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European Court of Human Rights: Case of TV Vest SA and Rogaland Pensjonistparti v Norway

On 11 December 2008, the European Court of Human Rights delivered a judgment regarding a ban on political advertising on television. The crucial question the Court had to decide was whether a blanket ban on political advertisements on TV, as it was applied in Norway, was to be considered "necessary in a democratic society'" within the meaning of Article 10 of the European Convention on Human Rights. In principle, there is little scope under Article 10 of the Convention for restrictions on political speech or on debate on questions of public interest. However, a ban on paid political advertisements on TV exists in many countries in Europe, such as the UK, Sweden, Denmark, France, Belgium and Norway. According to Art. 3, 1 (3) of the Norwegian Broadcasting Act 1992, broadcasters "cannot transmit advertisements for life philosophy or political opinions through television". The Court has now decided unanimously that an application of this ban was in breach of Article 10 of the Convention.

The case goes back to the application by TV Vest AS Ltd., a television company in Stavanger, on the west coast of Norway, and the regional branch of a Norwegian political party, *Rogaland Pensjonistparti* (the Rogaland Pensioners Party). A fine was imposed on TV Vest for broadcasting adverts for the Pensioners Party, in breach of the Broadcasting Act. This fine had been imposed by the *Statens medieforvaltning* (State Media Administration) and had been confirmed by the *Høyesterett* (Supreme Court), which found, *inter alia*, that allowing political parties and interest groups to advertise on television would give richer parties and groups more scope for marketing their opinions than their poorer counterparts. The Supreme Court also maintained that the Pensioners Party had many other means available to put across its message to the public. The Pensioners Party had argued that it was a small political party, representing only 1.3 % of the elec-

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torate, without powerful financial means or support from strong financial groups, that it seldom got any focus in editorial television broadcasting and, thus, had a real need to establish direct communication between itself and the electorate. The Party was never identified either in national or local opinion polls.

The European Court said that to accept that the lack of consensus in Europe regarding the necessity to ban political advertisements on TV spoke in favour of granting States greater discretion than would normally be allowed in decisions with regard to restrictions on political debate. The Court however came to the conclusion that the arguments in support of the prohibition in Norway, such as the safeguarding of the quality of political debate, guaranteeing pluralism, maintaining the independence of broadcasters from political parties and preventing powerful financial groups from taking advantage through commercial political advertisements on TV were relevant, but not sufficient, reasons to justify the total prohibition of this form of political advertising. The Court especially noted that the Pensioners Party did not come within the category of parties or groups that had been the primary targets of the prohibition. In contrast to the major political parties, which were given a large amount of attention in the edited television coverage, the Pensioners Party was hardly ever mentioned on Norwegian television. Therefore, paid advertising on television had become the only way for the Party to get its message across to the public through that type of medium.

The Court was not persuaded that the ban had the desired effect and it explicitly rejected the view expounded by the Norwegian Government that there was no viable alternative to a blanket ban. In the Court's view, there was no reasonable relationship of proportionality between the legitimate aim pursued by the prohibition on political advertising and the means employed to achieve that aim. The restriction that the prohibition and the imposition of the fine entailed on the applicants' exercise of their freedom of expression could not therefore be regarded as having been necessary in a democratic society. Accordingly, there had been a violation of Article 10 of the Convention. ■

Dirk Voorhoof
Ghent University (Belgium) & Copenhagen University (Denmark) & Member of the Flemish Regulator for the Media

● Judgment by the European Court of Human Rights (First Section), case of TV Vest SA and Rogaland Pensjonistparti v Norway, Application no. 21132/05 of 11 December 2008, available at:
http://merlin.obs.coe.int/redirect.php?id=9237

EN

Parliamentary Assembly: Stand on Regulation of Audiovisual Media

It is now 20 years since the first publication of the European Convention on Trans-frontier Television (ECTT), which reflected the state of broadcasting at that time, and set out standards for regulation, and for promoting freedom of expression, by Council of Europe Member States.

Since that time technological change in audiovisual media has been accelerating: with the switchover to digital transmission, the growth of video on demand, and most recently with the prospect of convergence with computing and telecommunications. Regulation which was possible when a few broadcasters transmitted to a mass audience is no longer possible or desirable: broadcasters have proliferated, and audiences can make many more choices.

The EU has responded with its new Audiovisual Media Services Directive, and the Council of Europe has been preparing a Protocol to update the ECTT, which will presumably also refer to audiovisual media services. Now the Parliamentary Assembly, in Recommendation 1855 (2009), has joined the debate. The Assembly's recommendations are backed up by a substantial explanatory memorandum, setting out its arguments in more detail.

The Parliamentary Assembly has been concerned that the Convention should respect the basic principles of Article 10 of the European Convention on Human Rights on freedom of information and expression, rather than the EU's single market concerns. It wants to see broadcasting regulation applied sensibly to on-demand audiovisual services, but not to the internet, whose glory is the new opportunities it offers for freedom of expression. The Assembly thinks this will still be true even as the internet acquires the ability to transmit images and sound as well as text.

The Parliamentary Assembly wants to protect and enhance the role and independence of public service broadcasting, which needs particular support in some of the newer Member States. It wants national regulators also to be independent of government, of political parties, and of commercial influence.

The Parliamentary Assembly wants to protect Member States' rights to set their own standards on broadcast content, but not to impose them on others. It wants regulators in Europe to have the mechanisms and resources to settle difference between Member States.

The recommendation also covers wider issues than the ECTT. The Parliamentary Assembly of the Council of Europe supports the Committee of Ministers' declaration of February 2008 on the allocation of the new spectrum made available from digital switchover: the opportunity should be taken to enhance public service broadcasting and high quality in all broadcasting.

Therefore the Parliamentary Assembly invites those drafting the Protocol revising the ECTT to incorporate this thinking into their final draft. It also invites the Ministerial Conference on Media and New Communication Services, which will meet in Rejkjavik in May 2009, to reflect these concerns and these principles in their decisions. ■

Andrew McIntosh
Chairman of the Sub-Committee on the Media and Rapporteur on media freedom of the Parliamentary Assembly of the Council of Europe

● The regulation of audiovisual media services, Recommendation 1855 (2009), Parliamentary Assembly of the Council of Europe, 27 January 2009, available at:
http://merlin.obs.coe.int/redirect.php?id=11603

EN-FR

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EUROPEAN UNION

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

Christina Angelopoulos
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On 28 January 2009, after the conclusion of the public consultation launched last October on the issue (see IRIS 2009-1: 6), the European Commission adopted a Communication confirming the extension, until 31 December 2012, of the validity of the State aid assessment criteria contained in the 2001 Cinema Communication. The criteria are based on the "cultural derogation" to the general prohibition of Article 87(1) EC on State aid with distorting effects on competition and are used by the Commission to approve Europe's national, regional and local film support schemes.

In the Communication, the Commission identified a number of emergent trends upon which further reflection is needed, with a view to the refinement, in due course, of the State aid criteria in a future communication. Such trends include support for areas other than film and TV production per se (e.g. film distribution and digital production), more regional film support schemes and competition amongst Member States, in the form of State aid, so as to attract investment from foreign, large-scale production companies. Despite these observations the Commission has concluded that for the time being a stable environment for the film industry and debate as to the best way forward among the Member States, film support bodies and the film industry take precedence.

Two previous extensions took place in 2004 and 2007. ■

● **State aid: Commission prolongs film support rules until end 2012, IP/09/138, Brussels, 28 January 2009, available at:**
http://merlin.obs.coe.int/redirect.php?id=11623

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

NATIONAL

AT – BKS Rules on Distinction between "Reminders" and "Advertising Dividers"

Robert Rittler
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In a decision issued at the end of 2008, the *Bundeskommunikationssenat* (Federal Communication Senate - BKS) stated that *Österreichische Rundfunk* (the Austrian public broadcasting corporation - ORF) had violated the rules on the labelling of TV advertising and the separation of programme and advertising content.

The BKS ruling concerned ORF programmes broadcast on its ORF 2 channel and was based on the following findings. On 28 July 2008, ORF broadcast a programme announcement with the ORF 2 corporate design followed by an "advertising divider", also with the ORF 2 corporate design but without any separation element, at the end of which the word "*Werbung*" (advertising) was displayed. Both elements were accompanied by music. Two advertising spots were then broadcast, followed by a "reminder" with the ORF corporate design which, because of elements such as the display of the word "*Werbung*" with the ORF 2 design, was, to a large extent, visually identical to the aforementioned "advertising divider". The "reminder" was accompanied by different music from the "advertising divider". The "reminder" was immediately followed by another advertising spot, which in turn was followed by the ORF 2 programme signal.

The BKS thought that advertising and programme content had not been separated clearly enough: "An element that is added by the broadcaster as a "divider" between programme content and advertising becomes ambiguous if it is also broadcast in the same or a similar form between individual advertising spots. (...) If this is the case, the viewer is more or less obliged to check after every item whether it means the advertising block has finished or whether the advertising is continuing." In this case, the BKS concluded that the "advertising divider" and the "reminder" were so similar that any differences would not be spotted by the average viewer, even though different music was played and the "reminder" also included the word "*Werbung*". ■

● **Ruling of the BKS (GZ 611.009/0021-BKS/2008), available at:**
http://merlin.obs.coe.int/redirect.php?id=11594

DE

BA – Switchover to Digital Broadcasting on the Agenda

The Digital Terrestrial Television (DTT) Forum, as an *ad hoc* body working under the auspices of the Communications Regulatory Agency (RAK), was entrusted with preparing a comprehensive plan for the transition from analogue to digital terrestrial television in Bosnia and Herzegovina (see: IRIS 2008-5: 3). This switchover undertaking relates to frequency bands 174-230 MHz and 470-862 MHz in the country.

