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IRIS

Legal Observations
of the European Audiovisual Observatory

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COUNCIL OF EUROPE

European Court of Human Rights: Standard Verlags GmbH v Austria

In its first judgment of 2012 related to (journalistic) freedom of expression, the European Court of Human Rights dealt with an interesting application of the right of the media to report on criminal cases in an early stage of investigation. The judgment also focuses in a peculiar way on the notion of a "public figure". The case concerns an article published by the Austrian newspaper Der Standard, reporting on the enormous speculation losses incurred by a regional bank, Hypo Alpe-Adria. The article reported on the criminal investigation into embezzlement that had been opened by the public prosecutor in respect of the senior management of the bank. It identified some of the persons involved, including Mr Rauscher, the head of the bank's treasury. Mr Rauscher brought proceedings against the newspaper's company for disclosing his identity in that article and, as a result, he was awarded EUR 5,000 in compensation. In its judgment the Vienna Court of Appeal found that Mr Rauscher's interest in the protection of his identity and the presumption of innocence outweighed the newspaper's interest in disclosing his name.

The Strasbourg Court however, after being requested to evaluate the interference in Der Standard's freedom of expression under the scope of Article 10 of the Convention, came to another conclusion in balancing the newspaper's right to freedom of expression against Mr Rauscher's right to protection of his identity. The European Court agreed with the finding by the Austrian courts that Mr Rauscher, as a senior employee of the bank in issue, was not a "public figure" and that the fact that his father had been a politician did not make him a public figure. The Strasbourg Court also agreed with the assessment that Mr Rauscher had not entered the public arena. However, the Court observed that the question of whether or not a person, whose interests have been violated by reporting in the media, is a public figure is only one element among others to be taken into account in answering the question whether the newspaper was entitled to disclose the name of that person. Another important factor that the Court has frequently stressed when it comes to weighing conflicting interests under Article 10 (freedom of expression) on the one hand and Article 8 (right to privacy) on the other hand is the contribution made by articles or photos in the press to a debate of general interest. The European Court emphasised that the article in Der Standard dealt with the fact that politics and banking are intertwined and reported on the opening of an investigation by the public prosecutor. In this connection the Court reiterated that there is little scope under Article 10 §2 of the Convention for restrictions on political speech or on debates on questions of public interest. It accepted the Vienna Court of Appeal's finding that the disclosure of a suspect's identity may be particularly problematic at the early stage of criminal proceedings. However, as the article at issue was not a typical example of court reporting, but focused mainly on the political dimension of the banking scandal at hand, revealing the names of some persons involved, including senior managers of the bank, it was legitimate. The Court considered that, apart from reporting the fact that the public prosecutor had opened an investigation into the bank's senior management on suspicion of embezzlement, the impugned litigious article did not deal with the conduct or contents of the investigation as such. Instead the focus was on the extent to which politics and banking are intertwined and on the political and economic responsibility for the bank's enormous losses. In such a context, names, persons and personal relationships are clearly of considerable importance and it is difficult to see how the newspaper could have reported on these issues in a meaningful manner without mentioning the names of all those involved, including Mr Rauscher. The Court therefore considered that the domestic courts had overstepped the narrow margin of appreciation afforded to them with regard to restrictions on debates on subjects of public interest. It follows that the interference with the newspaper's right to freedom of expression was not "necessary in a democratic society". Consequently, the Court concluded that there had been a violation of Article 10 of the Convention. The Court awarded Standard Verlags GmbH EUR 7,600 for pecuniary damages and EUR 4,500 for costs and expenses.

• Judgment by the European Court of Human Rights (First Section), case of Standard Verlags GmbH v Austria (no. 3), No. 34702/07 of 10 January 2012
http://merlin.obs.coe.int/redirect.php?id=15611 EN

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Committee of Ministers: Continued Attention for Online Freedom of Expression, Assembly and Association

On 7 December 2011, the Council of Europe's Committee of Ministers (CM) adopted a Declaration on the protection of freedom of expression and freedom of assembly and association with regard to privately operated Internet platforms and online service providers. This follows the CM's adoption in September 2011 of a similarly-titled Declaration on

the protection of freedom of expression and information and freedom of assembly and association with regard to Internet domain names and name strings (see IRIS 2011-10/6).

The Declaration opens with an affirmation of the importance of the right to freedom of expression (including "its corollary, freedom of the media") and of the right to freedom of assembly and association in democratic society (para. 1). These rights are guaranteed by Articles 10 and 11, respectively, of the European Convention on Human Rights (ECHR).

The Declaration stresses the importance of safeguarding these rights in an online environment due to the public's increased reliance on "social networks, blogging websites and other means of mass communication" for informational, communicative, associative and other purposes (para. 2). It notes that "these platforms are becoming an integral part of the new media ecosystem" and adds that although they are privately operated, "they are a significant part of the public sphere through facilitating debate on issues of public interest; in some cases, they can fulfil, similar to traditional media, the role of a social 'watchdog' and have demonstrated their usefulness in bringing positive real-life change" (para. 2).

The Declaration then draws attention to, and briefly explains, the threats to online freedom of expression posed by political influence or pressure on new media actors (para. 3) and by "[d]istributed denial-of-service attacks against websites of independent media, human rights defenders, dissidents, whistleblowers and other new media actors" (para. 4).

In light of the instrumental role of privately-owned Internet platforms and online service providers in safeguarding online freedom of expression, assembly and association, as well as the aforementioned threats to the role of those actors, the Declaration seeks to take a stand on their behalf. It does so by insisting on the importance of Articles 10 and 11 ECHR, as a shield against "politically motivated pressure exerted on privately operated Internet platforms and online service providers, and of other attacks against websites of independent media, human rights defenders, dissidents, whistleblowers and new media actors" (para. 7).

• Declaration by the Committee of Ministers on the protection of freedom of expression and freedom of assembly and association with regard to privately operated Internet platforms and online service providers, 7 December 2011
http://merlin.obs.coe.int/redirect.php?id=15643 EN FR

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Parliamentary Assembly: Resolution and Recommendation on Combating Child Abuse Images

On 5 October 2011, the Council of Europe's Parliamentary Assembly adopted Resolution 1834 (2011) and Recommendation 1980 (2011), both aimed at "combating 'child abuse images' through committed, transversal and internationally co-ordinated action." The two policy initiatives are addressed to the Council of Europe Committee of Ministers (Recommendation) vis-à-vis its member states (Resolution) and largely overlap content-wise.

Apart from the "dark" nature of child abuse (Resolution, para. 2), the Parliamentary Assembly is "very concerned about the high prevalence of such crimes, [04046] the way in which they are facilitated by the Internet" (Resolution, para. 2) and it's "multiplier" effect in inciting new crimes (Resolution, para. 4). Therefore, it recommends taking a "strong position" towards combating sexual abuse images (Recommendation, para. 1). At the same time, the Parliamentary Assembly is aware of the complexity of this endeavour, amongst others because of the attribution problem: "due to the anonymity on the internet, it is extremely difficult to uncover and to effectively prosecute offenders, and to identify and help victims" (Resolution, para. 2).

The contents of the two texts largely overlap, with some subtle but important differences. For instance, both documents call for adding mandatory criminalisation of "intentional consultation" of child abuse images to the Lanzarote Convention (Rec., para. 5.2; Res., para. 8.1.3 jo. para. 5), support public awareness programmes such as the Council's One in Five campaign (Rec., para. 5.4; Res., para. 8.3.3) and generally call for a uniform approach towards the policy area across the Council of Europe (Rec., para. 3 & para. 5.5; Res., para. 8.1).

The slight differences between the two texts reveal the Recommendation's greater ambition. In the Resolution the Parliamentary Assembly expresses "regret" that the "mandatory character of website blocking 04046[had] not found its way into the final European Union draft directive" (Res., para. 5) and proposes blocking "when appropriate" (Res., para. 8.2.2). In the Recommendation however, the adoption of "mandatory blocking" in an additional protocol to the Lanzarote Convention (Rec., para. 5.2) is advised. Regarding legal responsibility for internet intermediaries, the Recommendation strives to achieve this through intergovernmental work (para. 5.3), while the Resolution opts for dialogue with and self-regulation by these stakeholders (Res., para. 8.2.3 & para. 7). Given the concerns of the European Parliament and certain member states about the legitimacy and effectiveness of mandatory blocking, which led to the

exclusion of such a provision in the European Union directive, and increasing awareness of the limits of self-regulation in the European Parliament with regard to legality, it will be interesting to see how the Committee of Ministers responds to the Parliamentary Assembly Recommendation.

• Resolution 1834 (2011) on combating "child abuse images" through committed, transversal and internationally co-ordinated action
http://merlin.obs.coe.int/redirect.php?id=15615 EN FR

• Recommendation 1980 (2011) on combating "child abuse images" through committed, transversal and internationally co-ordinated action
http://merlin.obs.coe.int/redirect.php?id=15616 EN FR

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Parliamentary Assembly: Recommendation 1981 on Violent and Extreme Pornography

On 5 October 2011, the Parliamentary Assembly of the Council of Europe adopted Recommendation 1981 on violent and extreme pornography.

In the Recommendation the Assembly recalls its Resolution 1835 on violent and extreme pornography. The Assembly expresses its concern at the increased accessibility (especially via the internet) to violent and extreme pornographic material. The number of consumers of that type of pornography has risen in recent years.

The Assembly is apprehensive about the negative impact of violent and extreme pornography on the dignity of women and on the breach of their right to live free from sexual violence, as well as the protection of minors against exposure to violent and extreme pornographic material.

The Assembly recognises in Resolution 1835 that freedom of expression is a pillar of democratic societies and a right guaranteed by the European Convention on Human Rights. However, if prescribed by law and necessary in the interest of (amongst others) the prevention of crime, the protection of morals and the protection of the rights of others, it is possible to set limits to freedom of expression.

The Assembly notes that there are differences in the degree of regulation of (violent and extreme) pornography between the member states of the Council of Europe, as well as a lack of enforcement of existing laws and regulations.

The Assembly calls on the member states to ensure effective implementation of existing laws, to revise laws to ensure these provide adequate sanctions and to establish an obligation for companies to submit all audiovisual works for classification prior to commercial distribution (9.1.2./9.1.3 Resolution 1835). Where applicable, sanctions for non-compliance with the obligation to submit all audiovisual works for classification with the relevant body and sanctions for distributing such material without classification have to be strengthened (9.1.4. Resolution 1835)

In order to reach these goals, the Assembly suggests in Recommendation 1981 to the Committee of Ministers asking the appropriate bodies of the European Council to conduct two studies: a comparative study on the law and regulations applying to forms of violent and extreme pornography in member states and a study examining whether there is any scope for a harmonised approach to distribution of violent and extreme pornographic material on the internet. The second study should be conducted by the European Audiovisual Observatory on the feasibility of a common system of classification and content descriptors, in order to label the content of audiovisual works.

• Recommendation 1981 (2011) on violent and extreme pornography, 5 October 2011
http://merlin.obs.coe.int/redirect.php?id=15620 EN FR

• Resolution 1835 (2011) on violent and extreme pornography, 5 October 2011
http://merlin.obs.coe.int/redirect.php?id=15621 EN FR

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Parliamentary Assembly: Texts on Personal Data on the Internet and Online Media

The Parliamentary Assembly of the Council of Europe ("Assembly") adopted a Resolution and a Recommendation on 7 October 2011, both entitled "The protection of privacy and personal data on the Internet and online media". Since the late 1960s, the Council of Europe has been influential in the context of data protection regulation. In 1981 the Council of Europe drafted the first legally binding international instrument on data protection, the Data Protection Convention (Convention No. 108).

Some main points of the new Recommendation and the Resolution are listed below. In the Resolution the Assembly discusses recent developments in technology and society. The Assembly welcomes the "progress in information and communication technologies ('ICTs') and the resulting positive effects on individuals, societies and human civilisation as a whole". But the Assembly also "notes with concern that the digitalisation of information has caused unprecedented possibilities for the identification of individuals through their data. Personal data are processed by an ever-growing number of private bodies and public authorities throughout the world. Personal

information is put into cyberspace by users themselves as well as by third parties. Individuals leave identity traces through their use of ICTs. Profiling of Internet users has become a widespread phenomenon. Companies sometimes monitor employees and business contacts by means of ICTs."

About the use of personal data on the Internet, the Assembly says: "personal ICT systems as well as ICT-based communications may not be accessed or manipulated if such action violates privacy or the secrecy of correspondence; access or manipulation through 'cookies' or other unauthorised automated devices violate privacy, in particular where such automated access or manipulation serves other interests, especially of a commercial nature." Furthermore, data processing systems are often compromised by hackers.

