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INTERNATIONAL

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European Court of Human Rights: Case of Féret v. Belgium

In an interesting but highly controversial judgment, the European Court focused on the limits of freedom of expression in a case of incitement to hatred and discrimination ("hate speech"). The Court held by four votes to three that there had been no violation of Article 10 of the European Convention of Human Rights in respect of the conviction of the chairman of the Belgian political party "Front National", Mr. Daniel Féret. Mr. Féret was convicted by a Belgian criminal court for publicly inciting to racism, hatred and discrimination, following complaints concerning leaflets distributed by the Front National during election campaigns.

Between July 1999 and October 2001, the distribution of leaflets and posters by the Front National led to complaints by individuals and associations for incitement to hatred, discrimination and violence, filed under the law of 30 July 1981, which penalised certain acts and expressions inspired by racism or xenophobia. Mr. Féret was the editor in chief of the party's publications and was a member of the Belgian House of Representatives at the time. His parliamentary immunity however was waived at the request of the Public Prosecutor and in November 2002 criminal proceedings were brought against Féret as author and editor-in-chief of the offending leaflets, which were also distributed on the Internet on the website of Féret and Front National.

In 2006, the Brussels Court of Appeal found that the offending conduct on the part of Mr. Féret had not fallen within his parliamentary activity and that the leaflets contained passages that represented a clear and deliberate incitement to discrimination, segregation or hatred, for reasons of race, colour or national or ethnic origin. The court sentenced

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Mr. Féret to 250 hours of community service related to the integration of immigrants, commutable to a 10-month prison sentence. It declared him ineligible to stand for parliament for ten years and ordered him to pay EUR 1 to each of the civil parties.

Relying on Article 10 of the European Convention on Human Rights, Féret applied to the European Court of Human Rights alleging that the conviction for the content of his political party's leaflets represented an excessive restriction on his right to freedom of expression. The European Court however disagreed with this assumption, as it considered that the sanction by the Belgian authorities was prescribed by law sufficiently precisely and was necessary in a democratic society for the protection of public order and for the protection of the reputation and the rights of others, thereby meeting the requirements of Article 10 § 2 of the Convention. The European Court observed that the leaflets presented immigrant communities as criminally-minded and keen to exploit the benefits they derived from living in Belgium and that they also sought to make fun of the immigrants concerned, with the inevitable risk of arousing, particularly among less knowledgeable members of the public, feelings of distrust, rejection or even hatred towards foreigners. Although the Court recognised that freedom of expression is especially important for elected representatives of the people, it reiterated that it was crucial for politicians, when expressing themselves in public, to avoid comments that might foster intolerance. The impact of racist and xenophobic discourse was magnified by the electoral context, in which arguments naturally become more forceful. To recommend solutions to immigration-related problems by advocating racial discrimination was likely to cause social tension and undermine trust in democratic institutions. In the present case there had been a compelling social need to protect the rights of the immigrant community, as the Belgian courts had done. With regard to the penalty imposed on Mr. Féret, the European Court noted that the Belgian authorities had preferred a 10-year period of ineligibility to stand for parliament rather than a penal sanction, in accordance with the Court's principle of restraint in criminal proceedings. The Court thus found that there had been no violation of Article 10 of the Convention. The Court furthermore found that Article 17 of the Convention (abuse clause) was not applicable in this case. Three dissenting judges disagreed with the findings of the Court on the non-violation of Article 10, arguing that the leaflets were in essence part of a sharp political debate during election time. The dissenting judges expressed the opinion that the leaflets did not incite to violence nor to any concrete discriminatory act and that criminal convictions in the domain of freedom of political debate and hate speech should only be considered as necessary in a democratic society in cases of direct incitement to violence or discriminatory acts. They argued that the reference to a potential impact of the leaflets in terms of incitement to discrimination or hatred does not sufficiently justify an interference with freedom of expression. The dissenting judges also emphasised the disproportionate character of the sanction of 250 hours of community service or a 10-month suspended prison sentence, together with the Belgian Court's decision declaring Mr. Féret's ineligibility to stand for parliament for a period of ten years. The majority of the European Court however could not be persuaded by the dissenting judges' arguments: the four judges of the majority were of the opinion that the Belgian authorities acted within the scope of the justified limitations restricting freedom of political expression, as the litigious leaflets contained, in the eyes if the Court, incitement to hatred and discrimination based on nationality or ethnic origin. ■

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● Judgment by the European Court of Human Rights (Second Section), case of Féret v. Belgium, Application no. 15615/07 of 16 July 2009, available at: http://merlin.obs.coe.int/redirect.php?id=9237

FR

Conference of Ministers Responsible for Media and New Communication Services

The first Council of Europe Conference of Ministers responsible for Media and New Communication Services, entitled "A new notion of media?", was held on 28-29 May 2009 in Reykjavik, Iceland. The last comparable interministerial conference, the 7th European Ministerial Conference on Mass Media Policy, was held in Kyiv, Ukraine, in 2005 (see IRIS 2005-7: 2).

A number of texts were adopted at the Reykjavik Conference:
- Political declaration;
- Resolution & Action Plan – "Towards a new notion of media";
- Resolution – "Internet governance and critical Internet resources";
- Resolution – "Developments in anti-terrorism legislation in Council of Europe Member States and their impact on freedom of expression and information".

The crucial background paper for the conference, "A new notion of media? Media and media-like content and activities on new communication services", by Dr. Karol Jakubowicz, maps out and analyses relevant terrain in a comprehensive fashion.

The Political Declaration adopted at the Conference reaffirms many of the principles relating to free-

dom of expression and the media that define relevant Council of Europe standards. It also recognises the changing nature of the media and of the manner in which content is generated and disseminated by traditional and novel forms of communications technologies.

The Resolution and Action Plan, both entitled "Towards a new notion of media", pick up on these themes in much greater detail. The former recalls that the fundamental objectives of the media are: "to provide news, information or access to information; to set the public agenda; to animate public debate or shape public opinion; to contribute to development or to promote specific values; to entertain; or to generate an income or, most frequently, a combination of the above". It notes that "the content itself is evolving due to the way in which information is gathered and content is created, disseminated or distributed, sought, selected and received". It attributes this to "technical reasons, related to the communication platforms used, and to the presentation of content, which offers a perception of enhanced choice and interaction", as well as new business models. All of this pleads for a thorough re-examination of conventional thinking about the media, their role and their relationship to fundamental human rights.

As such, the Resolution explores the suitability of different regulatory techniques (e.g., self- and co-regulation) and tools (e.g., media literacy) for the fulfillment of relevant objectives in an evolving media environment. It addresses the need to uphold respect for fundamental rights and values such as freedom of expression and information, pluralism and diversity, public service ethos, human dignity, privacy, participatory potential, and the rights and best interests of children.

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The Resolution, "Internet governance and critical Internet resources", explains that the Internet "relies on a variety of resources which are indispensable for its functioning and which, because of their very nature, can at any one time have a considerable impact on the ability of large numbers of users to access or fully benefit from the Internet". In this connection, the signatory Ministers, inter alia:

- Call on all State and non-State actors to explore ways, building upon current arrangements, to ensure that critical Internet resources are managed in the public interest and as a public asset, ensuring the delivery of public service value, in full respect for international law, including human rights law;
- Call also on these actors to ensure full compatibility and interoperability of TCP/IP so as to guarantee the ongoing universal nature and integrity of the Internet;
- Invite the Council of Europe to explore the feasibility of elaborating an instrument designed to preserve or reinforce the protection of the cross-border flow of Internet traffic [...]

The Resolution on anti-terrorism and freedom of expression and information explores a relationship that has tended to be increasingly frictional in recent times and reiterates that freedom of expression and information are of central importance for combating terrorism. The Ministers (notwithstanding one State Delegation's reservation to the second paragraph cited below) stated their resolve to:

- pursue and redouble co-operation and efforts to protect effectively, in law and in practice, the right to freedom of expression and information while vigorously combating terrorism;
- review our national legislation and/or practice on a regular basis to ensure that any impact of anti-terrorism measures on the right to freedom of expression and information is consistent with Council of Europe standards, with a particular emphasis on the case law of the European Court of Human Rights. ■

● 1st Council of Europe Conference of Ministers responsible for Media and New Communication Services, 'A new notion of media?', 28-29 May 2009, Reykjavik, Iceland, Adopted Texts, Doc. No. MCM(2009)011, available at: http://merlin.obs.coe.int/redirect.php?id=11822

● Karol Jakubowicz, A new notion of media? Media and media-like content and activities on new communication services, available at: http://merlin.obs.coe.int/redirect.php?id=11823

EN-FR

Parliamentary Assembly: The Funding of Public Service Broadcasting

On 25 June 2009, the Parliamentary Assembly of the Council of Europe adopted Recommendation 1878 (2009), entitled "The Funding of Public Service Broadcasting".

In a time when public acceptance of the funding of public service broadcasting has decreased, the Assembly once again emphasises the important role of public service broadcasting. The Assembly states that public service broadcasting remains an essential element for governments in meeting the needs of individuals and society as a whole with regard to information, education and culture. Public service broadcasters ensure media pluralism and provide the public with unbiased information, which should be accessible and affordable for the public at large. The important public value of public service broadcasting should not be abandoned.

