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Legal Observations
of the European Audiovisual Observatory

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INTERNATIONAL

COUNCIL OF EUROPE

European Court of Human Rights: Nur Radyo Ve Televizyon Yayıncılığı A.Ş. v. Turkey

In 2002 the Turkish Broadcasting Authority (Radio ve Televizyon Üst Kurulu - the "RTÜK") revoked the broadcasting licence of Nur Radyo Ve Televizyon Yayıncılığı A.Ş. (Nur Radyo), a broadcasting company established in Istanbul at that time. In its motivation the RTÜK mainly referred to the fact that, despite six temporary broadcasting bans for programmes that had breached the constitutional principle of secularism or had incited hatred, Nur Radyo had continued to broadcast religious programmes. The RTÜK referred in particular to a programme "along the editorial line of Nur Radyo" that was broadcast on 19 November 2001 - during one of the bans - from Bursa. That concerned a pirate broadcast, transmitted via satellite and terrestrial links. RTÜK held Nur Radyo responsible for it and considered this new violation of the Turkish law as justifying the revocation of its broadcasting licence. In addition, criminal proceedings were initiated against the managers of Nur Radyo, in their personal capacity, on account of the pirate broadcast of 19 November 2001. The managers were acquitted, as the criminal court found that there was insufficient evidence of their presumed responsibility for the broadcasting of the pirated programme. Nur Radyo subsequently sought the review and immediate suspension of the RTÜK's decision to revoke its broadcasting licence, but was unsuccessful.

Nur Radyo then lodged an application with the European Court of Human Rights, arguing in particular that the revocation of its broadcasting licence had constituted an unjustified interference with its right to freedom of expression, as guaranteed by Article 10 of the European Convention on Human Rights.

The European Court noted that, in essence, the revocation of the licence was a reaction to a pirate broadcast, via satellite and terrestrial links, using a frequency that had not been allocated to the company and that came from Bursa, whereas Nur Radyo's broadcasting centre was in Istanbul. It further noted that the main reason why the RTÜK had found Nur Radyo to be responsible for that programme was because it reflected its editorial line. However, the criminal court had acquitted the managers of the company for lack of evidence of any responsibility for the pirate broadcast in question. The European Court thus took the view that it had been arbitrary to include the seventh programme in the aggregate assessment of the offences that led to the revocation. It concluded that the additional penalty imposed on Nur Radyo on the basis of offences for which other sanctions had already been imposed was not compatible with the principle of the rule of law. The European Court accordingly found that the breach of the freedom of expression of Nur Radyo had not been necessary in a democratic society 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* Nur Radyo Ve Televizyon Yayıncılığı A.Ş. c. Turquie *(n° 2), n° 42284/05 du 12 octobre 2010* (Judgment by the European Court of Human Rights (Second Section), case of Nur Radyo Ve Televizyon Yayıncılığı A.Ş. v. Turkey (n°2), No. 42284/05 of 12 October 2010)
http://merlin.obs.coe.int/redirect.php?id=12923 FR

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EUROPEAN UNION

Court of Justice of the European Union: Netherlands and Nederlandse Omroep Stichting v. Commission

On 16 December 2010 the General Court of the European Union handed down a decision in an action for annulment brought by the Netherlands and the *Nederlandse Omroep Stichting* (Dutch Broadcasting Foundation - NOS), a public service broadcaster, regarding state aid for the latter.

The NOS has a double role in Dutch public service broadcasting . Besides its duty as a public service broadcaster, its management board (operating under the name of Publieke Omroep - PO) also has the responsibility for coordinating the entire public service broadcasting system. In both of these two functions the NOS's main source of funding are annual State payments. Since 1994, it has also received ad hoc payments.

After receiving complaints by several Dutch commercial broadcasters, the Commission initiated an investigation regarding the funding of public service broadcasters in the Netherlands. It concluded in Decision 2008/136/EC that several ad hoc payments made by the Netherlands to the NOS constituted State aid. The Commission in addition considered these payments to be new aid, of which the Commission should have been notified. The Commission found that ad hoc State aid granted to the NOS in its capacity as the PO for its public service mission in the Netherlands public service broadcasting system was incompatible with the common market and had to be recovered from the NOS by the Netherlands. The amount decided upon for recovery was EUR 76.327 million, plus interest.

The NOS and the Netherlands argued before the Court that categorising the ad hoc funding as State aid and as new aid was incorrect. These arguments were mainly based on the assertion that the NOS should not be regarded as an undertaking. The General Court rejected these arguments on the basis that its role as a PO, despite providing it with a task of public interest, does in fact establish it as an undertaking subject to competition laws.

• Joined cases T-231/06 and T-237/06, Netherlands and Nederlandse Omroep Stichting v. Commission, 16 December 2010
http://merlin.obs.coe.int/redirect.php?id=15333 DE FR CS EL ES ET FI HU LT LV MT NL PL PT SK SV DA EN IT SL

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European Commission: Commissioner Neelie Kroes on the Commission's Examination of the Hungarian Media Law

On 17 January 2011 Neelie Kroes, Vice-President of the European Commission responsible for the Digital Agenda, addressed the European Parliament's Civil Liberties, Justice and Home Affairs Committee in an extraordinary meeting on the state of play of the Commission's examination of the recently adopted Hungarian Media Law (see IRIS 2011-2/30). Concerns have been raised regarding the compliance of the new rules with the EU's Audiovisual Media Services (AVMS) Directive, as well as, more generally, their respect for fundamental media freedoms, such as freedom of expression.

Commissioner Kroes pointed out that the legal enforcement powers of the Commission regarding fundamental rights are limited to cases where the Member States act in the sphere of European Union law, specifically when they are implementing such law. Within these confines, points on which the Hungarian Media Law does not appear in the Commission's initial opinion to be satisfactory include the following: first, the provisions of the law appear to apply also to media firms established in other EU Member States. Such a broad reach would be contrary to the "country of origin" rule enshrined in the AVMS Directive, which subjects, in principle, media service providers to regulations in their country of origin only. Secondly, the law requires the provision of balanced information not only in the area of broadcasting, where such rules are common, but also for on-demand audiovisual media services, including e.g. simple video bloggers. This could result in over-reach and lack of proportionality in the regulation of media freedom, while lack of compliance with the general Treaty rules on establishment and provision of services, which are applicable to all media, would also have to be investigated. Thirdly, the Commission foresees a possible over-extensive application of rules on media registration, due to lack of limiting criteria. Finally, the criteria for media authority independence also present a thorny issue.

Commissioner Kroes wrote to the Hungarian authorities on 23 December 2010 on the matter of the new media rules. Subsequently, formal and informal meetings have taken place between the Commission's services and the Hungarian authorities, while the Commission is currently examining the individual provisions following the formal notification of the legislation on 14 January 2011. The Commission's assessment will be set in writing in the near future. Commissioner Kroes feels confident that Hungary will take all the necessary measures to ensure that the implementation of the law takes place in full respect of European law and the European Convention on Human Rights, as well as that any necessary adjustments to the law will be made, should it be found to be lacking in compliance with these rules.

• Neelie Kroes Vice-President of the European Commission responsible for the Digital Agenda State of play of Commission's examination of Hungarian Media Law Extraordinary meeting of the European Parliament's Civil Liberties, Justice and Home Affairs Committee Strasbourg, 17th January 2011, SPEECH/11/22
http://merlin.obs.coe.int/redirect.php?id=12891 EN

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European Commission: News Corporation Bid for BSkyB Cleared on Competition Grounds

In June 2010 News Corporation offered to purchase the remaining 60.9% of shares which it did not already own in BSkyB, the leading British and Irish pay-TV operator. This bid has been considered on competition grounds by the European Commission and on public interest grounds relating to media plurality by the UK authorities.

The European Commission cleared the proposed acquisition on competition grounds. It found that it would result in only a small increment on BSkyB's existing share of the market for the supply of basic pay-TV channels and that the parties have only a small combined market share in online and TV advertising. Therefore it did not give rise to horizontal competition concerns. The Commission found that News Corp lacks sufficient market power to prevent access by BSkyB's competitors to premium movie content and that there would continue to be incentives for the wholesale supply of premium movie content and basic pay-TV channels to BSkyB by its competitors. The merged company would not be able to foreclose competing newspaper publishers by bundling pay-TV

and newspaper subscriptions given the low subscription rates for newspapers in the UK. There were also sufficient alternative opportunities for advertising by BSkyB's competitors.

The public interest examination on plurality grounds was to involve a decision by the UK Secretary of State for Business, Innovation and Skills, after receiving the advice of the Office of Communications as to whether or not to refer the bid to the Competition Commission. This question has proved highly controversial given the fact that News Corporation owns four national newspapers in the UK. The Business Secretary, however, was secretly taped by journalists as stating that "I have declared war on Mr Murdoch and I think we are going to win"; Rupert Murdoch controls News Corporation. The newspaper employing the journalists, being a rival of the Murdoch press and so opposed to the bid, did not print the story; however the remarks were leaked to the BBC. As a result, responsibility for competition and policy issues relating to media, broadcasting, digital and telecoms sectors were transferred immediately by the Prime Minister to the Secretary of State for Culture, Media and Sport. He will take a decision early in 2011 on whether to refer the bid to the Competition Commission.

• European Commission, "Mergers: Commission clears News Corp's proposed acquisition of BSkyB under EU merger rules", IP/10/1767, 21 December 2010
http://merlin.obs.coe.int/redirect.php?id=12886 EN

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European Commission: Romanian Film Support Scheme Approved

On 14 December 2010, the European Commission approved under EU State aid rules a Romanian scheme to support the development of the film industry, culture and cinematographic education in the amount of EUR 80.68 million (RON 347 million; see IRIS 2006-3/35).

The Romanian support scheme provides for interest-free loans and non-reimbursable grants for the production of Romanian films or films made with Romanian participation and was considered in line with the State aid assessment criteria laid down in the Commission's Cinema Communication and lastly extended until 31 December 2012 (see IRIS 2009-3/3). These criteria had previously been extended in 2004 and 2007 (see IRIS 2007-7/4 and IRIS 2004-4/6).

The main financing bodies in the field of culture in Romania are the Ministry of Culture and National Heritage, the Administration of the National Cultural Fund, the National Cinema Council and several local authorities.

The Romanian authorities plan to run the scheme until 31 December 2014.

• Press release of the European Commission
http://merlin.obs.coe.int/redirect.php?id=12874 EN

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European Parliament: Resolution on Public Service Broadcasting in the Digital Era

On 25 November 2010 the European Parliament adopted a resolution entitled "Public Service Broadcasting in the Digital Era: The Future of the Dual System". The Parliament emphasised in the recitals the special importance attached to the dual system, characterised by the coexistence of public service and commercial broadcasters, in the European audiovisual landscape. This tradition has ensured a diverse range of freely accessible programming with both broadcasting modes, while playing a crucial role with regard to audiovisual production, cultural diversity and identity, information, pluralism, social cohesion, the promotion of fundamental freedoms and the functioning of democracy. While the Parliament noted that changes in the audiovisual landscape in recent years, particularly with the development of digital technologies, proprietary pay platforms and new online media actors, have had an impact on the traditional dual broadcasting system and on editorial competition, it cautioned that these developments should not serve to make the dual system obsolete.

