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EUROPÄISCHE AUDIOVISUELLE INFORMATIONSSTELLE

IRIS
Legal Observations
of the European Audiovisual Observatory

IRIS 2012-7

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INTERNATIONAL

COUNCIL OF EUROPE

European Court of Human Rights: Frasilă and Ciocirlan v. Romania

The case concerns the ineffectiveness of the enforcement of a court decision giving journalists the right of access to the premises of a local radio station where they worked (Radio M Plus). Access to their work premises had been obstructed by the representatives of the broadcasting company Tele M, situated in the same building. In a decision of 6 December 2002 the Neamţ County Court ordered Tele M to grant Frasilă and Ciocirlan access to the Radio M Plus editorial office and held that the obstruction of their access by representatives of the Tele M company constituted an unlawful act that might be detrimental to the activities of the radio station of which they were the manager and editor respectively. Several attempts to have the court decision enforced failed, including a criminal complaint against the representatives of Tele M. Relying on Article 10 Frasilă and Ms Ciocirlan complained in Strasbourg that the authorities had failed to assist them in securing the enforcement of a final judicial decision ordering third parties to grant them access to the editorial office at the radio station where they worked as journalists.

The Court emphasized that genuine, effective exercise of freedom of expression is a precondition of a functioning democracy. The right to freedom of expression does not depend merely on the State's duty not to interfere but could require positive measures of protection, even in the sphere of relations between individuals. In determining whether the State had a positive obligation in that regard, the Court reiterated that it took into account the nature of the freedom of expression at stake, its capacity to contribute to public debate, the nature and scope of the restrictions imposed on freedom of expression, the existence of alternative means of exercising this freedom and the weight of the competing rights of others or the general public.

Although in this case the authorities did not bear any direct responsibility for the restriction on the applicants' freedom of expression, it was still necessary to determine whether or not the authorities had complied with any positive obligation they might have had to protect freedom of expression from interference by others. The Court observed that the case concerned the practice of a profession that played a crucial "watchdog" role in a democratic society, and that an essential element of freedom of expression, namely the means of exercising it, had therefore been at stake for Frasilă and Ciocirlan. The Court reiterated that the State was the ultimate guarantor of pluralism and that this role became even more crucial where the independence of the media was at risk as a result of outside pressure from those holding political and economic power, as it had been reported. As to whether the State had complied with its positive obligation, the Court observed that Frasilă and Ciocirlan had taken sufficient steps on their own initiative and made the necessary efforts to secure the enforcement of the court decision, but that the main legal means available to them for achieving this had proved inadequate and ineffective. Accordingly, the Court found that by refraining from taking the necessary measures to assist Frasilă and Ciocirlan in the enforcement of the court decision, the national authorities had deprived the provisions of Article 10 of the Convention of all useful effect. There had therefore been a violation of the right to freedom of expression.

• Judgment by the European Court of Human Rights, case of 10 May 2012, Frasilă and Ciocirlan v. Romania, nr. 25329/03 FR

Dirk Voorhoof
Ghent University (Belgium) & Copenhagen University (Denmark) & Member of the Flemish Regulator for the Media

European Court of Human Rights: Case Centro Europa 7 S.r.l. and Di Stefano v. Italy

In 2009 Centro Europa 7 complained in Strasbourg that for a period of almost ten years the Italian Government had not allocated it any frequencies for analogue terrestrial television broadcasting, while the company had already obtained a licence for TV broadcasting in 1999. The company submitted that the failure to apply the broadcasting law of 1997, the refusal to enforce the Constitutional Court's judgments imposing the effective allocation of frequencies for new private TV stations and the duopoly existing in the Italian television market (RAI and Mediaset) were in breach of Article 10 of the Convention. In this regard Centro Europa 7 especially referred to the private broadcaster Mediaset - owned by the family of Prime Minister Silvio Berlusconi - being treated preferentially and being the reason for the years-long postponing of making frequencies available to other broadcasting companies.