The transition is a very complex process and represents a real challenge for even any advanced State. Many factors have to be considered, among others the size of the media market, technical preconditions, such as the accessibility of cable or satellite television, the distribution of digital TV-receivers and financial modalities.

The Strategy for the Transition to Digital Terrestrial Television which was recently developed is the framework for the introduction of DTT in Bosnia and Herzegovina, also providing guidelines for the work

of competent institutions in this field, including the duties to inform stakeholders in the communications sector, as well as to familiarise citizens with the benefits digitalisation is offering to them: *inter alia* a better picture, better sound and the availability of many more channels.

Dusan Babic
Media researcher and analyst, Sarajevo

• A Draft of the Strategy is available at:
http://merlin.obs.coe.int/redirect.php?id=10734

BS

In early January this year, a draft version of the Strategy was formally opened for public consultation. The closing date for the submission of comments, recommendations and suggestions was set for 14 February 2009. After the public consultations the proposal of the document is to be submitted to the Council of Ministers of Bosnia and Herzegovina for adoption.

The complete switchover to DTT in Europe should take place no later than the year 2012. ■

BE – Flemish Regulator, "20 Minutes Rule" and Horror Trailers

In December 2008, the *Vlaamse Regulator voor de Media* (Flemish Regulator for the Media – monitoring and enforcement of media regulation) issued several interesting decisions. Two of them will be addressed below.

Firstly, the *Algemene Kamer* (General Chamber) condemned the commercial broadcasting corporation SBS Belgium for a triple breach of the so-called "20 minutes rule" during the broadcasting of the programme "Lost". This rule, described in Article 101 § 5 of the *Omroepdecreet* (Flemish Decree on Radio-broadcasting and Television), requires a period of at least twenty minutes to intervene between each successive interruption during a programme. The Regulator rejected the defence raised by the broadcaster to the effect that the rule was abolished by the Audiovisual Media Services Directive 2007/65/EC: the Flemish broadcasting corporations have to honour the present provisions and conditions in the Decree. The broadcaster further challenged the second breach by arguing that the programme transmitted contained two separate episodes from the fourth season of "Lost". The relevant part of the programme thus consisted of the end of episode 3 and the beginning of episode 4. As a consequence, the "20 minutes rule" did not apply. The Regulator cited Article 2.10 of the Decree, which defines a programme as the entire content of sound and/or images or other signals in any form which is provided by a broadcasting company under a separate title. At no time during the transmission had it been made clear to the viewers that two separate episodes of the series were being transmitted. No clear optical distinction was inserted. As a result, a triple breach of Article 101 § 5 was established. Because of the gravity of the infringement (three breaches in one programme) and the fact that SBS Belgium had been sanctioned on several occasions for the same infringement in the past (Decisions 2008/012, 2008/031, 2008/041), the Regulator decided to impose an administrative fine of EUR 15,000.

Hannes Cannie
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Secondly, the *Kamer voor Onpartijdigheid en Bescherming van Minderjarigen* (Chamber for Impartiality and the Protection of Minors) condemned the commercial broadcasting corporation VMMa for having transmitted a trailer in which three late night horror movies were announced at six p.m. According to Article 96 § 1 of the Flemish Media Decree, broadcasting companies may not broadcast any programmes which could harm the physical, mental or moral development of minors, unless the choice of the time of transmission or technical measures guarantee that minors in the broadcasting area would not normally see or listen to those programmes (2nd clause). This provision also applies to announcements for programmes (4th clause). By broadcasting the announcement in uncoded form at six p.m., no such guarantee was offered that children would not, in the normal course of things, see it. The Regulator was of the opinion that the trailer contained explicit images of atrocity and violence that were frightening, likely to leave a lasting impression on children and likely to provoke feelings of anxiety which could harm children's physical, mental or moral development. Nonetheless, as the transmission was partly the result of a mistake and given the fact that the broadcasting corporation was deemed likely to take all necessary measures to avoid future infringements, no penalty was imposed. ■

• VRM vs. NV SBS Belgium, 15 December 2008 (No 2008/077), available at:
http://merlin.obs.coe.int/redirect.php?id=11607

• Ann Dedecker vs. NV VMMa, 16 December 2008 (No 2008/083), available at:
http://merlin.obs.coe.int/redirect.php?id=11608

NL

BG – Supreme Administrative Court Repealed Provision Contravening Article 8 ECHR

On 7 January 2009 the Ministry of Internal Affairs and the State Agency for Information Technology and Communications adopted the Ordinance No 40 on Data Types and the Terms and Conditions for Retention and Dissemination of Data by the Enterprises Providing Public Electronic Networks and/or Services for the Purposes of National Security and Criminal Investigations ("the Ordinance"). The legal basis for this is Directive 2006/24/EC on data retention amending Article 251 of the Bulgarian Electronic Communications Act.

Article 5 para. 1 of the Ordinance reads as follows: „For the purposes of criminal investigation activities enterprises providing public electronic networks and/or services shall ensure passive technical access of the officials of the Operative-Technical Information Directorate through the computer terminal to

the data retained by the enterprises". The non-governmental Access to Information Programme Foundation ("Foundation") appealed the Ordinance before the Supreme Administrative Court (SAC) as illegal since it contravenes the ECHR.

The SAC (three-member jury), as a court of first instance, rejected the claim as being without merit. This decision was appealed by the Foundation. A five-member jury of the SAC as a court of final instance repealed the previous sentence and explicitly Article 5 according to the following legal reasoning: „Article 5 does not contain any restrictions as to the type of data to which access is allowed. In addition, the term "for the purposes of criminal investigation activities" is defined too broadly and there are no sufficient safeguards that Article 32 of the Bulgarian Constitution (right of inviolability of personal life) will be observed. The Ordinance does not provide any mechanism for the observance of the constitutional principle of protection against unlawful interference in the personal and family life of individuals and against encroachments on persons' honour, dignity and reputation."

The SAC upholds the reasoning that Article 5 contravenes Article 8 ECHR which provides to everyone the right to respect of his private and family life, his home and his correspondence, and any interference by a public authority is inadmissible. It contains an exhaustive list of exceptions where the above general principle shall not apply, namely: "such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others". The national legislation shall adhere to this rule and introduce clear and understandable grounds for access to data relating to the personal life of individuals and the procedures for granting such access. Article 5 does not contain sufficient measures protecting individuals against any unlawful interference in their personal and family life and therefore contravenes Article 8 ECHR, Directive 2006/24/EC and Articles 32 and 34 of the Constitution of the Republic of Bulgaria.

The Parliamentary Transport and Communications Commission is discussing a Draft Law on the Amendment and Supplementing of the Electronic Communications Act. One of the proposed changes concerns its Article 251 regulating the rules for access to particular types of data. Some media groups fear that parts of the restrictive rules contained in the Ordinance will be implemented in the Draft Law, which cannot be repealed by the SAC, but only by the Constitutional Court of the Republic of Bulgaria. ■

Rayna Nikolova
Council for Electronic Media, Sofia

● The Ordinance was promulgated in the State Gazette, issue No. 9 dated 29 January 2009

BG

CZ – Constitutional Court Rules on Youth Protection on Television

In a decision issued at the end of 2008, the *Ústavní soud* (Constitutional Court of the Czech Republic) ruled that measures taken by the Broadcasting Council to protect young people had not limited the freedom of speech in the media.

In the past, the Broadcasting Council has frequently had to deal with the principles of youth protection on television (particularly "Big Brother"-type formats) and imposed fines on the broadcasters of such programmes. The broadcasters appealed against these fines. The *Městský soud v Praze* (Prague Municipal Court) rejected some of the complaints and upheld the fines. The broadcasters appealed against these rulings of the Prague Municipal Court. The *Nejvyšší správní soud* (Supreme Administrative Court) rejected this appeal and ruled in favour of the Broadcasting Council (see IRIS 2008-8: 8). One broadcaster appealed to the Constitutional Court against the Supreme Administrative Court's decision on the grounds that it infringed the media's freedom of speech and asked that the decision be quashed. The broadcaster also asked the Constitutional Court to annul the youth protection provisions of the Broadcasting Act because they were also contrary to freedom of speech.

The Constitutional Court rejected the broadcaster's appeal. It ruled that the application of the Broadcasting Act by the Broadcasting Council and both courts in their assessments of these cases did not represent a breach of the Constitution's provisions on freedom of speech. The Supreme Administrative Court's ruling was sufficiently well-founded and in conformity with the Constitution. Such programmes could harm the development of children and minors and the State was obliged to protect them. Annulling the youth protection provisions of the Broadcasting Act was also out of the question. ■

Jan Fučík
Ministry of Culture, Prague

● *Usnesení ústavního soudu č.j. ÚS 2262/08 ze dne 18. prosince 2008* (Constitutional Court decision no. 2262/08 of 18 December 2008)

CS

DE – Lüneburg Court Confirms that RTL Programme Breached Human Dignity

According to a decision of the *Niedersächsische Oberverwaltungsgericht* (Lower Saxony Higher Administrative Court - OVG) in Lüneburg, the television broadcaster RTL breached human dignity with a report on the ill-treatment of a helpless old man (case no. 10 LA 101/07).

