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European Court of Human Rights: Case of Times Newspapers Ltd. (nos. 1 and 2) v. UK

The European Court of Human Rights has held unanimously that there had been no violation of Article 10 of the European Convention on Human Rights in the case of Times Newspapers v. the UK, because the British courts' finding that the Times Newspapers Ltd had libelled G.L. by the continued publication on its Internet site of two articles did not represent a disproportionate restriction on the newspaper's freedom of expression.

The applicant in this case, Times Newspapers Ltd, is the owner and publisher of The Times newspaper, registered in England. It published two articles, in September and October 1999 respectively, reporting on a massive money-laundering scheme carried out by an alleged Russian mafia boss, G.L., whose name was set out in full in the original article. Both articles were uploaded onto The Times website on the same day as they were published in the paper version of the newspaper. In December 1999, G.L. brought proceedings for libel against the Times Newspapers Ltd, its editor and the two journalists who signed the two articles printed in the newspaper. The defendants did not dispute that the articles were potentially defamatory, but contended that the allegations were of such a kind and seriousness that they had a duty to publish the information and the public had a corresponding right to know. While the first libel action was underway, the articles remained on The Times website, where they were accessible to Internet users as part of the newspaper's archive of past issues. In December 2000, G.L. brought a second action for libel in relation to the continuing Internet publication of the articles. Following this, the defendants added a notice to both articles in the Internet archive announcing that they were subject to libel litigation and were not to be reproduced or relied on without reference to the Times Newspapers Legal Department.

Times Newspapers subsequently argued that only the first publication of an article posted on the

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Internet should give rise to a cause of action in defamation and not any subsequent downloads by Internet readers. Accordingly, Times Newspapers submitted, the second action had been commenced after the limitation period for bringing libel proceedings had expired. The British courts disagreed, holding that, in the context of the Internet, the common law rule according to which each publication of a defamatory statement gives rise to a separate cause of action meant that a new cause of action accrued every time the defamatory material was accessed ("the Internet publication rule").

Relying on Article 10 (freedom of expression) of the Convention, the Times Newspapers Ltd complained before the Strasbourg Court that the Internet publication rule breached its freedom of expression by exposing them to ceaseless liability for libel. The European Court noted that while Internet archives were an important source for education and historical research, the press had a duty to act in accordance with the principles of responsible journalism, including by ensuring the accuracy of historical information. Further, the Court observed that limitation periods in libel proceedings were intended to ensure that those defending actions were able to defend themselves effectively and that it was, in principle, for contracting States to set appropriate limitation periods. The Court considered it significant that, although libel proceedings had been commenced in respect of the two articles in question in December 1999, no qualification was added to the archived copies of the articles on the Internet until December 2000. The Court noted that the archive was managed by the applicant itself and that the domestic courts had not suggested that the articles be removed from the archive altogether. Accordingly, the Court did not consider that the requirement to publish an appropriate qualification to the Internet version of the articles constituted a disproportionate interference with the right to freedom of expression. There was accordingly no violation of Article 10.

Having regard to this conclusion, the Court did not consider it necessary to consider the broader chilling effect allegedly created by the Internet publication rule. It nonetheless observed that, in the present case, the two libel actions related to the same articles and both had been commenced within 15 months of the initial publication of the articles. The Times Newspaper's ability to defend itself effectively was therefore not hindered by the passage of time. Accordingly, the problems linked to ceaseless liability did not arise. However, the Court emphasised that, while individuals who are defamed must have a real opportunity to defend their reputations, libel proceedings brought against a newspaper after too long a period might well give rise to a disproportionate interference with the freedom of the press under Article 10 of the Convention. ■

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● Judgment by the European Court of Human Rights (Fourth Section), case of Times Newspapers Ltd. (nos. 1 and 2) v. United Kingdom, Application no. 3002/03 and 23676/03 of 10 March 2009, available at http://merlin.obs.coe.int/redirect.php?id=9237

EN

Committee of Ministers: Declaration on Community Media and the Promotion of Social Cohesion and Intercultural Dialogue

The Council of Europe's Committee of Ministers' (CM) adopted a Declaration on the role of community media in promoting social cohesion and intercultural dialogue on 11 February 2009.

The Preamble to the Declaration lists a number of international instruments that are thematically relevant to various aspects of the Declaration's main focus. They include standard-setting texts elaborated by the Council of Europe, UNESCO, the European Union and the IGO special mandates on freedom of expression. The Preamble also explains in detail the distinctive characteristics of community media and their functional importance to society.

It recognises "community media as a distinct media sector, alongside public service and private commercial media" and stresses the need to examine ways in which legal frameworks could be adapted in order to facilitate the development and optimal functioning of community media. It favours allocating a sufficient number of (analogue and digital) frequencies to community media and ensuring that community media are not disadvantaged by the digital switch-over. It advocates educational and vocational measures geared towards maximising all communities' use of available technological platforms.

The Declaration then "[S]tresses the desirability of":

- exploring various funding possibilities for the community media sector;
- promoting good practice in community media, *inter alia*, through conducting studies, exchanging information, developing exchange programmes and other collaborative projects;
- facilitating appropriate capacity-building and training of community media workers;
- "encouraging the media's contribution to intercultural dialogue", *e.g.* by establishing networks on which to exchange information.

Finally, it invites community media – in the context of their role in promoting social cohesion and intercultural dialogue – to elaborate, adopt or review, and in any case adhere to, codes of professional ethics and internal guidelines. ■

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● Declaration of the Committee of Ministers on the role of community media in promoting social cohesion and intercultural dialogue, 11 February 2009, available at: http://merlin.obs.coe.int/redirect.php?id=11675

EN-FR

European Commission against Racism and Intolerance: Media Provisions in New Recommendation against Racism in Sport

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The European Commission against Racism and Intolerance (ECRI) launched its General Policy Recommendation (GPR) No. 12 on Combating Racism and Racial Discrimination in the Field of Sport in March 2009. It includes several media-specific recommendations.

GPR No. 12 makes three macro recommendations to the governments of Member States: to ensure equal opportunities in access to sport for all; to combat racism and racial discrimination in sport, and to build a coalition against racism in sport. Each macro recommendation comprises a number of specific recommendations. Some of the specific recommendations to combat racism and racial discrimination in sport are directed at various parties, including legislative and other authorities, police, sports organisations, athletes, coaches, referees, supporters' organisations, politicians, the media and sponsors and advertisers.

In this context, Member States are called on to "encourage the media":

a) to abstain from reproducing racist stereotypes in their reporting;
b) to pay the necessary attention to the image that they convey of minority groups in sports;
c) to report on racist incidents taking place during sport events and to give publicity to sanctions incurred by racist offenders

GPR No. 12 also contains provisions involving other freedom of expression issues. For instance, the police are requested to "identify and remove racist, antisemitic or discriminatory leaflets, symbols and banners". Similarly, sports federations and clubs are invited to "refuse access to sport grounds to persons who distribute or carry with them racist, antisemitic or discriminatory leaflets, symbols or banners". Supporters' organisations are encouraged to "be vigilant about possible racist and on their websites and fanzines". For their part, sponsors and advertisers are encouraged, inter alia, to "avoid giving a stereotyped picture of athletes from minority backgrounds".

ECRI regularly drafts GPRs as part of its work on general themes – one of its three main lines of activity. Country-by-country monitoring and developing relations with civil society are its other two main lines of activity. The thematic focuses of earlier GPRs include "Combating racism while fighting terrorism" (No. 8, 2004) and "The fight against antisemitism" (No. 9, 2004) (see IRIS 2004-10: 4) and "Combating the dissemination of racist, xenophobic and antisemitic material via the Internet" (No. 6, 2000) (see IRIS 2002-7: 3). ■

● **European Commission against Racism and Intolerance, General Policy Recommendation No. 12 on combating racism and racial discrimination in the field of sport, Doc. No. CRI(2009)5, 19 March 2009, available at: http://merlin.obs.coe.int/redirect.php?id=11703**

EN-FR

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

On 24 February 2009, the European Commission against Racism and Intolerance (ECRI) made public its latest reports on Bulgaria, Hungary and Norway, adopted in the fourth round of its monitoring of the laws, policies and practices to combat racism in the Member States of the Council of Europe (for commentary on earlier reports, see IRIS 2008-4: 6, IRIS 2006-6: 4 and IRIS 2005-7: 3).

In respect of Bulgaria, ECRI encourages the State authorities to "make the media aware, without undermining their editorial independence, of the need to ensure that the information they provide does not help to breed a climate of hostility towards members of ethnic and religious minorities" (para. 106). It also recommends that the authorities support media initiatives to achieve this goal, including through making resources available for training in issues relating to human rights and racism. It calls for maximum efforts to "prosecute and punish members of the media who incite racial hatred". Lastly, in this connection, it recommends that the Bulgarian authorities provide the Electronic Media Council with the means (i.e., personnel and funding) to use training and other measures to heighten its members' awareness of issues relating to racism (para. 107).

ECRI's recommendations in respect of Hungary focus primarily on the need to "keep the adequacy of the criminal law provisions against racial expression under review" (para. 13). It "strongly recommends" adherence to relevant international standards, including ECRI's General Policy Recommendation (GPR) No. 7 on national legislation to combat racism and racial discrimination. GPR No. 7 advocates the penalisation of a range of offences, including public incitement to violence, hatred or discrimination. To the extent that the adoption of such penal measures would affect the right to freedom of expression, guidance should be sought from Article 10 of the European Convention on Human Rights and relevant case-law of the European Court of Human Rights. ECRI also recommends the adoption of measures to raise awareness of relevant international standards among the Hungarian judiciary. It also recommends that Hungary ratify the Additional Protocol to the Convention on Cybercrime, concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems (para. 16).

