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EUROPEAN AUDIOVISUAL OBSERVATORY
EUROPÄISCHE AUDIOVISUELLE INFORMATIONSSTELLE

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Legal Observations
of the European Audiovisual Observatory

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European Court of Human Rights: Case of Laranjeira Marques da Silva v. Portugal

In one of its first judgments of 2010 the European Court of Human Rights has clarified how court and crime reporting can rely on the right to freedom of expression guaranteed by Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. Convicting a journalist or a publisher for breach of the secrecy of a criminal investigation or because of defamation of a politician can only be justified when it is necessary in a democratic society and under very strict conditions.

The applicant in this case, Mr Laranjeira Marques da Silva, was the editor of the regional weekly newspaper Notícias de Leiria at the relevant time. In 2000 he wrote two articles about criminal proceedings brought against J., a doctor and politician well-known in the region, for the sexual assault of a patient. In an editor's note he called upon readers to supply further testimonies relating to other possible incidents of a similar nature involving J. A short time later Mr Laranjeira Marques da Silva was charged with a breach of the *segredo de justiça*, a concept similar to confidentiality of judicial investigation, and with the defamation of J. The Leiria District Court held in 2004 that Mr Laranjeira Marques da Silva had overstepped his responsibilities as a journalist and had aroused widespread suspicion of J. by insinuating, without justification, that the latter had committed similar acts involving other victims. He was found guilty of a breach of the *segredo de justiça* and of defamation. He was sentenced to a daily fine payable within 500 days and ordered to pay EUR 5,000 in damages to J. On appeal, the applicant challenged his conviction concerning the *segredo de justiça* on the ground that he had obtained access to the information in question lawfully. On the defamation issue, he argued that he had simply exercised his right to freedom of expression and that his articles had been based on fact and, moreover, were related to a subject of general interest. The Court of Appeal dismissed his appeal in 2005. A constitutional appeal and later an extraordinary appeal seeking harmonisation of the case law with the Supreme Court were also unsuccessful. In Strasbourg, Mr. Laranjeira Marques da Silva complained essentially that his conviction had infringed his right to freedom of expression.

As to the applicant's conviction for breach of the *segredo de justiça*, the European Court was of the opinion that the Portuguese authorities' interference with his freedom of expression had been "prescribed by law" and that the interference in question had pursued the legitimate aim of protecting the proper administration of justice and the reputation of others. The Court however pointed out that neither the concern of safeguarding the investigation nor the concern of protecting the reputation of others can prevail over the public's interest in being informed of certain criminal proceedings conducted against politicians. It stressed that in this case there was no evidence of any damaging effects on the investigation, which had been concluded by the time the first article was published. The publication of the articles did not breach the presumption of innocence, as the case of Mr. J. was in hands of professional judges. Furthermore, there was nothing to indicate that the conviction of Mr. Laranjeira Marques da Silva had contributed to the protection of the reputation of others. The Court held unanimously that the interference with the right of freedom of expression of the applicant was disproportionate and that therefore there had been a violation of Article 10.

As to the conviction for defamation, the Court accepted that the disputed articles dealt with matters of general interest, as the public had the right to be informed about investigations concerning politicians, including investigations which did not, at first sight, relate to their political activities. Furthermore, the issues before the courts could be discussed at any time in the press and by the public. As to the nature of the two articles, the Court pointed out that Mr Laranjeira Marques da Silva had simply imparted information concerning the criminal proceedings in question, despite adopting a critical stance towards the accused. The Court observed that it was not its place or that of the national courts to substitute their own views for those of the press as to what reporting techniques should be adopted in the journalistic coverage of a court case. As to the editor's note, the Court took the view that, notwithstanding one sentence that was more properly to be regarded as a value judgment, it had a sufficient factual basis in the broader context of the media coverage of the case. Hence, while the reasons given by the national courts for Mr Laranjeira Marques da Silva's conviction had been relevant, the authorities had not given sufficient reasons justifying the necessity of the interference with the applicant's right to freedom of expression. The Court further noted that the penalties imposed on the applicant had been excessive and liable to discourage the exercise of media freedom. The Court therefore held, by five votes to two, that the conviction for defamation did not correspond to a pressing social need and that there had been a violation of Article 10 of the Convention.

• *Arrêt de la Cour européenne des droits de l'homme, (deuxième section), affaire* Laranjeira Marques da Silva c. Portugal, *requête n° 16983/06 du 19 janvier 2010* (Judgment by the European Court of Human Rights (Second Section), case of Laranjeira Marques da Silva v. Portugal, Application No. 16983/06 of 19 January 2010)
http://merlin.obs.coe.int/redirect.php?id=12237 FR

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Committee of Ministers: Declaration on Measures to Promote Respect of Article 10 ECHR

Prompted by concerns about the effectiveness of the implementation of Article 10 of the European Convention on Human Rights, the Council of Europe's Committee of Ministers (CM) adopted on 13 January 2010 a Declaration on measures to promote the respect of Article 10.

The Declaration notes that the European Court of Human Rights is the enforcement mechanism for (Article 10 of) the Convention and that this mechanism is supplemented by: (i) the procedure for the execution of the Court's judgments, which is supervised by the CM, and (ii) general standard-setting work by the Council of Europe in this area. It recognises the importance of strengthening the implementation of relevant standards in "law and practice" at the national level, a task which requires "the active support, engagement and co-operation" of all Member States.

It also acknowledges and welcomes the "action taken by other institutions, such as the Organisation [sic] for Security and Co-operation in Europe (OSCE) Representative on Freedom of the Media, as well as civil society organisations".

The CM "welcomes the proposals" made by the Steering Committee on the Media and New Communication Services (CDMC) aimed at improving the promotion, by various organs of the Council of Europe, of respect of Article 10 in Member States. The Declaration, however, only provides summary details of the CDMC's proposals and fails to indicate that the proposals are described more expansively in Appendix IV of the CDMC's 11th Meeting Report. The main proposals are listed in the Meeting Report as follows: enhanced information collection; enhanced coordination; enhanced technical follow-up (expert assistance); enhanced political follow-up, and evaluation (by the Secretary General of the Council of Europe).

The Declaration's call for "improved collection and sharing of information and enhanced co-ordination" across the Council of Europe is prefaced by a roll-call of the various "bodies and institutions" which "are able, within their respective mandates, to contribute to the protection and promotion of freedom of expression and information and of freedom of the media". It names the Committee of Ministers, the Parliamentary Assembly, the Secretary General, the Commissioner for Human Rights and "other bodies" as all being "active in this area". The significant relevant work being conducted in the context of (for example) the Framework Convention for the Protection of National Minorities, the European Charter for Regional or Minority Languages or the activities of the European Commission against Racism and Intolerance (ECRI), is presumably covered by the reference to "other bodies".

• Declaration of the Committee of Ministers on measures to promote the respect of Article 10 of the European Convention on Human Rights, 13 January 2010
http://merlin.obs.coe.int/redirect.php?id=12266 EN FR

• Steering Committee on the Media and New Communication Services, 11th Meeting (20-23 October 2009) report, 16 November 2009, Doc. No. CDMC(2009)025
http://merlin.obs.coe.int/redirect.php?id=12242 EN FR

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Parliamentary Assembly: New Recommendation on Respect for Media Freedom

On 27 January 2010, prompted by concern about continued violations of, and threats to, media freedom, the Parliamentary Assembly of the Council of Europe (PACE) adopted Recommendation 1897 (2010), entitled "Respect for media freedom". The Recommendation provides important re-affirmation of and/or follow-up to several earlier PACE texts as follows:

(i) Resolution 1535 (2007) – Threats to the lives and freedom of expression of journalists (see IRIS 2007-5: 0/102)

- Noting "with great concern" that at least twenty journalists have been killed in Europe since 2007, the PACE insists that the Council of Europe and its Member States "must do more to ensure respect for media freedom and the safety of journalists". It welcomes the appointment of a rapporteur on media freedom within the PACE and states its appreciation of the work of the OSCE Representative on Freedom of the Media and various professional and civil society organisations. It "deplores the fact that [04046] the Russian Federation has failed to conclude a proper investigation and adjudication of the murder of Anna Politkovskaya [04046] and to ensure that journalists can work freely and in safety". It also "deplores the fact that organised crime in several member states is threatening the safety of journalists, while law enforcement authorities remain ineffective against such threats".

(ii) Resolution 1438 (2005) – Freedom of the press and the working conditions of journalists in conflict zones

- The PACE "deplores" the loss of journalists' lives in the 2008 conflict between Russia and Georgia. While it "welcomes" amendments to Article 301 of the Turkish Penal Code, it "deplores the fact that Turkey has not abolished Article 301 or completed investigations into the murder of Hrant Dink [04046] especially as regards possible failures of the police and security forces". It observes that criminal charges have been brought against journalists under the "slightly revised Article 301".

(iii) Resolution 1577 (2007) – Towards decriminalisation of defamation

- The PACE "reaffirms that defamation and insult laws must not be used to silence critical comment and irony in the media". It states that defamation and insult laws must not offer protection for "the reputation of a nation, the military, historic figures or a religion". It calls on government members and parliamentarians to refrain from using political influence to silence critical media and to "engage in a constructive debate through all media" instead.

It recommends that the Committee of Ministers (CM) review national legislation and practice to ensure that they comply fully with PACE Recommendation 1706 (2005) – Media and terrorism (see IRIS 2005-8: 4). Similarly, it recommends that the CM "call on the governments of all member states, and in particular those of Azerbaijan, the Russian Federation and Turkey, to revise their defamation and insult laws and their practical application" in accordance with Resolution 1577. It calls for the safeguarding in all Member States (and in particular, in Armenia, Azerbaijan, Moldova, the Russian Federation, Ukraine and Belarus) of fair and equal access to the media for political parties and candidates during election periods. It also advocates the revision of Armenian legislation governing the allocation of broadcasting licences.

(iv) Resolution 1636 (2008) – Indicators for media in a democracy (see IRIS 2009-1: 4)

- The PACE asks the Secretary General of the Council of Europe to provide resources for the collation of information from media freedom organisations; its systematic analysis, on a country-by-country basis, using the indicators set out in Resolution 1636, and the wide dissemination of such information, including by way of periodic updates.

(v) Resolution 1387 (2004) – Monopolisation of the electronic and print media and possible abuse of power in Italy (see IRIS 2004-7: 3)

- The PACE asks the European Commission for Democracy through Law (the Venice Commission) to prepare "an opinion on whether, and to what extent, legislation in Italy has been adapted to take account of" the Commission's 2005 Opinion on the compatibility of the laws "Gasparri" and "Frattini" of Italy with Council of Europe standards in the field of freedom of expression and pluralism of the media (see IRIS 2005-8: 5).

(vi) Resolution 1372 (2004) – Persecution of the press in the Republic of Belarus

- The PACE "notes with concern the official warning addressed by the justice ministry of Belarus on 13 January 2010 to the Belarusian Association of Journalists, challenging its internationally recognised work in the interests of journalists, media and media freedom" and asks the Venice Commission to examine the compatibility of the warning with universal human rights standards.

Finally, the PACE draws attention to the relevance of media freedom to (and its promotion by) the (Council of Europe) Partial Agreement Group of States against Corruption (GRECO), the European Union Agency for Fundamental Rights and national human rights institutions.