The *Verwaltungsgericht Hannover* (Hanover Administrative Court) had previously upheld a decision taken by the *Niedersächsische Landesmedienanstalt* (Lower Saxony State Media Authority - NLM) against RTL due to a breach of human dignity (see IRIS 2007-

3: 11). During various news and magazine programmes on 1 December 2004, RTL had broadcast similar reports depicting the ill-treatment by his nurse of a 91-year old man in need of care.

The OVG Lüneburg rejected the appeal against this decision and confirmed the ruling of the Hanover Administrative Court, which considered there to have been no legitimate reason to show the victim's suffering in such detail in the 2004 programmes. The main points of the decision can be summarised as follows:

1. The NLM's decision cannot formally be considered unlawful on the grounds that the Examination Committee of the *Kommission für Jugendmedienschutz* (Commission for the Protection of Young People in the Media - KJM) took its decision by means of a "circulation procedure" rather that at a meeting. Under Art. 90 (1) sentence 2 of the *Verwaltungsverfahrensgesetz* (Act on Administrative Procedure - VwVfG), such a meeting is necessary only if the purpose or context of a rule is such that joint consultation is particularly important, which is not the case here.
2. The reports were unlawful under Art. 4 (1) sentence 1 no. 8 of the *Jugendmedienschutz-Staatsvertrag* (Inter-State Agreement on the Protection of Young People in the Media - JMStV) on the grounds that they breached human dignity, particularly by depicting an actual event showing people dying or being exposed to serious physical or mental suffering, without a legitimate reason for this form of representation or reporting.
3. If images in which a helpless old man is subjected to ill-treatment and insults by his nurse are broadcast in extended form as part of news and magazine programmes, they are unlawful even if the aim of the broadcast was to draw attention to and criticise problems with the care system. ■

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• Decision of the OVG Lüneburg of 20 October 2008 (case no. 10 LA 101/07), available at:
http://merlin.obs.coe.int/redirect.php?id=11600

DE

DE – Federal Government Plans Comprehensive Broadband Strategy

On 13 January 2009, the Federal Government's Coalition Committee reached an agreement on the details of the so-called "second economic package", which was due to be approved on 18 February 2009. One aspect of the package is a comprehensive broadband strategy, designed to drive forward the expansion of broadband, fill in supply gaps and support the development of high-performance wired and wireless networks.

The broadband strategy focuses particularly on the use of digital dividends, measures to reduce investment costs, aspects of funding and regulation relating to investment and growth. Decisions will also be taken on rapid financial support measures for the expansion of broadband networks. As a result, all German households should be equipped with a properly functioning broadband connection by the end of 2010. High-speed networks should be accessible to 75% of households by 2014 and all households by 2018. The Government's plans were welcomed by the business world; in particular, the possibility of combining different measures is seen as a way of accelerating the process.

Work on a broadband strategy is also under way at European level. The European Commission believes that businesses should support efforts to speed up the renewal and extension of broadband networks in order to close supply gaps, particularly in rural areas. ■

Simone Köbe
Institute of European Media Law (EMR), Saarbrücken/Brussels

• Provisions of the broadband strategy in the economic package, available at:
http://merlin.obs.coe.int/redirect.php?id=11595

• European Commission Communication, available at:
http://merlin.obs.coe.int/redirect.php?id=11596 (DE)
http://merlin.obs.coe.int/redirect.php?id=11597 (FR)

DE-FR-PT

DE – Bundesrat Adopts Amended Film Subsidies Act

On 19 December 2008, the *Bundesrat* (upper house of parliament) approved the fifth amendment to the *Filmförderungsgesetz* (Film Subsidies Act - FFG), which had already been adopted by the *Bundestag* (lower house of parliament) on 13 November 2008.

The most important changes concern the shortening of blocking periods for the media exploitation of films, the inclusion of new forms of exploitation, such as video-on-demand (VoD) and changes to the system of support for reference films and short films. In addition, so-called "media obligations" in the TV sector will be increased in the form of advertising time for cinema films (see IRIS 2009-1: 10).

The *Bundesrat* decided not to convene the Mediation Committee. As a result, the amended FFG entered into force as planned on 1 January 2009. It is valid for five years. ■

Anne Yliniva-Hoffmann
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• *Fünftes Gesetz zur Änderung des Filmförderungsgesetzes* (Fifth Act Amending the Film Subsidies Act), available at:
http://merlin.obs.coe.int/redirect.php?id=11598

DE

DE – ZAK and GVK Adopt Competition Rules

The *Kommission für Zulassung und Aufsicht* (Licensing and Monitoring Commission - ZAK) and the *Gremienvorsitzendenkonferenz* (Conference of Authority Chairpersons - GVK) of the *Landesmedienanstalten* (State Media Authorities) have adopted a common set of rules for radio and television competitions.

The rules particularly concern the protection of children and young people. Youngsters may take part in competitions (but not game shows) from the age of 14; children under 14 are generally prohibited from

participating in competitions and game shows, with the exception of competitions that are free to enter. Telephone calls must not cost more than EUR 0.50.

Broadcasters are required to provide comprehensive information, the extent and type of which depends on the category of programme. On television, for example, verbal information must be accompanied by written information on the screen and rolling text with detailed information, including the terms and conditions of entry. Transparency provisions and a ban on misleading and manipulating viewers are also included. The rules also contain practical guidelines on the organisation and structure of competitions. For example, a caller must not have to wait more than 30 minutes before being put through. Breaches of these obligations can result in a fine of up to EUR 500,000.

The rules form part of the amendments to the 10th *Rundfunkstaatsvertrag* (Inter-State Broadcasting Agreement - RStV), which entered into force in September and gave the State Media Authorities the legal basis for punishing competition-related infringements. They will be submitted to the governing bodies of all 14 State Media Authorities, if possible for adoption by the end of this year. Before that, the public broadcasters will receive detailed information about the rules and be involved in a procedure stipulated by law. ■

Julia Maus
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• Rules on competitions, available at:
http://merlin.obs.coe.int/redirect.php?id=11627
DE

ES – Decree on the Cinema Law

The Spanish Council of Ministers approved *Real Decreto 2062/2008, de 12 de diciembre, por el que se desarrolla la Ley 55/2007, de 28 de diciembre* (Royal Decree 2062/2008 of 12 December on Law 55/2007 of 28 December) a Regulation that elaborates on the current Cinema Law and which was published in the Spanish Official Gazette, number 10, on 12 January 2009.

In a single document, the Royal Decree expands upon all of the aspects of the current Cinema Law, except for the creation of a section on audiovisual works in the Register of Personal Property, which will be dealt with by a separate law.

The following are the more notable items.

The first measure worth highlighting is the simplification of the proceedings before the Spanish administration that film production companies are obliged to navigate in order to obtain a certificate of nationality, film qualification, distribution certificates or registration in the Register of audiovisual companies. To this end, the film qualification certificate disappears and will be replaced by a process for qualification resolution that is easier to manage.

In addition, another important measure to point out is the possibility opened by the Royal Decree for production companies and TV channels to agree on how to invest 5% of the TV companies' gross income. TV channels can now decide when and on which films they shall invest.

As far as State aid is concerned, it is worth mentioning that the relevant rules, as stated in the Law of Cinema for the creation, production, distribution, exhibition, preservation and promotion of cinematographic works, are now expanded.

The Royal Decree gives an incentive to *Agrupaciones de Interés Económico* (Economic Interest Associations) to invest in movie production, opting for the same forms of aid as other film production companies.

It also favours co-productions with foreign companies by easing the requirements for the approval of such initiatives.

Furthermore, in order to promote both locations and films in co-official Spanish languages, it has been decided that cooperation with the Spanish Autonomous Communities will be sought.

It is worth mentioning that there will be a three-month term (window), beginning with the premiere at theatres, before a film can be commercialised in DVD format, with the exception of films which, during the first month of commercial exhibition, earned less than EUR 60,000 at the box office. This is a measure that aims to promote the commercialisation of documentaries and short films.

Finally, the Regulation sets out diverse measures for the prevention of piracy of audiovisual works. ■

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• *Real Decreto 2062/2008, de 12 de diciembre, por el que se desarrolla la Ley 55/2007, de 28 de diciembre* (Royal Decree 2062/2008 of 12 December on Law 55/2007 of 28 December) Spanish Official Gazette, number 10, 12 January 2009, available at:
http://merlin.obs.coe.int/redirect.php?id=11611
ES

FR – Appeal against the Bill to Reform the Audiovisual Scene

The bill – examined at length and copiously amended at its first reading in the National Assembly and the Senate – passed through the joint mixed committee at the end of January. As a result of this examination, provided for in the urgent procedure adopted by the Government for passing the Act, the bill was ratified in the form it was submitted to the global vote of each assembly in the course of the following days. The package was finally adopted on 4 February 2009. Two types of appeal have already been lodged against the texts adopted.

Firstly, opposition members of the Senate have called on the Conseil d'Etat to suspend the decision to abolish advertising after 8 p.m. adopted by the board of directors of France Télévisions at the request of the Minister of Culture, who was concerned at the amount of time it was taking to get the bill through Parliament. The applicants felt that the Minister's letter to the chairman and managing director of the holding com-

pany constituted abuse of her position of power and an infringement of the principle of the separation of executive and legislative powers, denying the Senate's power of amendment. The Conseil d'Etat, deliberating under the urgent procedure, held that as the public-sector channels' advertising contracts and programme schedules could not be readjusted instantly, such a suspension would not have an immediate effect. It therefore rejected the application under the urgent procedure without examining the actual legality of the decision at issue, the merits of which could be the subject of examination.