According to the Assembly, the structure of public service broadcasting should be adapted to national or regional circumstances. Therefore it should be up to national legislators to decide on a specific mission, structure and funding of public service broadcasters. The Assembly is worried about

the trend within the European Union (EU) to restrict the powers of national legislators concerning public service broadcasting as a result of Internal Market regulations. The Assembly states that EU law should not interfere with the power of Member States to adapt public service broadcasting to specific national needs. The Assembly refers to the Unesco Convention on the Protection and Promotion of the Diversity of Cultural Expressions of 2005, which specifically stated that Member States may adopt measures aimed at providing public financial assistance and enhancing diversity of the media including through public service broadcasting. The European Union is a signatory to the convention.

The Assembly calls upon Member States to ensure that public service broadcasters have a clear mission and the long-term funding to fulfill this mission. Member States should also guarantee the editorial and managerial independence of public service broadcasters. They should be able to operate independently of national governments. On the other hand, the funding of public service broadcasting is in the public interest; therefore public service broadcasters must meet certain quality standards. National legislators must ensure the accountability of public service broadcasters by establishing public accountability mechanisms for quality control.

While the Assembly emphasises the importance of public service broadcasting, it acknowledges that the environment in which public broadcasters exist has changed. Public service broadcasters have to compete with commercial channels, on-demand media services and the constantly growing supply of audiovisual content on the internet. The Assembly recommends that public service broadcasters should also make use of new technologies and offer new additional services like on-demand media services.

This could increase their accessibility, as a result of which even more people can be reached, especially young people.

In conclusion, Member States should adapt the funding of public service broadcasting to the new audiovisual media environment. But at the same time, they should still safeguard the key principles of public service broadcasting, such as diversity, independence and impartiality. ■

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● **The Funding of Public Service Broadcasting, Recommendation 1878 (2009), Parliamentary Assembly of the Council of Europe, 25 June 2009, available at: http://merlin.obs.coe.int/redirect.php?id=11798**

EN-FR

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

On 26 May 2009, the European Commission against Racism and Intolerance (ECRI) made public its latest reports on Belgium, Germany and Slovakia, 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 2009-5: 4, IRIS 2008-4: 6, IRIS 2006-6: 4 and IRIS 2005-7: 3).

In respect of Belgium, ECRI "strongly recommends" that the State authorities "pursue and step up their efforts to combat the presence of racist expressions on the Internet" (para. 100), including through international cooperation efforts to eliminate "legal loopholes" which allow racist material to be disseminated online. The relevance of ECRI General Policy Recommendation (GPR) No. 6 on combating the dissemination of racist, xenophobic and antisemitic material via the Internet is recalled in this regard. ECRI also encourages the Belgian authorities "to continue their efforts to raise awareness among the media, without encroaching upon their editorial independence, to the need to prevent not only their own coverage but also readers' discussion forums hosted on their websites from contributing to the creation of a climate of hostility and intolerance towards members of minority groups" (para. 101). It is further recommended that the Belgian authorities "engage the media and members of the relevant civil society organisations in a debate about the best means of achieving this" (para. 101).

In respect of Germany, ECRI recommends that the State authorities "intensify their efforts to counter racist, xenophobic and antisemitic activities on the Internet", again recalling the relevance of ECRI GPR No. 6 in this connection (para. 74). It encourages the German authorities "to raise awareness among the media, without encroaching on their editorial independence, the need to ensure that reporting does not perpetuate racist prejudice and stereotypes and also the need to play a proactive role in countering such prejudice and stereotypes" (para. 75). Again, it recommends engagement with the media and civil society organisations with a view to achieving this aim (para. 75).

Whereas the report on Slovakia does not contain a section dealing specifically with the media and the Internet, some recommendations made elsewhere in the report are of relevance for actors in both sectors, e.g. a recommendation about awareness-raising designed to inform public discourse and thinking (para. 95). ■

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● **ECRI Reports on Belgium, Germany and Slovakia (fourth monitoring cycle), all adopted on 19 December 2008 and published on 26 May 2009; available at: http://merlin.obs.coe.int/redirect.php?id=11820**

EN-FR

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European Commission: New Communication on State Aid Directed at Public Service Broadcasters

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After a three-stage public consultation procedure spanning a period of nine months (see IRIS 2009-1: 6 and IRIS 2009-6: 4), the Commission adopted, on 2 June 2009, a modernised Broadcasting Communication. The Communication is intended to clarify the principles set out in the Amsterdam Protocol on the System of Public Broadcasting in Member States and is to replace the initial 2001 Communication on the Application of State Aid Rules to Public Service Broadcasting. The up-date of the Broadcasting Communication forms part of the EU's State Aid Action Plan and was necessary in view of the extensive case practice which, over the past eight years, has further clarified the application of the rules it contains, as well as significant changes in the audiovisual market environment.

The main changes incorporated in the new Communication centre around the following:

- Guarantees concerning the avoidance of the disproportionate effects of State aid, such as overcompensation and cross-subsidisation;
- Effective supervision of the fulfillment of public service obligations;
- The diversification of public service broadcasting. The Communication makes clear that public service broadcasters may use public funding to launch significant new audiovisual services, provided ex ante control exists ensuring that the material requirements of the Amsterdam Protocol are met;
- The clarification that the existence of a pay element in an audiovisual service will not necessarily exclude it from the public service remit;
- Increased financial flexibility for public service broadcasters. This element is connected to the aforementioned provision of pay services, given that public service broadcasters are increasingly turning to new sources of income, such as services against payment or online advertising.

The new Broadcasting Communication will be published in the Official Journal of the European Union and will come into effect as of the date of that publication. ■

● Communication from the Commission on the Application of State Aid Rules to Public Service Broadcasting, 2 June 2009, available at: http://merlin.obs.coe.int/redirect.php?id=11817

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

NATIONAL

AT – New Funds for Private Broadcasting and Commercial Communication Self-Monitoring

The latest amendment to the *KommAustria-Gesetz* (*KommAustria* Act - KOG) resulted in the creation of three funds, to be managed by the broadcasting regulators *Rundfunk und Telekom Regulierungs-GmbH* (RTR-GmbH) and *KommAustria*.

The *Fonds zur Förderung des privaten Rundfunks* (fund for the promotion of private broadcasting) is available to Austrian private commercial broadcasters and profit-oriented broadcasters that do not fall under Austrian jurisdiction but broadcast specifically to Austrian audiences. It will offer funding of EUR 5,000,000 per year. According to the Act, the money is to be used "to support the Austrian dual broadcasting system and the diversity of private, including local and regional, channels within the Austrian media landscape, and to foster the provision of a varied, high-quality range of programmes".

The *Fonds zur Förderung des nichtkommerziellen Rundfunks* (fund for the promotion of non-commercial broadcasting) was set up "to support non-commercial broadcasting within the Austrian media landscape and to foster the provision of a varied, high-quality range of programmes, which in particular should help to promote Austrian culture, Austrian and European identity, as well as providing information and education to the population". It will offer funding of EUR 1,000,000 per year. The fund can be used to support non-commercial Austrian radio and private television broadcasters as well as non-commercial broadcasters that do not fall under Austrian jurisdiction but broadcast specifically to Austrian audiences. Applicants for funding must not broadcast advertising and must guarantee open access to the public to produce programmes for broadcast on their channels.

In addition, the *Fonds zur Förderung der Selbstkontrolle bei der kommerziellen Kommunikation* (fund for the promotion of self-monitoring of commercial communication) was created to finance self-regulatory bodies for commercial communication in the media. It receives funding of EUR 50,000 per year, which can be claimed by self-regulatory bodies with a broad representation among the relevant professional groups and a sufficient level of transparency in terms of the bases for their decisions, their procedures and the implementation of decisions.

All three funds are financed from the revenue generated by the broadcasting licence fee, which is

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levied on the use of reception devices together with the programme fee that is used to fund *Österreichische Rundfunk* (Austrian broadcasting corporation - ORF). To allow for the creation of the new funds, the amount set aside for the *Digitalisierungsfonds* (digitisation fund) was reduced from EUR 6,750,000 to EUR 500,000 per year. The Act was made retrospective to 1 January 2009. ■

● ***Budgetbegleitgesetz 2009*** **(2009 Budget Act) (NR: GP XXIV RV 113 and Zu 113 AB 198 p. 21. BR: AB 8112 p. 771.), available at: http://merlin.obs.coe.int/redirect.php?id=11783**

DE

BE – Council of State Confirms Conviction of Public Broadcaster for Discrimination of Political Party

On 26 June 2007, the *Vlaamse Regulator voor de Media* (Flemish Regulator for the Media) issued a decision admonishing the Flemish public broadcasting organisation (VRT) for breach of its obligation of impartiality and non-discrimination (former Article 111bis of the Media Decree). Prior to the federal elections of 10 June 2007, the VRT had organised two television debates during which three top politicians (Leterme, Vande Lanotte and Verhofstadt), who all held first place on the list of representatives of their respective political parties in the Senate, were invited. The fourth politician in this position, Vanhecke, who at the time was president of the extreme right political party Vlaams Belang, was not invited. The VRT justified this editorial choice by stating that it aimed to establish a debate between politicians who had been designated in other media as possible candidates for the office of prime minister. Given the so-called *cordon sanitaire*, an agreement between all political parties not to cooperate in any way with the Vlaams Belang, it was practically impossible for this party to take part in the formation of the government. Hence, delivering the next prime minister was all the more out of the question. The Flemish Regulator firmly held that in the federal State of Belgium only the members of the parliament, thus not the prime minister, are directly elected. By organising two television debates exclusively between politicians that were designated as candidate prime ministers by other media, thereby giving the impression that the purpose of the elections was electing a prime minister rather than the members of the parliament, the VRT created a distinction between the aforementioned politicians that was not objective and not justified in a reasonable way, leading to a breach of its obligation of impartiality and non-discrimination. In reaction to the imposed admonition, the VRT lodged a complaint with the *Raad van State* (Council of State) with a view to nullifying this decision. This move however was to no effect.

