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European Court of Human Rights: Case of Khurshid Mustafa and Tarzibachi v. Sweden

The applicants, Adnan Khurshid Mustafa and his wife, Weldan Tarzibachi, are Swedish nationals of Iraqi origin. Relying on Article 10 (freedom to receive information) and Article 8 (right to respect for private and family life), they complained that they and their three children had been forced to move from their rented flat in Rinkeby (a suburb of Stockholm) in June 2006. The reason for their eviction was their refusal to remove a satellite dish in their flat after the landlord had initiated proceedings against them, because he considered the installation of a satellite antenna as a breach of the tenancy agreement that stipulated that "outdoor antennae" were not allowed to be set up on the house. The proceedings continued even after Mr. Khursid Mustafa and Mrs. Tarzibachi had dismantled the outdoor antenna and replaced it with an antenna installation in the kitchen on an iron stand from which an arm, on which the satellite dish was mounted, extended through a small open window. Eventually, the Swedish Court of Appeal found that the tenants had disregarded the tenancy agreement and that they should dismantle the antenna, if the tenancy agreement were not cancelled. The Swedish Court was of the opinion that the tenants were fully aware of the importance the landlord attached to the prohibition of the installation of satellite antennae and that, although the installation in the kitchen did not pose a real safety threat, their interests in keeping the antenna installation, based on their right to receive television programmes of their choice, could not be permitted to override the weighty and reasonable interest of the landlord that order and good custom be upheld.

The fact that the case involved a dispute between two private parties was not seen as sufficient reason for the European Court to declare the application inadmissible. Indeed, the Court found that the applicants' eviction was the result of a domestic court's ruling, making the Swedish State responsible, within the meaning of Article 1 of the Convention, for any

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resultant breach of Article 10 of the Convention. The European Court observed that the satellite dish enabled the applicants to receive television programmes in Arabic and Farsi from their country of origin (Iraq). That information included political and social news and was of particular interest to them as an immigrant family who wished to maintain contact with the culture and language of their country of origin. At the time, there were no other means for the applicants to gain access to such programmes and the dish could not be placed anywhere else. Nor could news obtained from foreign newspapers and radio programmes in any way be equated with information available via television broadcasts. It was not shown that the landlord had installed broadband or internet access or other alternative means which might have given the tenants in the building the possibility of receiving these television programmes. Furthermore, the landlord's concerns about safety had been examined by the domestic courts, who had found that the installation had been safe. And there were certainly no aesthetic reasons to justify the removal of the antenna, as the flat was located in one of Stockholm's suburbs, in a tenement house with no particular aesthetic aspirations. Moreover, the applicants' eviction, with their three children, from their home, a flat in which they had lived for more than six years, was disproportionate to the aim pursued, namely the landlord's interest in upholding order and good custom. The Court therefore concluded that the interference with the applicants' right to freedom of information had not been "necessary in a democratic society": Sweden had failed in its positive obligation to protect the right of the applicants to receive information. The European Court held unanimously that there had been a violation of Article 10, while it further held unanimously that there was no need to examine the complaint under Article 8. The applicants were awarded EUR 6,500 in respect of pecuniary damage, EUR 5,000 in respect of non-pecuniary damage and EUR 10,000 for costs and expenses. ■

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

● Judgment by the European Court of Human Rights (Third Section), case of Khurshid Mustafa and Tarzibachi v. Sweden, Application no. 23883/06 of 16 December 2008, available at
http://merlin.obs.coe.int/redirect.php?id=9237
EN

EUROPEAN UNION

Court of Justice of the European Communities: UTECA v. Administración General del Estado

In spring 2007, the Spanish *Tribunal Supremo* (Supreme Court) referred to the Court of Justice of the European Communities (ECJ) for a preliminary ruling a case involving an action brought by the *Unión de Televisiones Comerciales Asociadas* (Association of Spanish Commercial Televisions – UTECA) against Spanish national legislation implementing the EC Television without Frontiers (TwF) Directive. The legislation in question involves the Royal Decree 1652/2004 and the corresponding legislative provisions on which the decree is based, which require television operators to earmark 5% of their operating revenue for the previous year for the funding of full-length and short cinematographic films and European films made for television and to allocate 60% of that funding to the production of films the original language of which is one of the official languages of Spain. UTECA sought to have the decree declared inapplicable on the grounds of infringement of Community law. These claims were opposed by the *Administración General del Estado* (General State Administration). The ECJ was asked by the Spanish Supreme Court to assess the compatibility of the national provisions with the TwF Directive, as well as with Article 12 EC Treaty on the prohibition of discrimination on the grounds of nationality and Article 87 EC Treaty on State aid.

The Court first clarified that, pursuant to Article 3(1) TwF Directive, Member States are free to lay down more detailed or stricter rules with regard to television broadcasting bodies under their jurisdiction, provided that they respect the fundamental freedoms guaranteed by the Treaty. According to the Court, the measure requiring the allocation of 5% of operating revenue for the pre-funding of European cinematographic films and films made for television does not endanger these freedoms. By contrast, the obligation to reserve 60% of that 5% of operating revenue for the production of films of which the original language is one of the official languages of Spain does constitute a restriction on the freedom to provide services, the freedom of establishment, the free movement of capital and the freedom of movement for workers. As such, the provision may only be permitted where it serves overriding reasons relating to the general interest, is suitable for securing the attainment of the objective which it pursues and does not go beyond what is necessary in order to attain this objective. In the present case, the cultural aim of Spanish multilingualism provides such a defence, while, according to the ECJ, the measures under examination were also appropriate and proportionate in relation to this aim.

With regard to Article 12 EC, the Court pointed out that, in relation to the freedom of movement for workers, the right of establishment, the freedom to provide services and the free movement of capital, the principle of non-discrimination has been implemented by specific provisions of the EC Treaty (i.e., Articles 39(2) EC, 43 EC, 49 EC and 56 EC respectively). Since the Spanish national legislation does not seem to contravene these provisions, no breach of Article 12 can be said to have taken place either.

Finally, as concerns compatibility with EC State aid law, the ECJ recalled that classification as State aid requires that all conditions set out in Article 87 be met. Hence, (a) there must be an intervention by the

State or through State resources; (b) the intervention must be liable to affect trade between Member States; (c) it must confer an advantage on the recipient; and (d) it must distort or threaten to distort competition. In the case at issue, the Court ruled that it is not apparent how the measure disputed constitutes an advantage granted either directly or indirectly by the State or through State resources. Moreover, since the measure applies to television operators, it does not appear that the advantage in question is dependent on the control exercised by the public authorities over such operators. Consequently, the measures adopted by the Royal Decree 1652/2004 and the legislative provisions on which the decree is based should not be considered to be aid within the meaning of Article 87(1) EC.

As a result, according to the preliminary ruling of the ECJ, a measure adopted by a Member State which requires television operators to earmark 5% of their operating revenue for the pre-funding of European cinematographic films and films made for television and, more specifically, to reserve 60% of that 5% for works of which the original language is one of the official languages of that Member State does not infringe Community law. ■

Christina Angelopoulos
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● Case C-222/07 UTECA v. Administración General del Estado (ECJ 5 March 2009), available at: http://merlin.obs.coe.int/redirect.php?id=11667

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

European Commission: Agreement on Dutch Regulator's Competition Enhancing Proposal

On 10 February 2009, the European Commission (EC) cleared the proposal on broadcasting market regulation by the Dutch regulator *Onafhankelijke Post en Telecommunicatie Autoriteit* (OPTA). As a result, OPTA can now impose several regulatory obligations on the four largest cable operators in the Netherlands, Ziggo, UPC, Delta and CAIW, who currently hold dominant positions in Dutch broadcasting markets.

First of all, in order to enhance competition, UPC and Ziggo are now obliged to resell their analogue cable network based on regulated prices to other market parties. This will enable these parties to sell the same analogue TV programmes as UPC and Ziggo. Consumers can completely switch their analogue radio and television service from these two operators to alternative operators.

Second, the four largest cable operators in the Netherlands are now obliged to grant access to other market parties to distribute their signals over their digital television network to the consumer. KPN, a formerly State-owned network operator, is excluded from this access right. In return, cable operators do not have access to KPN's network. The exclusion of KPN is intended to stimulate other operators to invest in their own network.

The procedure for the granting of the Commission's approval began on 9 January 2009. On that date, OPTA notified the Commission of its draft decision on the market for wholesale broadcasting transmission services in the Netherlands. This notification is an obligation required by Article 7 of Directive 2002/21/EC on a common regulatory framework (EU Framework Directive). After receiving the Commission's approval, the Dutch regulator will consult with UPC, Ziggo and the alternative operators on the administrative and technological measures needed to allow the operators access to UPC and Ziggo's broadcasting networks. According to OPTA, consumers will be able to switch cable services by the end of 2009. ■

Joost Gerritsen
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● Commission clears Dutch regulator OPTA's proposal to enhance competition in the broadcasting markets, IP/09/245, 11 February 2009, available at: http://merlin.obs.coe.int/redirect.php?id=11671

EN-DE-FR-NL

● *Europese Commissie geeft groen licht aan OPTA om kabelmarkt te openen", persbericht OPTA 10 februari 2009* (European Commission allows OPTA to open up the broadcasting market, press release OPTA, 10 February 2009), available at: http://merlin.obs.coe.int/redirect.php?id=11674

NL

NATIONAL

BA – RAK Investigates Freedom from Accountability

The Communications Regulatory Agency (RAK), which is responsible for the telecommunications and broadcasting sector in Bosnia and Herzegovina, has recently opened an investigation procedure against the Federal Television (FTV), a public broadcaster, for possible breach of the Broadcasting Code of Practice, point 1 Programme Standards and Requirements, and point 1.2 Decency and Civility.