In addition, sixty members of the National Assembly and sixty members of the Senate called on the Constitutional Council to examine the constitutionality of the Act. Their application referred more particularly to the method for appointing and revoking the chairmen of the public-sector channels – which would be contrary to the principle of independence –, the tax on IAPs – which could contravene the principle of equality in the face of taxation – and the abolition of advertising – which would cease to be covered by the Act, in relation to the procedure contested but in the end adopted by the ministry. The Conseil d'Etat is to deliver its decision before the end of February; if it endorses the texts, they could be promulgated in early March. ■

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● **Conseil d'Etat (order under the urgent procedure), 6 February 2009, N. Borvo et al.**

FR

FR – Newscast Broadcasting of Images of Out-of-Courtroom Deliberation at a Criminal Court

The court of appeal in Amiens has just delivered an interesting order on a delicate point of law. The facts were as follows: after four days of debate before the criminal court of the Somme, when the judge and jury had withdrawn to deliberate, a journalist covering the case for a television channel noticed that the deliberation room was reflected in the glass building opposite. The journalist in question took the initiative of filming this reflection, thereby making it possible to view the deliberation process (which is theoretically secret) and more particularly two members of the jury voting by raising their hands. The images were then shown on the television newscast without distortion. A number of jurors reported the recording and the broadcast to the Public Prosecutor, claiming that this constituted an invasion of their privacy. The journalist, the editor-in-chief of the newscast and the channel's director of publication were then summoned to appear before the criminal court to answer charges of invasion of privacy by fixing or broadcasting the image or a person, and of complicity.

It should be recalled that Article 226-1 of the Penal Code holds the fact of "infringing another's privacy (…) by fixing, recording (…) without that person's consent the image of a person in a private place" to be a crime.

The criminal court acquitted the journalist, as it found that the elements which would constitute a crime were not present. The judge in the first instance proceedings held that a juror's activity as such was not part of his/her private life and that a court was a public place because of the very use to which it is put; furthermore, there had been no intention to infringe privacy. The Public Prosecutor and the complainant jurors appealed against the decision. In a decision delivered on 4 February, the court recalled firstly that the offence referred to in Article 39(3) of the Act of 29 July 1881, which prohibited "reporting on internal deliberations by either a jury or a court of any kind", could only be held against a person who, having been involved in a court deliberation, subsequently reported on it, which was not the case here. Similarly, the ban on photographing debates in court, provided for and sanctioned by Article 38 ter of the Act of 29 July 1881, only concerned the actual hearing and could not be extended to include a court's deliberations outside the courtroom.

The court therefore looked to see if the elements constituting the offence of invasion of privacy were present in this case, recalling firstly that it was held as established jurisprudence that a private place was a place where no-one could enter or gain access without the consent of the occupant. It mattered little, the court added, whether the place was in a building open to the public. In the present case, only the presiding judge of the criminal court was able to authorise entry to anyone belonging to neither the court nor the jury. The deliberations room was therefore temporarily, for the purposes of Article 226-1 of the Penal Code, a private place, according to the court. It also recalled that a jury deliberating on a criminal case did so by secret vote, further emphasising the strictly personal nature of the act, which could not be separated from the sphere of privacy. The court held that the journalist in question could not use good faith as an argument by claiming his desire to denounce a situation he considered to be wrongful and report on a topical item to public opinion. Such a claim could not remove the deliberate nature of the disputed filming and the journalist's knowledge of its unlawful nature, since he had not received any authorisation from the people he was filming. Furthermore, the court added, the journalist had the possibility, in order to observe the right to privacy, of using a blurred image, which he neither did himself nor required of the editors of the channel at the time of delivering his report.

This demonstrated fraudulent intent, and the matter was indeed an offence. The judgment was therefore overruled and the journalist was fined EUR 2,500 for invasion of privacy. The editor-in-chief of the television newscast and the channel's director of publication were also fined EUR 3,000 each. They have all appealed to the court of cassation, and it will be interesting to see what this court thinks about whether a court's deliberations room constitutes a private place within the meaning of Article 226-1 of the Penal Code. ■

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● **Court of appeal of Amiens, minor offences division, 4 February 2009; Jacquemart, Nezzari and Tessier v. Public Prosecutor and Corne**

FR

FR – Glimmer of Hope for Tele-reality Producers

It will be remembered that just a year ago a surprising judgment was handed down by the court of appeal in Paris in a dispute between participants in the tele-reality programme called *L'Ile de la Tentation* and the programme's producer. By upholding the candidates' claims (and awarding each of them EUR 27,000 in compensation in passing), the court stated clearly that the contract between the production company and the participants had all the features of an employment contract, such that the rules governing irregular breaking of the contract also applied (see IRIS 2008-4: 13).

Note should therefore be taken of the recent decision of the industrial tribunal of Saint-Etienne, as this re-opens the debate by opposing the court's solution. Presumably tempted by the amount of the compensation awarded to the "employees", a participant in the programme in 2006 took the matter to his local industrial tribunal so that his "participant rules" could also be re-classified as an employment contract. The participant put forward the jurisprudence from Paris as the basis for his application to the tribunal, claiming the existence of the three elements that constitute an employment contract (work carried out, in exchange for remuneration, with a degree of subordination). He described the days he spent as a "tempter", taking part in imposed activities, being available at all hours, and being required to follow instructions. He felt that this round-the-clock availability justified payment for overtime, and claimed almost EUR 40,000 in various allowances for having his services reclassified as an employment contract, failure to abide by the procedure for dismissal, and concealed employment, etc.

The tribunal began by recalling the need for the work carried out to be actual work. It found, however, that "the seeking through various activities, of a playful, sporting or other nature, to test a person's power of seduction in tourist establishments did not constitute organised work, as the applicant was at liberty to exercise this at any time". It also noted that "the posting of the daily programmes for the candidates could not be assimilated to in-house regulations or an obligation to work" and that "the exercise of seductive powers involved certain feelings or types of behaviour that were not in the nature of actual work". On the notion of legal subordination, the tribunal observed that there were some constraints on the participants in the television programme, and rules that had to be kept, but that subordination to regulations did not imply either the power of control over what was done or the power of sanction that was characteristic of an employment situation. In the present case, there was nothing to prevent the programme's candidates from refusing to participate in any of the activities, as indeed the party concerned had declared, "nobody forced me to do anything". Thus "what the applicant had done did not correspond to actual hours of work inasmuch as the tele-reality of *L'Ile de la Tentation* was not part of his professional life but, on the contrary, was part of his personal, affective and romantic life". Lastly, on the question of remuneration, the industrial tribunal recalled that participants did not receive any remuneration in return for their participation in the filming and that the EUR 1,525 paid corresponded to the transfer of their derived rights. The tribunal concluded that the essential elements of an employment contract were therefore not present, and rejected the participant's claim.

The industrial tribunal of Boulogne-Billancourt, for its part, in response to an application from 23 former candidates of the programme, decided on 3 February 2009 to refer the matter to a professional judge at the court of first instance for a decision on the matter. This was perhaps a way of gaining time pending the much-anticipated position of the court of cassation, to which last year's decision by the court of appeal in Paris has been referred. ■

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● **Industrial tribunal of Saint-Etienne, 22 December 2008; Raymond Reboul v. Glem**
FR

FR – Charter on the Participation of Minors in Television Broadcasts

In April 2007 the *Conseil Supérieur de l'Audiovisuel* (audiovisual regulatory authority -CSA) called for a charter to set the framework for the participation of minors in television broadcasts (see IRIS 2007-6: 11). A charter has now been drawn up, and the CSA published the text on 22 January 2009. It applies to broadcasts other than cinematographic and audiovisual works of fiction, and will be appended to the authorisations signed by those in parental authority.

As the CSA recalls, "in order to take into account the particular sensitivity and vulnerability of minors and to respect the child's person, particular attention must be paid both to the image that is presented of the minor because of his/her participation in a television broadcast and to the conditions in which the minor is received in order to take part in a broadcast". The text and its application are based on respect for the principles of freedom of expression and information as enshrined more particularly in Article 10 of the European Convention on Human Rights and as interpreted by the courts. In this respect it should be recalled that the protection of personal rights, such as rights concerning one's image, may be waived if the need for information so demands.

Concerning the conditions for minors' participa-

tion in broadcasts, the charter recalls that those in parental authority and the minor must be aware of the theme of the broadcast, its purpose, and – as far as possible – its title when consenting to the minor's participation. Also, the way the minor's account is presented – while remaining faithful to the concept of the television broadcast or its editorial line as stated in advance to the minor and to those in parental authority – must avoid dramatisation or derision. The child's intervention must not be damaging to his/her future and must preserve his/her prospects of harmonious personal development.

Once filming has ended, those in parental authority may oppose the broadcasting of the child's account. However, in accordance with jurisprudence, such retraction must not be abusive by nature, and in such a case it is for the parents to prove that the channel or the producer has substantially changed the purpose referred to in the authorisation they gave.

Concerning the conditions for receiving the child while the broadcasts are being filmed, the charter requires that the minor be accompanied by at least one of those in parental authority or by an adult duly authorised in writing by them for the purpose. In the event of filming lasting several days away from the minor's home, the minor must have normal living conditions and an adult, serving as the minor's reference person, must be present at all times during filming. ■

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● Charter on the participation of minors in television broadcasts, plenary assembly of the CSA meeting on 12 January 2009, available at:
http://merlin.obs.coe.int/redirect.php?id=11593

FR

GB – Regulator Fines ITV Companies for Failure to Meet Quotas for Productions Outside London

The Office of Communications (Ofcom), the UK communications regulator, has fined ITV a total of GBP 220,000 for failure to comply with quotas for expenditure on programmes made outside London in 2006 and 2007.