The Grand Chamber of the European Court of Human Rights reiterates that a situation whereby a powerful economic or political group in society is permitted to obtain a position of dominance over the audiovisual media and thereby exercise pressure on broadcasters and eventually curtail their editorial freedom undermines the fundamental role of freedom of expression in a democratic society as enshrined in Article 10 of the Convention, in particular where it serves to impart

information and ideas of general interest, which the public is moreover entitled to receive. It also clarifies that in such a sensitive sector as the audiovisual media, in addition to its negative duty of non-interference the State has a positive obligation to put in place an appropriate legislative and administrative framework in order to guarantee effective pluralism. It recognises that the failure to allocate frequencies to Centro Europa 7 deprived the licence it obtained in 1999 of all practical purpose since the activity it authorised was de facto impossible to carry out for nearly ten years, until June 2009. This substantial obstacle amounted to an interference with Centro Europa 7's exercise of its right to impart information and ideas. According to the European Court this interference was not justified under the scope of Article 10 §2 of the Convention as it was not 'prescribed by law'.

The Court indeed finds that the Italian legislative framework until 2009 lacked clarity and precision and did not enable Centro Europa 7 to foresee, with sufficient certainty, the point at which it might be allocated the frequencies and be able to start performing the activity for which it had been granted a licence in 1999, notwithstanding the successive findings of the Constitutional Court and the CJEU that the Italian law and practice was in breach of constitutional provisions and EU law. Furthermore the laws in question were couched in vague terms which did not define with sufficient precision and clarity the scope and duration of the transitional schemes for the allocation of frequencies. The Court also notes that the authorities did not observe the deadlines set in the licence, as resulting from Law no. 249/1997 and the judgments of the Constitutional Court, thereby frustrating Centro Europa 7's expectations. The Italian Government has not shown that the company had effective means at its disposal to compel the authorities to abide by the law and the Constitutional Court's judgments. Accordingly, it was not afforded sufficient guarantees against arbitrariness. For these reasons the Court considers that the legislative framework in Italy at the time did not satisfy the foreseeability requirement under the Convention and deprived the company of the measure of protection against arbitrariness required by the rule of law in a democratic society. This shortcoming resulted, among other things, in reduced competition in the audiovisual sector. It therefore amounted to a failure by the State to comply with its positive obligation to put in place an appropriate legislative and administrative framework to guarantee effective media pluralism.

These findings were sufficient to conclude that there has been a violation of Centro Europa 7's rights to the freedom to express and impart ideas and information under Article 10 of the Convention. The Court reached the same finding in relation to Article 1 of Protocol No. 1 (right of property) being violated, as the interference with the Centro Europa 7 company's property rights did not have a sufficiently foreseeable legal basis either within the meaning of the Courts case-law.

Centro Europa 7's claim of EUR 10,000,000 in respect of non-pecuniary damage was also awarded. The Court considered it appropriate to award this lump sum in compensation for the losses sustained and the loss of earnings resulting from the impossibility of making use of the licence by Centro Europa 7. In addition, the Court considered that the violations it had found of Article 10 of the Convention and Article 1 of Protocol No. 1 in the instant case must have caused Centro Europa 7 "prolonged uncertainty in the conduct of its business and feelings of helplessness and frustration". The Court also took into account that Centro Europa 7 already has been awarded compensation at domestic level, referring to the judgment of 20 January 2009 of the Consiglio di Stato awarding the company the amount of EUR 1,041,418 in compensation.