• "Respect for media freedom", Recommendation 1897 (2010) (Provisional edition), Parliamentary Assembly of the Council of Europe, 27 January 2010
http://merlin.obs.coe.int/redirect.php?id=12250 EN FR

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EUROPEAN UNION

European Commission: New European Communications Body

The Body of European Regulators for Electronic Communication (BEREC) was established in January 2010. The creation of BEREC was one of the reforms included in the package of rules for Europe's telecoms networks and services as formally approved by the European Parliament on 24 November 2009 (see IRIS 2010-1: 1/7). BEREC unites the national telecoms regulators of the EU Member States and seeks to strengthen the European telecoms market and guarantee fair competition. The establishment of an internal market for electronic communication is a topic of high priority because of the increasing economic importance of the telecoms sector in Europe.

BEREC replaces the European Regulators Group (ERG), the previous organisation within which National Regulatory Authorities (NRAs) exchanged their expertise and thoughts on the functioning of the telecoms market in the EU. Today there are 27 NRAs represented in BEREC.

The first meeting of BEREC took place on 28 January in Brussels, where the essential issues on the establishment of the organisation were dealt with. One of those issues concerned the election of the

chairpersons for the upcoming two years. John Doherty, the chair of the Irish communication regulator ComReg, was chosen as chairperson for 2010 and Chris Fonteijn, the current chair of the Dutch regulator OPTA, will be chairperson in 2011. BEREC is composed of the Board of Regulators, which will be provided with professional and administrative support through "the Office". The board consists of one member from each Member State, while "the Office" consists of a management committee and an administrative manager. In principle the Board of Regulators makes decisions by a two-thirds majority of its members.

BEREC provides a forum for the regulators to coordinate pan-European policies and study new developments in the telecoms market. The organisation makes use of the expertise available in the NRAs and cooperates with the NRAs and the Commission in order to carry out its tasks. The role and tasks of BEREC are set out in Articles 2 and 3 of the Regulation (No 1211/2009). BEREC will provide opinions, reports and advice to the NRAs, the Commission and, on request, to the European Parliament and the Council. Furthermore, BEREC will assist the institutions where considered necessary.

• Regulation (EC) No 1211/2009 of the European Parliament and of the Council of 25 November 2009 establishing the Body of European Regulators for Electronic Communications (BEREC) and the Office
http://merlin.obs.coe.int/redirect.php?id=12239 DE EN FR
BG CS DA EL ES ET FI HU IT LT LV
MT NL PL PT RO SK SL SV

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NATIONAL

AT-Austria

Preparations for Major Broadcasting Law Amendment

At the end of 2009, the *Bundeskanzleramt* (Federal Chancellery) published for debate an extensive draft amendment to Austrian broadcasting laws. The consultation procedure has since been completed, so the Federal Government can now consider the opinions that have been submitted as it draws up a Government bill.

The organisation and remit of the *Kommunikationsbehörde Austria* (Austrian communications authority - KommAustria) are the subject of significant changes. In future, KommAustriawill not be subject to directives and will take the form of a collegiate authority. Its role will be extended to include legal supervision of *Österreichischer Rundfunk* (Austrian broadcasting corporation - ORF) and audiovisual media services, as well as tasks set out in the *Fernseh-Exklusivrechtegesetz* (Act on exclusive television rights - FERG). On the other hand, supervision of collecting societies is transferred to the new *Aufsichtsbehörde für Verwertungsgesellschaften* (supervisory authority for collecting societies). Appeals against KommAustria's decisions can still be submitted to the *Bundeskommunikationssenat* (Federal communications senate).

The financing of ORF will be adapted to conform to the rules agreed between Austria and the European Commission at the end of 2009. The following measures are designed to ensure that the money received by ORF from licence fees is only used to fund activities that clearly fall within the public service remit defined by the Parliament in accordance with EU law, and to prevent any unnecessary distortion of competition linked to the fulfilment of this remit. To this end, the ministerial draft makes provision for the following measures:

- ORF's public service remit must be clarified with regard to its online services and special interest channels. This should be achieved by amending its legal remit and instructing ORF to draw up "service concepts", which should provide more concrete definitions.

- In addition, ORF must set up an internal quality assurance system involving its three most important organs, i.e., the Director-General, the *Stiftungsrat* (Foundation Board) and the *Publikumsrat* (Viewers' Council). An external council of experts will evaluate the overall performance of the quality assurance system and decide whether the quality criteria are being met in key areas. The *Publikumsrat* only has the power to make recommendations. KommAustriais required to ensure compliance with the provisions of the quality assurance system.

- It should be determined in advance whether new services provided by ORF - such as a new specialist channel or an additional online service - comply with European State aid law. To do so, such services must provide added value compared to existing public services, but at the same time must not excessively distort competition. KommAustriawill carry out this evaluation procedure.

- In order to prevent over-financing of ORF, the rules on calculating the maximum allowable licence fee will be clarified. As before, the level of the licence fee will be set by the *Stiftungsrat*, while the *Publikumsrat* will continue to have the right of veto with delaying effect; however, KommAustria will be obliged to examine decisions setting the licence fee.

The *ORF-Gesetz* (ORF Act) must also be brought into line with the AVMS Directive. To this end, the concepts of "commercial communication", "audiovisual media

service" and "on-demand service" will be defined in the Act for the first time.

The *Privatfernsehgesetz* (Private Television Act) will, in future, regulate audiovisual media services as well as terrestrial and mobile terrestrial private television, satellite television, cable television and multiplex platforms, and will consequently be renamed the "*Audiovisuelles Mediendienste-Gesetz*" (Audiovisual Media Services Act). Licences must be obtained in accordance with this Act by any company providing terrestrial and mobile terrestrial television or satellite television services. Cable broadcasters and other media service providers merely have to register their services with KommAustria. In accordance with the AVMS Directive, provisions on product placement for private audiovisual media services will be adopted. Product placement will be permitted under certain conditions in cinematographic works, films and series made for television, sports programmes and light entertainment programmes.

The *Privatradiogesetz* (Private Radio Act) will, in future, also regulate cable and satellite radio. Digital radio will be possible using a multiplex model. The date of the tender procedure for the multiplex platform has not yet been fixed, but it will conform to the digitisation concept. According to the bill, the operator of the multiplex platform for digital television will not be excluded from the tendering procedure for the radio multiplex platform.

The amendment of the *Fernseh-Exklusivrechtegesetz* is designed to implement Art. 3k of the AVMS Directive. A distinction is made between events of general interest to the public to which, due to the circumstances of the event, only one television broadcaster has access, and events of general interest to the public to which a television broadcaster has acquired exclusive broadcasting rights. For the latter category, the maximum length of short reports is 90 seconds, whereas there is no limit in the case of the former category. Compensation may not exceed the costs directly linked to the provision of access; a television broadcaster which, due to the circumstances of the event, is the only one able to report on it, may also charge a proportion of the production costs.

• *Ministerialentwurf 115/ME (XXIV.GP) und weitere Dokumente* (Ministerial draft 115/ME (XXIV.GP) and other documents)
http://merlin.obs.coe.int/redirect.php?id=12255 DE

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RAK Fines RTRS because of Unauthorised Digital Broadcasting

The Communications Regulatory Agency (RAK) has fined the public broadcaster Radio Televizija Republike Srpske (RTRS) BAM 100,000 (about EUR 50,000) due to a violation of Article 32 para. 1 of the BiH Law on Communications because of unauthorised use of the frequency band via 61 UHF channel around the area of Banjaluka, the capital of the Republika Srpska.

On 12 December 2009 RTRS started its experimental digital terrestrial broadcasting under a regular programme schedule (DVB-T standard and MPEG 2 compression). On 14 December 2009 the RAK warned RTRS and ordered it to stop the unauthorised digital broadcasting but RTRS did not, thus violating Article 46 section 3 point c) of the Law on Communications.

In doing so RTRS also ignored the national Strategy of the Transition to Digital Broadcasting, which was adopted by the Council of Ministers on 17 June 2009. In the course of promoting its digital broadcasting RTRS stated that potential viewers were obliged to buy a „set-top box“. But this device will be practically useless after the introduction of a digital broadcasting system on countrywide level, which shall be completed by the end of 2012 and for which the implementation of the MPEG 4 standard is envisaged (see: IRIS 2009-3: 4).

The fine imposed by the RAK is the highest financial amount imposed on a broadcaster in the post-Dayton BiH and critics say it was inappropriate with regard to the violation in question. The RTRS management announced that it will not obey the decision but rather spend the money on additional improvements to digital broadcasting.

Meanwhile, RTRS stopped its digital broadcasting, but this had nothing to do with the RAK's order.

• Authority's press release on the decision of 21 January 2010
http://merlin.obs.coe.int/redirect.php?id=12268 EN

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Flemish Regulator, Teleshopping and Advertorials

At the end of 2009, the*Vlaamse Regulator voor de Media* (Flemish Regulator for the Media) issued several decisions regarding audiovisual commercial communications. Two of them will be addressed below.

In a decision of 23 November 2009 the Flemish Regulator imposed on MTV Networks Belgium a fine amounting to EUR 2,500 for multiple breaches of the regulation on teleshopping. The Regulator considered three programmes ('Hot or Not', 'Your Take Ringtone Chart' and 'Your Take') to be teleshopping programmes. According to Article 82, §1 (1) of the Flemish Media Decree 2009, these programmes have to be designated as such by means of visual and acoustic signals. The Regulator stated that merely showing the price and/or the way in which an order may be placed, or merely displaying a banner with the words 'subscription service' do not suffice to meet the obligation that such programmes should be clearly, both visually and acoustically, designated as teleshopping. In 'Hot or Not', the viewers were invited, via banners displayed during video clips, to make comments on photographs of other viewers. At the end of each clip, a verdict was announced as to whether a viewer was hot or not. As this voting process exerted no influence whatsoever on the choice or ranking of the video clips, the Regulator decided that, instead of an interactive application (as argued by the broadcaster), this activity was a mere sale of screen space that incorporated all the elements of teleshopping. There was no clear separation between the clips and the banners, which, the Regulator added, could have been established by merely using a split screen. In 'Your Take Ringtone Chart', during which 20 music videos were broadcast, banners mentioning special offers were displayed during the broadcast of 19 of these. Again, the Regulator judged that there was no spatial separation between the clips and the banners. Moreover, the programme was interrupted for the first time after only 12 minutes. According to Article 82, §1 (3) of the 2009 Decree however, teleshopping programmes without interruption should last at least 15 minutes. Finally, in 'Your Take', video clips were shown for several seconds, each time followed by the invitation to order the corresponding ringtone. Instructions on how to order were displayed via banners for a duration of several seconds. The Regulator also considered this to be a teleshopping programme that was not designated as such by visual and acoustic signals and that was not distinguishable from editorial content (Article 82, §1 (2), 2009 Decree). The Regulator considered the fact that the presentation was done by an external and unknown person and the fact that only parts of video clips had been displayed were not sufficient to meet the obligation to distinguish teleshopping from editorial content.

In a decision of 21 December 2009 the Regulator decided to caution the commercial broadcaster VMMa for breach of the regulation on advertorials. In between two programme announcements, an 'advertorial' was broadcast which lasted for two minutes and showed some fragments of the previously transmitted pre-selection process in the programme 'Idols'. During the last ten seconds a link was established with the new Polo manufactured by VW Golf. According to Article 81, §5 of the 2009 Decree, advertorials are commercial communications that last longer than advertisements, as the emphasis is on their editorial and informative content. As the Regulator judged that in this 'report' the emphasis was not on the editorial and informative content at all, it considered the 'report' to be a television ad. As a consequence, the maximum allowed percentage of broadcasting time for television ads and teleshopping ads within an hour had been exceeded (see Article 81, §2 Decree 2009, according to which '[t]he share of television ads and teleshopping ads may not exceed twenty percent per clock hour'). As in the relevant period two isolated ads had also been broadcast (which should remain an exception, see Article 79, §2 of the Decree 2009), the Regulator decided to impose a fine amounting to EUR 1.250.