The Assembly is "alarmed by these developments". It adds: "In a democratic state governed by the rule of law, cyberspace must not be regarded as a space where the law, in particular that concerning human rights, does not apply." The Assembly emphasises that consent of the data subject "requires an expression of consent in full knowledge", and that consent has to be a "the manifestation of a free, specific and informed will, and excludes any automatic or tacit usage".

In the Recommendation the Assembly calls for the Committee of Ministers ("Committee") to seek the ratification of the Data Protection Convention by the European Union and of Council of Europe member states that have not yet done so, namely Armenia, the Russian Federation, San Marino and Turkey. The Assembly further recommends that the Committee encourage the signature of the Data Protection Convention by non-member states. The Assembly underlines the need "to reinforce the protection of all people regarding the use and storage of personal data, to ensure identical protection for everyone, regardless of the place of storage or where those responsible for the storage are located, and to avoid the risk of dumping in terms of protection."

In the Resolution the Assembly confirms that personal data may only be transferred "to another State or organisation where such State or organisation (04046) ensures an equally adequate level of protection for the intended data transfer". The Assembly adds that "[t]ransfers of personal data that violate the right to protection of private life under Article 8 of the European Convention on Human Rights may be the subject of proceedings before the national courts and, as a last resort, before the European Court of Human Rights."

• Recommendation 1984 (2011) on the protection of privacy and personal data on the Internet and online media, 7 October 2011
http://merlin.obs.coe.int/redirect.php?id=15622 EN FR

• Resolution 1843 (2011) on the protection of privacy and personal data on the Internet and online media, 7 October 2011
http://merlin.obs.coe.int/redirect.php?id=15623 EN FR

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EUROPEAN UNION

Council of the EU: Conclusions on the Open Internet and Net Neutrality in Europe

On 13 December 2011 the 3134th Transport, Telecommunications and Energy Council meeting was held in Brussels.

The Council underlines that ICT contributes significantly to economic growth, innovation and job creation in the EU.

An important policy objective according to the Council is a competitive digital single market which offers affordable and secure high bandwidth communications and rich online content, applications and services.

The Council notes that, in spite of the crucial role ICT plays in the European economies, the creation of a well-functioning competitive digital single market by 2015 still poses challenges that need to be addressed. These challenges lie in removing barriers that hinder cross-border electronic services, including the promotion of open and interoperable standards for Quality of Service in IP-based interconnection across networks.

With the establishment of a competitive digital single market the open and neutral character of the Internet must be preserved, ensuring the maintenance of a robust best efforts Internet for all with respect to fundamental rights, such as media pluralism, linguistic diversity, freedom of expression and information, as well as freedom to conduct business.

The open character of the Internet fosters innovation by creating a level playing field for all actors involved and contributes to the fulfillment of the goals of the Digital Agenda for Europe. The Council recognises that timely implementation of the objectives of the Digital Agenda for Europe will further spur growth and innovation in Europe.

The Council considers net neutrality (consumers' unrestricted access to networks that participate in the Internet) as a policy objective. Net neutrality as a policy objective is already identified in Article 8 of Directive 2002/21/EC (Framework Directive). Examples can be found in aspects such as the promotion of the ability of end users to access and distribute information or run services and applications of their choice

and the increased transparency in the characteristics and conditions of the Service Providers and the powers conferred upon the National Regulatory Authorities to impose minimum requirements on quality of service.

Moreover, the Council invites the European Commission to encourage its dialogue with member states and stakeholders on net neutrality, while supporting member states in ensuring the rapid development of broadband.

The Council invites member states to ensure the open and neutral character of the internet as their policy objective.

Finally, the Council invites stakeholders to develop strategies and economic choices that support an open internet platform, thus preventing the exclusion of small players and innovative models and enabling access to or transmission of online content, applications and services.

• Council of the European Union conclusions on the open internet and net neutrality in Europe, 13 December 2011
http://merlin.obs.coe.int/redirect.php?id=15619 EN

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OSCE

OSCE: Why Free Internet Matters

Dunja Mijatović, the OSCE Representative on Freedom of the Media, laid out several basic principles on Internet governance in a position paper released in December.

Arguing that the Internet is becoming, more and more, an indispensable tool for all citizens to receive, seek and impart information, she said that governments have an obligation to enable their citizens to access the Internet unhindered; that they must create a legal environment that allows for independent and pluralistic media and the free flow of information across borders.

Mijatović said that governments have a role to play when it comes to Internet content, protecting children, and fighting racism and cybercrime. The question, she said, is not whether governments should or should not regulate the Internet, but how, what and to what extent content should be regulated. Restrictions are legitimate only if they are in compliance with international norms and standards, are necessary for a democratic society and set forth clearly by law.

The Representative argued for broad access to the Internet. Access to digital networks and services should be unhindered and non-discriminatory - network neutrality should be safeguarded. Online information and traffic should be treated equally regardless of the device, content, author, origin or destination.

Mijatović also said that governments across the OSCE region should provide affordable broadband access to all their residents. And while countries have a legitimate interest to combat piracy, restricting or cutting off users' access (for instance with the "three-strikes" approach) is a disproportionate response and incompatible with OSCE commitments. Access to the public domain is important for both technical and cultural innovation and must not be endangered through the adoption of excessive provisions related to patent and copyright law, she said.

Freedom of the media is not reserved for media companies or editorial offices, Mijatović said. Rights to freedom of expression apply to all forms of journalism that is meant for public distribution, whether professional or citizen. It is a basic human right and cannot be divided into traditional media and new media.

Today's news is social, she said. Social media and social networks change the way news is generated and accessed. They influence media in three ways: as a tool to create content, to distribute and impart information and to seek, receive and access information. Social media and social networks themselves are becoming instrumental to the exercise of the right to media freedom and freedom of expression.

Finally, Mijatović argued for Internet literacy, which is the result of media education that enables people to make informed decisions about their use of the Internet, evaluate the accuracy and possible bias of online information and to protect minors from possibly harmful content. A non-protectionist approach is a key to engaging students in media literacy. Young people should not be viewed as victims who need to be rescued from the excess of their culture, but instead should be empowered to make sound judgments about their own online activities. An educated mind is the best filter, she said.

• OSCE Representative on Freedom of the Media, "Internet Freedom: Why It Matters"
http://merlin.obs.coe.int/redirect.php?id=15614 EN

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NATIONAL

AT-Austria

BKS Treats Sponsor Logo Wall in Sports Broadcasts as Product Placement

In a decision of 14 December 2011, the Austrian *Bundeskommunikationssenat* (Federal Communications Board - BKS) commented on the character of sponsor logo walls and sew-on badges worn by experts in sports broadcasts and ruled that unlawful product placement had taken place in a specific case.

The case concerned the broadcast of a football match by *Österreichischer Rundfunk* (Austrian public service broadcaster - ORF). During the pre-match coverage from the stadium concerned, the presenter interviewed a football expert. One camera shot showed the expert in front of a transparent wall displaying four colourful logos of four different brands. In addition, two other company logos were pictured, covering a large area (8 x 5cm and 7 x 3cm) of the expert's jacket. On average, these logos covered a total of 50%-60% of the screen. The same shot was used during the half-time and post-match analysis. In all, the company logos were visible for more than five minutes. At the start of both the pre-match coverage and the match itself, the broadcaster displayed the message "P - supported by product placement" at the top of the screen.

In its assessment, the BKS agreed with the decision of the *Kommunikationsbehörde Austria* (Austrian Communications Authority - KommAustria) of 18 October 2011, which stated that product placement had taken place and that the brands had been given excessive prominence. Although ORF agreed that the logos on the expert's jacket constituted product placement, it disputed this in relation to the logo wall. ORF argued that interview positions in the stadium depended firstly on its contract with the Bundesliga and secondly on the stadium rights of the club concerned, which was also responsible for the layout of the official logo walls. Regardless of that, however, ORF claimed that neither the Bundesliga nor the football clubs had an influence on the actual inclusion of logos in ORF programmes. ORF did not receive any payment or any other remuneration in return for conducting interviews in front of a logo wall.

Referring to KommAustria's decision, the BKS disagreed with ORF's argument. The sole purpose of the aforementioned contractual provisions was to ensure that the relevant logos were actually included in a broadcast. According to the BKS, it was therefore by definition a case of product placement in the form of inclusion of brands in a broadcast in return for payment or a similar service.

ORF also disputed KommAustria's view that the display of the logos had not been justified on either dramatic or editorial grounds. When drawing up this criterion, KommAustria had referred, *inter alia*, to the relevant guidelines of the German *Landesmedienanstalten* (*Land* media authorities). ORF argued that the relevant provision of the current *ORF-Gesetz* (ORF Act) no longer required such a dramatic or editorial justification, in contrast to a previous version ("necessary"). It said that KommAustria had therefore unlawfully reconstructed a criterion which had been deliberately removed by the legislature during a reform of the Act.

This argument did not convince the BKS. The view that a dramatic or editorial justification could be used to assess whether a brand had been given excessive prominence was directly supported by the origins of the provision of the EU Audiovisual Media Services Directive (2010/13/EU) in connection with the European Commission's interpretative communication of 28 April 2004 on certain aspects of the provisions on televised advertising.

The BKS also agreed with KommAustria's opinion on the intensity of the sponsors' logos and explained that the logos on the expert's jacket and the sponsors' wall had been presented in an extremely prominent and striking manner on account of their excessive size and the length of time for which they had been visible during the interview and commentary scenes. The logos had therefore been given excessive prominence, infringing the relevant provisions of the ORF Act.

• *Entscheidung des BKS vom 14. Dezember 2011 (GZ 611.009/0007-BKS/2011)* (BKS decision of 14 December 2011 (GZ 611.009/0007-BKS/2011))
http://merlin.obs.coe.int/redirect.php?id=15629 DE

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BG-Bulgaria

Film Industry Funding 2012

One of the most discussed topics among Bulgarian film industry experts at the beginning of 2011, was the declaration as unconstitutional of the amended Art. 17 of the Film Industry Act (Закон за филмовата индустрия Обн . ДВ . бр .105 от 2 Декември 2003463), which regulates the value of the State subsidy for film production in Bulgaria by the Constitutional Court (see IRIS 2011-5/8).

Up to the end of 2011 the Bulgarian Parliament did not revoke the new wording of Art. 17 of the Film Industry Act and the big question for all was what would be the amount of the State subsidy for producing Bulgarian films in 2012.

The Council of Ministers and the Parliament were obliged to take into consideration the Constitutional Court's decision and officially stated that the subsidy for 2012 is at the value of the average budgets for the previous year of 7 feature films, 14 feature-length documentaries and 160 minutes animation.

In figures, the amount of the subsidy for 2012 is BGN 12,100,000 or approximately less than EUR 6 Mio. This sum is EUR 1 Mio more than the subsidy for 2011, but in the same time, bearing in mind the official statistics for the film budgets in 2011, the determined subsidy is EUR 3 Mio less than the provided value according to the original wording of Art 17.

Additionally, there is still no positive development in connection with the idea for a tax credit for film producers in Bulgaria (see IRIS 2010-5/11).

Cumulatively, these facts make the film industry in Bulgaria feel unsatisfied and no optimism is on the horizon. The official governmental forecasts for the film production subsidy for 2013 and 2014 are for another reduction, to the sum of BGN 10,100,000 (approximately EUR 5 Mio).

• Тригодишна бюджетна прогноза за периода *2012-2014* в програмен формат на Министерство на култура (Budget forecast for the Ministry of Culture 2012-2014)
http://merlin.obs.coe.int/redirect.php?id=15590 BG

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Criteria for Evaluation of Damaging Content for Children

On 25 October 2011, the Council for Electronic Media and the State Agency for Child Protection drew up criteria for the assessment of content that is adverse to, or potentially damages, the mental, moral and/or social development of children, in compliance with Art. 32, para. 5 of the Radio and Television Act.

The following requirements are among these criteria concerning the programme content of media:

1. Elements of the programme content that may have an adverse impact or create a risk of harm to children, should be located in programme zones where children are not supposed to be the attracted audience.

2. Media service providers distributing audiovisual works/movies consider the categorisation of movies according to Art. 37, para. 4 of the Law on Film Industry, which is implemented by the National Film Rating Committee (see IRIS 2004-6/103).

3. Media service providers do not allow commercial communications directed at children or such containing an involvement of a child or a participation of a child using alcohol, cigarettes or tobacco products, drugs or treatment, except if prescription-based, and do not encourage immoderate consumption of such beverages and products.

