special rules for the new types of advertising, such as split-screen, virtual, interactive advertising and product placement. The rules are slightly different for audio and audiovisual media services providers, taking into account technical differences.

The legal status of the NBLC would remain roughly the same under the Draft Law – an independent institution for the supervision of media service providers. The Draft Law suggests new rules for the appointment of the members of the NBLC, reacting to the frequent critique that the members are not sufficiently independent. As previously, the nine members would be elected by the *Saeima* (Parliament). However, the Draft Law stipulates that the members must be selected from candidates proposed by certain governmental and non-governmental organisations. In addition, the Draft Law provides that the candidates must have at least five years of professional or academic experience in media or human rights.

On 17 November 2008 the NBLC announced that it has submitted the Draft Law to the Commission of Human Rights and Social Issues of the *Saeima*. As the NBLC does not have legal initiative rights, it has asked the Commission to submit the Draft Law to the *Saeima* for adoption. ■

**Ieva Bērziņa-Andersone**
*Sorainen*

● ***Audio un audiovizuālo mediju pakalpojumu likumprojekts*** **(Draft Audio and Audio-visual Media Services Law), available at: http://merlin.obs.coe.int/redirect.php?id=11499**

**LV**

## MT – Transposition of the AVMS Directive

Malta has begun the process of transposing the Audiovisual Media Services Directive (AVMS) into Maltese Law. This process began on 20 November 2007, with a conference for stakeholders organised by the Malta Forum in Europe, in collaboration with TAIEX and the Media Desk of the Ministry for Tourism and Culture. The conference was entitled "The New Media Landscape: Audiovisual Media Services Without Frontiers".

On 3 September 2008, the Minister responsible for broadcasting appointed a Working Group on the AVMS Directive with the following terms of reference:

- to carry out legal gap analysis in order to esta-blish which provisions of Maltese law need to be amended or substituted and to propose how they can be amended or substituted;
- to advise Government on a suitable entity for the regulation of the content of non-linear media in terms of the Directive;
- to advise Government on all the aspects of the AVMS Directive which, in one way or another, impact on the local media scene. These aspects include the non-obligatory provisions of the Directive;
- to thoroughly consult the public and all interested stakeholders prior to reaching its conclusions and making its recommendations.

The Working Group has already issued a Consultation Document on the transposition of the Directive and has invited comments from stakeholders. The closing date for the receipt of written submissions expired on 5 November 2008. The Working Group is

currently studying the submissions received and will be drawing up a report, as well as a draft bill to amend the Broadcasting Act and seven subsidiary laws. These will be directed at amending the regulations enacted under the Broadcasting Act by bringing them into line with the new AVMS Directive.

**Kevin Aquilina**
*Broadcasting Authority, Malta*

After the Working Group concludes its task, it will report back to the Minister, who will then have to consider the Committee's report, discuss it in Cabinet and bring the bill before in the House of Representatives. Once Parliament enacts the law in question, the subsidiary laws will be drafted. The proposed timeframe envisions bringing the amending law and subsidiary legislation into force by 1 October 2009, to coincide with the commencement of the autumn schedule. In this way, Malta's obligations under the AVMS Directive will be fulfilled. ■

● ***Ċirkulari 48/08, Proċess ta' Konsultazzjoni dwar id-Direttiva dwar Servizzi tal-Media Awdjoviżivi*** **(Consultation Document on the Audiovisual Media Services Directive), available at:**
**http://merlin.obs.coe.int/redirect.php?id=11493**
**MT**

## NL – Dutch Code for Notice-and-Take-Down

In the Netherlands a code of conduct on Notice-and-Take-Down (NTD) has been drawn up. The code establishes a procedure for intermediaries that have been notified about online content that is punishable or unlawful.