FTV is the most watched TV station in Bosnia and Herzegovina, mostly thanks to its political magazine programme 60 minutes, which has already been attempting for some years to disclose mafia-like activities focussing in particular on rampant corruption and close ties between political and criminal circles. In the absence of the rule of law and a reliable judiciary, journalists were playing the roles of quasi-investigators, prosecutors and finally judges, at the same time. This is, of course, a perverted role that journalists were/are playing, which contradicts professional and ethical codes, including international documents on media freedom.

As well as adhering to the "reporting the facts" concept, journalists should at the same time sharpen their sense of their responsibility, which is missing in this FTV story. Criticism has been levelled at the frequent use of defamation and offensive language, and the ignoring of the legal tenet of the presumption of innocence. Instead of respecting the principle of

"innocent until proven guilty", they apply an upside down concept: "guilty until proven innocent". In doing so, they demand the journalistic right "to offend, to shock and to embarrass" public figures, allegedly derived from the Declaration of Freedom of Political Debate in the Media, and supported by the EU, CoE, OSCE and journalists' associations.

Until recently RAK remained silent, but after the Grand Mufti, head of the Islamic Community of Bosnia and Herzegovina, strongly voiced objections to 60 minutes and the manner of reporting in a very sensitive case of paedophilia discovered in a remote Muslim village in central Bosnia, RAK decided to open the case. Before the court of original jurisdiction had found an Imam guilty of molesting a (minor) girl in his *dzemat* (Muslim community), 60 minutes branded him as a paedophile. RAK considered this to be unprofessional and irresponsible. ■

Dusan Babic
Media researcher and analyst, Sarajevo

● **Broadcasting Code of Practice, available at: http://merlin.obs.coe.int/redirect.php?id=10734**

BS

BE – RTL Group Wins Battle against the CSA

In its decision of 15 January 2009, the *Conseil d'Etat* (Belgian administrative court) repealed the decision of the *Conseil Supérieur de l'Audiovisuel* (audiovisual regulatory body of the French-speaking Community – CSA) of 29 November 2006, which ruled that "since 1 January 2006, the S.A. TVi has been broadcasting RTL-TVi and Club-RTL services, of which it is the editor, without authorisation" and which imposed a fine of EUR 500,000 on TVi.

The case featured the CSA on one side and CLT-UFA, a Luxembourgish broadcasting company, and its Belgian subsidiary TVi, a broadcasting company under Belgian law which broadcast programmes on the RTL-TVi and Club-RTL TV networks, on the other.

Up until 2005, TVi had always sought (and obtained) a licence from the CSA for its broadcasting activities in Belgium. However, in October 2005, TVi decided not to renew this licence, since it had already received a licence from Luxembourg. Indeed, in 2005, the Luxembourgish government granted CLT-UFA a licence, valid until the end of 2010, to broadcast its channels "of international reach", these being RTL-TVi and Club-RTL. From that point onwards, TVi and CLT-UFA claimed that the editorial activities concerning RTL-TVi and Club RTL had been transferred from TVi to CLT-UFA and that consequently no Belgian licence was necessary for the broadcasting of these channels.

The CSA came to the opposite conclusion in its decision of 29 November 2006. According to the CSA, the channels were still edited by TVi, since the editorial decisions were taken in Belgium by that company. Consequently, it imposed a fine of EUR 500,000 on TVi for broadcasting without a licence. TVi and CLT-UFA filed an appeal before the Conseil d'Etat against the ruling.

The Conseil d'Etat based its reasoning on the provisions of the Television without Frontiers (TwF) Directive (Directive 89/552/EEC) and on the principle of the free movement of services. Under the provisions of the TwF Directive, broadcasts are submitted to the control of one authority, designated in accordance with the "country of origin" rule. Practical criteria are listed in the Directive: for example, if a broadcaster has its head office in one Member State, but editorial decisions on programme schedules are taken in another Member State, it shall be deemed to be established in the Member State where a significant part of the workforce involved in the pursuit of the television broadcasting activity operates (Article 2 of the TwF Directive).

However, the Conseil d'Etat did not assess whether the CSA had correctly applied the criteria contained in the TwF Directive. It merely noted that the CSA did not dispute the fact that RTL-TVi and Club RTL were covered by a Luxembourgish licence. Therefore, it ruled that the CSA could not assess whether the Grand Duchy of Luxembourg had exceeded its jurisdiction by granting a licence to a broadcaster not established on its national territory: the decision to grant a licence could only be challenged through the appropriate diplomatic or jurisdictional channels, but not incidentally during proceedings intended to impose a fine on a broadcaster, which – to the extent that the Luxembourgish licence is valid – does not need to seek further authorisation in a different Member State.

Therefore, according to the Conseil d'Etat, the CSA could not rule that "[the CSA] must check whether that licence allows the legal operation of the services concerned", that "the sole existence of a licence issued by another Member State is not sufficient to conclude that the alleged lack of a licence in the French Community of Belgium is unlawful" and that "we need to check whether the licence was granted by the Member State that has jurisdiction over the editor of the services in question". By doing so, the CSA in effect denied any validity, or at least any effect, *vis-à-vis* third parties, to the licence granted by the Luxembourgish authorities. The Conseil d'Etat underlined that this exceeds the authority of the CSA; indeed, if the broadcasting is authorised by the Luxembourgish authorities – whether lawfully or not – the broadcaster benefits from the principle of the free movement of services within the European Union and no authority of another Member State can subject them to further authorisation proceedings for distribution in its territory.

Accordingly, the Conseil d'Etat decided to repeal the CSA decision. ■

Philippe Laurent
CRID (University of Namur) and Marx Van Ranst Vermeersch & Partners

Olivier Sasserath
Marx Van Ranst Vermeersch & Partners

● ***S.A. TVi et S.A. de droit luxembourgeois CLT-UFA c. C.S.A (Conseil Supérieur de l'Audiovisuel), Conseil d'Etat, section du contentieux administrative, arrêt n°189.503, 15 janvier 2009* (S.A. TVi and S.A. CLT-UFA (company under Luxembourgish law) v CSA (audiovisual regulatory body), Belgian Administrative Supreme Court, judgment n°189.503, 15 January 2009**

FR

BE – On the Road to Political Advertising on Radio and Television?

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The Media Commission of the Flemish Parliament has accepted an important modification to the draft of the new Media Decree (see IRIS 2009-2: 8). In pursuance of the European Court of Human Rights judgment in the case of TV Vest SA and Rogaland Pensjonistparti v Norway (see IRIS 2009-3: 2), the Commission has approved a provision allowing paid political advertising on radio and television in pre-election time (Article 47). The provision's viability, however, depends on a double condition: approval in the plenary session of the Flemish Parliament and modification of the federal law on election expenditure and election campaigns. If these conditions are met, a turn of 180 degrees will have been accomplished in relation to the total ban on political advertising on radio and television, as provided in Article 97 § 3 of the present Media Decree.

In the above-mentioned judgment, the ECHR came to the conclusion that the arguments in support of the prohibition on political advertising in Norway, such as the safeguarding of the quality of the political debate, guaranteeing pluralism, maintaining the independence of broadcasters from political parties and preventing powerful financial groups from taking advantage of access to commercial political advertisements on TV, were relevant, but not sufficient, reasons to justify the total prohibition of this form of political advertising. The Court had especially noted, in its judgment of 11 December 2008, that the applicant Pensioners Party, in contrast to the major political parties, received hardly any coverage in the Norwegian media. Therefore, paid advertising on television became the only way for the party to get its message across to the electorate. This judgment does not necessarily mean that any prohibition on political advertising on radio and television has to be abolished, but it makes it clear that any ban should be applied with sufficient flexibility or that exceptions should be applicable for smaller parties and political movements or organizations that receive very little media coverage.

As the law currently stands in the Flemish Community, political advertising on radio and television is prohibited. The federal law on election campaigns also stipulates a ban, but this federal ban is restricted to the three months preceding elections. While the ban in the Flemish Media Decree is directed to the broadcasting companies in the Flemish Community, the federal law prohibits all political parties and their candidates in Belgium from financing political broadcasting on radio and television. Hence, in the current situation, the fact that the ban is restricted in time in federal legislation does not change anything for Flemish broadcasters, as they are not allowed at all to broadcast paid political messages on radio and television. Nonetheless, the public broadcasting corporation of the Flemish Community (VRT) is under an obligation to allocate broadcasting time (on radio and television), during a period of two months preceding the elections, to the political parties which are represented in the Flemish Parliament (Articles 29 and 30 § 6 of the present Media Decree). Half of the broadcasting time is divided in accordance with the proportional representation of the political parties in the Flemish Parliament and the other half is divided equally between all parties. This free broadcasting time on public radio and television is a kind of compensation for the existing ban on paid political advertising on radio and television. The problem from the perspective of Article 10 ECHR with the current situation is, however, that it does not guarantee access to this free political broadcasting time to small or new parties that have not yet won representation in the Flemish Parliament and receive only very little media coverage.

Following the amendment approved by the Media Commission, this guarantee regarding free pre-electoral broadcasting on public radio and television will be abrogated and will be replaced by the possibility for broadcasters to offer paid commercial communications to politicians and political parties in pre-election time (Article 47). The Commission of the Flemish Parliament claims that political advertising on radio and television should also be made possible by lifting the federal ban on paid political advertising on radio and television in pre-election time. So far (4 March 2009), no legal proposal whatsoever has been presented in the Federal Parliament, which means that, even if the new Article 47 will have been approved by the Flemish Parliament, paid political advertising on radio and television in the period before the regional and European elections of 7 June 2009 remains prohibited for the political parties and their candidates in Belgium, included in the Flemish Community. ■

• The provisions currently accepted by the Media Commission of the Flemish Parliament are available at:
http://merlin.obs.coe.int/redirect.php?id=11664

NL

BG – Implementation of the Digitalisation of TV Broadcasting

The Act on the Amendment and Supplementation of the Radio and TV Act was promulgated on 20 February 2009 in the State Gazette, issue 14 ("New Law"). The New Law sets out the main principles and rules for digital TV broadcasting in Bulgaria.