ECRI's recommendations to the Norwegian authorities are largely similar to those made to their Bulgarian and Hungarian counterparts:

- improve legislative protection against racist expression (para. 15)
- raise awareness of (the implications of) legislative

changes regarding racist expression among police and public prosecutors (para. 15)
- raise awareness of relevant international standards among the judiciary (para. 16)
- "keep the adequacy of the criminal law provisions against racial expression under review" in a way that is mindful of the specific provisions of GPR No. 7 (para. 17)
- increase efforts to "counter" racist expression online, including by "bringing those responsible for any offences to justice" (para. 18)
- "impress on the media, without encroaching on their editorial independence, the need to ensure that the method of reporting does not contribute to creating an atmosphere of hostility and rejection towards members of any minority groups" (para. 90)
- involve the media and relevant civil society organisations in discussions on how this goal could best be achieved (para. 90). ■

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- **ECRI Report on Bulgaria (fourth monitoring cycle), adopted on 20 June 2008**
- **ECRI Report on Hungary (fourth monitoring cycle), adopted on 20 June 2008**
- **ECRI Report on Norway (fourth monitoring cycle), adopted on 20 June 2008**

All available at:
http://merlin.obs.coe.int/redirect.php?id=11705

EN-FR

EUROPEAN UNION

European Court of First Instance: Case TF1 v. Commission

In 1993, Télévision française 1 SA, owners of the private French television network TF1, lodged a complaint with the European Commission alleging, inter alia, that the repayment of the audiovisual licence fee by France to the French public service broadcasters, France 2 and France 3, constituted illegal state aid. On 10 December 2003, the Commission issued Decision 2004/838/EC, dismissing TF1's claim, concluding that the financing scheme was indeed compatible with the rules of the common market, according to Article 86(2) EC Treaty (see IRIS 2004-2: 4), and including a number of recommendations directed at the French government. The French authorities responded to the document with a number of commitments intended to ensure compatibility with Community state aid legislation. On 20 April 2005, the Commission issued Decision C(2005)1166 final, confirming that the commitments made by France satisfied its recommendations and closing the procedure.

Subsequently, TF1 brought an action before the European Court of First Instance seeking the annulment of the Commission's final decision, however, in May 2008, the Court found the case to be inadmissible, due to lack of the clarity and precision required under Article 44(1) of the Rules of Procedure. In October 2008, TF1, claiming new legal circumstances, brought a second action against the Commission. In a judgment delivered on 11 March 2009, the Court, in essence, confirmed the Commission's 2005 decision.

TF1 rested its case on five main points, each of which was examined and rejected in turn by the Court: First, the Court found no violation of the rights of the defence nor was there a breach of the procedure for the examination of aid. It then proceeded to analyse whether the judgment of the Court of Justice in the Altmark case of 24 July 2003 had been correctly interpreted by the Commission and applied to the case at hand and found that to be the case. Finally, the Court confirmed that the Commission did not fail to fulfil its obligation to provide a statement of reasons nor did it find that the commitments undertaken by France to guarantee the compatibility of the audiovisual licence fee with the common market were insufficient.

Particularly as concerns the interpretation of the Altmark case, it is worth mentioning that, according to standard ECJ case law, for a measure to constitute state aid, all preconditions set out in Article 87(1) EC Treaty must be met, i.e. there must (a) 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. The Court then, expounding on the third of these requirements, explained that a state measure will escape classification as state aid within the meaning of Article 87, only if all the following circumstances (referred to by the Court as "the Altmark conditions") occur:

(1) the recipient undertaking must actually have public service obligations to discharge and those obligations must have been clearly defined ("first Altmark condition");
(2) the parameters on the basis of which the compensation is calculated must have been established in advance in an objective and transparent manner ("second Altmark condition");
(3) the compensation must not exceed what is necessary to cover all or part of the costs incurred in the discharge of public service obligations, taking into account the relevant receipts and a reasonable profit ("third Altmark condition");
(4) where the undertaking which is to discharge public service obligations, in a specific case, is not chosen pursuant to a public procurement procedure, the level of compensation needed must be determined on the basis of an analysis of the costs which a typical undertaking, well-run and adequately equipped, so as to be able to meet the necessary public service requirements, would have incurred in discharging those obligations, taking into account the relevant receipts and a

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reasonable profit for discharging the obligations ("forth Altmark condition").

The Court noted that the Altmark conditions concern only the question of the classification of a state measure as state aid. The assessment of the compatibility of a state aid measure with the common market is a separate issue, regulated under Article 86(2) EC Treaty. ■

● Case T 354/05, Télévision française 1 SA (TF1) v. Commission of the European Communities (11 March 2009), available at:
http://merlin.obs.coe.int/redirect.php?id=11697
ES-ET-FR-GR-RO

European Parliament: Resolution on Video Games

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On 12 March 2009, the European Parliament (EP) adopted a resolution on the protection of consumers, in particular minors, in respect of the use of video games. This non-legislative resolution deals with the restriction of the sale or banning of video games, which falls within the area of Member State competence. It does not propose particular EU-wide legislation.

The Members of Parliament (MEPs) derive their considerations from a report drafted by Toine Manders, rapporteur of the political group Alliance of Liberals and Democrats for Europe (ALDE). The report stresses that video games have a value of not only in entertainment, but also for educational and medical purposes. The report concluded that not all games are suitable to all ages and video games can have harmful effects on the minds of children. Therefore, to help parents choose to make a decision on which videogame to buy for their children, MEPs welcome the adoption of EU-wide labelling rules for video games.

Furthermore, the MEPs note that currently video games can be downloaded from the internet and be played on mobile devices. These developments necessitate an effective age verification system for online games in particular. The EP calls on the video game industries, as well as the Commission and Member States, to improve the self-regulatory Pan-European Game Information (PEGI) age rating system by, inter alia, regularly updating the criteria for these ratings, as well as the labelling on the videogames.

In order to ensure that minors are not exposed to harmful content in (online) video games, Parliament calls for additional efforts. One of these efforts is to explore the merit of a "red button". This "red button" can be included on game devices and should have the ability to disable a game in the case of inappropriate content for minors or control access at certain hours.

Lastly, Parliament holds the view that a common approach is needed towards retailers who sell video games to children which are rated for a higher age level. Members States should put in place measures to prevent this kind of sales. Sanctions are also required for internet café owners who let children play video games in their café which are rated for a higher age level. Also, the industry itself should be encouraged to further develop self-regulatory systems.

The history of the adopted resolution dates back to 22 April 2008. On that date the European Commission (EC) initiated its document on the protection of consumers against the harmful effects of using video games (see IRIS 2008-6: 3). ■

● Non-legislative resolution, "Protection of consumers, in particular minors, in respect of the use of video games", INI/2008/2173, available at:
http://merlin.obs.coe.int/redirect.php?id=11701
EN-FR

NATIONAL

AT – Advertising Refusal Justified

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On 9 March 2009, the *Bundeskommunikationssenat* (Federal Communications Senate - BKS) decided that the refusal by *Österreichische Rundfunk* (Austrian broadcasting corporation - ORF) to sell advertising time to the operator of an online gaming platform was justified.

The plaintiff operates an online gaming platform under betting and gambling licences issued in Gibraltar. It had asked ORF to broadcast an advertising spot, which referred to its poker game. The spot contained the text: "You weak, boring, stupid idiot, if you can accept these insults, then you are damn well ready to play poker with us". ORF refused to broadcast the spot, citing the *Glücksspielgesetz* (Gambling Act).

The BKS did not consider this decision to constitute an infringement of the non-discriminatory allocation of advertising time. ORF was not obliged to break the laws to which it was subject by broadcasting advertising. Legitimate doubts about the lawfulness of the advertisement were sufficient to justify the refusal. Since the plaintiff did not have the licence required under Austrian law to organise poker games on the Internet, ORF might have committed an offence by broadcasting the advertising spot.

Restrictions on gambling could, in some circumstances, represent a violation of basic freedoms. However, since the Supreme Court had not taken any decision on the subject, ORF could not be expected to take the risk of being held liable for an offence. ■

● Decision of 9 March 2009 (case no. 611.975/0001-BKS/2009), available at:
http://merlin.obs.coe.int/redirect.php?id=11683
DE

AT – Obligation to Deliver for Online Media

Media owners in Austria are obliged to offer or deliver printed matter to certain public libraries, including the Austrian National Library (ÖNB). In 2000 this obligation was extended to include "other forms of media, except phonograms and moving picture carriers" – in other words, essentially DVDs containing text (see IRIS 1999-7: 13 and IRIS 2000-9: 14).

At the beginning of March 2009, an amendment to the *Mediengesetz* (Media Act) came into force, extending the obligation to offer and deliver to include periodical electronic media that are accessible (websites) or distributed at least four times each calendar year in a similar format (e.g., electronic newsletters). If the ÖNB is able to gather the content of these media itself, it is entitled to do so as long as it is available from an ".at" domain or concerns Austria in some way. The ÖNB is only allowed to collect other similar media on an "individual" basis and must notify the media owner if it does so. The media owner concerned does not need to take any action, but simply to allow its content to be collected.