Through the Resolution, the Parliament called on Member States to ensure that sufficient resources are provided to enable public service broadcasters to take advantage of new digital technologies and secure the benefits of modern audiovisual services for the general public. PSBs should be structured in such a way as to offer attractive, quality online content so as to reach young audiences, who mainly access the media via the Internet. The Parliament also encouraged Member States to address the digital divide, ensuring that all persons in all regions have equal access to public service broadcasting. It underlined the principle of technological neutrality, in accordance with which PSBs must be offered the opportunity to take advantage of all available platforms. Political interference with the content of services offered by public service broadcasters should also end; members of public service broadcasters' boards should be appointed on the basis of their competence and acquaintance with the media sector. With regard to private broadcasters, the Parliament noted that transparent ownership must be guaranteed in all Member States.

The EP reminded Member States of their commitment to European standards concerning PSB, as set out in

Council of Europe recommendations and declarations. It thereby called on the Commission and Member States to give the European Audiovisual Observatory a mandate and resources to gather data and conduct research on the way in which Member States have applied these standards, with a view to determining whether the desired effects have been achieved. Finally, it called on Member States to intensify cooperation between national media regulators within the European Platform of Regulatory Authorities (EPRA) and step up the exchange of experience and best practice.

• European Parliament resolution of 25 November 2010 on public service broadcasting in the digital era: the future of the dual system (2010/2028(INI))
http://merlin.obs.coe.int/redirect.php?id=12889 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

BKS Rules on Unlawful Product Promotion in ORF Programme

On 22 November 2010, the Austrian *Bundeskommunikationssenat* (Federal Communications Office - BKS) issued a decision on the classification of unlawful product promotion in a television programme in response to a ruling of the Austrian *Verwaltungsgerichtshof* (Administrative Court - VwGH) of 8 October 2010, overturning an earlier BKS decision (case no. 611.941/0002-BKS/2006) on the grounds that its content was unlawful.

The case concerned a report in a programme broadcast by *Österreichischer Rundfunk* (ORF) about food for overweight dogs, which contained a 6-second panning shot showing various products. These products clearly belonged to a certain brand, as indicated by the company logo and colour. The end titles of the programme included a reference to the manufacturer as the programme sponsor.

In its first decision in April 2006, the BKS had classified the shot as advertising and found ORF guilty of breaching the rules on separation of advertising and programme material. The VwGH held that, in doing so, the BKS had failed to check the existence of product placement or whether sponsorship rules had been infringed (ban on inciting viewers to buy the sponsor's products).

After reviewing the facts of the case in accordance with the VwGH's instructions, the BKS has now concluded that the explicit, very clear depiction of the branded products was specifically designed to encourage uninformed, undecided viewers to buy them. This impression was further strengthened by the positive comments made by the presenter at the time. The images therefore represented direct incitement to buy the products and breached Article 17(2)(3) of the version of the *ORF-Gesetz* (ORF Act - ORF-G) that was in force at the time of the ruling.

The BKS decided that this was not an example of product placement. In view of the corresponding advertising fees for the nearest advertising break, it calculated a fictitious fee of EUR 510 for the 6-second shot, which was below the lower limit of EUR 1,000 applied by the VwGH. This was not, therefore, a case of product placement in the sense of Article 14(5) ORF-G.

• *Bescheid des BKS vom 22. November 2010 (GZ 611.941/0003-BKS/2010)* (BKS ruling of 22 November 2010 (case no. 611.941/0003-BKS/2010))
http://merlin.obs.coe.int/redirect.php?id=12896 DE
• *Erkenntnis des VwGH vom 8. Oktober 2010 (Zl. 2006/04/0089/-6)* (VwGH decision of 8 October 2010 (case no. 2006/04/0089/-6))
http://merlin.obs.coe.int/redirect.php?id=12897 DE

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BE-Belgium

Three Major Flemish Broadcasters Again in Breach of Advertising Regulation

In three recent decisions, the *Vlaamse Regulator voor de Media* (Flemish Regulator for the Media - monitoring and enforcement of media regulation) addressed the three major Flemish broadcasters for breach of the advertising regulation.

The first decision (18 October 2010) concerned the illegitimate transmission of a television advertisement. On the broadcasting programme VT4, a single spot was shown that featured the presenters holding a party, all of them drinking "Martini Brut". The bottles and the logo were prominently displayed and, at the end of the programme, a voice-over stated "*Beleef een bruisende zomer met VT4 en Martini Brut*" (freely translated, "Have a delightful summer with VT4 and Martini Brut"). According to SBS Belgium, this spot should be viewed as self-promotion, sponsored by Martini. The General Chamber, however, judged this spot to be an advertisement in favour of Martini. The message via voice-over and the clear display of the bottles and logo of Martini Brut gave this spot the

character of advertising. Article 79, §1 of the Flemish Media Decree stipulates that television advertising, excluding self-promotion, should be clearly identifiable and easy to differentiate from editorial content. In this regard, it should be kept quite distinct from other parts of the programme by visual, and/or acoustic, and/or spatial means (1st clause). The Regulator took into account that SBS Belgium had earlier been fined for almost identical facts (see IRIS 2010-6/10) and decided to impose a fine of EUR 25,000.

In its second decision (22 November 2010), the Regulator addressed the programme "Game Power Special", transmitted by the commercial broadcaster VMMa. The content and the length of this programme, as well as the fact that the games in question are highly recommended by the presenter and the representative of the game company, suggest that this programme is actually an advertorial. As the broadcaster failed to identify the programme as such, it violated the Flemish Media Decree (Articles 79, §1 and 81, §5). As it was the first time that the VMMa violated these provisions, it was only cautioned by the Flemish Regulator.

In the third decision (22 November 2010), the public broadcaster VRT was sanctioned, again, for breach of the regulation on product placement (see also IRIS 2010-5/9, IRIS 2010-7/7 and IRIS 2010-8/14). This time "Bacardi" benefited from undue prominence during the programme "Villa Vanthilt", in breach of Article 100, §1, 3°of the Flemish Media Decree. Given that the VRT had already been fined several times for similar facts, the Regulator decided to impose a fine of EUR 10,000.

• *VRM v NV SBS Belgien, 18/10/2010 (Nr. 2010/044)* (VRM v. NV SBS Belgium, 18 October 2010 (No. 2010/044))
http://merlin.obs.coe.int/redirect.php?id=12878 NL

• *VRM v NV VMMa, 22/11/2010 (Nr. 2010/052)* (VRM v. NV VMMa, 22 November 2010 (No. 2010/052))
http://merlin.obs.coe.int/redirect.php?id=12879 NL

• *VRM v NV VRT, 22/11/2010 (Nr. 2010/053)* (VRM v. NV VRT, 22 November 2010 (No. 2010/053))
http://merlin.obs.coe.int/redirect.php?id=12880 NL

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Flemish Public Broadcaster Maintains Too Low Standards of Protection of Minors

In three recent decisions, the public broadcaster VRT has been rapped over the knuckles for repeatedly transmitting content that has been deemed unsuitable for minors.

The first decision (28 September 2010) was rendered by the *Kamer voor Onpartijdigheid en Bescherming van Minderjarigen* (Chamber for Impartiality and the Protection of Minors) of the *Vlaamse Regulator voor de Media* (Flemish Regulator for the Media - monitoring and enforcement of media regulation) and concerned the transmission of a trailer at around 7 pm, just after the popular family quiz programme "Blokken". The trailer in question in particular displayed an image in close-up of a murder by way of a gunshot in the forehead. The Flemish Media Decree prohibits the broadcasting of any programmes which could cause serious detriment to the physical, mental or moral development of minors. However, the second clause of Article 42 refines this rule by clarifying that broadcasting such programmes is allowed where it is ensured, by the selection of the time of the broadcast or by any technical measure, that minors in the area covered by the service will not normally hear or see such broadcasts (with the exception of cases of pornography or unnecessary violence, for which there exists an absolute prohibition, see Article 42, 1st clause). The Decree explicitly adds that this provision is also applicable to trailers (Article 42, 4th clause). The Chamber considered that displaying such horrifying or shocking images at a time when the whole family, including children, are likely to be watching television can exert a negative influence on the physical, mental or moral development of minors and accordingly cautioned the VRT for breach of this provision (see also IRIS 2010-5/9).

The two other decisions (23 and 24 November 2010) were issued by the Belgian *Jury voor Ethische Praktijken inzake Reclame* (Jury for Ethical Practices Concerning Advertising), upon complaints lodged by members of the public. This Jury is the self-regulatory authority of the advertising and marketing sector in Belgium (for more information, see IRIS 2010-1/9). Both complaints concerned television ads promoting the youth radio station "Studio Brussel". The first spot displayed a spacecraft speeding on the highway, with a loud scream at the moment that it seemed to hit a car that was driving against the traffic. According to the Jury, this spot attracts the attention of youngsters by comparing regular traffic with a video game, mixing up fiction with reality in a socially unacceptable way. Moreover, it violates Articles 73 and 74 of the Flemish Media Decree, which prohibit advertisements that are not created with the necessary sense of social responsibility or that are capable of eliciting feelings of fear or unease in children or young people. The Jury has requested that this ad not be transmitted any further. The second spot displayed several couples making love to promote the programme "One night stand". Although little nudity is shown, the Jury decided that this ad is inappropriate to be seen by children and that transmitting it before 10 pm would be socially unacceptable. The VRT has accordingly ensured that the spot will only be broadcast after 10 pm.

• *VRM v NV VRT, 28/09/2010 (No. 2010/043)* (VRM v. NV VRT, 28 September 2010 (No. 2010/043))
http://merlin.obs.coe.int/redirect.php?id=12881 NL

• *JEP, VRT Studio Brussel (23/11/2010)* (Jury for Ethical Practices Concerning Advertising, complaint against VRT, 23 November 2010)
http://merlin.obs.coe.int/redirect.php?id=12882 NL

• *JEP, VRT Studio Brussel (24/11/2010)* (Jury for Ethical Practices Concerning Advertising, complaint against VRT, 24 November 2010)
http://merlin.obs.coe.int/redirect.php?id=12883 NL

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Partial Cancellation of Ban on Advertising for Political Parties

Until recently, advertising for political parties was banned on audiovisual media services in the French-speaking Community of Belgium. The first sentence of the first paragraph of Article 12 of the Decree by the French-speaking Community of 27 February 2003 on broadcasting (which has since become the Decree of 26 March 2009 on audiovisual media services) provides that "neither political parties nor organisations representative of employers and workers may be the subject of commercial communication".

This provision was cancelled by the Constitutional Court on 22 December 2010 in response to an application by three of the country's main private-sector radio networks (Bel RTL, Contact and Nostalgie), although its scope also includes television, and the public as much as the private sector. The Court found that the absolute and permanent nature of the ban contravened Article 19 of the Belgian Constitution, which guarantees freedom of opinion.

Reiterating the limits laid down by the European Court of Human Rights, more particularly in its judgments in the cases of Verein gegen Tierfabriken v. Switzerland of 28 June 2001 and TV Vest AS & Rogaland Pensjonistparti v. Norway of 11 December 2008, the Court found that the text of the Decree could "have the consequence of preventing certain formations from having access to an important means for them of making their positions known to the public".

It should nevertheless be said that, by virtue of a number of federal laws on expenditure relating to elections, which are applicable to all parts of the country, political parties and candidates are still not allowed to broadcast commercial advertising on radio and television or in cinemas, or paid-for messages on the Internet, during the three months prior to elections.