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Before the Council of State, most of the arguments developed by the VRT were related to the interpretation of the former Article 111bis of the Media Decree (now Article 39). The VRT stated that its obligation of impartiality and non-discrimination should be judged in view of its programme offer in general (collective objectivity) and not on a programme by programme basis (individual objectivity). The Vlaams Belang had been given a chance to take part in various other programmes, hence, from an overall point of view, this party could hardly hold to be discriminated against. Although the Council of State approved of this way of reasoning, it also recognised the particular importance of the two debates in question, which functioned as the absolute climax of the reporting on the elections. Both debates were, given the specificity of the content, the selected participators and the time at which they were held, to be considered as so different in comparison to other information programmes concerning the elections that the Flemish Regulator legitimately could judge the VRT's objectivity in disregard of any other information programmes. The VRT further held that the selection criterion "designated by other media as candidate prime ministers" actually is objective, since the preferences of the VRT editorial room had not been taken into account. The Council of State replied that this consideration takes nothing away from the fact that this choice could breach the obligation of political and ideological impartiality. This vision is of particular value, given that these "other media" consisted, in essence, of the print media, which are not subjected to Article 111bis of the Media Decree and can therefore express partisan political and ideological preferences. Finally, the VRT invoked a violation of Article 10 ECHR. It stated that the argumentation of the Flemish Regulator leads to a prohibition on a specific debate format, namely a debate between persons who are generally designated as the most important candidates to lead the next government. The Regulator failed to demonstrate that such prohibition is necessary in a democratic society, as is required by Article 10 § 2 ECHR. Moreover, the VRT expressed its concern about an additional chilling effect, given the vagueness of the Regulator's decision. The Council of State countered this argument by saying that the Regulator in no way imposed a prohibition on organising a public debate about the future formation of a government. The VRT, as a public service, cannot invoke the right to freedom of expression to disregard the obligation of impartiality and non-discrimination formulated in Article 111bis of the Decree. Compliance with this obligation can be deemed necessary in a democratic society in order to protect the rights of others and can therefore legitimately be required by the Flemish legislator. ■

● **Frank Vanhecke v NV VRT, 26 June 2007 (No 2007/032), available at: http://merlin.obs.coe.int/redirect.php?id=11832**

● **Council of State, 25 June 2009 (No 194.650), available at: http://merlin.obs.coe.int/redirect.php?id=11797**

NL

BG – Decision of the Constitutional Court on Digital Broadcasting

On 4 June 2009 the Bulgarian Constitutional Court decided on a case regarding the constitutionality of some provisions of the Electronic Communications Act (ECA) and the Radio and Television Act. The application to the Constitutional Court was submitted by 51 members of the National Assembly. The application contains arguments for declaring Article 47a, Article 48, paras. 3, 4 and 5 of the ECA (published in the State Gazette, issue 17 of 2009); Paragraphs 5, 5a, 5b, 5c, 5d of the Final and Transitional Provisions of the ECA and Article 116i of the Radio and Television Act (published in the State Gazette, issue 14 of 2009) incompatible with the Bulgarian Constitution.

The application states that Article 47 of the ECA contradicts the Constitution because by virtue of this provision a restriction on radio and television operators and their related parties in obtaining permits for the use of a scarce resource (radio frequency spectrum for carrying out electronic communications through electronic communications networks for terrestrial digital broadcasting) is established.

According to the disputed Article 48, para. 3 of the ECA, an enterprise and its related parties, which has/have obtained a permit for the use of an individually assigned scarce resource, is/are restricted to becoming a radio and television operator or to creating radio or television programmes. In addition, the above-mentioned enterprises and their related parties cannot construct electronic communications networks for broadcasting radio and television programmes (Article 48, para. 5 of the ECA). According to the claim submitted to the Constitutional Court the said prohibition contradicts Article 19, paras. 1, 2 and 3 of the Constitution because it violates the principle of equal economic initiative and the principle that all Bulgarian and foreign legal entities performing economic activities in the country should enjoy equal rights. The prohibition contained in Article 48, para. 3 of the ECA is identical with the ban set out in Article 116i of the Radio and Television Act.

The Constitutional Court decided as follows:
- Article 48, para. 5 of the ECA has been proclaimed unconstitutional and therefore illegal, and
- Paragraph 5a, item 1 (which says:" Within the framework of a single procedure under Article 48 (1) herein, the Communications Regulation Commission shall designate a single undertaking whereto the said Commission shall grant an authorisation for the use of the individually assigned scarce resource - radio spectrum, for the provision of electronic communications over electronic communications networks for digital terrestrial broadcasting within a national range in conformity with the provisions for the First Stage of the Plan for the Introduction of Digital Terrestrial Television Broadcasting (DVB-T) in the Republic of Bulgaria, adopted by the Council of Ministers.") has been proclaimed partially illegal.

The rest of the disputed provisions have been declared compatible with the Constitution and therefore remain in force. ■

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● ***РЕШЕНИЕ № 3 София, 4 юни 2009 г. по конституционно дело № 3 от 2009 г., съдия докладчик Георги Петканов (Обн., ДВ, бр. 45 от 16.06.2009 г.)*** **(Decision No 3 of 4 June 2009 on Constitutional Case No 3/2009), available at:**
http://merlin.obs.coe.int/redirect.php?id=11855

BG

CZ – Broadcasting Act Amended

The Czech Parliament has adopted an amendment to the Broadcasting Act, which is known to the public as the "digital radio amendment" and is designed to support radio digitisation. In fact, however, the amendment barely deals with the subject of digitisation and it remains largely unclear what radio digitisation will be like.

The amendment relaxes media concentration rules in the radio sector and redefines the concept of national radio stations. The latter are now defined as channels that can be received by at least 80% of the population, whereas previously the figure was 70%. Regional radio broadcasters holding several broadcasting licences were previously prohibited from broadcasting to more than 70% of the population under all their licences combined. This limit has been increased to 300%.

The amendment also permits programme regionalisation. Current channels are now allowed to broadcast regional or local windows (programmes, advertising and teleshopping) at certain times of the day, something which was previously prohibited. Up to 15% of programmes may be broadcast in this way. With the consent of the broadcasting regulator, radio broadcasters are allowed to transmit the programmes of another radio station.

Broadcasters that agree to support radio digitisation and give up their analogue frequencies are entitled to so-called transformation licences, which are valid until 2025.

In addition, amendments to broadcasters' ownership structures are now permitted. For example, a sole trader can transfer his licence to a legal entity if he owns 100% of the shares in that company. Legal entities which own 100% of the shares in several companies owned by a radio broadcaster may carry out mergers between these companies as long as they also own 100% of the shares in the new company. ■

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Ministry of Culture, Prague

● ***Zákon č. 196/2009 Sb., kterým se mění zákon č. 231/2001 Sb., o rozhlasovém a televizním vysílání*** **(amendment to Broadcasting Act no. 196/2009 collection), available at:**
http://merlin.obs.coe.int/redirect.php?id=11784

CS

CZ – Arbitration Proceedings Concerning Broadcaster TV3

The arbitration proceedings between the Czech Republic and the Luxembourg-based company European Media Ventures concerning the broadcaster TV3, conducted by the court of arbitration in London, were decided in favour of the Czech Republic. The proceedings were opened in 2005, although the case itself had begun before that.

In 1999, a sole trader was granted a licence to broadcast regional television programmes in Prague and Hradec Králové. When he started broadcasting, he was supported by the company EMV. In principle, a broadcasting licence may not be transferred to another person. However, it is possible for a natural person to transfer a broadcasting licence to a legal entity in which he owns a 100% stake. EMV asked the sole trader to transfer his licence to the Luxembourg-based company KTV; the sole trader tried to comply, but the transfer was turned down by the regulatory body. Although the sole trader formally owned 100% of the shares in KTV, he did not actually control the company. The licence was then transferred to another Czech company with the regulator's agreement. This company subsequently ceased broadcasting for financial reasons.

EMV appealed to the court of arbitration in London. On the basis of international agreements between the Czech Republic and Belgium/Luxembourg concerning mutual investment support and protection, EMV sued the Czech Republic for lost investment. The sum claimed was in the region of EUR 35 million. The decisive phase of the proceedings took place in 2008, when the written documents and witness statements were examined. The arbitral award in the Czech Republic's favour was announced in July 2009. The tribunal must now decide who should pay the costs of the proceedings. ■

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DE – Constitutional Court Rejects Urgent Appeal against Screening of Film about "Cannibal of Rotenburg"

On 17 June 2009, the *Bundesverfassungsgericht* (Federal Constitutional Court - BVerfG) rejected an urgent application in which the applicant, who became known as the "Cannibal of Rotenburg" after he committed murder and ate parts of his victim's body, tried to prevent the planned screening of a film about his life and actions.

