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Coordination: Cyril Chaboisseau, European Audiovisual Observatory • Development and Integration: [www.logidee.com](http://www.logidee.com) • Layout: [www.acom-europe.com](http://www.acom-europe.com) and [www.logidee.com](http://www.logidee.com)

### ISSN 2078-6158

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## INTERNATIONAL

### COUNCIL OF EUROPE

#### European Court of Human Rights: *Sipoș v. Romania*

In a remarkable judgment the European Court of Human Rights has come to the conclusion that Romania breached the right of privacy of a journalist when the Romanian courts acquitted the director and the coordinator of the press office of the Romanian Television Company (SRTV) in criminal defamation and insult proceedings.

At the heart of the case lies a press release published by the management of the Romanian State TV channel, after removing the applicant, Ms. Maria Sipoș, from a programme that she produced and presented on the National State channel România 1. Following her replacement as a presenter, Ms. Sipoș made a number of statements to the press alleging that SRTV was engaged in censorship. The broadcaster responded in turn by issuing a press release, explaining that Ms. Sipoș had been replaced due to audience numbers. The press release, quoted by six national newspapers, also made reference to Ms. Sipoș' emotional state due to family problems, it questioned her discernment, referred to allegedly antagonistic relations between her and her colleagues and suggested she was a victim of political manipulation. Ms. Sipoș claimed that SRTV's press release had infringed her right to her reputation, and she brought criminal proceedings before the Bucharest District Court against the channel's director and the coordinator of the SRTV's press office, accusing both of insults and defamation. The Bucharest County Court acknowledged that the press release contained defamatory assertions about Ms. Sipoș, but having regard to the fact that the defendants had not intended to insult or defame her and in view of their good faith, it dismissed Ms. Sipoș' claims.

Before the European Court of Human Rights Ms. Sipoș complained that the Romanian authorities had failed in their obligation, under Article 8 of the Convention, to protect her right to respect for her reputation and private life against the assertions contained in the press release issued by the SRTV. Referring to the positive obligations a State has in securing respect for private life, even in the sphere of relations between private individuals, the European Court clarified that it had to determine whether Romania had struck a fair balance between, on the one hand, the protection of Ms. Sipoș' right to her reputation and to respect for her private life, and on the other, the freedom of expression (Article 10) of those who had issued the im-

pugned press release. For that purpose the Court examined the content of the press release and found, in particular, that the assertions presenting Ms. Sipoș as a victim of political manipulation were devoid of any proven factual basis, since there was no indication that she had acted under the influence of any particular vested interest. As regards the remarks about her emotional state, the Court noted that they were based on elements of her private life whose disclosure did not appear necessary. As to the assessment about Ms. Sipoș' discernment, it could not be regarded as providing an indispensable contribution to the position of the SRTV, as expressed through the press release, since it was based on elements of the applicant's private life known to the SRTV's management. The Court noted that, given the chilling effect of criminal sanctions, a civil action would have been more appropriate, but it concluded nonetheless that the statements had crossed the acceptable limits and that the Romanian courts had failed to strike a fair balance between protecting the right to reputation and freedom of expression. Thus, there had been a violation of Article 8, and Ms. Sipoș was awarded EUR 3,000 in damages.

One dissenting judge, Judge Myer, drew attention to a particular issue in this case. Although the Third Chamber of the Court recognized that criminal sanctions have a chilling effect on speech and that it would have been more appropriate to initiate the civil proceedings available to the applicant, nevertheless the majority of the European Court found that the criminal sanction of the director and press officer of the SRTV was necessary in a democratic society in order to protect Ms. Sipoș' right to her reputation and private life, an approach that contrasts with Resolution 1577(2007) of the Parliamentary Assembly of the Council of Europe urging the decriminalization of defamation and insult.

• *Arrêt de la Cour européenne des droits de l'homme rendu le 3 mai 2011 (troisième section), affaire Sipoș c. Roumanie, requête n° 26125/04* (Judgment by the European Court of Human Rights (Third Section), case of *Sipoș v Romania*, No. 26125/04 of 3 May 2011)  
<http://merlin.obs.coe.int/redirect.php?id=15260>

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### EUROPEAN UNION

#### Court of Justice of the European Union: *FA Premier League et al. v. QC Leisure et al. and Karen Murphy v. Media Protection Services*

In its groundbreaking judgment of 4 October 2011 the

Court of Justice of the European Union has essentially legalized the import, sale and use of foreign satellite television decoder cards. The judgment, which was given in two joined (originally British) cases, concerned decoder cards that provide access to encrypted satellite transmissions from Greece of British Premier League football matches. Foreign decoder cards such as these are widely sold and used in the United Kingdom, both for private viewing and in public houses, because they provide access to televised Premier League football at substantial lower cost than asked in the British domestic market.

In response to a request for a preliminary ruling by the British High Court (see IRIS 2011-3/2), the Court of Justice held that provisions in UK law that prohibit the import, sale or use of foreign decoder cards are in conflict with the freedom to provide services, and cannot be justified by the objective of protecting intellectual property rights, since the Greek broadcasts were duly licensed by the Premier League and charges for the foreign decoder cards were being paid. By the same token, such cards were held not to be 'illicit devices' within the meaning of Directive 98/84/EC (Conditional Access Directive), even if the cards were procured by providing false names and addresses and in breach of contractual restrictions, because the cards were originally manufactured and placed on the market with the authorisation of the provider of the satellite service.

Most importantly, the Court of Justice also held that a system of exclusive broadcasting licenses that creates absolute territorial exclusivity in a Member State (i.e. Greece) by prohibiting the sale of decoder cards to foreign television viewers, is contrary to EU competition law. According to the Court these impediments to the freedom to provide services and freedom of competition are not justified because license income from encrypted satellite transmissions can be based on actual audiences both in the Member State of the broadcast and in other states where the broadcasts are received. In this connection the Court observed that partitioning markets with the sole aim of creating artificial price differences between Member States and thereby maximizing profits (price discrimination) is irreconcilable with the Treaty.

The judgment is likely to have far-reaching ramifications for current business practices in the broadcasting sector, as broadcast licenses conferring absolute territorial exclusivity are common, not only as regards televised football matches and other sporting events, but also in respect of motion pictures and other premium content.

The thirty-page judgment of the Court additionally contains important holdings on issues of harmonized copyright law, in particular concerning the interpretation of Directive 2001/29 on copyright in the information society. Transient (i.e. temporary) copies of copyright works made in the memory of satellite decoder equipment are excepted from the reproduction right, because they serve a lawful use. By contrast,

showing television broadcasts on a television screen to customers of a pub amounts to communication to the public, and therefore requires permission of the rightsholders.

• Joined Cases C-403/08 and C-429/08, FA Premier League et al. v. QC Leisure et al. and Karen Murphy v. Media Protection Services, Judgment of the Court of Justice of the European Union (Grand Chamber) 4 October 2011

<http://merlin.obs.coe.int/redirect.php?id=15280>

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**Court of Justice of the European Union:  
Commission and Court of First Instance  
Prohibition of DVB-T Subsidies in Berlin-  
Brandenburg Was Legitimate**

In a judgment of 15 September 2011 following an appeal procedure, the Court of Justice of the European Union (ECJ) confirmed a ruling of the Court of First Instance of 6 October 2009 (T-21/06), dismissing an action brought by the Federal Republic of Germany (FRG) against a decision of the European Commission (see IRIS 2006-3/5). In November 2005, the Commission had prohibited the granting of subsidies to support the transition from analogue to digital terrestrial television (DVB-T) in Berlin-Brandenburg by the *Medienanstalt Berlin-Brandenburg* (Berlin-Brandenburg Media Authority) because it infringed state aid rules and ordered the repayment of the subsidies (see IRIS 2006-1/8).

In its judgment, the Court of First Instance had essentially found that the Commission had not misused its powers of discretion when assessing the compatibility of the aid with the common market, nor infringed the principles of sound administration or the right to be heard.

The FRG appealed this judgment to the ECJ and argued, firstly, that the Court of First Instance had misjudged the incentive effect of the aid in question and failed to check whether the Commission had made an obvious error of judgment. Secondly, the FRG criticised the way the Court of First Instance had dealt with the alternative measures suggested by the Commission. It argued, on the one hand, that the Commission did not have the power to make such suggestions and, on the other, that the Court of First Instance, by claiming that an aid measure was incompatible with the common market simply because there were supposed alternatives, had infringed the fundamental right of the freedom to pursue an economic activity. Thirdly, it claimed that the Court of First Instance had

wrongly assessed the criterion of technological neutrality, since in this case it had not been an appropriate criterion against which to assess the compatibility of the aid in question.

The ECJ disagreed and rejected the FRG's comments about the alternative proposals.

Concerning the incentive effect, the ECJ ruled that the Court of First Instance had in fact dealt with the issue in its judgment - albeit not very clearly - and had checked whether the Commission had made an obvious error of judgment.

Finally, the ECJ ruled that the Court of First Instance, in its statement that the aid in question did not fulfil the criterion of technological neutrality, had not excluded the possibility that a subsidy could, in certain circumstances, be aimed at a single type of broadcasting. The Court of First Instance had therefore not made an error when it had stated that the FRG had failed to disprove the Commission's concerns regarding existing restrictions of competition caused by structural issues and to demonstrate that the subsidy in question represented a proportionate means of supporting the transition to DVB-T.

• *Urteil des EuGH vom 15. September 2011 (C-544/09 P)* (Judgment of the ECJ of 15 September 2011 (C-544/09 P))

<http://merlin.obs.coe.int/redirect.php?id=15291>

DE FR

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## Court of Justice of the European Union: Judgment in RojTV/FRG Preliminary Ruling Procedure

On 22 September 2011, the Court of Justice of the European Union (ECJ) published its judgment in the joined cases C-244/10 and C-245/10 following references for a preliminary ruling from the German *Bundesverwaltungsgericht* (Federal Administrative Court - BVerwG) concerning the interpretation of the ban on the broadcast of programmes that incite hatred, enshrined in Article 22a of the Television Without Frontiers Directive 89/552/EEC (now: Article 6 of the Audiovisual Media Services Directive 2010/13/EU).

The related national procedure concerned an order issued by the *Bundesministerium des Innern* (Federal Ministry for Home Affairs), prohibiting the operator of the Danish television channel RojTV from operating the channel within the scope of the German *Vereinsgesetz* (Associations Act). In its initial ruling, the BVerwG held that the programmes broadcast on RojTV glorified the armed conflict being waged by the PKK against the Turkish Republic and therefore violated the ban on harming international understanding

as set out in the Associations Act. The BVerwG therefore asked whether the EU ban on the broadcast of programmes that incite hatred included programmes that were likely to damage relations between Turkish and Kurdish groups living in Germany by glorifying the PKK.

In its judgment, the ECJ followed the conclusions of the Advocate General (see IRIS 2011-7/3) and stated that the Directive, by using the concept "incitement to hatred", was designed to forestall any ideology that failed to respect human values, in particular by glorifying violence by terrorist acts against a particular group of people. The behaviour of the broadcaster described by the referring court therefore fell within the field coordinated by the Directive.