• Judgment by the European Court of Human Rights (Grand Chamber), 7 June 2012, Centro Europa 7 S.r.l. and Di Stefano v. Italy, nr. 38433/09
http://merlin.obs.coe.int/redirect.php?id=15970 EN

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EUROPEAN UNION

Court of Justice of the European Union: Advocate-General Decides Compensation Rule in Short Reporting Law Does Not Breach Fundamental Rights

On 12 June 2012, Advocate-General Bot delivered his opinion to the Court of Justice of the European Union (ECJ) in case C-283/11. The case concerned a reference for a preliminary ruling from the Austrian *Bundeskommunikationssenat* (Federal Communications Board - BKS) concerning the compensation rule applicable when exercising the right to short reporting in the sense of Article 15(6) of the Audiovisual Media Services Directive 2010/13/EU (AVMSD). The Directive states that any compensation may not exceed the additional costs directly incurred in providing access to short extracts.

In a legal dispute between *Sky Österreich* and *Österreichischer Rundfunk* (Austrian public service broadcaster - ORF), the BKS had expressed doubt over whether the provision of the Directive was compatible with the Charter of Fundamental Rights of the European Union - particularly the freedom to conduct a business enshrined in Article 16 and the right to property described in Article 17 of the Charter. The BKS thought that the Directive's provision fundamentally excluded the possibility for national authorities to assess cases on an individual basis. Such authorities

could not, therefore, award compensation in excess of basic access costs to a broadcaster which had to grant short reporting rights to another broadcaster. In view of the proportionality principle, it was necessary to consider whether a rule should be introduced, allowing individual circumstances to be examined (see IRIS 2011-8/11).

In his analysis, the Advocate-General firstly found that the aforementioned fundamental rights had been infringed, since broadcasters that held exclusive rights to the transmission of an event of high interest to the public could no longer freely decide on the price they charged for access to short extracts. The compensation arrangements in this provision prevented, in particular, television broadcasters from having other television broadcasting organisations that wished to use short extracts contribute to the acquisition costs of those exclusive rights. These arrangements could also have a negative impact on the commercial value of exclusive rights.

The Advocate-General then stated that one of the objectives of the disputed provision was to fully and properly safeguard the fundamental right to information and the interests of viewers in the EU. In order to review proportionality, it was therefore necessary to weigh various fundamental rights. In the Advocate-General's opinion, the compensation arrangements in Article 15(6) of the Directive were not only appropriate for attaining the objective pursued, but also did not go beyond what was necessary to achieve it. The provision promoted the dissemination of information on events of high interest to the public, in particular by broadcasters that did not have considerable financial resources available to them. It favoured, by the same token, the emergence of a European opinion and information area within which the freedom to receive information and media pluralism were guaranteed. Failure to limit compensation would be detrimental to the effectiveness of the right to short news reports, since such a limit was the cornerstone of the mechanism put in place by Article 15 of the Directive. Limiting compensation also ensured that all television broadcasters could exercise the right on an equal footing. In the light of the increased prices they had to pay to acquire exclusive transmission rights, the lack of such a limit could mean that the price charged to produce short news reports would reach such proportions as to deter broadcasters from exercising their right.

The Advocate-General also stated that the compensation rule could only be accurately understood if viewed in close conjunction with the conditions and limits laid down by the Union legislature in relation to the right to short reporting. These particularly included the fact that it was limited to "events of high interest to the public" and to "general news programmes", rules on the maximum length of short reports and the obligation to indicate the source. In the Advocate-General's view, these conditions helped to mitigate the infringement of the freedom to conduct business and of the right to property of the holders of exclusive transmission rights.

On these grounds, the Advocate-General concluded that, when adopting Article 15(6) of the Directive, the Union legislature had weighed the different fundamental rights at stake in a balanced manner. Examination of the question referred had not therefore disclosed any factor such as to affect the validity of this provision of the Directive.

• Opinion of the Advocate-General (C-283/11) of 12 June 2012
http://merlin.obs.coe.int/redirect.php?id=15998 DE EN FR
CS DA EL ES ET FI HU IT LT LV MT
NL PL PT SK SL SV

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Council of the EU: Conclusions on Digitisation and Online Accessibility of Cultural Material and Digital Preservation

During the Council meeting of 10-11 May 2012, the Council released its conclusions on the digitisation and online accessibility of cultural material and digital preservation. These conclusions are a follow up to the Commission Recommendation of the same name (see IRIS 2012-1/4) and refer to the Comité des Sages' report "New Renaissance" (see IRIS 2011-3/5) as well as to the Commission's recent legislative proposals (orphan works, re-use of public sector information). In 2006, the Council had already issued conclusions on the same topic but since that date, the Council notes that the context for digitisation has changed, notably with the launch of Europeana.