4. Potentially harmful to children are such transmissions or other elements of the programme that contain pornography or sexually explicit scenes or scenes which:

a) contain unjustified acts of violence against people and/or animals;

b) cause incitement to criminal and/or anti-social behaviour;

c) contain shocking scenes children usually cannot witness e.g. dead, mutilated human bodies, or victims of violence or other medical manipulations etc.

• Критерии за оценка на съдържание , което е неблагоприятно или създава опасност от увреждане на физическото , психическото , нравственото и /470473470 социалното развитие на децата (Criteria for the assessment of content that is adverse to, or potentially damages, the mental, moral and/or social development of children)
http://merlin.obs.coe.int/redirect.php?id=15589 BG

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CH-Switzerland

Proposal to Change System for Collecting Reception Fee

The Federal Council (the Swiss government) has been instructed by the Federal Assembly (parliament) to devise a new system for collecting the reception fee to bring the financing of the public service into line with the evolution of technology. Thus the motion tabled by the transport and telecommunications committee of the National Council (CTT-N), which was passed on to the Federal Council in September 2011, provides that the fee in future would cease to be dependent on the possession of an appliance allowing the reception of radio or television programmes, and would instead be levied on all households and companies. There would nevertheless be a provision for a number of exceptions, so that small businesses and some households would be exempt on social grounds.

In Switzerland the reception fee constitutes the main source of financing for the public-sector radio and television broadcasters. The current fee collection system links the obligation to pay the fee to the possession of a reception appliance. It was introduced at a time when very few people were able to watch television or listen to the radio, and it therefore made sense to limit the requirement to pay the fee to those people who could actually watch or listen to the programmes. The situation is quite different today, as everyone has ready access to radio and television programmes, particularly with the increasing use of multifunctional appliances.

The CTT-N motion is based on a report drawn up by the Federal Council in January 2010. The report noted that the evolution in technology constantly makes it more difficult and more expensive to abide by an obligation to pay linked to the possession of a reception appliance. Moreover, there are relatively few possibilities for financing radio and television programmes other than by means of a fee; it is therefore essential to be able to count on an effective collection system capable of ensuring the financing of public-service radio and television. The current system is not suited to the use of multi-function appliances.

After examining a number of variations, the Federal Council has recommended a fee collection system that is no longer linked to the possession of a reception appliance. As a result, every household and company will be required to pay a fee, regardless of whether or not they possess such an appliance. According to the Federal Council, the cost of collecting the fee under such a system should be lower than the cost of the present system, since it would cease to be necessary to determine or check whether households and companies have an appliance for receiving radio or television programmes. The Federal Council also believes it is legitimate for everyone to participate financially in the provision of a public service, since this is an essential aspect of ensuring democracy.

The Federal Council will submit a bill to Parliament, probably in 2012, but the new fee will not be introduced before 2017. The task of collecting the fee will be allocated by means of a public tender procedure.

• Motion tabled by the Transport and Telecommunications Commission of the National Council, 23 February 2010 DE FR IT

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DE-Germany

Decision on Injunction against Reporting that Identified Defendant

On 11 January 2012, the *Oberlandesgericht München* (Munich Appeal Court - OLG), in a dispute over costs, ruled in summary proceedings on a temporary injunction against a publisher that had been issued by the *Amtsgericht München* (Munich Local Court) and later declared lifted by the parties in appeal proceedings. The injunction had prevented the publisher from reporting on the main proceedings in a manner that identified the defendant. The OLG had to consider under what circumstances an injunction could be enforced in order to provide temporary legal protection.

The case followed a series of programmes broadcast on German commercial television, documenting, among other things, how a female journalist had posed as a 13-year old girl in online chat forums in order to make contact with and meet men. At these meetings, which were secretly filmed by the TV broadcaster, the part of the alleged 13-year old was played by adult actresses. The programme-makers claimed that the aim of the series, which attracted huge public attention, was the conviction of male paedophiles.

Following these broadcasts, the Munich public prosecutor's office launched criminal proceedings against two of the men concerned for attempted sexual abuse of children. Both before and during the court proceedings against one of the two defendants, several newspapers and online media reported on the case, unlawfully identifying the accused by printing his first name and the initial of his surname, his place of residence and his occupation, as well as photographs of him, in which only his face was blanked out.

In order to prevent such reporting in his own case, the defendant in the second criminal procedure obtained a temporary injunction against the publisher of one of the newspapers, prohibiting it from reporting on the main proceedings in a way that identified him. The publisher appealed to the *LG München I* (Munich District Court I) against this injunction. Finally, after the publisher had submitted a declaration to cease and desist, the parties declared the matter closed, with the result that the LG only had to decide on the costs, which it charged to the publisher. The OLG upheld the LG's decision on costs after the publisher appealed against them. The costs had been attributed on the basis of what the court thought the outcome of the case would have been if the matter had not been settled.

Explaining its ruling, the OLG began by acknowledging that, in order to demonstrate a risk of first infringement sufficient to justify the granting of a temporary

injunction against the publisher, strict requirements needed to be met. However, in the present case, the newspaper concerned had regularly reported on criminal proceedings that had attracted significant public interest. It had also reported on the first procedure relating to the aforementioned television programme in a way that had identified the defendant. There had therefore been a risk of first infringement. There had been reason to fear that the second defendant would also be the subject of such reporting. In order to prevent such a temporary injunction, the publisher would have had to dispel this fear, which it had failed to do. In the weighing up of conflicting interests that is necessary when deciding whether to grant a temporary injunction, the court concluded that the risk to the personality rights of the defendant and his family outweighed the publisher's reporting rights. It noted that particular consideration should be given to the fact that the public's right to information could be fulfilled through reporting in a way that protected the defendant's anonymity.

• *Beschluss des OLG München vom 11. Januar 2012 (Az. 18 W 1752/11)* (Ruling of the Munich Appeal Court of 11 January 2012 (case no. 18 W 1752/11))
http://merlin.obs.coe.int/redirect.php?id=15628 DE

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Prominent Figures Liable When Promoting Investment Companies

In a ruling of 17 November 2011, the *Bundesgerichtshof* (Federal Supreme Court - BGH) decided that prominent figures who advertise investment funds that ultimately fail can, in some circumstances, be liable for losses suffered by investors. This particularly applies to advertisers who refer to their specialist knowledge in advertising for investment products.

The decision was taken in the case of a former German Defence Minister, who was sued for damages by several investors because of his appearance in an advertisement for an investment fund. In the first instance, the politician was ordered to pay damages. However, the *Oberlandesgericht* (district appeal court) upheld the appeal against the first instance ruling, overturned the decision and rejected the claim. The BGH has now quashed the appeal ruling and referred the case back to the district appeal court for a new decision.

The BGH considers the defendant to be liable on account of information contained in a prospectus. According to its established case law, liability for information contained in an investment fund prospectus is shared not only by the publisher of the prospectus and the company's management, but also by people who support the company, who exert particular influence on the structure of the actual investment model and who therefore share responsibility for it.

The BGH ruled that the "product information" published by the fund's parent company along with the issue prospectus, as well as the press articles that were distributed with the prospectus, should be considered as common components of an investment prospectus, since they had been distributed together and used jointly to attract investors. The "product information" served as an easy-to-read supplement to the prospectus. In addition, however, when viewed in isolation, it gave the impression of being a comprehensive description of the investment fund and therefore constituted, in its own right, a prospectus in the legal sense. The general comments made by the defendant in the "product information" were supplemented by the two magazine articles distributed with it. The defendant's comments in these articles provided further evidence of his role, his influence on the company and his positive assessment of the reliability of the advertised investment products. An average person interested in the investment fund could interpret the comments of a (now emeritus) university law professor and former Federal Minister, who was portrayed as an expert, as offering an additional guarantee of the security and success of the investment fund. The fact that he actually had little influence as an advisory committee chairman was not significant in the overall context of the publications, since it did not prevent readers from acquiring an objective sense of confidence. The fact that he had stepped down from the advisory committee before the plaintiffs decided to invest did not release him from liability. His previous comments were not merely a retrospective assessment of the investment model, but also created the expectation that he would continue to vouch for the interests of investors and investment companies through his political and business contacts.

• *Urteil des Bundesgerichtshofs (Az. III ZR 103/10) vom 17. November 2011* (Ruling of the Federal Supreme Court (case no. III ZR 103/10) of 17 November 2011)
http://merlin.obs.coe.int/redirect.php?id=15630 DE

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Approval of 15th Inter-State Broadcasting Agreement

Having been adopted by 14 *Land* parliaments in recent months, the 15th *Rundfunkänderungsstaatsvertrag* (Agreement Amending the Inter-State Broadcasting Agreement) has now been approved by the parliament of North Rhine-Westphalia and finally, on 16 December 2011, by the *Landtag* of Schleswig-Holstein.

The agreement concerns the financing of public service broadcasting. In response to changing user behaviour, it regulates the switch from a device-based licence fee to a household-based tax from 2013, with continued exemptions (e.g., for people receiving income support or unemployment benefit, or for deaf-blind people) and reductions (e.g., for partially deaf or blind people and those with a disability rating of 80 or above) (see IRIS 2010-6/21).

For business premises, the level of the tax depends on the number of employees. For example, under the ten-step sliding scale, places of business with eight employees or fewer will pay one-third of the licence fee. Those with between 50 and 249 employees will pay five times the licence fee, while those with 500 to 999 staff members will pay 20 times the amount. At the top of the scale, businesses with more than 20,000 employees will have to pay the equivalent of 180 licence fees.

In addition to this, owners of commercial premises with hotel and guest rooms will pay one-third of the fee for each room from the second room upwards. The same proportion must also be paid for each licensed motor vehicle used for business purposes, although an exemption applies for one vehicle per place of business.

After ARD and ZDF requested a higher level of funding for the 2013-2016 licensing period, leading to speculation in areas of the media and among the public that the broadcasting tax would be raised as part of the financing reforms, the *Kommission zur Ermittlung des Finanzbedarfs* (Committee for the Investigation of Financial Requirements - KEF) made clear in a statement that the monthly fee would remain unchanged at EUR 17.98, at least at the start of the forthcoming four-year licensing period, subject to a review of the level of revenue actually generated.

In accordance with its provisions, the 15th Agreement Amending the Inter-State Broadcasting Agreement will enter into force on 1 January 2013.

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

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Bundestag Adopts Act Abolishing Access Obstruction Act

On 1 December 2011, the *Bundestag* (lower house of parliament) adopted the *Aufhebungsgesetz zum Gesetz zur Erschwerung des Zugangs zu kinderpornographischen Inhalten in Kommunikationsnetzen* (Act abolishing the Act on the obstruction of access to child pornography via communication networks - *Zugangserschwerungsgesetz*).

The *Zugangserschwerungsgesetz*, which entered into force on 17 February 2010, was designed, *inter alia*, to make it possible to block Internet sites containing child pornography (see IRIS 2010-4/19). However, after heavy public criticism, in accordance with the coalition agreement of the then newly-formed Federal Government and on the basis of a decree of the Federal Ministry of the Interior, it was never implemented (see IRIS 2011-5/19).

On 17 December 2011, the *Bundesrat* (upper house of parliament) decided not to file an objection against the Act abolishing the *Zugangserschwerungsgesetz*, with the result that the latter ceased to be in force when the Act was executed by the Federal President and announced in the Federal Gazette.

• *Entwurf eines Gesetzes zur Aufhebung von Sperrregelungen bei der Bekämpfung von Kinderpornographie in Kommunikationsnetzen* (Draft Act abolishing obstruction rules in the fight against child pornography via communication networks)
http://merlin.obs.coe.int/redirect.php?id=15633 DE
• *Entscheidung des Bundesrats* (Decision of the *Bundesrat*)
http://merlin.obs.coe.int/redirect.php?id=15634 DE

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Minister-Presidents Sign New Inter-State Gambling Agreement

On 15 December 2011, the Minister-Presidents of all the *Länder* except Schleswig-Holstein signed a new *Glücksspielstaatsvertrag* (Inter-State Gambling Agreement) at the conference of Minister-Presidents in Berlin, after 15 *Länder* had expressed support for the liberalisation of the gambling industry in the *Bundesrat* (upper house of parliament). Schleswig-Holstein did not sign the draft agreement because it had already adopted its own Gambling Law in September 2011, which entered into force on 1 January 2012.

In the field of sports betting, the *Glücksspielstaatsvertrag* makes provision for 20 national licences to be granted to private betting companies, with an initial duration of seven years. However, the State will continue to hold a monopoly where lotteries are concerned. Casino games such as poker can, as before, only be organised by casinos.