According to the New Law the Council for Electronic Media (CEM) is empowered to grant licenses for broadcasting regional and national TV and radio programmes. The applications for such licenses should be reviewed and evaluated on the basis of the following criteria:

1. The original content and variety of the programming;
2. The opportunities for the creation of internal productions;

3. The degree of readiness and stages for 24-hour broadcasting of the programme;
4. Proven experience as a radio and TV operator.

The evaluation shall be carried out by an expert commission comprising three members of the CEM and two members of the Communications Regulation Commission (CRC). The expert commission shall propose to the CEM whether a license should be issued or refused. The CEM shall decide upon the issuance or refusal of the license on the basis of the following principles:

1. The right of information is ensured;
2. Favourable conditions for media variety will be created;
3. The national identity is preserved.

The number of licenses under the New Law is unlimited. The CEM is obliged to issue the license within 10 days of its positive decision on granting the license.

Once the license is issued the programmes can be broadcast by an enterprise that has been granted a permit for the use of an individual scarce resource – radio frequency spectrum for carrying out electronic communications through terrestrial digital networks for radio transmission by the CRC.

The enterprise that has been granted a permit for the use of individual scarce resource – radio frequency spectrum, shall propose to the CEM the type and profile of the licensed TV programme to be broadcast. The enterprise that has been granted a permit for the transmission of programmes cannot be both a TV and a radio operator at the same time.

The CEM is obliged by operation of law to issue licenses for digital terrestrial broadcasting to the public Bulgarian National Television and the two nationwide commercial operators – Balkan News Corporation EAD and Nova Television – First Private Channel EAD, as they meet the following conditions:

1. They have already been granted licenses for TV activities with national coverage on the basis of previous tenders;
2. They transmit their programmes through electronic communication networks for terrestrial analogue radio transmission;
3. The electronic communication networks ensure access to their programmes of at least 50 % of the country's population. ■

Rayna Nikolova
Council for Electronic Media, Sofia

● Act on the Amendment and Supplementation of the Radio and TV Act, promulgated on 20 February 2009 in the State Gazette, issue 14 ("New Law")

BG

DE – Film Contributions Unconstitutional in Current Form

The *Bundesverwaltungsgericht* (Federal Administrative Court - BVerwG) has decided that the contributions paid by the film, video and television industries to the *Filmförderungsanstalt* (Film Support Office - FFA) are unconstitutional in their current form.

It suspended proceedings arising from complaints by nine cinema operators and referred them to the *Bundesverfassungsgericht* (Federal Constitutional Court - BVerfG). It acknowledged that contributions by cinema operators, video companies and TV providers to support film promotion were, in principle, justified. However, under the current rules, the principle of equality of contributions derived from Art. 3.1 of the *Grundgesetz* (Basic Law - GG) was not being upheld. Whereas under Art. 66 f. of the *Filmfördergesetz* (Film Support Act - FFG) cinema operators and video companies had to pay a fixed percentage of their turnover, television companies were free to negotiate the size of their contributions (Art. 67 FFG). However, in order to adhere to the fair contributions principle, television companies should also be required by law to pay a level of contributions laid down by law. If television companies were to continue paying contributions on a contractual basis, the law would need to lay down certain criteria for calculating the level of their contributions.

The BVerfG must now decide whether the film contributions system is constitutional. ■

Jacqueline Krohn
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● BVerwG press release of 26 February 2009, available at: http://merlin.obs.coe.int/redirect.php?id=11638

DE

ES – Right to Privacy vs. Right to Information

The right to privacy and the right to information are considered to be Fundamental Rights by the Spanish Constitution. The former is enshrined in Article 18(1) and the latter in Article 20(1)(d). However, each right limits the other and litigation will normally occur when a party claims the enforcement of one of these rights against another party claiming a defence based on the other right. In such a case, it is up to the court to find the correct balance between the two rights in question.

The right to privacy is expanded upon by *Ley Orgánica 1/1982 de 5 de mayo, de Protección Civil del Derecho al Honor, a la Intimidad Personal y Familiar y a la Propia Imagen* (Act no. 1/1982 of 5 May 1982 on the Protection of the Right to Honour, Personal and Family Privacy and Own Image). The Act considers certain types of conduct to constitute an infringement of the right to privacy (Article 7), such as the use of hidden cameras or recording devices intended to record or reproduce private moments of the life of individuals.

On the other hand, the right to freedom of information is limited by the right to privacy, this fact is reflected in Article 20(4) of the Spanish Constitution.

Problems arise as to the determination of which of the two Fundamental Rights must prevail over the other in the case of a conflict between them, as no specific rules to help solve the problem are provided by law, while judges are called upon to analyse the question on a case by case basis.

In relation to this issue, the Spanish Supreme Court has established that the broadcasting on television of images captured with hidden cameras or devices, without the consent of the person involved, should be considered as an illegal interference, which is not justified by the exercise of the right to freely communicate information.

This was the conclusion reached by the Civil Chamber of the Supreme Court in considering an appeal from a woman who practised naturopathy and was recorded, in 2000, without her knowledge, by a journalist posing as a patient, these images being subsequently shown on a television programme in Spain.

The decision was taken against what had been a consistent course of jurisprudence, since it had been held by the lower courts that these actions could be included within the scope of an investigation, excluding them from being interpreted as illegal interferences. In fact, the *Audiencia Provincial de Valencia* (provincial supreme court of Valencia) had ruled that such an action could be part of so-called "investigative journalism", "as long as no private conversations of third persons were recorded". In addition, the Court did not consider such actions as reprehensible, as there was no doubt as to the informative character of the case.

Notwithstanding this, the Spanish Supreme Court, on 18 December 2008, considered that such interference was not justified by the exercise of the right of free speech and, accordingly, the relevant doctrine has been amended in Spain. ■

Laura Marcos and Enric Enrich
Enrich Advocats, Barcelona

● **Decision of the Supreme Court of 18 December 2008**

ES

ES – Government Approves a New Decree-Law on Television

On 23 February 2009, the Spanish Government approved a new Decree Law, whose provisions deal with the introduction of Digital Terrestrial TV (DTTV) and limits to media ownership.

In Spain, laws are generally approved by Parliament, but, in case of urgent need, can also be approved by the Government, by means of a "Decree Law". In this case, the Government has considered that, in the context of the economic crisis and the switch-off of analogue terrestrial TV, there was an urgent need to change the limits to media ownership in order to allow the national broadcasters to reach, within the new limits, the agreements needed to create companies adapted to the decrease in advertising revenue and able to fund the transition from analogue to digital terrestrial television.

Regarding the switch-off, it is important to bear in mind that in Spain terrestrial TV broadcasting is still considered a public service, which can be directly managed and provided by the State through public broadcasters, or which can be indirectly managed by those private companies that are granted a concession.

The private concessionaires are required to cover at least 96% of the population and the national public broadcaster RTVE is required to cover at least 98%. However, this means that once the switch-off takes place, a small part of the population, located in certain rural areas, will not have access to the public service of terrestrial TV.

The new Decree Law establishes that, in order to avoid that situation, the national terrestrial TV broadcasters shall reach, within three months, an agreement to ensure that their free-to-air DTTV programmes are simultaneously available from at least one satellite platform. Access to those programmes via satellite will be restricted to those areas not covered by DTTV once the switch-off is complete. The users in those areas shall not be required to pay any subscription fee or any decoder rental.

That scheme may also be used by regional or local terrestrial TV concessionaires, provided it can be ensured that their programmes are only effectively received by users within the areas specified by the concessions granted to those broadcasters.

All these provisions shall be further implemented by means of a Decree.

As regards media concentration, the Government has decided to remove the ownership limit that prevented any company from having more than 5% of capital shares in more than one national terrestrial TV concessionaire. According to the new limit, a company is only prevented from acquiring shares in more than one national terrestrial TV concessionaire if the average audience share of all the channels affected by the acquisition during the previous 12 months was greater than 27%. This limit will not apply if the 27% audience share threshold is reached once the acquisition is complete.

However, there are two additional limits with which broadcasters have to comply. A company cannot get a voting right or a relevant participation in the capital share of more than one terrestrial TV concessionaire, if the following apply:

a) It gets control of spectrum capacity equivalent to two national DTTV multiplexes or, for each region, more than one regional DTTV multiplex.
b) That means that there would be fewer than three concessionaires, which would be considered as detrimental to media pluralism.

The Decree-Law also establishes that national public broadcasters shall not control more than 25% of the spectrum capacity available for DTTV, and regional and local public broadcasters shall not control more than 50% of the spectrum capacity available for DTTV in the corresponding territories. ■

Alberto Perez
Entidad publica empresarial RED.ES

● ***Real Decreto Ley 1/2009, de 23 de febrero, de medidas urgentes en materia de telecomunicaciones, Boletín Oficial del Estado, n. 47, de 24 de febrero de 2009, pp. 19.015 y ss.*** **(Decree Law 1/2009, of 23 February 2009, on urgent measures for the telecommunications sector, Official Journal n. 47, 24 February 2009, p. 19,015 ff.) available at:**
http://merlin.obs.coe.int/redirect.php?id=11676

ES

FR – Orange Foot's Offer Constitutes Conditional Sale and Unfair Competition

Orange (a subsidiary of France Telecom) has just been ordered by the commercial court in Paris to suspend its exclusivity for the broadcasting of certain football matches on its channel Orange Sport.