In its introduction, the Council considers that digitised cultural materials are an importance resource for cultural and creative industries and also contribute to economic growth and job creation. Although efforts have already been made in the field of digitisation, further steps are necessary to exploit cultural heritage and turn it into an asset for European citizens. This includes better coordination of member states' actions.

The conclusions are largely focused on the development, use and support of Europeana. The Council invites the member states, the Commission and Europeana to make further progress. In an annex to the conclusions, the Council addresses specific priorities for member states in the format of actions and objectives for the period 2012-2015:

- Consolidation of their strategies and targets for digitisation (e.g., development of standards to select materials to digitise and participation in the Commission's assessment of the progress of digitisation and digital preservation);

- Consolidation of the organisation of digitisation and funding thereof (through public-private partnerships or the use of EU Structural Funds);

- Improvement of the conditions for granting online access to materials (tools to facilitate accessibility to out-of-commerce works and the specific issue of digitisation of public domain materials);

- Participation in the development of Europeana (through seven action points);

- Maintenance of the long-term digital preservation (including the promotion of specific strategies, the exchange of information between member states as well as the setup of the legal conditions for copying and depositing materials)

• Council Conclusions on Digitisation and Online Accessibility of Cultural Material and Digital Preservation
http://merlin.obs.coe.int/redirect.php?id=15963 EN CS DA DE EL ES ET FI FR HU IT LT LV MT NL PL PT SK SL SV

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REGIONAL AREAS

Position of the Nordic Consumer Ombudsmen on Marketing in Social Media

On 3 May 2012 the Nordic Consumer Ombudsmen presented a Joint Position regarding marketing in social media. These kinds of guidelines are not legally binding, but are generally well regarded and relied upon by Swedish courts when determining good market practices.

In the Joint Position, the Nordic Consumer Ombudsmen confirmed that Marknadsföringslagen (the Swedish Marketing Practices Act - MPA) is technology neutral and applies in full to social media. The Joint Position deals among other things with issues such as (i) unsolicited commercial messages, especially relating to Facebook as this was acknowledged as being the most commonly used social media today, as well as (ii) identification of commercial messages.

With regard to unsolicited commercial messages on Facebook, the MPA prescribes as a general rule that advertising by electronic mail (for example e-mail and SMS) requires that the recipient has given his or her prior consent to such advertising from the sender (opt-in).

The Nordic Consumer Ombudsmen noted that given how some social media are technically designed there are doubts as to whether certain messages can be considered to require opt-in.

The Nordic Consumer Ombudsmen found that messages to Facebook's inbox and timeline (profile) fall within the definition of electronic mail, which requires prior consent from the user (opt-in) accordingly.

Moreover, a Facebook user can also receive messages on Facebook under his or her "News Feed". These messages may include "status updates" from traders whom the user has "liked". A user may also receive messages indicating that the user's friends "like" a particular trader, information received because one of the user's friends has "shared" information about a trader, or messages indicating that a friend has participated in a competition. The Nordic Consumer Ombudsmen found that it is uncertain whether such messages from traders appearing under "News Feed" fall within the definition of electronic mail. Until greater clarity has been achieved on this matter, the Nordic Consumer Ombudsmen established that such communications would be considered "other unsolicited communications", and that recipients must subsequently be able to opt out of receiving advertising through the "News Feed". The Nordic Consumer Ombudsmen mentioned that they will discuss this matter with the European Commission and the European enforcement authorities in order to find out how these rules are to be interpreted.