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If the ÖNB is unable to collect the content itself, for example because it is subject to access controls or some other restriction, it can ask the media owner to supply it. Delivery will usually involve the disclosure of access codes at no cost to the media owner, although any other costs that arise must be borne by the media owner up to a limit of EUR 250. Any additional costs must be reimbursed by the ÖNB. The ÖNB must make the media content that it collects or that is supplied available to certain other public libraries in Austria.

If media content that is collected or supplied is protected by copyright or a related right, the ÖNB may make one copy for its own purposes and a further copy for each library that makes a legitimate request for the media content concerned.

All collected or delivered content of media that are accessible or distributed at least four times per calendar year may only be made available to library users at the library's own premises. The owners of media that are subject to access controls can impose a one-year blocking period on the use of their content by library users. If no such blocking period is imposed, or after such period has elapsed, such content may only be made accessible to one library user at a time in the library concerned. Hard copies may be supplied to library users, but electronic reproduction is prohibited. ■

● **Federal Act amending the *Mediengesetz* (Media Act), available at:**
http://merlin.obs.coe.int/redirect.php?id=11682

DE

AT – Advertising Restrictions Relaxed for Private TV Broadcasters

Under an amendment to the *Privatfernsehgesetz* (Private Television Act), announced in February 2009, advertising restrictions for private TV broadcasters have been relaxed.

The possibility of interrupting programmes with television advertising and teleshopping has been extended, insofar as there is no longer a minimum gap between interruptions. During sports broadcasts, it is now possible to show isolated advertising and teleshopping spots. The daily advertising time limit of 15% (20% including teleshopping) has been abolished. Teleshopping is no longer restricted to three hours and eight windows per day. Teleshopping channels and self-promotion channels exclusively devoted to self-promotion have been exempted from the provisions on programme interruptions and the duration of advertising and teleshopping (see Art. 19 of the Audiovisual Media Services Directive).

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The draft amendment was submitted to Parliament in view of the imminent expiry of the deadline for transposing the Audiovisual Media Services Directive into national law. The Act is designed to make it easier to finance broadcasting companies in Austria and thereby protect their position in the international broadcasting market. ■

● **Federal Act amending the *Privatfernsehgesetz* (Private Television Act) and the *Privatradiogesetz* (Private Radio Act), available at:**
http://merlin.obs.coe.int/redirect.php?id=11684

DE

BA – The Use of the Internet Is in Expansion

The Communications Regulatory Agency (CRA/RAK) recently published its 2008 report on the Internet in Bosnia and Herzegovina.

There are currently 66 Internet service providers (ISPs) legally registered in the country. According to the information available, provided by 62 of those ISPs, there are 336,163 Internet subscribers and approximately 1.3 million Internet users. The percentage rate shows a degree of the Internet use amounting to 34 %, which is an increase of 6.75 % compared to the previous year. The total population of Bosnia and Herzegovina is less than 4 million.

Regarding the access to the Internet the so-called dial-up model still prevails (via analogue modem and ISDN), representing 43.9 % of the total number of the subscribers. But statistics indicate that the dial-up access is in retreat, and in a nearby future the broadband Internet access will prevail.

Financially the ISPs gained BAM 52 million (about EUR 26 million), which represents 0.24 % of the country's gross national product.

Available statistics clearly indicate that the use of the Internet increases. Its expansion might be detrimental for traditional media, both print and broadcast,

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since many Internet users read the online editions of the mainstream papers, and even watch TV via Internet.

The RAK also expects that further liberalisation of the telecommunications markets and the introduction of new technologies, digitalisation in the first place, will mean better services and a further expansion of the Internet. ■

● **CRA, 2008 report on the Internet in Bosnia and Herzegovina, available at: http://merlin.obs.coe.int/redirect.php?id=10734**

BS

BE – New Flemish Media Decree Approved

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On 18 March 2009, the Flemish Parliament officially approved the text of the new media decree, which primarily aims at transposing the Audiovisual Media Services Directive 2007/65/EC into regional law. Following this final approval, only publication in the *Belgisch Staatsblad* (Belgian Monitor), which is expected in a short time, is necessary so as to make the new Flemish decree legally binding. As the French Community also already adopted a decree in pursuance of Directive 2007/65/EC on 5 February 2009 (published in the Belgian Monitor on 18 March 2009), Belgium is proving itself to be one of the most motivated students in the European classroom. As several articles on this matter already have appeared in this periodical (see IRIS 2009-1: 8, IRIS 2009-2: 8 and IRIS 2009-4: 6), this contribution will limit its goal to a concluding follow-up on the final outcome, highlighting the principal features of the new Flemish decree.

The main "formal" characteristics of the decree can be outlined as follows: first, the text differentiates between "broadcasting activities" and "broadcasting services". The latter are to be compared with the audiovisual media services covered by Directive 2007/65/EC and are part of the broader category of "broadcasting activities", which also implies activities that are primarily non-economic (e.g. private websites). Only "broadcasting services" are submitted to the procedural and content-related requirements of the decree (compare with para. 16 of the Preamble to the Directive), while ""broadcasting activities" that are not "broadcasting services" are only prohibited from inciting hatred (Articles 38-39). Second, a basic tier of coordinated rules applies to all audiovisual media services (linear and on-demand, compare with para. 7 of the Preamble to the Directive). In addition, more stringent rules apply to linear services because of their greater impact and the fewer possibilities for control by users. Third, all "commercial communications" (a notion extracted from the Directive) are treated in the same chapter (IV). The decree here explicitly expands some basic rules of advertising to all types of commercial communication, following the lead of the Directive (see IRIS 2009-2: 8).

The new decree also contains some important "content-related" changes in pursuance of Directive 2007/65/EC. For the first time, it introduces a regulation on product placement, which is allowed in the programmes and under the conditions stipulated in the Audiovisual Media Services Directive, although the decree is more stringent than the Directive as to the insertion of "free" product placement in children's programmes (Article 99) (see IRIS 2009-1: 8). Furthermore, the new decree follows the Directive very closely as to the relaxation of advertising regulation (Articles 11 and 18 of the Directive, clarified by para. 55, 57 and 59 of the Preamble) (see IRIS 2009-2: 8). Finally, the decree responds to the aspiration of the Directive to introduce rules to protect minors in all audiovisual media services, including audiovisual commercial communications (para. 44 of the Preamble). With this view in mind, the text adopts the code concerning publicity and sponsorship on radio and television (20 September 1995), which contains a new Chapter VII, entitled "Publicity directed towards children and young people", thereby affording a protection level beyond the one required by the Directive (Articles 70-77 of the Flemish decree) (see IRIS 2009-2: 8). Moreover, the Flemish legislator has directly transposed the admonition in the Directive as to the development of codes of conduct regarding inappropriate audiovisual commercial communication (Article 3sexies, 2), into a binding provision concerning commercial communication of foods and beverages containing nutrients and substances, excessive intakes of which are not recommended, such as fat, trans-fatty acids, salt or sodium and sugars: commercial communications directed towards children and young people cannot encourage excessive intakes of such foods and beverages (Article 77).

More striking, and not required by the Directive, is the abolition of the existing ban on political advertising on radio and television. The new text allows paid political ads on radio and television in pre-election time, within the framework provided by the federal legislation on election expenditure and election campaigns (Article 49). In exchange, the free pre-electoral broadcasting time on public radio and television, given, during a period of two months preceding the elections, to the political parties that are represented in the Flemish Parliament (former Articles 29 and 30 § 6) has been abrogated (see IRIS 2009-4: 6).

On some domains however, the Flemish legislator seems to ignore the aspirations of Directive 2007/65/EC. No references to co- and self-regulation can be found, although the Directive encourages their consideration (para. 36 of the Preamble). The *Vlaamse Regulator voor de Media* (Flemish Regulator for the Media) is, as before, charged with the monitoring and enforcement of media regulation (chapter VII). Next, although the Directive urges the promotion of the development of media literacy, as an alternative for protective, legal measures (para. 37 of the Preamble), the new Flemish decree does not contain any provisions in this direction. ■

● ***Decreet betreffende de radio-omroep en televisie* (new Flemish Decree on Radiobroadcasting and Television, approved by the Flemish Parliament on 18 March 2009), available at: http://merlin.obs.coe.int/redirect.php?id=11698**

NL

BG – Changes to the Electronics Communications Act

In March 2009 important amendments to the Electronic Communications Act (ECA) became effective. Some of the changes concern the process of digitalisation, while the remainder concern the licensing of analogue television.

As a result of the changes the Council for Electronic Media (CEM) is no longer responsible for granting permits for analogue TV broadcasting and its powers have been transferred to the telecommunications regulator, Communications Regulation Commission (CRC), which is a political state body.

Para 5 item 2 of the Transitional and Final Provisions of ECA states that: "Until new permits for the utilisation of the individual scarce resource – radio frequency spectrum, for the provision of electronic communications by electronic communications networks for terrestrial digital radio broadcasting with a national coverage under the terms and conditions of this act are issued, the CRC may grant to TV operators registered under the Radio and Television Act permits for the use of available free scarce resource – radio frequency spectrum, which is not allocated according to para. 9a of the Transitional and Final Provisions of the Radio and Television Act".