Last August, having spent EUR 203 million on acquiring the exclusivity of some of the rights for broadcasting premier league football during the period from 2008 to 2012 (including one premium broadcast, the Saturday night match live), Orange launched its channel Orange Foot (renamed Orange Sports in January). The channel's offer, comprising linear, non-linear and interactive services, is offered as a paying option in Orange's TV package for EUR 6 per month. This is only accessible by subscribing to the operator's triple-play offer, comprising land-line telephone, broadband Internet connection and the basic television package. Free and Neuf Cegetel (SFR), Orange's two main competitors, brought a complaint against it in the commercial court, claiming that the offer it proposed constituted a conditional sale, which is prohibited by Article L. 122-1 of the Consumer Code. The Code prohibits making the sale of a product conditional on the purchase of a specified quantity or the concomitant purchase of another product or service and making the provision of a service conditional on the provision of another service or the purchase of a product. In the present case, the applicants complained that a client who wanted to take up the Orange Foot offer was obliged to take out a subscription to Orange's broadband Internet. Clients could not therefore have access to Orange Foot if they did not have this subscription, and if they had a subscription with a different IAP, they had to terminate it since one telephone line cannot carry more than one ADSL broadcast.

Amélie Blocman
Légipresse

The Court, initially, will determine whether the two elements that make up the Orange Foot offer may be acquired separately on the market. France Telecom claims that the offer constitutes an inseparable package of conventional television services and non-linear and interactive services requiring broadband Internet access, which therefore cannot be dissociated from an Orange subscription. The Court noted that, in those areas where ADSL was not a possibility, consumers had satellite access to all the television services (including football matches) but not the interactive services. Moreover, the Orange Foot offer was broadcast in these areas by satellite and not exclusively by broadband Internet. The Court concluded that the Orange Foot offer and Orange's broadband Internet subscription were two separate products and did not constitute complementary products within the meaning of Article L. 122-1 of the Consumer Code. Orange Foot's offer, by making subscription to the Orange Foot channel dependent on an Orange Internet subscription, therefore constituted conditional sale. Furthermore, this was declared to constitute unfair competition since it enabled France Telecom to acquire a clientele to the detriment of its competitors. The operator was ordered to stop making subscription to Orange Foot dependent on subscription to Orange's broadband offer, on pain of paying a fine of EUR 50,000 for each day of failing to do so. The Court felt it did not have enough information at its disposal to pronounce on the extent of the prejudice resulting from the unfair competition, and appointed an expert to provide the information necessary for it to be able to do so.

This decision is another hard blow for Orange, which lost a court case a few months ago over the right to be the only mobile operator to distribute the iPhone in France. Moreover, the competition authority received an application last month from both the Government, and Canal+ and SFR, requesting it to deal with the issue of exclusive offers of content (sport and cinema) by the IAPs, and Orange's television channels in particular. The match is not over yet… ■

● Commercial Court in Paris, 23 February 2009; Free and Neuf Cegetel v. France Telecom and Orange Sports

FR

FR – CSA on the Application of State Aid Rules to Public Service Broadcasters

The *Conseil Supérieur de l'Audiovisuel* (national audiovisual regulatory authority - CSA) has just published its reply to the consultation launched in November 2008 by the European Commission on its draft revised Communication on the application of State aid rules to public service broadcasters. The evolution of the audiovisual market and its legal environment has made it necessary to update the 2001 Communication. According to the Commission, the main elements of discussion are the greater leeway allowed to the public-sector broadcasting bodies to take up the challenges of the new media environment, the principles that underlie the Member States' definition of the public-service mission, and the supervision of public-service activities at the national level.

Firstly, the CSA acknowledges the value of updating the 2001 Communication, which it believes constitutes an efficient framework for appreciating the compatibility of the schemes for financing public-sector audiovisual services, but whose principles need to be consolidated and extended to the newly developed services and communication networks. Emphasising the importance of the Amsterdam Protocol, which ensures that the organisation and

financing of the public-sector audiovisual services are the sole responsibility of the Member States, the CSA feels that some of the provisions of the draft Communication could not be adopted in their present state without challenging these principles. At issue, firstly, are the limitations on the content and the actual nature of the services that may be proposed by the public-sector bodies and, secondly, measures that set out in excessive detail the procedures to be implemented at the national level. Thus, advocating the principle of editorial freedom, the CSA reaffirms that no type of programme should be categorically prohibited. Rather, it is the way in which themes are treated, and their quality, that should be the characteristic feature of the public-sector service. Thus it considers that the public-sector bodies should be able to acquire and propose content that is particularly attractive to the public (of the "premium" type). Consequently, the CSA considers that banning or restricting in principle, as contained in the draft revision, the broadcasting of programmes that are of particular interest to the general public, such as the major sports events that everyone wants to watch, is not compatible with the objective of the public service.

The Council also calls the Commission's attention to the financial limitations envisaged by the draft, which it feels could run counter to an efficient and flexible management of the public-sector groups. Moreover, the evolution of market structures and the uncertainties over economic models may, at least temporarily, justify the paying for, or exclusive nature of, certain innovative services. The presence of the public-sector service offer on the new platforms is decisive for its future.

In conclusion, the CSA emphasises its deep attachment to respect for the principle of subsidiarity and the freedom of choice of the Member States with regard to the methods of financing the public audiovisual sector. As a result, this should retain the means of being attractive to the public as a whole, thanks to quality programmes being available on all the media. On the basis of the observations received in response to the consultation, the Commission could adopt an updated Communication on broadcasting by the summer. ■

Amélie Blocman
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● **Reply by the national audiovisual regulatory body (*Conseil Supérieur de l'Audiovisuel* - CSA) to the consultation of the European Commission on revision of the Commission's Communication on the application of State aid rules to public service broadcasters (2001/C 320/04), available at the following address: http://merlin.obs.coe.int/redirect.php?id=11636**

FR

FR – Canal+ and i-Télé Formally Ordered to Observe Honesty in News Items

Coming after France 2 having broadcast erroneous news images in a news item on the conflict between Israel and Palestine last January, the *Conseil Supérieur de l'Audiovisuel* (national audiovisual regulatory authority - CSA) decided on 24 February 2009 to issue a formal order to the channels Canal+ and i-Télé reminding them to observe their obligation of honesty in the information they broadcast as required by Article 28 of the Act of 30 September 1986 and as specified in their agreements. The two channels, which belong to the same group, had broadcast in their newscasts on 17 February 2009 an item on the demonstrations in Guadeloupe, which included images of an intervention by armed forces against demonstrators in Madagascar. The CSA held that "as there was no indication given on the screen about the content of the images, which bore no relation to the item being dealt with, broadcasting them was likely to cause confusion in viewers' minds".

The management of the Canal+ group has indicated that "the item was corrected immediately after its first showing (at 1.06 p.m. on i-Télé); a new version was on the air from the 1.15 p.m. edition onwards". Also, Apologies were proffered "for this unfortunate error which led to 20 seconds of images of Madagascar being used to illustrate an item on Guadeloupe". It should be recalled that a formal order of this kind is at the level below a financial penalty, which the CSA may impose in the event of a further infringement. ■

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● **Press release by the CSA on 26 February 2009, available at the following address: http://merlin.obs.coe.int/redirect.php?id=11631**

FR

FR – Audiovisual Reform Adopted and Promulgated

The Act "on audiovisual communication and the new public television service" and the Implementing Act on the appointment of the chairmen of the public-sector audiovisual companies were gazetted on 7 March 2009. A few days earlier, the Constitutional Council, in response to an application by opposition MPs, had validated all the key measures of the reform, including the abolition of advertising on the public-sector channels, their financing, and – more controversially – the appointment of the chairmen of the public-sector audiovisual companies (France Télévisions, Radio France and the company responsible for audiovisual services outside France) by the President of the Republic and his Council of Ministers. The Constitutional Council held such appoint-

ments to be in compliance with the Constitution on condition that they are subjected to the opinion procedure and to the right of possible veto of the parliamentary committees, and are only made if the opinion of the national audiovisual regulatory authority (*Conseil Supérieur de l'Audiovisuel* - CSA) is favourable. On the other hand, the arrangement making provision for the Parliament to have a right of veto in respect of the revocation was cancelled, and the Parliament's opinion made merely consultative.

Thus the Act brings about the total abolition of advertising on the public-sector channels by the end of 2011 (when analog TV stops); the ban has been in operation for the slot between 8 p.m. and 6 a.m. since 5 January 2009 (see IRIS 2009-2: 13). In exchange, there is a new tax on advertising on the private channels (between 1.5 and 3%) and another on electronic communication operators (0.9%). The text also provides that the audiovisual licence fee (now called a "contribution to the public-sector audiovisual scene"), which currently stands at EUR 116, should be indexed to inflation and increased to EUR 118 in 2009 and then to EUR 120 on 1 January 2010.

Apart from the question of the financing of public-service audiovisual services, one of the main elements of the text is the transformation of the France Télévisions group into a single programme company, with a list of specifications that will set out the details and the characteristics of the editorial lines of the different channels. The governance of the public-sector audiovisual companies is to be reformed by the signature of a contract of objectives and means corresponding to the duration of the chairman's term of office which is to be sent to the CSA before it is signed.

Another important aspect of the text is its Section III (Articles 36 to 70), devoted to the transposition into French law of the Audiovisual Media Services Directive. The CSA, whose sphere of responsibility is thus extended to include the Internet, will henceforth ensure the regulation of audiovisual media services on demand (mainly catch-up TV and video on demand). The Act makes provision for a single legal framework for linear services on demand, although with special rules, to be laid down subsequently by decree, for audiovisual services on demand, which will allow more flexibility in the obligations that will be imposed on them. The Act nevertheless requires the actual promotion of European and original French-language audiovisual and cinematographic works (Art. 55). The Act leaves it to the CSA to lay down the conditions for having recourse to investment, although it does state the demands to be met (Art. 40). It also authorises private channels to introduce a second commercial break during films, television films and magazine programmes corresponding to the criteria of audiovisual works. As part of the transposition of the AMS Directive, the Act also lays down provisions concerning the accessibility of programmes for the blind and partially sighted, and a stronger guarantee of the right to information about events of any kind that are of a major interest to the general public.