The code was presented to the secretary of Economic Affairs and announced in a press release on 9 October 2008. It was adopted in the context of a project undertaken by the *Nationale Infrastructuur Cyber Crime* (National Infrastructure against Cybercrime – NICC), a public private partnership that brings together stakeholders to collaborate in the fight against cybercrime. The partnership includes broadband providers, cable providers and Dutch government authorities. The code is based on an inventory of the existing NTD practices exercised by the stakeholders. Additionally, ministries, law enforcement agencies and organisations such as eBay and the *Bescherming Rechten Entertainment Industrie Nederland* (Protection Rights Entertainment Industry Netherlands – BREIN), the Dutch rights-holders representative, were involved in the drafting process. An official list of participants does not exist; participants are obliged to notify of their adherence to the code on their website. Compliance to the code is completely voluntary and cannot be formally enforced.

The code defines intermediaries as hosting and mere conduit providers and providers of space on the internet where third parties can publish content, e.g. BitTorrent sites, forums, online market places and music and video sites. The code applies to situations in which Dutch law is applicable and to information that is punishable or unlawful under Dutch law.

The code permits intermediaries to develop criteria for "undesirable" content and to treat notices of such content in the same way as notices of illegal content. The code defines "undesirable" content as content that the intermediaries themselves find undesirable and do not want to host.

The code makes a distinction between notifications made by a private party and those made by law enforcement officials. Intermediaries cannot question formal notifications of law enforcement officials that are part of criminal investigations relating to a criminal offence. However, on the initiative of the Dutch government, Cycris, the Centre for Cybercrime Studies, made a study of the Dutch law on NTD. Cycris concluded - amongst other things - that there are insufficient statutory grounds for a NTD order on the part of the public prosecutor. The code does not seem to take this conclusion into consideration.

Private parties, when making a notification, must include their contact address, a description of the content, the location where the content can be found (URL) and a clarification as to why the intermediary addressed is the most suitable to handle the notification. Intermediaries have to evaluate the notifications of unlawful or punishable content by private parties and the (non-formal) notifications by law enforcement officials within a reasonable time limit.

In the case of content that is "unequivocally" unlawful or punishable, the intermediary must remove the content immediately. No put-back rights are formulated in the code and no reference is made to freedom of expression. The code requires intermediaries to take precautions to ensure that no more content than requested in the notification is removed. To the contrary, when the content is not "unequivocally" unlawful or punishable, the intermediary is under no obligation to remove the content. When content cannot be clearly evaluated, the content provider and the notifier must come to an agreement or the notifier can choose to either make an official report to the police or start civil proceedings. However, the code stipulates that the law does not oblige intermediaries to cooperate with the notifier by handing over data identifying the content provider and that the provision of such data cannot be enforced in all circumstances. ■

**Esther Janssen**
*Institute for Information Law (IViR), University of Amsterdam*

● **"Notice-And-Take-Down Code of Content", National Infrastructure against Cybercrime, available at:**
**http://merlin.obs.coe.int/redirect.php?id=11495**
**EN**

● ***"Wat niet weg is, is gezien. Een analyse van art. 54a Sr. in het licht van een Notice-and-Take-Down-regime"*****, Cycris, available at:**
**http://merlin.obs.coe.int/redirect.php?id=11496**
**NL**

## RO – Election Campaign with CNA Sanctions

Shortly before campaigning ended for the parliamentary elections held in Romania on 30 November 2008, the *Consiliul Național al Audiovizualului* (national council for electronic media – CNA) took stock of the reported breaches of audiovisual laws and regulations (see IRIS 2008-10: 17).

A CNA press release of 28 November 2008 reported that eight television and seven radio channels had participated in the election campaign at local level, along with 122 television and 204 radio stations at national level. Through their programmes "all these broadcasters ensured media coverage of the campaign throughout the country and provided the candidates with access to election programmes, debates and appropriate advertising spots". During the election campaign, the CNA closely monitored compliance with the rules applicable to the electronic media; as a result of legal infringements, it imposed a total of 133 sanctions, including 15 fines and 114 public warnings.

The press release of 28 November 2008 reported that the regulatory body issued a total of 40 *scrisori de atenționare* (cautions) to the national broadcasters for more minor infringements, while more than *reclamații de la competitori electorali sau de la cetățeni* (complaints filed by election candidates or members of the public) were analysed and dealt with. Further infringements were identified by the CNA inspectors and observers.