The cancellation judgment delivered on 22 December 2010 is therefore limited to "ordinary" time, outside periods of election campaigning.

• *Arrêt de la Cour constitutionnelle du 22 décembre 2010* (Judgment by the Constitutional Court of 22 December 2010)
http://merlin.obs.coe.int/redirect.php?id=12912 DE FR

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Judgment on Conflict of Interest in the Media Sector

By its judgment No. 14555 dated 30 November 2010 the Supreme Administrative Court imposed a fine of BGN 1,000 on the Chairman of the Съвет за електронни медии (Council for Electronic Media - CEM) for not submitting in time a declaration under Art. 12, item 2 of the Prevention and Disclosure of Conflict of Interest Act (see IRIS 2010-10/17).

Pursuant to Art. 24, para 1 of the Radio and Television Act, the chairperson was elected by the National Assembly on 1 April 2010 as a member of the CEM. He was elected as chairman of the CEM on 7 April 2010. He submitted to the National Assembly a declaration under Art. 12, item 2 of the Prevention and Disclosure of Conflict of Interest Act on 20 May 2010.

The Supreme Administrative Court ruled that the declaration was submitted after the expiry of the prescribed seven-day term from the date of the election as a member of the Council for Electronic Media. The Court took into consideration that the administrative offence committed was the first of its kind for him and therefore decided to apply the minimum fine set out by the law - BGN 1,000.

• РЕШЕНИЕ № 14555, 30/11/2010 (Judgment of the Supreme Administrative Court no. 14555, 30 November 2010)
http://merlin.obs.coe.int/redirect.php?id=12868 BG

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Limitations to State Funding for the Film Industry

On 1 January 2011 new rules concerning the State funding for the Bulgarian film industry came into force. According to the amendments to Art. 17 of the Закон за филмовата индустрия (Film Industry Act), the subsidy for the National Film Centre - which is an Executive Agency of the Ministry of Culture (Изпълнителна агенция "Национален филмов център", see IRIS 2004-6/103) - shall be granted only "if possible" and its annual rate shall be based on the sum of the average budgets for the previous year of "up to" 7 feature films, 14 feature-length documentaries and 160 minutes animation.

These amendments got through the Bulgarian Parliament between the first and second voting on the

State Budget Law for 2011, which was published in the State Gazette issue No. 99/2010. It provoked the dissatisfaction not only of the film sector, but of the opposition in the Parliament, too. 56 Members of Parliament filed a claim before the Constitutional Court against Art. 17 stating that the new wording of the article infringed the principles of a parliamentary republic where the Parliament should decide how much the subsidy for the film industry should be, not the government. In addition, the opposition claims that the amendment was not contained in the bill, that it was not discussed during the first reading and that it is against the procedural rules for an amendment to be passed at the last minute without any discussions with the sector.

The previous version of Art. 17 provided for the annual granting in the State Budget of the Republic of Bulgaria of a subsidy for the National Film Centre, the amount of which could not be less than the sum of the average budgets for the previous year of 7 feature films, 14 full-length documentaries and 160 minutes animation.

The addition of the phrases "if possible" and "up to" gives the Ministry of Finance the opportunity to decide alone that there is not enough money in the State budget for the film industry and to determine a subsidy lower than that fixed by the Parliament in the law.

On 28 December 2010 the Constitutional Court opened a case (No. 22/2010) on the basis of the claim of the 56 Members of Parliament and in case the judges establish that there is a violation of the Constitutional rules the Parliament shall review its decision.

Up to then the new version of Art. 17 of the Film Industry Act remains in force.

• ЗАКОН ЗА ФИЛМОВАТА ИНДУСТРИЯ Обн . ДВ . бр .*105* от *2* Декември *2003*463., изм . ДВ . бр .*28* от *1* Април *2005*463., изм . ДВ . бр .*94* от *25* Ноември *2005*463., изм . ДВ . бр .*105* от *29* Декември *2005*463., изм . ДВ . бр .*30* от *11* Април *2006*463., изм . ДВ . бр .*34* от *25* Април *2006*463., изм . ДВ . бр .*98* от *27* Ноември *2007*463., изм . ДВ . бр .*42* от *5* Юни *2009*463., изм . ДВ . бр .*74* от *15* Септември *2009*463., изм . ДВ . бр .*99* от *17* Декември *2010*463. (Film Industry Act (most recently amended on 17 December 2010))
http://merlin.obs.coe.int/redirect.php?id=12917 BG

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CY-Cyprus

Harmonisation with European Union AVMS Directive

Cyprus amended its Law on Radio and Television Stations (L. 7(I)/1998) and the Cyprus Broadcasting Corporation Law (Ch. 300A) and harmonised the Republic's legislation with the European Directive 2010/13/EU on Audiovisual Media Services - codified version. The amending laws were published in the Official Gazette on 10 December 2010.

Extensive amendments to various sections of the Law on Radio and Television Stations aimed at updating it in order to cover the broadcasting and audiovisual landscape, regulating not only the broadcasting sector but also Video-on-Demand (VOD) services.

The terminology section was amended with some terms changed and new ones added, most notable being the change of "station" (broadcaster) into "radio/television organisation" and the addition of "provider of audiovisual services" and other terms relating to the latter's activities. Several provisions rule on the activities and the obligations of providers of audiovisual services, while special rules for providers of VOD-services introduce an obligation on them to install special filters and mechanisms aiming at the protection of children.

Different licences will be granted according to the category of the broadcaster (general - thematic), the dissemination of its programme (encoded) and other criteria.

The functions and powers of the Radio Television Authority, the media regulator, were also amended to cover a broader spectrum of media services; its power to grant licences and its monitoring of the operation and content of services extend beyond broadcasting, while the Authority will also assume the responsibility to plan and organise media education. Providers of audiovisual services will have to participate in specific aspects of that activity, in particular the dissemination of information relevant to media education campaigns and the creative use of new media.

Product placement, while generally ruled as prohibited, is allowed under special conditions in movies, series and light entertainment programmes, in productions that date after the entry into force of the amending law.

The amendment proposals were made after the Radio Television Authority conducted a public consultation with various groups and organisations, in early 2009. No report of the consultation was made public.

The Law on the public service Cyprus Broadcasting Corporation underwent amendments as well, albeit of a limited scope, in order for it to comply with the new EU Directive.

• Ο Περί Ραδιοφωνικών και Τηλεοπτικών Σταθμών *(344301377300377300377371367304371372 377302)* Νόμος του *2010* - Νόμος 335.*118*(331)*/2010* (Law amending the Radio and Television Stations Law, L. 118(I)2010. Official Gazette, 10 December 2010) EL

• Ο Περί Ραδιοφωνικού Ιδρύματος Κύπρου (3443013773003773003773713673043713723377302) Νόμος του 2010 - Νόμος 335. 117(331)/2010 (Law amending the Cyprus Broadcasting Corporation Law, L. 117(I)/2010. Official Gazette, 10 December 2010) EL

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CZ-Czech Republic

Constitutional Court Rules on Freedom of Expression

On 25 November 2010, the Constitutional Court of the Czech Republic ruled on a case concerning freedom of expression in caricatures and noted that the freedom of expression was not limitless and that drawings showing naked politicians carrying out sex acts exceeded the admissible limit of satire and exaggeration.

This decision represented victory for a former Czech minister in a legal dispute with the Czech magazine *Reflex*. The magazine's publisher, Ringier, therefore lost its appeal to the Constitutional Court, in which it had claimed that it had suffered damage as a result of the courts' order that it should apologise for the aforementioned caricatures. It had argued that its freedom of expression and artistic freedom had been violated.

The dispute over the caricatures lasted nine years. In May 2001, a caricature had been published in the satirical comic strip *Green Raoul*, showing the then minister naked, engaging in sex acts with colleagues. The minister sued the magazine for damaging his reputation as a citizen and a minister and exceeding the limits of freedom of speech. The municipal court in Prague, the appeal court and the Supreme Court all decided that the magazine's publisher should apologise. They rejected the defence's argument that political satire and exaggeration of this kind were acceptable. The Supreme Court in Prague ruled that the images bordered on pornography and seriously infringed the common rules of decency.

The Senate of the Constitutional Court upheld the courts' argument and rejected the magazine publisher's claims. The judges confirmed that, although politicians had to endure a high level of criticism, freedom of expression was not totally limitless. Even caricatures, which could go further than other works, had to respect certain boundaries in relation to the freedom of expression.

• Nález Ústavního soudu II.ÚS 468/03 z 25.11.2010 (Constitutional Court decision of 25 November 2010)
http://merlin.obs.coe.int/redirect.php?id=12930 CS

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DE-Germany

Supreme Court Rules on Reasonableness of General Agreement for Collecting Society

On 14 October 2010, the *Bundesgerichtshof* (Federal Supreme Court - BGH) issued a ruling on whether it was reasonable to expect a collecting society to enter into a general agreement. In the case concerned, the *Bundesverband Musikindustrie e.V.* (Federal Music Industry Association), which represents 13 music download services, had taken legal action against the *Gesellschaft für musikalische Aufführungs- und mechanische Vervielfältigungsrechte* (Society for Musical Performance and Mechanical Reproduction Rights - GEMA) because the latter had refused to sign a general agreement with it on the use of fees laid down by the GEMA for the use of music in music download services.

Under Article 12 of the *Urheberrechtswahrnehmungsgesetz* (Copyright Administration Act), collecting societies are obliged to sign general agreements with such associations unless they cannot reasonably be expected to do so, particularly if an association has too few members. Such an agreement has a practical advantage for the collecting society compared to several individual contracts because it lightens its administrative workload. In return, the association benefits from discounted usage fees.

Agreeing with the ruling of the *Oberlandesgericht München* (Munich Appeal Court), the BGH concluded that the association had no right to a general agreement, since it was unreasonable to expect the GEMA to sign one. Since the association only had 13 members, the advantages that the defendant would gain from signing such an agreement would not be reasonably proportionate to the 20% discount that it would have to offer. The responsibility for certain administrative tasks that the association would have to take under a general agreement would not significantly reduce the administrative burden of the defendant.

In determining whether it was reasonable to expect a collecting society to sign such an agreement, the fact that the music download services represented by the association held a market share of approximately 90% was irrelevant. If the market share of the download services was decisive, the defendant would still

be obliged, for example, to offer a general agreement discount if the market was dominated by only two companies, even if it would not gain any significant advantage in the management and collection of the fees. For this reason, it was also irrelevant whether the association's members generated substantial turnover from the sale of music recordings via music download services.

The BGH was not convinced by the reference to a previous general agreement signed by the GEMA with an association of 13 cinema operators. Since, in that case, the individual cinema operators themselves had represented a total of 47 cinemas, the general agreement had reduced the defendant's administrative workload much more than it would have done in this case.

• *Urteil des BGH vom 14. Oktober 2010 (Az. I ZR 11/08)* (BGH ruling of 14 October 2010 (case no. I ZR 11/08))
http://merlin.obs.coe.int/redirect.php?id=12900 DE

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Supreme Court Rules on Owner's Right to Prohibit Filming

On 17 December 2010, the *Bundesgerichtshof* (Federal Supreme Court - BGH) decided that the owner of a plot of land could, in principle, prohibit the unauthorised creation and exploitation of photographs and film recordings of its property for commercial purposes.