The necessary ratification by the parliaments of the individual *Länder* will begin after the agreement has been examined by the European Commission. The Commission had queried an earlier draft amendment to the previous *Glückspielstaatsvertrag* in July 2011, referring in particular to its incompatibility with the

basic freedoms enshrined in EU law and competition regulations.

• *Pressemitteilung der Ministerpräsidentenkonferenz vom 15. Dezember 2011* (Press release of the conference of Minister-Presidents of 15 December 2011)
http://merlin.obs.coe.int/redirect.php?id=15632 DE

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BKartA Approves Liberty's Takeover of Kabel BW

On 15 December 2011, the *Bundeskartellamt* (Federal Cartels Office - BKartA) approved the takeover of the cable network operator Kabel Baden-Württemberg by the American media group Liberty. After the BKartA had expressed serious concerns about the takeover in October (see IRIS 2012-1/20), Liberty's German subsidiary Unitymedia was able to dispel its concerns by making certain commitments.

For example, Unitymedia will no longer encrypt digital free-to-air channels, enabling cable customers in North Rhine-Westphalia and Hessen to receive around 70 digital channels without a smartcard or additional charges. Unitymedia will also give up the exclusive rights it currently enjoys under its contracts with building firms. Users of Unitymedia's TV service will also therefore be able to subscribe to other providers' bundled telecommunications services. Liberty also grants special cancellation rights for licensing contracts covering more than 800 homes that have more than three years' contracts still to run.

The BKartA particularly welcomed the decision to stop encrypting digital free-to-air channels, which will make it easier for competitors to apply for licensing contracts and have a positive impact on the feed-in market. In addition, the granting of special cancellation rights will enable building firms to open up competition to cheaper network operators that they would not before have been able to.

The BKartA believes that these commitments will strengthen the competitive opportunities of other providers and compensate for the negative effects of the merger. It therefore approved the takeover, subject to the aforementioned obligations being met.

• *Pressemitteilung des BKartA vom 15. Dezember 2011* (BKartA press release of 15 December 2011)
http://merlin.obs.coe.int/redirect.php?id=15631 DE

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ES-Spain

Spain Implements Website-Blocking 'Sinde Law'

Spain's new government has implemented the controversial Royal Decree based on the Intellectual Property final provision contained in the Ley de Economía Sostenible (Act for Economic Sustainability), informally known as *Ley Sinde* (Sinde Act), after former Minister of Culture Ángeles González-Sinde.

The Sinde Act was passed by the Spanish parliament in February 2011, but opposition from the public kept the socialist government from implementing the law. The main aim of the law is to protect copyright owners, creators and other rightsholders against financial harm caused by illegal downloading.

Under the act, copyright and intellectual property right owners should be able to report suspected infringing websites to a new governmental commission. The commission then determines the merit of the complaint and whether action should be taken against the company/individuals running the website in question and/or against the ISPs providing service to the website. If the claim is found to have merit, the complaint is passed on to a Spanish judge who then rules on whether the infringing website should be shut down or not. The Spanish government aims at making this an expedited process, with a goal of 10 days per complaint.

Unexpectedly, the Sinde Act has cancelled out the controversial Spanish private copying levy, applied to media content storage devices and supports. The private copying levy was established in 1987, but has been severely criticised by Spanish and European judiciary, see IRIS 2011-5/20, IRIS 2011-4/23 and IRIS 2010-10/7), mainly because of its indiscriminate application to all types of equipment and devices, including those likely to be used for purposes clearly unrelated to private copying (e.g., when acquired by a company, a professional or a public administration that will not use them for private copying purposes).

After negotiating with the sector, the government has decided to provide rightsholders with fair compensation for acts of private copying out of the federal budget. The exact amount agreed upon between the parties involved could range between EUR 37 and EUR 42 million, according to sources at the Ministry for Education, Culture and Sports. This money will come out of the State budget and will be directed towards copyright management societies in charge of distributing it to the content creators.

• Real Decreto 1889/2011, de 30 de diciembre, por el que se regula el funcionamiento de la Comisión de Propiedad Intelectual, BOE no. 315 de 31 de diciembre de 2011 (Royal Decree 1889/2011 of 30 December 2011 regulating the Intellectual Property Commission, Official Journal no. 315 of 31 December 2011)
http://merlin.obs.coe.int/redirect.php?id=15612 ES

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FR-France

On-line Digital Recording Service for Downloading Programmes from DTV Channels without their Authorisation Banned

A company, currently in enforced liquidation, that made available to the public a free on-line digital recording service allowing the downloading of the programmes of the 18 national DTV channels to the service user's computer, was summoned to appear in court to answer claims of infringement of copyright by a number of these channels, who were holders of intellectual property rights in respect of the programmes. In the initial proceedings, the regional court had allowed their claims and pronounced measures banning the downloading of the programmes at issue. In support of its appeal, the company in the case claimed that the functioning of the disputed service was based on the successive generation of two copies, each covered by an exception to the monopoly of copyright and neighbouring rights: the temporary copy and the private copy, initiated respectively by separate persons - the temporary copy was initiated by the service and the private copy by the user. The court of appeal in Paris found, without contesting the modus operandi of the service, that the channels were right in claiming that the encrypting and decrypting operations required had no effect on the nature of the service, which consisted of making a single copy that was not temporary but was intended to be saved by the user on a computer hard drive or on any other durable digital medium, for the entire time necessary for the user's requirements (the user being the only person who might delete a file), i.e., for an unlimited period of time. The court found that the operation consisting of the user decrypting a copy encrypted previously by the service could not be regarded as generating a new copy separate from the initial copy. Thus the service generated one single copy, with its own economic value since each copy was attached to a user, and the amount of the advertising revenue generated by the site was directly linked to the number of users. Therefore the copy made by the company in this case did not meet the definition of a temporary copy as defined in Articles L. 122-5-6°and L. 211-3-5°of the Intellectual Property Code. The company was also wrong in claiming the exception for making a private copy, since the copy was not intended for the use of the person making the copy but for that of the final user.

The court also upheld that the reproduction of the semi-figurative mark of one of the channels on the home page of the site at issue, with the advertising message *"Gratuit enregistrez toute la TNT"* (record everything on DTV for free), constituted its appropriation by the appellant company for its own promotion to the public of the service it was offering, which constituted an infringement of copyright. The court however rejected the claims made on the grounds of unfair and parasitic competition, as the facts of the case in this respect were no different from those invoked for the infringement of copyright. The court upheld the measures banning the downloading of the respondents' programmes pronounced in the initial proceedings. In evaluating the prejudice suffered by the channels, the court referred to the average cost of a video on demand, which was EUR 2 per copy made of each programme, arriving at a figure of between 10, 000 and 1.2 million Euro, which is to be included in the liabilities of the liquidation of the appellant company.

• *Cour d'appel de Paris (pôle 5, ch. 1), 14 décembre 2011 - C. Rogeau, liquidateur judiciaire de Wizzgo c. Métropole Télévision, TF1 et a.* (Court of appeal in Paris (unit 5, chamber 1), 14 December 2011 - C. Rogeau, official liquidator of Wizzgo v Métropole Télévision, TF1 et al.)
FR

Amélie Blocman
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CSA Recommendation on the Election of the French President

On 30 November 2011, the audiovisual regulatory authority (*Conseil Supérieur de l'Audiovisuel* - CSA), after obtaining the opinion of the Constitutional Council, adopted a recommendation on the election of the French President, which is to be held on 22 April and 6 May 2012. Under Article 1 of the Act of 30 September 1986, the CSA is responsible for ensuring "observance (04046) of the pluralist nature of the expression of currents of thinking and opinion"; Article 16 requires it to adopt a recommendation and to define if necessary the conditions for the production and programming of broadcasts as part of the official audiovisual campaign.

This recommendation, together with the CSA's deliberation of 4 January 2011 on the principle of political pluralism at election time, which it supplements, lays down the scheme applicable to coverage of the election campaign in the audiovisual media. It has been applicable since 1 January 2012 to all radio and television services, in whatever way they are broadcast by any means of electronic communication. The text does not apply, however, to on-line services devoted

to election propaganda for candidates or the political formations backing them. In the CSA report drawn up at the end of the election in 2007, several proposals were expressed in cooperation with radio and television channels, and they are incorporated in this text. The aim was to better reconcile the demands of political pluralism during the election period with freedom of audiovisual communication. As a result, the CSA has reduced the duration of application of its recommendation (18 weeks instead of 22 in 2007) and made the supervision methods more flexible. It has also defined the notions of "equity" ("to appreciate observance of this principle, the CSA shall take into account firstly the capacity to manifest the intention to stand as a candidate and secondly the representativness of the candidate"), "declared or presumed candidacy", and "backing". The recommendation creates three successive periods, corresponding to the various stages in the election campaign. From 1 January to 19 March, the day before the day on which the Constitutional Council publishes the list of candidates, declared or presumed candidates and their backers have the benefit of equitable presentation and access to the audiovisual media. From 20 March to 9 April, the day before the official election campaign begins, the candidates and their backers will have equal speaking time and equitable time on the air on the audiovisual media. From 9 April to 6 May, the candidates and their backers will have equal speaking time and time on the air on the audiovisual media. Throughout the campaign, the CSA will be required to ensure observance of the principle of equity and subsequently the principle of equality. With a view to transparency, the speaking and broadcasting times of the candidates and their backers will be published regularly on the CSA's Internet site. In addition to the lists of speaking time and time on the air that the CSA may itself produce, the channels are also required to produce and send in their own lists. If any discrepancy is noted, the CSA should contact the editors concerned and ask them to remedy the situation so that the principles of equity and/or equality may be observed by the end of each of these periods.

• *Recommandation n°2011-3 du 30 novembre 2011 du Conseil supérieur de l'audiovisuel à l'ensemble des services de radio et de télévision concernant l'élection du Président de la République, Journal officiel, 6 décembre 2011* (Recommendation No. 2011-3 of 30 November 2011 by the *Conseil Supérieur de l'Audiovisuel* to all radio and television services regarding the French presidential election, Official Gazette of 6 December 2011)
http://merlin.obs.coe.int/redirect.php?id=15627 FR

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CSA Amends Conditions for Making Available Programmes Likely to Shock Minors

On 20 December 2011, the audiovisual regulatory authority (*Conseil Supérieur de l'Audiovisuel* - CSA) adopted a deliberation on the protection of young audiences, deontology, and the accessibility of programmes on on-demand audiovisual media services (AMSs), replacing the deliberation of 14 December 2010 (see IRIS 2011-2/27). Under Article 1 of the Act of 30 September 1986, the CSA is required to protect young audiences from programmes that might be damaging to their physical, mental or moral development. More particularly, Article 15 of the Act requires it to ensure the implementation of any means suited to the nature of the on-demand audiovisual media services. The development of a method of consumption that allows viewers extensive freedom of choice is bound to increase the potential for young people to be exposed to content that might be offensive. This has led the CSA to lay down specific rules for on-demand audiovisual media services. The programmes are classified according to five levels of acceptability in relation to the need to protect children and young people, which the editor must implement, more particularly by adopting special signing (pictogram and the words "not suitable for anyone under the age of 04046."), which must be indicated to viewers each time the programme is mentioned. The editor of an on-demand AMS that offers programmes "for the general public" will include a special area in its catalogue where families and young people will find programmes that are solely intended "for the general public", excluding any excerpts, programme trailers and advertisements for content or services to which young people have restricted access. The purpose of the new deliberation is to set new arrangements in place for programmes in Category V ("cinematographic works that may not be viewed by persons under 18 years of age, and pornographic or extremely violent programmes that may only be viewed by an informed adult public"), because of the repeal on 12 July 2011 of the previous arrangement applicable to these programmes. These programmes may only be marketed as part of offers requiring payment, by subscription or pay-per-view. They must be kept separate in a special area, as must the images, descriptions, excerpts, trailers and advertisements for these programmes. The text makes provision more particularly, for the category in question, for the abolition of the time restrictions initially set up for on-demand AMSs for subscribers (and checking the user's age by requiring a copy of his/her ID card in order to override the restriction). In return, the special area for Category V programmes is kept "locked" at all times and activated the first time the service is used, by adopting a more secure personal code. This arrangement is scheduled to come into force six months after publication of the text, to enable operators to carry out the technical adjustments necessary for its implementation.