- *ZAAK VAN VRMt. BVBA MTV NETWORKS BELGIUM (dossier nr. 2009/0493 + 2009/494) - BESLISSING nr. 2009/078, 23 november 2009* (VRM v. BVBA MTV Networks Belgium, 23 November 2009 (No 2009/078))
http://merlin.obs.coe.int/redirect.php?id=12234 NL
- *ZAAK VAN VRMt. NV VLAAMSE MEDIA MAATSCHAPPIJ (dossier nr. 2009/0493) - BESLISSING nr. 2009/079, 21 december 2009* (VRM v. NV VMMa, 21 December 2009 (No 2009/079))
http://merlin.obs.coe.int/redirect.php?id=12235 NL
- Act on Radio and Television Broadcasting, 27 March 2009 (non official translation)
http://merlin.obs.coe.int/redirect.php?id=12236 EN

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Recommendation on Product Placement

Product placement has been authorised in the French-speaking Community of Belgium since 19 December 2009, in compliance with Article 21 of the Coordinated Decree of 26 March 2009 on audiovisual media services. By totally banning product placement in news broadcasts and children's programmes, the legislator has in fact gone further than is required by the AVMS Directive, but the amendment is significant nonetheless: in all other types of programme, the placement of accessories is authorised, whereas product placement *stricto sensu* (i.e., in return for

payment) is only accepted in cinematographic and television fiction (series, films made for television), in sports programmes (including matches), and in entertainment programmes (games, variety broadcasts, reality shows, etc).

With this in mind, the authorisation and supervision college of the *Conseil Supérieur de l'Audiovisuel* (audiovisual regulatory body - CSA) adopted a recommendation on 17 December 2009 on product placement on television to lay down a framework and some criteria for this new practice, with a view to ensuring transparency and legal security. Like many audiovisual regulatory bodies throughout Europe, the CSA does not have any regulatory power - and the recommendation is therefore not a regulation that creates a law - but its power of supervision and sanction nevertheless means that it will be required to apply the statutory provisions to product placements. The recommendation has been drawn up after meetings with the various stakeholders in the sectors concerned (editors, producers, advertisers, consumer associations, etc), and its function is therefore to explain to editors the way in which the regulator will interpret this practice in its future decisions.

In compliance with the Directive, the coordinated decree on audiovisual media services imposes observance of four conditions for product placement: the content and, in the case of television broadcasting, the programming, must not be influenced in such a way as to infringe the service editor's liability and editorial independence, there must be no direct incitement to purchase or hire the goods or services, attention must not be drawn to the product without justification, and there must be clear identification that a product is being placed. In this respect, the CSA recommends that editors adopt a two-stage approach: for a period of three months, to familiarise viewers with the idea of product placement, the CSA recommends that editors indicate the presence of product placement, and explain what is involved by showing a full-screen notice for at least ten seconds before the start of the programme stating that "The following programme contains the commercial placement of products, brand names or services" accompanied by a "PP" pictogram. During a second stage, the pictogram would suffice, but should appear alone for at least ten seconds at the start and end of programmes, and after commercial breaks.

• *Conseil supérieur de l'audiovisuel, « Recommandation relative au placement de produit », 17 décembre 2009* (CSA "Recommendation on product placement", 17 December 2009)
http://merlin.obs.coe.int/redirect.php?id=12251 FR

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Controversial Changes to the Electronic Communications Act

In December 2009 the Council of Ministers submitted a Draft Law on the Amendment and Supplementation of the Electronic Communications Act ("Draft Law") to the National Assembly.

The Draft Law has been prepared in order to resolve the legal problems that have arisen from the last amendment of Article 251 of the Electronic Communications Act and influenced significantly the day-to-day investigative activities of the judicial system. The other reason for the proposed Draft Law is the requirements for the implementation of Directive 2006/24/EC on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks into Bulgarian legislation.

It is explicitly provided in the Draft Law that the data extracted from electronic communications should be presented to the court and the authorities conducting the investigation under the terms and procedures laid down in the Criminal Procedure Code directly by the enterprises providing public electronic communications networks and/or services. If the electronic communications have been provided to the court and the authorities conducting the investigation directly by the public communications operators the data contained in the electronic communications can serve as valid evidence in the criminal proceedings.

The above-mentioned new rule has received a very negative reception from the general public. As a result, the Government has started a consultation process with all interested parties in order to amend the text of Article 251 of the Electronic Communications Act in a way that would not restrict the right to private life of the citizens.

• Законопроект за изменение и допълнение на Закона за електронните съобщения (Draft Law on the Amendment and Supplementation of the Electronic Communications Act)
http://merlin.obs.coe.int/redirect.php?id=12270 BG

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IRIS
Legal Observations
of the European Audiovisual Observatory
OBSERVATOIRE EUROPÉEN DE L'AUDIOVISUEL
EUROPEAN AUDIOVISUAL OBSERVATORY
EUROPÄISCHE AUDIOVISUELLE INFORMATIONSSTELLE

CH-Switzerland

Controversial Commercial Broadcast after 16 Years

At the end of January 2010, *Schweizer Fernsehen* broadcast an advertisement by the *Verein gegen Tierfabriken* (VgT) three times, thus bringing an end to a 16-year legal dispute. In January 1994, the VgT had asked the *Schweizerische Radio- und Fernsehgesellschaft* (Swiss radio and television corporation - SRG) to broadcast its spot, which attempted to raise awareness of the cruel treatment of pigs and to urge viewers to eat less meat. However, SRG's subsidiary, *publisuisse SA*, refused this request on the grounds that the spot infringed the ban on political advertising on television. This was followed by a legal battle in which the Swiss *Bundesgericht* (Federal Court) and the European Court of Human Rights (ECHR) were each involved on three separate occasions.

Following the ECHR's third ruling in the case of 30 June 2009 (see IRIS 2009-10: 4), the Swiss *Bundesgericht* ruled in the VgT's favour. In a judgment of 4 November 2009, the highest Swiss court granted the VgT's (second) appeal. In the grounds for its decision, the *Bundesgericht* held that the disputed spot did not represent banned political advertising on television. It departed from its earlier view, expressed in 2002, that the VgT would need to take the case to a civil court. It ruled that the SRG must take its decision into account with immediate effect and offer a solution within a reasonable period of time. If it failed to do so, the broadcasting regulator (the *Bundesamt für Kommunikation* - Federal Communications Office) would need to consider measures under licensing law.

The SRG subsequently agreed to broadcast the spot. The version that was finally shown in January 2010 differed in two ways from the original spot which the VgT had asked to be broadcast in 1994 and which the various courts had ruled on:

- Firstly, the VgT added a text that was shown on screen and read out at the beginning of the spot. This text mentioned the ECHR judgment and criticised the "censure" by *Schweizer Fernsehen*, to which the minister responsible and the *Bundesgericht* had given their blessing.

- Secondly, the VgT removed part of the original spot because Swiss rules on pig-keeping had changed since the pictures were filmed. It therefore omitted a section containing claims that pigs would be "forced to keep still" and "crammed full of medicines" throughout their lives.

• *Urteil des Bundesgerichts 2F_6/2009 vom 4. November 2009* (Judgment 2F_6/2009 of the Federal Court, 4 November 2009)
http://merlin.obs.coe.int/redirect.php?id=12261 DE

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Supreme Court Decision on the Competence of the Media Regulator to Examine Ethical Issues

The Supreme Court, First Instance jurisdiction, decided on 18 December 2009 that the Radio Television Authority ("Authority") has the power to make decisions on breaches of the Law in matters that are subject to the Code of Journalistic Ethics ("Code"); this is possible when the breach is connected to a provision of the Law other than those in the Code.

A broadcaster had appealed against a decision of the Authority in which the Authority imposed a fine due to the way the broadcaster dealt with an air disaster near Athens in 2005 in which 121 people died. The Authority found that there was a breach of the principles that govern news bulletins and current affairs programmes as set out in Article 26 (2) of the Law on Radio Television Stations and of the Rules 24 (1)a and 24 (2), (1) of the Regulations and in particular of the provision to avoid screening close-up shots of people bleeding or found in an extreme emotional state of despair or anger.

In its appeal the broadcaster challenged the decision on various grounds. The main position of the appellant was that the Authority had no competence to decide on the matter as it was linked to ethical issues and required a demand of the Media Complaints Commission before examining the case. This argument was based on Rule 27 (4) providing that "News programmes, tele-magazines and human reality shows are subject to the Code of Journalistic Ethics, attached in the current appendix VIII of the regulations" and Article 3 (2) (z) (ii), which stipulates that the Authority can examine cases of breaches of the Code only after a demand of the Media Complaints Commission.

In support of this position, the appellant cited a relevant decision of the Supreme Court, by which the Authority's sanctions against a broadcaster were cancelled based on the above argument (see IRIS 2006-2: 11).

The Supreme Court clarified that in the cited case the Authority's decision was totally cancelled because the

sanctions imposed were for both the breach of a provision of the Code and of a rule set out in the Regulations, without them being separated. Thus, the Law does not prohibit the examination of breaches of provisions of the Law or Regulations by the Authority in matters which are subject to the Code but the breach is not connected or referred to a provision of the Code.

Further the broadcaster submitted that the Authority's exercise of discretionary powers was wrong because it had not given any definition of the terms/principles set out in the provisions of the Law and Regulations breached. In conclusion, the Supreme Court said that answers to the issue of interpretation and justification of 'value-judgement terms' in the breached provisions could be found in the previous parts of its own decision and no further explanation was needed.

Based on the above the Supreme Court dismissed the appeal. The decision is subject to review by the Supreme Court's Second Instance jurisdiction.

• Decision of the Supreme Court, Case 572/2007, Antenna Ltd v. Radio Television Authority, 18 December 2009 EL

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Radio Television Authority Can Claim its Dues in Court

The Radio Television Authority ("Authority") has the right to file a recourse to a trial court to claim its dues. This is the verdict of the Supreme Court dated 17 December 2009, which upheld the relevant decision of a trial court. Thus, the issue of the Authority seeking in court the payment of its dues by a broadcaster receives a definite answer as this is the first time the Supreme Court deliberated on the matter. As a result, the broadcaster must pay its debts to the Authority.

The Supreme Court was concerned with an appeal by Sigma Radio TV against the Authority following the decision of a trial court that ordered the broadcaster to pay its dues to the Authority, plus interest and costs. The Authority had filed a recourse to the Nicosia District Court following the refusal of the broadcaster to pay penalties for breaches of the Radio and Television Law and Regulations. The claim amounted to CP 15,300 (EUR 26,140) and the fine had been imposed by the Authority in two separate decisions. The appellant challenged the first instance court decision on several grounds including the following:

- the trial court had no jurisdiction to issue a summary decision as the requirements of the civil procedure rules were not fulfilled;

- the decision on the substance of the Authority's claim was issued without the court having examined whether the appellant had good arguments against it;

- the decision not to send the suit to the Supreme Court or the non-examination of issues concerning the constitutionality of the Radio and Television Law and Regulations was wrong and

- the court was wrong in allowing and accepting the decisions of the Authority that condemned the appellant as sufficient evidence for its decision.