Concerning marketing messages, the MPA provides that a message that involves marketing must be clearly indicated as commercial communication. This means among other things that traders must not falsely create the impression that they are not acting for purposes related to their trade and it must also be made clear if a private individual has received payment or other benefits for promoting a product or service. A trader will be obligated to inform the private individual of the duty.

• Position of the Nordic Consumer Ombudsmen on Marketing in Social Media
http://merlin.obs.coe.int/redirect.php?id=15964 EN
• Appendix 1
http://merlin.obs.coe.int/redirect.php?id=15965 EN

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NATIONAL

AL-Albania

Approval of Digital Strategy Paves the Way for Official Digital Switchover

On 2 May 2012, the Council of Ministers approved the Strategy for Digital Switchover, which will pave the way for the official start of the switchover to digital broadcasting (see IRIS 2010-6/6). The first version of a strategy for this process appeared in 2005, right after the first digital multiplex emerged on the market. Ever since, there have been several attempts to draft, revise and approve the strategy. This version of the strategy was the work of an ad-hoc committee, composed of the responsible ministries, public service broadcaster, electronic media regulatory authority, representatives of electronic media, etc. The Parliament approved a law that would regulate this sector in 2007 (see IRIS 2007-8/6), which has not been implemented so far. After approval of the Strategy, the head of the National Council of Radio and Television called for the speedy approval of the draft law on Audiovisual Services, currently before Parliament, so that both the Strategy and the new law could begin to be implemented.

Even though the Strategy has only now been approved, the first multiplex started operating in 2004 (see IRIS 2005-7/9), while the second emerged four years later. As a result, the Albanian public is generally familiar with the process, which is advantageous for a smooth switchover. On the other hand, as the consultations on the strategy have showed, the situation of prolonged broadcasting with no regulation has resulted in several challenges regarding switchover. These challenges consist in guaranteeing fair and free competition in the market while guarding investments already made, overseeing that public interest is regarded as being above any business interest, enabling access and fair conditions for local operators, guaranteeing the transition to switchover for the public service broadcaster, along with a guarantee of the fulfillment of the public mission, ensuring sufficient information, know-how and funds for sectors of the public that cannot afford switchover, etc.

The Strategy addresses these issues by outlining the ownership of multiplexes, the modalities for the network and access to local multiplexes, the funding for a public awareness campaign and the subsidy for decoders, the transition costs of the public broadcaster, and licenses of the commercial multiplexes. The aim of the strategy is to set the necessary guidelines for the final switchover to be completed by 2015. For this purpose, an inter-institutional committee has been set up, which will oversee the implementation of the switchover.

• News release on the Council of Ministers' Meeting, 2 May 2012 SQ

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Regulatory Authority Criticises TV Stations after Monitoring on Ethics

In the first months of 2012 the National Council of Radio and Television (NCRT) has monitored some of the programmes on the two national commercial TV stations, TV Klan and Top Channel TV. The NCRT reported that the monitoring was carried out after complaints by citizens about these programmes. According to the outcome of the monitoring process, the satirical weekly programme broadcast by Top Channel TV, "Portokalli", used vulgar language, with an undue amount of allegations. The statement said that in spite of the humorous nature of the programme, the choices were not always justified. In addition, the monitoring group observed that some of the spots on the show also contained discrimination based on origin regarding different regions of the country.

Meanwhile, the monitoring of TV Klan noted that two of the programmes also violated ethical norms in terms of language used and the norms of communication. The first programme is "Zone e Lire", a talk show. This show was rebroadcast at a time when children could watch it, which makes the situation even more serious. Moreover, NCRT stressed that it is not the first time this programme has violated ethical norms. In addition, the second programme, "Aldo Morning Show", used allegations of homosexual conduct, with words and gestures that were not appropriate to the morning time slot. The NCRT has sent messages to both TV stations, indicating their opinion of the unethical conduct of these programmes.