Most practitioners and commentators are of the opinion that the above-cited provision may lead to an unequal treatment of operators competing on the same market, namely: those who have been granted licenses for TV activity and the others who can be given the right to operate within the free scarce resource, which is exclusively owned by the State. The main difference between these two groups is that the first one is obliged to meet certain programme requirements, which are included in their licenses, while the second one is not expected to meet any predetermined criteria concerning their programme content. Therefore, para 5 item 2 of the Transitional and Final Provisions of the ECA may be considered as contradicting to the Law on Limiting Administrative Regulation and Administrative Control over Economic Activity and the Law on Protection of Competition.

Pursuant to para 5 item 3 of the Transitional and Final Provisions of the ECA the permits mentioned above shall be issued in compliance with the rules and procedures adopted by the CRC. Thus, the CRC is granted powers to legislate by creating secondary legislation in areas, which shall be exclusively regulated by the National Assembly on a primary level in the form of legislative acts. Article 18, para 5 of the Bulgarian Constitution explicitly stipulates that the conditions and procedure by which the state shall grant licences for the activities related to the radio frequency spectrum shall be established by law as adopted by the National Assembly, which is the only competent authority to legislate on the issues concerning the radio frequency spectrum.

Para 5 item 4 of the Transitional and Final Provisions of the ECA stipulates that the permits shall be issued after the CEM has given its positive consent. It is unclear what the legal consequences would be if the CEM refused to grant such consent. According to the Administrative Procedure Code granting of a positive consent is not considered an administrative Act and it is unclear why such a requirement has been adopted in the ECA. ■

Rayna Nikolova
Council for Electronic Media, Sofia

● **Amendments to the Electronic Communications Act, State Gazette, issue 17 of 6 March 2009**

BG

CH – M6's Swiss Signal Violates Copyright and Constitutes Unfair Competition

The company Métropole Télévision operates the French television channel M6. Although this is aimed at the French public, it is possible to receive its signal, broadcast by satellite and terrestrially, in Switzerland as a result of natural overspill. Since January 2002, Métropole Télévision has been broadcasting a second signal, separate from the one used for broadcasting in France. This second signal, distributed in Switzerland by a number of cable distributors, uses all the programming broadcast by M6 in France, but incorporates advertising messages directed specifically at viewers in the French-speaking part of Switzerland. Thus Métropole Télévision in fact operates a second set of advertising during its programming, using Swiss advertisers.

Télévision Suisse Romande, a branch of the Swiss radio and television broadcasting company (*Société Suisse de Radiodiffusion et Télévision* - SSR), also broadcasts a good number of the films and series that are available on M6. In November 2003, SSR brought proceedings against Métropole Télévision before the court of the canton of Fribourg to have M6's programming including Swiss advertising declared unlawful. On 29 August 2007, the Swiss Federal Tribunal allowed SSR to instigate proceedings against Métropole Télévision and referred the matter to the cantonal court for a further decision (see IRIS 2008-3: 9).

In a decision delivered on 12 February 2009, the civil court of appeal of the cantonal court of the State of Fribourg admitted the proceedings brought by SSR. It held that by broadcasting programming that included advertising slots specifically directed at the Swiss public Métropole Télévision was violating the copyright of the parties holding the rights for the works being broadcast in their programming, inasmuch as the latter had not authorised such broadcasting. The judges found that swapping the advertising messages during the simultaneous broadcasting of the work, in order to reach a different target public, affected the content of the programme and was equivalent to a new broadcast specifically directed at a territory which was not part of the broadcasting territory covered by the contract. Consequently, in the absence of authorisation, this further broadcast violated the exclusive right of the originators or their

beneficiaries to broadcast the works in question.

The court in Fribourg stated that the contractual clauses authorising the natural overspill, an involuntary and technically unavoidable phenomenon, did not give a concession-holder licence to broadcast anything other than material for which it held rights. Consequently, if the concession-holder went beyond the rights held, more particularly by overstepping the authorised territorial limits, it was violating not only the contract but also the copyright protection held by the party conceding the rights. Lastly, in its judgment the court held that the broadcasting of a work with an advertising slot directed specifically at the Swiss public, carried out in violation of copyright law, gave Métropole Télévision an unlawful competitive advantage and therefore constituted a violation of national legislation on unfair competition. ■

Patrice Aubry
Télévision Suisse Romande (Geneva)

● **Decision no. 42 2007-132 of 12 February 2009 delivered by the civil court of appeal of the court of the Canton of Fribourg**

FR

CY – Supreme Court Decision on Advertising Services of a 'Parapsychologist'

The Supreme Court of Cyprus decided that the broadcasting of an advertisement by a parapsychologist claiming that she could solve a number of problems, such as stress at work, alcoholism, domestic violence, love relations and others, breaches the law. The Court was concerned with an appeal of SIGMA TV against a decision of the Radio Television Authority (RTA) to impose a fine of CYP 2,000 (EUR 3,400) on the channel for transmitting the advertisement in question. In December 2004 an anonymous viewer complained to the RTA that SIGMA TV advertised the services of a 'psychologist by intuition' claiming that she could solve a number of serious problems on a single phone call to a special rate services number. The RTA examined the case and decided that there was a violation of regulations B1 and D1 of the Code for Advertising, which are part of the Radio and TV Broadcasting Regulations (Normative Administrative Acts 10/2000). The regulations stipulate respectively that advertisements must be legal, honest, true, tasteful and must not contain any excessive or unfounded allegations or lead to any erroneous assumptions.

The broadcaster challenged the decision on the grounds that no sufficient investigation was made by the RTA, that it was based on the personal view of the officer that investigated the case and that the decision was erroneous and not properly justified.

The Court rejected the claims of the broadcaster, on the following grounds:

- The RTA noted that problems which the psychologist claimed to be in the position to solve on a single phone call problems which are serious and chronic and can only be dealt with by specialists within a long-term treatment. There is no such specialisation as 'psychologists by intuition', as claimed in the advertisement.
- The RTA provided evidence which was substantial and constituted a good basis to draw solid conclusions. The decision was not based on personal views; as the RTA conducted full investigation in conformity with the principles set by law.
- The facts examined by the RTA show that it studied and took into account all substantial elements and information before reaching a decision.
- The justification provided by the RTA is sufficient. It provides the criteria according to which the RTA exercised its discretionary powers.

For the above reasons, the Court dismissed the case. ■

Christophoros Christophorou
Media and elections analyst

● **Case 1327/2007, SIGMA Radio TV Public LTD v. Radio Television Authority, decided on 13 February 2009**

EL

CZ – Advertising Logo Sponsorship

A number of Czech television channels have recently broadcast several unusual commercial inserts. Immediately before the commercial separator was shown, the logo of a sponsor appeared, identified as the sponsor of the commercial separator.

The Broadcasting Council considered this to be a breach of the provisions of the Broadcasting Act on the separation of advertising and programme material. Advertising must be clearly identifiable and separated from other programme elements by optical means on television and acoustic means on radio. Sponsorship, on the other hand, is the contribution of a natural or legal person to the direct or indirect financing of a programme. However, since such a programme must have its own editorial value in the sense that it should deal with a particular theme, sponsorship of a commercial separator is prohibited.

The Broadcasting Council issued several fines in response to these violations, against which one of the broadcasters lodged a complaint. The broadcaster argued that the commercial separator was also a programme, since it corresponded with the definition contained in the Broadcasting Act, and could therefore also be sponsored. The Broadcasting Council disagreed, claiming that it could not be classified as a programme because of its short duration and the purpose and significance of the commercial separator.

The court rejected the complaint, concluding that the commercial separator was not a programme, but a means of distinguishing between advertising and programme content.

This verdict is open to appeal. ■

Jan Fučík
Ministry of Culture

● ***Rozsudek Městského soudu v Praze č.j. 8 Ca 234/2008 z 24.2.2009* – Prague Municipal Court ruling of 24 February 2009, case no. 8 Ca 234/2008, available at: http://merlin.obs.coe.int/redirect.php?id=11685**

CS

DE – Wiesbaden Administrative Court Submits Data Retention Questions to ECJ

Sebastian Schweda
Institute of European Media Law (EMR), Saarbrücken/Brussels

The *Verwaltungsgericht Wiesbaden* (Wiesbaden Administrative Court - VG) has submitted to the Court of Justice of the European Communities (ECJ) a reference for a preliminary ruling concerning, *inter alia*, the compatibility of the Data Retention Directive with fundamental rights.

The underlying case concerns the compatibility with EC data protection law of agricultural law provisions requiring information about the recipients of certain EC agricultural subsidies to be published annually online. The VG considers the rules to be a disproportionate intrusion on the European basic right to data protection. It also believes that the publication of data exclusively on the Internet, as required by the implementing Regulation (EC) No. 259/2008, contradicts the stricter rules on telecommunications surveillance. Citizens are obliged to allow their data to be stored in order to access the information they need to participate in public affairs. In the VG's opinion, data retention is unnecessary in a democratic society. It refers in this connection to the judgment in the Promusicae case, which expressed doubt over the storage of traffic data without specific reason.

In case the ECJ only confirms the validity of the implementing regulation and the Data Retention Directive is annulled, the VG has also asked the ECJ to examine the legality of the Directive.