In its verdict the Supreme Court noted that the evidence provided was sufficient for a verdict to be issued and that the decisions of the Authority, as administrative acts, were effective. This was based on the Law, which provides that "Fees or administrative fines or other dues are payable regardless of any objections or recourse". Moreover, the said acts based on which the Authority raised its claims were lawful as no court decision had cancelled them and the appellant had not challenged their validity. With respect to the constitutionality of the Radio and Television Law and Regulations or specific provisions, such as the power of the Authority to attend to a case, decide on it and to impose fines, the Supreme Court reminded the parties that such questions have been examined in other cases and there is abundant case-law dismissing alleged unconstitutionality of the Law (see IRIS 2009-1: 9).

The decision opens the way for the Authority to impose and collect fines that some broadcasters have so far refused to pay.

• (340377373371304371372΄367 Έφεση 321301. *187/2007) 17* 324365372365μ362301΄371377305, *2009* (Decision of the Supreme Court of Cyprus, Second Instance, Appeal 187/2007, Sigma Radio TV v. Radio Television Authority, of 17 December 2009)
http://merlin.obs.coe.int/redirect.php?id=12231 EL

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Information Campaign on Digital Television Switch-over Begun

The Office of the Commissioner for Electronic Communications and Postal Regulation (OCECPR) has launched its first information bulletin on the introduction of digital terrestrial television in Cyprus (see IRIS 2010-2: 1/7).

In the publication the general framework and the arrangements for the start of digital terrestrial television and the complete switch-off of analogue transmission in July 2011 are explained. Answers to ten questions then follow. These concern:

- technical issues and requirements the consumer needs to respond to in order to be able to receive digital television programmes;

- forms of digital television services beyond their terrestrial form;

- the features and advantages and

- services that are/will be offered by digital television.

The bulletin explains that Cyprus has changed the technical standard for digital television, shifting from DVB-T MPEG-2 to DVB-T MPEG-4 as the latter was judged as offering more advantages at an accessible price, leaving open the possibility for the consumer to benefit from new services in the future.

A public information campaign regarding digital television in general and not only its terrestrial form will be part of the authorities' supporting measures (including also a subsidy for the purchase of digital decoders). This was announced in the Policy Paper on the authorisation of digital television networks published in early December 2009. The campaign will be as comprehensive as possible and will be conducted by an information team consisting of representatives of Government offices, regulatory authorities and the private and public service television broadcasters. The Government will bear the financial costs of the enterprise.

• Εισαγωγή της Επίγειας Ψηφιακής Τηλεόρασης στην Κύπρο (Document published by the OCECPR)
http://merlin.obs.coe.int/redirect.php?id=12230 EL

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DE-Germany

Federal Administrative Court Rejects Competitors' Claim for Access to Telekom's Dark Fibre

On 28 January 2010, the *Bundesverwaltungsgericht* (Federal Administrative Court - BVerwG) decided that Deutsche Telekom AG is not obliged to provide its competitors with access to its optical fibres between cable distributors and main distribution frames (MDFs).

In the proceedings,Deutsche Telekom had appealed against a regulatory order issued by the *Bundesnetzagentur* (Federal Network Agency - BNetzA) on 27 June 2007. The order obliged the former monopolist to grant its competitors access not only (as before) to the 8,000 or so MDFs, but also to the cable ducts between the MDFs and the 300,000 or so cable distributors. The decision to broaden the obligation to provide access was based on the fact that Deutsche Telekom, by extending its VDSL network, was bringing its digital transmission technology nearer to customers' end terminals in order to achieve higher transmission rates. Direct access to the cable distributors would enable competitors to create their own broadband infrastructures. However, this would not mean providing access to Deutsch Telekom's VDSL technology. Nevertheless, according to the order, Deutsche Telekom had to make its own dark fibre available to competitors, in return for payment, if it was unfeasible to install additional fibre optic cables due to technical or capacity reasons.

The BVerwG has now lifted the latter obligation, since the BNetzA failed to provide sufficient evidence that such access was justified. However, the court confirmed the other provisions of the order.

When announcing the order, the BNetzA had argued that Deutsche Telekom, unless it provided subsidiary access to its fibre optic cables, could, by filling the cable conduits in an inefficient manner, prevent its competitors from accessing cable distributors in order to extend their own networks.

• *Pressemitteilung des BVerwG zum Urteil vom 27. Januar 2010 (Az. 6 C 22.08)* (Press release of the BVerwG on the ruling of 27 January 2010 (case no. 6 C 22.08))
http://merlin.obs.coe.int/redirect.php?id=12256 DE

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Munich Appeal Court Upholds Information Claim against Aegis Media

On 23 December 2009, the *Oberlandesgericht München* (Munich Appeal Court - OLG) upheld the company Danone's claim to information about the kick-back payments received by the media agency Aegis Media during the period of a contract between the two companies (case no. 7 U 3044/09).

The plaintiff had been using Aegis Media as its media agency for many years. As such, Aegis Media essentially managed the company's TV advertising budget and bought advertising slots from broadcasters. Under the contract between the two parties, all economic benefits that were neither part of the advertising fee nor the result of common market practice, but which the defendant received when purchasing advertising slots had to be forwarded to Danone.

The OLG decided that Danone had a right to information under Art. 666 of the BGB (Civil Code) in connection with the agency contract concerned. Aegis Media had to disclose information about the rebates and

other benefits that it had received between 2003 and 2005 from TV broadcasters or their marketing companies with which advertising spots had been placed on behalf of Danone, particularly about rebates in kind ("free spots") and kick-back payments. This was the first time that the OLG had recognised the right of a media agency customer to information about the agency's kick-back payments.

The appeal judgment clearly states that there is no possibility of appeal against this ruling.

• *OLG München, Urteil vom 23. Dezember 2009, Az. 7 U 3044/09* (Munich Appeal Court, ruling of 23 December 2009, case no. 7 U 3044/09) DE

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Court Considers Unauthorised Use of Open WLAN as Criminal Offence

According to media reports, the *Amtsgericht Zeven* (Zeven district court - AG) has issued a penalty order against the user of another person's unencrypted WLAN. In the court's view, the unauthorised use of the WLAN constitutes the offence of unauthorised tapping under Art. 148 in connection with Art. 89 of the *Telekommunikationsgesetz* (Telecommunications Act - TKG). Furthermore, the woman, by making contact with her former partner and his new girlfriend via the social network "StudiVZ", was found guilty of stalking under Art. 238 of the *Strafgesetzbuch* (Criminal Code - StGB) and of false accusation under Art. 164 StGB.

After her relationship had ended, the defendant had managed to obtain the confidence of her former partner's new girlfriend by using a female false identity. Using another, male, false identity, she used the information she had thus obtained in order to make compromising remarks to her former partner about his new girlfriend. The defendant accused her, for example, of damaging her former partner's vehicle. In the end, the former partner broke off his new relationship. In order to remain anonymous, the defendant had used the unsecured WLAN network of a neighbour, who had known nothing about it.

The court treated this as a punishable case of unauthorised tapping, as the *AG Wuppertal* (Wuppertal district court) had done in a similar case in 2007. The latter court had considered it an offence under Articles 148 and 89 TKG on the grounds that the allocation of an IP address to a computer represented a "message" in the sense of these provisions. Since it was not the WLAN router, but its owner who decided who could use the IP address, the message had not been intended for the accused, who was therefore guilty of unauthorised tapping.

In such cases, the dominant opinion in case law and literature until now has been that such offences are not punishable under criminal law, but merely lead to the granting of civil law actions such as claims for damages.

• *Pressemitteilung der den Strafbefehl beantragenden Staatsanwaltschaft Stade vom 16. Dezember 2009* (Press release of the State public prosecutor's office, which applied for a penalty order, 16 December 2009)
http://merlin.obs.coe.int/redirect.php?id=12259 DE

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OVG Denies Obligation to Pay to Use Archive Material in Film Production

In a ruling of 17 December 2009, the *Oberverwaltungsgericht Münster* (Münster Higher Administrative Court - OVG) decided that the system of fees charged by the *Landesarchiv* (State archive - LA) of North Rhine-Westphalia (NRW) for the presentation of archive material in television programmes is illegal in its current form.

The plaintiff in this case had asked the LA for permission to inspect certain archive material and a licence to film individual items in connection with the production of a historical documentary film. The LA granted the permission requested and, after the film had been completed, issued a corresponding invoice to the plaintiff. This was based on the provisions of the *Gebührenordnung* (scale of charges - GebO) for the NRW State archive and charged the plaintiff for presenting the filmed archive material in television, video and film productions, as well as repeat showings. The plaintiff protested against this invoice and, when its protest was refused, instituted legal proceedings. It argued, *inter alia*, that the LA was not entitled to charge fees for the presentation of archive materials in television or film broadcasts, since the fees related to the use of the LA and did not apply to presentation in a television programme. The service provided by the LA was simply to make the relevant documents available. The LA rejected this, arguing that its charges were based on how the archive material was used.

The lower court had rejected the complaint. The OVG now ruled in the plaintiff's favour. In particular, it noted that para. 3.2 of Appendix 2 to the GebO, on which the LA's decision was based, was invalid on the grounds that it lacked an effective legal basis. The provisions of the *Archivgesetz* (Archive Act - ArchivG NRW) and *Gebührengesetz* (Fees Act - GebG NRW),

on which the charges were based, were each dependent on use of the LA. According to the ArchivG NRW, such use resulted from direct use of archive materials, "but not the use of products created through the use of archive materials". The fee charged under para. 3.2 was not linked to the use of the archive materials themselves during the film production, but to the screening of this production, which had been created using the archive materials. The same applied from the point of view of use of a reproduction. It was doubtful whether acts such as this could be categorised as the reproduction of archive material. In any case, however, even if they could, the broadcasting of the film did not constitute a direct use of the reproduction. The exploitation of usage rights could only be taken into consideration "as a value factor in the calculation of the fee and the determination of the amount".

There is no right of appeal against this decision.

• *Urteil des OVG Münster vom 17. Dezember 2009 (Az: 9 A 2984/07)* (Decision of the OVG Münster of 17 December 2009 (case no: 9 A 2984/07))
http://merlin.obs.coe.int/redirect.php?id=12258 DE

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Draft Amendment to FFG Tabled

The Federal Government has published a press release, announcing that it has adopted a draft amendment to the *Filmförderungsgesetz* (Film Support Act - FFG).

The proposal to revise the FFG followed concerns raised by the *Bundesverwaltungsgericht* (Federal Administrative Court - BVerwG) concerning the conformity of the current rules on contributions with Art. 3.1 of the *Grundgesetz* (Basic Law - GG). It was claimed that, under the current provisions of Arts. 66 and 67 FFG, cinema operators and the video industry on the one hand, and television companies and pay-TV providers on the other, were treated differently with regard to the contributions they had to pay to the *Filmförderungsanstalt* (Film Support Office - FFA). Whereas cinema and video companies had to pay a fixed amount laid down by law, the contributions owed by television companies were based on contractual agreements with the FFA (see IRIS 2009-4: 7).

These concerns over the constitutionality of the current system should be dispelled by the amendment of the FFG. To this end, the draft proposes that, in future, the level of contributions to be paid by television companies and pay-TV providers should also be laid down by law. The amount should be determined in accordance with the provisions applicable to cinema operators and video companies, taking into account the fact that television companies and pay-TV providers do not receive any direct support from the FFA and generate only part of their income from cinematographic works.

• *Pressemitteilung der Bundesregierung vom 27. Januar 2010* (Press release of theFederal Government, 27 January 2010)
http://merlin.obs.coe.int/redirect.php?id=12257 DE

• *Entwurf eines Sechsten Gesetzes zur Änderung des Filmförderungsgesetzes* (Draft Amendment to the Film Support Act)
http://merlin.obs.coe.int/redirect.php?id=12274 DE

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FI-Finland

Legislator Proposes Changes to the Protection of the Media's Information Sources for Reasons of Protecting Privacy

The Finnish legislator intends to make some changes to the protection of the media's information sources in cases in which the published information has been given in violation of a duty of secrecy, which is subject to punishment under a separate provision.