The applicant had already lost an appeal to the *Bundesgerichtshof* (Federal Supreme Court - BGH) which, although it accepted that the screening of the film could cause considerable psychological strain to the plaintiff and that his innermost privacy would be affected, concluded that, after weighing these factors against the defendant's artistic freedom and freedom to film, the plaintiff's personality rights were of lesser importance (see IRIS 2009-7: 7). In these latest proceedings, the applicant argued that this decision violated the Constitution and asked for a temporary injunction under Art. 32 of the Federal Constitutional Court Act (BVerfG), pending the outcome of the main procedure.

The BVerfG dismissed the application on the grounds that the screening of the film would not be sufficiently detrimental to the applicant and explained that the information contained in the film – not least on account of the behaviour of the applicant himself towards the media – had already been made widely known to the public and was still in the public domain. In addition, the BVerfG did not think that the portrayal of the applicant by an actor who resembled him constituted a breach of his image rights – particularly since the applicant had agreed to the publication of photographs of himself in the press and on the cover of a book that he had authorised.

The Court also ruled that the minor deviations from reality contained in the screenplay did not cause additional damage to the applicant's reputation; neither did the use of stylistic devices typical of the genre – such as the accentuation of the events as a horror story – caused significantly more harm to the applicant's personality rights. ■

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● **Ruling of the BVerfG of 17 June 2009, available at: http://merlin.obs.coe.int/redirect.php?id=11785**

DE

DE – MyVideo Wins Legal Dispute with CELAS before Munich District Court I

In a ruling of 25 June 2009 in favour of the video portal MyVideo, the *Landgericht München I* (Munich District Court I – LG) decided that MyVideo is not obliged to stop reproducing pieces of music over which the defendant, the licensing company CELAS, asserts mechanical reproduction rights.

The collecting society GEMA (society for musical performance and mechanical reproduction rights) was originally entrusted with the task of managing the rights to the EMI repertoire. However, EMI Music Publishing then demanded some of these rights back from GEMA and transferred responsibility for them to CELAS, a joint venture between GEMA and the British PRS. CELAS was asked to sell licences for EMI's Anglo-American repertoire in the mobile and online sector across Europe. GEMA, which retained the right to make the works accessible to the public, signed a corresponding licensing agreement with MyVideo. CELAS acquired the mechanical reproduction rights, for which it asked MyVideo to pay a licence fee or otherwise stop using the material concerned.

The *LG München I* ruled that this separation of individual exploitation rights was unlawful. In the

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online sector, technical conditions meant that the performance of musical works was always dependent on the creation of a copy, which meant it was impossible to separate the right to make a work accessible from the related reproduction rights (Arts. 16 and 19a of the Copyright Act - UrhG). The transfer of the reproduction rights was therefore invalid and CELAS' claim for an injunction was unfounded. The rights were still held by GEMA.

According to reports, CELAS intends to appeal against this decision. ■

- **Ruling of the *Landgericht München I* (Munich District Court I – LG) of 25 June 2009 (case no. 7 O 4139/08), available at: http://merlin.obs.coe.int/redirect.php?id=11790**

DE

DE – Structural Aid for Cinema Operators Aimed at Full Digitisation

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On 19 June 2009, the Board of the *Filmförderungsanstalt* (Film Support Office - FFA) declared itself in favour of complete digitisation of cinemas in Germany.

The decision follows an initiative by the Federal Commissioner for Culture and Media and is also designed to help settle the legal dispute between the FFA and representatives of the cinema and video industry over the fairness of tax contributions (see IRIS 2009-4: 7). It provides for financial support for cinema operators worth up to EUR 40 million over a five-year period. In return, the cinema operators must withdraw their complaints and pay their contributions to the FFA unconditionally. The FFA Board now has until 1 October 2009 to submit a plan for the financing and implementation of the adopted measures. A review of the *Filmförderungsgesetz* (Film Support Act - FFG) in relation to the fairness of the disputed contributions is also expected.

In this context, a decision was also taken by the *Verwaltungsgericht Berlin* (Berlin Administrative Court – VG), in which a cinema operator was refused temporary legal protection. On account of the aforementioned pending legal dispute, during which the *Bundesverwaltungsgericht* (Federal Administrative Court) asked the *Bundesverfassungsgericht* (Federal Constitutional Court – case no. 1 BvL 8/09) to examine the constitutionality of the FFG's provisions, the cinema operator had asked to be temporarily exempted from the obligation to pay the contributions in question. The VG Berlin rejected the request, referring to the predominant public interests of the FFA and the basic guarantee that the State would reimburse any unlawful payments it received.

On 6 August 2009, the FFA also announced that the companies belonging to the *Verband Privater Rundfunk und Telemedien* (association of private broadcasters and telemedia - VPRT) had promised to the FFA film support worth a total of EUR 13.5 million (cash and media services) for this year. This sum, which is higher than in previous years, will in future also be available for first video productions and video-on-demand services. ■

- **FFA press release of 19 June 2009, available at: http://merlin.obs.coe.int/redirect.php?id=11786**
- **VG Berlin decision of 27 July 2009 (case no. VG 22 L 147.09), available at: http://merlin.obs.coe.int/redirect.php?id=11787**
- **FFA press release of 6 August 2009, available at: http://merlin.obs.coe.int/redirect.php?id=11788**
- **VPRT press release of 6 August 2009, available at: http://merlin.obs.coe.int/redirect.php?id=11789**

DE

DE – Code of Conduct on Commercial Communication for Foods and Beverages

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The *Deutsche Werberat* (German Advertising Standards Council) has published a code of conduct on commercial communication for foods and beverages.

The aims of this voluntary self-monitoring initiative are to ensure compliance with legal requirements and to promote competition. The code of conduct includes so-called general principles, such as the protection of consumers in their confidence in the quality of foods and beverages, the ban on advertising messages that counteract a balanced and active lifestyle and diet, or that encourage unbalanced or excessive consumption. The code also contains specific provisions for advertising aimed at children, such as the need to take into account the inexperience and particularly trusting nature of children, and to avoid direct invitations to purchase and consume, as well as the suggestion that certain foods and beverages are indispensable.

The code of conduct entered into force on 1 July 2009. ■

- **Code of Conduct of the *Deutsche Werberat* (German Advertising Standards Council) on commercial communication for foods and beverages, July 2009 version, available at: http://merlin.obs.coe.int/redirect.php?id=11792**

DE

DK – Control of the Accomplishment of the Media Agreement 2007-2010 oncerning Public Service for 2008

On 8 June 2006, a Media Agreement for 2007-2010 was established between the political parties and the Government (see IRIS 2006-8: 13). According to the Agreement, the channels Danmarks Radio (DR) and TV 2 have to fulfill public service obligations. They must broadcast news, information, educational programmes, culture, art and entertainment. They must also broadcast services for blind and deaf per-

sons and programmes for children and young people. In addition, a current dialogue with the population must be stimulated.

The accomplishment of these obligations is controlled by the *Radio- og tv-nævnet* (Board for Radio and TV), which is conferred with obligations of supervision regarding the radio and TV sector. The Media Agreement provides for an annual report on Public Service to be presented by each of the channels DR and TV 2 before 1 May each year. The reports for 2008 were commented upon by the Board for Radio and TV. On 10 July 2009, the Board published its Statements on the public service results accomplished in 2008 by DR and TV 2. The Statements are published on the homepage of the *Styrelsen for bibliotek og medier* (Managing Board for Libraries and the Media) under the supervision of the Ministry of Culture, which provides administrative assistance to the Board for Radio and TV.

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The most important comments included in the Statement concerning the DR are the following: The Statement observes that the broadcast on television of Danish music, understood in a broad sense, has been remarkably augmented during 2008. The same can be said concerning TV and radio broadcasts of Danish culture, such as programmes on films, culture guides and cultural events. It also observes that DR has introduced a linguistic policy for the conservation and development of a correct and understandable Danish language, without eliminating dialects or accents. The Board notes with dissatisfaction however that programmes in foreign languages – in particular those of immigrants – have yet to be realised. The Board drew the attention of the DR to the fact that there must be a better representation of less prominent categories of sport in DR broadcasting. These categories concern every sport other than football, handball and bicycling. The broadcast time for programmes for young people must be increased in order to fulfill completely the requirements of the agreement. The Board stated that an economic plan was put into effect in 2008. However it has not been possible to observe its effects on the quality and versatility of the programmes. The Board encouraged the DR pay attention to evaluations made by the television and radio audiences and to publish such evaluations.

The Statement concerning the report on TV 2 observes that the broadcast of Danish drama has been satisfying, but that the representation of short films and documentary films is very low and must be augmented. There have been positive developments in the services for deaf people, in the form of subtitled programmes and interpretation into deaf sign language.