Finally, if the ECJ decides that the Directive is valid, the VG would like to know whether the storage of dynamic IP addresses by the website on which the data concerning the plaintiffs was published is compatible with the Data Protection Directive. The VG considers dynamic IP addresses, as personal data, to be particularly worthy of protection. ■

• VG press release on the decision of 27 February 2009 (case no. 6 K 1045/08.WI), available at:
http://merlin.obs.coe.int/redirect.php?id=11689

DE

DE – "Sex and the City" Broadcast Broke Youth Protection Rules

Meike Ridinger
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The *Verwaltungsgericht Berlin* (Berlin Administrative Court - VG) has decided that the private television channel *ProSieben* broke youth protection legislation by broadcasting the episode "Three's a Crowd" of the series "Sex and the City" at 6p.m., and rejected the broadcaster's appeal against the objections raised by the *Medienanstalt Berlin-Brandenburg* (Berlin-Brandenburg Media Authority - MABB).

The *Kommission für Jugendmedienschutz* (Commission for the protection of young people in the media - KJM) considered the episode to be likely to harm the development of children under 12 within the meaning of the *Jugendmedienschutzstaatsvertrag* (Inter-State Agreement on the protection of young people in the media - JMStV) and ruled that, in future, it should only be broadcast after 8p.m. *ProSieben* argued that the *Freiwillige Selbstkontrolle der Filmwirtschaft* (the film industry's voluntary self-monitoring body - FSK) had granted an "over 12" certificate for this edited version of the series. The *Freiwillige Selbstkontrolle Fernsehen* (the television industry's voluntary self-monitoring body - FSF) had also granted applications for 42 episodes of the series to be shown during the daytime; the broadcaster claimed that this meant the whole series could be broadcast in the daytime schedule. It also argued that the episode concerned did not harm the psychosocial and psychosexual development of children, since it did not contain any visual portrayal of sexual themes and the words used were a common part of young people's vocabulary.

The VG disagreed. It held that the certificate issued by the FSK did not mean that this version of the episode could be broadcast in the early evening schedule, for which an "over 6" or "no age restriction" certificate would be required. Moreover, requests to the FSF to examine individual episodes did not signify that the whole series could be shown during the daytime. Incidentally, *ProSieben* had previously submitted two different edited versions of the episode in question to the FSF and been denied permission to show them before 8 p.m. The episode had been likely to harm the development of children in the sense of the JMStV. It was true that, when evaluating this question, the defendant had no leeway at all. Nevertheless, the KJM was an expert body whose decisions could only be appealed if they were implausible, inconsistent or based on inaccurate information. With this in mind, the plaintiff's objections were not sufficient to cast doubt on the KJM's evaluation. In particular, it had failed to take into account that, as far as the language used was concerned, it was not just 12-year olds, but much younger children who could be affected. ■

• Ruling of the *Verwaltungsgericht Berlin* (Berlin Administrative Court - VG), 28 January 2009 (case no. VG 27 A 61.07), available at:
http://merlin.obs.coe.int/redirect.php?id=11690

DE

DE – Hartplatzhelden e. V. Appeal Rejected

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The *Oberlandesgericht Stuttgart* (Stuttgart Regional Court of Appeal - OLG) has rejected an appeal by Hartplatzhelden e. V., thereby confirming the decision of the *Landgericht* (regional court), according to which the appellant's private video portal must not show footage of amateur football matches that fall within the responsibility of the Württemberg Football Association (WFV) (see IRIS 2008-7: 9).

As the organiser of the amateur matches concerned, the WFV was considered to be the sole owner of the relevant exploitation rights. Hartplatzhelden e. V. was deemed to have violated those rights by unfairly adopting the WFV's product, within the meaning of competition law.

Appeals against this decision were allowed because of its fundamental importance. ■

• Press release of the OLG Stuttgart on its decision in case no. 2 U 47/08, available at:
http://merlin.obs.coe.int/redirect.php?id=11687

DE

DE – Key Points Adopted for Combating Child Pornography

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The *Bundesfamilienministerium* (Federal Ministry of Family Affairs) is now using legislation as well as a voluntary agreement scheme for Internet Service Providers (ISPs) to combat child pornography on the Internet.

The *Bundeskabinett* (Federal Cabinet) has decided on the key points of a corresponding Act, which could be implemented by summer 2009. By then, ISPs are supposed to be technically capable of blocking child pornography sites. Countries such as Sweden, Finland, Norway, Denmark, Canada, Switzerland and Italy have already introduced such blocks. The aim is to create a legal basis obliging all German ISPs to make it more difficult to access Internet sites that contain or refer to child pornography in the sense of Article 184b of the *Strafgesetzbuch* (Criminal Code).

The document outlining the key points has been welcomed in some quarters, although critics fear the expansion of Internet censorship and consider that blocking Internet sites is ineffective. ■

• Key points for combating child pornography on the Internet, 25 March 2009, available at:
http://merlin.obs.coe.int/redirect.php?id=11686
DE

DE – Mediation Committee Agrees on *TKEntschNeuOG*

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The *Vermittlungsausschuss* (Mediation Committee - VA) of the *Bundestag* and *Bundesrat* (lower and upper houses of parliament respectively) has reached an agreement on the *Gesetz zur Neuordnung der Entschädigung von TK-Unternehmen für Dienste im Rahmen der Strafverfolgung* (Act on the reform of compensation for telecommunications companies providing assistance with criminal prosecutions - TKEntschNeuOG).

The *Bundesrat* had convened the VA (see IRIS 2009-2: 11) because it thought some of the fixed amounts laid down in the draft Act to compensate telecommunications companies for surveillance measures were too high. In its recommendation, the VA reached a compromise on the size of the payments. The payments will also be graded more closely in line with the duration of surveillance operations: the full monthly rate for a surveillance measure will not, as previously, be paid for every month that is started, but only when the operation lasts for more than two weeks. Furthermore, a more detailed differentiation between connection types will be carried out: for example, companies will receive more compensation for surveillance of a DSL or ISDN connection than an analogue one.

However, the general reduction of compensation for information about traffic data stored for ID purposes from EUR 30 to EUR 20 was rejected. ■

• Recommendation of the *Vermittlungsausschuss* (Mediation Committee) of the *Bundestag* and *Bundesrat*, 4 March 2009, available at:
http://merlin.obs.coe.int/redirect.php?id=11688
DE

ES – Films in Catalan

Laura Marcos & Enric Enrich
Enrich Advocats, Barcelona

The Catalonian Government is preparing a new Cinema Act which is expected to be approved before the end of this year.

One of the multiple questions that this new proposed act deals with is the one related to the promotion of the Catalan language, in the sense that half of the foreign movies shown in the movie theatres in Catalonia will now have to be dubbed into Catalan (a co-official language in Catalonia together with Spanish). And, in the case of foreign movies shown in their original versions, half of them must be subtitled in the Catalan language too.

According to Joan Manuel Treserras (Councillor of Culture and Communication Media of the Generalitat), this measure is justified as there is currently a great imbalance between Spanish and Catalan cinema in Catalonia and this would be the only way to guarantee equality between both languages.

This measure, if and when approved, will be introduced progressively. During the first year after the adoption of the new Cinema Law, movies dubbed and subtitled in Catalan must be at least a 30% of the total, finally reaching 100% during the third year.

The bill, which develops an issue already introduced in the Catalan Act of Linguistic Normalization of 1983, exempts from the measure all movies whose original version is already in Spanish or in Catalan.

The bill has caused great discussions within the industry, as majors, distributors and exhibitors are concerned about the increases in cost that the measure may entail. ■

FR – Acquittal of Advertisers on Peer-to-peer Sites Upheld

It will be recalled that the producers of the hit film "The Chorus" (*"Les choristes"*) brought a case against half a dozen major advertisers (Voyages-sncf.com, AOL France, Neuf Cegetel, Telecom Italia, etc) who were advertising on peer-to-peer sites alongside links giving access to the unlawful downloading of the film (see IRIS 2006-8: 14). The film's producers had brought them to court, rather than the actual peer-to-peer sites, the advertising

agencies or the Internet access providers (IAPs), on the grounds that the advertisers were promoting the unlawful availability of a cinematographic work in disregard of the rights of its creators and producers. Following on from the regional court in 2008, the court of appeal in Paris has in its turn rejected the case brought by the producers who are the victims of infringement of copyright. The court of first instance had confirmed that an offence had been committed. Thus "every Internet user who exchanges unlawful files on a network of the peer-to-peer type is guilty of infringement of copyright since the work is made available to the public in violation of the copyright and neighbouring rights of its producers". Similarly, "the criminal liability of the editors of peer-to-peer sites or dedicated sites is at issue inasmuch as they are organising and promoting the distribution of intellectual works without authorisation from the rightsholders". The court nevertheless noted that neither the liability of the Internet users nor that of the editors of the sites at issue was being invoked in the case. It therefore analysed the question of the criminal liability of the advertisers whose banners were published on the illegal downloading sites. Recalling that Article 121-7 of the Criminal Code referred to in the proceedings sanctions intentional complicity, the court set out to determine whether the advertisers in this case had put their advertising on the sites in question deliberately or otherwise. The latter strongly contested the accusations made against them by the parties claiming damages regarding any intention on their part to promote peer-to-peer sites. Upholding their line of argument, the court noted that the defendant advertisers were not in any way professional advertisers on the Internet, and indeed that they had had to go through advertising agencies which had in turn made use of sub-contractors. It was recalled that "a media agency that calls on a multi-media agency purchases 'a volume of space' on dozens or hundreds of sites constituting a package, although the advertiser never receives a list of the sites on which the advertising appears". Moreover, the court added, the hypothesis of "banner-jacking" could not be excluded in the present case, and it therefore discharged the defendants, since it was not established that they had knowingly had their banners published on the sites at issue. The producers are not giving up, however – they have appealed to the court of cassation. ■

Amélie Blocman
Légipresse

● Court of appeal of Paris, 13th chamber, section A, 25 March 2009; Api, Films Galatée et al. v. Neuf Cegetel et al.