The reason for this is the protection of privacy, as this right is guaranteed as a constitutional and human right. Nowadays it is impossible to breach the confidentiality of information sources during a pre-trial investigation unless the maximum punishment of the suspected crime which is to be investigated is at least six years imprisonment. Because the violation of a duty of secrecy is not punishable with so severe a sentence, the victim of that kind of crime has in practice no possibility or, at best, a very weak chance of finding out who has breached their obligation of maintaining secrecy. This means that the offender cannot be charged with this crime and neither can compensation for the damage caused be sought from him or her. As a result, the right to privacy is not very well protected in this kind of case.

At the trial however, a witness may be ordered to answer a question even when information that has been given in violation of a duty of secrecy, which is subject to punishment under a separate provision, is concerned. In practice trials of this kind have not occurred, as it is exceedingly difficult to determine who should be accused of the crime, when the confidentiality of sources cannot be breached during the pre-trial investigation.

According to the first proposal for the new provisions, the source of information would have been able to be ascertained in a pre-trial investigation if there were probable reasons to doubt the information in question

was given under a duty of secrecy and the breach of that duty was subject to punishment under a separate provision, while answering the question would be perceptibly indispensable to solving the case and justifiable in comparison to the seriousness of the crime or of its consequences.

The proposal was strongly criticised as it would have given very wide discretionary powers to the courts and would have had a chilling effect on sources' willingness to impart information. Because of this, the proposal has been stalled.

Now the Ministry of Justice is to examine the legislative models in effect in other European countries and on this basis decide what kind of formulation would give on one hand sufficient protection to the individual's right to privacy and on the other hand sufficient protection for information sources' freedom of speech and the free flow of information that appertains to it.

• 2009:2 Esitutkintalain, pakkokeinolain ja poliisilain kokonaisuudistus. Esitutkinta- ja pakkokeinotoimikunnan mietintö (The total reform of the Criminal Investigations Act, Coercive Measures Act and Police Act. Report of the Committee of Criminal Investigations and Coersive Measures)
http://merlin.obs.coe.int/redirect.php?id=12271 FI

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FR-France

Conseil d'Etat Cancels Abolition of Advertising on Public Television before Legislation Is Adopted

In a decision on 11 February 2010 the *Conseil d'Etat* cancelled the letter from the Minister for Culture and Communication of 15 December 2008 calling on the Chairman of France Télévisions to stop marketing advertising space on the group's channels between 10 p.m. and 6 a.m. "in accordance with both the spirit and the letter of the legislative reform in hand". The letter was issued at a time when the bill on reforming the audiovisual sector, directed mainly at abolishing advertising on public service television, was pending: the Act had only passed through the National Assembly on its first reading, and was awaiting examination by the Senate, scheduled for 19 January 2009. The Government, however, wished to have the advertising abolished immediately, from 5 January 2009, and had therefore sent the disputed letter calling on France Télévisions to abandon advertising from that date. It did so, as approved by the company's board of directors on 16 December 2008, before the Senate's deliberations. About twenty members of the Senate, who held the Minister's letter and the resolution adopted by the board of directors to be against the law, called on the *Conseil d'Etat* to cancel them, even though the arrangements were already being applied. The *Conseil d'Etat* concurred, recalling that under Article 34 of the Constitution, 'The law lays down the rules concerning the civil rights and the fundamental guarantees granted to citizens for the exercise of public freedoms; the freedom, diversity and independence of the media (04046)". In the present case, the *Conseil d'Etat* held that the abolition of advertising during a substantial part of airtime was a measure that had the effect of depriving France Télévisions of a significant part of its income and impacting on the guarantee of its resources, which constituted an element of its independence and could therefore only be decided on by the legislative authority. The two contested documents were therefore cancelled.

Although this decision, seen by the opposition as "a slap in the face for the executive authority", is fairly strong symbolically, the CSA feels that it will have "no practical consequences". As the *Conseil d'Etat* notes, the cancellation only concerns the period between 5 January - the date on which the measure was implemented - and 8 March 2009, the date on which the Act reforming the audiovisual sector, and abolishing advertising between 10 p.m. and 6 a.m. on the channels in the France Télévisions group, came into force. This measure, decided on by the legislator and in force for more than a year, is not *a priori* being called into question, except perhaps by the European Commission. The Commission has qualified the 0.9% tax on turnover imposed since the adoption of the Act of 5 March 2009 on telecom operators to compensate for the abolition of advertising as "an administrative fee incompatible with European law", and France therefore has two months to reply. To be continued, then!

• *Conseil d'Etat, (5e et 4e sous-sect.), 11 février 2010, Mme Borvo et autres* (Conseil d'Etat, (5thand 4thsub-sections), 11 February 2010, Ms Borvo et al.)
http://merlin.obs.coe.int/redirect.php?id=12253 FR

Amélie Blocman
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Numbering of BFM TV and NRJ 12 Channels: Suspension of CSA Decisions

In an order delivered under the urgent procedure on 16 February 2010, the Conseil d'Etat has suspended the two decisions by the Conseil Supérieur de l'Audiovisuel (audiovisual regulatory body - CSA) ordering Canalsat to revise the numbering in its offer of the channels NRJ 12 and BFM TV (see IRIS 2010-2: 1/18). It will be recalled that the two channels are numbered 12 and 15 respectively in the "logical numbering" for DTV drawn up by the CSA, and that they

wish to keep the same numbers on all the broadcasting media. They had turned to the CSA as they felt they were being disadvantaged by their numbering in the Canalsat package, operated by Canal + Distribution, in which they are numbered 36 and 55 respectively. The CSA instructed the group to change its numbering, which it considered "discriminatory" and contrary to the new provisions of Article 34-4 of the amended Act of 30 September 1986.

Canal + Distribution has lodged two appeals against these decisions, one in the ordinary manner and the other under the urgent procedure. Under the urgent procedure a judge receiving an application for an administrative decision to be cancelled or set aside may order its suspension, or the suspension of some of its effects, where this is justified by the urgency of the application and there is an argument such as to cast serious doubt as to the legality of the decision (Art. L. 521-1 of the Code of Administrative Justice).

The Conseil d'Etat based its order on the CSA's interpretation of Article 34-4 of the Act of 30 September 1986, which Canal + Distribution holds to be erroneous from a legal point of view, in considering whether there was serious doubt as to the legality of the contested decisions. It considers that the CSA's decisions are based on an interpretation of the text that is in turn based on the preparatory work for the Act, according to which it was the legislator's intention to prevent distributors structuring the services they offered by only partially adhering to the "logical numbering" of 1 to 18, by keeping these numbers only for the "historic" channels. The judge noted that another interpretation was possible, based on the letter of the law, which merely provided that if the distributors did not observe the "logical numbering", i.e., if they did not use the numbers 1 to 18 for the sequence of DTV channels, they were required to reserve for these channels a homogenous group that observed the same sequence and was placed immediately after a multiple of 100. The Conseil d'Etat also noted the urgency of the matter, inasmuch as the new numbering needed to be established by 1 March 2010 at the latest and that the risk of disturbing Canalsat's services schedule was likely to have serious consequences for both Canalsat and viewers.

As proof was provided of serious doubt as to the legality of the contested decisions and of the urgency of the matter, the Conseil d'Etat has therefore suspended the contested decisions by the CSA until the case is heard in the normal way, and has ordered the State to pay Canal + Distribution 3,000 euros in procedural costs.

• *Conseil d'Etat (ord. réf.), 16 février 2010, Société Canal + Distribution* (Conseil d'Etat (order under the urgent procedure), 16 February 2010, the company Canal + Distribution)
http://merlin.obs.coe.int/redirect.php?id=12254 FR

Amélie Blocman
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CSA Able to Sanction a Channel that Fails to Comply with Legislation on the Protection of Intellectual Property

The *Conseil d'Etat* has just delivered an extremely interesting decision on an issue that, to our knowledge, has given rise to few disputes. A television channel that had retransmitted live without authorisation a programme on the debates between the Socialist Party's candidates for the presidential election being broadcast on the parliamentary channel had been ordered by the *Conseil Supérieur de l'Audiovisuel* (audiovisual regulatory body - CSA) to comply in future with the terms of Article 2-2-3 of its agreement, according to which the editor is required to comply with France's legislation on intellectual property. The channel had applied to the administrative judge for the decision to be cancelled.

The *Conseil d'Etat* recalled that, under Article 42 of the Act of 30 September 1986, the CSA may order editors and distributors of radio or television broadcasting services to abide by the obligations imposed on them by the legislative and regulatory texts and by the principles defined in Article 1 of the Act. These principles include respect for other people's property, including intellectual property and the neighbouring rights attached to it. The *Conseil d'Etat* concluded that one of the CSA's missions was to ensure that the audiovisual services it supervised complied with the legislation protecting intellectual property, and that if they failed to do so, it ought to exercise the power of sanction conferred on it by the provisions of the Act of 30 September 1986. In the present case, it was therefore for the CSA to carry out its own appreciation of such disregard on the part of the applicant channel, without waiting for the courts to reach a decision on the dispute between the two channels. Consequently, the channel's argument was not well founded in claiming that the CSA did not have authority to issue it with an order. The *Conseil d'Etat* went on to examine the merits of the dispute. It recalled that audiovisual communication companies holding neighbouring rights were not able, under Article L. 211-3 of the Intellectual Property Code, to "forbid: (...) 3. Subject to elements of identification of the source: (...) - the broadcasting, even in full, as topical news, of addresses made to the public at political, administrative, legal or academic meetings, and public meetings of a political nature and official ceremonies". In the present case, the applicant channel was claiming that the debate broadcast should be considered a public meeting of a political nature, within the meaning of the text, and as a result the parliamentary channel was not able, subject to elements of identification of the source, to prevent live broadcasting by the channel in question.

Having regard to the specific nature of these studio programmes, and more specifically to the television

broadcasting arrangements set up by the services editor, the*Conseil d'Etat*found that these could not be considered as constituting addresses made to the public at a public meeting of a political nature. Since the exception could not be applied, the parliamentary channel held an intellectual property right in respect of these programmes, reproduction of which, under Article L. 216-1 of the Intellectual Property Code, was subject to their authorisation. Since this had not been obtained, the grounds for contesting the CSA's order were not erroneous from a legal point of view.

• *Conseil d'Etat (5e et 4e sous-sect. réunies), 2 décembre 2009, Société BFM TV* (Conseil d'Etat (5thand 4thsub-sections combined), 2 December 2009, the company BFM TV) FR

Amélie Blocman
Légipresse

CNC Called on to Review its System for Financing Digitisation of Cinema Theatres

On 1 February 2010, the competition authority (*Autorité de la Concurrence*) delivered its opinion on the support arrangements being proposed by the national centre for cinematography (*Centre National de la Cinématographie* - CNC) for financing the digitalisation of cinema theatres. Until now, this cost has been shared between operators, who bear the cost of the investments, and distributors, who mainly reap the benefits of digitisation. They then pass on to the operators part of the savings they have achieved, through private "third-party investors", thereby enabling them to finance some of their investments in digital projection. Almost 1000 cinemas still need to switch to digital in France, but not all of them are in a position to finance the necessary work, or to call on third-party investors, mainly because of the nature and volume of their programming. This is why the CNC is proposing the setting up of a mutualisation fund using third-party investors, which it would manage directly. Its mission would be to collect a contribution from the distributors. This would be a virtual copy fee (*"frais de copie virtuelle"* - VPF), and it would be used to finance 75% of cinema theatre operators' investments. Thus each operator would be able to choose between the CNC offer and the third-party investor offer.