The Statements will be commented upon by the DR and TV 2. Following that, the Statements and the comments will be presented to the political leaders for further deliberation. ■

- ***Mediepolitisk aftale for 2007-2010*** **(Media Political Agreement for 2007-2010), available at:**
http://merlin.obs.coe.int/redirect.php?id=11800
- ***DR Årsrapport 2008. Public Service redegørelse*** **(DR Annual Report 2008. Public Service Report), available at:**
http://merlin.obs.coe.int/redirect.php?id=11801
- ***Radio- og tv-nævnets udtalelse om DR´s public service redegørelse for 2008*** **(Statement by the Board for Radio and TV Concerning the DR Report on Public Service for 2008), available at:**
http://merlin.obs.coe.int/redirect.php?id=11802
- ***TV 2/Danmark A/S´s public service-redegørelse for 2008*** **(TV 2/Danmark Ltd. Report on Public Service for 2008), available at:**
http://merlin.obs.coe.int/redirect.php?id=11803
- ***Radio- og tv-nævnets udtalelse om TV 2/Danmark A/S´s public service redegørelse for 2008*** **(Statement by the Board for Radio and TV Concerning the TV 2 /Denmark Ltd. Report on Public Service for 2008), available at:**
http://merlin.obs.coe.int/redirect.php?id=11804

DA

ES – Draft Law on the Funding of RTVE Corporation

In May 2009, a draft law reforming the funding of the Corporación de Radio y Televisión Española (RTVE), the national public service broadcaster, was presented to the Spanish Parliament. The original text, approved by the Cabinet (see IRIS 2009-6: 10), included the elimination of advertising on Televisión Española (TVE) and proposed a new financial equilibrium that would be achieved through State subsidy and income originating from three different types of taxes: an existing one on the use of spectrum frequencies, and two new ones, to be paid by national commercial broadcasters (both pay and free-to-air) and telecommunications operators offering audiovisual services.

The Parliament debated and considered amendments for the most part in June, including the most important details described below:

- If the new tax to be paid by national commercial free-to-air operators is to be 3% of their gross financial income and the one to be faced by pay-TV operators and telecommunications companies is to be 1.5% and 0.9%, respectively, it has been specified that the latter will not contribute with more than 25% of the Corporation's total income and that, in turn, free-to-air and pay-TV operators will not add beyond 15% and 20%. The Telecommunications Market Commission, CMT, will analyse the proportionality of contributions.
- Additionally, direct support from the State is guaranteed so as to reach financial equilibrium, in case other resources are reduced, as long as the Corporation's expenditure is in line with a pre-approved budget.
- The necessity of increasing programmes to educate and entertain the youngest section of the audience has been outlined. It has been specified that from Monday to Friday 30% of the offerings between 17:00h and 21:00h should be directed at children

from 4 to 12 years of age. During holidays such programming should be offered from 9:00h to 20:00h and, once the switch-off of analogue television has taken place, it will be broadcast making use of the multilingual system.
- The Corporation will have the possibility of buying sports rights limited to 10% of its total annual budget – excluding the Olympic and Paralympic Games – from a general interest sporting events list designed by the Audiovisual Council, which is to be created by the Audiovisual Draft Law.
- A commitment to making programming as accessible as possible to all audiences, including those with any kind of disability, has been included. Before 1 January 2013, TVE will have to deliver subtitles in at least 90% of its offerings and, at least 10 hours per week including audio description and sign language.
- The Corporation will have to provide information regularly about debates in Parliament and broadcast live those sessions of special interest to citizens.

This report with amendments on the draft law was sent by mid-July to the Senate, where it could either be simply approved or else amended again. In the latter case, the text would go back to Parliament in September. ■

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● ***Proyecto de Ley de financiación de la Corporación de Radio y Televisión Española*** **(Draft Law on the Funding of RTVE Corporation), available at:**
http://merlin.obs.coe.int/redirect.php?id=11805

● ***Texto remitido por el Congreso. Proyecto de Ley de financiación de la Corporación de Radio y Televisión Española*** **(Draft Law on the funding RTVE Corporation. Amended text by the Parliament), available at:**
http://merlin.obs.coe.int/redirect.php?id=11831

ES

FR – Opinion of the Authority on Competition on IAPs' Exclusive Access to TV Content

After the recent cases involving Orange Sports and the courts' examination, in terms of consumer law, of exclusive content distributed by Internet access providers (IAPs) (see IRIS 2009-6: 12), it is now up to the Authority on Competition (*Autorité de la Concurrence*) to adopt a position. The matter was referred to the Authority by the Minister of the Economy; she invited the Authority to make a statement on the compatibility of the exclusive access to highly attractive content that some IAPs reserved for their subscribers with the regulations on competition. She also invited it to draw up an opinion on whether it would be advisable to set up a specific legal framework with the intention of preventing the risk of such exclusive practices.

In a consultative opinion on 7 July 2009, the Authority on Competition presented the advantages and risks of the recent model for exclusive content set up by Orange further to its acquisition of "premium" content (sports and cinema films). The model involves double exclusivity – exclusive distribution, through subscription to the actual television service, and exclusive transport and access requiring subscription to the IAP's triple-play offer in order to be able to access the content in question. This new model is likely to spread to other content and other media (ADSL today, fibre optics tomorrow).

While the Authority holds that anything that encourages the arrival of new players on the pay television market is bound to have a positive effect, particularly for consumers who can expect a drop in prices and an increase in diversity of the content on offer, it considers that the response should be sought elsewhere rather than in the – questionable – economic model of double exclusivity put forward by Orange. This model actually restricts the choice of the consumer, who ceases to have access to all attractive content or who is obliged to pay a great deal more to have universal access to content. There is also a risk that Orange's strategy will destabilise the broadband market to the detriment of competitive operators. Thus if the economic model of double exclusivity were to become generalised, it could eventually lead to a duopoly on both the pay television market and the broadband market. The Authority therefore recommends that IAPs should only operate exclusive access to television content in exceptional cases, and should be strictly limited in duration (one or two years) and scope. It should also be restricted to true technical or commercial innovations (associated interactive services, for example). The Authority considers "auto-distribution" to be a satisfactory, balanced solution for both players and consumers. This would enable a distributor to reserve exclusivity for certain channels. This would not prevent it distributing its offer on as many platforms as possible (satellite, ADSL, etc) while retaining its commercial relationship with the subscriber.

The Authority on Competition would therefore like to see in the near future a substantial change in the current operating conditions for the wholesale pay television market, in addition to the strict limits that ought to be placed on the double exclusivity model put forward by Orange. The Authority feels that the time has come to lay down clear rules covering all these issues, and is calling on the legislator to put out "a strong signal" in the context of the upcoming development of fibre optics and superbroadband. ■

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● **Authority on Competition: Opinion No. 09-A-42 of 07 July 2009 on exclusive relations between the activities of electronic communications activities and content and services distribution activities; available at:**
http://merlin.obs.coe.int/redirect.php?id=11781

FR

FR – Agreement on Media Chronology Signed

Article 17 of the Act on 'Creation and the Internet' ("HADOPI") of 12 June 2009 encouraged the conclusion of an inter-profession agreement on reorganising media chronology in the months following its promulgation (see IRIS 2009-7: 13). This is the part of the Act that aims, at the same time as combating piracy, to develop the legal offer of films. After complex negotiations carried out under the auspices of the National Cinematographic Centre (*Centre National de la Cinématographie* – CNC), the agreement on reorganising media chronology was finally signed within the short amount of time allowed by the Act.

On 6 July, the players in the cinematographic industry, the pay and free television channels, editors of video-on-demand services and Internet access providers – more than twenty signatories – concluded an agreement that was described as "historic" by the new Minister of Culture, Frédéric Mitterrand. It is in fact the third time that an inter-profession agreement has made it possible to cover and organise all the possibilities for showing a cinema film, from its first screening to its broadcasting to the general public free of charge.

Until very recently, the chronology could be summed up in a sequence of four main blocks – screening in a cinema theatre, followed by video, pay television, and lastly free television. It was important to update the rules for exploiting cinematographic works in order to include the Internet, the new on-demand audiovisual services, and all their possibilities (pay-per-film, payment of a subscription, or access free of charge). Furthermore, the organisation of media chronology makes it possible to organise the schemes for successive exclusivity that comprise all forms of financing the cinema industry. Consequently, films will therefore be available on video-on-demand (and on DVD under the HADOPI Act) four months after their release in cinema theatres, compared with seven and a half months until now. This period of time could be reduced to three months, subject to fairly strict conditions – only those films "having recorded less than sales of 200 box office tickets within four weeks of exploitation in cinema theatres" could have the benefit of such a waiver.

The agreement also shortens the period before films may be shown on television channels, thereby consolidating their contribution to funding the cinema. Films may be shown on pay television channels ten months after their cinema theatre release, compared with twelve months previously. For free television, the time period drops to 22 months, compared with 24 or even 36 previously. Lastly, films may be shown by a subscription VOD service on the expiry of a period of 36 months starting from the first screening in a cinema (48 months for free-of-charge VOD).