FR

FR – Dailymotion's Liability Invoked under Common Law despite its Status as a Host

A new element has been added to the body of jurisprudence being amassed on the liability of video share sites – in the present case, Dailymotion. The producers and directors of three documentaries (*"Les enfants perdus de Tranquillity Bay"*, *"Une femme à abattre"*, and *"Les années de sang"*), realising that their works were again accessible on the site despite the formal notices that had been issued previously, and an initial withdrawal, brought proceedings against Dailymotion for infringement of copyright. As has now become common practice, Dailymotion claimed in its defence its status as host within the meaning of Article 6 of the Act of 21 June 2004 in favour of confidence in the digital economy (LCEN), which instituted a scheme of limited liability, waiving common law, in a limited number of cases (the liability of the technical service provider cannot be invoked unless it has actually had knowledge of the unlawful nature of the information being stored or if it has not taken prompt action to withdraw the information or prevent access to it as soon as it becomes aware of such information). The applicant rightsholders considered for their part that Dailymotion had not behaved as a host but as a "broadcaster of audiovisual content", proposing the downloading of the documentaries at issue as part of a scheme that was nothing short of a video-on-demand service that bore its brand name. They felt therefore that the rules of common law on infringement of copyright should apply to the company. The court noted that in reality Dailymotion's role was limited to the supply of technology for storing and viewing videos; these could only be put online on the initiative of the site's users, who retained total control. It could not therefore be assimilated to a video-on-demand service. Moreover, and contrary to the arguments put forward by the applicants, the commercialisation of advertising space could not be deemed to exclude the benefit of the provisions of the LCEN, which did not contain any provision that prohibited the host from making a profit from its site. Furthermore, the court held that the distinction the applicants had drawn between an online communication service for the public and hosting was artificial, as it was not the intended result of the legislation, "the second (hosting) being in fact, by virtue of the text, the technical means of achieving the first (online communication to the public)". As far as the court was concerned, and in accordance with the larger part of the jurisprudence, Dailymotion did indeed have the status of host. As such it could not then in the present case validly claim the benefit of the scheme of limited liability instituted by Article 6 of the LCEN. Having in fact been duly informed by notification of the unlawful nature of the content at issue, the platform had not demonstrated that it had "implemented all the necessary means of preventing further circulation". Thus, whereas the company had been prompt in withdrawing the disputed content that had been

reported to it by the applicant parties, complying with its obligations as a host, the documentaries at issue had nevertheless been made available again subsequently. "Having failed to carry out the diligences necessary for rendering it impossible to put online again the documentaries already notified as unlawful, the company Dailymotion could not claim the benefit of the scheme introduced by Article 6-I-2 of the LCEN and its civil liability is therefore invoked under common law on infringement of copyright, on the basis of Articles L. 335-3 and L. 335-4 of the Intellectual Property Code (CPI)". On the basis of both the number of times each documentary had been viewed and the infringement of the moral rights of the applicants because of the mediocre quality of the broadcasting of their films and the omission of their names as joint originators, the regional court ordered Dailymotion to pay them 80,000 euro in damages. ■

Amélie Blocman
Légipresse

● Regional court of Paris, 3rd chamber, 2nd section, 10 April 2009; Zadig Production et al. v. Dailymotion

FR

FR – Air-time for the French President in the Audiovisual Media

On 8 April 2009 the Conseil d'Etat delivered a noteworthy decision on the matter of the audiovisual media's treatment of air-time devoted to the French President in the light of the rules on political pluralism. The matter had been referred to the highest formation of the Conseil d'Etat by François Hollande, at that time the leader of the French Socialist Party, and Didier Mathus, a member of the French Parliament and a specialist in audiovisual matters; they called for the cancellation of a decision by the *Conseil Supérieur de l'Audiovisuel* (national audiovisual regulatory authority - CSA) which excluded the taking of presidential speeches into account in considering observance of political pluralism. According to Article 3 of the Act of 30 September 1986, one of the CSA's tasks is to lay down rules to ensure a balanced presentation of national political debate on radio and television. Thus in a ruling on 8 February 2000 it described as a "reference principle" the rule according to which "editors must observe a balance between the speaking time of members of the Government, that of members of the parliamentary majority, and that of members of the parliamentary minority, and ensure that they enjoy comparable programming arrangements". "Save where justified by current events, the speaking time of members of the parliamentary opposition may not be less than half the aggregate speaking time of members of the Government and the parliamentary majority." (This is referred to as the "three thirds rule".) Thus while speeches by the President and his collaborators are totted up by the CSA, they are not necessarily taken into account under the obligation of the "reference principle"; the applicant parties contested this, claiming that they should be treated in the same way as in calculating speaking time for the Government. Since the CSA refused to amend the rule, the parties concerned referred the matter to the Conseil d'Etat.

The Conseil d'Etat began by recalling that the CSA had a broad power of appreciation in laying down, under legal supervision, the rules for ensuring a balanced presentation of the national political debate in its entirety. It continued by stating that, in compliance with the constitutional organisation of powers, the French President did not speak in the name of a political party or grouping; his speaking time in the audiovisual media should therefore not be accounted as such. Nevertheless, because of his role, his speeches and those of his collaborators could not in principle and regardless of their content and context be regarded as being unrelated to the national political debate and, consequently, to the consideration of the balance to be sought between the currents of political opinion.

The Conseil d'Etat therefore cancelled on the grounds of a mistake of law the CSA's decision to refuse in principle to take presidential speeches into account, although it did not itself define the rules that should be laid down, as this was a task for the CSA.

The CSA took note of the decision, and on 22 April 2009 invited the radio and television companies to take Presidential speeches into account from 27 April 2009 onwards, "if their content and their context fall within the scope of national political debate". Thus reactions to Presidential speeches falling within the scope of national political debate will not be included in the air-time allowed to the Opposition on condition that they are broadcast within two days, except in special circumstances. This is a provisional arrangement, and will be reviewed after the European Parliament elections in June. The CSA will then lay down the final rules applicable to the speaking time of the President and his collaborators. ■

Amélie Blocman
Légipresse

● Conseil d'Etat, 5th sub-section of the disputes section, 8 April 2009, Messrs Hollande and Mathus; available at: http://merlin.obs.coe.int/redirect.php?id=11707

FR

GB – Position in EPG Challenged

JML, a home shopping television channel, contracted with Freesat (UK) Ltd to carry its programmes, JML and JML Cookshop services.

Freesat is owned jointly by the BBC and ITV. It is a platform which enables anyone owning a Freesat set-top box or a television with an inbuilt Freesat

digital tuner access to digital satellite television (including HD television, radio and interactive services). Freesat is a not-for-profit company. Its GBP 9,000,000 income derives from shareholders and charging providers to have a presence on the platform.

Providers want to appear high up on the first page of the relevant category list in the electronic programme guide (EPG). JML was allocated channels 809 and 810. This meant that on the home shopping category page it appeared in the 10th and 11th position.

In general, the regulation of EPGs is prescribed by sections 310 and 311 of the Communications Act (2003). Section 310 enjoins Ofcom "…to draw up, and from time to time to review and revise, a code giving guidance as to the practices to be followed in the provision of electronic programme guides."

Ofcom's Code of Practice on Electronic Programme Guides sets out the best practice: "This Code sets out the practices to be followed by EPG providers:

a. to give appropriate prominence for public service channels;
b. to provide the features and information needed to enable EPGs to be used by people with disabilities affecting their sight or hearing or both; and
c. to secure fair and effective competition."

JML argued in Court that the positioning it had been allocated was a breach of contract and that Freesat had failed to comply with both its own "Listing Policy" and the relevant Ofcom Code rules. It argued that Freesat had adopted a "haphazard, slipshod and highly subjective" method of allocating the channel positions. Freesats' MD counter-argued that Freesat tried to ensure that "…that the best known and most watched services were placed in a prominent position in the EPG list".

Mr Justice Blackburne rejected JML's claims. He was satisfied that the duty Ofcom's Code laid on Freesat, namely that it "publish and comply with an objectively justifiable method of allocating listings" was satisfied by Freesat's Listing Policy. ■

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● JML Direct Ltd v. Freesat(UK) Ltd, available at: http://merlin.obs.coe.int/redirect.php?id=11702

EN

GB – Regulator Imposes Record Fine on BBC for Offensive Material on the Russell Brand Show

Ofcom, the UK communications regulator, has imposed a record fine of GBP 150,000 on the BBC for the broadcast of offensive material, invasion of privacy and failures of compliance, in relation to the "Russell Brand Show" broadcast on the radio. The presenters of the pre-recorded show had made offensive phone calls to the answerphone of a distinguished actor, claiming that one presenter, Russell Brand, had had a sexual relationship with the actor's granddaughter; this was broadcast with further reference to the sexual relationship. After a newspaper campaign, Ofcom received almost 2,000 complaints and the BBC almost 43,000.