• *Délibération du 20 décembre 2011 relative à la protection du jeune public, à la déontologie et à l'accessibilité des programmes sur les services de médias audiovisuels à la demande, Journal officiel du 31 décembre 2011* (Deliberation of 20 December 2011 on the protection of young audiences, deontology, and the accessibility of programmes on on-demand audiovisual media services, Official Gazette of 31 December 2011)
http://merlin.obs.coe.int/redirect.php?id=16128 FR

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Strict Regulation by the Conseil d'Etat of the CSA's Powers in Settling Differences

On 7 December 2011, the *Conseil d'Etat* (Council of State) delivered a high-profile decision on the powers of the audiovisual regulatory authority (*Conseil Supérieur de l'Audiovisuel* - CSA) in the settlement of differences. Since 2004, the CSA has had a quasi-jurisdictional power as, under Article 17-1 of the Act of 30 September 1986, it may be referred to by an editor, a distributor of services, or an operator or supplier of access to digital radio or television services, with a view to settling any differences involving the distribution of a radio or television service.

In the case at issue, in the face of the refusal of a channel editor (Métropole Télévision/M6) to allow a company distributing audiovisual services by satellite (AB Sat) to engage in any negotiations whatsoever with a view to concluding a distribution contract, the editor company referred the difference of opinion to the CSA. In a decision made public on 8 July 2008, the authority called on the channel to send the distributor a commercial proposal for distribution within six months of notification of the decision. The channel therefore appealed to the Conseil d'Etat to cancel the CSA's decision. The Conseil d'Etat took advantage of the opportunity to lay down a number of major principles intended to provide a clearer definition of the perimeter of the CSA's powers in settling differences. The Conseil d'Etat stated that these powers, conferred by Article 17-1 of the Act of 30 September 1986, must be reconciled with the contractual freedom enjoyed, within the limits laid down by law, by the editors and distributors of audiovisual services. Thus, when a dispute was referred to it is based on a contractual relationship between an editor and a distributor or by offer of a contract, the CSA was acting within its powers, in order to ensure the observance of all the principles and obligations listed in Article 17-1 of the Act of 30 September 1986, if, under the supervision of a judge, it issued orders in relation to the conclusion, content or performance of agreements between the parties to the difference. On the other hand, when the case referred to did not involve a contractual relationship or an offer of a contract, as was the case here, the CSA did not have the authority to issue an order to make such an offer except in two cases: firstly, in respect of an operator specifically required by law to make a service available or to resume the same, or secondly if issuing such an order is necessary in order to prevent a blatant infringement of the pluralist expression of currents of thought and opinion, to preserve public order, to meet the demands of public service, or to protect minors, human dignity, or the quality and diversity of programmes.

In the case at issue, the Conseil d'Etat noted that the private editor of the free television service that was a party to the dispute was under no legal obligation to make its signal available to a distributor using satellite. Furthermore, the distributor and the editor were not involved in any contractual relationship at the time the difference arose between them, and the editor had not made any offer to make its programme available. Consequently, the CSA, which had noted no blatant infringement of the principles listed above but merely discriminatory behaviour on the part of the editor, to the detriment of the distributor, could not issue the disputed order as doing so exceeded its powers. The Conseil d'Etat therefore cancelled the CSA's disputed decision.

• *Conseil d'Etat (5e et 4e s.sect.), 7 décembre 2011 - Société Métropole Télévision* (Conseil d'Etat (5th and 4th sub-sections), 7 December 2011 - the company Métropole Télévision) FR

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GB-United Kingdom

Regulator Fines Iranian News Channel for Breach of Broadcasting Code

The Office of Communications (Ofcom), the UK communications regulator, has imposed a fine of GBP 100,000 on Press TV, an Iranian news channel broadcasting in English on the Sky platform under a Television Licensable Content Service licence issued by Ofcom. The fine was for breach of provisions of Ofcom's Broadcasting Code requiring broadcasters to avoid unjust or unfair treatment of individuals or organisations in programmes and that any infringement of privacy in programmes must be warranted (Rules 7.1 and 8.1).

The case concerned a broadcast in July 2009 by Press TV of a news item concerning an attack on a Basij base in Tehran by the supporters of the unsuccessful presidential candidate. The report included interview footage of Mr Maziar Bahari stating that he had sent a report about the attack to Channel 4 News and Newsweek. The report did not make it clear that Mr Bahari was being held in an Iranian jail because he was suspected of being a spy. He had not consented

to giving the interview. It should have been clear to Press TV that the interview was being given under duress, but this was not made clear to viewers. It also amounted to a serious and unwarranted infringement of Mr Bahari's privacy whilst he was in a vulnerable state. It unfairly inferred that Mr Bahari was a biased journalist who might have been involved in the attack.

Ofcom's adjudication against Press TV was sent to it in May 2011, however the broadcaster continued to include the interview in later news footage and referred viewers to a website criticising the adjudication. The decision was referred to Ofcom's Broadcasting Sanctions Committee for consideration of the imposition of a financial penalty under s. 237 of the Broadcasting Act 2006. The committee held a hearing at which the company was represented and noted that in the past a fine had been imposed where breaches were serious, persistent, repeated deliberate, reckless or negligent. It considered that the breaches were serious and that a penalty of GBP 100,000 was appropriate.

• Ofcom, Decision by the Broadcasting Sanctions Committee: Press TV Limited for breaches of the Ofcom Broadcasting Code, BSC 68(11), 1 December 2011
http://merlin.obs.coe.int/redirect.php?id=15609 EN

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Audiovisual Media Services Directive Transposed into the Law of Gibraltar

The Government of Gibraltar has made regulations transposing the Audiovisual Media Services Directive into the Law of Gibraltar. This follows a reasoned opinion from the Commission at the end of 2011 requesting the UK Government to secure such implementation; Gibraltar is a British Overseas Territory that governs its own internal affairs, with some matters - such as foreign relations - remaining the responsibility of the UK Government.

The Audiovisual Media Services Regulations, made under the Interpretation and General Clauses Act, took effect on 20 October 2011. They state that they apply to GBC, the Gibraltar broadcaster, and to all audiovisual media services transmitted by media service providers under Gibraltar jurisdiction. The regulations then repeat the provisions of the Directive in relation to jurisdiction, freedom of reception and the other matters dealt with under the Directive.

The authority responsible for enforcing the new regulations is the Gibraltar Regulatory Authority, established under the Gibraltar Regulatory Authority Act 2000, which acts together with the Gibraltar minister with responsibility for broadcasting. Powers under Gibraltar's Communications Act 2006 are incorporated into the regulations to permit the Minister and the Authority to enforce them and to regulate broadcasting; these include powers to obtain information and to issue directions. The Authority is also empowered to issue codes of practice to broadcasters on matters such as standards and advertising of products to children. Breach of the provisions of the Regulations is made a criminal offence and civil proceedings may also be brought for breach of the Regulations.

• Audiovisual Media Services Regulations 2011 (LN. 20011/207), 20 October 11
http://merlin.obs.coe.int/redirect.php?id=15613 EN

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HU-Hungary

Decision of the Constitutional Court on New Media Laws

On 19 December 2011 the Constitutional Court delivered a decision on the new Hungarian media laws (Decision 1746/B/2010. AB). In its decision the Court annulled several provisions and established the need for further legislation.

During 2010, as it is widely known, the Hungarian Parliament adopted a series of acts, thus it created a new legal and institutional framework of media regulation (see IRIS 2010-8/34). The most important elements of this legislation were:

- Act CIV. of 2010 on Freedom of Expression and on the Basic Rules of Media Content (Media Constitution; see IRIS 2011-1/37); and

- Act CLXXXV. of 2010 on Media Services and Mass Media (Media Act; see IRIS 2011-2/30).

Although the new Acts have been amended several times since their adoption (see IRIS 2011-5/100 and IRIS 2011-3/24), certain elements of media regulation have remained the subject of widespread debates in the following months (see IRIS 2011-4/7). The recent decision of the Constitutional Court touched upon some of these issues.

The main findings of the Court can be summarised as follows:

- The Constitutional Court has established that in the case of written press and websites the protection of certain values (such as human dignity, the rights of persons interviewed, human rights and the right to privacy) in an administrative way can be deemed unnecessary and/or disproportionate. The notion "administrative way" refers in the judgment to any legal procedure other than proceedings by the court. It also

implies the procedures of the media authority, but this is not explicitly mentioned by the text. On this basis the Court has excluded these kinds of media from the scope of the Media Constitution from 31 May 2012. However, it should also be noted that the Court has not found the regulation of the written and internet-based press in itself unconstitutional.

- Furthermore, the Constitutional Court has annulled the provision of the Media Constitution that generally referred to the public interest as a condition of the protection of journalists' sources. At the same time the Court also expressed the need for additional procedural safeguards in cases when authorities seek information about journalistic sources. The Parliament is obliged to establish these guarantees by 31 May 2012.

- The Court also stated that the powers of the *Nemzeti Média és Hírközlési Hatóság* (National Media and Telecommunications Authority - NMHH) to oblige entities within its jurisdiction to provide data for its procedures has to be synchronised with the legal protection of confidentiality, most notably with regulations guaranteeing client-attorney privilege and the protection of journalists' sources of information.

- The Media Act has established the institution of the Media and Telecommunications Commissioner as an ombudsman-like official attached to the NMHH. The role of the Commissioner is to handle complaints related to media content or telecommunications services submitted by members of the public. Although the opinions of the Commissioner are not legally binding, such complaints can be formulated on a wide basis. The Court has found that there is no constitutional reason for enabling the Commissioner to proceed against media service providers and publishers in this order. On these grounds the Court has annulled the regulation relating to the functions of the Commissioner from 31 May 2012.

In general, the decision of the Constitutional Court has called the Parliament to revise the Hungarian media regulation in a number of issues and to adopt the necessary changes to the existing legal framework by the end of this May.

- *1746/B/2010. AB határozat* (Constitutional Court, Decision 1746/B/2010. AB)
http://merlin.obs.coe.int/redirect.php?id=15592 HU

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Significant Amendments to the Film Act

On 1 January 2012 an amendment to Act II. of 2004 on Motion Pictures came into force significantly changing the institutional and funding system of the Hungarian film industry (see IRIS 2004-2/28).

Under the new law the recently established *Magyar Nemzeti Filmalap Közhasznú Nonprofit Zrt.* (Hungarian National Film Fund - MNF) replaces the *Magyar Mozgókép Közalapítvány* (Motion Picture Public Foundation - MMKA), becoming the central body for the support of the Hungarian film industry.

The MMKA was established jointly by the Government and organisations of the film industry; the MNF's founder is the *Magyar Nemzeti Vagyonkezelő Zrt* (Hungarian State Holding Company - MNV) which exercises (under current regulations by the Ministry of National Development) the rights of the State of Hungary as owner of public assets. The head of MNF is the chief executive who shall be appointed by the founder of MNF. The tasks of MNF shall be in particular:

- to operate the system for distributing film subsidies, to monitor the use of these subsidies and to contribute to the development of the system;

- to elaborate principles for tender applications;

- to represent and support the Hungarian film industry internationally;

- to utilise films produced with State support.

The *Filmszakmai Döntőbizottság* (Film Industrial Arbitration Committee) shall be responsible for performing the MNF's task of operating the system of subsidies, in a manner defined in the Code of Subsidies of the MNF. Members of this committee are the CEO of MNF and four Hungarian citizens appointed by the CEO, who have at least five years' professional experience in the film industry.

The MNF shall receive 80% of the 6/45 Lotto Game's gambling tax revenues, which will be approximately HUF 4 billion; this will become the MNF's primary fund.

From 1 January 2012 the *Nemzeti Média és Hírközlési Hatóság* (Office of the National Media and Communications Authority - NMHH) shall perform the public administration tasks related to the operation of the motion picture industry. The NMHH shall operate the *Nemzeti Filmiroda* (National Film Office), the body which was previously responsible for these tasks. The head of the office shall be appointed by the president of NMHH. The authority shall in particular:

- rate films in order to protect minors and apply sanctions set out in the Act if rating regulations are breached;

- classify films worthy of support due to their artistic value or films that fulfill the supported cultural requirements, as well as movie theatres distributing such films;

- keep public records about films and organisations of the motion picture industry;

- verify entitlement to use subsidies and issue the subsidy certificate that entitles films to tax benefits;

- issue co-production certificates;

- perform statistical and data provision activities concerning the film industry.