A condition in each of the regional Channel 3 licences of ITV requires that "at least 50 percent of expenditure on originated Network programmes in each calendar year shall be allocated to the production of programmes produced outside the M25 area" (the M25 is the orbital motorway surrounding London). These are known as the "out of London" requirements. Although ITV had reported initially that the requirements had been met, a subsequent audit revealed that though they had been met for volumes of productions, they had not been met for expenditure and that ITV had allocated to out of London productions only 45.6% of expenditure in 2006 and 44.3% in 2007. Ofcom was immediately notified. After considering written evidence and holding an oral hearing, the regulator decided that this amounted to a serious breach of a very important public service broadcasting requirement. The effect was to reduce the activity of the production sector outside London and potentially to damage it and to decrease diversity of programming for viewers. It had warned ITV in 2006 that any shortfall would be viewed seriously. Although the current quota and definition of an out of London production had only taken effect from 2006, they had been published as early as March 2004, so ITV should have been fully aware of their implications.

In view of the seriousness of the breach, Ofcom decided that it was appropriate to fine ITV GBP 20,000 for each licence, making a total of GBP 220,000. ■

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● Adjudication of the Ofcom Content Sanctions Committee: ITV, 16 January 2009, available at:
http://merlin.obs.coe.int/redirect.php?id=11602

EN

GB – Regulator Sets Out Proposals for Future of Public Service Broadcasting

The Office of Communications (Ofcom), the UK communications regulator, has issued the final report of its second Public Service Broadcasting Review. It is obliged by the Communications Act 2003 to undertake such a review at least every five years; this follows an earlier report setting out options for the future (see IRIS 2008-10: 12).

The Review focused on how to ensure the delivery of content which fulfils public purposes and meets the interests of citizens and consumers throughout the UK, aiming to make recommendations which responded to the huge changes brought about by the transition to the digital era and which would ensure that a historically strong and successful public service broadcasting system can move to the new digital environment. This includes public service broadcasters embracing new digital platforms, so that public service content is available across all digital media, not just linear broadcasting. The transition to the digital era is undermining the current model for delivering public service content outside the BBC through increased competition and decline in advertising revenues, so Ofcom considers that a new approach is needed.

Ofcom considers that it is essential to retain a strong BBC with funding to deliver its core services across digital platforms. A second institution, ope-

rating independently of the BBC and with clear public service goals, will help to ensure wide availability of digital content. This is likely to be based on Channel 4 in partnership, joint venture or even merged with other organisations. The most likely collaboration is with BBC Worldwide, the BBC's commercial arm, although a further possibility is a merger of Channel 4 with Channel 5.

Other commercially-owned networks, notably ITV, will retain only a modest public service commitment to UK original content and to UK and international news; Ofcom is immediately lifting some of ITV's public service obligations. To sustain news for the regions and devolved nations of the UK, independently funded consortia should bid for public funding; the government should also consider funding for other content in the devolved nations and for children's programming.

The report has now gone to ministers, who will take the ultimate decisions; Ofcom states that decisions will be needed within the next year as the current model of commercial public service broadcasting is clearly no longer sustainable. Changes to Channel 4's remit will require legislation. ■

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• Ofcom, 'Putting Viewers First: Ofcom's Second Public Service Broadcasting Review', January 2009, available at: http://merlin.obs.coe.int/redirect.php?id=11609

• For the immediate changes in regulatory requirements, see also Ofcom's 'Statement on Short Term Regulatory Decisions', available at: http://merlin.obs.coe.int/redirect.php?id=11610

EN

GR – Appropriate Manner of Broadcasting on Disorder during Demonstrations

In December 2008, the manner in which demonstrations and accompanying disorder are broadcast by the media came under scrutiny in Greece. In particular, the *Ethniko Symvoulio Radiotileorasis* (National Council for Radio and Television - ESR) issued two recommendations concerning the appropriate manner of reporting on disorder during demonstrations, while the *Symvoulio tis Epikratias* (Administrative Court of Justice) issued two decisions on the right of a journalist to decide as to the suitable amount of time that should be dedicated to the broadcast of demonstrations as such and the amount of time that should be devoted to the ensuing disorder.

During the last month of 2008, the Greek media were principally occupied with reporting on the demonstrations that took place in many Greek cities after the shooting of a Greek schoolboy by a police officer. The ESR, acting within its competences, issued two recommendations concerning the appropriate approach to the presentation of information on these events.

The first recommendation, issued on 12 December 2008, required that the media avoid broadcasting scenes of extreme violence in a way that could be interpreted as encouragement to demonstrations of extreme antisocial behaviour. As a complement to this, the second recommendation, issued on 16 December 2008, extended a further request, enjoining the media to accompany any video material depicting disorder from previous days with the label "archive material", in order to prevent confusion among the public and the creation of the impression that the transmitted scenes are taking place in the present.

These recommendations were issued at the same time that the Administrative Court of Justice gave further clarifications on the way in which information about demonstrations and ensuing disorder should be presented in two related decisions. Both decisions refer to the way two Greek channels (MEGA Channel and ANTENNA) broadcast the demonstrations that took place in Greece in 2003 in opposition to the then forthcoming war in Iraq. At the time, the ESR had imposed fines on both television channels, on the grounds that they dedicated more time to reporting on the disorder during the demonstrations than to reporting on the demonstrations as such. The Administrative Court of Justice, after an appeal by the above-mentioned channels, invalidated the decision of the Council.

In particular, according to the ruling, the devotion of more time to the broadcasting of the disorder itself did not breach the principle of objectivity or constitute an ethics violation. In accordance with the freedom of press, as guaranteed by the Constitution, journalists have the right to evaluate pieces of news as more or less significant and to choose what should be considered sufficiently important to report upon, as well as how much time should be devoted to each incident.

Furthermore, the ESR is indeed competent to have control over whether the Media failed to broadcast an incident generally considered as important, as this would be equivalent to hiding the truth and attempting to manipulate public opinion. On the contrary, according to the Court, prioritization and evaluation are not subject to sanctions by the Council, as they do not form a violation of the objective broadcast of news. ■

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Office of the European Data Protection Supervisor

• *Υπόδειξεις Αριθμ. 4/12.12.2008 και 5/12.12.2008* (Recommendations No. 4/12.12.2008 and 5/12.12.2008)

• *Αποφάσεις Αριθμ.* 3620/2008 und 3621/2008 (Decisions Nr. 3620/2008 and 3621/2008)

EL

IE – Media Mergers

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A report of an Advisory Group on media mergers was published on 2 January 2009. The Group was established in March 2008 by the Minister for Enterprise, Trade and Employment to review the current legislative framework regarding the public interest aspects of media mergers.

The Group was asked to examine the relevant provisions of the Competition Act 2002 and, in particular, the "relevant criteria" specified in the Act, by reference to which the Minister currently considers media mergers. The terms of reference of the Group were: to review and to consider the current levels of plurality and diversity in the media sector in Ireland; to examine and review the "relevant criteria" as currently defined in the Act; to examine and consider how the application of the "relevant criteria" should be given effect and by whom; to examine the role of the Minister in assessing the "relevant criteria" from a public interest perspective and the best mechanism to do so; to examine international best practice, including the applicability of models from other countries; and to make recommendations, as appropriate, on the above.

The Group made eleven recommendations. First, there should be a statutory definition of media plurality, referring both to ownership and content (Rec. 1). Secondly, the Competition Act should be amended to incorporate a statutory test to be applied by the Minister in the discharge of his or her function in relation to media mergers (Rec. 2). In addition, the current definition of the "relevant criteria" in Section 23(10) of the Competition Act should be replaced (Rec. 3), indicators on diversity of ownership in the media sector should be regularly collected and published (Rec. 4) and the Competition Authority should no longer have a role in relation to the application of the relevant criteria (Rec. 5). There should also be a separate system of notification of media mergers to the Minister for clearance (Rec. 6); an obligation on parties to a media merger to provide full information, with appropriate penalties for non-compliance (Rec. 7); and Guidelines should be published by the Minister (Rec. 8) on how s/he would generally apply the relevant criteria. The Advisory Group also proposed that in complex cases that require a detailed investigation, a Consultative Panel (three to five people) should be established to advise the Minister on the media merger, with the final decision being made by the Minister (Rec. 9). Finally, the term "media business" should be amended to include online publication of newspapers and periodicals and the broadcasting of certain audiovisual material over the Internet (Rec. 10); and the important role of the media in a democracy should be recognised by Statute (Rec. 11). ■

- **Section 23 of the Competition Act 2002, available at: http://merlin.obs.coe.int/redirect.php?id=11612**
- **Minister for Enterprise, Trade and Employment press release, available at: http://merlin.obs.coe.int/redirect.php?id=11613**
- **Report of the Advisory Group on Media Mergers, available at: http://merlin.obs.coe.int/redirect.php?id=11614**

EN

IE – Treaty of Lisbon Guidelines

Since November 2008, the Joint *Oireachtas* (Parliament) Committee on the Constitution has been reviewing the referendum process. Its first consideration has been the current arrangements whereby information is imparted to the public during referendum campaigns. To that end, the Committee has sought the views of broadcasters, media regulatory bodies and various others. In its submission, the Broadcasting Complaints Commission (BCC) said that 20 of the 21 complaints it received in relation to the referendum on the Lisbon Treaty alleged bias in favour of the Yes side. All were considered and all were rejected. The central issue was fairness and balance.