The CNA published 20 press releases in November 2008 alone in order to provide the public with correct information during the election campaign. "The CNA considers that, thanks to the new measures, legal infringements were, for the most part, prevented, which contributed to a civilised, balanced audiovisual election campaign." ■

**Mariana Stoican**
*Journalistin, Bukarest*

● ***CNA* press release, available at:**
**http://merlin.obs.coe.int/redirect.php?id=11524**
**RO**

## SE – Complaint Lodged Against Council on Market Ethics for Claiming TV Commercial was Poor Advertising

*Marknadsetiska Rådet* (The Council on Market Ethics – MER) is a self-regulatory board composed of several Swedish associations and companies.

MER, whose statements are not legally binding, rules on good business practice. Recently it delivered a statement regarding a TV commercial that has caused debate within the advertising business.

The issue concerns a TV commercial for the OLW Sverige AB company. In the commercial, a one-legged person asks a three-legged person if the latter wants to share. Bringing forward a packet of crisps the three-legged person then responds, "*Av det här goda?*" (approx. "Of this good?").

MER stated that Article 1 of the ICC (International Chamber of Commerce) Code of Advertising and Marketing Communication Practice applied to the commercial. Article 1 provides that, among other things, all marketing communication should be inoffensive, should be prepared with a due sense of social and professional responsibility and should conform with the principles of fair competition, as generally accepted in business. Moreover, the article provides that no communication should be such as to impair public confidence in marketing.

According to MER, it was obvious that the one-legged person's question related to the third leg of the other person.

MER's previous rulings show that there may, in some cases, exist acceptable grounds for illustrating a disability, but such illustration may never amount to humour based on disabilities. Therefore, in such cases, caution is required.

MER concluded that the commercial was demeaning towards disabled people. However, it did not rest there, but went on to hold that the commercial constituted an example of such bad taste and poor advertising that it impairs public confidence in advertising and marketing in general.

This last statement caused an advertising professional to lodge a quite amusing complaint with MER against the council itself. The professional contended that it is not MER's role to determine what constitutes good or poor advertising. MER eventually responded that its statements do not constitute a marketing activity. Therefore, MER held that, assuming the complaint was in earnest, it had no competence to try the issue. ■

**Michael Plogell and Erik Ullberg**
*Wistrand Advokatbyrå, Gothenburg*

● **MER:s Uttalande 34/2008 - Dnr 37/2008 (Statement from Council on Market Ethics 34/2008 - Reg. no. 37/2008), available at:**
**http://merlin.obs.coe.int/redirect.php?id=11494**
**SV**

## SI – RTV Viewer and Listener Ombudswoman's Demand on Cartoons Programming

The public service Radio and Television Slovenia (RTV) has established a Viewer and Listener Ombudsman in June 2007 and the person in charge was appointed to this position on 1 May 2008. At the end of November 2008 the Ombudswoman made the first public complaint related to the radio and television programming. She opposed the change of the broadcasting time of the children's cartoons, which was stable for decades.

On 17 November 2008 Television Slovenia started a new format –a telenovela titled "Passions" which

has been produced in-house. Like Mexican and Columbian telenovelas on the Slovenian commercial channels, it is broadcast before the central TV news at 7 p.m.. As a consequence the cartoons for children had to be scheduled earlier.

The Viewer and Listener Ombudswoman reported that she had received over sixty complaints from viewers. She communicated this information to the media. A public debate developed and the governmental Office of the Ombudsman also became involved. It is argued that the broadcasting of cartoons at 6.40 pm constituted an important part of evening family life. Specifically, it was contended that young children usually associated the end of the cartoons with their bedtime and, as a result of the rescheduling, this association was lost. The Ombudswoman argues that family life is very fragile and every intrusion in its routine has to be made with great caution and sensibility. She also stated that research showed a decline in the audience for TV news and that the RTV leadership sought to solve this problem by altering the time at which the news is broadcast.