The plaintiff, the "*Stiftung Preußische Schlösser und Gärten*" (Prussian Castles and Gardens Foundation), a public law foundation, is responsible for looking after, maintaining and providing public access to numerous historic buildings and gardens of interest to tourists in the *Länder* of Berlin and Brandenburg. Two of the defendants sell their own and third-party photographs and films. The third defendant operates an Internet platform where photographers can post their images, which can then be downloaded for a fee. The foundation considered that, since all the defendants had sold images of the cultural treasures that it managed, its ownership rights had been infringed and it therefore applied for an injunction, disclosure of information and damages. The first instance court granted these requests, but they were rejected by the appeal court.

The BGH overturned the appeal court's decision. Referring to previous rulings, it explained that owners could prevent the creation and sale of images made on their land. Owners were entitled to decide whether and for what purpose people could walk on their land. This applied in this case even though the owner was not a private individual and the cultural treasures could normally be visited free of charge.

The BGH referred the proceedings against the first two defendants back to the appeal court for the clarification of unresolved questions, particularly concerning the foundation's status as owner and the level of fault. Regarding the platform operator, the BGH also referred to previous decisions (see IRIS 2010-7/14) and ruled that he had not infringed any rights.

• *Pressemitteilung des BGH zu den Urteilen vom 17. Dezember 2010 (Az. V ZR 44/10, 45/10 und 46/10)* (BGH press release on the rulings of 17 December 2010 (case nos. V ZR 44/10, 45/10 and 46/10))
http://merlin.obs.coe.int/redirect.php?id=12901 DE

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Interior Ministry Tables Data Protection Amendment

The *Bundesministerium des Innern* (Federal Ministry of the Interior - BMI) tabled a bill amending data protection law on 1 December 2010. The bill particularly included measures to prevent serious breaches of privacy.

According to the ministry, the bill, which was initially submitted to the department ministers for a federal government vote, is mainly designed to strengthen the right of individuals to decide how their personal data is used on the Internet. For this reason, a new Article 38b is to be included in the *Bundesdatenschutzgesetz* (Federal Data Protection Act - BDSG), regulating the publication of this data via telemedia. Under this provision, publications that seriously breach privacy will only be allowed if permitted by the law, if the person concerned has expressly agreed or if there is a predominant legitimate interest for the publication.

The BMI considers that particularly serious breaches of privacy are committed when data is deliberately collected, stored and used for commercial purposes in order to create extensive personality or movement profiles, or if the person concerned is depicted or described in an insulting manner. Other examples mentioned by the BMI include the publication of personal contact details or information about a person's dependents.

However, predominant legitimate interests such as freedom of speech, freedom of research or artistic freedom could mean that such publication is allowed in individual cases. As well as the existing "privilege of the press", enshrined in Article 41 BDSG, press-type reporting will also be able to rely on predominant legitimate interests as part of the freedom of the press.

The bill also contains proposals for the regulation of "Internet services that are particularly relevant to the protection of privacy". In this category, the BMI includes facial recognition systems, with which people can be identified on the Internet using biometric features, services that create profiles based on search engine entries, and the collection of location data from mobile telephones and GPS smartphones. Since this is completely new territory, the BMI suggests that these proposals should be discussed in detail. The BMI was restrained in its views on the introduction of new sanction mechanisms, since it was hard to predict how this area would develop in future.

Individuals whose privacy is seriously breached will, in future, also be entitled to immaterial damages from private companies. The level of damages should be sufficient to give them a preventive effect.

The new bill was tabled in the context of discussions about the Google Street View map service. The Federal Minister of the Interior stressed that he opposed the adoption of a specific law about this new service. He said that, as far as possible, existing provisions should be used and self-regulatory mechanisms strengthened. The proposed amendments were designed to keep the law "open to future developments".

• *Informationsdokument des BMI vom 1. Dezember 2010 zum Gesetzentwurf* (BMI information document on the bill, 1 December 2010)
http://merlin.obs.coe.int/redirect.php?id=12899 DE

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BVerwG Quashes BayVGH Ruling on Axel Springer AG's takeover of ProSiebenSat.1

In a judgement of 24 November 2010, the *Bundesverwaltungsgericht* (Federal Administrative Court - BVerwG) quashed the decision of the *Bayerische Verwaltungsgerichtshof* (Bavarian Administrative Court - BayVGH) concerning Axel Springer AG's planned takeover of private television broadcaster ProSiebenSat.1 (P7S1) and referred the case back to the BayVGH.

The legal dispute concerned Axel Springer AG's plan to acquire all the shares in P7S1 and to submit a public takeover bid for the free-floating preference shares without voting rights attached. The *Bayerische Landeszentrale für neue Medien* (Bavarian New Media Office - BLM) and the *Kommission zur Ermittlung der Konzentration im Medienbereich* (Commission for the Investigation of Media Concentration - KEK) refused to grant approval for the merger, which is necessary under media law, on the grounds that it would give Axel Springer AG a dominant influence over the expression of opinion. The media company finally relinquished its takeover plans, but asked for a declaratory judgment stating that the refusal was unlawful. This request was rejected in the lower instance courts. The BayVGH considered the appeal inadmissible on the grounds that it lacked legitimate interest (see IRIS 2009-9/12).

The BVerwG has now decided that the appellant has an ongoing interest in a decision on the merits in this case. For Axel Springer AG, the refusal to approve the takeover under media law creates a danger that "potential sellers will not take it into consideration as a serious negotiating party for any future takeover."

In June 2010, the *Bundesgerichtshof* (Federal Supreme Court) had confirmed the decision of the *Bundeskartellamt* (Federal Cartel Office) to ban the merger (see IRIS 2010-7/12).

• *Pressemitteilung des BVerwG zum Urteil vom 24. November 2010 (Az. 6 C 16.09)* (BVerwG press release on the ruling of 24 November 2010 (case no. 6 C 16.09))
http://merlin.obs.coe.int/redirect.php?id=12902 DE

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Munich Appeal Court Classifies Online Video Recorder as Separate Type of Use

On 18 November 2010, the *Oberlandesgericht München* (Munich Appeal Court - OLG) ruled in favour of RTL Television GmbH in its dispute with a company that provides technical support for the online video recorder (OVR) service Save.TV.

In the first instance proceedings, RTL had obtained a temporary injunction against the Save.TV service company from the *Landgericht München I* (Munich District Court 1) for breach of its retransmission rights set out in Articles 87 and 20 of the *Urheberrechtsgesetz* (Copyright Act - UrhG) (see IRIS 2010-9/17). The Appeal Court upheld this decision with reference to the ruling of the *Bundesgerichtshof* (Federal Supreme Court - BGH) of 22 April 2009 in the case RTL versus Save.TV (case no. I ZR 175/07; see also IRIS 2009-7/9). The Save.TV service company was therefore prohibited from continuing to provide technical support for the OVR service.

In the appeal proceedings, the service provider had argued that RTL had transferred its rights to the *Gesellschaft zur Verwertung der Urheber- und Leistungsschutzrechte von Medienunternehmen* (Society for the Administration of Copyright and Performance Rights of Media Companies - VG Media) and was therefore not entitled to take legal action.

Taking into account a press release issued by the *Deutsche Patent- und Markenamt* (German Patent

and Trade Mark Office - DPMA) on 10 September 2010, in which the DPMA gave its views on the extent to which the rights exercised by VG Media covered the use of OVRs (see IRIS 2011-1/22), the OLG München nevertheless concluded that the retransmission of television signals to OVRs represented a separate type of use, since there were technical and economic differences compared to traditional video recorders, particularly in terms of financing. Therefore, according to the rule set out in Article 31(5) UrhG, under which, if the types of use to which exploitation rights extend were not specifically designated when the right was granted, the scope of transferred rights is limited to the types of use necessary to achieve the purpose of the agreement, OVRs were not included under the copyright agreement between the broadcasters and VG Media. The retransmission rights therefore remained the property of the broadcasters, which meant that RTL was entitled to prohibit the OVR service provider from retransmitting its programmes.

• *Urteil des OLG München vom 18. November 2010 (Az. 29 U 3792/10)* (OLG München ruling of 18 November 2010 (case no. 29 U 3792/10)) DE

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15th Inter-State Broadcasting Agreement Signed

The heads of government of the *Länder* signed the *15. Rundfunkänderungsstaatsvertrag* (15th Agreement Amending the Inter-State Broadcasting Agreement - RÄStV) at the Minister-Presidents' conference held in Berlin on 15 December 2010.

Under the agreement, a new contribution model for the financing of public service broadcasting will be introduced in 2013. The obligation to pay the licence fee will no longer be based on ownership of a reception device, but on that of a home (Art. 2(1) RÄStV), place of business (Art. 5(1) RÄStV) or non-privately used vehicle (Art. 5(2) RÄStV; see IRIS 2010-6/21). In order to reduce the burden on small businesses and the part-time self-employed, one vehicle per place of business will be exempt.

The current standard fee (EUR 17.98 per month) will not be raised before 2015 at the earliest. Disabled people who are capable of working will pay a third of the standard fee (Art. 4(2) RÄStV).

The *Gebühreneinzugszentrale* (Fee Collection Office - GEZ) remains responsible for levying the fees, although it will no longer be necessary to check whether broadcasting devices are being used in individual households. The addresses of people to whom the fee applies can be obtained from residents' registration offices in cases where the people concerned do not register their obligation to pay the fee themselves (Art. 8 and 11 RÄStV).

The RÄStV still needs to be ratified by the *Land* parliaments.

• *Fünfzehnter Staatsvertrag zur Änderung rundfunkrechtlicher Staatsverträge (15. Rundfunkänderungsstaatsvertrag - RÄStV)* (15th Agreement Amending the Inter-State Broadcasting Agreement)
http://merlin.obs.coe.int/redirect.php?id=12927 DE

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Bills to Step Up Fight Against Hatred on the Internet

On 16 December 2010, the *Bundestag* (lower house of parliament) adopted two bills ratifying and implementing the Additional Protocol of 2003 to the Council of Europe's Convention on Cybercrime (see IRIS 2001-10/3) and taking into account Framework Decision 2008/913/JHA of the Council of the European Union of 28 November 2008 (see IRIS 2009-2/5).

The Additional Protocol to the Convention on Cybercrime generally criminalises the dissemination of racist and xenophobic material via computer and distribution systems such as the Internet. This includes "any written material, any image or any other representation of ideas or theories, which advocates, promotes or incites hatred, discrimination or violence, against any individual or group of individuals, based on race, colour, descent or national or ethnic origin".

The Council Framework Decision essentially requires member states to take measures necessary to ensure that publicly inciting to violence or hatred directed against a group of persons or a member of such a group defined by reference to race, colour, religion, descent or national or ethnic origin is punishable.

As a result, the *Bundestag* proposed that Article 130 of the *Strafgesetzbuch* (Criminal Code - StGB) be amended so that, in future, it should cover incitement to hatred and violence not only against segments of the population, but also against national, ethnic or religious groups, groups defined by their traditions, and individual members of such groups.

The concept of "group" should, in the *Bundestag*'s view, not be limited to the list in Article 130 StGB (new version), but should also include all groups of people that stand out as a discernible entity through some permanent external or internal distinguishing feature. The same legal situation therefore applies to attacks

on individuals on grounds of homosexuality or disability, for example, as to those based on religion or nationality.