The competition authority, asked for its opinion by the Minister for the Economy on the basis of Article L. 462-1 of the Commercial Code, felt that the project was indeed of "general interest" and that having the digital cinema financed by third-party investors did not seem to be a satisfactory response to this objective. However, the authority felt that the direct intervention of the CNC, as the sector's regulator (which has regulatory powers, collects taxes, and distributes the aid from the support fund that is essential to financing any cinema industry) was likely to seriously distort - or even totally eliminate - competition in the market for financing the digital cinema. By creating such a fund, the CNC would in fact be in direct competition with the third-party investors for a large part of its activity. Whatever precautions might be taken, such a mutualisation fund would have a decisive advantage over its competitors because of its links with the sector's regulator and the corresponding State guarantee.

In light of this, the authority is inviting the CNC to consider alternative solutions that would make it possible to achieve the same objective more economically and with less restriction of competition. It has even suggested considering a solution that would involve direct aid, partly allocated by applying a mechanism of calling for tenders financed by a tax on digital copies. The authority believes that this mechanism "appears to be neutral in terms of competition, and neutral for public finances, and would make it easier to target the shortcomings in the market that public intervention wishes to remedy. It appears to be easier to set up than a mutualisation fund, would correspond better to the CNC's usual method of intervention, and would make it possible to retain the principle of solidarity to which the CNC is legitimately attached". It is now up to not only the CNC and the public powers, but also the European Commission, which has also been notified of the plan for this arrangement for support in the form of State aid.

• *Autorité de la concurrence, avis n°10-A-02 du 1er février 2010 relatif à l'équipement numérique des salles de cinéma* (Competition Authority, Opinion No. 10-A-02 of 01 February 2010 on the digitisation of cinema theatres)
http://merlin.obs.coe.int/redirect.php?id=12252 FR

Amélie Blocman
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GB-United Kingdom

Court of Appeal Upholds Decision to Force BSkyB to Sell Shares in ITV

The Court of Appeal has upheld the decision of the Competition Commission and the Secretary of State for Business and Enterprise requiring BSkyB to reduce its 17.9% holding in ITV plc to below 7.5%, in rejection of an appeal of the decision of the Competition Appeal Tribunal (for earlier discussions of this long-running saga, see IRIS 2007-10: 14/23, IRIS 2008-3: 13/19 and IRIS 2008- 10: 12/18).

The basis for the decision to require divestment was that the acquisition of the shares had created a "relevant merger situation" which resulted in a "substantial lessening of competition" under the Enterprise Act 2002. BSkyB argued that the Competition Appeal Tribunal had misinterpreted its own powers. Under the

statute it is required to apply the same principles as those used by the courts in judicial review, rather than conducting a full appeal on the merits. Nevertheless, according to BSkyB, it should have subjected the decision to the greater intensity of review used by the courts in human rights cases. This submission was rejected by the Court of Appeal, which considered that the normal principles of judicial review should apply. BSkyB also claimed that the authorities had wrongly taken into account the fact that the holding permitted it to block a special resolution proposed by ITV management, for example in relation to a merger. The Court of Appeal held that in doing so, they had shown no misdirection in law and the decision was not unreasonable; the tribunal had also correctly understood the standard of proof, which did not require separate consideration of each stage in the authorities' reasoning process. Thus, its decision was upheld. The court also considered that the authorities had not been irrational in rejecting BSkyB's offer of alternative remedies of placing its shares in a non-voting trust and undertaking not to exercise the entirety of its voting rights.

As the decision was based on competition grounds, this was enough to dispose of BSkyB's challenge. The court also considered, however, the issue of media plurality, which had not been used as a basis for requiring reduction of the shareholding. This involved difficult questions of interpretation of the Enterprise Act about whether the authorities should take into account only the number of persons with control of the media or also 'internal plurality', the range of information and views made available by enterprises under common control. The tribunal had adopted the first interpretation that each enterprise had to be treated as a single person and that 'internal plurality' is not relevant. However, this was overturned by the Court of Appeal (without affecting the outcome of the case), which decided that the actual extent of control exercisable over one enterprise by another had to be taken into account.

The court refused leave for a further appeal to the UK Supreme Court and BSkyB quickly reduced its shareholding in ITV to below 7.5%.

• British Sky Broadcasting Group plc v The Competition Commission [2010] EWCA Civ 2
http://merlin.obs.coe.int/redirect.php?id=12241 EN

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Clarification of the BBC's Duties under the Freedom of Information Act

The BBC is mentioned in the Freedom of Information Act 2000, which provides a right of access to official information. However, it is only covered in relation to information held "for purposes other than those of journalism, art or literature." The High Court has clarified the meaning of this position, following other litigation concerning the scope of the appeal procedures in such cases (see IRIS 2009-4: 11).

The case concerned an internal review of BBC coverage of Middle Eastern Affairs based on a report commissioned from a senior journalist; it included consideration of the impartiality of the BBC's coverage. An application was made under the Freedom of Information Act for disclosure of the report; this was declined on the ground that the Act did not apply to it; the decision was upheld by the Information Commission, but overturned by the Information Tribunal. The court now had to decide whether the report fell within the derogation relating to journalism.

The Information Tribunal had held that news gathering and editorial functions fall within the 'journalistic space'. The report had originally been commissioned for predominantly journalistic purposes, but was used for wider purposes of strategic policy and resource allocation and so fell outside the derogation. According to the High Court, it was not correct to ask what the predominant purpose for which the information was held was; if information was held for multiple purposes, including journalism, that did not mean that it had to be disclosed. Instead, the legislation meant that the BBC has no obligation to disclose information which is held to any significant extent for the purposes of journalism, art or literature, whether or not the information is also held for other purposes. If the information is held for mixed purposes, it is not disclosable. Moreover, strategic policy and issues of impartiality themselves fall within the concept of 'journalism' preventing disclosure.

• British Broadcasting Corporation v Steven Sugar [2009] EWHC 2349
http://merlin.obs.coe.int/redirect.php?id=12240 EN

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Operator of File-Sharing Site Found Not Guilty of Conspiracy to Defraud

In the first trial of its kind in the UK, Alan Ellis, the owner of www.oink.me.uk (later, www.oink.cd) was found not guilty, by a unanimous jury verdict at Teesside Crown Court, notwithstanding the fact that "[t]he Court of Appeal has twice ruled that complicated matters of copyright should not be heard in the crown court but the in Chancery Division of the High Court."

The charge was "conspiring with others unknown to defraud such persons as have an interest in musical works, sound recordings and in the rights and performance of music."

As the Judge, Tony Briggs, said, "Put very simply it is suggested he was involved in a website that was used to distribute sound recordings and things of that nature in breach of copyright."

Oink held no music itself, but allowed users to find each other and share music files, using peer to peer bit torrent file-sharing.

By the time of its closure, the website had about 200,000 members. Users had downloaded 21 million files and paid USD 288,545 to Mr Ellis in donations.

It ran from 2004 till October 2007, initially in Norway and then on servers at Schiphol Airport, Amsterdam, before being closed down in Interpol-led raids.

However, music industry representatives have indicated they may launch a civil lawsuit against Alan Ellis.

David Goldberg
deeJgee Research/ Consultancy

Making Star Wars Helmets Does not Amount to Copyright Infringement

In 1976, Lucas Films invited Andrew Ainsworth to create the helmet and armour to be worn by the Stormtrooper characters in the Star Wars films. Lucas Films gave Mr Ainsworth two drawings of the Stormtroopers and a prototype helmet. Moulds were made to produce the helmets and the armour.

The moulds were kept and in 2004 Ainsworth set up a website to sell helmets and armour made using the moulds. Most of the sales were made in the USA, although Ainsworth was resident in the UK.

Lucas Films sued for infringement of copyright in California. They won the action, were awarded $10 million and now sought to enforce the judgment (focusing on the helmets) in the English courts.

Lucas Films argued that the helmets were protected under the Copyright, Designs and Patents Act 1988 (CDPA), Section 4, being an artistic work, specifically a 'sculpture' (a term which includes "a cast or model made for the purposes of sculpture").

The defence relied on Section 51 of CPDA, which provides: "It is not an infringement of any copyright in a design document 04046for anything other than an artistic work 04046to make an article to the design 04046.."

Upholding the decision by the High Court, the Court of Appeal ruled that the helmets were not "artistic" works of sculpture: "the prototype helmet was not protected by copyright as an artistic work as it was not a sculpture. To be a sculpture a work must be created primarily for the purpose of visual appeal in the sense that it might be enjoyed for that purpose alone. A purely functional item could not be a sculpture. The prototype helmet was utilitarian and lacked any artistic purpose."

Further, the Court of Appeal refused to enforce the US Californian, judgment, on the ground that to do so would require a significant presence in that country. Ainsworth's presence was only via his website: merely advertising, marketing and selling goods in a country are inadequate to amount to someone being "present" in that country.

• LucasFilm Limited v Andrew Ainsworth [2009] EWCA Civ 1328, 16 December 2009
http://merlin.obs.coe.int/redirect.php?id=12246 EN

David Goldberg
deeJgee Research/ Consultancy

Product Placement to be Permitted, Subject to Restrictions

The consultation carried out by the UK Department for Culture, Media and Sport on product placement (see IRIS 2010-1: 1/25) has been completed and the Government has decided to permit product placement, subject to restrictions.

According to the minister, such conditional approval will permit benefits to commercial television companies and programme makers through extra sources of finance whilst taking account of legitimate concerns. Product placement will be permitted in the four categories of programme set out in the Audiovisual Media Services Directive: cinematographic works, films and series made for television or on-demand services; sports programmes; and light entertainment programmes. In view of consultation responses, product placement will not be allowed in current affairs, consumer or religious programming, even if they fall within the 'series' category. No product placement will be allowed in BBC's licence fee funded services.

The legislation will also prevent placement of products in the following categories: alcoholic drinks; foods and drinks high in fat, salt or sugar; gambling; smoking accessories; over-the-counter medicines; and infant milk formula. This will supplement the Directive's total ban on product placement in children's programmes.

The new legislation will specify that product placement should not affect editorial independence, be unduly prominent or directly encourage purchase. It will also require that audiences be alerted to the presence of product placement by signalling at the beginning

and the end of a programme and after advertising breaks.

The change in policy will be implemented through the making of regulations under the European Communities Act 1972. However, product placement will not be permitted until Ofcom (the UK communications regulator) has amended its Code after further consultation. This stage should be reached later in 2010. Ofcom will also have the responsibility for policing the provisions, including ensuring that product placement is not included in programmes not properly falling within the categories where it is permitted. Ofcom will also be able to set further conditions in its Code to ensure editorial integrity.