The agreement has been concluded for a two-year period; it may be extended for additional one-year periods by tacit renewal, with an assessment of its application every six months, under the auspices of the CNC. The decision to extend it, made on 9 July 2009 in application of Article 30-7 of the Code of the Cinematographic Industry, makes it compulsory for the entire sector to comply with the main provisions of the agreement, while those affirming "the necessity of rules" on the "guaranteed minimum remuneration for rightsholders" and those involving "practices for the promotion of works" continue to apply only to the signatories. ■

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● Decision of 09 July 2009 adopted in application of Article 30-7 of the Code of the Code of the Cinematographic Industry; gazetted (published in the Official Journal) on 12 July 2009, available at:
http://merlin.obs.coe.int/redirect.php?id=11782

FR

FR – New Principle of Pluralism for Speaking Time for Politicians on Radio and Television

Taking note of the decision made by the Conseil d'État on 8 April 2009 (see IRIS 2009-5: 14), the national audiovisual regulatory authority (*Conseil Supérieur de l'Audiovisuel* – CSA) adopted on 21 July 2009 a new "principle of pluralism" that will govern the balance in regard to the proportion of speaking time for politicians on radio and television. Starting on 1 September, this principle will replace the so-called "three thirds" rule (government, majority, and opposition), in force since 1969, which excluded the Head of State for the purpose of the calculation. As a result, the total speaking time for the parliamentary opposition now may no longer be less than half the total speaking time of the Head of State and the presidential majority. Speeches by the President and members of his staff will therefore be added automatically to that total. With this recalculation of the total speaking time for the presidential majority (members of the Government, the parliamentary majority and the Head of State's staff), the CSA is emphasising a simplification of the rules for calculation. Furthermore, only those speeches by the President that, because of their content or context, fall within "the national political debate" within the meaning of the Conseil d'État's decision, will be taken into account. This means that speeches falling within the scope of the Head of State's "sovereignty functions" (*fonctions régaliennes*) within the meaning of Article 5 of the Constitution (functions involving compliance with the Constitution, the proper functioning of the public authorities, the continuity of the State, national independence and

the integrity of the territory, and observance of treaties).

For those political formations that do not belong to either the majority or the opposition, and for those not represented in Parliament, the channels will continue to ensure fair speaking time based on various features of the representation. Each channel shall send the times to the CSA, which will then inform the leaders of the parliamentary chambers and the political parties present in the Parliament each month. The results may also be consulted on the CSA's Internet site. ■

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● CSA adopts a new principle of pluralism for speaking time for politicians; CSA press release, 21 July 2009, available at: http://merlin.obs.coe.int/redirect.php?id=11780

FR

GB – Government Publishes "Digital Britain" Proposals

The UK Government has published "Digital Britain – Final Report" setting out its proposals on a wide range of communications issues. Its basic aim is "to secure the UK's position as one of the world's leading digital knowledge economies".

A number of proposals directly concern the broadcasting sector. The Government has rejected privatisation of Channel 4, but its statutory remit will be updated and discussions will continue on a strategic partnership between Channel 4 and BBC Worldwide, the Corporation's commercial arm. The Government will consult on a "Contained Contestable Element" of the television licence fee, currently used only to fund the BBC. This would be used to fund "independently-financed news consortia" to provide multi-media and broadcast regional news independently of the BBC, using the Channel 3 broadcast regional news slots. The new arrangements would replace the provision of such news by Channel 3, which is finding it increasingly difficult to meet public service obligations due to increased competition from digital media and a decline in advertising revenue. Other public service obligations on Channel 3 may also be relaxed and the general direction will be one of gradual liberalisation. The funding proposal is bitterly opposed by the BBC, which sees it as a threat to its own independence by breaching the distinction between the licence fee and general taxation.

The Report also includes other major proposals across a range of different media. Digital switchover is proposed for all national radio stations by the end of 2015. The Government has assured it will deliver a commitment to universal broadband at 2Mbps by 2012. This will be achieved by a mix of technologies and will be supported by public funding. After that date, next generation networks will be made universally available with at least 90% coverage by 2017 funded by a levy of 50 pence per month on all fixed copper lines. The Communications Act 2003 will also be amended to add to the principal duties of the regulator, Ofcom, a duty to promote investment in communications infrastructure.

Ofcom will be given new functions aimed at reducing copyright infringement on the Internet. It will require Internet service providers to notify account holders of alleged copyright infringement and to maintain and make available, after a court order, data to allow serious repeat offenders to be identified. This will be underpinned by an industry code of practice, though Ofcom may impose a code if agreement is not reached. It will also have the power to impose additional conditions on service providers, including blocking, should other measures not be effective in reducing unlawful file sharing. ■

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● Department for Business, Innovation and Skills, Department for Culture, Media and Sport, 'Digital Britain – Final Report', Cm 7650, June 2009, at: http://merlin.obs.coe.int/redirect.php?id=11809

EN

GB – Regulator Consults on Proposal to Require Sky to Make Premium Content Available to Competitors at Regulated Prices

Ofcom, the UK communications regulator, has completed a further phase in its long-running investigation into pay-TV markets and is now consulting on possible remedies (see IRIS 2009-1: 13). The central issue is the wholesale supply of premium content by Sky to its competitors.

Ofcom has found that live top-flight sports and first-run Hollywood movies are particularly effective in driving pay-TV subscriptions because they combine broad audience appeal with a high degree of exclusivity to pay-TV. There are narrow economic markets for the wholesale of Core Premium Sports and Core Premium Movie channels and Sky has market power in those markets to residential customers. Ofcom is concerned that Sky may distribute its premium content in a manner that favours its own platform and its own retail business, exploit content rights selectively and set high wholesale prices. These channels are provided to only one major third-party retailer and to none outside the cable platform. This means that Sky can manage competition between retailers on different platforms to protect its

own satellite platform and prevent rival retailers from establishing a strong retail presence, which would also strengthen their position in bidding for content rights. Analysis commissioned by Ofcom suggested that Sky had made an aggregate return of above 20%, significantly above its cost of capital. Consumer choice is reduced by restricted availability of premium content and by the range of retail bundles made available on each platform.

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Ofcom proposes to remedy the problems through a wholesale must-offer obligation, extending to Sky Sports 1 and 2 and all Sky Movies channels apart from Classics; high definition and interactive versions would be included. Prices would be set by Ofcom on a retail-minus basis, using current costs as a cross-check.

Ofcom is investigating subscription video-on-demand rights further with a view to separating their sale from standard subscription rights. ■

● Ofcom, "Pay TV Phrase Three Document", 26 June 2009, available at: http://merlin.obs.coe.int/redirect.php?id=11810

EN

GB – Taste and Standards in Broadcasting

In the period following the broadcast of an item on 18 October 2008 during the Russell Brand show, the BBC received 42,851 complaints (see IRIS 2009-5: 15).

The Editorial Standards Committee concluded that the material, regarding Mr Andrew Sachs and his granddaughter Ms Baillie, was "so grossly offensive" that there was no justification for its being broadcast.

Subsequently, the BBC Trust requested the BBC Executive to research audience expectations regarding issues raised by the broadcast and to make recommendations. It commissioned the research from Professor Sonia Livingstone (LSE), Ipsos MORI and the Blinc Partnership and the report was published: "Taste, Standards and the BBC: Public Attitudes to Morality, Values and Behaviour in UK Broadcasting".

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deeJgee Research/Consultancy

It details major new in-depth audience research carried out by the BBC and sets out the resulting recommendations to tighten up protection for BBC audiences from potentially offensive content, whilst providing appropriate safeguards for creativity and innovation in programming.

On 24 June 2009, the BBC Trust published its response to the BBC Executive's report, which it welcomed. As was the Executive, the BBC Trust is confronted by the need to balance a number of principles: maintaining the highest editorial standards; ensuring that the audience is not exposed to offensive content; and "guarding against stifling creativity".

In addition, the Trust made some of its own specific recommendations and outlined the next steps for the "full forthcoming review of the BBC's Editorial Guidelines" (to take place during 2009), or online guidance, which will, it says, take into account the "public feedback and comments on the findings of the Executive's report".

In particular, the Trust recommends that the BBC "should not make programmes that celebrate or condone gratuitous, aggressive, intrusive, and humiliating behaviour".

The Trust has challenged the Executive to clearly address this issue in the Editorial Guidelines. Whilst licence-payers can distinguish between comedy and satire – of which they approve – they disapprove of programmes containing "unjustified humiliation". ■

● BBC Trust, "Commentary on the Executive's Report 'Taste, Standards and the BBC: Public Attitudes to Morality, Values and Behaviour in UK Broadcasting'", available at: http://merlin.obs.coe.int/redirect.php?id=11811

● BBC Executive, "Taste, Standards and the BBC: Public Attitudes to Morality, Values and Behaviour in UK Broadcasting", available at: http://merlin.obs.coe.int/redirect.php?id=11812

EN

HU – Amendment to the Broadcasting Act Found Unconstitutional

On 30 June 2009 the Hungarian Constitutional Court declared a recent amendment to Act I of 1996 on Radio and Television Broadcasting (Broadcasting Act) incompatible with the Constitution.

The amendment was adopted by the Parliament on 8 December 2008. The new rules would have made possible the renewal of broadcasting licences without tendering in the case of analogue programme services, given that the broadcaster concerned undertakes obligations to contribute to the process of the digital switchover. The term of such renewal was determined to be a maximum of five years, but it may not exceed the date of analogue switch-off (as regards TV broadcasting on 31 December 2011, as regards radio, conditionally, on 31 December 2014). According to the amendment the decision on the renewal shall be made by the *Országos Rádió és Televízió Testület* (National Radio and Television Commission – ORTT). The adopted amendment was of crucial importance for the two national commercial radio broadcasters, Danubius Rádió Műsorszolgáltató

Zrt. and Sláger Rádió Zrt., whose broadcasting licences will expire in November this year.

The adopted amendment was not signed by the President, who decided to invite the Constitutional Court to exercise its power of constitutional control prior to its promulgation. In his initiative the President noted that, if adopted, the rules would lead to the exclusion of new entrants from the radio market. This discrimination contradicts the rights to equality of freedom of expression and of freedom of competition on the market.