For Christine Albanel, Minister of Culture, it is "the audiovisual scene as a whole that will be boosted, with a public-sector service free to fulfil its missions and fewer restrictions on the private channels". ■

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● Act No. 2009-258 of 05 March 2009 on audiovisual communication and the new public-service television, published in the Official Gazette no. 0056 of 07 March 2009 (page 4321). Available at:
http://merlin.obs.coe.int/redirect.php?id=11632

● Implementing Act No. 2009-257 of 05 March 2009 on the appointment of the chairmen of the companies France Télévisions and Radio France and of the company in charge of France's external audiovisual services, published in the Official Gazette no. 0056 of 07 March 2009 (page 4321). Available at:
http://merlin.obs.coe.int/redirect.php?id=11633

● Decision no. 2009-576 DC of 03 March 2009, Published in the Official Gazette no. 0056 of 07 March 2009 (page 4336). Available at:
http://merlin.obs.coe.int/redirect.php?id=11634

● Decision no. 2009-577 DC of 03 March 2009, Published in the Official Gazette no. 0056 of 07 March 2009 (page 4336). Available at:
http://merlin.obs.coe.int/redirect.php?id=11635

FR

GB – Court Decides Procedure for Determining when the BBC is Covered by the Freedom of Information Act

The House of Lords, the UK's highest court, has decided the procedure to be adopted in determining whether information held by the BBC can be obtained under the Freedom of Information Act 2000. This Act, which came into effect in January 2005, creates duties for a public authority, when requested to provide information, to confirm whether it holds the information and to communicate it to the applicant. The right is subject to a large number of exemptions; decisions may be enforced by the Information Commissioner and then appealed to the Information Tribunal, both of which have wide powers to decide whether the information is covered by an exemption and should or should not be disclosed. There is a further appeal from the Tribunal to the courts limited to points of law.

The BBC and other public service broadcasters are included in the list of public authorities to which the Act applies; however, they are only public authorities "in respect of information held for purposes other than those of journalism, art or literature". In this case, an application was made for an internal report which the BBC had commissioned on its coverage of the Middle East; this was refused, as the Corporation considered it to be held for the purposes of journalism. The applicant applied to the Information Com-

missioner, who upheld the BBC's view, but this decision was reversed by the Information Tribunal. However, the High Court and the Court of Appeal held that the Commissioner and the Tribunal had had no power to decide the case, as the question of whether a body was a public authority fell outside the scope of the appeal rights; it could only be challenged in the courts by judicial review. This would give the courts only limited powers to overturn the decision, for example if it was unlawful or unreasonable.

By a three-two majority, the House of Lords held that the Information Commissioner had the power to decide whether or not the information held by the BBC was covered by the Act and his decision could be appealed to the Information Tribunal. The majority (Lords Phillips, Hope and Neuberger) considered that the application had been made to the BBC as a public authority, but that information could be excluded from the rights provided by the Act if it was held for journalistic purposes. It was more appropriate that any challenge to the decision be decided by a specialist tribunal than by the courts. The minority (Lord Hoffman and Baroness Hale) considered that the BBC was not a public authority at all in relation to information held for journalistic purposes and that it was appropriate for the courts, rather than the Tribunal, to decide the meaning of "public authority" as a question of law.

This decision concerned only the procedure for challenging a decision as to whether the BBC was a public authority in these circumstances. The case has now been sent to the Administrative Court, as if on appeal from the Information Tribunal, for the court to determine whether the report actually constituted information held for purposes of journalism. ■

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• Sugar v British Broadcasting Corporation [2009] UKHL 9, available at: http://merlin.obs.coe.int/redirect.php?id=11653

EN

GB – Video on Demand Project Ruled "Anticompetitive"

BBC Worldwide (BBCW), ITV plc and Channel 4 Television Corporation (UKVOD) entered into a joint venture to offer video on demand content online. The working title was Project Kangaroo. It was intended to offer primarily UK-originated television content.

On 30 June 2008, the Office of Fair Trading (OFT) referred the anticipated joint venture to the Competition Commission for investigation and report, under section 33(1) of the Enterprise Act 2002: the OFT may refer completed or proposed mergers which create or enhance a 25 per cent share of supply in the UK (or a substantial part thereof) or where the UK turnover associated with the enterprise being acquired is over GBP 70 million.

The Competition Commission had regard to the fact that the participants in the venture "controlled the vast majority of [the] content." In December 2008, the Competition Commission published its provisional findings setting out possible remedies to avoid a "substantial lessening of competition." Proposed remedies included: controlling the way that content would be offered to other providers; making material modifications to the terms of the joint venture; and removing the joint venture's ability to withhold "combined with measures to prevent the exchange of commercially sensitive information."

In its ruling of the 4 February 2009 on the competition aspect of the project, the Competition Commission declared that "After detailed and careful consideration, we have decided that this joint venture would be too much of a threat to competition in this developing market and has to be stopped." ■

David Goldberg
deeJgee
Research/Consultancy

• Competition Commission, "Anticipated Joint Venture between BBC Worldwide Limited, Channel Four Television Corporation and ITV PLC: Final report", 4 February 2009, available at: http://merlin.obs.coe.int/redirect.php?id=11655

• Competition Commission, "Project Kangaroo'—Provisional Findings", 2 December 2008, available at: http://merlin.obs.coe.int/redirect.php?id=11656

EN

GB – BBC Trust Upholds Decision Not to Broadcast Gaza Crisis Appeal

The BBC Trust has decided not to overrule the decision of the Corporation's Director-General refusing to broadcast an appeal from the Disasters Emergency Committee (representing 13 leading UK aid agencies) seeking donations for humanitarian relief for the residents of Gaza. The appeal was broadcast by the other public service broadcasters (though not by Sky).

The Director-General had argued that the Israeli-Palestinian conflict is deeply divisive and that the suffering of civilians plays a central part in the political case each side makes in the "court of world opinion". It was thus impossible to separate the political causes from their humanitarian consequences. The appeal, by its very nature, would have shown only one aspect of the conflict and broadcasting it, according to the Director-General, would have implied a significant level of endorsement by the BBC of the appeal itself. This would have put the BBC's impartiality at risk, as required under its Agreement with the Secretary of State which sets out the applicable regulatory rules.

The refusal to broadcast the appeal was highly controversial and over 40,000 complaints had been received by the BBC. However, the Trust decided that it was not its role to second-guess decisions of the Director-General and that he had acted correctly and reasonably throughout, given the importance of preserving the BBC's reputation for impartiality. The decision not to broadcast the appeal was within the parameters of reasonable decisions open to him and he had taken proper advice before reaching the decision.

In view of the public concern over the matter, the Trust asked the Director-General to explore any wider lessons from the episode through discussions with the Disasters Emergency Committee and to take a view on whether the BBC's agreement with the Committee was still appropriate to today's conditions. ■

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● Summary Decision by the BBC Trust Regarding the DEC Gaza Appeal, 19 February 2009, available at:
http://merlin.obs.coe.int/redirect.php?id=11654

EN

HR – Rules on the Switchover to Digital Broadcasting

The Rules on the Switchover of Radio and TV Programmes from Analogue to Digital Broadcasting and on Granting Access to Positions in a DTT Multiplex have been adopted pursuant to Article 96, paragraph 4 and Article 125, paragraph 3 of the Law on Electronic Communications.

The Rules stipulate that during the transition period (which expires on 31 December 2010, see IRIS 2008-9: 14) the broadcasters may simulcast TV programmes in analogue technology and radio and TV programmes in digital technology, provided that the technical conditions allow. The current TV broadcasters' analogue TV signal coverage is to be replaced by the digital one, the transmission of TV programmes in analogue technology is to be gradually switched off and the conditions for the usage of the digital dividend ensured. After the expiry of the transition period, the radio and TV programmes in terrestrial broadcasting shall be transmitted in digital technology only.

The overall transmission capacity of a multiplex may be divided to carry several separate radio or TV channels as well as other digital data. The number of radio and TV channels and the number and type of other services to be carried within a multiplex shall be determined by the Croatian Agency for Post and Electronic Communications. During the digital switchover procedure, the Agency shall ensure that it reserves the necessary capacity within DTT multiplexes for current TV broadcasters who were already transmitting their TV programmes in analogue technology.

The conditions for the analogue switch-off are to be ensured in compliance with the relevant regional switchover plan.

A network operator shall provide for the coverage of the digital TV signal on the basis of a licence to use the radio frequency spectrum allocated for digital broadcasting. It shall be considered appropriate if the following conditions are fulfilled:

- The coverage by the digital TV signal of PSB must reach 95 % of the Croatian population, and access to it via terrestrial, satellite or cable networks must be available to anyone who pays the radio and TV licence fee;
- The coverage of the population by the digital TV signal of the current TV broadcasters shall not be less than the coverage by its analogue TV.

The digital TV user base shall be considered established in any region where the transition procedure is being carried out if the following conditions are fulfilled:

- The public has been sufficiently informed on the actions to be taken before the digital TV signal can be received,
- The public has been sufficiently informed on the important dates relevant to the beginning of the digital terrestrial TV broadcasting and the switch-off of the analogue one.

Following the fulfilment of the conditions for the transition of TV programmes, the current TV broadcasters are obliged to immediately submit to the Agency the relevant licences to transmit radio or TV programmes, which had been issued in accordance with regulations applicable before the coming into force of the Law on Electronic Communications, so that they can be cancelled.