The Federal Republic of Germany was not permitted to prohibit the retransmission of the channel concerned for reasons that fell within the fields coordinated by the Directive because it was solely for the member state from which television broadcasts emanated to monitor the application of the relevant provisions.

Nevertheless, the court concluded, with reference to its De Agostini ruling (joined cases C-34/95 to C-36/95, see IRIS 1997-8/7), that the Directive did not prevent a member state from taking measures against a foreign television broadcaster as long as it did not prevent retransmission per se of the television broadcasts. The prohibitions ordered by the German authorities on the basis of the law of associations mainly concerned public screenings of RojTV programmes and sympathy activities for the broadcaster held on German territory. The reception and private use of RojTV's programmes were not affected (and, in practice, not prevented) by the order.

Nevertheless, it was for the referring court to determine the actual effects that followed from such a prohibition, in particular whether it prevented retransmission per se in the member state receiving the broadcasts.

• Judgment of the ECJ of 22 September 2011 (joined cases C-244/10 and C-245/10)

<http://merlin.obs.coe.int/redirect.php?id=15396>

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## Court of Justice of the European Union: BKS Withdraws Question on Interpretation of TWF Directive

As is now public knowledge, the Austrian *Bundeskommunikationssenat* (Federal Communications Board -

BKS) wrote to the Court of Justice of the European Union (ECJ) on 6 July 2011, withdrawing its reference for a preliminary ruling on the interpretation of the Television Without Frontiers Directive (89/552/EEC) after the *Publikumsrat* (Viewers' Council) of *Österreichischer Rundfunk* (Austrian public service broadcaster - ORF) had, in turn, withdrawn the complaint it had filed with the BKS against ORF.

The original case before the BKS concerned the depiction of a couple dancing from the left to the centre of the bottom third of the screen, together with the caption "*Dancing Stars ab Freitag 20:15*" (Dancing Stars starts Friday 8.15 p.m.) during a feature film shown on public service television. The BKS held that this raised the legal question as to whether programming elements in which the TV broadcaster referred to its own programmes were covered by advertising rules and, if so, whether they should be separated from other programme material and whether the rules on the insertion of advertising applied (see IRIS 2011-6/6).

In its recently published decision of 26 July 2011, the ECJ ordered case C-162/11 to be removed from the court register, as a result of which the European court will not clarify the issue for the time being.

• *Beschluss des EuGH vom 26.7.2011 (Rs. C-162/11)* (ECJ decision of 26 July 2011 (case C-162/11))  
<http://merlin.obs.coe.int/redirect.php?id=15294>

DE FR

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## Council of the EU: Amended Directive Extends the Term of Protection for Performers and Sound Recordings

On 12 September 2011 the EU Council of Ministers, in the final stage of the adoption process, accepted the long-debated proposed amendments to Directive 2006/116/EC on the term of protection on copyright and certain related rights (see IRIS 2008-8/3). Under the new rules the term of protection for performers' and phonogram producers' rights in sound recordings is extended from 50 to 70 years from the starting point which sets the term running (either the date of first publication of the sound recording or the date of first communication to the public, depending). The change is intended to bring the protection of neighbouring rights more into line with that offered to copyright, which already lasts (as a general rule) for 70 years after the death of the author.

The amended Directive also contains accompanying measures intended to benefit performers. Under the new "use it or lose it" clause, if a record company does not market a sound recording during the first 50

years after it was first lawfully published or communicated to the public, the performer may opt to reclaim the rights, enabling him/her to exploit the sound recording in another way. Thus, phonogram producers are prevented from "locking up" phonograms they do not find commercially interesting. In addition, record companies are obliged to set up a compensation fund intended to help session musicians, into which they will have to pay 20% of the revenues earned during the extended 20-year period of protection. Finally, to ensure that a percentage of the royalties arising during the extended term will go to performers, regardless of pre-existing contractual arrangements, a "clean slate" is given to performers, preventing record producers from making deductions to the royalties due to performers after the initial 50 years of protection are over.

Changes to the rules governing the term of protection of copyright in co-authored musical works (musical compositions with words) have also been introduced. Under the new provisions, copyright in works shall last for 70 years after the death of the last of the following persons to survive, regardless of whether they are designated as co-authors under national law: the author of the lyrics and the composer of the musical composition, provided that both contributions were specifically created for the co-authored musical work. The new provisions apply to co-authored musical works which are already the subject of protection in at least one member state two years from the date of entry into force of the new rules or which are created after that date.

It should be noted that, although the new term of protection has been cut back by the European Parliament from the Commission's initial proposal of 95 years from the event that sets the term running, the extension remains controversial. After a two-year stall before the Council, the proposal was finally adopted after Denmark removed itself from the blocking minority last April. However, with Belgium, the Czech Republic, Netherlands, Luxembourg, Romania, Slovakia, Slovenia and Sweden all voting against and Austria and Estonia abstaining, the list of dissenting countries remains quite long.

• Directive 2011/77/EU of the European Parliament and of the Council of 27 September 2011 amending Directive 2006/116/EC on the term of protection of copyright and certain related rights

<http://merlin.obs.coe.int/redirect.php?id=15279>

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## European Commission: Allocation of Bonus Channels in France Deemed Contrary to EU Law

Compensatory channels, or “bonus channels”, were awarded to the “historic” operators (TF1, M6 and Canal+) by the 2007 “Television of the Future” Act (see IRIS 2007-3/20) to compensate for the prejudice suffered as a result of the early stoppage of their broadcasting in analog mode and the appearance of competitor channels on digital TV. Since the switch to all-digital was scheduled for November 2011, these compensatory channels could theoretically start broadcasting next month. Except for the fact that in December 2010 the European Commission began infringement proceedings against France in respect of these compensatory channels. The Commission is keen to ensure that the digital dividend should be allocated using procedures that are open, transparent, objective, non-discriminatory and proportionate (apart from the specific case of channels pursuing objectives of general interest). The purpose of this is to ensure the arrival of new players on the market and to increase the choice available to viewers. It came as no surprise on 29 September 2011 when Brussels sent France a reasoned opinion, holding that the French arrangement granting additional television channel (“compensatory channels”) to the three historic operators TF1, M6 and Canal+ outside the normal competition procedure was contrary to EU law, penalised competitor operators, and deprived viewers of a more attractive offer. The Commission held that such a procedure was not possible unless it was necessary in order to obtain an objective of general interest, which was not the case here. Moreover, granting frequencies as compensation did not seem proportionate since the alleged prejudice suffered by the operators in question as a result of stopping broadcasting in analog mode a few months early seemed negligible and could even have been compensated for already by the advantages already granted. Lastly, the Commission held that automatically granting additional channels to certain operators was discriminatory. France now has two months in which to comply with EU legislation, i.e., to repeal the disputed provisions in the 2007 Act, failing which the Commission could apply to the Court of Justice of the European Union.

• Press release of the European Commission, “Antitrust: the Commission calls on France to ensure non-discriminatory allocation of digital TV broadcasting frequencies”, IP/11/1115 of 29 September 2011  
<http://merlin.obs.coe.int/redirect.php?id=15394>

DE EN FR

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## European Commission: Implementation Report on the Protection of Children in the Digital World

On 13 September 2011 the European Commission adopted a report on how member states are implementing EU recommendations (dating from 1998 and 2006) on the online safety of children. Member states are increasingly making efforts to implement these recommendations, but it seems action in this area is insufficient and inconsistent between countries. Moreover, the scenery has rapidly changed since the last evaluation. Accordingly further action is needed.

Neelie Kroes, Commission Vice President for the Digital Agenda said: “Children are going online more, and younger, and are exploring an exciting digital world of opportunity. But we urgently need to step up a gear on what we do, and how we work together to empower and protect children in this ever-changing digital world. We need to give parents and teachers the confidence to take on their responsibilities. The strategy I will present later this year will tackle these problems head on”.

Europe’s Digital Agenda acknowledges the impact the digital era has had on consumers and children in particular. Minors have increasingly better access to the internet, which is getting easier through the use of mobile devices. Although these new developments offer more opportunities for minors, they make it continually harder to protect them. The Council has published two recommendations, in 1998 and 2007, on how to protect minors who use audiovisual and online services. These recommendations speak of codes of conduct and new measures against illegal content and activities on the internet, such as breach of privacy and discrimination.

Since these recommendations were published, the way consumers use media has dramatically changed. In response, the Commission has adopted a report in which the implementation and effectiveness of the recommendations is analyzed. What has been done already and what should the next steps be in order to realise the Digital Agenda for Europe?

The report, which was based on the responses of member states to a questionnaire, suggests several courses of action. Firstly, hotlines should be better known and fully implemented. This way the removal of harmful and illegal content can be undertaken more efficiently. Secondly, online safety for children should be promoted through awareness campaigns and teaching in schools. The final suggestion concerns age-rating systems for online games. Different systems are currently being used through Europe, but retailers should be more aware of age ratings.

- Commission Report on the Protection of Minors, "Protecting Children in the Digital World" and accompanying Commission Staff Working Paper

<http://merlin.obs.coe.int/redirect.php?id=15261>

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## NATIONAL

### AT-Austria

#### ORF and Competition Authority Agree Compromise on Culture and Information Channel

According to media reports, *Österreichischer Rundfunk* (Austrian public service broadcaster - ORF) and the Austrian competition authority agreed a compromise on 6 September 2011 in relation to ORF's culture and information channel (ORF III), and withdrew their respective objections filed with the *Bundeskommunikationssenat* (Federal Communications Board - BKS) against a decision of the *Kommunikationsbehörde Austria* (Austrian Communications Authority - KommAustria) of 18 May 2011 (see IRIS 2011-8/12).

Under the KommAustria decision, which has therefore entered into force, ORF is prohibited from advertising its new special interest channel on other ORF channels, apart from brief references to the channel's content. The ban also covers any ORF campaigns aimed at installing the new channel in the third, fourth or fifth slot on viewers' remote controls, directly below the two general channels ORF eins and ORF 2. ORF III will also not broadcast blockbusters or US sitcoms, nor show traditional advertising during evening prime-time hours at weekends and on bank holidays. Finally, the new channel must include the words "*Kultur und Information*" (Culture and Information) in its title.

ORF III is expected to be launched on 30 October 2011 and will be available via satellite, cable and DVB-T.

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### CY-Cyprus

#### Sports Television Rights - From Monopoly to Fragmentation

At the start of the new sports season the issue of television sports rights is currently on the public agenda: competition by broadcasters and television service providers for the acquisition of transmission rights is affecting prices and access by the public. Today's fragmented offer requires households to invest in multiple subscriptions in order to follow live sport events.

On the other hand, a monopoly that existed before 2007 allowed the football federation to attribute exclusively, and almost eternally, transmission rights to one broadcaster. Decisions by the Commission for the Protection of Competition (Επιτροπή Προστασίας Ανταγωνισμού) and the Supreme Court between 2004 and 2007 led to an opening up of the market.

Three broadcasters and three television service providers hold television sports rights for the 2011-2012 season. The major stakeholder is pay-TV channel Lumiere TV (LTV), which holds the rights for home matches of more than half of the Cyprus First Division football teams, for English, German, Spanish football championships and for EURO 2012. LTV holds also the rights for Eurobasket 2011 and NBA and for other popular sports.