• *Njoftim për Media, Tiranë më, 21.05.2012* (News release of the National Council of Radio and Television, 21 May 2012)
http://merlin.obs.coe.int/redirect.php?id=15942 SQ

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AT-Austria

BKS Considers Definition of Premium Sports Competition under ORF Act

On 23 May 2012, the *Bundeskommunikationssenat*

(Federal Communications Board -BKS) described in detail which sports competitions should be considered as premium sports competitions in the sense of the *Gesetz über den Österreichischen Rundfunk* (ORF Act). Under Article 4b(4) of the ORF Act, the ORF sports channel may not broadcast sports competitions that already receive a high level of coverage in the Austrian media (so-called premium sports competitions, see also IRIS 2012-4/9).

The case concerned various live broadcasts by ORF on its specialist sports channel in April and May 2012: an Austrian Football Cup semi-final, several matches at the Ice Hockey World Championship (with and without Austrian involvement) and an ATP tournament quarter-final involving an Austrian tennis player.

In September 2011, the lower-instance body *Kommunikationsbehörde Austria* (Austrian Communications Authority - KommAustria) had upheld a complaint that ORF had breached Article 4b(4) of the ORF Act by broadcasting the football and ice hockey matches, but had rejected a complaint concerning the tennis broadcast.

In its decision, the BKS stated firstly that it was important, when assessing the facts, to determine what a "high level of media coverage" in Article 4b(4) of the ORF Act actually meant. The most telling way of deciding this was to examine media reporting of similar sports events in the past. Comparability of such events might depend, for example, on the event's venue or whether or not Austrian athletes were involved. After a thorough, detailed analysis of the coverage of various similar sports events in the Austrian press and television, the BKS concluded that the football and tennis matches concerned should not be classified as premium sports competitions.

However, with regard to the Ice Hockey World Championship broadcasts, the BKS differentiated between matches involving the Austrian national team and those that did not. Analysis of newspaper and television reporting had demonstrated that matches involving the Austrian team should be considered as premium sports competitions. However, matches not involving the Austrian team had been reported in different ways by the two types of media. For example, comparable matches at the previous world championship in 2009 had received sufficient newspaper coverage to be classified as premium sports competitions. In contrast, television reporting on these matches had fallen a long way short of the level required for them to be considered as premium competitions. Since the previous television coverage had been so different to that of premium sports competitions and since the level of newspaper reporting had not been sufficient to compensate for the lack of television coverage, the BKS thought that the matches concerned did not fall into the category of premium sports competitions.

Finally, the BKS explained that its media analysis had shown that it was possible to glean the meaning of a "high level of media coverage" and points of reference from the legislative provisions in order to foresee whether an event should be classified as a premium sports competition. ORF could be expected to make such a judgment in advance if it carried out detailed media analysis and research itself or commissioned it from a third party.

• *Entscheidung des BKS vom 23. Mai 2012 (GZ 611.941/0004-BKS/2012)* (BKS decision of 23 May 2012 (GZ 611.941/0004-BKS/2012))
http://merlin.obs.coe.int/redirect.php?id=15979 DE

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BKS Clears ORF of Breaching Sponsorship Ban in Stock Market Programme

On 23 May 2012, the *Bundeskommunikationssenat* (Federal Communications Board - BKS) ruled that *Österreichischer Rundfunk* (Austrian public service broadcaster - ORF) had not infringed the ban on sponsorship of news programmes and political information broadcasts enshrined in Article 17(4) of the *ORF-Gesetz* (ORF Act - ORF-G) by broadcasting its weekly "*Schauplatz Börse*" programme.

A complaint had been lodged, arguing that the programme "*Schauplatz Börse*" was a topical news programme for the stock market and financial sector, which should not be sponsored. The topical nature of the programme was clear from the continuous scrolling text showing share prices and exchange rates, which was typical of financial news programmes. The latest results of listed companies, including their current share price or the relevant stocks- or currency-related political situations were presented and analysed in each programme.