In its decision the Court shared the President's constitutional concerns and expressed largely similar arguments. It recalled that in the case of radio there is no evident and pressing need for digitalisation from the side of the consumers. As a consequence analogue distribution is expected to remain the main platform for radio programme services. Against this background the adopted regulation would indeed pose unreasonable obstacles for new market entrants.

The Constitutional Court also established that the amendment actually does not formulate a general rule, but addresses a particular question (i.e., the utilisation of the two national terrestrial commercial analogue radio networks).

It is also worth noting that the ORTT, in parallel with the procedure of the Constitutional Court, has already begun the tendering procedure relating to the rights to programme services via the two national commercial radio networks. ■

Márk Lengyel
Attorney at law

● **Decision of the Constitutional Court 71/2009. (VI.30.) AB, available at: http://merlin.obs.coe.int/redirect.php?id=11794**

HU

MT – The Right to a Fair and Public Trial in Administrative Broadcasting Proceedings

On 11 May 2009, the Civil Court, First Hall, decided that the Malta Broadcasting Authority had not, when hearing a charge issued by the Chief Executive of the said Authority against the public service broadcaster, given the latter a fair hearing during administrative proceedings. This court case involved the first instance of application by the Authority in 2000 of the then new law which changed the procedure as to the enforcement of broadcasting legislation from one based on criminal proceedings to one based on administrative proceedings.

The facts of the case are as follows. On 21 March 2000, a programme was broadcast prior to the watershed on the public service television station (TVM) dealing with sex education. The Authority took note of a Memorandum submitted to it by its Chief Executive and also heard the oral submissions of the station in connection with the alleged infringement of the good taste and decency provision of the Broadcasting Act. On 12 July 2000, the Authority found the station in breach of the Broadcasting Act and imposed an administrative penalty of MTL 600 (now EUR 1397.62), while also ordering the station to broadcast a summary of the Authority's findings during the principal news bulletin of TVM. It did so after noting the new amendments to the Broadcasting Act, which had come into effect the day before, on 11 July 2000. These amendments had empowered the Authority to inflict administrative sanctions, such as the above-mentioned penalty, a power which it did not previously have, as infringements of broadcasting law were prior to 11 July 2000 considered criminal offences. The station sought judicial review of the Authority's decision, claiming that it had not been given a fair hearing in the infliction of such a penalty.

The court argued that the new amendments to the Broadcasting Act had raised the standard of administrative proceedings from disciplinary proceedings to proceedings which had to respect the right to a fair and public trial. It further expressed its opinion that once the new law had come into force and the proceedings in question had not yet been definitively decided, the Authority was bound to comply with these new provisions, as that was the law in force at the specific moment in time. In the court's view, the Authority should – following the entry into force of the new amendments – either have requested TVM to declare that it was not going to adduce further evidence and that it was relying on the evidence it had already produced or else TVM should have been given the opportunity to produce fresh evidence. Furthermore, TVM had not received a charge in terms of the new law, nor was it informed on which provision of the law its conduct was being investigated. The Authority failed to inform TVM that the latter had the right to adduce evidence to defend itself and to be assisted by a lawyer. In addition, the Chief Executive of the Authority, who filed a written statement, was not cross-examined by TVM. Finally, the court concluded that when a law is changed following the commission of a criminal offence, it is the law most favourable to the accused that should apply. The Court thus found in favour of TVM and ordered the Authority to refund the administrative penalty which TVM had paid to the Authority.

On the other hand, the court observed that it resulted from the facts of the case that the Authority had not acted as a prosecutor and as a judge at the same time, as TVM had alleged, and therefore rejected TVM's contention in this regard.

The decision is now final as the Broadcasting Authority did not appeal the judgment. ■

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

● **Public Broadcasting Services Limited v Awtorita' Tax-Xandir, available at: http://merlin.obs.coe.int/redirect.php?id=11807**

MT

RO – Partnership Agreement between CNA and Council of Europe Office

Mariana Stoican
Journalist, Bucharest

On 14 May this year, the *Consiliul Naţional al Audiovizualului* (national council for electronic media – CNA) and the Council of Europe office in Romania concluded a partnership agreement for the purposes of mediation in the Romanian electronic media, as part of a Council of Europe initiative under the motto "*Dosta!* Go beyond prejudice, discover the Roma!"

It was agreed that a broadcasting campaign should be carried out between 1 June and 31 August 2009 (Chapter 1 Art. 1) with the aim of raising public awareness of Roma issues and fighting existing prejudices through the broadcast of television and radio spots. The TV and radio spots were produced by the Council of Europe in the Romanian language (Art. 2 para. 1).

The partners to the agreement also undertook to publicise this media campaign on their respective Internet sites (Art. 2 para. 2). The Council of Europe office agreed to record the spots onto mini-DVD and CD and to reproduce them for distribution to television and radio broadcasters. The CNA, for its part, promised to do everything necessary to support the transmission of the TV and radio spots in accordance with the powers invested in it by Audiovisual Act no. 504/2002, including the relevant amendments and additions (Art. 3).

Each partner appointed one person to take responsibility for the successful implementation of the agreed activities (Art. 4). ■

● ***Acord de colaborare între CNA şi Biroul Consiliului Europei din România*** **(Agreement on cooperation between the CNA and the Council of Europe office in Romania), available at:**
http://merlin.obs.coe.int/redirect.php?id=11793

RO

RS – Amendments to Law on Public Information Proposed

Miloš Živković
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At its session held on 9 July 2009 the Government of Serbia adopted the Proposal for Amendments to the 2003 Law on Public Information, explaining that under the existing legal framework media outlets can easily misuse their rights in order to achieve practical impunity for all their mistakes and for damages they have caused to third parties.

The subsequent deliberation of that Proposal in the National Assembly has demonstrated the controversial nature of the proposed amendments and unexpectedly put the existing government majority at risk. Namely, after very critical reactions on the part of media outlets, journalists associations and NGO's involved with freedom of expression issues, some of the ruling coalition parties publicised their decision to restrain from voting in favour of the government proposal, thus jeopardising the parliamentary majority.

Even though the deliberations in the National Assembly improved the text of the Proposal by removing some of the most criticised provisions, there are two sections still causing concerns and giving rise to discussions: the registration of media outlets and especially the increased amounts of fines for media outlets in case of mistakes. As for the registration, the issue giving rise to most discussion is the fact that a temporary ban on publication may be ordered in a case where a media outlet does not conform with registration requirements. As for the fines, their amount has been increased to the level of causing a serious chilling effect on any type of investigative journalism. In both cases, the constitutionality and compatibility of these sections with the European Convention on Human Rights, to which Serbia is a Party, has been put in question. The provision of the Proposal under which the founding rights of a media outlet shall not be transferable also caused concerns. The fact that the existing expert group for the reform of the media legislation has not been consulted at all during the preparation of the Proposal has also been emphasised as proof that a basically restrictive intent hides behind it.

The vote on the current version of the Proposal (the version after parliamentary amendments) was scheduled to take place on 31 August 2009. ■

RS – Digitalisation Strategy Adopted

At its session held on 2 July 2009 the Government of the Republic of Serbia adopted the Strategy and Action Plan for the Transfer from Analogue to Digital Broadcasting ("Digitalisation Strategy"). The Strategy has been prepared by the Ministry of Telecommunications and Information Society. The switch-off date for analogue broadcasting has been set for 4 April 2012, the selected compression method is MPEG-4 and the selected standard for digital TV broadcasting is DVB-T2.

The Strategy underlined a number of open issues, such as the manner and the proceedings for the choice of the digital broadcasting network operator, the manner of multiplex management and the tender conditions for future operators, the manner and procedure for issuing licenses for programme contents, the amount of fees for content licenses, the protection of competition on the digital TV market, the rights and obligations of public service broadcasters in the digitalisation process, as well as the conditions for distribution and use of the digital dividend.

During the public discussion about the draft prepared by the ministry, the existing commercial broadcasters succeeded in having the following items included in the Strategy: A place within the multiplexes shall be guaranteed only to broadcasters having valid licenses at the time of the analogue switch-off; the application of equal, non-discriminatory

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conditions relating to quality, availability and fees for all broadcasters shall be guaranteed by the future network operator, whereas the fee amount shall be based upon the cost-covering principle; the recognition of the rights and the market positions of the existing broadcasters shall be guaranteed; a special simulcast fee shall not be introduced; the maintaining of the same service zones as provided by the existing broadcasting licenses and the same data flow for all programmes within a multiplex are guaranteed. ■

RU – Warning to Broadcaster Annulled

Andrei Richter
Moscow Media Law and Policy Centre

On 2 June 2009 Basmanny District Court in Moscow took an important decision in a case taken by a broadcaster against the prosecutor's office. The court overruled a 22 August 2008 warning issued by the Basmanny Inter-District Prosecutor to the 2x2 television channel, owned by a Russian private Prof-Media holding company.