It is followed by Cytavision, owned by CYTA, the major telecommunications and Internet provider on the island. Cytavision holds the rights for the home matches of the five First Division football teams, for UEFA and various national football championships, as well as for Cyprus, Greece and other countries' basketball and other sports championships. Through strategic alliances, Cytavision offers LTV packages to its subscribers at extra cost.

Television service providers Primetel and Nova Cyprus also hold significant transmission rights in football and other sports.

Sports commentators, consumer associations and citizens often complain that this fragmentation makes it too costly for households to follow a large part of sports events.

The situation has not always been the same as today. The public service television faced - along with the end of its monopoly in 1992 - a gradual loss of foreign and Cyprus football championships and other sports rights to the benefit of pay-TV channel LTV.

With regard to Cyprus football, agreements with KOP (Κυπριακή Ομοσπονδία Ποδοσφαίρου - Cyprus Football Federation) gave LTV recording and transmission



rights (1996) and - since 2001 - live broadcasting rights. LTV could sell some minutes of transmission to free-to-air broadcasters, which were bound by a clause not to bid to KOP for rights. The 2003 agreement gave LTV privileged treatment for the next five years and first preference up to 2011.

Following recourse by ANT1 television to the competition authorities and the Supreme Court, the monopoly and privileged treatment of LTV was broken, while the exceptional right that allowed KOP to negotiate on behalf of the teams participating in the championship was also cancelled. A more specific challenge of this right before the courts ended KOP's privilege (see Supreme Court Case 952/2004, ANTENNA v Commission for the Protection of Competition and Case 1120/2004, CYTA v Commission for the Protection of Competition, Decision of 9 August 2007).

Additional developments between 2004 and 2007 changed the landscape significantly; the coming of television service providers MiVision (later Cytavision), Primetel, NOVA and Cablenet that could count on multichannel transmission and income from subscriptions increased the number of competitors.

This led to the opening up of the market, though still dominated mostly by pay-TV and television service providers (i.e., cable, IP or satellite television providers, who distribute the programmes of broadcasters), with the latter operating in a legal quasi-vacuum. Free-to-air broadcasters are disadvantaged because the lack of regulation of television service providers allows the latter to operate without limits and compete from a rather privileged position.

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*Expert in Media and Elections*

## CZ-Czech Republic

### Amendment of the Audiovisual Regulation

On 6 September 2011 the Parliament of the Czech Republic adopted amendments to audiovisual legislation that concern advertising and teleshopping in public television programmes and the funding of Czech cinematography.

During the transition period from analogue to digital terrestrial television broadcasting the public broadcaster ČT is allowed to broadcast advertising in the amount of 0.75 percent of the daily broadcasting time in the programme of CT 1 and of 0.5 percent in other programmes. A part of the income from this is reserved for the support of the Czech cinematography sector. With regard to teleshopping, the public television broadcaster is allowed to extend its share of

advertising time as specified in the above-mentioned provisions, up to 5 percent of the daily broadcasting time on each programme. During the time period from 19.00-22.00 h, the share of advertising and teleshopping time should not exceed six minutes per broadcasting hour, as regards each of the public broadcasters' programmes, respectively.

The transition period ends on 11 November 2011. After this date a public television broadcaster shall not be allowed to broadcast advertising other than such, the insertion of which is directly connected with the broadcasting of a sports or cultural event, provided that the acquisition of the rights to broadcast such an event requires the inclusion of the advertising. If advertising is inserted in the public broadcaster's programme as indicated in the preceding sentence, the share of broadcasting time reserved for such advertising shall not exceed 0.5 percent of the daily broadcasting time, and during the time from 19.00-22.00 h it must not exceed six minutes per broadcasting hour. Direct connection with the broadcasting of a sports or cultural event means the insertion of advertising in the programme immediately before or immediately after the broadcasting of, and in breaks during, such an event. Czech Television should transfer the revenues from the broadcasting of advertising on its programme CT 2 (Culture) to the State Cultural Fund of the Czech Republic. Revenues from advertising on CT 4 (Sports) should be used for the production and broadcasting of sports programmes on Czech TV. The public broadcaster is not allowed to broadcast teleshopping.

The broadcaster of free-to-air non-local or non-regional television with a license to distribute programmes containing cinematographic works is obliged to pay a fee for the broadcasting of advertising to the State Fund for the Support and Development of Czech Cinematography. This fee amounts to 2 percent of the advertising revenues.

• Zákon ze dne 6. září 2011, kterým se mění zákon č. 483/1991 Sb., o České televizi, ve znění pozdějších předpisů, a některé další zákony (Law of 6 September 2011 amending the Law Nr.483/1991 Coll. on the Czech Television as Amended and Other Legislation)  
<http://merlin.obs.coe.int/redirect.php?id=15329>

CS

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## DE-Germany

### Appeal Court Confirms Compensation Obligation for Use of Private Broadcasters' Programmes

According to media reports, the *Oberlandesgericht München* (Munich District Appeal Court - OLG) decided

on 30 June 2011 that hotel operators and cable companies are obliged to pay reasonable compensation to broadcasters for the use of their television and radio programmes.

In the proceedings, a hotel operator and a private news broadcaster had argued over whether compensation was due for the use of television programmes in hotel rooms.

According to the reports, the OLG found that using the hotel's own distribution equipment to retransmit programme signals to television and radio sets installed in hotel rooms constituted secondary exploitation, which was subject to copyright law and compensation obligations. The hotel operator should be licensed by the broadcaster or the responsible collecting society. The hotel benefited directly from making television channels available to its guests by charging higher room rates. The compensation obligation applied regardless of the hotel's occupancy rate and chosen means of reception. The *OLG München* also stated that cable companies should pay compensation to broadcasters for the retransmission of television programmes (see IRIS 2010-6/17 and IRIS 2010-4/15).

The decision of the *OLG München* is final.

• *Pressemitteilung der VG Media vom 12. September 2011 zum Urteil des OLG München (Az. 6 Sch 14/09 WG)* (VG Media press release of 12 September 2011 on the ruling of the *OLG München* (case no. 6 Sch 14/09 WG))  
<http://merlin.obs.coe.int/redirect.php?id=15289> DE

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### Cologne District Court Denies Liability of ISP

In a ruling of 31 August 2011, the *Landgericht Köln* (Cologne District Court - LG) rejected an action brought by several manufacturers of audio storage media against an Internet Service Provider (ISP). The plaintiffs wanted to force the ISP to block its customers' access to a well-known file-sharing platform.

In the plaintiffs' opinion, the ISP was liable under Article 97(1) of the *Urheberrechtsgesetz* (Copyright Act) because it enabled its customers to infringe their rights. The ISP was both technically and legally able to prevent its customers accessing the file-sharing service concerned by blocking DNS and/or IP addresses.

The *LG Köln* decided that the ISP was neither liable nor obliged to take precautionary measures by blocking access. In order to take such measures, the ISP would need to control data communication among its customers, through which it would obtain information about the circumstances of the telecommunications,

including their content. The creation of corresponding filters and blocking mechanisms without a legal basis was incompatible with the principle of telecommunications secrecy enshrined in Article 10(1) and (2) of the *Grundgesetz* (Basic Law).

In addition, the measures demanded by the plaintiffs were unreasonable because the ISP would have to take numerous technical precautions in the form of data filters, which would have to be constantly adapted to changing circumstances and new forms of infringement.

Finally, the requested blocks were not a suitable means of preventing further rights infringements. Only minimal amendments to a particular URL would be required to ensure the same illegal service remained available under the same domain, albeit with a different URL. This had been clearly demonstrated in the current proceedings by the fact that the plaintiffs had had to amend their action several times and add more and more new URLs in order to deal with the illegal content under the domain concerned.

• *Urteil des LG Köln vom 31. August 2011 (Az. 28 O 362/10)* (Ruling of the *LG Köln* (Cologne District Court) of 31 August 2011 (case no. 28 O 362/10))  
<http://merlin.obs.coe.int/redirect.php?id=15288> DE

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### ZAK Complains About Several Cases of Unlawful Advertising

On 9 August 2011, the *Kommission für Zulassung und Aufsicht der Medienanstalten* (Media Licensing and Monitoring Commission - ZAK) filed complaints about several cases of unlawful advertising on the channels Sat.1, Sport 1 and the Turkish-language channels Kanal Avrupa and Türkshow.

In the ZAK's opinion, Sat.1 infringed the rules on the separation of advertising and programme material contained in Article 7(3) of the *Rundfunkstaatsvertrag* (Interstate Broadcasting Agreement - RStV) by broadcasting its own image trailer directly before commercial breaks. The trailer showed a famous female singer running up to a convertible car, getting in and driving past various stars of the channel's programmes, with the car and its logo repeatedly and clearly visible. On several occasions, in commercial breaks directly following this trailer, Sat.1 broadcast an advertising spot in which the singer promoted the same car. The ZAK thought that the broadcaster's image trailer should be treated as programme material, which had therefore been unlawfully mixed with advertising. From the viewer's perspective, the advertising in the trailer was neither easily recognisable as

such nor clearly separated from the editorial part of the programme.

The complaint against Sport 1 concerned the transmission of the English League Cup final, during which the broadcaster made several references to the sponsorship of the sports betting provider "bet-at-home.com" and broadcast an advertising spot for the company. Since "bet-at-home.com" is not an authorised betting provider in Germany, the ZAK thought that the broadcaster had breached the ban on advertising for unauthorised betting services contained in Article 5(4) of the *Glücksspielstaatsvertrag* (Interstate Betting Agreement).

Regarding the Turkish-language channels, the ZAK found that the ban on surreptitious advertising and advertisement labelling rules had been breached. In one case, it considered the mention and presentation of a nose clip in an editorial report about snoring to be unauthorised surreptitious advertising under Article 7(7) in conjunction with Article 2(2)(8) RStV, since the way in which it had been presented showed a clear intent to advertise and the repeated references to the product could not be editorially justified. Besides, viewers had been misled by the inclusion of advertising messages in the programme. In the second case, the ZAK deemed the insertion of advertising messages during a call-in show as split-screen advertising, which had not been labelled as such and had not been visually separated clearly enough from the rest of the picture. It had therefore breached the labelling obligation enshrined in Article 7(3) RStV.

• *Pressemitteilung der ZAK vom 10. August 2011* (ZAK press release of 10 August 2011)

<http://merlin.obs.coe.int/redirect.php?id=15290>

DE

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## Federal Government Statement on TMG Amendment

The Federal Government has issued a statement in response to the bill tabled by the *Bundesrat* (upper house of parliament) amending the *Telemediengesetz* (Telemedia Act - TMG). The bill, based on a draft text adopted in June 2011 in order to improve data protection on online platforms, was tabled on 3 August 2011 (doc. 17/6765).

By means of the bill, the *Bundesrat* endeavours to increase information obligations for service providers, improve transparency in relation to the gathering, processing and use of personal data, and provide clearer information, particularly for young people, about the "dangers to their personality rights and privacy". The *Bundesrat* also hopes that, in principle,

the highest security level will be applied as the default setting with regard to personal data. In addition, providers should enable users to delete, block or make anonymous their data in the telemedia service concerned.

In the government's opinion, the bill deals with important subjects related to data protection linked to Internet services offering user-generated content. For example, the government believes that a particularly high level of data protection is desirable, especially in order to ensure the effective protection of children and young people.