Ofcom found that the radio series had been turned into an independent production by a company co-owned by Russell Brand. The executive producer was a senior figure at the agency which represents the presenter; the BBC did not appoint its own executive producer or similar senior editorial figure to oversee the series and the producer who actually oversaw the programme was loaned by the BBC to work for the production company. Thus, although it was a high-risk programme, part of its risk management had been ceded to those working for the presenter; according to Ofcom, it would appear that the interests of the presenter had been given greater priority than those of the BBC's risk management systems.

There had been six flaws in the BBC compliance systems for the programme. There was a lack of clarity about the exact role of the senior figure from the agency representing the presenter acting as executive producer; the executive producer had not attended a BBC compliance course, despite this being a condition of the production contract, and compliance forms had not been signed off, despite this being another contractual obligation. There had been no proactive testing and insufficient monitoring of the BBC compliance systems after the series became an independent production; there was an unacceptable conflict of interest for the producer in charge of the series seconded on a part-time basis to the independent production company and a lack of clarity at the BBC about who had "hands-on" editorial oversight of the series. In addition, there had been further very serious problems of compliance in this case, including the failure to obtain the informed consent of the actor or his granddaughter and the failure of any BBC manager to listen to the programme before it was broadcast.

Ofcom found that the broadcast material breached rules 2.1 and 2.3 of its Broadcasting Code covering offensive material; the breach had been particularly serious as the material was "exceptionally offensive, humiliating and demeaning". There had also been serious breaches of rule 8.1 on privacy, where there was no justification for gross breaches. The BBC was fined GBP 70,000 for breaches of the rules on offence and GBP 80,000 for breach of the rule on privacy. ■

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● Ofcom, "Ofcom fines BBC £150,000 over Russell Brand show", 3 April 2009, available at: http://merlin.obs.coe.int/redirect.php?id=11692

EN

GB – Minister Announces Decision on Product Placement and Other Policies

The UK culture secretary has now announced, after a consultation exercise, how the Government intends to proceed on key broadcasting policies set out in the Audiovisual Media Services Directive.

The most controversial policy is in relation to product placement, currently banned in any UK-made programmes. Broadcasters argued that allowing product placement would provide a new source of revenue, but consumer and viewer groups claimed that it would blur the distinction between advertising and editorial content and undermine the trust that viewers have in the integrity of UK-made programming. The Government concluded that the evidence of economic benefit did not outweigh the detrimental effect of product placement on the quality and standards of British television and viewers' trust in it. Therefore, the existing ban will continue, although it will be reviewed in 2011/12. Product placement will continue to be allowed in programmes made for video-on-demand, in films and in programmes acquired from outside the UK.

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Secondly, Ofcom, the communications regulator, will be given powers to regulate UK video-on-demand services, so that it can then designate and delegate powers to an industry-led co-regulatory body to regulate programme content in these services. This will replace the existing self-regulatory body. Ofcom will be able to issue guidance on which services fall within the scope of those covered and will retain backstop powers to deal with serious or repeated breaches of the standards and to intervene in the event of systemic failure. Regulation of advertising on video-on-demand services will be delegated to the Advertising Standards Authority, as in the case of other advertising content.

Finally, the Government has decided that non-EU satellite television channels uplinked from the UK will be required to have a broadcasting licence issued by Ofcom. This will ensure that the standards set out in the Directive can be enforced by the regulator.

The Government will lay before Parliament later this year an Order under the European Communities Act 1972 to implement the new arrangements. The Government is considering separately the remaining issue of the use of short extracts from other broadcasters' exclusive coverage for news reports. ■

● Department for Culture, Media and Sport, "Preserving standards will be cornerstone of UK media services", Press Release 128/09, 11 March 2009, available at: http://merlin.obs.coe.int/redirect.php?id=11691

EN

IE – Broadcasting of Referendum Campaigns

In April 2009, the Joint *Oireachtas* (Parliament) Committee on the Constitution, issued a report on the referendum procedure prescribed by Articles 46 and 47 of the Irish Constitution. In particular, the Committee examined the current arrangements whereby information is conveyed to the public by the broadcast media during referendum campaigns. The current arrangements followed a Supreme Court decision in Coughlan v. the Broadcasting Complaints Commission in 2000 (see IRIS 2000-2: 7). As a result of that decision, broadcasters believed they were required to allocate equal airtime to the "yes" and "no" sides in a campaign and adopted a "stopwatch" system. The system became an issue in the referendum on the Lisbon Treaty in 2008 (see IRIS 2009-3: 13). The Committee accepted that the current situation is unreal and impractical. It formed the view that the Coughlan decision primarily concerned party political broadcasts. It recommended, therefore, that broadcasting legislation be amended to qualify the use of party political broadcasts during a referendum campaign. Broadcasters would be obliged to treat all sides of the argument fairly, but would be entitled to have regard to a range of factors, in the same way as they already do in current affairs programming. These would include the relative strengths and standing of the political parties, various interest groups and individual contributors. The rules, practices and principles that apply during general election campaigns should apply during referendum campaigns also, the Committee said. During the course of its deliberations, the Committee consulted widely with interested parties and commissioned a study of the rules that apply in each of the other EU Member States, which is appended to its report. ■

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● Joint Committee on the Constitution, Second Report: Articles 46 and 47 - Amendment of the Constitution and the Referendum (First Interim Report, 2 April 2009), available at: http://merlin.obs.coe.int/redirect.php?id=11699

● "New Broadcasting Legislation Needed to Ensure Media Coverage of Referenda Campaigns is Fairer and More Practical", 2 April, 2009, available at: http://merlin.obs.coe.int/redirect.php?id=11700

EN

MT – Public Consultation on the Regulation of Broadcasting Content on Certain Electronic Communications Networks

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The Broadcasting Authority (BA) and the Malta Communications Authority (MCA) have issued a joint consultation document on the making of a set of regulations entitled "Broadcast Distribution Services Regulations" and on amendments to the "Cable Systems (General) Regulations, 2001". The purpose of this public consultation exercise is to seek input from stakeholders on both sets of draft regulations. These legislative changes complement each other and aim to establish in clear terms the role of the Broadcasting Authority as the competent authority responsible for regulating content carried on an electronic communications network. Hence, the Broadcast Distribution Services Regulations will empower the BA to license and monitor programming content in so far as electronic communications networks are concerned, whereas the "Cable Systems (General) (Amendment) Regulations" will do away with most of the current provisions relating to content and broadcasting matters which are regulated by the MCA.

The "Cable Systems (General) Regulations" were made in 2001 to regulate the provision of cable networks and services at a time when the cable market was still not fully liberalised. Key elements of these Regulations, as originally phrased, included powers to licence content transmitted by cable network operators under the Broadcasting Act, content related provisions and must-carry obligations. In 2004, these Regulations were substantially amended in line with the requirements of the European Union's (then) new Electronic Communications Framework. However, the regulations could not then be repealed completely, as there were a number of provisions relating to content regulation and other regulatory matters relating to market analysis and regulatory remedies which were still applicable. The proposed Broadcast Regulations and the Cable Systems Amendment Regulations are intended to enable the Broadcasting Authority to license programming content where such content is carried over an electronic communications networks, whilst doing away with other provisions relating to regulatory matters which relate to former retail obligations. The totality of such regulations will serve to have one comprehensive broadcast content regime applicable to all players enforced by one public authority, namely the Broadcasting Authority.

In terms of the proposed "Broadcasting Distribution Services Regulations, 2009", electronic communications networks will have to apply to the BA for a programming content licence and BA will monitor such programming in so far as these licenses are concerned. The regulations are proposed to come into effect on 1 January 2010 together with the entry into force of articles 19 and 20 of Part III of the "Communications Laws (Amendment) Act, 2007", that is, the provision under which these regulations will be made. A saving provision is made in the "Cable Systems (General) (Amendment) Regulations, 2009" with regard to existing operators (Melita Cable plc and GO plc).

The "Cable Systems (General) (Amendment) Regulations, 2009" propose that all the other provisions, namely those relating to dominance and related remedies, quality of service and broadcasting (including broadcast licences and must-carry provisions), are repealed, since they are no longer in line with EC and other Maltese key legislation. A must-carry provision is still contained in article 40 of the Broadcasting Act. The surviving provision is in relation to the need for a must-carry requirement with respect to the Education Channel and the Weather and Information Channel. ■

• Consultation on the making of regulations entitled Broadcast Distribution Services Regulations and on amendments to the Cable Systems (General) Regulations, 2001, available at:
http://merlin.obs.coe.int/redirect.php?id=11693

MT

NO – Government Responds to Strasbourg Ruling on Political Advertising on TV

The Norwegian ban on political advertising on TV will be upheld. This was made clear by the Norwegian Government in an announcement of 11 March 2009, where the Government also stated that it did not intend to appeal the European Court of Human Right's (ECHR) judgment in the case of TV Vest AS and Rogaland Pensjonistparti v. Norway (see IRIS 2009-3: 2) to the Court's Grand Chamber. Instead, the Government proposes changes to the remit of the Norsk rikskringkasting AS (Norwegian public service broadcaster – NRK) that should allow access for small political parties to the TV media.

In its ruling, the ECHR found that a fine imposed on the local station TV Vest by the *Statens medieforvaltning* (the Mass Media Authority) in 2003 for transmitting ads for a political party in an election period constituted a violation of Article 10 of the European Convention on Human Rights. The Government has taken the position that the judgment only addresses the scope of the prohibition as applied to small political parties that are not normally included in the media's editorial coverage of an election campaign. Consequently, the Government has argued that the total ban on political advertising may be upheld, as long as appropriate measures are taken to secure access for small parties to the TV media.