A producer, his authorised representative or a dealer of digital receivers who distributes them in the Croatian market shall be obliged to clearly and transparently display their technical specifications, whether on the receiver, on its packaging or in its user manual, according to the Ordinance on the Technical Specifications of Digital Receivers, issued by the Agency. The technical specifications must in particular contain information on the type of services receivable, the frequency band and the manner of the signal reception as well as the signal encoding and compression norms. ■

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● Rules for the Switchover from Analogue to Digital Broadcasting of Radio and Television Programmes and for Granting Access to Positions in a DTT Multiplex , Official Gazette No. 148/08, available at:
http://merlin.obs.coe.int/redirect.php?id=9658

● Law on Electronic Communications, Official Gazette No. 73/08, available at:
http://merlin.obs.coe.int/redirect.php?id=9658

● Decision on the Beginning of the Digital Switchover and the Switch-off of Analogue Broadcasting of Television Programmes in the Republic of Croatia, Official Gazette No. 73/08, available at:
http://merlin.obs.coe.int/redirect.php?id=9658

HR

HU – Regulatory Authority Rejects Proposal to Decrease Fees Paid by the National Television Broadcasters

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On 11 February 2009 the *Országos Rádió és Televízió Testület* (National Radio and Television Commission, ORTT) decided to reject the proposal of MTM-SBS and M-RTL, the operators of the two national terrestrial television channels, to the decrease of their broadcasting fees.

In accordance with the rules of Act I on Radio and Television Broadcasting of 1996 (Broadcasting Act) broadcasters are required to pay an annual broadcasting fee. In the case of terrestrial broadcasters the amount of this fee is defined by the broadcasting contract concluded between the respective broadcaster and the ORTT. MTM-SBS and M-RTL concluded their broadcasting contracts with the ORTT in 1997. In 2005 they successfully applied for the extension of the terms of their contracts until 2012.

This decision of the regulatory authority was much criticised by media professionals and officials. The basis of this criticism was that the ORTT did not take into account the requirements of the digital switchover in its decision and, as a consequence, missed a unique opportunity to interest the two national commercial channels in this process.

The participation of M-RTL and MTM-SBS in the digital switchover is widely considered as crucial among Hungarian experts. Following the successful tendering of the digital terrestrial multiplexes by the *Nemzeti Hírközlési Hatóság* (National Communications Authority – NHH) the rollout of the digital terrestrial television network began at the end of last year (see IRIS 2008-9: 14). However, Antenna Hungária, the network provider, has so far failed to reach agreements with M-RTL and MTM-SBS on the distribution of their programmes on its service.

On the other hand, the two national commercial channels also face difficulties. As a consequence of the increasing share of multichannel offers on the Hungarian market and the gains of the broadband segment, they continue to suffer a steady decrease in their audience shares year by year.

Against this background of a rapidly changing media market, ORTT also signalled in its decision that it remains open to talks concerning the amount of the broadcast fee, but an eventual decrease shall be based on a detailed and objective evaluation of the trends of the media market, and on the principle of equal treatment of the broadcasters. ■

• Decision of the Competition Council Vj-7/2007/42, available at: http://merlin.obs.coe.int/redirect.php?id=11680

HU

IE – Religious Advertising

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In December 2008, the Broadcasting Commission of Ireland (BCI) rejected a proposed radio advertisement for Veritas. Veritas is a religious publisher and retailer wholly owned by the Irish Catholic Bishops Conference. The advertisement for products available in Veritas shops and on their website was due to be broadcast over the Christmas period on RTÉ, the national public service broadcaster. The BCI found that the advertisement did not comply with the legislation and regulation regarding advertising directed towards a religious end, specifically section 65 of the Broadcasting Act, 2001 and section 9 of the BCI General Advertising Code (see IRIS 2008-5: 13, IRIS 2004-8: 11, IRIS 2004-3: 10, IRIS 2003-2: 11 and IRIS 2001-7: 9). In reaching its decision, the BCI also had regard to a decision of the Broadcasting Complaints Commission in September 2008, upholding a complaint against a Veritas advertisement, broadcast on RTÉ Radio 1. The advertisement was for religious gifts which relate to "what Holy Communion and Confirmation are really about".

Veritas submitted three versions of the script for the Christmas advertisement but all were rejected by the BCI. The BCI deemed the following lines to offend the legislation: "Christmas: aren't we forgetting something?"; "Why not give a gift that means more?" and "So to give a gift that means more…" It also found that asking people to visit the Veritas website was "unacceptable". The previous year Veritas had to drop the word "crib" from an advertisement after RTÉ raised concerns. RTÉ said that an issue might arise if the BCI considered that promoting the sale of cribs was directed towards a religious end and was therefore in breach of the legislation and code.

New broadcasting legislation, the Broadcasting Bill 2008, is at an advanced stage in the *Oireachtas* (Parliament). In that context, the BCI has made suggestions to the Department of Communications, Energy and Natural Resources regarding possible amendments which could be made to the section of the legislation dealing with advertising directed towards a religious end. ■

• Decision of the Broadcasting Complaints Commission, available at: http://merlin.obs.coe.int/redirect.php?id=11663

EN

IE – Film Tax Incentives

The Section 481 tax relief scheme for film and television (section 481 of the Taxes Consolidation Act 1997, as amended, see IRIS 2008-5: 13, IRIS 2004-1: 14 and IRIS 2001-2: 10), has been strengthened by new measures contained in section 28 of the Finance (No. 2) Act 2008. The maximum that each individual can invest in film production is increased from EUR 31,750 to EUR 50,000. The amount that they can claim against their tax liability is increased from 80% to 100%. According to the Chairman of the

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Irish Film Board, this means that Ireland will be able to offer a 28% net benefit to attract international film producers to shoot on location in Ireland. The changes in the Act followed two publications from the Irish Film Board, a report entitled "Restoring Viability and Balance to the Irish Film Production Industry" (September 2008) and a survey, "Irish Audiovisual Content Production Sector Review" (December 2008). Also, in September 2008, a Statutory Instrument (S.I. No. 357 of 2008) entitled "Film Regulations 2008" set out details of films that are eligible and other matters, such as the application procedures and documentation required for certification by the Revenue Commissioners, records to be maintained and notification of completion. The Revenue Commissioners also provided Guidance Notes for Film Producers and Promoters (September 2008). ■

- **Finance (No. 2) Act, available at: http://merlin.obs.coe.int/redirect.php?id=11658**
- **Irish Film Board, "Irish Audiovisual Content Production Sector Review", available at: http://merlin.obs.coe.int/redirect.php?id=11659**
- **Irish Film Regulations (S.I. No. 357 of 2008), available at: http://merlin.obs.coe.int/redirect.php?id=11660**
- **"Guidance Note for Film Producers and Promoters on the certification of qualifying films Under "Section 481" – Tax relief incentive for investment in film", available at: http://merlin.obs.coe.int/redirect.php?id=11661**
- **"Guidance Note for Film Producers and Promoters on Post Certification Requirements for Qualifying Companies Under "Section 481" – Tax relief incentive for investment in film", available at: http://merlin.obs.coe.int/redirect.php?id=11662**

EN

LV – Parliament Rejects Amendments to a Law Threatening to Restrict Media Freedom

On 26 February 2009 the Latvian *Saeima* (the Parliament) reviewed in second reading amendments to the Law on Press and Other Mass Media. The amendments were initially planned to address a minor issue on the payment of a State fee for the registration of media in the Registry of Mass Media. However, after the first reading the Ministry of Justice submitted a new proposal for the amendments, which immediately caused serious concerns over threats to media freedom.

The proposal suggested that the Law on Press and Other Mass Media should provide stricter rules for publishing and discussing materials on criminal procedures and criminal litigation. The law as it currently stands provides that the media may not publish materials concerning a pre-trial investigation without the written consent of the prosecutor or investigator. Also, in reflecting on the litigation process it is prohibited to publish materials that violate the presumption of innocence. These restrictions are generally considered to be reasonable and to indicate a balance between the public right to information and the rights to a free trial and the protection of personal life. However, the Ministry obviously considered that the existing restrictions do not achieve this balance and suggested wording the restrictions as follows: "It is prohibited to publish materials of a criminal procedure until the completion of the criminal procedure and the moment when the final decision comes into force. No information acquired during the pre-trial investigation may be published before the completion without the written consent of the prosecutor or investigator. It is prohibited to provide such information in reflecting on criminal procedure, which violates the presumption of innocence or the inviolability of personal life".

The largest Latvian media immediately reacted to this proposal by arguing that such restrictions would render the reporting of criminal procedures and investigations virtually impossible. Moreover, it was suggested that the amendments were perhaps proposed in favour of certain high-standing individuals who have lately faced accusations in relation to criminal offences. It was also indicated that such far-reaching restrictions might be in breach of Article 10 of the European Convention on Human Rights. The Parliamentary Committee of Human Rights and Public Affairs did not endorse the proposed amendments. *Saeima* agreed with the opinion of the committee and adopted the amendments to the law in the second reading without the disputed proposal.

The remaining amendments to the Law on Press and Other Mass Media still have to be approved in the third reading, which might take place in March 2009. Now, the only proposed amendments are the introduction of a State fee for the registration in the Registry of Mass Media which would be provided by the Cabinet of Ministers. ■

Ieva
Bērziņa-Andersone
Sorainen

- **Law on Press and Other Mass Media, available at: http://merlin.obs.coe.int/redirect.php?id=11644**
- **Proposed amendments available at: http://merlin.obs.coe.int/redirect.php?id=11645**

LV

ME – PSB Adopts Rules for Media Coverage

The Council of the Radio and Television of Montenegro and the councils of local PSB have adopted the Terms and Conditions for the Presentation of Candidates and their Programmes for the forthcoming extraordinary parliamentary elections, scheduled for 29 March 2009.

According to the Broadcasting Law they were obliged to adopt and publish the terms and conditions of the representation of political parties, candidates and their respective programmes, not later than 15 days after the elections have been scheduled. The due date for publishing was 10 February 2009 and they are available on the website of the Montenegrin Broadcasting Agency, as well as on the website of the national public broadcaster. The adherence of the public broadcasters to the aforementioned obligations is intended to contribute to the transparency of the elections, enabling every

citizen to be timely, accurately and impartially informed on all phases of the electoral procedure.