However, the government also thinks that the bill throws up some questions. For example, it believes it is necessary to "examine the current legal situation very carefully" in order to "determine the current need for legislative action". This process should cover all provisions relevant to data protection law.

The government also states that the "particular challenges relating to the protection of personal data in the Internet age" should be regulated at European level rather than by individual countries. A particular advantage of Europe-wide regulation is that it is easier to enforce at international level than by national laws. In this connection, the government refers, among other things, to the European Commission's anticipated proposals to amend European data protection law.

• *Stellungnahme der Bundesregierung zum Gesetzentwurf des Bundesrates für ein 04046 Gesetz zur Änderung des Telemediengesetzes (TMG) (BR-Drs. 156/11 - Beschluss)* (Federal Government statement on the *Bundesrat* bill amending the *Telemediengesetz* (Telemedia Act - TMG) (doc. 156/11 - decision))

<http://merlin.obs.coe.int/redirect.php?id=15286>

DE

• *Gesetzentwurf des Bundesrates Entwurf eines 04046 Gesetzes zur Änderung des Telemediengesetzes (TMG), Drucksache 17/6765, 3. August 2011* (*Bundesrat* bill amending the *Telemediengesetz* (Telemedia Act - TMG), doc. 17/6765, 3 August 2011)

<http://merlin.obs.coe.int/redirect.php?id=15287>

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## KJM Recognises Two New Self-Regulatory Authorities

On 19 September 2011, the *Kommission für Jugendmedienschutz der Landesmedienanstalten* (Land Media Authorities' Commission for the Protection of Minors in the Media - KJM) announced the recognition of two new voluntary self-regulatory authorities (see IRIS 2011-7/17).

According to the press release, *Freiwillige Selbstkontrolle der Filmwirtschaft* (Voluntary Self-Regulation of the Film Industry - FSK) and *Unterhaltungssoftware*

*Selbstkontrolle* (Voluntary Self-Regulation of Entertainment Software - USK) - both of which have, for a long time, been recognised as self-regulatory authorities for the age classification of films and computer games - have created FSK.online and USK.online in order to protect young people from online content.

In its decision of 14 September 2011, the KJM recognised both institutions under the terms of Articles 16 and 19 of the *Jugendmedienschutz-Staatsvertrag* (Interstate Agreement on the Protection of Young People in the Media - JMStV).

In view of the experience of FSK and USK in the field of youth protection in the media, as well as the objective to continue with the “regulated self-regulation” model, which has proved successful, and in response to the failure to amend the JMStV on 1 January 2011 (see IRIS 2010-5/17), the KJM welcomed the creation of specific regulatory bodies for telemedia.

• *Pressemitteilung der KJM vom 19. September 2011* (KJM press release of 19 September 2011)  
<http://merlin.obs.coe.int/redirect.php?id=15292>

DE

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## FR-France

### Competition Authority Withdraws Authorisation for Closer Connection between TPS and Canal Plus

On 31 August 2006 the Ministry for the Economy and Finance gave the green light for the merger of the satellite television platforms CanalSat (Canal Plus, Vivendi Group) and TPS, the two major operators in the pay television market in France (see IRIS 2006-8/22). In view of the extensive risk of harm to competition, this authorisation - issued after obtaining the opinion of the competition council (Conseil de la concurrence) - was made subject to the implementation of 59 undertakings on the part of Vivendi Universal and the Canal Plus group. The operation, which resulted in the creation of the company Canal+ France, created a monopoly for the editing and marketing of premium channels, and reinforced the dominant position of the Canal Plus group in the downstream distribution market, as its competitor TPS had disappeared. On 21 September 2011, the competition authority (Autorité de la concurrence) noted that the Canal Plus group had failed to meet ten of its undertakings - including a number that were essential - and decided to rescind its decision to authorise the operation. “The competition authority feels that failure to perform the undertakings in respect of the provision of channels

and the maintenance of their quality is particularly serious since it is essential that the obligations be met in order to protect competition.”

It should be borne in mind that the purpose of these undertakings was to allow those distributors of pay television remaining after the operation (mainly Internet access providers) access to sufficiently attractive content to be able to constitute competitive pay channel packages that would help to ensure competition. The aim was to make it easier for the Canal Plus group’s competitors to acquire audiovisual rights and to enable them to purchase the themed channels they needed in order to constitute attractive packages. The unbundling (i.e., availability from any distributor) of seven channels (TPS Star, Cinéstar, Cinéculte, Cinétoile, Sport +, Piwi, and Télétoon) offering must-have themes for pay television (cinema, sport, young people) constituted the core of the undertakings. In its decision, the competition authority noted that the Canal Plus group had taken its time in making these seven channels available to third-party distributors, which had given an advantage to its new offer entitled “Le Nouveau CanalSat” since the Internet access providers using ADSL were not yet able to propose a retail offer including any or all of the seven unbundled channels. On the basis of this it was possible to establish the existence of discrimination against the ADSL operators’ platforms. What is more, it transpired that Canal Plus had diminished the quality of the channels it was to unbundle, in terms of both programming and innovation. TPS Star in particular, according to the competition authority, could no longer be qualified as “prime”. Lastly, the Canal Plus group had not respected a number of its undertakings aimed at enabling third-party distributors to add to their packages by including attractive independent channels, whose independence from the Canal Plus group needed to be safeguarded. The competition authority noted that the Canal Plus group had kept a number of editors of independent channels (including Equidia, Trace TV, and Télémaison) in a dependent situation by maintaining relations with them that were not transparent and hence potentially discriminatory (particularly with regard to the conditions for their remuneration and the duration of their contracts). Noting the essential nature of some of these failings, and recalling that the authorisation for the operation had only been issued in 2006 on condition that all of the 59 undertakings were to be implemented, the authority therefore decided to rescind the 2006 decision authorising the operation, and to fine Canal Plus EUR 30 million. Unless they return to their state prior to the operation, Vivendi and the Canal Plus group now have one month in which to notify the operation again.

• *Décision n°11-D-12 du 20 septembre 2011 relative au respect des engagements figurant dans la décision autorisant l'acquisition de TPS et CanalSatellite par Vivendi Universal et Groupe Canal Plus* (Decision No. 11-D-12 of 20 September 2011 on respecting the undertakings contained in the decision authorising the acquisition of TPS and CanalSatellite by Vivendi Universal and the Canal Plus group)

<http://merlin.obs.coe.int/redirect.php?id=15281>

FR

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### Wine Channel Contests Granting a Competitor a Broadcasting Convention

During the summer, the Conseil d'Etat received an application under the urgent procedure from Edonys, the international television channel devoted to wine, represented by Media Place Partners, which had been refused a broadcasting convention at the end of March 2011. The channel wishes to broadcast discussions and documentaries on the wine sector and to propose interactive tastings. However, this is not allowed under the "Evin Act" which bans all direct or indirect advertising in favour of alcohol (as stated in Article L. 3323-2 of the Public Health Code). Edonys called for the suspension of performance of the convention granted to its competitor, Deovino, by the audiovisual regulatory body (Conseil Supérieur de l'Audiovisuel - CSA) on 6 July 2011. The channel had undertaken to follow a "good conduct" charter, and to refrain from organising tastings and promoting wine, and has announced plans to broadcast programmes on the health risks posed by the consumption of wine.

The applicant's main claim was that the broadcasting of Deovino's programmes was contrary to the aim of protecting public health set out in Article L. 3323-2 of the French Public Health Code. It also felt there was serious doubt as to the legality of the CSA's deliberation since its Chairman, who had taken part in the deliberation, rendered it irregular by having retired several months earlier. Also, one of the CSA members who had been involved with granting Deovino a broadcasting convention is said to have personal and professional connections with one of the channel's managers. The Conseil d'Etat swept these arguments aside, however; it took care to recall that use of the urgent procedure to achieve suspension or performance was conditional on "urgency justifying the procedure, or the production of an argument such as to cast serious doubt, at that stage in the investigation, on to the legality of the decision".

The Conseil d'Etat went on to state that the fact that the CSA's Chairman was retired on the date of the deliberation "was not such as to give rise to a serious doubt as to the legality of these acts, since the circumstance had no effect on the continuation of his term of office". It also noted that there were "many, specific clauses in the broadcasting convention signed

with Deovino on observance of the rules governing propaganda and advertising in favour of alcoholic beverages". The application under the urgent procedure was therefore rejected.

Edonys has indicated its intention to broadcast from the Grand Duchy of Luxembourg to the whole of Europe, and particularly to France, whereas Deovino is scheduled to start broadcasting from France in October.

• *Conseil d'Etat, 29 août 2011, SARL Média Place Partners* (Conseil d'Etat, 29 August 2011, Media Place Partners Sarl)

<http://merlin.obs.coe.int/redirect.php?id=15283>

FR

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### France Télévisions Adopts a "Channels Charter"

The public-service television company France Télévisions has just adopted a "Channels Charter". Its Chairman and Managing Director, Rémy Pflimlin, claims it is the first to be drawn up by an audiovisual group in France. Public-sector television has a particular role to play in the country's democratic life as well as in its social and cultural life - on the basis of this idea, the France Télévisions group wanted to define the fundamental principles that ought to determine the course of its action and that of its employees. The text recalls the "ethical rules" and the "public-service missions" required of the holding company's channels, including "honesty of information", "transparency", the "independence and pluralism of information", and the "representation of the diversity of the population of France". Faced with the multiplication of sources of information, particularly the Internet and the use of browsers, the charter recalls that journalists are required to check "every item of information" before presenting it on the air and to check all images that are to be broadcast: "journalists shall ensure that images broadcast correspond to the subjects they are supposed to illustrate". In order to preserve the independence of professionals working for France Télévisions, the charter provides that they must avoid "any situation that might cast doubts on the company's impartiality and its independence in relation to pressure groups of an ideological, political, economic, social or cultural nature". Employees must "take care to avoid any surreptitious advertising" and refuse "money, gifts, gratifications, travel, holidays or other favours or advantages of any kind whatsoever that might prejudice their independence and their credibility". They must also exercise caution when using blogs and social networks, ensuring "respect for professional and ethical rules", and refrain from compromising their credibility or that of the company. In this respect, the charter has been supplemented by an "employees' guide to good practices on

social networks” since “all France Télévisions’ employees may talk about their employer some day”. The document covers a dozen points, recalling the ban both on comments that are slanderous, defamatory or racist, and the divulgence of in-house, confidential and/or financial information specific to the company. Employees are also to be held personally responsible for the content they publish in a blog or on a site, media or social network. It is also recommended that journalists should not tweet about what they did not say on screen, and that they should always indicate the source of content and always check on an item of news before communicating it. Extracts from the “Channels Charter” are expected to be incorporated in the collective agreement that is currently under negotiation.

• *Charte des antennes de France Télévisions* (Charter of the channels of France Télévisions)  
<http://merlin.obs.coe.int/redirect.php?id=15282>

FR

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### **CNC Publishes Comparative Study on Tax Incentives for Location of Audiovisual and Cinematographic Production**

The purpose of the international tax credit instituted by the 2009 Budget and embodied in Art. 220 *quaterdecies* of the General Tax Code is to make it easier to shoot and manufacture in France cinematographic and audiovisual works originated by a non-French producer and containing elements that attach it to the culture, heritage or territory of France. Thus the tax credit is granted to a company that carries out the executive production of a work in France, subject to the company being approved by the national cinematographic centre (Centre National de la Cinématographie - CNC). The credit represents 20% of the eligible expenditure on the work in France, with a ceiling of EUR 4 million per work.