The Programme standards (*Programski standardi*) issued by the Programme Council of RTV Slovenia (*Programski svet RTV Slovenija*) determined that programming should stimulate a healthy life and environment and that contents which could impair the physical, mental or moral spheres are to be broadcast at an appropriate time.

According to the declared obligations and rights of the Viewer and Listener Ombudswoman which are promoted on the RTV home page, it is within her remit to call attention to different problems and warn against "delicate" contents. There is no evidence that the RTV administration is obliged to respect her view. ■

**Renata Šribar**
*Ljubljana Graduate School of the Humanities, and Centre for Media Politics of the Peace Institute, Ljubljana*

● ***Programski standardi*** **(Programme standards), available at:**
**http://merlin.obs.coe.int/redirect.php?id=11501**

● ***Varuhinja pravic gledalcev in poslušalcev*** **(Information on the Viewer and Listener Ombudswoman) available at:**
**http://merlin.obs.coe.int/redirect.php?id=11502**

**SL**

## TM – New Constitution Adopted

On 26 September 2008 President Gurbanguly Berdymukhamedov signed into law the new Constitution of Turkmenistan, adopted that same day by the 21st extraordinary session of the *Halk Maslahaty* (People's Council). The new Constitution replaces the text adopted in 1992 which, itself, was amended several times.

The new Constitution does not make significant changes in the legal status of the mass media. Article 28 states that "citizens of Turkmenistan shall have the right to freedom of opinion and their free expression, as well as to receive information unless it represents a state secret or any other secret protected by law". Article 21 provides that the "execution of rights and liberties shall not violate the rights and freedoms of others, or contravene morality, law, public order, or national security".

Article 25 protects one's privacy and correspondence, honour and dignity. Article 39 provides for artistic freedoms and Article 43 stipulates for judicial protection of honour and dignity, of other personal and political rights and freedoms listed in the Constitution and national statutes. They are also granted the right to appeal courts decisions and actions of the government. Article 47 permits the suspension of constitutional rights during martial law and emergency situations only. Article 105 states that court proceedings are to be held in public. ■

**Andrei Richter**
*Media Law and Policy Centre*

● **Constitution of Turkmenistan**

**RU**

## TR – RTÜK Forces Closure of 11 Doğan Media Group Channels

In a decision of 27 October 2008, the *Radio ve Televizyon Üst Kurulu* (Turkish broadcasting regulator – RTÜK) ordered the closure of various TV channels, including a total of 11 channels forming part of the digital D-SMART service, which belongs to the Doğan Media Group.

The regulator based its decision on the fact that the broadcasters concerned had either failed to apply for their respective licences to be renewed or had submitted incomplete renewal applications. As a result, the channels have ceased broadcasting without a valid licence.

According to media reports, this explanation was rejected by the parties concerned, who accused the RTÜK of deliberately ignoring licence applications submitted over a two-year period in order to put pressure on the channel owners.

The RTÜK denied this accusation in a further statement and pointed out that licences had been granted to a total of 10 channels forming part of the D-SMART service and owned by the Doğan Media Group. It added that licences had also been refused for channels that did not form part of the D-SMART service. It had therefore not deliberately discriminated against the Doğan Media Group. Furthermore, the channels that had been closed down had been asked to complete or amend their applications and had failed to do so.

According to a statement, the RTÜK is considering legal action against the broadcasters concerned, while media reports suggest that opposition politicians are preparing a lawsuit against the RTÜK president. ■

**Anne Yliniva-Hoffmann**
*Institute of European Media Law (EMR), Saarbrücken/Brussels*

● **RTÜK press releases of 27 and 30 October 2008, available at:**
**http://merlin.obs.coe.int/redirect.php?id=11522**
**http://merlin.obs.coe.int/redirect.php?id=11523**

**TR**

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## The Legal Status of the Producer of Audiovisual Works in the Russian Federation

*by Dmitry Golovanov*
Moscow Media Law and Policy Centre

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