• *Entwurf eines Gesetzes zu dem Zusatzprotokoll vom 28. Januar 2003 zum Übereinkommen des Europarats vom 23. November 2001 über Computerkriminalität betreffend die Kriminalisierung mittels Computersystemen begangener Handlungen rassistischer und fremdenfeindlicher Art* (Bill on the Additional Protocol of 28 January 2003 to the Council of Europe Convention of 23 November 2001 on cybercrime, concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems)
http://merlin.obs.coe.int/redirect.php?id=12903 DE

• *Entwurf eines Gesetzes zur Umsetzung des Rahmenbeschlusses 2008/913/JI des Rates vom 28. November 2008 zur strafrechtlichen Bekämpfung bestimmter Formen und Ausdrucksweisen von Rassismus und Fremdenfeindlichkeit und zur Umsetzung des Zusatzprotokolls vom 28. Januar 2003 zum Übereinkommen des Europarats vom 23. November 2001 über Computerkriminalität betreffend die Kriminalisierung mittels Computersystemen begangener Handlungen rassistischer und fremdenfeindlicher Art* (Bill on the implementation of Council Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law and on the implementation of the Council of Europe Convention of 23 November 2001 on cybercrime, concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems)
http://merlin.obs.coe.int/redirect.php?id=12904 DE

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-Estonia

Two New Legal Acts in the Media Field

In December 2010 two new legal Acts in the media field were adopted by the Estonian Parliament.

First, the Media Services Act replaces the old Broadcasting Act and reconciles Estonian media regulation with the Audiovisual Media Services Directive (AVMSD). Following the spirit of the AVMSD, the Media Services Act in principle takes a more liberal approach to advertising restrictions, while the broadcasting licensing procedure is also simplified. Regarding media regulation, the Media Act encourages a self-regulation model. Only if self-regulation fails, are executive powers invited to exercise their regulatory power. Despite the fact that the AVMSD emphasises the importance of the existence of an independent regulatory body, such a body was not established.

The second legal Act in the media field is the Law of Protection of Source of Information (LPSI). This was actually an amendment of several existing legal acts: the Media Act, the Law of Criminal Procedure, the Code of Civil Procedure and the Law of Obligations Act. LPSI provides principles of information source protection in judicial proceedings. Before LPSI was adopted, the protection of sources of information was established only in broadcasting, while now all media are covered. When the draft of the Act was discussed, a heated debate arose between stakeholders over the provision supplying the courts with so-called preventive tools which can be used "were there is a need to influence the person who caused damage (tortfeasor) in order to restrain him from causing further damage while taking into account his financial situation". The article itself is targeted at avoiding the dissemination of defamatory material and protecting the honour and dignity of persons, but some actors interpreted it as a possible tool for the restriction of freedom of speech. Conflict between the regulator and main media houses has been so strong that the Estonian President, who proclaimed this act, was given the title of "Enemy of the Press 2010" by the media.

• Meediateenuste seadus. RT I, 06.01.2011, 1 (Media Services Act, Official Journal RT I, 6 January 2011, 1)
http://merlin.obs.coe.int/redirect.php?id=12925 ET

• Ringhäälinguseaduse, kriminaalmenetluse seadustiku, tsiviilkohtumenetluse seadustiku ja võlaõigusseaduse muutmise seadus (Allikakaitseseadus), RT I, 21.12.2010, 1 (Amendment to the Media Act, the Law of Criminal Procedure, to the Code of Civil Procedure and to the Law of Obligations Act (Information Source Protection Act), RT I, 21 December 2010, 1)
http://merlin.obs.coe.int/redirect.php?id=12926 ET

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ES-Spain

Spanish Congress Rejects Controversial Copyright Bill

On 21 December 2010 the Spanish Congress rejected a controversial bill aimed at protecting intellectual property rightsholders from Internet downloaders. All of the main Spanish parties, except for Prime Minister José Luis Rodríguez Zapatero's Socialist Party rejected the so-called Sinde Bill, named after Culture Minister Ángeles González-Sinde. The draft legislation would have set up a government commission which would have then provided courts with details of websites offering access to copyright-protected material, such as music, movies, video games or software. A judge could then have ordered the closure of offending websites.

The Sinde Bill would give the Commission on Intellectual Property, an administrative body under the Ministry of Culture, the power to handle complaints and to propose the closure or blocking of websites. Judicial review would be borne by the *Sala de lo Contencioso Adminsitrativo de la Audiencia Nacional* (the Chamber for Administrative Matters of the Spanish High Court), which would make a decision in a maximum period of four days.

Objections to the Sinde Bill were already raised at the time of its initial proposal. The opposition, which had

submitted several amendments to ensure greater judicial intervention in the process, favoured a more moderate approach. It expressed support for intellectual property rights, but absolute rejection of the government project. For the opposition parties, the provision would institute a rapid judicial procedure whereby the Commission on Intellectual Property would be offered the power of closing down websites. Legislation may establish the closure of websites through which files protected by copyright may be downloaded, including music, movies, video games and software, but always under judicial authorisation, insisted the opposition.

The Socialist Party argued that sufficient judicial guarantees were contained in the law, as the High Court would ultimately decide whether to authorise the closure of sites which infringe intellectual property rights. For the critics of the law, such guarantees do not exist, as the Court would not decide on the merits.

But critics of the law should not claim victory yet. The copyright bill is currently being debated in the Senate, where the Socialists may negotiate with other parties to try to win their support and, in case of failure, seek a compromise with them. This means that the Sinde Bill ain't dead yet.

• Anteproyecto de Ley de Economía Sostenible (Sustainable Economy Bill)
http://merlin.obs.coe.int/redirect.php?id=12890 ES

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FR-France

Conseil d'Etat Validates TF1's Purchase of TMC and NT1 Channels

With two decisions delivered on 30 December 2010, the Conseil d'Etat rejected the requests made by M6 for the cancellation of the decisions adopted by the *Autorité de la Concurrence* (competition authority) and the *Conseil Supérieur de l'Audiovisuel* (audiovisual regulatory body - CSA) authorising the acquisition by TF1 of the entire capital of the AB Group, in order to gain control of the terrestrially broadcast digital channels TMC and NT1. On 16 January 2010, the competition authority had validated this concentration operation, on condition that the parties made a number of undertakings, required because of the effects on competition identified in the markets for both broadcasting rights and television advertising. In support of its appeal for the decision to be cancelled, M6 claimed that the authority should have prohibited the operation because of these effects on competition. The Conseil d'Etat, however, considered that these effects were not so important that prohibiting the operation was the only possible proportionate measure to take.

In the alternative, M6 claimed that the undertakings entered into by the parties were insufficient. The channels concerned undertook firstly to refrain from any form of coupling, subordination, advantage or consideration in marketing advertising space on TF1 and on NT1 and TMC, and secondly that the marketing of advertising space on NT1 and TMC should be carried out in an autonomous fashion by a company other than TF1's advertising agency, with only "support" functions being carried out jointly within the Group. Other undertakings had been made, more particularly to limit the increase in the purchasing power of the TF1 Group, and to facilitate the circulation of works and access to rights by the other channels. The Conseil d'Etat found that these undertakings address the risks identified.

In its second decision, the Conseil d'Etat, as the country's highest administrative jurisdiction, was called upon to pronounce on the validity of the CSA's approval of the operation in March 2010 (see IRIS 2010-5/24). M6 held that the CSA had exercised its powers wrongfully by merely approving the decision made by the competition authority and had defined additional undertakings in disregard of the principle of impartiality. The Conseil d'Etat found that the changes implied by the purchase of the AB Group were not on a scale or of the type such that the CSA should have refused approval and withdrawn the authorisation issued to the TMC and NT1 channels. It based its decision on an overall appreciation of the various undertakings required of the company TF1 by the CSA in addition to those already entered into in respect of the competition authority, which were considered as being such as to preserve the diversity of the programme offer, guarantee maintenance of a separate editorial line for each of the three channels, and not jeopardise a sufficient diversity among operators. It is true that the Act of 1 August 2000 emphasises the need for operator diversity, stressing the importance of the inclusion in DTV of operators independent of the incumbent groups (such as TF1), which in turn have been given the benefit of "compensatory channels" by the Act. However, it did not specifically prevent these groups, subject to sufficient supervision, from obtaining further authorisations in the DTV sector. The CSA had therefore not committed an error of appreciation in considering that the operation submitted to it was not on a scale or of the type such that it should have refused its approval.

• *Conseil d'Etat, 30 décembre 2010, Société Métropole Télévision, n°338197 et n°338273* (Conseil d'Etat, 30 December 2010, Société Métropole Télévision, Nos. 338197 and 338273) FR

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Should the Film "Séraphine" be Outlawed?

The original nature of the screenplays for two successful French films has recently been contested in court.

The first was the screenplay for "Outlaws" (original title "Hors la Loi"), a film by Rachid Bouchareb presented at the Cannes Film Festival in 2010, which relates the involvement of Algerians living in France in the war of independence through three brothers who adopt the different attitudes of Algerians. The co-writers of another screenplay, entitled "Sparring Partners", called for a ban on showing the film and claimed damages to compensate for the prejudice they felt they had suffered as a result of the alleged infringement of copyright. The 3rd Chamber of the Regional Court in Paris found however that viewing the films and reading the screenplays sufficed to demonstrate that these were two very different stories, covering different periods of time, and with different themes. The applicants' screenplay merely told the story of two enemy brothers who shared a passion for boxing and whose friendship was almost crushed by History. Thus the screenplay for "Outlaws" told a universal story, whereas the other film was limited to the fate of two individuals. The Court found that there was therefore no similarity between the two works, in terms of either subject matter, treatment, or construction. Furthermore, the only two points of contact between the two works were a passion for boxing, displayed by one of the three brothers in the film "Outlaws", and the Algerian war as a triggering factor. The Court found that the focal points of war, boxing, prison, and exile that the applicant (the other applicant having been declared inadmissible for lack of proof of capacity to take action as an originator) claimed bore the imprint of his personality were no more than general ideas and could not be protected by copyright in that form. Only the definitive form the film or the screenplay gave to the various themes could constitute a form of the themes that might be protected. In the present case, the oversimplified nature of the screenplay and the general claim the applicant laid to these themes meant that they could not be protected in any way.

The other noteworthy judgment concerns "Séraphine", a film about the painter of the same name, which has won a number of awards, including the César for best original screenplay in 2009. An art historian who has written a novelised biography of the painter, in whom he specialises, and his editor, claimed that many passages of the screenplay for the film were a slavish or quasi-slavish reproduction of his book, published in 1986; they identified 35 borrowings. The same chamber of the Court recalled that historical or purely biographical facts could not in themselves be appropriated in any way. It was very different if the tale describing them brought previously little-known events or situations to the public's knowledge and treated them in a manner specific to the author. The Court held that in many cases the alleged resemblances were based on biographical elements taken from reality, or on general ideas, or on expression in a form that did not display any originality. In nine specific cases, however, it noted a similarity in the wording used, sometimes to the letter, between the screenplay for the film and the book written by the applicant, such that copyright had been infringed. The Regional Court therefore ordered the production company and the screenwriter to pay the applicant EUR 25 000 to compensate for the infringement of his moral rights as author, and to pay his editor EUR 25 000 to compensate for the infringement of its pecuniary rights. The Court also ordered the publication of its judgment in three newspapers or magazines. The request to ban showing the film was rejected, however, since it was only one version of the screenplay and not the film itself that infringed copyright.