The results for cinematographic production for the year 2010 show that the producers of certain types of French full-length films are choosing to relocate to the Grand Duchy of Luxembourg and Belgium. The CNC therefore decided to launch a comparative study of the functioning of certain non-French tax incentive schemes for cinematographic and audiovisual production, in order to measure and analyse this trend objectively. The study covers seven countries - Belgium, the Grand Duchy of Luxembourg, Germany, Ireland, Hungary, the United Kingdom and Canada.

The study shows that while the aims of the various national tax incentive schemes are relatively similar, the ways in which they operate are very varied.

The works covered and the extent of eligible expenditure vary from one country to another. Moreover, the ceilings applied to the tax reductions or credits practiced in the various countries are often much higher than in France; indeed the study shows that, of the seven schemes studied, France’s tax credit arrangement is currently the least attractive in strictly financial terms, with a rate among the lowest at 20% of eligible expenditure, compared with 29 to 39% of eligible expenditure in Belgium, and 25 to 65% of eligible expenditure in Quebec. It is also the most restrictive, since it is virtually incompatible with the other schemes and requires filming - unless the scenario justifies otherwise - and post-production (mainly) to be carried out in France. Belgium’s “tax shelter” scheme, with its broad base of eligible expenditure, and Canada’s tax credit scheme are in theory compatible with the French scheme. The non-French schemes studied are also broadly compatible with each other.

Some French producers explain their repeated collaboration with the European countries studied (particularly Belgium, the Grand Duchy of Luxembourg, and Ireland) by the fact that they do not lose the benefit of the French tax credit. The French scheme of aid for production makes it possible to retain a large part of the benefit of financial support, even if the tax credit is lost because the work is filmed elsewhere. Moreover, such collaboration makes it possible to obtain other forms of national or regional aid in the coproduction countries, or even supranational aid, such as Eurimages, and hence to cumulate financing.

• *Etude comparative des systèmes d'incitation fiscale à la localisation de la production audiovisuelle et cinématographique* (Comparative study of tax incentives for the location of audiovisual and cinematographic production)

<http://merlin.obs.coe.int/redirect.php?id=15284>

FR

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### **GB-United Kingdom**

#### **Court Requires ISP to Block Access to Site Providing Links to Pirated Movies**

On 28 July 2011, the English High Court ordered BT, the UK’s largest internet service provider, to block access to a site which aggregates a large amount of illegally copied material found on Usenet discussion forums. BT has decided not to appeal the decision, which is likely to provide the basis for a number of other claims in the future. It also supplements the provisions in the Digital Economy Act 2010, which survived a recent legal challenge (see IRIS 2011-6/20).

The case was brought by six major film studios and production companies, all members of the Motion Pic-

ture Association of America (“the Studios”) in order to block access to the “Newzbin2” website. It followed the earlier granting of an injunction against its predecessor site, “Newzbin1”, to prevent it from continuing to breach the Studios’s copyright. Newzbin then relocated outside the jurisdiction of the court and continued to offer the same website. Newzbin includes a facility for its members to reassemble files on Usenet forums into complete films in breach of copyright. The Studios argued that the only relief available to them was thus an order under s. 97A of the Copyright, Designs and Patents Act 1988 (which implemented the 2001 Information Society Directive) to require the site to be blocked. Blocking was to be effected through BT’s “Cleanfeed” technology previously used to block access to websites featuring child sex abuse.

BT claimed that the court had no jurisdiction to issue the order for a number of reasons. First, it claimed that neither the users nor the operators of the website were using BT’s service to infringe copyright. The court disagreed, as BT’s services were being actively used for downloading by users. Secondly, BT claimed that it had no actual knowledge of the copyright infringement, as the Act required so that an order to be made. According to the court, actual knowledge of a particular transaction infringing copyright was not required; it was enough that BT knew in general terms of the large scale copyright infringement by Newzbin2. Thirdly, BT claimed that to grant the order would infringe Art. 12(1) of the E-Commerce Directive, as it was a “mere conduit” and so protected from liability. However, the court considered that the order could still be made under Art. 12(3) to terminate the infringement. BT also claimed to be protected by Art. 15(1) of the Directive, which prohibits the imposition of a general monitoring requirement on providers, but according to the court the order would not require such general monitoring. Finally, BT claimed that the order would infringe Art. 10 of the European Convention on Human Rights as it was not “prescribed by law”. The Court considered that the order fell well within those grounds foreseeable on the basis of the statute and the Directive, and did not infringe Art. 10; nor was it disproportionate. The court thus granted the order in the form applied for by the Studios.

• Twentieth Century Fox Film Corporation et al v British Telecommunications plc [2011] EWHC 1981 (Ch), 28 July 2011  
<http://merlin.obs.coe.int/redirect.php?id=15267> EN

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### Guidance on the Use of Digital Enhancements Re-Issued

On 27 July 2011, the UK Advertising Standards Authority (ASA) ruled that two cosmetic advertisements

were “misleading”. L’Oreal’s brands, Lancôme and Maybelline, were the object of adverse adjudications because “they could not demonstrate that images of Julia Roberts and Christy Turlington, which had been digitally enhanced, were an accurate representation of the results the products could achieve. As such we judged the ads were misleading.”

Whilst the specific matter concerned magazine advertisements, misleading advertising is prohibited likewise under UK advertising rules applying to broadcasts, in the UK Code of Broadcast Advertising (BCAP Code), which gives the rules for broadcast advertisements.

Section 3.12 states: “Advertisements must not mislead by exaggerating the capability or performance of a product or service.”

The ASA in a statement said that “while advertisers are not prohibited from altering or enhancing images in all circumstances, if they do decide to reach for the airbrush, they have to be careful not to exaggerate the capability or performance of a product.”

Several high profile ASA rulings in this area have set a benchmark for what is and is not acceptable when using post-production techniques: L’Oreal (UK) Ltd t/a Lancôme; L’Oreal (UK) Ltd t/a Maybelline; Procter & Gamble (Health & Beauty Care) Ltd; Rimmel International Ltd; Coty UK Ltd t/a Rimmel London.

The ASA Guidance on cosmetic advertisements has been re-issued.

- ASA Adjudication on L’Oreal (UK) Ltd t/a Lancôme  
<http://merlin.obs.coe.int/redirect.php?id=15264> EN
- ASA Adjudication on L’Oreal (UK) Ltd t/a Maybelline  
<http://merlin.obs.coe.int/redirect.php?id=15265> EN
- BCAP Section 3.12  
<http://merlin.obs.coe.int/redirect.php?id=15266> EN

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### HU-Hungary

#### Co-regulatory Agreements between the Hungarian Media Self-regulatory Bodies and the Media Authority

In July 2011, the Media Council of the *Nemzeti Média és Hírközlési Hatóság* (National Media and Infocommunications Authority - NMHH) concluded public administration agreements on media co-regulation with the four Hungarian media self-regulatory bodies: the Association of Hungarian Content Providers (MTE), the

Advertising Self-regulatory Body (ÖRT), the Association of Hungarian Publishers (MLE) and the Association of Hungarian Electronic Broadcasters (MEME).

According to Art. 190 of Act CLXXXV of 2010 on Media Services and Mass Media (Media Act; see IRIS 2011-2/30) "the Media Council shall have the right to conclude a public administration agreement with the self-regulatory body of good standing on cooperation for the administration of cases specified in the Act falling within the administrative competence of the Council". The agreements set up a co-regulation model in which complaints regarding the alleged breach of certain provisions of (i) Act CIV of 2010 on the freedom of the press and the fundamental rules on media content (Media Constitution), (ii) the Media Act and (iii) the Co-regulatory Code of Conduct of the self-regulatory body will be handled primarily by the committee of experts of the concerned body. The Codes of Conduct specify in detail — within the context of the authorisations granted in the Media Act — the provisions on proceedings to be performed by the bodies.

The self-regulatory bodies shall perform their tasks in relation to a) their registered members, except those that expressly objected to being bound by the co-regulation, and b) media content providers (in case of ORT advertising organisations) that agreed to be bound by the Code of Conduct. The self-regulatory bodies shall act as entities performing the tasks within their own scope of competence and not as tasks under the powers of authorities. In so doing, their involvement shall have priority to and supplement the activities of the Media Council.

The procedures shall be pursued a) upon request or b) ex officio (in cases defined in the applicable Code of Conduct). Before requesting the procedure of the self-regulatory body the petitioner (the person whose rights or lawful interests are directly affected by the media content) is obliged to inform the concerned content service provider of the complaint (this obligation is not included in ORT's co-regulation agreement). In case of failure to solve the problem this way, the petitioner shall have the right to initiate the co-regulation procedure.

The self-regulatory body has 30 days to end the procedure, which may be extended by 15 days with due heed to the complexity of the case and the difficulties that may arise in revealing the facts of the case. The committee shall have the right to hold a hearing if it is necessary or if there is an attempt to reach consent. The competent committee has - in particular - the following options to decide:

- a) to declare the occurrence of the infringement,
- b) to oblige the perpetrator to stop its unlawful behaviour (and - if applicable - to restore it to the original state),
- c) to oblige the perpetrator to make restitution (e.g., in a statement) either publicly disclosed or otherwise,

d) to oblige the perpetrator to make a non-pecuniary restitution by other suitable means and to reimburse the procedural fees and costs paid by the petitioner,

e) to suspend the perpetrator's right to participate in the co-regulation procedure (in this case the perpetrator shall be subject to the procedure of the authority during the suspension),

f) to disclose to the public its decision containing the perpetrator's name and the committed infringement.

It shall be noted that no penalty may be imposed by the self-regulatory bodies during the co-regulation procedure. Parties may appeal the committee's resolution on the grounds of a breach of the Media Act or the Code of Conduct. The appeal shall be adjudged by the self-regulatory body's appeal committee of experts. Parties may request the review of the final resolution from the Media Council, but only on the grounds of unlawful proceedings (the procedure of MEME does not contain such an "in-house" appeal system).

The Media Council shall exercise supervision over the activities of the self-regulatory bodies under the public administration agreements. In so doing, the Media Council shall have the right to check the fulfilment of the provisions of the agreements on a continuous basis and their delivery in accordance with the agreement.

- *Magyarországi Tartalomszolgáltatók Egyesülete - MTE* (Co-regulation Code of Conduct of Association of Hungarian Content Providers)

<http://merlin.obs.coe.int/redirect.php?id=15252>

HU

- *Önszabályozó Reklámtestület - ÖRT* (Co-regulation Code of Conduct of the Advertising Self-regulatory Body)

<http://merlin.obs.coe.int/redirect.php?id=15253>

HU

- *Magyar Lapkiadók Egyesülete - MLE* (Co-regulation Code of Conduct of the Association of Hungarian Publishers)

<http://merlin.obs.coe.int/redirect.php?id=15254>

HU

- *Magyar Elektronikus Műsorszolgáltatók Egyesülete - MEME* (Co-regulation Code of Conduct of the Association of Hungarian Electronic Broadcasters)

<http://merlin.obs.coe.int/redirect.php?id=15255>

HU

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## IE-Ireland

### Updated Broadcasting Code on Referenda and Election Coverage

The Broadcasting Authority of Ireland (BAI) on 13 September 2011 published an updated BAI Broadcasting Code on Referenda and Election Coverage (Election Code). The updated Election Code sets out rules with which all Irish broadcasters must comply when covering all relevant elections and polls (Referenda;



General, Presidential, European and Local elections; Senate elections and By-elections) held in Ireland.