Responding to the complaint, ORF argued that news programmes typically reported on current events, covered a wide range of themes related to home, foreign, cultural and economic affairs and included reports prepared in the style of news stories. "*Schauplatz Börse*" did not provide any topical news reporting, but analysed developments in the stock and money markets. Contrary to the complainant's description, the running text at the bottom of the screen did not show current share prices and exchange rates, but only the changes compared to the previous week. This was particularly relevant, since the programme was broadcast on Saturdays, when the stock markets were closed.

In its decision, the BKS agreed with ORF and, in line with its previous decisions, ruled that news programmes had to contain reports on current events in fields relevant to the formation of public opinion,

prepared in the style of news stories. The concept of "news" should be interpreted in its narrow sense, so it did not include every form of reporting on actual events. The sponsorship ban only applied to news programmes and political information broadcasts which, from the outset, needed "special protection" from any kind of influence on the formation of public opinion in sensitive areas, as well as from any impression that such influence was being exerted by a third-party advertiser.

According to the BKS, "*Schauplatz Börse*" dealt with individually selected, more or less current financial events, but focused on developments in the stock and money markets in order to meet investors' interests. However, the programme did not provide political information or, in a narrower sense, information on economic policy. It should not, therefore, be categorised as a news programme or political information broadcast in the sense of Article 17(4) ORF-G and, as such, did not fall under the sponsorship ban enshrined in that provision.

In this case, the BKS also did not consider that the sponsor had unlawfully influenced the programme's content. Neither the sponsorship contract nor the plausible assurances given by ORF concerning the programme's usual production processes had, in any way, provided grounds for suspecting that the sponsors' experts had or could have forcibly exerted any influence beyond the simple suggestion of themes. The same applied to the role and authority held by the programme presenter. Neither had the proceedings revealed any evidence that the sponsor had made its financial contribution dependent on the fulfilment of certain requests or that, due to other circumstances, the sponsor was specifically liable to issue threats in relation to the programme's content.

• *Entscheidung des BKS vom 23. Mai 2012 (GZ 611.966/0004-BKS/2012)* (BKS decision of 23 May 2012 (GZ 611.966/0004-BKS/2012))
http://merlin.obs.coe.int/redirect.php?id=15980 DE

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BG-Bulgaria

Penalty for Content Inciting National, Political, Ethnic and Religious Intolerance

On 19 April 2012 the Council for Electronic Media imposed a penalty equal to the amount of BGN 3,000 (EUR 1528) on the Nova Broadcasting Group (Penal Decree no. 25). A political cause of the Serbian paramilitary organisation *Chetnichki pokret* had been presented during the broadcast Karbovski Direct, aired on 28 January 2012 from 4.51 p.m. to 5.18 p.m. An illegal revolutionary movement for the liberation of Kosovo called its orthodox brothers to arms. There was an exclusive interview with its chief Bratislav Zivkovic and his Bulgarian comrades Pavel Chernev and Zivko Ivanov.

The anchorman asked what the message of the movement to the orthodox brothers was and what had happened purely demographically in the Balkans. He also asked about Turkey's role in modern history. Zivkovic stated that "Turkey has always had influence throughout the region and that the region will not be peaceful hereinafter. Turks will not be peaceful. Turks in Macedonia will not be peaceful. [...] Now, more than ever, we must be united and turn against evil. The evil has to leave the Balkans. If that is the will of God, our goal is for the Balkans to have only orthodox [peoples] - Bulgarians, Serbs and Greeks. If that is the will of God, [our goal is] to pursue the Turks as it becomes possible."

The media service provider Nova Broadcasting Group has admitted the creation and dissemination of broadcast content inciting national, political, ethnic and religious intolerance, which violates Article 17, para. 2 of the Radio and Television Act (RTA).