The rules are the same as those that were used during the presidential elections in 2008 set up by OSCE experts, with minor changes in the number and scheduling of political debates. An innovation concerning political marketing stirred up a public debate. At the same meeting of the national PSB Council the newly appointed general director of Televizija Crne Gore (TVCG) asked the Council to support his attitude not to allow political advertising to those parties who have unpaid debts for the broadcasting of campaign material from previous elections. As the general director said, the total debt amounts to around EUR 200,000 and the debtors are solely opposition parties.

Three opposition parties running for the forthcoming elections identified by TVCG's general director as debtors protested against this decision. These parties agreed that the PBS would thus jeopardise the electoral process by not offering the complete picture to the public during the pre-electoral campaign. They also added that all political parties should be offered free political advertising in the election campaign since, according to the new Law on Public Broadcasting Services of December 2008, PBS is financed directly from the national budget. The centre for democratic transition (CDT), a non-governmental organisation that conducts the civic monitoring of the elections, said that for the sake of the electoral process, any politicisation of financial issues between the Radio Televizija Crne Gore (RTCG) and political parties should be avoided, pointing out that the contracting parties should solve all issues regarding contractual rights and obligations through court or other legal procedures, not by public appeals.

The president of the Montenegrin Parliament said that RTCG as a public broadcasting service should be contributing to democratic elections in Montenegro, and not make them more difficult. ■

Daniela Seferovic
KRUG Communications & Media

● Rules and Procedures adopted by PBSs, available at: http://merlin.obs.coe.int/redirect.php?id=11646

MT – Proposed Amendments to the Broadcasting Act on Satellite Broadcasting

A bill to amend the Broadcasting Act has been published in the Malta Government Gazette of Friday, 6 February 2009. The object of the Bill is to amend the Broadcasting Act to enable the Broadcasting Authority to license broadcasting content on satellite radio and television services. As the situation stands to date, the licensing of satellite radio and television broadcasting content has always been entrusted to the Government of Malta and, in particular, to the minister responsible for communications. This Bill proposes to entrust this function to the independent broadcasting regulator. In fact, in practice, the Ministry has always delegated the processing and issuing of such licences to the Broadcasting Authority. The Bill would officially divest the Government of the regulation of broadcasting content and assign the task to the Broadcasting Authority.

A person who is under the jurisdiction of Malta cannot supply a compilation of programmes for the purpose of transmission as a radio or television broadcasting service, whether for reception in Malta or elsewhere, by means of a satellite device, otherwise than under and in accordance with a satellite radio or television content broadcasting licence. In the case of a television licence, compliance with the provisions of the European Union's Television Without Frontiers Directive is necessary. An application fee of one thousand euros (EUR 1,000) has to be paid to the Authority by an applicant for a satellite radio or television content broadcasting service. A satellite content licence will include: a condition requiring the holder of the licence to comply with such legislation, requirements as to such standards, practice and conditions as the Authority may specify with respect to the programmes supplied in pursuance of the licence and a condition requiring the holder of the licence to utilise that licence for such duration as the Authority may establish, provided that such duration shall not exceed a maximum period of eight years.

An application for a licence to provide satellite content service will be made in such a manner and will be accompanied by such licence fees as the Authority may determine.

An administrative penalty may be imposed by the Authority of up to a maximum of three hundred thousand euro, should there be a breach by a satellite content service licence-holder of the Broadcasting Act or any subsidiary legislation made thereunder. Finally, the Prime Minister may, following agreement with the Authority, make regulations to give better effect to the new provisions on satellite broadcasting. ■

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● Bill entitled the Broadcasting (Amendment) Act, 2009, Government Gazette of Malta No. 18,376, 6 February, 2009, available at: http://merlin.obs.coe.int/redirect.php?id=11670

ML

NL – Norma & Irda v. Vecai et al.

The trade organisation Vecai (now renamed NLkabel) represents five cable operators. Vecai et al. were called upon to defend themselves against legal claims by the collecting societies Norma and Irda. Norma and Irda represent performing artists in the sense of the *Wet op de naburige Rechten* (Related Rights Act – *WNR*): Norma and Irda are allowed to represent their performers in their right to authorise the unaltered and unabridged re-broadcasting by a cable broadcasting installation of a performance or phonogram or a reproduction thereof. Their claim is that the cable operators are re-broadcasting without the performing artists' permission, infringing the performers' related rights. On 28 January 2009, the District

Court of The Hague decided that the case involves broadcasting rather than re-broadcasting and thus there is no infringement of related rights.

Nowadays, broadcasting organisations transmit their (inaccessible to the public and sometimes encrypted) signals using satellite or cable directly to cable operators, such as the defendants. The question was whether or not this distribution system of signals constitutes a form of re-broadcasting in the sense of Article 14a WNR.

Norma and Irda's claims are based on Article 14a WNR. This Article states, among other things, that it is the performer who has the right to authorise the unaltered and unabridged re-broadcasting by a cable broadcasting installation. This right may also be exercised by legal persons such as Norma and Irda. The plaintiffs claim that the broadcasting by the cable operators is a form of "re-broadcasting". They argue that no authorisation for re-broadcasting has been given, making the act unlawful. In turn, Vecai et al. disputed the claim that this is a case of re-broadcasting. They base their arguments on the European Court of Justice cases C-306/05 (SGAE v. Rafael Hoteles, see IRIS 2007-2: 3) and C-192/04 (Lagardère Active Broadcast v. SPRE & GVL), according to which, "re-broadcasting" means that a) a public radio or television signal is picked up and re-transmitted, while b) contrary to the rightsholder's intention, the signal ends with a different public.

The District Court of The Hague held that the distribution of signals between broadcasting organisations and cable operators is not a form of re-broadcasting in the sense of Article 14a WNR. As a result, the signal transmitted by the cable operators should be defined as "broadcasting" instead of, as the plaintiffs claimed, "re-broadcasting".

The plaintiffs' claim with regard to Article 9 of the Cable and Satellite Directive (Directive 93/83/EEC on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission) cannot stand. This Article states that Member States shall ensure that the right to grant or refuse authorisation to a cable operator for a cable retransmission may be exercised only through a collecting society such as Norma and Irda. The plaintiffs claim that an interpretation of the term "re-broadcasting" in national law in conformity with the term "retransmission" in the Directive would result in making Article 14a WNR applicable to broadcasting as well. According to the court, such an extension of the term "re-broadcasting" would be *contra legem*. ■

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● ***Rechtbank 's-Gravenhage, 28 januari 2009, vonnis van Norma & Irda tegen Vecai et al.*** **(District Court of First Instance The Hague, 28 January 2009, decision of Norma & Irda v. Vecai et al.), available at:**
http://merlin.obs.coe.int/redirect.php?id=11665

NL

RO – ANC or ANRCTI?

On 29 January 2009, the European Commission issued a press release announcing the launch of an infringement proceeding against Romania due to an infringement of Community rules on the independence of the telecommunications regulator.

This was triggered by the removal from office of the President of the *Autoritatea Naţională pentru Reglementare în Comunicaţii şi Tehnologia Informaţiei,* (national regulatory body for communication and information technology – ANRCTI) in August 2008 by the then Romanian Prime Minister Tăriceanu and the subsequent appointment of a replacement. Although the Bucharest Court of Appeal declared the change unlawful on 18 September 2008, the former President was not reinstated in his position because, on the very same day, the Romanian Government decided to restructure the ANRCTI by passing Emergency Decree no. 106 (*Ordonanţa de Urgenţă Guvernului nr. 106 din 18 septembrie 2008 privind înfiinţarea Autorităţii Naţionale pentru Comunicaţii)*. The newly formed authority, *Autoritatea Naţională pentru Comunicaţii* (national communication authority – ANC), was to be chaired by the newly appointed President.

The European Commissioner for Information Society and Media considered this restructuring to be a violation of the independence of the national regulator and sent administrative letters to the Government on 19 September and 14 October 2008, expressing her concern about the failure to comply with the Court of Appeal's ruling, the hasty restructuring of the regulatory body and the resulting harm to the stability and independence of the telecoms market in Romania. Since the Government failed to provide a satisfactory response, the Commission launched the first stage of an infringement proceeding against Romania under Article 226 of the EC Treaty on 29 January 2009.

The newly elected Romanian Government must now find a solution in accordance with the Community *acquis*. The Commission is offering the new authorities its support. During the first stage of the proceeding, which lasts two months, Romania must decide on the fate of the ANC. One possibility being discussed is for the regulator to be under the control of the Parliament rather than the Government. The *Ministerul Comunicătiilor şi Societăţii Informaţionale* (Ministry for Communication and Information Society – MCSI) has decided to set up a working group to discuss the matter. ■

Mariana Stoican
Journalist, Bucarest

● ***Ordonanţa de Urgenţă a Guvernului nr. 106 din 18 septembrie 2008 privind înfiinţarea Autorităţii Naţionale pentru Comunicaţii, Monitorul Oficial al României nr. 1046 din 29 decembrie 2008*** **(Emergency Decree no. 106 of 18 September 2008, official gazette no. 1046 of 29 December 2008), available at:**
http://merlin.obs.coe.int/redirect.php?id=11640

RO

● **European Commission press release IP/09/165 of 29 January 2009, Brussels, available at:**
http://merlin.obs.coe.int/redirect.php?id=11641

EN-FR-DE-IT-EL-LT-LV-PL-SK-SL-RO

IRIS LEGAL OBSERVATIONS
OF THE EUROPEAN AUDIOVISUAL OBSERVATORY

SE – Sponsoring Message Considered an Advertisement and Promotion of Commercial Interests in an Improper Manner

On 16 February 2009, *Kammarrätten i Stockholm* (the Stockholm Administrative Court of Appeals) delivered a judgment regarding the promotion of a commercial interest in an improper manner in a sponsoring message. The case concerned the application of sections 6:4 and 7:8 of *Radio- och TV-lagen* (the Radio and Televisions Act – *RTL*). The RTL is based, *inter alia*, on Directive 89/552/ECC, as amended by Directive 97/36/EC.