• Department for Culture, Media and Sport, 'Written Ministerial Statement on Television Product Placement', 9 February 2010
http://merlin.obs.coe.int/redirect.php?id=12249 EN

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HR-Croatia

The New Electronic Media Law

The Electronic Media Law ("Law") of the Republic of Croatia has adopted the provisions of Directive 2007/65/EC on audiovisual media services, Directive 98/84/EC on the legal protection of services based on, or consisting of conditional access and in part the provisions of Directive 2006/114/EC concerning misleading and comparative advertising. Bearing in mind the need to adopt regulations that will be in line with the development of technology, the principle of media freedom and the need to promote public interests in the performance of the activity of providing audiovisual media services, the Law regulates:

- specific terms used in the Law, particularly those adopted from the AVMSD such as: audiovisual media services, audiovisual programme, editorial responsibility, media service provider, TV broadcaster, TV media service or TV broadcast, on-demand audiovisual media service, audiovisual commercial communication, product placement and other terms;

- general principles linked to the performance of the activity of providing audio- and audiovisual media services and the manner of promoting and protecting the interests of the Republic of Croatia;

- issues that relate to all audio/audiovisual media services so as to prescribe relevant data on audiovisual media service providers that must be accessible to users, ban hate speech, prescribe conditions in which a necessary public announcement must be broadcast and conditions for the broadcasting of audiovisual commercial communications, sponsored audiovisual media services and programmes and product placement;

- conditions in which on-demand audio/audiovisual services can be provided;

- conditions for performing the activity of providing TV and radio media services, namely technical, spatial, financial and personnel conditions;

- programme conditions for performing the activity of providing TV and radio media services prescribing in detail programmes and programme services and their categorisation as well as quantitative proportions between specific content categories, the maximum share of advertising (promotional) content and the minimum share of own production and Croatian music and other programme principles and obligations. Apart from the general programme channel a specialised programme channel is introduced which must have a programme scheme declaring the type of programmes whereby 70% of programmes must be of the same type. Special emphasis is placed on the share of European audiovisual works in the programme;

- non-profit radio and TV programmes introducing non-profit TV and/or radio as community TV and/or radio that can be established by educational institutions, student and school associations, citizen and non-governmental associations with the status of legal persons as broadcaster;

- encrypted services that represent TV and radio media services and other audiovisual media services as well as information society services provided for a fee and on the basis of conditional access, or the provision of conditional access to the herein mentioned media services as such;

- conditions under which legal and natural persons may publish electronic publications, editorially-formed internet pages and/or portals that contain electronic equivalents to printed press and/or information from the media in a manner that makes them accessible to the public regardless of their scope;

- the protection of pluralism and diversity of electronic media which includes issues of the publicity and transparency of ownership, limitation of ownership in order to prevent the creation of prohibited concentrations in the field of electronic media as well as the protection of concessionaire competitiveness. The Law regulates in detail the status of the fund for promoting pluralism and diversity of electronic media whose main task is to promote production and broadcasting of programmes of TV and/or radio broadcasters at local and regional levels that are of public interest as well as to promote programmes of non-profit TV and/or radio broadcasters;

- the status, composition, manner of selecting its members and the scope of the regulatory body, the Electronic Media Council, and the scope of the Electronic Media Agency as a professional service of the Council.

In addition to the above-mentioned basic issues the Law also stipulates fines for violations in cases of non-compliance with its provisions and prescribes in its transitional and final provisions a transitional period during which the concessionaires and other media service providers are obliged to align the performance of their activity and publishing of electronic publications with the conditions and standards stipulated in the Law.

• *Zakon o elektroničkim medijima* (Electronic Media Law, Official gazette No 153/09)
http://merlin.obs.coe.int/redirect.php?id=12272 HR

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LT-Lithuania

Order on Remuneration of the Acquisition Costs of Set-Top-Boxes Approved

On 20 January 2010 the Government of the Republic of Lithuania adopted a Resolution on the Order on the remuneration of expenses caused by the purchase of the equipment necessary to receive digital television. This Order was prepared as part of the implementation process of the programme for the switch-off of analogue television and the promotion of digital television in Lithuania which was adopted by a Government Resolution on 28 September 2008.

With a view to the switch-off of analogue television in Lithuania on 29 October 2012 (see IRIS 2006-1: 17) the Government undertook an initiative to support welfare recipients in purchasing set-top-boxes and in this way to accelerate the introduction of digital terrestrial television in Lithuania.

The coverage of digital television in Lithuania has reached 90% since 2008, however, only 10% of the population has the necessary equipment to view digital television. According to the statistical data approximately 90% of all television sets in Lithuania are not suitable for the reception of digital signals.

In accordance with the Resolution of 20 January 2010 only families and persons with a low income (a monthly income which is less than Litas 525 (EUR 125) per capita) will acquire the right to get the remuneration for the equipment costs (set-top-boxes). The means for remuneration will be allocated from the State budget and people will receive them from the local Municipality administration.

The remuneration process will start 6 months prior to the analogue television switch-off date and will end 3 months after this date. The Ministry of Communications is responsible for the implementation of the Order.

• *NUTARIMASDĖL IŠLAIDŲ, SKIRTŲ SKAITMENINĖS TELEVIZIJOS PRIĖMIMO ĮRANGAI ĮSIGYTI, KOMPENSAVIMO MAŽAS PAJAMAS GAUNANČIOMS ŠEIMOMS IR VIENIEMS GYVENANTIEMS ASMENIMS TVARKOS APRAŠO PATVIRTINIMO 2010 m. sausio 20 d. Nr. 81* (Resolution No. 81 of the Government of the Republic of Lithuania of 10 January 2010 on the Approval of the Order on the Remuneration of the Expenses of Purchasing the Equipment for the Reception of Digital Television for Families and Persons of Low Income)
http://merlin.obs.coe.int/redirect.php?id=12273 LT

Jurgita Iešmantaitė
Radio and Television Commission of Lithuania

ME-Montenegro

New TV Broadcasting Frequencies Allocated

The Council of the Agency for Electronic Communications and Postal Services decided to allocate all requested broadcasting frequencies to Vijesti television, after a two-year bureaucratic proceeding during which the TV station operated and broadcast its signal through cable operators. The available frequencies have been distributed to other interested broadcasters in Montenegro, too, thus ending the two-year vacuum in the needs and supply in the Montenegrin media market.

Apart from Vijesti television which received all requested frequencies, one of seven was awarded to Television Pink Montenegro. Bidders had a 15-day period for complaints. The director of Vijesti television stated that the outcome was expected but also that he remained cautious until the equipment was placed on the transmitters, since there were still several procedures to be completed where further procrastination was possible.

The process of the allocation of radio frequencies was blocked for more than two years due to legal changes and Vijesti television suffered the greatest damage in this. The conditions for the realisation of a new public call for the allocation of radio frequencies were fulfilled in October 2009 when amendments to the Law on Electronic Communications came into force identifying the Agency for Electronic Communications as the eligible body for the distribution of frequencies.

Up to that point, the regulatory body was the Broadcasting Agency, which according to the new legislation remains in charge of the programme content of Montenegrin broadcasters.

Despite the initiatives with the Broadcasting Agency to take steps to provide possibilities for obtaining the necessary earth-link frequencies which existed in practice since Fox TV left Montenegro and returned its frequency in 2008, this did not happen. The adoption of the new Law on Electronic Communications in August 2008 left a legal void regarding the jurisdiction of these issues between the existing regulatory Broadcasting Agency and the newly-founded Agency for Electronic Communications and Postal Services. The solution was found only in October 2009 when the Law was amended.

The Council of the Broadcasting Agency gave its approval for the initiation of the invitation for tenders for the radio frequencies in November 2009 and immediately afterwards the public call was issued. The final decision came on 27 January 2010.

A certain degree of legal ambiguity still exists in the regulation of the broadcasting sector. The Council of the Broadcasting Agency complains that its function as regulator for the programme content can not be fully defined until the adoption of the Law on Electronic Media which would - alongside the Law on Electronic Communications - legally round up the broadcasting sector in Montenegro.

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KRUG Communications & Media, Montenegro

NL-Netherlands

Implementation of the Audiovisual Media Services Directive

On 19 December 2009 the implementation of Audiovisual Media Services Directive (AVMSD) in the Media Act and the Tobacco Act was made official in the Netherlands. The bill for this implementing act was accepted by the Tweede Kamer, the lower chamber of the Dutch Parliament, on 30 June 2009 and by the Eerste Kamer, the first chamber of the Dutch Parliament, on 8 December 2009.

The AVMSD, the successor to the Television without Frontiers Directive, introduced the term 'audiovisual media service' as its central concept. The goal of the Directive was to create a modern (technically neutral) and harmonised framework for audiovisual content so that borders no longer present an obstacle to viewers.

The Directive already had an impact on the Dutch Media Act before December 2009. On 1 January of the same year, the Media Act (Mediawet 2008) was revised and some adjustments were made to the definitions. On the final day of the deadline set by the European Commission for the implementation of the Directive, 19 December 2009, the Dutch law was amended. A number of new articles and paragraphs were adopted as part of the Media and Tobacco Act. The following changes are the most significant:

- For the first time, non-linear media services, like on-demand services (as long as they originate from the Netherlands), will be regulated by the government;

- For commercial broadcasting companies, the regulations concerning sponsoring and advertising are now more flexible than under the previous legislation. Accordingly, product placement, for example, is now allowed in certain circumstances. News programmes and films are now permitted to be subject to more commercial breaks.

- The Dutch legislator made use of the possibility given by the Directive for opting for heavier than the minimum regulation (Article 3, paragraph 1) as concerns the rules for alcohol commercials.

- The flexible rules on commercials do not apply to the public broadcasters. The government set stricter rules in order to preserve independence and non-commerciality.

As a consequence of the change to the regulation of non-linear services, the Dutch suppliers of on-demand media services will need to register at the *Commissariaat voor de Media* (Commissary for the Media). The Commissary will check whether the service is an audiovisual media service in the sense of the Media Act 2008. If so, the Commissary will monitor whether the content of the service is in compliance with the rules set out in the Act. In addition, the Commissary will monitor activity on the internet in search of websites that fall within the increased scope of the Media Act 2008.

It is worth noting that the implementation of the Directive has given rise to criticism in the Netherlands, especially in relation to the regulation of non-linear media services.

• Wet van 10 december 2009 tot wijziging van de Mediawet 2008 en de Tabakswet ter implementatie van de richtlijn Audiovisuele mediadiensten (Act of 10 December 2009 amending the Media Act 2008 and Tobacco Act for the implementation of the Audiovisual Media Services Directive)
http://merlin.obs.coe.int/redirect.php?id=13163 NL

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IRIS
Legal Observations
of the European Audiovisual Observatory
OBSERVATOIRE EUROPÉEN DE L'AUDIOVISUEL
EUROPEAN AUDIOVISUAL OBSERVATORY
EUROPÄISCHE AUDIOVISUELLE INFORMATIONSSTELLE

RO-Romania

Appeal Court Waives UPC Fines

Mariana Stoican
Journalist, Bucharest

On 17 November 2009, the *Curtea de Apel Bucureşti* (Bucharest Appeal Court) overturned decision no. 237/2006 of the *Consiliul Concurenţei* (Competition Council), imposing two fines totalling approximately RON 7.1 million (EUR 2.1 million) against the cable provider UPC România.

According to information given by the Romanian Competition Council on 12 December 2006, the competition authority, as a result of investigations conducted over several years, suspected the two cable TV companies UPC and Hi-Fi Quadral of reaching a cartel-like agreement in 2001 with the aim of sharing between themselves the cable TV market in and around the city of Timisoara. By doing so, according to decision no. 237/2006, they had violated the provisions of the *Legea concurenţei nr. 21/1996* (Competition Act no. 21/1996). In particular, they had breached Art. 5(1), which "prohibits any express or tacit agreement between companies or any agreed practice which could result in the restriction, obstruction or distortion of competition in the Romanian market". Art. 5(1)(c) also prohibits "the sharing out of markets or sources of supply according to geographical or other criteria, as well as arrangements concerning the sharing out of sales and acquisition volumes". As well as UPC, the cable provider RCS&RDS - the successor to Hi-Fi Quadral - was fined around EUR 235,000. RCS&RDS and UPC are currently the two main players in the Romanian cable TV market.