The Government wants to achieve this by impos-

ing stricter obligations on the NRK when it comes to giving small political parties editorial coverage. In Report No. 18 (2008-2009) to the *Storting* (Norwegian Parliament), the Government proposes changes to the NRK-plakat (the NRK's Statement of Commitments), which sets out the overall principles of the NRK's programme activities and its obligations as a public service broadcaster. The first pillar of the statement is entitled "Supporting and strengthening democracy". Point (1)(b) states the following: "The NRK should promote public debate and play its part in ensuring that the entire population receives sufficient information to enable it to actively participate in democratic processes". In its effort to give small political parties access, the Government now proposes the following addition to this wording: "The NRK shall provide a broad and balanced coverage of political elections. All parties and electoral lists over a certain size shall be covered in the normal manner by the editorial election coverage".

However, in its report, the Government stressed that not all parties and electoral lists will be guaranteed editorial coverage and that the amendment does not entail a requirement of equal treatment. It is made clear that, as for all other public service requirements, it is for the Director General, as the NRK's editor, to secure compliance with the remit. In Norway, it is the task of the *Medietilsynet* (Media Authority) to monitor whether the public service broadcasters fulfil their obligations, but the Authority may not impose sanctions on the NRK, as opposed to the commercial public service broadcasters, for violating its obligations.

Accordingly, the Government has not opted for regulating so-called party political broadcasts, commonly found in many other European States, which give political parties free airtime to present their programmes, sometimes in the format of short advertising spots. This option is however mentioned in the report as a possible solution that may be introduced later, if considered necessary. It is expected that the Parliament will adopt the proposed amendment to the NRK-plakat later this spring.

The Government's response to the judgment has caused a heated public debate in Norway. Media law experts and in particular media representatives have argued that the TV Vest-ruling makes it clear that an absolute prohibition on political advertising, which is what section 3-1 of the Norwegian Broadcasting Act calls for, is a violation of Article 10. The critics argue that, instead of upholding the total ban, the rules must be relaxed. Alternatively, new regulations should be passed, allowing for some restrictions on political advertising on TV. The proposal to amend the NRK-plakat has been criticised as being of little value and has also been characterised as an unacceptable interference with the NRK's editorial independence. Several local TV stations in Norway have, during the last month, defied the Government and transmitted advertisements for political parties, both small and large, that clearly do fall within the scope of the ban. The Media Authority has stated that it will have to conduct an independent evaluation of whether the transmission of these advertisements shall be sanctioned or not. ■

Ingvil Conradi Andersen
Norwegian Media Authority

- ***Fortsatt forbud mot politisk TV-reklame i Norge*** **(Announcement from the Ministry of Culture and Church Affairs), available at: http://merlin.obs.coe.int/redirect.php?id=11694**
- ***St. meld. Nr. 18 (2008-2009)*** **(Report No. 18 (2008-2009), available at: http://merlin.obs.coe.int/redirect.php?id=11695**

NO

RO – ANCOM instead of ANC

Under the *Ordonanţa de urgenţă 22/2009 privind înfiinţarea Autorităţii Naţionale pentru Administrare şi Reglementare în Comunicaţii, ANCOM* (Emergency Decree No. 22/2009 on the establishment of the national administrative and regulatory authority for communication – ANCOM), which was adopted by the Government on 11 March 2009, the renamed regulatory body for communications, previously known as the *Autoritatea Naţională pentru Comunicaţii* (ANC) was placed under the control of the Romanian Parliament.

It is hoped that this decision, which entered into force on 19 March 2009 when it was published in the Official Gazette no. 174, will bring an end to the infringement proceedings against Romania launched by the European Commission on 29 January 2009 under Art. 226 of the EC Treaty (see IRIS 2009-4: 17).

Art. 1 (1) of the Emergency Decree makes provision for the creation of the ANCOM, "an autonomous public authority with legal personality under parliamentary control", which is to be exclusively self-financing. The ANCOM is the result of the reorganisation of the ANC, which has been abolished. The ANCOM is responsible for "implementing national policy in the field of electronic and audiovisual communication and postal services, including market and technical regulation in these areas" (Art. 2 (1)). In order to fulfil its functions, the ANCOM works with the *Consiliul Concurenţei* (competition authority) and the *Autoritatea Naţională pentru Protecţia Consumatorilor* (consumer protection authority). This cooperation includes the exchange of all the information necessary to comply with the relevant laws (Art. 4 (1)). The ANCOM, unlike the ANC, has no authority to regulate and monitor the IT sector. All responsibility in this area has been assigned to the *Ministerul Comunicaţiilor şi Societăţii Informaţionale* (Ministry for Communication and Information Society).

The ANCOM will be led by a chairman and two vice-chairmen, who will be appointed by the Romanian President on the Government's recommendation

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for a six-year term, renewable once for a further six years (Art. 11 (1) and (5)).

Within 60 days of the Emergency Decree's entry into force, the ANCOM president will determine the rules of procedure and structure of the new authority.

On 2 April 2009, Presidential Decree No. 509 was published in the Official Gazette, announcing the appointment of Marius Cătălin Marinescu as ANCOM president. ■

● ***Ordonanţa de urgenţă nr. 22 din 2009 privind înfiinţarea Autorităţii Naţionale pentru Administrare şi Reglementare în Comunicaţii*** **(Emergency Decree No. 22/2009 on the establishment of the national administrative and regulatory authority for communication),** ***Monitorul Oficial al României nr. 174 din 19/03/2009***

RO

SE – Implementation of the Enforcement Directive in Sweden

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Finally the Enforcement Directive 2004/48/EC has been implemented in Sweden. The introduction of amendments to inter alia the Copyright Act on the 1 April 2009 has been highly debated by the Swedish public, while the Commission has complained on the late implementation.

The implementation has been commonly named the "IPRED law", when in fact it introduces several amendments and changes to inter alia the Copyright Act. Rightsholders have demanded the implementation in order to enable their protection against illegal distribution, criticising the problems with attempts to hinder illegitimate file sharing in Sweden. The lack of enforcement instruments in Swedish civil law has forced some rightsholders to pursue the famous Pirate Bay case through the public prosecutor. The decision of the Stockholm District Court on the case was issued on 17 April 2009.

The implementation of the Enforcement Directive has introduced the possibility of hunting down information on infringers, such as their IP addresses. The balance between rightsholder interests and the integrity of the public has however necessitated that the order claiming IP addresses from an Internet Service Provider (ISP) be issued by a competent court. ■

● ***Lag om ändring i lagen (1960:729) om upphovsrätt till litterära och konstnärliga verk*** **(Law amending the Act (1960:729) on copyright to literary and artistic works), Swedish Official Journal (SFS 2009:109), available at: http://merlind.obs.coe.int/redirect.php?id=11714**

SV

SI – Amended Code of Advertising Practice and the Protection of Minors

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The amended self-regulation document of advertisers passed the *Slovenska oglaševalska zbornica* (Slovenian Advertising Chamber – SOZ) on 19 March 2009.

The Article titled "Children and Minors" has been transposed to the section "Special Rules" and some substantial changes have been made; the provision has been expanded in accordance with the new media and information and communication technology related risks, and the age limit was lowered.

In the first two paragraphs of Article 18 of the Code it is claimed that it is foremost the responsibility of parents or guardians to protect children against potentially harmful contents or related practices, and that minors under the age of 16 are considered by this provision.

The fourth paragraph provides that advertising should not contain any "scenes of physical or psychological violence and other contents which might impair the integrity of the development of children and minors".

Under paragraph five it is prohibited to obtain children's personal information and those of their relatives by advertising.

The new code of advertisers will come into force on 1 October 2009. Its function as an autonomous advertisers' Regulation is sustained. The only sanction measure will still be the concealing of the illegitimate advertisement or promoting practice. All decisions related to the code are passed by the *Oglaševalsko razsodišče* (Advertising Arbitration Court) and they cannot be doubted or denied by any other institution.

The Slovenian Code of Advertising Practice is the referential document in the Slovenian jurisdiction. In the introduction it is stated that the legitimacy of the Code should not be questioned in principle but if there are stipulations which appear to be ambiguous their congruity with the Slovenian law could be surveyed.

When the Code was published by the Slovenian Advertising Chamber the expert analysis was done by the Ljubljana Graduate School of Humanities in the context of the research project "Slovenia: Towards the complex protection of minors in the field of audio-visual services and products", which is supported by the Embassy of the Netherlands in Ljubljana. The stipulation included in the provision on children and minors according to which only persons under the age of 16 are considered is not deemed right. It opposes the *Kazenski zakonik KZ-1* (Slovenian Penal Code) which in Article 176 criminalises the abuse of a minor (under eighteen) in the production of porn or other sexual contents (cf. para 2) and the production and dissemination of porn or other sexual material, which involves minors or their realistic images (cf. para 3). It is argued that these illegal activities could be involved in advertising as the production and dissemination of porno chic advertisements for commercial sexuality (telephone hot lines and contents on mobile portals) often allude to under-aged commercial sexual services. ■

● ***Novi Slovenski oglaševalski kodeks*** **(The New Slovenian Code of Advertising Practice), available at: http://merlin.obs.coe.int/redirect.php?id=11681**

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OF THE EUROPEAN AUDIOVISUAL OBSERVATORY

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