Prior to that, in April 2008, the Broadcasting Commission of Ireland (BCI) published Guidelines in respect of coverage of the referendum on the Treaty of Lisbon. The guidelines were issued further to Section 9 of the Radio and Television Act 1988 (see IRIS 2004-8: 11) and Section 18 of the Broadcasting Act 2001. Like previous guidelines, they included restrictions relating to broadcasts in the 24 hours before polling, which might reasonably be considered likely to influence the outcome of the poll (see IRIS 2002-7: 12). However, on this occasion, the moratorium was extended from 12.01 a.m. on the day before polling stations opened until they closed. The previous restrictions applied from 7.30 a.m. on the day before the referendum. Broadcasters and guests could speak about Europe or how Ireland has benefited from the EU, but could not discuss the treaty or related amendments.

The guidelines provided that all coverage on the Referendum should be fair to all interests and presented in an objective and impartial manner and without any expression of the broadcaster's own views (Guidelines 4, 5 and 6). All interests concerned should receive equal treatment in current affairs programmes (Guideline 6) (see IRIS 1998-6: 7, IRIS 2000-2: 7, IRIS 2001-7: 9 and IRIS 2004-8: 11). Proponents and opponents of the Referendum should be represented in the same programme. If this were impracticable, two or more related broadcasts could be treated as a whole, as long as the broadcasts were transmitted within a reasonable period of each other. The subsequent use of extracts from such programmes in other programmes must be monitored, to ensure continued balance and fairness and overall balance and fairness in the treatment of the views of different interests. Furthermore, in programmes including

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audience participation, it should be ensured that there is balance and fairness in the views broadcast and that a range of views are adequately represented in the questions/comments/issues raised in the programme.

The review of the referendum process by the Joint Oireachtas Committee continues. ■

● BCI Guidelines in Respect of Coverage of the Referendum on the Treaty of Lisbon and Related Constitutional Amendments, available at: http://merlin.obs.coe.int/redirect.php?id=11628

EN

IT – Commission Authorises Italian Film Production Tax Incentives

On 22 August 2008, the General Direction for Cinema, according to the provisions of the third paragraph of Article 88 of the EC Treaty, formally notified the European Commission of new measures containing fiscal incentives for film production and distribution companies. The relevant paragraph – which deals with State aid – indeed provides that, "The Commission shall be informed, in sufficient time to enable it to submit its comments, of any plans to grant or alter aid. If it considers that any such plan is not compatible with the common market having regard to Article 87, it shall without delay initiate the procedure provided for in paragraph 2. The Member State concerned shall not put its proposed measures into effect until this procedure has resulted in a final decision".

The Italian Act of 6 August 2008 no. 133, which comprised an amendment to the Italian Finance Act of 2008, provides a new system of incentives for Italian cinema (see IRIS 2008-9: 15). The Law proposes to ensure the support policy for the national film industry, so as to promote the production and distribution of national films. To achieve this goal, the Act specifically introduces tax breaks for companies, internal and external to the cinema sector, which reinvest their profits in Italian film production and distribution.

Technically, these legal measures provide two intervention channels: a tax credit and tax shelter, which, according to the supporters of the reform, aim at strengthening the entire cinematographic chain, avoiding the direct intervention of the government, while also respecting freedom of expression. In fact, the logic behind the new Law, more innovative than ever before, is to overcome the direct intervention of the State, which until now could decide whether or not a project was eligible for finance.

In general terms, tax shelters are a method of reducing taxable income, cutting the revenue receipts. In the new Italian Law, in accordance with this tax measure, a maximum default budget is introduced. Moreover, this is proportionate to the cost of production of a funded film with regard to the size of the loan.

The tax credit, on the other hand, provides an incentive for companies with little income or even those making a loss. Every company, in fact, owes the treasury a debt, even if it does not make a profit. In this regard, the tax credit can be an attractive option for everyone.

The main objective of the Italian film support scheme is to maintain and enhance the cultural potential of the film sector. In Italy, the fragmentation of the film sector and the strong presence of the US majors in distribution and production have combined to create a dominance of mainly US commercial films with high budgets. Up to now, the Italian film sector had focused increasingly on films with limited audience appeal, leading to a few major commercial films with a near dominant position. The scheme introduces tax credits to support the production of European cultural films and films of special cultural interest, as well as a tax shelter for European cultural films. The tax credit and tax shelter are available to companies which are taxable in Italy and the tax credit is available against all types of taxes.

The new rules grant the taxpayers outside the film industry a tax credit of as much as 40% on funds invested for the production of Italian films for the years 2008, 2009 and 2010. In turn, the film industry should use 80% of these resources in the national territory, employing Italian workers and services and promoting training and apprenticeship in all technical areas of production.

Tax credits for direct production and film distribution are also foreseen, as well as total exemptions from taxable income that the film industry reinvests in film production. This exemption is partial (30% of profits) for companies outside of the film sector that invest their profits in the cinema. In any case, in order to find out in detail how the economic incentive will work, it is necessary to wait for the ministerial directives.

In accordance with the provisions of European law on State aid, Italy could not implement the new scheme before it had been approved by the European Commission. Therefore, the Italian Government, in order to enact measures implementing the aforementioned Law, awaited European authorization.

On 19 December 2008, the European Commission approved under EC Treaty State aid rules a EUR 104 million Italian tax incentive scheme for film production until 31 December 2010. The Commission found that the scheme was compatible with the cultural derogation of the EC Treaty, in line with the Cinema Communication rules concerning aid for film production. The Commission's assessment of the tax credit and tax shelter for film production was based on the

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State aid rules in the 2001 Cinema Communication, applying the derogation in Article 87.3(d) of the EC Treaty, allowing aid for cultural activities under certain conditions.

In line with the Cinema Communication, the support is targeted towards cultural products, where the maximum aid is limited to 50%, with the exception of low budget and "difficult" films, in which case it could amount to 80%. The applicable territorial conditions are below the maximum territorial requirement allowed in the Cinema Communication. The Italian authorities are also committed to implementing any changes that may be required by modifications to the State aid criteria in the Cinema Communication before the scheme comes to an end. ■

● ***Legge 6 Agosto 2008, numero 133: "Conversione in legge, con modificazioni, del decreto-legge 25 giugno 2008, n. 112, recante disposizioni urgenti per lo sviluppo economico, la semplificazione, la competitività, la stabilizzazione della finanza pubblica e la perequazione tributaria"*** **(Italian Law 6 August 2008 number 133), available at:**
http://merlin.obs.coe.int/redirect.php?id=11395

● ***Legge 24 Dicembre 2007, numero 244: "Legge finanziaria 2008", articolo 1 commi 325 – 343*** **(Italian Law 6 August 2008, no 133, Art. 1, paras. 325 – 343)**

● ***Comunicato Stampa del Ministero per i Beni e le Attività culturali pubblicato il 22 agosto 2008: "Incentivi fiscali per la produzione e la distribuzione delle opere cinematografiche (Tax shelter e Tax credit)"*** **(Press Release of Ministry of Cultur of 22 August 2008), available at:**
http://merlin.obs.coe.int/redirect.php?id=11396

DE-EN-FR-IT

LV – Amendments to Laws Governing Pre-Election Campaigns in Media

On 15 January 2009 *Saeima* (the Parliament) adopted amendments to laws governing pre-election campaigns: the Law on Pre-Election Campaigns before the Elections of *Saeima* and the European Parliament and the Law on Pre-Election Campaigns before the Municipal Elections. The amendments seek to address the loopholes in the financing of election campaigns discovered in the last *Saeima* election campaign (in 2006), as well as to specify the duties of broadcasters within the election campaigns.

The amendments state that the period for pre-election campaigns starts 120 days before the election. Hitherto such a period was not envisaged. Several time frames applicable to the duties of broadcasting organisations are amended accordingly. Hence the amendments significantly shorten the time frame within which the broadcasting organisations must provide their price lists for paid broadcasting time during the pre-election campaigns. Previously such price lists had to be published in the official newspaper of Latvia (*Latvijas Vēstnesis*) 270 days before the elections, thus causing additional costs to the broadcasters, however, the duty applied to public broadcasters only. Now, this period is shortened to 150 days before the elections and concerns both public and private broadcasters. The costs incurred are reduced by the elimination of the requirement to publish lists in the official newspaper.

The broadcasters must send the price lists to the National Broadcasting Council, which publishes them on its home page. In addition to that, the broadcasters must provide separate price lists with respect to broadcasting pre-election campaigns commissioned and paid for not by political organisations or election candidates but by third parties. The price lists are binding and may not be changed after their publication.

The amendments also shorten the broadcasting period that may be devoted to pre-election campaigns. Previously, the broadcasters were entitled to expand the advertising period for up to 10 % within a period starting 60 days before the elections in order to broadcast paid pre-election campaigns. Now, this option is cancelled. Following the amendments, it is not permissible to broadcast the opinion polls on the election day in the programmes of any broadcasters. Previously, this prohibition applied only to the programmes of public broadcasters.