The *Curtea de Apel* also cancelled an additional fine of EUR 5 million imposed on UPC România under decision no. 237/2006. This had been based on the abuse of a dominant market position in the municipality of Bucharest by the companies Astral Telecom and Cablevision of Romania, which had subsequently been bought by UPC. The two companies had been accused of raising their prices even though they had not suffered any actual rise in costs. According to UPC's representative, the Appeal Court decided that the price increase in the field of rebroadcasting of television programmes via cable should not be interpreted as an abuse of a dominant market position, since the provider was entitled to raise specific tariffs as long as the increase was reflected elsewhere within the pricing structure.

An appeal against the Appeal Court's decision may be taken to the *Înalta Curte de Casaţie şi Justiţie* (Court of Cassation).

• Ştire privind sentinţa Curţii de Apel Bucureşti din 17 noiembrie 2009 (Report on the decision of the Bucharest Appeal Court of 17 November 2009)
http://merlin.obs.coe.int/redirect.php?id=12260 RO

Transition to Digital Television Delayed

The switchover from analogue to digital television on 1 January 2012 will be delayed for six months. The Romanian Government is to adopt a Decision on the granting of licences to use radio frequencies within the digital television system. The document was approved by the National Council for Electronic Media (CNA) on 14 January 2010.

The Government Decision modifies the *Strategia privind tranziţia de la televiziunea analogică terestră la cea digitală şi implementarea serviciilor mutimedia la nivel naţional* (strategy for the switchover from analogue terrestrial television to digital television and the introduction of digital multimedia services at national level), approved by Government Decision no. 1213/2009 (see IRIS 2009-9: 17). According to the Decision, the licences to use radio frequencies for digital terrestrial broadcasting will be granted according to a comparison-based selection organised by the National Administrative and Regulatory Authority for Communication (ANCOM). Romania has a total of six allocations (multiplexes) which cover the national territory.

The winners of the first two licences will be announced by 31 May 2010 and the licences will be granted by 1 July 2010 (instead of 31 December 2009, the initial deadline). The tax fee amounts to EUR 2.5 Mio each.

The first two digital multiplexes have to be in operation before 1 January 2012 to observe some conditions of territorial and population coverage, free-to-air broadcasting, transparent and non-discriminatory broadcasting of present analogue programmes of the national public television alongside commercial stations with significant market share and geographical coverage according to the conditions, criteria and procedures established by the CNA.

The remaining four multiplexes will be announced by 31 October 2010 and the licences will be granted by 30 December 2010 (initially 1 July 2010), with the possibility of offering digital television broadcasting services starting on 1 January 2012, on the basis of the proposals of an interdepartmental group. Each of the four multiplexes will have to rebroadcast at least seven television channels in standard definition with identical technical broadcasting parameters for each channel or a combination of standard and high definition channels alongside multimedia services.

As to the other deadlines, the first two multiplexes will have to cover 60% of the population and 50% of the Romanian territory by 30 June 2011 (initially 31 December 2010), 80% of the population and 70% of the territory by 31 December 2011 (initially 30 June 2011), 90% of the population and 80% of the territory by 30 June 2012 (initially 31 December 2011).

The other deadlines of the Strategy remain unchanged.

• Hotărârea Guvernului nr. 1213/2009 (Government Decision no. 1213/2009) RO

• Hotărârea Guvernului privind acordarea a licenţelor de utilizare a frecvenţelor radio în sistem digital terestru de televiziune (proiect) (Government Decision on the granting of licences to use radio frequencies within the digital television system, draft) RO

Eugen Cojocariu
Radio Romania International

SE-Sweden

Use of Personal Data in Mobile Content Services

The rapid growth of the market for mobile content services, such as weather and news reports, has brought with it an opportunity for mobile operators to sell personal data to content providers. In a joint project, the Swedish Data Inspection Board (DIB) and the Swedish Post and Telecom Agency (PTS) have reviewed how personal data is handled in mobile content services.

One of the project's findings was that many stakeholders in the market have different opinions on what rules apply to their activities, leading to an uncertain situation as to who is responsible for the processing of the personal data.

The two authorities found that the processing of personal data in mobile content services is in general satisfactory, but improvements could be made in certain areas. These would concern, for example, the information that the content providers must provide to the users with regard to their right to obtain information about what data is processed by the content provider and the possibility for the user to request corrections, as well as the information on why personal data is collected and processed.

The report contains a number of recommendations, including that operators must not use mobile phone numbers for identification if not necessary, since access to mobile phone numbers makes it possible for content providers to survey the consumers' use of mobile content services. This means that the operators should not design their systems for e.g., positioning and charging in such a manner that telephone numbers are used to identify the subscriber. It is the authorities' opinion that it should be enough to use more anonymous information, which only the mobile operator can trace to the actual subscriber.

Further, integrity issues should be taken into consideration already when new services are being developed, for example by classifying information and analysing risks. Improving integrity protection at a later stage is more difficult and more expensive. It is also often suitable to protect information by safe authentication procedures and by using encryption. Authentication and transactions should also be logged so as to make tracing possible.

• Användning av trafikuppgifter i mobila innehållstjänster - Rapport efter avslutad tillsyn (Use of Traffic Data in Mobile Content Services - Post Supervision Report)
http://merlin.obs.coe.int/redirect.php?id=12248 SV

Helene H. Miksche and Sanna Thiel
Bird & Bird, Stockholm

SI-Slovenia

Draft Act on the Slovenian Film Centre

The Slovenian Ministry of Culture released a draft Act on the Slovenian Film Centre ("Act") for public discussion early in February 2010.

The regulation is expected to solve the crisis in the Slovenian cinematography sector which culminated in a series of irregularities in the Slovenian Film Fund in 2007. These were revealed by civil society and State institutions such as the Budget Supervision Office, the Commission for the Prevention of Corruption and finally in 2009 by a revision of the Court of Audit. The Act on Public Funds which was amended in August 2008 demands several minimum standards for the functionality of such funds. As the Slovenian Film Fund does not conform to these standards it must be revised to achieve an acceptable form within a two-year period, ending August 2010.

The proposed draft Act contains 32 Articles and its basic aim is that the new film institution should be more flexible. The essential change is that the grant for film productions is not an investment any longer but a subsidy, so the complete income from the distribution accrues to the producer. The aim is to strengthen the producers' business infrastructure to boost Slovenian film production. The core of the new regulation is to provide for a sustainable future for the Slovenian film sector, and not just to improve the current conditions.

The Act recognises independent producers as core partners. This shall motivate producers to enter into

international co-productions and to be more active in applications for European programmes. The Act includes an automatic grant in matching funds in case of European funding. The limitation for financing is set at 50% of the total production costs, except for low budget productions and youth and children's films where the limitation is set at 80%.

Provision is made for the participation of TV broadcasters in the financing scheme. The public service broadcasters will contribute 2.5% of their subscription income, while the commercial broadcasters' contribution is 2% of their income generated from advertising and TV sales. That should result in a considerable increase in the budget for Slovenian cinematography.

With regard to the decision-making process, more weight is given to the professional community in order to neutralise political influence. Two members of the Supervisory Board will be chosen by representative professional associations, two by TV broadcasters, two by the Ministry of Culture and one by the Ministry of Finance. However, the managing director is still appointed by the Government at the suggestion of the Supervisory Board, as determined in the Act on Public Funds. A new provision is that in the case of inability to appoint a managing director (as has happened in the past three years) the acting director can be chosen from among experts in the industry and is no longer limited to the members of Supervisory Board. The acting director can be appointed for a one-year period.

The most important point was the formal status as the Court of Audit demanded a proper form that matches legal standards. One suggestion was that the institution should become a part of the Ministry of Culture. That idea was strongly rejected both by civil society and by the Ministry itself. So the Slovenian Film Fund will be transferred to the Slovenian Film Centre and remain a public fund.

The adoption of the Act is expected before August after a one-month public debate and procedure in the National Assembly.

• *Predlogi predpisov* (Documents of the Ministry of Culture)
http://merlin.obs.coe.int/redirect.php?id=12233 SL

Denis Miklavcic
Union Conference of Freelancers in Culture and Media at GLOSA, Trade Union of Culture Workers of Slovenia

SK-Slovakia

Developments in the Financing of Public Television

The last three years have brought several changes in the area of public media financing in the Slovak Republic. The legislative changes introduced several different sources of financing, including payments for public services, resources granted under contracts with the State and contributions from the Audiovisual Fund. There is a proposal in the Parliament to alter the existing system. In line with S. 21 of the present Act No. 16/2004 Coll. on Slovak TV (see IRIS 2004-4:15) the income for television is generated inter alia from:

- payments for public services in the area of television broadcasting provided by Slovak TV;

- the contribution from the State budget granted according to the contract with the State and assigned for the implementing of programmes of public interest or special investment projects;

- revenues from the broadcasting of advertising;

- grants from natural and legal persons for the fulfilment of public interest activities.

The "payments for public services in the area of television broadcasting" have been established by Act No. 68/2008 Coll. These are to be paid by all natural persons who purchase electricity and by employers who employ at least three persons. This new model has replaced the former "concessionary fees". According to the former system only natural persons who owned a television receiver and legal persons who held a record of a television receiver in their accounting were obliged to pay the fees. Since there was no possibility of controlling the ownership of TV sets a fair portion of households and companies avoided their obligations. The new system based on electricity consumption covers practically all households and commercial premises. This has brought an increase in the amount of revenue collected. The aim of the new Act is to save the system of public contributions which was on the brink of extinction.

The latest amendment to the Slovak TV Act has introduced another method of public television financing: State contracts. These should stabilise the budget of Slovak TV and support the creation of original works. Their existence should not cause the exclusion of State aid for other specific projects, e.g., digitisation. On 21 December 2009 Slovak TV signed a State contract according to which financial resources from the State budget will be granted for the production of original programmes of public interest (see IRIS 2010-1:1). One problem with the State contract could be

that these means of financing have never been notified to the Commission.

A Member of Parliament filed a proposal according to which from January 2011 public television and radio should not be financed from payments for public services and State contracts but directly from the State budget. The MP claims that the proposed model of financing of these media should bring more funds and more independence.

According to the proposed amendment, Slovak TV should receive an annual amount of 0.7% of the State budget expenses while Slovak Radio should be granted a 0.3% portion of the budget. With reference to the preparatory memorandum, this model should double the available financial resources of Slovak TV and Slovak Radio compared to those that they receive in accordance with the present system.

The Ministry of Culture asserts that such a model of public media financing would cause a nationalisation of those broadcasters. On the other hand, the new legislation may bring about a simplification of the complicated system of financing.

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Agenda

IViR International Copyright Law Summer Course

5 - 9 July 2010
Organiser: Institute for Information Law (IViR), University of Amsterdam
Venue: Amsterdam
Information and Registration:
Ms. Anja Dobbelsteen
Tel. +31.20.525.3406
Fax. +31.20.525.3033
E-Mail: A.G.J.M.Dobbelsteen@uva.nl
http://www.ivir.nl/courses/icl/icl.html

Egta's New Media Conference

24 - 25 March 2010
Organiser: Egta
Venue: Brussels
Information & Registration:
Tel: +32 2 290 31 34
Fax: +32 2 290 31 39
E-Mail: annelaure.dreyfus@egta.com
http://www.egta.com/

European Forum on Cultural Industries

29 - 30 March 2010
Organiser: Spanish Presidency of the European Union
Venue: Barcelone
Information & Registration:
http://www.eu2010feic.org/

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