The 2x2 channel broadcasts via cable networks in Russia and in St. Petersburg over the air a 24-hour daily programme of cartoons for adults. Acting on complaints from private individuals the prosecutor's office ordered and obtained an expert opinion that claimed in particular that an episode titled "Mr. Hankey's Christmas Classics" from the "South Park" cartoon series (produced in the U.S. by Comedy Central) was extremist in the sense of the 2002 Federal Statute "On Counteraction of Extremist Activity" because it promoted hatred between religions. That served as the basis of the warning issued in accordance with the Federal Statute (see IRIS 2002-8: 15, IRIS 2007-1: 16, and IRIS 2007-9: 19). It is to be remembered that, by law, the activities of a mass media organization can be terminated if the warning is not appealed, or deemed illegal by the court, and also if the infringements are repeated within twelve months from the date of issue of the warning or new facts are discovered that prove the carrying out of extremist activity by the mass media organisation.

In addition, a separate criminal investigation into suspicions of excitement of religious strife was opened in the Basmanny court by the same prosecutor in September of 2008, and in a separate motion the prosecutors asked the court to declare the series to contain extremist material that would involve criminal prosecution of those who disseminate it. After two new expert opinions had been provided that denied the existence of extremist materials in the cartoon series, the investigation was closed and the court motion was withdrawn by the prosecutor's office. However, that did not prevent the prosecutors from defending the legality of their warning before the court.

Based on the expert opinions the Basmanny District Court annulled the warning of the Prosecutor. It is a rare case when a warning to a media outlet is successfully overruled in court. The District Court decision was appealed by the prosecutor's office in the Moscow City Court. On 28 August 2009, the City Court upheld the lower court's decision. ■

● **Decision of the Basmanny District Court of the City of Moscow of 2 June 2009 on Case # 2-1810/09**
RU

RU – Draft Law on the Protection of Minors against Information Detrimental to their Health and Development

Andrei Richter
Moscow Media Law and Policy Centre

On 24 June 2009 the State Duma (parliament) adopted at the first reading the bill *«О защите детей от информации, причиняющей вред их здоровью и развитию»* (On the Protection of Minors against Information Detrimental to their Health and Development).

The proposed federal statute shall regulate "products of the mass media, printed materials, movies, TV and video films, electronic and computer games, other audiovisual products on any material object, including those disseminated in public performances and on the information telecommunication networks of general access (including Internet and mobile telephony)".

The bill defines seven categories of information banned for dissemination among minors (persons of below 18 years of age). They range from pornography (also defined in the bill) to "propaganda of negation of family values".

The ratings of the "informational products" related to the age of their consumers will be as follows: universal (all ages), below 6 (years old), 6+, 12+, 16+ and 18+. The bill introduces mandatory specific labeling of the products including TV programmes (other than news, current affairs, entertainment and live broadcasts) in accordance with their age rating. Airing of products labeled 16+ shall be allowed on TV only from 9 p.m. to 7 a.m., and those labeled 18+ from 11 p.m. to 6 a.m.

Facilities, such as Internet cafes, providing Internet access to customers shall be obliged to use technical and programming means to protect minors from detrimental information.

Producers and distributors shall be responsible for marking their products in accordance with the directives of the new law. In particular it encourages them to solicit an expert opinion (that is an opinion of experts as to what category the product belongs), specific rules and legal consequences of which are also regulated in the bill. The expert opinion of computer and other games is mandatory. ■

● **Bill *„О защите детей от информации, причиняющей вред их здоровью и развитию"* (On the Protection of Minors against Information Detrimental to their Health and Development)**
RU

SE – Head Judge in the Pirate Bay Case Was Not Biased

In the aftermath of the Pirate Bay court decision, the head judge of the *Stockholms tingsrätt* (the District Court of Stockholm) was accused of conflict of interest in that case (see IRIS 2009-6: 17). Accordingly, a formal complaint was lodged on several grounds by the defendants' counsel, in which they argued that the District Court of Stockholm should declare a mistrial.

Svea Hovrätt (the Svea Court of Appeal) has now delivered its judgment on this issue.

The head judge as well as the president of the District Court of Stockholm disputed that there were any conflicts of interests present.

The head judge is a member of *Svenska Föreningen för Upphovsrätt* (the Swedish Association for Copyright – SFU) and a board member of *Svenska Föreningen för Industriellt Rättsskydd* (the Swedish Association for the Protection of Industrial Property – SFIR). The plaintiffs' counsel are also members of these organisations. Moreover, the head judge, as well as one of the plaintiff's attorneys, are sometimes engaged as arbitrators in domain name disputes by the same foundation (.SE).

The defendants argued, inter alia, that the head judge had a conflict of interest due to his links to SFU, which is affiliated with the Association Littéraire et Artistique, and SFIR, as well his commitment to the above-mentioned foundation. Furthermore, it was claimed that he should have informed the parties of these circumstances before hearing the case.

The Svea Court of Appeal found that there was no conflict of interest where a judge is merely a member of an organisation whose primary objective is to organise discussions and seminars on certain legal issues. Thus, the head judge's membership of SFU did not constitute a conflict of interest.

The Svea Court of Appeal stated that SFIR had a closer connection to rightsholders than SFU. In this context the court acknowledged that memberships of associations may constitute a conflict of interest if the association in question has a direct interest in the outcome of a case. Additionally, a conflict of interest may arise if the judge is particularly committed to a certain cause. There was, however, no concrete evidence that SFIR had a particular stake in the Pirate Bay case. SFIR's general interest in acting against intellectual property infringements was also considered to be in line with Swedish constitutional law and other relevant laws in this area. Consequently, the Svea Court of Appeal did not find the head judge's engagement in SFIR to constitute a conflict of interest either.

Nevertheless, the Svea Court of Appeal considered that the head judge should have informed the parties of the abovementioned engagements, although this was not considered reason enough to declare a mistrial.

Finally, the Svea Court of Appeal held that judges and counsel must normally be allowed to serve side by side on e.g., arbitration boards, without this amounting to a conflict of interest in future cases where they act in their respective professional roles.

Consequently, the Svea Court of Appeal ruled against the defendants' plea that the head judge had had a conflict of interest when trying the Pirate Bay case. The decision of the Svea Court of Appeal is final and not subject to appeal.

Having settled this issue, the Svea Court of Appeal now has to try the material parts of the Pirate Bay case. ■

Michael Plogell and Erik Ullberg
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● ***Svea Hovrätts beslut den 24 juni 2009 i mål nr B 4041-09*** **(Decision of the Svea Court of Appeal of 24 June 2009 in case No. B 4041-09)**
SV

SK – Controversial Amendment to the State Language Law

The Slovak Parliament approved a controversial amendment to Law No. 270/1995 of Coll. on the State Language of the Slovak Republic of 15 November 1995 ("State Language Law"), proposed by the Government on 30 June 2009. The Amendment, i.e., Law No. 318/2009 of Coll., shall come into effect on 1 September 2009. The reason for it is that the standard of oral culture in Slovakia is deteriorating.

As the provisions concerning sanctioning (i.e., § 10 of the State Language Law) were repealed in 1999 due to imperfections in the provisions, the Ministry of Culture ("Ministry") - as supervisor of adherence to the obligations resulting from the State Language Law - has since been entitled only to notify violations to the legal entities and natural persons concerned and to require a remedy for such illegalities. If the imperfections were not removed, the Ministry lacked competence to impose fines. The Amendment enables the Ministry to exercise stricter supervision on the proper use of the Slovak language. Consequently, if imperfections appear and are not corrected after repeated calls by the Ministry, a fine of EUR 100 to EUR 5,000 may be imposed. Fines imposed will accrue to the State cultural fund, Pro Slovakia.

The amended Law shall apply to State authorities, authorities of territorial self-administration and other State administrative authorities, legal entities and natural persons. The Amendment introduces, inter alia, changes concerning media law, mainly in regard to radio and TV broadcasting, and determines not only the use of the State language, which is the language in which radio and TV programmes are broadcast in the whole Slovak Republic, but also

specifies exceptions to this rule, such as the use of the Czech language, i.e., a language that fulfils the requirement of essential understandability from the point of view of the State language. Some exceptions include the possibility of regional broadcasting in a minority language.

In accordance with the Amendment, signs, advertising and announcements providing information to the public must be written first in Slovak followed by any foreign language in the same or smaller font size.

The Amendment has been criticised, particularly by Hungarian Slovaks, who say it limits the rights of ethnic minorities to use their native language in official dealings with the authorities. The opposition Hungarian Coalition Party (SMK) has rejected the Amendment, describing it as putting citizens who belong to a minority at a disadvantage and violating the principle of equality. The Ministry maintains the contrary saying that the Amendment would not punish anyone for using ethnic minority languages. National minorities of Poles and Ruthenians in Slovakia do not consider the possible impact of the Amendment to be a potential threat to either their everyday activities or communication in a public context

On 21/22 July 2009 the OSCE High Commissioner on National Minorities received delegations from Slovakia and Hungary to discuss the Amendment. ■

Jana Markechova
Markechova Law Office, Bratislava

● OSCE press release, OSCE minorities' commissioner discusses amendments to Slovakia's language law, available at:
http://merlin.obs.coe.int/redirect.php?id=11795
SK

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Fosbrook, Deborah
Media and business contracts handbook
Sweet and Maxwell, 2009
ISBN 978-1847039088

AGENDA

MAVISE Seminar What's New in the News?
Evolution of the European TV News Market
Wednesday 7.10.09 from 4:30 pm to 6.00 pm
Venue: Cannes, Auditorium K, Level 4, Palais des Festivals
Organiser: The European Commission (DG Communication) and the European Audiovisual Observatory
Information & inscription: Fax: + 33 (0)3 90 21 60 19 or par e-mail: cannes@coe.int