In order to tackle the problem of loopholes in the financing of pre-election campaigns, the amendments provide that political organisations, election candidates, as well as third parties, must conclude the contracts on paid pre-election campaigns directly with the broadcasting organisations. The latter have to notify the Corruption Prevention and Combating Bureau on all contracts concluded on the broadcasting of pre-election campaigns not later than on the next business day after entering into such agreements. Moreover, the broadcasting organisations must follow the rule that the payment for the broadcasting of the pre-election campaign does not exceed the limit provided in the amendments to the law. The ceiling of such expenses is set at 15 times the minimum official salary as applicable on 1 January of the relevant calendar year (currently: LVL 180 (ca. EUR 256) gross).

To conclude, the amendments update some of the existing and impose several new obligations on public and private broadcasters in order to ensure a fair pre-election campaign.

Nevertheless, the amendments are still being criticised by various non-governmental organisations for failing to address all the ways of circumventing the financial limitations imposed on the election candidates. The amendments came into force on 31 January 2009. ■

Ieva Bērziņa-Andersone
Sorainen

● ***Par priekšvēlēšanu aģitāciju pirms pašvaldību vēlēšanām*** **(Law on Pre-Election Campaigns before the Municipal Elections), available at:**
http://merlin.obs.coe.int/redirect.php?id=11605

● ***Par priekšvēlēšanu aģitāciju pirms Saeimas vēlēšanām un Eiropas Parlamenta vēlēšanām*** **(Law on Pre-Election Campaigns before the Elections of *Saeima* and the European Parliament), available at:**
http://merlin.obs.coe.int/redirect.php?id=11606

LV

ME – Government Establishes Ministry for Information Society

Daniela Seferovic
KRUG Communications & Media, Montenegro

The Montenegrin Government founded a new Ministry of Information Society, the main task of which is to improve the use of modern information and communication technologies. According to the amendments to the Regulation on the Organisation and Functioning of the State Administration adopted on 11 December 2008, the new Ministry replaces the existing Secretariat for Development.

The latter was, apart from taking care of the drafting, implementation and monitoring of national and regional development strategies, in charge of developing and maintaining the information system of the State administration bodies, preparing the basis for the accession to the EU in the areas of development and implementation of information and communication technologies (e-Europe), as well as for keeping the central electoral registry and implementation of regulations relating to the electronic signature. Explaining its motives for these structural changes, the Government stated that a further development in modern information and communication technologies usage was necessary for the State administrative bodies to be able to accomplish their objects in an effective and economic manner and that it is a precondition for the overall development of the economic, academic and civil society. While the last year saw the successful introduction of the Montenegrin national internet domain ".me" which many regard as the biggest accomplishment within the information sector, one of the main projects for this year is expected to be the start of the implementation of the Montenegrin eGovernment project, whereby functions of administrative bodies would be carried out in digital form over the internet.

Last year the Government additionally strengthened its role in the regulation of broadcasting by establishing a new Agency for Electronic Communications and Postal Activity which merged the technical sector of the Broadcasting Agency, which dealt with the distribution of the broadcasters' frequencies and licenses, and the Government-dependent Agency for Telecommunications. ■

● Amendments to the Regulation on the Organisation and Functioning of the State Administration adopted on 11 December 2008, available at: http://merlin.obs.coe.int/redirect.php?id=11629

ME – New Model of Financing for the Public Broadcasting Service

Vojislav Raonić
KRUG Communications & Media

The Montenegrin Parliament adopted the amended version of the Law on Public Broadcasting Service which significantly changes the way the national public broadcaster Radio Televizija CRNE GORE (RTCG) will be financed. According to these amendments passed by the national parliament in December 2008, a fixed amount of 1.2 % of the annual budget of Montenegro will be redirected to fund the core activities of the radio and television of Montenegro (Article 16).

After the country's main telecommunications operator stopped collecting the license fees for the national public broadcaster in August 2007, RTCG had no source of income. An agreement was negotiated with the electricity enterprise Elektroprivreda Crne Gore AD Nikši (EPCG) which started collecting the license fees together with its electricity bills as from 1 July 2008. This system was able to generate only 30 % of the full income. This was mostly because the license fee part of the electricity bill was optional, meaning that persons could choose not to pay it. The draft Law came into force after a public debate involving the civil society, media representatives, the public service broadcaster and international media experts. During the debate the criticism was made that such a provision would undermine the independence of the public service broadcaster and would mean the establishment of a State television. On the other side, promoters of the amendments pointed out that such a system of financing by the allocation of a fixed percentage of the budget is a widely accepted practice in Europe and beyond.

According to an OSCE report on the State of Media Freedom in Montenegro, the key factor in assessing the success of the Law will be the extent to which it contributes to the sustainability of the radio and television in Montenegro precluding possibilities for political interference. The draft Law also proposes a new mechanism for the prompt appointment of the members of the RTCG-Council according to which a list of nominees will be submitted to parliament for approval. ■

● Amended version of the Law on Public Broadcasting Service, available at: http://merlin.obs.coe.int/redirect.php?id=11630

MT – Policy Document on General Interest Objectives

The Malta Communications Authority (MCA), the Broadcasting Authority (BA), the Ministry for Education, Culture, Youth and Sports, and the Ministry for the Infrastructure, Transport and Communications, have been discussing a policy document entitled "Making Digital Broadcasting Accessible to All: A Policy and Strategy for Digital Broadcasting Meeting General Interest Objectives". The MCA led the discussions on the drafting of the document, with input from the BA and both ministries. Eventually the document was referred to the Cabinet for approval and, on 6 February 2009, released to the public.

On 15 September 2007, the MCA and the BA jointly published a consultation document on how broadcasting may best meet General Interest Objectives (GIOs). The consultation period was spread over a period of five months (see IRIS 2008-1: 17). The consultation document was built around a number of fundamental principles that are seen as forming the conceptual framework within which a GIO set-up should be modelled, namely:

- The public's right to free-to-air viewing of GIO channels via unencrypted transmission;
- An adequate number of GIO broadcasters, balanced against minimal distortion of market mechanisms;
- Efficient use of spectrum;
- Sufficient frequency spectrum for GIO broadcasting, such as to cater for future needs, on the basis of known (existing and foreseen) technology capabilities;
- The concept of GIO broadcasting embracing both the public service broadcaster and a number of private broadcasters;
- The application for GIO status, by privately owned stations, on a voluntary basis;
- The award of GIO status only on the basis of stringent qualifying criteria;
- PBS Ltd. as the "de facto" public service broadcaster;
- The need for transition costs to be kept at manageable levels;
- Broadcasting to go beyond GIOs via the award of commercial licences.

In determining the nature and ownership of the network, the Government has opted for the setting up of a distinct GIO network. The Government has taken note of the fact that PBS Ltd. is the only broadcasting company with an obligatory requirement to operate under a GIO remit. This makes it the ideal company to organise and run the GIO multiplex. The public service broadcaster will therefore be appointed as the network operator for broadcasting that meets GIOs. As a result of this arrangement, there will be no need to enforce must-carry obligations on terrestrial commercial networks. Such a course of action would result in an unnecessary duplication of transmission capacity.

The following are the other key features of the policy direction that the Government has adopted with respect to broadcasting that meets GIOs:

- The GIO network will be required to carry up to six GIO TV stations;
- All transmissions on the GIO networks will be unencrypted and therefore viewable without the need for any subscription to a network operator and free of charge;
- The second frequency reserved for GIO use will be kept in reserve for the eventual transition of GIO stations to HDTV;
- The BA, with the technical assistance of the MCA, will provide the necessary monitoring of the operation of the GIO network;
- On the drawing up of detailed criteria by the BA, an eligibility test for broadcasters will be carried out, with right of first choice for existing analogue terrestrial;
- Vacant slot(s) on the GIO network will subsequently be filled via a call for expressions of interest.

The publication of this policy document marks the start of a series of initiatives that will lead to analogue switch-off, set for the end of December 2010. Such initiatives will include updating of the Broadcasting Act, the refinement of the high level GIO eligibility criteria, the setting-up of the GIO network infrastructure, the selection of GIO stations and public information initiatives. The implementation of these steps will pose quite a challenge to all concerned. ■

Kevin Aquilina
Department of Public Law, Faculty of Laws, University of Malta

● "A Policy and Strategy for Digital Broadcasting that meets General Interest Objectives", Malta Communications Authority (MCA), the Broadcasting Authority (BA) and the Ministry for the Infrastructure, Transport and Communications (February 2009) available at:
http://merlin.obs.coe.int/redirect.php?id=11622

EN

NL – Eredivisie N.V. et al. v. Myp2p

Eredivisie N.V. (hereinafter: ENV) is the legal person in charge of organizing the *Eredivisie* (the highest league) of football in the Netherlands. The football clubs which play in the Eredivisie hold the rights for the broadcasting of their football matches. Defendant Myp2p is a website which provided online live broadcasts of these matches (livestreams). Applicants ENV and the football clubs requested an interlocutory injunction against Myp2p to prevent imminent infringement of their intellectual property rights by, among other things, the livestreaming of the football matches. This ex parte petition is an implementation of Article 9 of Directive 2004/48/EC on the enforcement of intellectual property rights and is a request for a decision to be taken without the defendant being heard. In this case, the petition was admitted by the District Court of The Hague on 22 January 2009.