The Broadcasting Act 2009 s.42 provides that the BAI shall prepare, and from time to time as occasion requires, revise codes governing standards and practice to be observed by broadcasters. The updated Election Code reflects existing practice and codes established by the BAI (see IRIS 2011-5/26) with a number of revisions relating specifically to the forthcoming Referenda and Presidential election, which will take place on 27 October 2011.

The updated Election Code was introduced following a short consultation process. While the general prohibition on political advertising is retained (see IRIS 2004-8/23), the updated code reflects the requirements set out in the Referendum Act 1998 (as amended) and s.41(6) of the Broadcasting Act 2009, by confirming that advertisements broadcast at the request of the Referendum Commission are not covered by the prohibition on political advertising.

With respect to party political broadcasts, the updated Election Code provides that, in relation to referenda, broadcasters must ensure that the total time allocated amounts to equal airtime being afforded to both sides of the debate. Party political broadcasts made in support of candidates for a Presidential Election should be taken into account when assessing whether the totality of broadcasts is fair to all interests concerned. While there is no obligation on broadcasters to allocate uncontested airtime to Presidential candidates during a Presidential Election, the updated Election Code requires a broadcaster who chooses to do so to ensure that all candidates are treated equitably and that the broadcast treatment is fair to all interests concerned.

The moratorium period on coverage by broadcasters of an election remains unchanged and runs from 2 p.m. on the day before the poll takes place and throughout the day of the poll itself until polling stations close (see IRIS 2011-5/26). The updated Election Code expressly confirms the application of the moratorium to Referenda coverage. In their guidance notes the BAI acknowledge the difficulties involved for programme makers in striking a balance between requirements to keep the public informed and ensuring that programming does not breach the moratorium. However the guidance confirms that the moratorium on election coverage in the run-up to the poll extends to all areas of programming including newspaper reviews, coverage of opinion polls and information announcements.

• BAI Broadcasting Code on Referenda and Election Coverage, September 2011

<http://merlin.obs.coe.int/redirect.php?id=15268>

EN

• BAI Broadcasting Code on Referenda and Election Coverage - Guidance Notes, September 2011

<http://merlin.obs.coe.int/redirect.php?id=15269>

EN

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## IT-Italy

### AGCOM Regulation on Televoting in TV Shows

On 3 February 2011 AGCOM (the Italian communications authority) adopted a regulation concerning transparency and effectiveness in televoting in TV shows, after a public consultation launched in December 2010.

The regulation, whose scope is limited to national broadcasters, aims to provide users with the necessary quality and transparency in televoting, which, in most cases, is a service provided in return for payment.

AGCOM regulation lays down a few basic rules: users have to be transparently made aware of televoting with complete information on its function; all votes must be assured of equal treatment, avoiding those mechanisms that allow an automated delivery of a massive amount of votes.

These kinds of mass call services are usually offered as part of specific TV programme formats, for a limited period of time; for example, in order to determine the winner of a song or beauty contest by recognizing the preferences of the public. These rules apply even where televoting affects only partially the results of the competition, allowing the participation of a significant number of users and providing a very high number of call attempts.

Therefore, the procedure does not apply to services, sometimes inaccurately called "televoting", that do not detect the preferences of the public in such competitions, but whose purpose is, for example, to win prizes by responding to a question via SMS ("quizzes") or to track the preferences of the public with regard to current issues (such as "inquiries").

At least 15 days before the broadcast of the TV programme relevant to televoting, both the broadcaster and the service provider shall publish on their websites a specific and easy to find regulation on televoting.

Each user can send a maximum of:

a) 5 votes for each televoting session that takes place over 24 hours, with an overall limit of 50 votes per week;

b) 10 votes for every session of televoting that takes place over 24 hours, with an overall limit of 50 votes per week. Votes exceeding these limits shall be deemed invalid and the user may not be requested to pay for them.

AGCOM is charged with monitoring the correct application of the regulation, notably the level of transparency adopted by broadcasters, who have to specify how they treated the received answers, indicating the medium used (mail, phone, etc.,) and, in general, the given answers and their timing. This requested summary must be broadcast, without delay, at the end of the programme.

• Delibera n. 38/11/CONS, "Approvazione del regolamento in materia di trasparenza ed efficacia del servizio di televoto", 03.02.2011 ( Deliberation n. 38/11/CONS of 3 February 2011, "Regulation concerning transparency and effectiveness in televoting")

<http://merlin.obs.coe.int/redirect.php?id=15270>

IT

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## **AGCOM Adopts a New Regulation on the Promotion of European Works by On-Demand Audiovisual Media Services**

On 6 April 2011, the Italian Communications Authority (*Autorità per le garanzie nelle comunicazioni* - AGCOM) adopted Regulation no. 188/11/CONS on the promotion of European works by on-demand audiovisual media services (hereinafter "the Regulation"). The Regulation establishes the duties of video on-demand services related to the promotion of European audiovisual works, according to Article 44, paragraph 7 of the Audiovisual Media Services and Radio Code, adopted by Legislative Decree no. 44/2010. The Regulation has been adopted through co-regulatory procedures.

For the development of the new rules, AGCOM has established a technical committee, with the participation on a voluntary base of all the stakeholders involved. The committee was established on 9 October 2010 by Deliberation no. 476/10/CONS. After almost 6 months of long discussions, the new Regulation introduced the rules relating to promotion of European works by non-linear audiovisual media services, as defined by Directive 2007/65/EC. The regulation consists of one article that amends the main AGCOM framework on the general promotion of European and independent audiovisual works adopted by Regulation no. 66/09/CONS.

The first paragraph introduces the definition of "catalogue", that is the list provided by non-linear audiovisual media services of programmes that can be immediately viewed by the user. The second paragraph introduces the definition of a thematic catalogue consisting in an offer with more than 70% of programmes dedicated to a unique theme.

The third paragraph introduces Article 4-bis to the main framework, which sets the obligation for video on-demand media services to promote European

works, gradually and taking into account the development of the market by the adoption of either of these measures:

a) a minimum 20% share of European works in video on-demand catalogues, calculated on the total number of hours provided on an yearly basis;

b) a financial contribution to the production of and acquisition of rights in European works that must not be less than 5% of the revenues recognised for the provision of video on-demand services.

Article 4-bis, paragraph 2 concerns the gradual introduction of the duties within the fourth year from the coming into force of the regulation. According to Article 4-bis, paragraph 3, during this transitional period the share of works in the catalogue must not be less than the 5% and the financial contribution must not be not less than 2%.

Paragraph 4 of Article 4-bis establishes that AVMS on-demand providers who opt for the financial contribution obligation are permitted to have an incidental 1% decrease of the quota during one year that has to be recovered during the next year.

According to Article 4-bis, paragraph 5, all providers must provide an explanatory memorandum when they are not able to reach the minimum quota.

According to Article 4-bis, paragraph 6, the providers owned or controlled by one company shall reach the minimum quota calculating the operas in all the catalogues provided by the company.

Article 4-bis, paragraph 7, concerns the exclusion from the obligations related to the promotion of European works for the subjects that do not fall within the scope of the general AVMS on-demand regulation adopted by Decision no. 607/10/CONS.

The final provisions of Decision 188/11/CONS are related to the possibility of derogation from the obligations for on-demand AVMS providers that provide a thematic catalogue or that suffer financial losses in the last two years, in accordance with the same possibility granted to linear AVMS.

• Approvazione del regolamento riguardante la promozione della produzione e della distribuzione di opere europee da parte dei servizi di media audiovisivi a richiesta ai sensi dell'articolo 44, comma 7, del testo unico dei servizi di media audiovisivi e radiofonici, 06/04/2011 ( Decision No. 188/11/CONS, Framework regarding the promotion of the production and distribution of European works by on-demand audiovisual media services, 6 April 2011)

<http://merlin.obs.coe.int/redirect.php?id=15271>

IT

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## AGCOM Regulation and Self-Regulatory Rules on the Representation of Judicial Processes in Television

At the beginning of 2008 Agcom (the Italian Communications Authority) adopted Deliberation no. 13/08/CSP, pointing out the risks that arise from making a show of ongoing judicial processes in TV programmes, such as docu-dramas and docu-fictions, which reconstruct legal cases in spectacular and attractive ways, in order to increase the audience by creating a sort of media tribunal that almost replaces the real one and compromising objectivity and impartiality of information.

Throughout the above-mentioned deliberation, Agcom set out the following guiding principles for a correct representation of judicial processes on TV: media overexposure or artificial description of trials in progress, which make it hard for the viewer to have an appropriate comprehension of the facts, shall be avoided; on the one hand, the right to inform should not be affected, but on the other hand, the presumption of innocence of the defendant should be protected; information shall respect the principles of completeness, accuracy, fairness and protection of human dignity, avoiding turning private pain into a public show and implementing strengthened protections when minors are involved.

In addition to this deliberation, Agcom invited broadcasters, in association with the Italian order of journalists, to adopt a self-regulatory code in order to ensure the concrete implementation and enforcement of these criteria. This code was adopted in May 2009, and in addition to the transposition of Agcom's instructions into concrete rules for a proper representation of judicial processes in TV, it also provided for the establishment of a specific Committee charged with monitoring their compliance, as well as adopting measures in cases of infringement.

The Committee first met on 17 December 2009, and on the same date, the self-regulatory code came into force. On 18 July 2011, the working procedures of the Committee were adopted by the signatories of the code and then published on Agcom's website.

According to these procedures, anyone who considers a programme not to be compliant with the self-regulatory rules can report it in detail to the Committee, filling in the specific form available on Agcom's website. The Committee will screen all reports in advance, in order to verify their completeness, validity and admissibility, and, afterwards, the President of the Committee will choose a member from among Agcom's representatives as rapporteur of the investigation phase. The report will be transmitted to the broadcaster concerned, who can defend itself in writing, as well as ask for a hearing within 15 days. The

Committee will also acquire the recording of the contested programme.

At the deadline, the rapporteur will inform the President of the closing of the investigation phase and email all relevant documentation to him/her. The President will then convene with the Committee, which will decide by absolute majority. Where an infringement of the Code is ascertained, the broadcaster will have to communicate it to the public within a suitable term and the deliberation will be published on Agcom's website.