The former Act contained three types of direct subsidies:

- Selective: subsidy that is due to the film producer, distributor or any other applicant under the Act based on the decision of the supporting body made by way of tender applications, by evaluation or individual request subject to the characteristics of the film (in particular script, budget, artistic value, the identity of the authors, producers and actors of the film) or the nature of another objective to be supported;

- Normative: subsidy that is due to a film producer or distributor if he/she meets the conditions specified in this Act or announced by the supporting body and which subsidy may be used by film distributors for distributing films and by film producers to produce films; and

- Structural: subsidy granted to applicants by the supporting body on a continuous basis, by assuming an obligation persisting for several budget years to promote motion picture industry objectives implemented throughout several years or in the same manner every year in accordance with the Act, provided that the applicant complies with the conditions specified by the Act and/or the supporting body throughout the entire duration of support provision.

From 1 January 2012 only the selective subsidy remains; the amendment abolished the others.

The Act contains several other amendments as well, for example in order to protect minors it adds a new rating category to the existing five: "not suitable for viewers below the age of 6".

• 2011. évi CLXIX. törvény a 2004. évi II. törvény módosításáról (Act CLXIX of 2011 amending Act II. of 2004 on Motion Pictures, published in the Hungarian Official Journal of 9 December 2011 (pages 37357-37379))
http://merlin.obs.coe.int/redirect.php?id=15591 HU

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AGCOM Procedure for Detecting the Emerging Platforms for Audiovisual Sport Rights Marketing

On 17 November 2011 the *Autorità per le Garanzie nelle Comunicazioni* (Italian Communications authority - AGCOM) started an investigation procedure, to be concluded by 12 March 2012, aimed at detecting emerging platforms for the sale of audiovisual sports rights. Prior to the launch of a public consultation audiovisual media service providers operating on different distribution platforms had been asked to provide information on the media services they offer and the technological standards and equipments they employ.

To support the development and growth of emerging platforms, Legislative decree no. 9/2008, which gave AGCOM new powers regarding audiovisual sports rights for championship events, cups and tournaments involving professional teams, has obliged the organisers of the named competitions to license sport broadcasting rights directly to these platforms on a non-exclusive basis, suiting the rights to the technological skills of the concerned platforms and selling them at prices that are proportionate to the effective consumption of audiovisual content on each platform.

More generally, the main innovation of this Decree is the shift from a system focused on the ownership of rights by the individual sports clubs to a new system based on co-ownership rights shared between the organisers of the competitions and the clubs. In this context AGCOM regulates and monitors (ex officio or upon receiving a complaint) the correct application of the measures adopted and may impose fines in case of violation of the rules on the exercise of sport information adopted by Regulations nos. 405/09/CONS and 406/09/CONS.

As to the procedure, pursuant to Article 14 of the above-mentioned decree, AGCOM is required to conduct a biennial procedure, analysing the evolution of technologies (such as distribution systems and distribution of audiovisual products) to identify the emerging platforms, which can acquire the broadcasting rights over sports events on more favourable terms. The procedure must be conducted using the methodologies for market analysis in the electronic communications sector. With this new investigation, AGCOM has to verify if the platforms considered to be emerging following the last analysis adopted by Deliberation no. 665/09/CONS - namely IPTV, Mobile (GSM-GPRS/EDGE and UMTS/HSDPA) and DVB-H - can still be qualified as such.

• Delibera n. 598/11/CONS - "Avvio del procedimento per l'individuazione delle piattaforme emergenti ai fini della commercializzazione dei diritti audiovisivi sportivi, ai sensi dell'art. 14, del d.lgs. 9 gennaio 2008, n. 9 e dell'art. 10 del regolamento adottato con delibera n. 307/08/CONS" (Agcom Deliberation no. 598/11/CONS, Procedure for the detection of emerging platforms for audiovisual sports rights' marketing, pursuant to Article 14, Legislative Decree no. 9/2008)
http://merlin.obs.coe.int/redirect.php?id=15617 IT

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AGCOM Shortens the Procedures on Conflict of Interest

On 12 December 2011 the *Autorità per le garanzie nelle comunicazioni* (the Italian Communications Authority - AGCOM) adopted Deliberation no. 682/11/CONS amending the regulation on the resolution of conflicts of interest approved by Deliberation No. 417/04/CONS, according to Act no. 215/2004 (see IRIS 2004-10/30). According to this regulation, as already amended by Deliberation No. 392/05/CONS, AGCOM monitors the behaviour of media service providers headed or controlled by holders of a government post and providing privileged support to the latter. For this purpose, AGCOM evaluates any conduct, put into effect by the named media providers which, especially having regard to the fundamental principles of the broadcasting system, such as pluralism, objectivity, completeness, fairness and impartiality of information, provide privileged support, defined as any form of advantage, whether direct or indirect, political, economic or relating to image, to holders of the government posts. AGCOM exercises its powers in 90 days both ex officio and on the basis of complaints. Having verified the existence of such privileged support, AGCOM issues a notice requiring the media provider to desist from the detected behaviour and, where practicable, imposes the necessary corrective measures. The penalties provided for in such cases are increased by one third compared to ordinary pecuniary sanctions due to the seriousness of the violation.

Following the amendments introduced by Deliberation no. 682/11/CONS, AGCOM has shortened the duration of the procedure for the determination of the existence of privileged support during electoral and referendum campaigns; in such cases, the deadline for the adoption of the final decision is 15 days from the start of the proceeding, including any preliminary investigation activity. This deadline is extended by 5 days if further preliminary investigation is ordered by the Council. Where violations have occurred during the fifteen days preceding the date of the vote, including second ballots, AGCOM conducts a brief investigation and, once notified of the facts, in consultation with interested parties and having been presented with any counter-arguments - to be submitted within twenty-four hours after the notification of the charges - adopts a final decision without any delay and, in any case, within forty-eight hours after the ascertainment of the breach or the complaint.

• Delibera n. 682/11/CONS, *12 dicembre 2011*, Modifiche e integrazioni al regolamento per la risoluzione dei conflitti di interessi, Gazzetta n. 3 del 4 gennaio 2012 (Deliberation No. 682/11/CONS of 12 December 2011, Changes and additions to the regulation on the resolution of conflicts of interest, Official Journal no. 3 of 4 January 2012)
http://merlin.obs.coe.int/redirect.php?id=15618 IT

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LT-Lithuania

A New Law on Cinema Adopted

On 22 December 2011 the *Seimas* (Lithuanian Parliament) adopted a new Act on Cinema. The draft law was prepared by the Ministry of Culture in cooperation with the Union of Lithuanian Cinematographers and the Association of Independent Producers.

The new Law determines the basis for State regulation and financing of Lithuanian cinema, the protection of its heritage and the rules for film distribution and presentation in cinemas. It aims at distinguishing between the State policy forming function and the implementation function in the cinema sector. The Law foresees that the State policy forming function is discharged by the Ministry of Culture, while the implementation function is carried out by a newly-established institution, the Lithuanian Cinema Centre. This Centre will administer the State funds allocated to cinema projects, supervise the expenditure and account of funds, represent Lithuania in international organisations, foundations, events etc., administer the Film Registry and index Lithuanian and foreign films meant for public presentation etc. The Law embeds the right to finance cinema projects from the State and Municipality funds. It defines the areas of State financing, i.e., State funds can only be allocated to film preparatory works, production, distribution, presentation, and the collection and protection of cinema heritage. Besides, the Law establishes certain criteria for a particular area of State financing, e.g., the funds can be allocated to film production provided the screenplay or the main theme is based on events of Lithuanian or European culture, history, religion, mythology, society life etc. In accordance with the provisions of the Law funds can only be allocated to legal persons or other organisations or their units, which are established in Lithuania or another State of the EEA and one of the main activities of which is film production, distribution, presentation and the collection of cinema heritage and its protection. The Act establishes that in case the film is 100 % State-financed, the duty to present the film from the moment it is registered in the Film Registry within one year's time is with the public broadcaster Lietuvos nacionalinis radijas ir televizija.

It also has to be noted that with the new Act a new film rating system was introduced. It differs from the that for television programmes. The following ratings are introduced with regard to the viewers' age: „V" for films of various age; „N-7" from 7 years of age; „N-13" from 13 years of age; „N-16" from 16 years of age and „N-18" from 18 years of age. Besides, the Act obliges cinema owners and/or managers to make information on the meaning of the ratings publicly available. The Law also obliges legal persons who are engaged in film distribution to publish information about the respective ratings in Lithuania or the State of production on the cover of the record. All films, which are either produced in Lithuania or brought to Lithuania from abroad for cinema presentation, should be registered in the Film Registry, except those which are meant to be presented during certain events, e.g., festivals, seminars or retrospectives, which are dedicated towards satisfying the cultural, artistic and educational needs of society. Only films that have been classified according to age categories can be registered in the Film Registry. The Act will enter into force on 1 May 2012.

• Kino įstatymo pakeitimo Įstatymas*, 2011 m. gruodžio 22 d. Nr. XI-1897 (Žin., 2002, Nr. 31-1107; 2003, Nr. 108-4812; 2009, Nr. 77-3163)* (Act on Cinema, Official Journal, no. 6-192, 10 January 2012)
http://merlin.obs.coe.int/redirect.php?id=15642 LT

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More Funds for the Public Broadcasting Service

The Macedonian Parliament amended the Law on Broadcasting in order to ensure a stable financing of the Public Broadcasting Service, Macedonian Radio and Television (MRT), which has been suffering from underfunding for years.

The amendments proposed by the Government envisage an increase of the broadcasting fee from MKD 120 per month (EUR 2) to MKD 190 (EUR 3). Another measure planned in the Government's proposal is an increase of the advertising limits for the PBS from 4 to 12 minutes per real programme hour including the prime time, which was until now reserved only for advertising broadcast by the commercial TV channels. This aroused heavy criticism from the commercial broadcasters, which are afraid that they will lose a big part of their share of the advertising market, which is in any case too small to sustain all 150 licensed commercial broadcasters in a country of two million citizens. Moreover, this small advertising cake has caused the media to turn to political advertising as a rich souce of revenue, which is to be seen as critical to editorial independence. After the intense debate between the parliamentarian opposition and the ruling parties and due to the pressure from the commercial media sector the majority of the Members of Parliament decided to allow MRT an advertising time of up to 8 minutes per real programme hour. In order to increase the other revenue sources the Government also proposed the deletion of the ban for MRT to broadcast lottery or other similar games of chance. The amendments also bring more clarity in the part that defines what legal entities are obliged to pay the broadcasting fee and to what amount, which will make the collection of the fee more effective and reliable.

The unstable funding of the PBS has been a problem for the national authorities since the power distribution company was privatised and refused to collect the broadcasting fee (see IRIS 2010-10/35). The situation with the PBS did not get better even after the current Law on Broadcasting was adopted in November 2005 (see IRIS 2006-4/30). The implementation of the provisions for a State grant of about EUR 6 Million in order to help the PBS to establish an effective mechanism for the collection of the fees failed right after the vote of this law in the Parliament. As a result the PBS had to reduce its staff in the following years.

In its reports on the country's progress the European Commission was constantly noting that the PBS had been suffering from serious underfunding. In 2010 the obligation for collecting the fee was transferred from MRT to the Public Revenue Office and since then the collection rate has been constantly increasing. The other gaps in the funding system have been filled with Government interventions. Namely, some funds collected by the Agency for Electronic Communications (electronic communication regulatory body) have been used for modernisation and digitalisation of MRT. The EC reacted to this by stating that the "use of the operators' money for the digitalisation of the public broadcaster is not in line with best European practices", insisting on developing an effective funding system for MRT, which would ensure financial and political independence.

• Предлог - закон за изменување и дополнување на Законот за радиодифузната дејност (второ читање) (Draft Law Amending the Law on Broadcasting (second reading))
http://merlin.obs.coe.int/redirect.php?id=15594 MK
• Commission Staff Working Paper - The Former Yugoslav Republic of Macedonia 2011 Progress Report, SEC(2011) 1203 final, 12 October 2011
http://merlin.obs.coe.int/redirect.php?id=15595 EN

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Court Orders ISPs to Block End-User Access to The Pirate Bay

On 11 January 2012 the District Court of The Hague ordered two Dutch internet access providers to block access to The Pirate Bay. Furthermore, Stichting BREIN, a foundation protecting the interests of the Dutch copyright industry, has been granted a right to directly request the providers to block future IP-addresses and (sub) domain names that may refer to The Pirate Bay. The providers in question, Ziggo and XS4ALL, have already announced they will appeal the ruling. BREIN, on the other hand, has announced it will request similar measures from other providers.