ENV and the football clubs maintain that the distribution of the broadcasts functions as a closed system. Consequently, only viewers who pay a subscription are allowed to watch the matches. Myp2p operates outside this closed system by providing users with livestreams of the matches using peer-2-peer technology (Sopcast). According to the applicants, this streaming is illegal for, *inter alia*, the following reasons:

Myp2p makes the streams (a cinematographic work in the sense of Article 45d Dutch Copyright Act) available to the public. According to Article 3 of

Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society, authors have the exclusive right to authorise or prohibit any communication to the public of their works. Recital 23 of the Directive makes clear that "communication to the public" should be understood in a broad sense. To clarify this "broad sense", the applicants made an analogy with the decision of the European Court of Justice (ECJ) in case C-306/05 (SGAE v. Rafael Hoteles) (see IRIS 2007-2: 3/3). The ECJ ruled that "the distribution of a signal by means of television sets by a hotel to customers staying in its rooms, whatever technique is used to transmit the signal, constitutes communication to the public within the meaning of Article 3(1) of [the] [D]irective". According to the applicants, Myp2p's role in the present case is comparable to that of the hotel in the ECJ case because Myp2p is retransmitting the broadcasts to a different, non-paying, public and is therefore communicating to the public, which is a right reserved for the football clubs.

The judge admitted the ex parte request for two reasons. Firstly, My2p is causing confusion among the public regarding the origin of the streams by using the football clubs' trademark logos. Moreover, by making the live broadcasts available without the applicants' permission, Myp2p is infringing the rightsholders' copyright in those images. Therefore, Myp2p's activities with regard to the streaming of the Eredivisie broadcasts should cease immediately, as postponement could cause irretrievable damage to ENV and the football clubs. ■

Joost Gerritsen
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● ***Rechtbank 's-Gravenhage, 22 januari 2009, ex parte beschikking in de zaak van Eredivisie N.V. et al. en Myp2p*** **(District Court of First Instance of The Hague, ex parte provision in the case of Eredivisie N.V. et al. v. Myp2p), available at: http://merlin.obs.coe.int/redirect.php?id=11626**

NL

NL – Media Act 2008

On 1 January 2009, the *Mediawet 2008* (Media Act 2008) came into effect in the Netherlands, replacing the old *Mediawet* (Media Act). Like its predecessor, the purpose of the new Act is to provide a legal basis for Dutch media policy. The scope of media policy in the Netherlands includes, inter alia, the financing and regulation of national public service broadcasting, the regulation of commercial radio and television and the broadcast of events of major importance for Dutch society. This latter category of events is listed in the accompanying *Mediabesuit 2008* (Media Decree 2008).

Two reasons can be pointed out for the introduction of a whole new Act. Firstly, various amendments to the Act have, over the years, contributed to a less accessible Media Act. The successor of the Media Act restores in its text the structure and the arrangement of Dutch media policy. Secondly, the new Act is formulated in such way as to make it easier to process upcoming legislation. For instance, incorporating the recent Audiovisual Media Services Directive into the Media Act 2008 will now be less cumbersome thanks to the new Act's set of modern definitions. These definitions strive to maintain a technically-neutral approach.

With regard to media policy, four main differences exist compared to the former *Mediawet*. In the first place, the new Act cancels the difference between main and sideline tasks for public service broadcasting. Instead, public service broadcasting should be provided to the public anytime and anywhere, through the use of multimedia such as digital theme channels and websites. Second, the Mediawet 2008 guarantees that local, regional and national public service broadcasting services are included in the package of digital television channels. A third difference is that the new Act expands the regulations dealing with commercials and sponsorship of commercial service broadcasting. The goal is the reduction of loss for Dutch broadcasters due to competition from broadcasters who focus on the Netherlands but operate from Luxembourg. Lastly, some entirely new provisions have been added, such as the banning of broadcasters for promoting hate speech.

The revision of the former Act was necessary because the *Mediawet* was written in the era of analogue radio and television. With the present convergence of radio, television and the Internet, the *Mediawet 2008* has been tailored to fit the modern digital media landscape. ■

Joost Gerritsen
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● ***Mediawet 2008 - Wet van 29 december 2008 tot vaststelling van een nieuwe Mediawet*** **(Media Act 2008 - Act of 29 December 2008 on establishing a new Media Act), available at: http://merlin.obs.coe.int/redirect.php?id=11620**

● ***Mediabesluit 2008 - Besluit van 29 december 2008 houdende vaststelling van een nieuw Mediabesluit*** **(Media Decree 2008 - Decree of 29 December 2008 on establishing a new Media Decree 2008), available at: http://merlin.obs.coe.int/redirect.php?id=11621**

NL

RO – Emergency Decree Defines European Works

Part of the *Ordonanţa de urgenţă nr. 181/2008 pentru modificarea şi completarea Legii audiovizualului nr. 504/2002* (Emergency Decree no. 1818/2008 amending and supplementing Audiovisual Act no. 504/2002), which entered into force on 3 December 2008, adds the following definitions to the Audiovisual Act:

"European works" in the sense of the Act are

- works originating from EU Member States (Art. 1 para.1 letter a);
- works originating from non-EU Member States that have signed the Council of Europe's Convention on Transfrontier Television and fulfil the conditions set out in para. 3 (Art. 1 para.1 letter b);
- and works produced under the terms of relevant agreements concluded between the EU and non-EU Member States in the audiovisual sector.

Para. 3 explains that the above letters a and b include productions that are essentially based on the work of authors and other participants who live in one of more of the countries concerned. The following conditions also need to be met:

a) The productions are the work of one or more producers who are resident in one or more of the countries concerned;
b) The production of these works was actually supervised and approved by one or more producers who are resident in one or more of the countries concerned.

Para. 4 stipulates that audiovisual productions that cannot be considered European works in the sense of para. 1, but which are the result of bilateral co-production agreements between EU and non-EU Member States, can nevertheless be considered "European works" if the majority of the overall costs were paid by co-producers from EU Member States and if the production was not supervised by one or more producers from non-EU Member States.

The emergency decree also provides that audiovisual on-demand services should, "where possible and with adequate means, promote the production of and access to European works. Such support may consist, for example, of financial participation in the production costs and the purchase of copyright for European works or a percentage and/or proportion of the European works within the programme catalogue" (Art. 23 para. 1). The National Audiovisual Council will submit a report to the European Commission by 19 December 2011 and must subsequently inform the Commission about the application of the provisions of para. 1 every four years (Art. 23 para. 2). ■

Mariana Stoican
Journalist, Bucharest

● ***Ordonanța de urgență nr. 181/2008 pentru modificarea și completarea Legii audiovizualului nr. 504/2002*** **(Emergency Decree no. 1818/2008 amending and supplementing Audiovisual Act no. 504/2002)**

● ***Legea Audiovizualului Nr. 504 din 11 iulie 2002 cu modificările și completările ulterioare, inclusiv cele aduse prin OUG nr. 181/25.11.2008,*** **available at: http://merlin.obs.coe.int/redirect.php?id=11601**

RO

RU – Access to Information Law Adopted

On 9 February 2009 President Dmitry Medvedev of the Russian Federation signed the Federal Statute On provision of access to information on activity of the State bodies and bodies of local self-government, earlier adopted by the State Duma (the national parliament). The Statute enters into force on 1 January 2010.

The main aims of the new Statute are openness of activities of governmental and municipal authorities, a wide use of new technologies, and objective and full information for the public on the activities of the State. The Statute is founded on the principle of the presumption of openness of information with the exception of certain cases, as envisaged in federal statutes and related to legally protected secrets (Art. 5, para. 1). The need to explain the reasons to obtain information sought from the authorities shall become unnecessary (Art. 8, para. 3 point 1).

The Statute sets forms and means of provision of information. In a number of cases the information shall be provided for a nominal fee to be set by the Government.

The Statute foresees the establishment and regular updating of official Internet websites of State bodies and bodies of local self-government. With this aim such offices, as well as public libraries and other places open to public shall have points of access to the Internet. Article 13 of the Statute enumerates the types of information that are allowed to be provided on the Internet. It includes inter alia technical standards, information on results of inspections by the authorities, statistical data, information on expenditures of public money, and on vacancies. The exact types of information to be provided on official Internet websites, though, shall be determined by the authorities that hold these websites. In fact the only obligatory items for official websites are the address of the official e-mail for inquiries, working hours and news updates.

The Statute sets out the possibility for citizens to be present at the meetings of collegial State bodies and collegial bodies of local self-government, as well as their collegial committees. At the same time the authorities themselves regulate the presence of citizens at their meetings in by-laws (Art. 15).

The Statute introduces amendments to the Code of Administrative Offences that envisage administrative fines for violations of the Statute. Control over the execution of the Statute shall be conducted by the heads of the State bodies and heads of the bodies of local self-government. No regular reporting on its application is envisaged by the Statute. ■

Andrei Richter
Media Law and Policy Centre

● **Federal Statute** ***„Об обеспечении доступа к информации о деятельности государственных органов и органов местного самоуправления"*** **(On provision of access to information on activity of the State bodies and bodies of local self-government) of 9 February No. 8-FZ was published in** *Российская газета* **(Rossiyskaya gazeta) official daily on 13 February 2009**

RU

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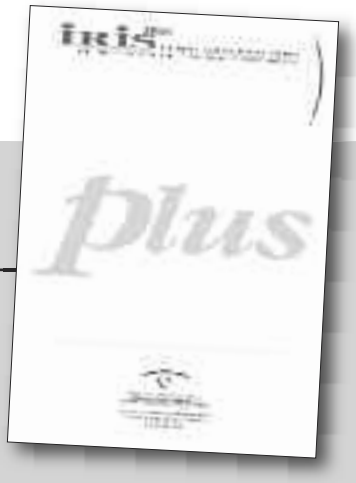

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