- Delibera n. 13/08/CSP - Atto di indirizzo sulle corrette modalità di rappresentazione dei procedimenti giudiziari nelle trasmissioni radiotelevisive, Gazzetta Ufficiale della Repubblica italiana n. 39 del 15 febbraio 2008 (Deliberation no. 13/08/CSP - Guidelines for a correct representation of judicial processes in TV, Official Journal No. 39 of 15 February 2008)

<http://merlin.obs.coe.int/redirect.php?id=15272>

IT

- Codice di autoregolamentazione in materia di rappresentazione di vicende giudiziarie nelle trasmissioni radiotelevisive sottoscritto 21 maggio 2009 (Self-regulation code on representation of judicial processes on TV signed on 21 May 2009)

<http://merlin.obs.coe.int/redirect.php?id=15373>

IT

- Regolamento di procedura del Comitato di applicazione del Codice di autoregolamentazione in materia di rappresentazioni televisive di vicende giudiziarie adottato il 18 luglio 2011 (Working procedures of the Committee for the enforcement of a self-regulation code on the representation of judicial processes in TV adopted on 18 July 2011)

<http://merlin.obs.coe.int/redirect.php?id=15274>

IT

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## MT-Malta

### Yes for Divorce Movement/Yes for Marriage v Broadcasting Authority

On 23 May 2011 the Civil Court, First Hall, sitting in its constitutional capacity, held that the Broadcasting Authority - by withholding two political spots from being broadcast during the divorce referendum campaign - was not in breach of freedom of expression under the Constitution of Malta and the European Convention on Human Rights and Fundamental Freedoms. No appeal was lodged against this judgment to the Constitutional Court.

In Advocate Dr. Deborah Schembri and others in their personal name and on behalf of the Yes for Divorce Movement/Yes for Marriage, the said Yes Movement filed a freedom of expression case against the Broadcasting Authority on 16 May 2011. The Yes Movement claimed that, as part of the scheme of divorce referendum broadcasts organised by the said Authority on public service television, the Authority had stopped the airing of two political spots of the Yes Movement. The latter had prepared two spots consisting of footage showing Mgr. Charles Vella, who had in the

past granted an interview during prime time on a private television station where he discussed, amongst other things, the divorce issue. This footage was used by the Yes Movement as part of its referendum campaign after it obtained permission from the private television station and the programme producer, but not from Mgr. Vella, whose image was shown on both spots together with an excerpt of what he had stated during the said programme.

The Authority allowed the broadcast of the spots twice on 12 May 2011, but withdrew them the following day after the receipt of a letter of protest by Mgr. Vella, who informed the Authority that he had not given consent for his image to be used in the Yes Movement's campaign. According to the Authority's scheme of referendum broadcasts, third parties could be portrayed in political spots provided that they gave their consent for this purpose. Mgr Vella noted that in the two spots in question, his interview had been edited and taken out of context, giving the impression that he was advocating the introduction of divorce legislation in Malta. In its pleadings, the Authority submitted that Mgr. Vella was a private person and not a public figure; that it initially allowed the spots to be aired until it received Mgr. Vella's complaint, whereupon it took immediate action to stop the spots from being broadcast in its scheme of referendum broadcasts, whilst asking the Yes Movement to substitute them with two others; that Mgr. Vella had not given his consent for the broadcast of his image in the Yes Movement spots; that Mgr. Vella - who was against divorce legislation - was depicted in the two spots in an abusive way and out of context; and that the television programme in which Mgr. Vella had participated had been broadcast before the House of Representatives had decided to call a referendum on the divorce issue, before the Yes Movement had been established and before the date of the referendum had actually been announced. Moreover, the said television programme had dealt with several issues, amongst which was that of divorce. The Authority further pleaded that, although Mgr. Vella participated in a television discussion programme, this did not imply that he had renounced any copyright he enjoyed over the reproduction of his own image. Finally, it noted that the inclusion of Mgr. Vella's television programme interview in the two said political spots favouring divorce did not fall under extant fair use rules.

The court considered the Yes Movement's submissions that Mgr. Vella was a public person, had spoken on television, his intervention was made in public and that both the television station and programme producer had given their consent for the broadcast of excerpts of Mgr. Vella's interview during the two spots in question. The court further noted that Mgr. Vella did not occupy any institutional office, in so far as both the Government and Church were concerned. As a private citizen, he was still an influential person, as he was the founder of the Cana Movement - a Catholic Church institution having the family at heart. He was also an institutional figure in Italy in the family sec-

tor and remained an expert on family matters, having written on the issue of the family during the course of his career. The court found that as Mgr. Vella was an influential person and the Yes Movement had extracted passages from his programme interview for its spots to favour its cause. But the extract, the court held, was taken out of context and Mgr. Vella had not participated at all in the divorce referendum debate; nor did he support the Yes Movement. Although Mgr. Vella was, prior to the campaign, interviewed on divorce, this did not imply that what he said during the television programme could be reproduced without his consent and out of context in the two spots depicting him as though he favoured the introduction of divorce in Malta. Furthermore, when the Authority stopped the said spots from being aired, it immediately permitted the Yes Movement to replace the said two spots with another two of the Yes Movement's choice, an option of which the Yes Movement availed itself.

- Schembri Deborah Av Dr et Noe v. I-Awtorita' tax-Xandir, 23/05/2011 (Decision of the Civil Court, First Hall (Constitutional jurisdiction), Yes for Divorce Movement/Yes for Marriage v. Broadcasting Authority, reference no. 22/2011, 23 May 2011)  
<http://merlin.obs.coe.int/redirect.php?id=15275>

MT

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## PT-Portugal

### **New Set of Auditions Delay Elections for the Regulatory Body**

On 24 August 2011, the Social Democratic Party (PSD) delivered to the Parliamentary Commission of Ethics, Citizenship and Communication a requirement for the audition of four persons in the framework of media regulation and the performance of the ERC Regulatory Council during the past five years. The Regulatory Council is the main body of the *Entidade Reguladora para a Comunicação Social* (media regulatory authority - ERC). The main objective is to provide information regarding the new model for media regulation and the mandate for the first Regulatory Council. Amongst the names for these auditions are those of the President of the ERC, the President of the Journalists' Syndicate, the Director of Information of the private broadcaster TVI and the expert in constitutional issues, Vital Moreira.

This situation is delaying the election of the new Regulatory Council, since the mandate of their current members ended on 17 February 2011. This set of auditions was initially proposed by the PSD Parliamentary Group last February and is aimed at analysing the

state of media regulation in Portugal before proceeding to the appointment of new members. Moreover, the objective was also to assess the need for changes in the current legal framework of the ERC, to identify the strengths and weaknesses of this regulatory body and to reflect on its functions and powers.

The process will now continue and the hearings will proceed, with three of the proposed auditions being scheduled for an extraordinary meeting on 16 September 2011.

- Agenda da reunião ordinária da Comissão Parlamentar para a Ética, a Cidadania e a Comunicação do dia 24 de Agosto de 2011 ( Agenda for the ordinary meeting of the Parliamentary Commission of Ethics, Citizenship and Communication of 24 August 2011)

<http://merlin.obs.coe.int/redirect.php?id=15277>

PT

- Agenda da reunião extraordinária da Comissão Parlamentar para a Ética, a Cidadania e a Comunicação do dia 16 de Setembro de 2011 (Agenda for the extraordinary meeting of the Parliamentary Commission of Ethics, Citizenship and Communication of 16 September 2011)

<http://merlin.obs.coe.int/redirect.php?id=15277>

PT

- Requerimento apresentado pelo Grupo Parlamentar do PSD no dia 22 de Fevereiro de 2011 ( Requirement delivered by the PSD Parliamentary Group on 22 February 2011)

<http://merlin.obs.coe.int/redirect.php?id=15278>

PT

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## Golden Shares in PT Officially Revoked

On 25 July 2011 the Portuguese government officially revoked the special rights it held in several publicly quoted companies, including the oil company Galp, the energy group EDP and the operator Portugal Telecom (PT). The government was under an obligation to revoke such rights as part of the terms of a EUR 78 billion plan to save the country from bankruptcy.

The special rights given to the 500 action of category A (golden share) held by the Portuguese government were revoked by a vote in favour of 99% of the actionists present that day.

A Golden Share is a position held by the State in a company that guarantees to the State a certain amount of special rights in certain strategic decisions in the company, such as investments, mergers, acquisitions etc.

The Portuguese Parliament approved the revocation by Decree 90/201 (Decreto-Lei n.º 90/201) on 25 July. This was in line with the imposition made by the Troika (European Union, ECB and IMF).

During the debate that took place to adopt the resolution, as a clear example for the revocation of the golden share, the recent case of acquisition that had as its main characters PT, VIVO (Brasil) and Telefonica

(Spain) and the intervention of PT between VIVO and Telefonica was recalled.

- Decreto-Lei n.º 90/2011, de 25 de Julho, que "elimina os direitos especiais detidos pelo accionista Estado na EDP " Energias de Portugal, S. A., na GALP Energia, SGPS, S. A., e na Portugal Telecom, SGPS, S. A.." (Decree 90/201, 25 July 2011, revoking the special rights held by the State in Galp, PT and EDP)

<http://merlin.obs.coe.int/redirect.php?id=15276>

PT

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## RO-Romania

### CNA Sanctions for Breaching the Electoral Campaigns Rules

The *Consiliul Național al Audiovizualului* (National Council for Electronic Media - CNA) imposed public warnings on two local commercial Romanian TV stations for breaches of the Audiovisual Code - *Decizia nr. 220/2011 privind Codul de reglementare a conținutului audiovizual, cu modificările și completările ulterioare* (Decision no. 220/2011 regarding the regulation of audiovisual content, with further modifications and completions) and *Decizia nr. 210/2010 privind principii și reguli de desfășurare a campaniei electorale pentru alegerile parțiale parlamentare, prin intermediul serviciilor de programe audiovizuale* (Decision no. 210/2010 regarding the principles and rules of the carrying out of electoral campaigns for partial parliamentary elections through audiovisual programme services; see inter alia IRIS 2009-6/28, IRIS 2009-1/29 and IRIS 2007-4/30).

UNU TV from Piatra Neamț (north-eastern part of Romania) and MARAMUREȘ TV from Baia Sprie (north) were sanctioned because they broadcast before the official start of the electoral campaign several electoral and promotion programmes for the main candidates for the two vacant seats of the *Camera Deputaților* (Chamber of Deputies, lower chamber of the Romanian Parliament).

The regional elections took place on 21 August 2011 and the electoral campaign was scheduled from 6 to 20 August: but both sanctioned stations broadcast several programmes beforehand, one in favour of the ruling party candidate (UNU TV) the other in favour of the opposition candidate (MARAMUREȘ TV). The stations were accused of infringements of Art. 139 of the Audiovisual Code, which forbids political advertising and messages outside electoral campaigns periods, and of Arts. 1 and 11 of Decision no. 210/2010, which state that electoral campaigns start 15 days before the elections and end 24 hours before the vote and that electoral promotion is forbidden between the

date of the public announcement of the voting and the start of the electoral campaign, respectively.

The Council compelled the stations to broadcast an announcement of the sanction in the coming 24 hours after issuing the public warnings, at least three times between 18.00 and 22.00 h, including once during the main news programme.