• *TGI de Paris (3e ch. 1re sect.), 16 novembre 2010* - MM. Afiri et Roques c. R. Bouchareb et a. (Regional Court of Paris (3rd Chamber, 1st Section), 16 November 2010 - Mr Afiri and Mr Roques v. R. Bouchareb et al.) FR

• *TGI de Paris (3e ch. 2e sect.), 26 novembre 2010* - Editions Albin Michel et a. c. Sté TS Productions et a. (Regional Court of Paris (3rd Chamber, 2nd Section), 26 November 2010 - Éditions Albin Michel et al. v. the company TS Productions et al.) FR

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France Télévisions Heavily Penalised for Ethical Failing when Providing Information

The *Conseil Supérieur de l'Audiovisuel* (audiovisual regulatory body - CSA), meeting in plenary assembly on 7 December 2010, fined France Télévisions EUR 100 000, to be paid into the fund to support audiovisual and cinematographic production, for France 2 failing to observe the rules of ethical conduct in the provision of information. On 1 October 2009, in its lunchtime news programme, the channel broadcast an item on subsequent offences by sex offenders during which a named child was twice wrongly presented as having died in an attack. The public service channel had already received formal notice in January 2009 on the same grounds. As the Conseil d'Etat stated recently in a decision on 22 October 2010, in response to a radio station contesting a fine of EUR 200 000 imposed by the CSA for having broadcast utterances infringing the dignity of minors, "it does not transpire from any text or general principle of law that there is any time limit on the formal notices sent by the CSA on the basis of Article 42 of the Act of 30 September 1986". The CSA was therefore permitted to implement the sanction procedure since "such a practice may constitute a failing in the obligation of honesty of information provided for in Article 43-11 of

the Act of 30 September 1986 and in Article 35 of the Charter of France Télévisions". The CSA did not consider that the correction of the false announcement made during the same news programme constituted an attenuating circumstance.

• *Décision du CSA du 7 décembre 2010* (CSA Decision of 7 December 2010)
http://merlin.obs.coe.int/redirect.php?id=12894 FR

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CSA Deliberates on Protection of Young People on On-demand AVMSs

Following on from the Decree of 12 November 2010 (see IRIS 2011-1/26), the Conseil Supérieur de l'Audiovisuel (audiovisual regulatory body - CSA) has adopted a deliberation on the protection of young people, ethical rules, and the accessibility of programmes on on-demand audiovisual media services established in France. Article 15 of the Act of 30 September 1986 gives the CSA responsibility for protecting young people, and requires it to ensure the implementation of all possible means adapted to the nature of on-demand audiovisual media services. The development of a method of consumption that gives viewers a wide freedom of choice increases the potential for young people to be exposed to content that might be damaging for them. This has led the CSA to lay down specific rules for on-demand audiovisual media services. Its recommendation establishes a classification of programmes according to five levels of acceptability in relation to the need to protect young children and teenagers: for the general public; including scenes likely to be harmful for children under 10 years of age; cinematographic works and programmes not to be shown to anyone under 12 years of age; those not to be shown to anyone under 16 years of age; those not to be shown to anyone under 18 years of age. Signing is associated with each of these categories, in the form of round white pictograms showing the age limit in black, and the editor is required to show this. The deliberation requires the service editors to promote a "general public" area and limit the availability of programmes not advised for anyone under the age of 16 years free of charge, during the day. Furthermore, "Category V" programmes (not to be shown to anyone under the age of 18 years) are only to be marketed as part of an offer for which a charge is made, either by subscription or as pay-per-view, and are to be isolated in a reserved space, together with the images, descriptions, extracts, trailers and advertisements for the programmes. The deliberation also requires the setting up of technical blocks for the areas reserved for programmes in this category, which may only be made available to the subscribing public between 10.30 p.m. and 5 a.m., although this may be waived if the majority of subscribers have been checked. More generally, the editor of an on-demand AVMS will be required to ensure observance of the code of ethics for programmes (human dignity, combating different forms of discrimination, honesty of information, respect of personal rights, etc). The deliberation, applicable from 1 January 2011, nevertheless allows a period of grace until 1 September 2011 for setting up the filters for programmes not to be shown to anyone under the age of 18 years and until 1 January 2012 for signing.

• *Délibération du CSA du 14 décembre 2010 concernant la protection du jeune public, la déontologie et l'accessibilité des programmes sur les services de médias audiovisuels à la demande* (CSA Deliberation of 14 December 2010 on the protection of young people, ethical rules, and the accessibility of programmes on on-demand audiovisual media services)
http://merlin.obs.coe.int/redirect.php?id=12895 FR

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Infringement of Database - Jurisdiction of English Courts

Football Dataco, the "official, general licensing website, for the 4 professional football leagues in the United Kingdom" compiles and maintains football match data in a database called "Football Live". It is a "live" database and comprises information from UK football matches, such as goals scored, penalties, yellow and red cards and substitutions.

Sportsradar is a German company, owned by a Swiss holding company. It also operates a live sports data service, "Sports Live Data", with the material held on servers hosted in Germany and Austria. It is both accessible from the UK and made available to third parties, some of whom are in the UK.

Football Dataco raised an action claiming copyright and database right infringement by Sportsradar for unlawfully using material from "Football Live". Sportsradar argued that the English courts did not have jurisdiction to hear the claim: it was not committing any infringing acts in the UK and it was domiciled in Germany and Austria.

The issue regarding extraction from a database turned on the interpretation of Article 7(2)(b) of the Database Directive: "Any form of making available to the public all or a substantial part of the contents of a database by the distribution of copies, by renting, by on-line or other forms of transmission."

Legally, where did the act of "making available" occur?

As regards online transmission, the judge analogised from the question, where did a satellite broadcast occur - at the place of transmission or the place of receipt? The Directive on Satellite Broadcasting and Cable Re-transmission favours the former (the so-called "emission theory").

Mr Justice Floyd stated that "I have come to the conclusion that the better view is that the act of making available to the public by online transmission is committed and committed only where the transmission takes place. It is true that the placing of data on a server in one state can make the data available to the public of another state but that does not mean that the party who has made the data available has committed the act of making available by transmission in the State of reception. I consider that the better construction of the provisions is that the act only occurs in the state of transmission."

The full trial will consider whether Sportsradar is liable for authorising copyright infringement and/or is jointly liable for the infringement.

• Football Dataco Ltd, The Scottish Premier League Limited, The Scottish Football League and PA Sport UK Limited v. Sportradar GmbH & and Sportradar AG, 17 November 2010
http://merlin.obs.coe.int/redirect.php?id=12887 EN

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New Greek Legislation on the Cinema

On 23 December 2010 the Greek Parliament approved new legislation on support for cinematographic art and its development.

The new Act starts by laying down the principles of national policy on the cinema sector and goes on to define the conditions for designating a work a "Hellenic cinematographic work" in order to be able to take advantage of the measures for financial support. Each year, producers of Hellenic full-length cinema works receive part of the special tax levied on cinema theatre tickets, usually between 8 and 12%. The amount allocated to each producer depends on the number of tickets sold, after the application of specific weightings. The remainder of the amount collected is divided between the Hellenic Cinematographic Centre (80%) and the Ministry of Culture and Tourism (20%).

The new Act also provides for support for production from media service providers. More specifically, the public-sector television broadcasting body ERT S.A. is required each year to invest 1.5% of its annual turnover, including the audiovisual licence fee, in production. Private-sector television broadcasting bodies must allocate to production 1.5% of their annual income from advertising.

Half of the amount to be invested may be made available to the Hellenic Cinematographic Centre in the form of advertising time for promoting cinema works. From 2015 onwards, pay-per-view broadcasters will only be able to invest in production.

The Act introduces a new obligation to aid production, incumbent on telecommunication service providers. They are now required to devote to production 1.5% of their annual turnover from supplying audiovisual media services via the Internet or mobile phones. The penalty for failing to do so will be a fine.

The Act amends the articles of association of the Ελληνικό Κέντρο Κινηματογράφου (Hellenic Cinematographic Centre) which now becomes a not-for-profit entity under private law under the supervision of the Minister for Culture and Tourism, instead of a public company. The Centre retains its administrative and financial autonomy. The seven members of its Board of Directors are appointed by ministerial decision, for a three-year term of office. Four members are appointed from the Greek or international cinema world, while the remainder may come from the humanities sector or have substantial experience of the management of such bodies. The Director General, appointed by a decision of the Minister for Culture and Tourism on a proposal from the Board of Directors, is responsible for strategy and for achieving the Centre's policies. The Centre has been given responsibility for the Hellas Media Desk. The Hellenic Film Commission deals with foreign production in Greece and the promotion of Greek productions in other countries.

The Act also reorganises the Φεστιβάλ Κινηματογράφου Θεσσαλονίκης (Thessalonica Cinema Festival), which is a not-for-profit entity under private law.

Regarding cinematographic archives, the not-for-profit entity under private law Εθνικό Οπτικοακουστικό Αρχείο (Hellenic National Audiovisual Archive) is henceforth responsible for the upkeep of the cinematographic archives with a view to collecting, preserving, digitalising and cataloguing them as well as all kinds of printed material, photographs and objects related to the art and history of the cinema. Every producer of a cinematographic work or who has an original copy of a film in his/her possession is required to deposit one copy in digital or film form. Failure to do so would deprive the producer of entitlement to benefit from the support introduced by the Act.

The purpose of this new text is to update the regulation of the sector that has been in place since 1986 (Act No. 1597/1986 - the "Melina Mercouri Act").While a lot of hope had been pinned on the new Act, it has been received not without dissatisfaction, the main issue being the new status of the Cinematographic Centre.

• Νόμος 3905/2010 «325375΄371303307305303367 και ανάπτυξη της κινηματογραφικής τέχνης και άλλες 364371361304΄361376365371302» (346325332 Α΄ 219/23.12.2010) (Act No. 3905/2010, Gazette A 219 of 23 December 2010)
http://merlin.obs.coe.int/redirect.php?id=12893 EL

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New Act on Mass Media Adopted

On 21 December 2010 the Hungarian Parliament adopted Act CLXXXV of 2010 on Media Services and Mass Media (Media Act). The new Act replaces Act I of 1996 on Radio and Television Broadcasting and Act II of 1986 on the Press. By adopting the new Media Act the Hungarian Parliament has completed the fundamental reform of the Hungarian media regulation (see IRIS 2010-8/34 and IRIS 2011-1/37).

The main issues and features of the Media Act are as follows:

- The Act implements the European Directive on Audiovisual Media Services. In line with the Directive it loosens advertising rules to a certain extent and allows product placement.

- The new Media Act redefines the rules on the protection of minors, human dignity and other constitutional values.

- It reshapes the system of public service media by redefining its purpose, supervision and financing.

- It introduces a system for the protection of media pluralism based on the actual power of media undertakings to influence public opinion. Similarly to the German system this power is to be assessed on the basis of ratings.

- The new Act also introduces a co-regulatory system. In this framework professional self-regulatory media organisations may enter into agreement with the *Nemzeti Média- és Hírközlési Hatóság* (National Media and Communications Authority - NMHH), gain official recognition to their codes of conduct and receive support for performing their self-regulatory activities.