The District Court found the legal basis for these orders in the Dutch implementations of Art. 11 of Directive 2004/48/EC (Enforcement Directive), Art. 8 (3) of Directive 2001/29/EC (Copyright Directive) and the recent European Court of Justice L'Oreal/eBay ruling (C-324-09), in which the ECJ held that injunctions against internet intermediaries may be aimed at preventing future copyright infringements. Earlier court proceedings in the Netherlands had been targeted at The Pirate Bay and ordered it to stop making infringing material available to the Dutch market. Since The Pirate Bay continued anyway, the Court found the BREIN injunctions legitimately aimed at the intermediaries in this particular case.

The District Court noted that it should exercise judicial restraint, as website blocking raises freedom of expression concerns as protected by Art. 10 ECHR. In assessing the proportionality and subsidiarity of website blocking by the two access providers, the District Court ruled that in this particular case the measure was justified. Along with the limited effect of earlier rulings, it based its proportionality test on evidence provided by BREIN. The Court held that a sufficient proportion of customers had been using The Pirate Bay to download several Dutch movies. Furthermore, the legal material provided by The Pirate Bay would be available through other websites, which limits the effect of blocking on free speech in this instance. Lastly, the Court found that DNS- and IP-blocking of one particular website does not entail active surveillance of the contents of all end-user internet traffic with the help of Deep Packet Inspection technologies, which the ECJ had ruled illegal in its recent Scarlet/Sabam ruling (C-70/10).

Just on 20 December 2011, a Parliamentary majority spoke out against blocking for copyright enforcement purposes in a resolution. The judges considered the initiatives by the Dutch legislature, but found it too early to let their decision be influenced by it. Therefore, it will be noteworthy to follow whether the legislature follows up on its initiative any time soon and to see whether it may impact upon the providers.

• Rechtbank 's-Gravenhage, 11 januari 2012, LJN: BV0549, Stichting BREIN tegen Ziggo B.V. & XS4All Internet B.V. (District Court of the Hague, 11 January 2012, LJN: BV0549, Stichting BREIN v Ziggo B.V. & XS4All Internet B.V.)
http://merlin.obs.coe.int/redirect.php?id=15624 NL

• Tweede Kamer, 29 838 Auteursrechtbeleid, Nr. 35 Motie van het Lid Verhoeven (Second Chamber, 29838, Copyright policy, Nr. 35, Motion by MP Verhoeven)
http://merlin.obs.coe.int/redirect.php?id=15645 NL

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Sanctions for Infringements of the Advertising Rules

On 14 December 2011 the *Consiliul Naţional al Audiovizualului* (National Council for Electronic Media - CNA) issued sanctions on several Romanian television broadcasters for breaching the audiovisual rules with regard to the limits of advertising (see inter alia IRIS 2010-1/38, IRIS 2010-8/42, IRIS 2011-1/44 and IRIS 2011-6/31).

The Romanian public broadcaster TVR received a public warning and the commercial television stations Antena 1, PRO TV, Prima TV and KANAL D were fined RON 100,000 (EUR 23,040) each for breaches of Art. 35 (1) of *Legea audiovizualului nr. 504/2002, cu modificările şi completările ulterioare* (Audiovisual Law no. 504/2002, with further modifications and completions), which determines the maximum limit for advertising and teleshopping of 8 minutes/hour for public and 12 minutes/hour for commercial stations. According to Art. 35 (2) the provisions of Art. 35 (1) do not apply to self-promotion, sponsoring and product placement.

The sanctions are among the highest ones ever issued by the CNA. The Council found that, when accumulated, in October TVR broadcast 15 minutes of advertising more than allowed, Antena 1 120 minutes, PRO TV 170 minutes, Prima TV 180 minutes, and KANAL D 107 minutes more than the legally permitted limit. According to Art. 90 (2) of the Audiovisual Law, fines range from RON 10,000 (EUR 2,300) to RON 200,000 (EUR 46,080).

The CNA issued in 2011 a total of 249 sanctions for infringements of audiovisual legislation. The most frequent breaches were made regarding the: protection of human dignity and the right to one's image; protection of children; securing of correct information and

pluralism; advertising, teleshopping and sponsoring rules; provisions concerning the rebroadcast notification; must carry principle and political advertising.

• Decizia nr. 708 din 14.12.2011 privind amendarea cu 100.000 lei a S.C. ANTENA TV GROUP S.A. pentru postul de televiziune ANTENA 1 (Decision no. 708, ANTENA 1)
http://merlin.obs.coe.int/redirect.php?id=15597 RO

• Decizia nr. 709 din 14.12.2011 privind amendarea cu 100.000 lei a S.C. DOGAN MEDIA INTERNATIONAL S.A. pentru postul KANAL D (Decision no. 709, KANAL D)
http://merlin.obs.coe.int/redirect.php?id=15598 RO

• Decizia nr. 710 din 14.12.2011 privind amendarea cu 100.000 lei a S.C. SBS BROADCASTING MEDIA S.R.L. pentru postul de televiziune Prima TV (Decision no. 710, Prima TV)
http://merlin.obs.coe.int/redirect.php?id=15599 RO

• Decizia nr. 711 din 14.12.2011 privind amendarea cu 100.000 lei a S.C. PRO TV S.A. pentru postul de televiziune PRO TV (Decision no. 711, PRO TV)
http://merlin.obs.coe.int/redirect.php?id=15600 RO

• Decizia nr. 713 din 14.12.2011 privind somarea SOCIETĂŢII ROMÂNE DE TELEVIZIUNE pentru postul de televiziune TVR 1 (Decision no. 634, TVR 1)
http://merlin.obs.coe.int/redirect.php?id=15601 RO

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New Data Retention Law Rejected by the Senate

On 21 December 2011, the Senate (upper Chamber of the Romanian Parliament) unanimously rejected the new draft Law on the retention of data generated or processed by providers of public electronic communications networks and by electronic communication services providers directed at the public, issued in November 2011.

The new Draft was intended to implement the EU Data Retention Directive 2006/24/EC, after the *Curtea Constituţională a României* (Romanian Constitutional Court) decided on 7 October 2009, that the transposing Law 298/2008 was unconstitutional due to a breach of Art. 28 of the Romanian Constitution, with regard to the secrecy of correspondence and of Art. 25, 26 and 30 (freedom of movement, privacy and expression). The Court also declared an infringement of the ECHR and that data retention as proposed by Law 298/2008 would be a disproportionate intrusion into private life which is open to abuse. The new Draft, coming after a series of drafts in the matter, was severely criticised by several Romanian human and civil rights NGOs, which claimed the text to be still unconstitutional and encroaching on the right to privacy.

The European Commission started an infringement procedure against Romania on 16 June 2011 for not having implemented the Directive. The second phase of the procedure was initiated on 27 October 2011 requesting Romania to ensure conformity with EU legislation within two months. The Romanian Government abstained from issuing an official point of view on the Draft, stating that because of the conflict between the obligation to transpose Directive 2006/24/EC and the necessity to observe the demands of the Constitutional Court, the Parliament is the only institution able to decide on the adoption of the legislative initiative.

The Draft has four chapters (General provisions, Data retention, Sanctions, Final provisions) and 21 articles. Art. 1 states that the retained data shall be used for the prevention, investigation, finding and suit of severe crimes (such as terrorism, transnational crime, infanticide, organised crime, paedophilia, rape, theft, crimes against the EU economic interests, fiscal evasion, electronic payments frauds). According to Art. 3 providers are asked to retain the data necessary for: following and identification of the source, destination and date of communication; determination of its time and duration; identification of the type of communication, the user's communication equipment or the devices use and identification of mobile communication's device location. Data shall be retained for 6 months after the communication. According to Arts. 4-8 the draft refers to data from mobile and fixed telephone use, Internet access, electronic mail and voice over Internet. According to Art. 12 it is forbidden under threat of punishment to intercept and retain the content of communication or of information accessed during the use of an electronic communications network. After the retention period data have to be irreversibly destroyed by the service providers, except such used by the authorised institutions, in the meantime. According to Art. 13 the retained data have to be of the same quality and equally protected and secured as data used through electronic communications providers networks. According to Art. 18 offences are subject to fines of Lei 2,500-500,000 (EUR 575-115,200).

The draft has to be discussed by the *Camera Deputatilor* (lower Chamber), now, which will have the final decision on it. But usually a draft rejected by the Chamber that debated on it (Senate or Deputies Assembly) firstly is rejected by the second Chamber, too. There is no term for the second Chamber to discuss the draft.

• Senatul României - Propunere legislativă privind reţinerea datelor generate sau prelucrate de furnizorii de reţele publice de comunicaţii electronice şi de furnizorii de servicii de comunicaţii electronice destinate publicului (Senate Legislative proposal on the retention of data generated or processed by the providers of public electronic communications networks and by electronic communication services providers directed to the public) RO

• Proiect de lege privind reţinerea datelor generate sau prelucrate de furnizorii de servicii de comunicaţii electronice destinate publicului sau de reţele publice de comunicaţii noiembrie 2011 (Draft law on the retention of data generated or processed electronic communication services providers directed to the public or by public communications networks, November 2011)
http://merlin.obs.coe.int/redirect.php?id=15596 RO

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

The First Frequency Spectrum Tender in Romania

The *Autoritatea Naţională pentru Administrare şi Reglementare în Comunicaţii* (National Authority for Administration and Regulation in Communications - ANCOM) will, in 2012, open for tender all radio frequencies available in the 900 and 1,800 MHz bands, currently used by the most important mobile communications providers in the Romanian market, Cosmote, Orange and Vodafone (see IRIS 2011-1/45).

The decision was issued on 28 December 2011, the day after the Romanian Government's transitory decision to prolong for one year the licences of the mobile telephony providers Orange and Vodafone, which would have expired on 31 December 2011. The decision was taken in order to ensure the continuous provision of mobile communications services. Each provider has to pay for this prolongation a tax of EUR 6.4 Mio, calculated on the basis of the initial costs of the licences, multiplied by the inflation rate.

ANCOM has decided that the new licenses will enter into force on 1 January 2013, for the bands currently owned by Orange România and Vodafone România and on 6 April 2014, for the bands currently owned by Cosmote. The initial licences were granted for 15 years in 1996 and 1998, respectively. On the other hand, ANCOM will undertake the necessary measures to free and open for tender the 800 and 2,600 MHz bands, currently partially used by the Ministry of National Defence.

ANCOM stated that the solution to grant radio spectrum rights of use in the 900 MHz and 1,800 MHz bands by a tender procedure fully complies with the relevant European legislation with regard to the allocation of spectrum resources as well as with national legislation. Romania is already covered by several mobile communications networks, the penetration has reached 110%. ANCOM's President considers the tender will allow new competitors to enter the Romanian market as well.

The tender will take place during the first half of 2012 and the Authority will develop and submit to public consultation a detailed tender plan.

• Guvernul a decis, ca măsură tranzitorie, prelungirea licenţelor unor operatori de telefonie mobilă; comunicat de presă 27.12.2011 (Government decision on the prolongation of the licenses of some mobile telephony providers)
http://merlin.obs.coe.int/redirect.php?id=15602 RO

• ANCOM va organiza în 2012 prima licitaţie de spectru din România; comunicat de presă 28.12.2011 (ANCOM will organise in 2012 the first frequency spectrum tender in Romania)
http://merlin.obs.coe.int/redirect.php?id=15603 RO

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RU-Russian Federation

Licensing Rules Adopted by Government

On 8 December 2011 the Government of the Russian Federation adopted an ordinance that approved new rules on licensing television and radio broadcasting. This follows the entering into force on 10 November 2011 of the Statute "On amending some legal acts of the Russian Federation in order to improve legal regulation in the sphere of mass information" (see IRIS 2011-7/42),

The rules set down that the Federal Service for Supervision in the Sphere of Telecommunications, Information Technologies and Mass Communications remains the licensing body. This Service, under the Ministry of Communications and Mass Communications, is part of the Government.

A necessary condition of issuing a license to an applicant is the establisment of an editorial board with its statute and registration carried out in accordance with the Statute "On the Mass Media". In case of re-broadcasting there should be a contract with an editorial board of the TV or radio channel, established in accordance with this statute. Under the realm of broadcasting Russian law now understands any form or platform of dissemination of TV and radio channels as a conglomerate of programmes formed in accordance with the relevant listings.

Violation of the programme policy, a blueprint document in which the applicant should conceptualise and describe the range of programmes it proposes to offer, is considered to be a gross violation of licensing rules.

The rules confirm that licensing may be based on a tender, competition or auction but do not provide details as to how that will be determined.