• Decizia nr. 491 din 11.08.2011 (Decision no. 491 of 11 August 2011)

<http://merlin.obs.coe.int/redirect.php?id=15256>

RO

• Decizia nr. 492 din 11.08.2011 (Decision no. 492 of 11 August 2011)

<http://merlin.obs.coe.int/redirect.php?id=15257>

RO

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### Lower Support for Film Promotion and Distribution

The Board of Administration of the *Centrul Național al Cinematografiei* (National Cinematography Centre - CNC) has reduced by 40 percent, starting from 1 September 2011, the maximum amount of non-reimbursable cumulated financial support for the promotion and domestic and/or international distribution of full-length films (see inter alia IRIS 2011-6/29, IRIS 2011-2/34, IRIS 2010-7/34 and IRIS 2010-2/30).

The Decision no. 151 from 30 June 2011 was taken due to the economic crisis, budgetary constraints and the decrease of the sums collected by the Cinematographic Fund. The document modifies Decision no. 123 of 16 September 2010.

According to this the maximum support for films participating in international FIAPF (International Federation of Film Producers Association) „A”-category festivals (competitive) is of EUR 30,000 for awarded films and of EUR 27,000 for selected/nominated films, irrespective of whether they were produced with or without CNC support. The maximum support for films participating in other international FIAPF festivals is of EUR 27,000 for awarded films and of EUR 24,000 for selected/nominated films, irrespective of whether they were produced with or without CNC support. The support for films participating in other festivals, agreed by the CNC, is of up to EUR 24,000 for awarded films and of up to EUR 21,000 for selected/nominated films. The sums include the support for both promotion and distribution. The maximum total support for participating in several different festivals is in the region of EUR 30,000. The last support category is for films that were not presented at festivals: up to EUR 15,000 for films produced with CNC's support (instead of EUR 25,000 previously) and up to EUR 7,000 for those that were realised without CNC's support (instead of EUR 10,000).

Short-reel films will receive 25 percent of the corresponding full-length film category support.

• Hotărârea Consiliului de Administrație al Centrului Național al Cinematografiei nr. 151/30.06.2011 (Decision of the Board of Administration of the National Cinematography Centre no. 151/30.06.2011)

<http://merlin.obs.coe.int/redirect.php?id=15258>

RO

• Hotărârea Consiliului de Administrație al Centrului Național al Cinematografiei nr. 123/16.09.2010 ( Decision of the Board of Administration of the National Cinematography Centre no. 123/16.09.2010)

<http://merlin.obs.coe.int/redirect.php?id=15259>

RO

**Eugen Cojocariu**

*Radio Romania International*

### SE-Sweden

#### Direct Linking to Streamed Broadcasts of Ice Hockey Games is Copyright Infringement (Appeal)

The Court of Appeal for Southern Norrland has tried an appeal regarding criminal liability for direct linking to the streamed broadcasts of ice hockey games. The perpetrator was found guilty of violating the Swedish Copyright Act (CA) and was accordingly ordered to pay a fine and damages to C More Entertainment AB. Although the outcome of the Court of Appeal's decision is similar to that of the decision of the District Court (see IRIS 2011-1/47), many interesting issues were judged differently.

During autumn 2007 Swedish TV channel Canal + broadcast ice hockey games on a pay per view basis, inter alia, through live streaming on the Internet. The broadcasts were produced by the company C More Entertainment AB and the rights to the transmissions were owned by the same company.

In October and November 2007 a person published links to the broadcasts of the games on his website, an unofficial fan site of his favourite Swedish ice hockey team. By following hyperlinks visitors were granted direct and free access to the games on their computers.

C More Entertainment AB filed charges and the perpetrator was prosecuted for violating the CA. The claims were based on the grounds that the broadcasts constituted works of art as well as being protected by the neighbouring rights granted to the producers of recordings of sounds and images.

The defence disputed all charges invoking, amongst others, that the broadcasts were not subject to copyright and that the alleged actions did not amount to any relevant exploitation within the meaning of the CA. Nonetheless, the perpetrator was found guilty by the District Court and held liable to pay fines and damages.

The defence appealed and continued to dispute all charges. C More Entertainment AB on their side sought full compensation for their alleged loss. The Prosecutor wanted the perpetrator to be found guilty of premeditated violation of the CA.

As opposed to the District Court, the Court of Appeal did not recognize that the commentary on the ice hockey games was original and of a personal character and thus protected by copyright. In the Court of Appeal's view, the commentary essentially seemed to follow the events of the game and could not significantly be distinguished from other commentary performances. Neither could the commentator's personal comments and opinions be regarded as distinctive. In summary the Court of Appeal did not consider the commentary on the ice hockey games to be individual and original performances to be deserving of copyright protection.

The Court of Appeal also made a different assessment regarding the broadcasts in their entirety, i.e., the coordination by the technical producer, choice of focus, timing etc. In this regard the Court of Appeal considered the camerawork to be neither individual nor original to the extent that it should be given copyright protection. The camerawork and its coordination were accordingly not unique and could not be considered to enhance or increase the drama or specific features of the game.

C More Entertainment AB and the Prosecutor had also claimed that replays in the broadcasts were protected by neighboring rights. For such rights there is no requirement of individuality or originality under the CA.

As did the District Court, the Court of Appeal also found that replays and slow-motion sequences of goals and other highlights that occurred during the game are protected as neighboring rights. Only C More Entertainment AB had the right to distribute the replays. The latter was something that was not disputed by the defense.

By granting users direct and free access to the games through links on his website (direct linking) the perpetrator had communicated the replays to the public. The Court of Appeal noted that whether direct linking is seen as transferring to the public is not dependant on how many people actually watch the broadcast by the link. Instead, what is vital for the assessment is the possibility for the public to view the transmission.

Furthermore, the Court of Appeal stated that C More Entertainment AB could not be considered to have contributed to the linking by not having effective counter-measures in place against linking. The fact that the game was offered on a pay per view basis and the link was not available through any ordinary search engines was considered an indication that C More Entertainment AB had tried to protect the replays from infringement.

In conclusion, the perpetrator was found guilty of violating the CA. Therefore, he was ordered to pay a fine

and damages to C More Entertainment AB for having made the replays available to the public without the company's consent.

• Hovrätten för Nedre Norrlands dom den 20 juni 2011 i mål nr B 1309-10 (Judgment of the Court of Appeal of Southern Norrland of 20 June 2011 in Case No. B 1309-10) SV

**Michael Plogell and Erik Ullberg**  
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## GB-United Kingdom

### Competition Commission Publishes provisional Findings on BSkyB Film Rights

On 19 August 2011, the UK's Competition Commission (CC) published its provisional findings on the competition situation with regard to the marketing of films in the British pay-TV sector.

In its report, the CC establishes that the dominance of BSkyB in the area of pay-TV film rights limits competition between the pay-TV retailers, thus leading to higher prices and less choice for subscribers.

An important element for this assessment by the authority is that, owing to its long-standing exclusive arrangements with the six biggest Hollywood studios, BSkyB has a dominant market position with regard to the purchase of films and the first subscription pay-TV window (FSPTW), thus preventing the development of effective competition. The range of Hollywood films, if possible the latest productions, makes BSkyB attractive for a very large number of subscribers - according to the investigations, about twice as many as all the other pay-TV retailers put together - and that in turn strengthens BSkyB's economic negotiating position with regard to the acquisition of film rights compared with potential rivals.

The CC also pointed out that BSkyB charged other pay-TV retailers excessive prices for the supply of its film rights, thus making any offerings by its rivals unprofitable.

As possible remedies, the CC proposes, inter alia, restricting the number of major Hollywood studios from which BSkyB acquires exclusive FSPTW rights to films, limiting the range of exclusive FSPTW rights and/or imposing conditions on BSkyB in terms of prices and content - with rival services in mind.

Interested parties now have until mid-September to comment on the results of the investigation and the remedies proposed. The final findings report is due to be made available by the beginning of August 2012 at the latest.

According to reports, BSkyB has criticised the CC for failing to include online film providers such as Netflix and LOVEFiLM in the investigation.

As early as 2010, the British regulator Ofcom took steps against BSkyB concerning its pricing policy and the marketing of the broadcaster's premium sports channels (see IRIS 2010-5/26).

• CC's report findings, 23 August 2011  
<http://merlin.obs.coe.int/redirect.php?id=16241>

EN

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## AT-Austria

### **Constitutional Court Cancels Provisions of the ORF-Act about Enfranchised Voters concerning the Choice of the Audience Council**

On 27 September 2011, the Austrian Constitutional Court (VfGH) decided that the provisions of the ORF-Act in § 28 section 6 to 10 about enfranchised voters concerning the choice of the ORF-Audience-Council are unconstitutional and therefore must be repealed.

In the opinion of the VfGH, the provisions in § 28 section 6 to 10 of the ORF-Act do not fulfill the requirements for the determination of laws. Article 18 of the Federal Constitutional Law (B-VG) requires that laws have a content by which the conduct of the authorities is determined in advance. This requirement also applies to the statutory definition of barriers concerning the private autonomy of the Austrian public broadcasting (ORF). Therefore, the legislature has to adopt sufficiently certain laws, if he wants to regulate the behavior of the organs of the ORF by law.

The VfGH criticized the fact that it is unclear, which persons are entitled to vote the ORF-Audience-Council. Even after exhausting all possibilities, the persons, who are entitled to vote, cannot be determined with sufficient certainty. In particular, the question could not be answered, whether the ORF-Act only allows television viewers to select, who have a subscriber number, or whether under certain conditions other television viewers are entitled to vote.

According to the law neither all household members of an owner of a television or radio nor any people, who actually only uses a television or radio without being its owner, can be considered as entitled to vote. Such an interpretation of the law would give all users of a television or radio the right to vote and would make the enforcement of the law impossible, because of the ever-changing number of users.

Even the consideration of only those persons as entitled to vote, who have the power to decide about the use of television or radio relating to other people in their environment, makes a reasonable enforcement of the law impossible. The recording of all individuals in each household, who have the right to decide about the use of television or radio through another person, cannot be accomplished with reasonable effort.

In the view of the court, only those persons disposing of a subscriber number seem to be entitled to vote. Consequently, the process of allocation of subscriber numbers is a relevant aspect for the legal assessment. Concerning this process, it is not clear, whether subscriber numbers are allocated in connection with the election of the ORF-Audience-Council, and for the case that this happens, in which way the subscriber numbers will be allocated. The ORF-Act does not contain a provision, according to which household members or nursing home residents have the right to vote, after they have made a report about the use of a television or radio, even though they have to pay any fees for the use of the television or radio, because the fees are already paid by someone else (for example by the owner of the television or radio). In particular, the ORF-Act does not contain a provision, according to which of these people get an own subscriber number or the subscriber number of the person, who is paying the fees.

With regard to the examination of the election rules for the election of six members of the ORF-Audience-Council, the VfGH stipulates that the election code of the ORF is not a sufficient legal regulation, because there is a lack of statutory authority by the legislature.

• *Urteil des VfGH (G9/11; V5/11) vom 27. September 2011* (Judgment of the VfGH (G9/11; V5/11) of 27 September 2011)  
<http://merlin.obs.coe.int/redirect.php?id=17308>

DE

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## Agenda

### Media 20 Years of Passion: European Day

29 October 2011 Organiser: Media Desk Italia Venue: Rome  
Information & Registration:  
[http://www.obs.coe.int/about/oea/infoday\\_media2011.pdf](http://www.obs.coe.int/about/oea/infoday_media2011.pdf)

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