- By amending Act LXXIV of 2007 on the Rules of Broadcast Distribution and Digital Switchover (see IRIS 2007-8/23) it postpones the deadline for the digital switchover to the end of 2014.

Certain features of the Media Act became subjects of special international attention and also subjects of analysis by the European Commission (see IRIS 2011-2/3). In this regard the most important points can be summarized as follows:

- The scope of the new Media Act covers a variety of media content ranging from the print press across traditional radio and television, to non-linear services and internet newspapers or news portals. The scope covers exclusively services "which are offered as a business service, for the content of which a natural or legal person, or a business entity with no legal personality has editorial responsibility, and the primary purpose of which is to deliver textual or image content to the general public for information, entertainment or educational purposes, in a printed format or through any electronic communications network". As a consequence private websites and online content services not dedicated primarily to presenting news on professional basis are not regulated by the new rules.

- The act maintains the requirement of balanced coverage of news in case of radio and television broadcasting. It also extends this requirement to presentation of news by on-demand audiovisual media services. However, balanced coverage is still not a legal obligation for the print media and internet news services under the current Hungarian regulation. It can also be noted, that no fines can be applied in case a media service provider fails to meet this criterion.

- The Media Act also defines the legal status of the Media Council (Médiatanács) of the NMHH. This body is responsible for performing the tasks of the regulatory authority for the media. The Media Council is comprised of members elected by the Parliament by a two-thirds majority for a term of 9 years. The act provides a set of rules with the purpose to ensure their independent conduct in their office: in performing their duties, members of the Media Council shall not take orders from anyone; they cannot be recalled; and they have to comply with a set of incompatibility rules. The elected members of the Media Council are expected to have no ties, either formal or informal, with any political party or with the government.

The new Media Act entered into force on 1 January 2011.

• 2010. évi CLXXXV. Törvény a médiaszolgáltatásokról és a tömegkommunikációról (Act CLXXXV of 2010 on Media Services and Mass Media)
http://merlin.obs.coe.int/redirect.php?id=12870 HU

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Law on Electronic Media Updated

With the *Loi du 17 décembre 2010 portant modification de la loi modifiée du 27 juillet 1991 sur les médias électroniques* (the Law of 17 December 2010 Amending the Modified Law of 27 July 1991 on the Electronic Media, Electronic Media Law 2010) and eight accompanying Regulations of the same day, Luxembourg has finalised the transposition of the EU Audiovisual Media Services Directive and updated one of its main media-related acts.

After a first step amending the advertising rules in a Regulation of 2008, the new law and regulations align the Luxembourgish rules for audiovisual media services with the requirements of the EU Directive. After fulfilling this obligation, there is an ongoing debate about a further reform of the Electronic Media Law 2010 concerning its institutional provisions.

The Luxembourgish law covers all forms of electronic media and therefore goes beyond television and on-demand audiovisual media services by also encompassing radio. Consequently, Chapter V with the content-related rules distinguishes between norms applicable to all forms of audiovisual and radio media services and specific ones for only certain types of services. The provision against content inciting racial hatred is an example of a horizontal norm. Also, concerning radio, some earlier planned amendments facilitating frequency allocation for programmes with low coverage have now been enforced. Upholding the earlier differentiation between programmes directed at a national audience or with an international reach, the law now creates corresponding categories of services. Together with the new definitions foreseen by the Directive, this amounts to 28 terms being defined in the key provision of Art. 2 of the Electronic Media Law 2010.

Both as concerns the definitions and the newly created substantive provisions that result from the Directive, the Luxembourgish law is almost completely a literal transposition of the Audiovisual Media Services Directive. This is for example the case with the inserted provision on the conditions under which the State can temporarily block the retransmission of foreign on-demand services. An important addition are the notification rules (Art. 23bis to 23quater) that require providers of IPTV or on-demand services, as well as services not under the jurisdiction of an EU Member State but addressed to such States and using Luxembourgish satellite capacities, to notify in advance the authorities of their intended service. The latter reflects the significance of the Luxembourg-based SES Astra satellite system for dissemination in Europe and has already been an established procedure. Based on the Electronic Media Law 2010, a number of Regulations give more details, e.g. concerning product placement.

• *Loi du 17 décembre 2010 portant modification de la loi modifiée du 27 juillet 1991 sur les médias électroniques, Mémorial A, n°241 du 24.12.2010, p. 4024* (Law of 17 December 2010 amending the Law of 27 July 1991 on the Electronic Media, Electronic Media Law 2010, Mémorial A, n°241 of 24 December 2010, p. 4024)
http://merlin.obs.coe.int/redirect.php?id=12888 FR

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Competition Council Allows Merger of Two Largest Cable TV Operators

On 13 November 2010 the Latvian Competition Council (CC) adopted a decision allowing the merger of the two largest cable TV operators in Latvia, the Baltkom Group and the Izzi Group. The case is interesting in terms of the market definition provided, as well as taking into account that the merger was allowed despite the fact that it will result in the market power of the new merged cable operator.

In its market analysis the CC had to establish whether the pay-television market constitutes a single relevant product market, or whether it should be divided into separate relevant product markets according to the various technology platforms (terrestrial, satellite, cable or Internet protocol television). In this case the CC arrived to different conclusions than in a similar analysis performed in 2005. In that case the CC decided that a separate technology-specific pay-television market should be taken as the relevant product market.

In the present case the CC performed again an analysis of supply and demand substitution. As regards the supply side, the CC concluded that there exist significant barriers to supply substitution from the perspective of suppliers of various technologies for the transmission of television signals. By contrast, in relation to the demand side the merger participants argued that all pay-televisions are mutually replaceable irrespective of the technology platform used. The CC, after a detailed analysis of pay-television pricing, agreed to this argument, as it found a mutual competition among all pay-televisions. Thus, the whole pay-television market was established as the relevant product market, including all types of pay-television services irrespective of the technology used.

Further, the relevant geographic market was assessed as the cities and towns where the merger participants provided cable television operator services, instead of

the whole territory of Latvia. This was based on the argument that cable television markets are localised within specific towns or cities. In addition, the CC identified a wholesale pay-television market, distinguishing it from the free-to-air-television market (in this conclusion it followed its earlier practice in 2009, assessing the abuse of the dominant position by VISAT and TV3 television channels).

In its analysis of the impact of the merger, the CC established that the operation in question amounted to a merger between close competitors and that as a result of the merger there would only remain two major competitors in the pay-television market in Latvia: the Baltkom/Izzi Group and SIA Lattelecom. In addition, the merged market participant would have a very large market share and the majority of subscribers. The only major competitor, SIA Lattelecom, would not create sufficient competition in the relevant markets and thus, as a result of the merger, the merged market participant would gain the possibility to act independently from consumers. There would also be negative consequences in the wholesale market of pay-television channels: the potential subscribers would have less freedom of choice. However, the CC also pointed to potentially positive consequences of the merger: the pooling of resources may promote new services.

An important argument for allowing the merger was the prognosis for the future development of the pay-television market in Latvia. The CC was of the opinion that IPTV will have a much more significant role in the future: "In the next five years the number of IPTV operators will increase and IPTV will offer such services as archives of television broadcasts, video rentals, recording of broadcasts and films, voting for favourites while watching television shows, ordering pizza, etc. In Latvia the IPTV service is in its developmental stage, and many of the named functions are not available yet." According to the CC, this argument would decrease the negative impact of the merger.

As a result, the CC allowed the merger but imposed several binding commitments on the merger participants. The commitments include both duties towards consumers (to improve the contents of the contracts) and towards competitors (to refrain from exclusionary pricing mechanisms), as well as special commitments towards the two largest Latvian commercial TV broadcasters.

The permission of the merger has already been criticized by a number of competitors and stakeholders. Currently, it is still unknown whether the decision will be appealed to the court by any of the affected actors. However, according to the Latvian Competition Law, the appeal of the decision does not suspend its enforcement.

• *Par tirgus dalībnieku apvienošanos Lieta Nr. 1492/10/03.01.-01./13 „Par Baltkom grupas, Izzi grupas un SIA „EST Risinājumi" apvienošanos"* (Decision of the Competition Council No. 83 of 13 November 2010, in case No. 1492/10/03.01.-01./13)
http://merlin.obs.coe.int/redirect.php?id=12871 LV

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Council of Ministers Approves Events of General Interest

On 28 October 2010, the minister responsible for the media sector, Jorge Lacão Costa, approved the list of events that must be considered to be of general public interest. This communication (*Despacho nº 16552-A/2010*) was published in the official Portuguese bulletin on 29 October 2010 and states that these events must be broadcast by national terrestrial open access television channels only. This means that those who buy the exclusive rights for the transmission of these events should provide access through open access channels. As stated in the Television Act (Act 27/2007 of 30 July 2007, Article 32), the government member responsible for the media sector holds the responsibility for annually publishing the list of events that cannot be broadcast by non-national restricted access channels.

The list comprises sports events only, especially football. Six out of nine items are related to professional football, whether national championships or European games. The remaining events concern other sports namely cycling, hockey, handball and basketball on a national level (such as the Portuguese bicycle tour around the country called *Volta a Portugal em bicicleta*) or in an international framework (such as the participation of Portuguese athletes in European or World championships).

Before the publication of this annual list, the government has the legal duty of consulting the *Entidade Reguladora para a Comunicação Social* (media regulatory authority - ERC) on the matter.

• Despacho publicado no "Diário da República" - 2.ª Série, n.º 211, Suplemento, de 29 de Outubro de 2010, página 54240 - (2) (Official communication of the list of important events in the Official Portuguese Journal, 2nd Series, no. 211, Supplement, of 29 October 2010, page 54240 - (2))
http://merlin.obs.coe.int/redirect.php?id=12922 PT

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Film Subsidies Contest and Eurimages Support

In December 2010 the *Centrul Naţional al Cinematografiei* (National Cinematography Centre - CNC) announced that the applications for the second 2010 direct subsidising session for Romanian film productions and the development of cinematographic projects could be submitted until 31 January 2011 (see IRIS 2010-7/34).

The total funds allocated for the session are of RON 10 million (EUR 2,331,000), of which RON 1.7 million (EUR 396,300) are for first fiction full-length films, RON 700,000 (EUR 163,200) for fiction short reel films, RON 1 million (EUR 233,100) for documentaries and for cartoons respectively, RON 5.5 million (EUR 1,282,000) for fiction full-length films and RON 100,000 (EUR 23,300) for developing film projects (fiction long reel, documentaries and cartoons).

On the other hand, the CNC addressed a warning to those persons who did not fulfil their obligations under existing contracts with the Centre or did not observe the contractual terms with regard to finishing a film and depositing a standard copy of it, upon starting exploitation of the film. These persons are not allowed to take part in the subsidising sessions. At the same time, those producers who give up a project, which receives funding in this session, will not be allowed to apply for the next subsidising session.

The CNC also announced that the Board of Directors of Eurimages agreed during its 121st meeting in Lucerne, Switzerland, in December 2010, to support more Romanian film projects or distributors.

• Centrul Naţional al Cinematografiei - Anunţ privind organizarea concursului de proiecte cinematografice sesiunea a II-a 2010; Comunicat de presă (Press release of the National Cinematography Centre with regard to the organisation of the second 2010 session for cinematographic projects)
http://merlin.obs.coe.int/redirect.php?id=12872 RO

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Draft Law on Electronic Communications

The *Autoritatea Naţională pentru Administrare şi Reglementare în Comunicaţii* (National Authority for Administration and Regulation in Communications - ANCOM) has drafted a new Law on Electronic Communications and has submitted it for public consultation until 21 January 2011.