Section 6:4 of the RTL states that programmes that are not advertisements may not promote commercial interests in an improper manner. Section 7:8 of the RTL stipulates that, if the cost of a non-advertising programme has been paid for in whole or in part by a party other than the person or entity conducting the broadcasting activities or producing audiovisual works (sponsored programmes), the identity of the sponsor shall be stated in an appropriate manner at the beginning or the end of the programme or both.

The programmes in question were the films "The Fellowship of the Ring" and "The Return of the King" broadcast by the Swedish nationwide television channel TV4 on 24 and 26 December 2006 respectively. Sponsoring messages were broadcast before and after each programme, as well as during the advertising breaks.

In brief, the sponsoring messages consisted of a speaker stating that "The movie is presented in co-operation with Eniro…" and then followed by statements such as "Search help via catalogue, Internet and telephone". The URL eniro.se and Eniro's logotype were shown in relation to the sponsoring messages.

Michael Plogell & Erik Ullberg
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Eniro is a company providing services allowing users to find such information as telephone numbers, addresses and directions to Swedish persons and companies.

Granskningsnämnden för radio och TV (the Swedish Broadcasting Commission – GRN) initiated proceedings against TV4 and ruled against the television channel, ordering that a special fee be imposed on TV 4 for the promotion of a commercial interest in an improper manner. The GRN claimed that the improper promotion consisted of the showing of the logotype and the URL related to Eniro's services.

TV4 appealed to *Länsrätten i Stockholms län* (the Stockholm County Administrative Court), but the court found in favour of the GRN. TV4 then took the matter to the Stockholm Administrative Court of Appeals.

Firstly, the Stockholm Administrative Court of Appeals found that, from the *travaux preparatoires* of the RTL, it follows that the legislator intended that sponsoring messages be considered as part of the programme that the message concerns. Therefore, section 6:4 of the RTL applies to such messages.

Moreover, the Administrative Court of Appeals established that by showing, in addition to the sponsor's name, substantial parts of the sponsor's business or products, the sponsoring messages go beyond what is required for information purposes according to section 7:8 of the RTL. These circumstances also meant that TV4 had acted in breach of section 6:4 of the RTL.

Consequently, TV4 was ordered to pay a fine of SEK 450,000.

TV4 has the possibility of appealing to the Supreme Administrative Court. It should be mentioned that a similar case is already pending before the Supreme Administrative Court (see IRIS 2008-3: 18), which has yet to decide whether TV4 will be granted the right to appeal in that case. ■

● ***Kammarrätten i Stockholm, 2009-02-16, mål nr 4491-08, överklagat avgörande: Länsrättens i Stockholms län dom den 29 april 2008 i mål 14699-07*** **(The Stockholm Administrative Court of Appeals, 2009-02-16, case nr 4491-08, appealed judgment: Stockholm County Administrative Court's judgment 2007-12-03 in case nr 14699-07)**

SV

SI – Potentially Harmful Content in Advertising and the Survey of Related Complaints in 2008

At the beginning of March 2009 *Tržni inšpektorat* (the Slovenian Market Inspectorate) published a report on its activities in the year 2008.

The report does not mention the problematic issue of advertisements for "porno chic" content on the internet, accessed via mobile phones and targeted at children, which could on their own or indirectly, by the promoted internet content, impair the physical and mental condition of children. But, in the report there is reference to a provision on misleading and indecent advertising of the *Zakon o varstvu potrošnikov* (Consumer Protection Act); concerning which no data on complaints and related proceedings are available. The *Oglaševalsko razsodišče* (Advertising Arbitration Court – AAC), part of the *Slovenska oglaševalska zbornica* (Slovenian Advertising Chamber), the self-regulatory body of advertisers, received eight complaints from consumers on indecent and/or potentially harmful content from the protection of minors perspective. All except one were declared unjustified by the AAC.

In February 2008 two Slovenian non-governmental organisations, the Association for the Promotion of Equality and Plurality, Vita Activa, and the Association of Parents and children, Sezam, contacted the

Market Inspector with a complaint about "porno chic" advertisements for mobile portals aimed at children, one of them containing child pornography. In June 2008 the Market Inspectorate replied that the advertisements were, in the inspector's opinion, not contentious. Besides, it was stated that the AAC had been consulted and no violations of the *Oglaševalski kodeks* (Advertising Practice Code) were detected. In the report there was no mention of the case, so the issue of the protection of children from potentially harmful content in advertising is, as already argued, absent.

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In 2008 the AAC received seven complaints from consumers about jumbo posters advertising women's underwear, a men's magazine (Playboy) and a Slovenian women's journal. The complaints were all primarily based on the decency provision of the Advertising Practice Code. The case of Playboy related to the protection of minors provision also. Both posters for magazines displaying half-naked and sexualised female bodies were also considered inappropriate because of their location near an elementary school. The court declared the enumerated complaints irrelevant and the argument did not tackle the problem of the location of the posters.

One complaint was addressed in the court of the self-regulatory advertising body on the basis of the provisions on decency and the protection of minors of the Advertising Practice Code (Articles 3 and 12). The content of the advertising campaign for the advertising agency was considered inappropriate in the complaint, since it consisted of the picture of a very young girl as being pregnant. The court declared the complaint justified and ordered the campaign to be stopped. ■

- ***Poslovno poročilo Tržnega inšpektorata Republike Slovenije za leto 2008* (Business Report of the market Inspectorate of Republic Slovenia for the year 2008), available at:**
http://merlin.obs.coe.int/redirect.php?id=11647
- ***Zakon o varstvu potrošnikov* (Act on Protection of Consumers – ZVPot-UPB2), available at:**
http://merlin.obs.coe.int/redirect.php?id=11648
- ***Oglaševalski kodeks* (Code of Advertising Practice), available at:**
http://merlin.obs.coe.int/redirect.php?id=11649
- ***Oglaševalsko razsodišče* (Advertising Arbitration Court), available at:**
http://merlin.obs.coe.int/redirect.php?id=11650

SL

SK – Audiovisual Fund Act and TASR Act

The Slovak Parliament has recently approved the Audiovisual Fund Act No. 516/2008 Coll. (hereinafter referred to as "Act").

The Act came into effect on 1 January 2009 except for the provisions of § 32 (Co-Production Statute - *Koprodukčný štatút*), which will come into effect on 1 January 2010. The audiovisual fund is a public service institution whose most important purpose is to help revive Slovak films. According to this Act, the audiovisual fund will be financed *inter alia* by the State budget and by the broadcaster defined in the Act. The fund will support Slovak filmmaking, renewal, development and presentation of audiovisual works by means of various grants, subventions, loans, stipends or loan guarantees. The fund is obliged to use 95 % of its income for the support activities outlined in this Act; only 5 % of its total income can be used for its own purposes.

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On 1 January 2009, the new Press Agency of the Slovak Republic Act No. 385/2008 Coll. (hereinafter referred to as "Act") became effective, according to which the Press Agency of the Slovak Republic (TASR) became a public, national, independent and information institution, which provides a wide range of services in the area of press services. According to this Act, TASR receives finance from the State and will also be financed by various contributions stated in the Act. The Culture Ministry believes this legal change will make TASR more effective, independent and competitive among the news agencies. ■

- **Audiovisual Fund Act, available at:**
http://merlin.obs.coe.int/redirect.php?id=11651
- **TASR Law, available at:**
http://merlin.obs.coe.int/redirect.php?id=11652

EN-SK

TR – Court's Ruling on Pornography

Pendik (a district in Istanbul) 4th Criminal Court of First Instance has recently ruled on a case concerning an obscenity offence which is indictable according to Article 226 of the Turkish Penal Code (TPC). Although this ruling is not final, it is significant because it attempts to define the concept of "unnatural sexual acts".

Article 226 TPC criminalises certain acts relating to obscene materials. According to section (d) of the first paragraph, the offering for sale, selling and renting of obscene materials at places other than shops designated to sell these types of materials, shall merit imprisonment from six months to two years and a judicial fine. The fourth paragraph of this Article imposes a sentence from one to four years and up to five thousand days of judicial fine for producing, importing, offering for sale, selling, shipping, storing, making available for the use of others or possessing products in written, audio or visual form which are related to sexual acts conducted with the use of violence, with animals (zoophilia), on corpses (necrophilia), or by other unnatural acts.

In the case concerned the defendant had offered 125 CDs of pornographic content for sale and was eventually charged with having violated Article 226 TPC. The defendant was found guilty under Article 226, paragraph 1, section (d) TPC for supplying obscene materials at a place other than a shop designated to supply and sell these materials.

In this context the Court discussed the meaning of the term "unnatural sexual acts". The two disputed matters that the Court focused on were content displaying sexual intercourse between two parties of the same sex or between more than two parties.

The Court referred to the equality principle and the right to private life provisions of the Turkish Constitution, Articles 8 and 14 of the ECHR, Article 13 of the EU-Treaty, Article 1 of Directive 2000/78/EC and the case law of the ECHR. It found that sexual intercourse between adults of the same sex or between more than two persons may be regarded as unorthodox or even shocking by the public, but are not banned by any laws and therefore cannot be construed as "unnatural". The Court stressed that the term "unnatural sexual acts" should be interpreted in a narrow manner.

There is currently no information available as to whether this case was appealed. According to Turkish law, cases decided by courts of first instance have no binding effect on other courts. ■

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AGENDA

European Audiovisual Observatory's Afternoon in Cannes

Show me the Money!
Monitoring film revenues and collecting rightsholders' money

Sunday 17th of May 2009, 4 pm – 6 pm

Salon des Ambassadeurs (4th floor - Palais des Festivals)
Free entry to anyone with a Cannes Film Market accreditation
Registration required: cannes@coe.int