• Постановление Правительства Российской Федерации от 8 декабря 2011 г. N 1025 г. Москва "О лицензировании телевизионного вещания и радиовещания". Дата первой официальной публикации: 16 декабря 2011 г. Опубликовано: в "РГ" - Федеральный выпуск №5660 16 декабря 2011 г. Вступает в силу 24 декабря 2011 г. (Rules on Licensing Television Broadcasting and Radio Broadcasting, approved by ordnance No. 1025 of the Government of the Russian Federation on 8 December 2011. Published in official daily Rossiyskaya gazeta on 16 December 2011)
http://merlin.obs.coe.int/redirect.php?id=15588 RU

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Act Transposing the Audiovisual Media Services Directive Adopted

On 19 October 2011, the Act on Audiovisual Media Services (*Zakon o avdiovizualnih medijskih storitvah* - ZAvMS) was adopted and entered into force on 17 November 2011. As described in previous IRIS issues, its adoption was crucial due to the infringement procedure against Slovenia, started earlier in 2011 by the European Commission for non-transposition of the Directive in due delay (see IRIS 2011-8/42). Despite the fact that Slovenia notified to the Commission a complete transposition of the AVMSD on 21 November 2011, the infringement procedure remains pending, as the Commission needs to analyse the notified measures and to check whether the Slovenian law correctly implements all aspects of the rules on AVMS.

Being exclusively dedicated to AVMS, the Act brought revised jurisdiction criteria and all obligations arising from the Directive, such as rules on identification, accessibility, incitement to hatred, protection of minors, events of major importance, short news extracts and on promotion of European audiovisual works, both in linear and in on-demand services. The latter are expected to notify their activity to the national regulator, as the Act introduced the establishment of an official database of non-linear AVMS providers. The Slovenian regulator APEK has to be informed prior to the start of service of a non-linear AVMS. The notification must contain the information needed for the identification of the service and for determination whether APEK is competent to deal with it. The licensing regime of linear services remains almost unchanged, as it is defined by the *Zakon o medijih* (Media Act - ZMed), which for the most part remains in force. The only difference is that the obligation to get a licence prior to the start of broadcasting now applies to all linear AVMS, regardless of the platform. The extension of the licensing regime therefore affects mainly providers of internet television, as they were exempt from it under the previous regulation.

The new Act includes provisions on audiovisual commercial communications stemming from the Directive, together with rules on product placement, sponsorship and teleshopping. Further guidance will be elaborated within statutory instruments. Under the new legal framework product placement is generally not allowed; however, as in many other EU member states there are derogations, both for commercial and public service broadcasters. Consequently, product placement is permitted in several programmes, provided that they are not aimed at children and are properly labelled. There are no exceptions for acquired programming. Production props and prizes included in the programmes without payment, are according to the ZAvMS not considered to be product placement if the goods or services involved are of insignificant value in relation to the production costs. The notion of significant value has to be defined by a general act of APEK, which has overall responsibility for implementation of the ZAvMS.

One of the new aspects in the regulation of television advertising brought by ZAvMS is the reduction in the amount of advertising permitted in public service television channels. Hence, RTV Slovenia can during the day broadcast 10 minutes of advertising per hour, while between 6 pm and 11 pm only 7 minutes per hour. Unlike commercial TV broadcasters, the public service broadcaster is not allowed to interrupt feature films, news shows and cultural, arts, science or educational programmes with advertising.

Under the new Act APEK received much more authority and power for oversight and enforcement, but also much greater accountability in relation to the audiovisual media sector. While currently drafting numerous general acts that are required by the ZAvMS and need to be adopted by May 2012 at the latest, the regulator is preparing also for practical implementation of the new law. One of the most challenging aspects will be that of training staff for the application of the powers of inspection, as the persons who will carry out inspection must pass the prescribed examination. Despite the substantial increase of competencies, APEK however cannot count on recruiting new staff at the moment, as the regulator has a ban on employing new personnel. Another, not less important challenge will be that of providing sufficient financial resources for all the tasks that are required. Since APEK is funded solely by the market players, the introduction of a fee for all AVMS providers, linear and non-linear, brought by the ZAvMS, is welcome. However, at the time being, funding is not guaranteed yet, as the relevant statutory acts determining the method of calculation and the tariff need to be adopted first.

• Zakon o avdiovizualnih medijskih storitvah (ZAvMS), Uradni list RS, št. 87/2011 z dne 2. 11. 2011 (Act on Audiovisual Media Services, Official Journal 87/2011 of 2 November 2011)
http://merlin.obs.coe.int/redirect.php?id=15604 SL

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Penalty for Publishing Classified Data in Print Magazine Cancelled

At the beginning of December 2011, the Slovak Supreme Court (court of final resort) overruled a deci-

sion of a regional court (court competent to review administrative sanctions delivered by State authorities) and cancelled a penalty imposed on the Chief editor of the Slovak magazine Zurnal issued by the National Security Authority (hereinafter: NSA). The Supreme Court issued the same decision in late November in an identical matter concerning a journalist of the same magazine. The rulings effectively dismissed both NSA's decisions and returned these cases back to NSA for new legal investigation.

In 2007 NSA penalised the Chief editor and a journalist (author) for publishing the article "Draught in Secret Safes" in the magazine. This article dealt with a classified documents leak in the Secret Military Service pointing to a concrete classified document (at that time in possession of the magazine) and for revealing some of its content to the public. The NSA eventually imposed a maximum fine (circa EUR 500) on both persons for failure to maintain the confidentiality of classified information of which they have learnt and to comply with the obligation to give notice of classified information and surrender it to the NSA or Police. Both persons did not deny these facts as such. But they stressed that their motivation was solely to inform the public about problems with protecting classified documents in the Military Secret Service, and claimed to so having acted in the public interest. The article did not contain any names or other concrete facts that could directly endanger national security or people working in this sphere and the document itself contained information about actions from 2004. Under these circumstances they claimed that there was no actual need to impose sanctions and that the legal procedure itself was sufficient to secure their awareness about handling classified information.

On the contrary NSA in its decisions stated that it is possible to inform the public about a classified-data leak without actually revealing some of the information. It also stated that the document as such was marked as classified and a journalist is not competent to decide what parts of the document may be revealed to public without any security hazards. NSA also considered that the gravity of this unlawful action was increased by the fact that the subjects published classified information in a national magazine (and its e-version) and therefore displayed it to a large part of the public. The authority therefore concluded that there is a need to impose a fine on each subject and that the circumstances in this case justified the maximum amount set by law. NSA reaffirmed its decisions in the administrative procedure and these were also confirmed by the regional court.

The regional court's judgment was then challenged at the Supreme Court where the journalist's attorney pointed out that publishing given information in the article incited public consultation on a serious issue. The interest of the public in being informed may under specific circumstances prevail over the objective to preserve classified information. With reference to ECHR jurisprudence (see IRIS 1999-2/4) the attorney also argued that in specific cases journalists may decide whether or not it is necessary to reproduce documents to ensure the credibility of their statements. He stressed that in this case it was necessary to reveal classified information to provide "reliable and precise" information on an issue of general interest. Despite these facts the NSA and the regional court considered that there is a need for a sanction of a maximum fine. It was also stressed that in the NSA's decision the fact that the given classified information was published in print media to inform the public was used to describe the enormous gravity of these unlawful actions. According to the attorney this is in clear contradiction of ECHR case-law.

The Supreme Court in its reasoning stated that the amount of a fine is at the competent authority's discretion and in this case the amount was within the range set by law. However, the Supreme Court stressed that the authorities' considerations about the amount are an integral part of (the motivation of) its decision and therefore must be subject to a courts' review, meaning they must be clear and concrete. This applies even more when imposing the maximum fine. In this case the reasoning about the amount was too vague and the decisions needed to be dismissed.

One, however, cannot leave unnoticed the fact that even though concrete questions about substantial issues were raised before the Supreme Court (possibility to reveal classified information in the public interest, level of balance between freedom of expression and national security) no answers were given. The Supreme Court limited itself to reviewing only those considerations that led to imposing the maximum fine but it did not deliver any opinion on the core issue as to whether such actions under these circumstances are in breach of the provisions of the Act on the Protection of Classified Information with regard to the Charter of Fundamental Rights.

• *Najvyšší súd Slovenskej republiky 8Sžo/17/2011, 08/12/2011* (Decision of the Supreme Court 8Sžo/17/2011, 8 December 2011)
http://merlin.obs.coe.int/redirect.php?id=15607 SK

• *Najvyšší súd Slovenskej republiky 5Sžo/34/2011, 24/11/2011* (Decision of the Supreme Court 5Sžo/34/2011, 24 November 2011)
http://merlin.obs.coe.int/redirect.php?id=15608 SK

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Winner of the Tender for the 4th Multiplex

The Slovak Telecommunications Regulatory Authority (hereinafter "Telecom Office") announced on 15 December 2011 the winner of the tender for the frequencies allocated for the 4th terrestrial multiplex. The company Towercom was awarded individual authorisation for the use of the given frequencies with

the purpose to build up a communications network for the 4th multiplex that will provide TV broadcasting in DVB-T standard (with a possible upgrade to a newer standard, e.g., DVB-T2), along with other complementary interactive digital services such as EPG, e-government, online trading etc.

The tender had the form of a beauty contest with two participants. Act. No 220/2007 Coll. (Digital Act) sets out the required criteria, but the importance of each criterion was assessed and awarded with a specific number of points (maximum 2700) by the Telecom Office.

The participants could earn the most points (600) for the scheduled signal coverage at the start of the multiplex. 500 points were assigned respectively for the offered price, the ability to build up and operate multiplex in the scheduled time and the technical solution. Transparency and credibility of financial resources were awarded 300 points and the interest to operate the multiplex in more frequency allocations at one time 200 points. The participants could gain 100 points for declaring the obligation to provide a project with the aim of promoting technical means that enable end-users to access digital broadcasting or other complementary interactive digital services. All except the last criterion were binding, meaning that the participant must have declared how it would achieve the objectives set. The minimum price was determined to be EUR 500,000 by the Telecom Office. One participant was rejected from the contest for not meeting the necessary requirements in its application (failure to provide a legal Slovak translation for its English project documentation of the transmitters and antenna system).

According to the individual authorisation Towercom is obliged to start the commercial operation of the multiplex by 31 August 2012 with a network coverage of 46.5% of the Slovak population, which must be increased to 61% by 31 December 2012. By this date Towercom will also provide at least the interactive services EPG, Multimedia Home Platform MHP (e-government, online trading) and Over-The-Air (OTA) software update. These obligations were declared by Towercom in its application and became legally binding. The authorisation is valid until 2029 and the offer price of EUR 500,100 must be paid.

Towercom now holds licences for all frequencies used in existing or prepared national terrestrial multiplexes in Slovakia. Towercom originally developed from a State-owned company for governing and operating TV and radio transmission. It gained the licences for the first and second multiplex in a tender procedure with similar criteria as in the recent contest. This fact and especially the actual final outcome (Towercom being the only provider of all national multiplexes) are subject to continuous criticism of some journalists. The main objection is that although the criteria are laid down by law the scheme of assessment set by the Telecom Office favoured Towercom, the owner of the only existing system of TV transmitters in Slovakia. The Telecom Office actions therefore supposedly granted Towercom a monopoly in the DVB-T market in Slovakia.

The Telecom Office responds to this criticism saying that there is no monopoly in the Slovak digital terrestrial TV market. According to the European Commission's Recommendation No. 2007/879/EC the Telecom Office executed in 2010 a three-criteria-test in the wholesale market for broadcasting transmission services, to deliver broadcast content to end-users and found that the market is no longer susceptible to ex-ante-regulation since there are 16 companies (it should be noted, however, that the referred operators are not active on a national level in the transmission of broadcasting services in the DVB-T standard) providing analogue or digital terrestrial TV broadcasting and there is also effective competition in other platforms such as satellite, IPTV and cable. The European Commission reviewed the Telecom Office findings and raised no objections.

- *Víťazom výberového konania na 4. multiplex je Towercom 15.12.2011* (Press release about the winner of the tender for 4th multiplex, 15 December 2011)
http://merlin.obs.coe.int/redirect.php?id=15605 SK

- *Štvrtý multiplex začne do 31.8.2012 s pokrytím min. 46,5% 21.12.2011* (Follow up press release with some details about 4th multiplex, 21 December 2011)
http://merlin.obs.coe.int/redirect.php?id=15606 SK

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Agenda

Empowering citizenship through media literacy

1 March 2012 Organiser: European Broadcasting Union
Venue: Brussels Tel.: +32 2 286 91 15
http://www.regonline.co.uk/Register/Checkin.aspx?EventID=1053338

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