The amendments became necessary following the review of the European Framework and the main purpose is to implement the new European Directives (see IRIS 2010-1/7). The amendments concern several areas: the general authorisation regime; the radio spectrum and numbering management; end-users' rights; universal services; measures the regulatory authority should adopt in view of fostering competition; and sanctioning/monitoring procedures.

Concerning the radio spectrum the changes intend to enhance flexibility and efficiency in the allocation of this resource. The proposed amendments allow more flexibility as regards the spectrum users' possibility to transfer to third parties the right to use radio frequencies, provided that this does not harm competition and does not lead to a non-usage of frequencies. The Draft proposes that broadcasters providing public radio and television programmes be exempted from the selection procedure for the granting of the right to use radio frequencies under certain conditions. ANCOM will be able to wholly/partly revoke the right to use radio frequencies, if such a measure is deemed necessary in order to ensure competition. The licences granted for the use of radio frequencies will be renewed while ensuring the possibility for ANCOM to review the initial conditions. ANCOM will be able to subject the licence renewal to the payment of a licence fee, which will be put towards the State budget and the amount of which shall be established by the government.

One of the main objectives of the European Framework amendments relates to promoting consumers' interests, by ensuring a high level of protection of personal data and privacy and the integrity and security of the electronic communications networks and services.

The provisions concerning end-users' rights have also been amended and completed, to ensure transparency and the right to be informed by the providers on publicly available electronic communications services. In addition to the current regulations, providers must insert in the contracts information on: conditions limiting the access/use of certain services and applications; procedures for the measurement and management of the traffic load in order to avoid the congestion of network segments or to ensure their use at full capacity; the impact of these procedures on the service quality; the types of measures that can be taken should incidents, threats and vulnerability regarding the security/integrity of the network and/or services occur. Special importance was attached to end-users with disabilities.

The new European Framework brought a series of amendments with regard to sanctioning and monitoring procedures. If ANCOM finds that an obligation was breached, it will notify the provider and set a specific time limit for it to express its view on the breaches identified. The Authority will enforce the due sanction even in cases in which the provider undertook to remedy the respective infringement. ANCOM may even

decide to suspend/postpone the provision of a service or a package of services, which might affect competition, for a certain period of time.

The amendments to the European Framework must be transposed into the Romanian legislation no later than 25 May 2011.

• *LEGE PRIVIND COMUNICAŢIILE ELECTRONICE (Proiect)* (Draft Law on Electronic Communications)
http://merlin.obs.coe.int/redirect.php?id=12918 RO

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State Permits for Collective Societies Issued

The Ministry of Culture has completed a process of awarding special permits envisioned by Article 1245 of the Fourth Part of the Civil Code introduced on 1 January 2008 (see IRIS Plus 2008-2). On 24 September 2010 it awarded the Russian Union of Rightsholders (RSP), headed by famous film director Nikita Mikhalkov, the status of an accredited organisation. This is in fact a governmental licence to collect fees on all imported electronic devices and blank recordable media on behalf of authors.

The Russian Union of Rightsholders will collect 1 percent of the price of blank media and electronic devices and will redistribute this sum among copyright holders in a bid to fight losses inflicted by piracy. The collected sum could amount to USD 100 million per year.

The Federal Service to Control Observance of Law in the Sphere of Protection of Cultural Heritage (Rosokhrankultura - http://www.rosohrancult.ru/) at the Ministry of Culture was assigned by a governmental decree of 29 December 2007 to conduct the (misnamed) accreditation procedure. In 2008-2010 the procedure was used in all six fields of collective management, including public performance, broadcasting and cablecasting of musical works.

Four organisations have won the status. They are the Russian Authors' Society (RAO - http://www.rao.ru/); the All-Russian Organization for Intellectual Property (VOIS - http://www.rosvois.ru/); the Partnership to Protect and Manage Rights in the Sphere of Arts (UPRAVIS - http://www.upravis.ru/); and now the Russian Union of Rightsholders (RSP - http://www.rp-union.ru/).

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The Pirate Bay Appeal

On 26 November 2010 *Svea Hovrätt* (the Svea Court of Appeals) delivered its verdict on the appeal in the case against the people behind the well-known file sharing site The Pirate Bay (TPB), hereinafter jointly referred to as the accused. IRIS already reported on the judgment of the District Court of Stockholm (first instance) (see IRIS 2009-6/29).

It was established that a considerable amount of the (torrent) files directed through TPB was subject to copyright. According to the Svea Court of Appeals the accused had been aware that illegal file sharing on a large scale occurred on TPB. The Svea Court of Appeals found, in agreement with the court of first instance, that TPB's services had facilitated such illegal file sharing in a way that resulted in criminal liability.

The Svea Court of Appeals concluded that the accused had participated in the illegal activities in different ways and to varying degrees. Unlike the court of first instance, the Svea Court of Appeals did not adopt a collective assessment of responsibility. The Svea Court of Appeals instead made a more individualised assessment, emphasising that liability for the actions of the accused should be tried on an individual basis. Overall, this lead to a reduction in the custodial sentences for the accused (ten, eight and four months respectively, instead of 1 year for each of the accused as had been ruled in the first instance).

Moreover, the Svea Court of Appeals, unlike the district court, accepted the plaintiffs' evidence in relation to the damages. The plaintiffs also submitted further support of their claims. The Svea Court of Appeals raised the damages from approximately SEK 30 million to SEK 46 million accordingly. Still, the Svea Court of Appeals upheld the finding of the court of first instance that the accused are jointly liable to pay the damages.

Due to illness one of the accused was unable to attend the court proceedings in the Svea Court of Appeals. Therefore, the case against him will be tried separately at a later stage.

Execution of the judgment is stayed pending a decision on the application for leave to appeal the judgment before the Supreme Court.

• Svea Hovrätts dom den 26 november 2010 i mål nr B 4041-09 (Judgment of the Svea Court of Appeals of 26 November 2010 in case No. B 4041-09) SV

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The Second Draft of the New Media Act

On 20 September 2010 the public discussion on the Draft of the new Media Act - 1 (*Zakon o medijih - 1, osnutek*) was closed.

The Draft Media Act implements the Audiovisual Media Services Directive, which changes the definition of media. New categories are introduced: audiovisual media services and audiovisual media services on demand. Besides, the Directive defines and incorporates in its provisions the novel concepts of editorial responsibility, providers of audiovisual media services, audiovisual commercial communication and product placement. After the media and expert comments of the Draft a revision was made by the Ministry of Culture. At the beginning of October 2010 the Second Draft of the New Media Act - 1 (*Zakon o medijih - 1, drugi osnutek*) was published; some improvements which were suggested by the expert platform were considered and implemented; on the other hand, a few of the proposed stipulations still include controversial issues, especially those related to content regulation from the perspective of the protection of minors (see IRIS 2010-10/39).

The protection of minors is addressed in four sections: in the introductory part of the Second Draft and then, separately, in the advertising, television and audiovisual media services sections.

The content regulation for the protection of minors in the introductory section (Art. 8) deals with pornographic contents in print media, advertising and electronic publications. The article proposes setting some restrictions on pornography, while no other contents which are generally recognised as potentially harmful are included here. The protection of minors in the context of advertising is treated in Art. 44. As regards the most commonly recognised harmful contents, violence and porn, only the latter is structurally thematicised; so-called "erotic" content (i.e. porno-chic) is not specifically referred to. The proposal for the protection of minors in television and radio programming relates to different contents, age groups of children, options for protection and protection devices. Indeed, the experts felt that a complex solution was necessary for the effective regulation of content for the purposes of the protection of minors and that this would be the best legislative choice in the framework of the discussed Draft (Art. 60). The following article deals with the protection of minors in the context of audiovisual media services on demand and radio on demand (Art. 61). The proposed stipulation addresses contents which might seriously impair the physical, mental and moral development of children and youngsters, especially pornography and gratuitous violence; these contents are to be allowed under the condition that children and youngsters are not able to see or hear them. In the proposal of the second paragraph of the article the contents which might impair the development of minors are considered without reference to the nature/genre of these contents.

The proposed Draft of the New Media Act introduces for the first time in the history of Slovenian media legislation the establishment of a Media Council. Among its tasks are a few related to the survey of media contents: specifically their relation to ethical and professional media standards and their representative capacity as regards social pluralism (Art. 81). Potentially harmful contents are not taken into account as a special issue here as the related self-regulation can be surveyed and evaluated from an ethical and professional standards perspective.

• Zakon o medijih - 1, drugi osnutek (Second Draft of the New Media Act - 1)
http://merlin.obs.coe.int/redirect.php?id=12876 SL

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SK-Slovakia

Act on Slovak Radio and Television

Since 1 January 2011 Slovak Television (STV) and Slovak Radio (SRo) have merged into a single public institution under the Act No. 532/2010 on Slovak Television and Radio (hereinafter referred to as "Act") of 15 December 2010 (see IRIS 2011-1/49).

Pursuant to the Act, Radio and Television of the Slovak Republic (hereinafter referred to as "RTS") is a national, independent, informational, cultural and educational public service institution in the area of radio and television broadcasting. The activities of RTS are carried out by the following two branch offices: SRo and STV, which as separate entities dissolved on 1 January 2011. Consequently, RTS took over all rights and obligations of these institutions. Therefore, the respective branch offices do not have legal capacity; however, they are entitled to administrate their financial property independently. The same applies to funds, assets and future income. RTS is also entitled to establish subsidiary corporations, whose scope of business activities is related to the function and activity of RTS. It is also interesting to note that the public multiplex, which contains two television programming services is preserved under the Act and the spare capacity shall be filled with radio broadcasting at the request of RTS.

Pursuant to the Act the bodies of RTS are the General Director and the Council of RTS.

The Council, which is the control and supervisory body of RTS, consists of nine members, two experts respectively in the fields of radio broadcasting, television and law, and three experts in the field of economics. The members are appointed and recalled by the National Council of the Slovak Republic. It is necessary to underline that the candidates can no longer be proposed by the Members of Parliament. Moreover, the members must not participate in a political party or political movement according to the Act. The Council is tasked with various duties, among others to determine the remuneration of the General Director as well as to approve the RTS budget.

The General Director being the statutory body of RTS is entitled to act on behalf of this institution. The General Director is elected and recalled by the National Council and his term of office lasts for a period of five years. He shall also appoint two representatives, one for SRo and one for STV. For the sake of completeness it is to be noted that until the new General Director is appointed the former one of the SRo presently represents RTS as temporary General Director.

• Zákon z 15. decembra 2010 o Rozhlase a televízii Slovenska a o zmene a doplnení niektorých zákonov (Act No. 532/2010 on Slovak Television and Radio of 15 December 2010)
http://merlin.obs.coe.int/redirect.php?id=12921 SK

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Agenda

Digital Media & Broadcasting Conference 2011: Staying Ahead of the Digital Curve
2 - 3 March 2011
Organiser: FT Global Conferences & Events
Venue: London
Information & Registration
Tel.: +44 (0)20 7873 4109
Fax: +44 (0)20 7873 4204
Email: ftconferences@ft.com
http://www.ftconferences.com/digitalmedia/

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