• НАКАЗАТЕЛНО ПОСТАНОВЛЕНИЕ № *25 / 19.04.2012* г. (Decision of the Council for Electronic Media of 19 April 2012)
http://merlin.obs.coe.int/redirect.php?id=15933 BG

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Advertising Income may be Confiscated by Media Watchdog under *Land* Media Act

On 23 May 2012, the *Bundesverwaltungsgericht* (Federal Administrative Court - BVerwG), in a judgment that has not yet been published in full, ruled that the *Bundesländer* may, in their media legislation, empower the *Landesmedienanstalten* (*Land* media authorities - LMA) to confiscate advertising income received by private TV broadcasters in connection with programmes judged to be illegal.

The case concerned clips shown in the "Bimmel-Bingo" section of the programme "TV total" broadcast by the TV company ProSieben, in which a camera crew had rung the doorbells of single-family houses unannounced at night in order to wake up the occupants and persuade them to enter a competition. In these clips, the doorbell label, including the family's surname, was regularly shown and the occupants

were addressed by name. The reaction of several householders (slamming the door, threatening to call the police) clearly showed that they were unhappy to have been woken up and filmed.

On 2 December 2010, the *Oberverwaltungsgericht Berlin-Brandenburg* (Berlin-Brandenburg Higher Administrative Court) had confirmed two rulings of the Berlin-Brandenburg LMA (mabb) and rejected the broadcaster's appeal against them. The mabb had complained that the clips had infringed the general personality rights of the people filmed, as well as their right to their own image. After the broadcaster had ignored a request from the mabb to declare how much advertising income it had received in connection with the programmes concerned, the mabb demanded payment of the estimated income of EUR 75,000. The broadcaster appealed against this claim.

The BVerwG ruled that the relevant provision of the *Medienstaatsvertrag Berlin-Brandenburg* (Berlin-Brandenburg Media Agreement - MStV) was compatible with federal law (particularly the *Grundgesetz* - Basic Law). The *Länder* had the power to adopt such a rule, which did not form part of criminal law. Complaining about a programme and confiscating the advertising income were media supervision measures used, not to punish criminal offences, but to effectively ensure that broadcasting law obligations were fulfilled by private broadcasters.

In the BVerwG's view, the rule did not, therefore, infringe the principle of equal treatment, for example, because for public broadcasters there was no provision for complaints to result in the confiscation of advertising income. Under the dual broadcasting system, private and public broadcasters were subject to different supervisory bodies, each with its own responsibilities and rules, which was why the means available to their respective watchdogs did not have to be identical.

• *Pressemitteilung des BVerwG zum Urteil vom 23. Mai 2012 (Az. 6 C 22.11)* (BVerwG press release on the decision of 23 May 2012 (case no. 6 C 22.11))
http://merlin.obs.coe.int/redirect.php?id=15976 DE

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Berlin Supreme Court Considers Documentary Footage Non-Copyrightable

On 28 March 2012, the *Kammergericht Berlin* (Berlin Supreme Court - KG), in a recently published judgment, confirmed the lower-instance decision of the *Landgericht Berlin* (Berlin District Court - LG) of 20 May 2011 and ruled that film footage showing the removal of a GDR citizen shot dead at the Berlin Wall was not protected by copyright. The plaintiffs had claimed copyright over the footage and demanded that the defendant be prohibited from reproducing it, making it publicly accessible or broadcasting it on television.

The KG Berlin ruled out such a claim under the *Urheberrechtsgesetz* (Copyright Act - UrhG). The footage was not a cinematographic work in the sense of Article 2(1)(6) and 2(2) UrhG, since it did not display the necessary level of creativity. There was no obvious creative process that could justify a claim that the cameraman concerned had even produced a simple intellectual creation (known as a "*kleine Münze*") that would be protected by copyright. The footage was merely a recording of an unforeseen event which, in the circumstances, must have been filmed without any preparation. The scenes filmed were not the result of any dramatic creative process. It was also hard to see what creative intellectual activity the cameraman had carried out, other than the purely technical process of filming the recorded images concerned. Rather, the images amounted to nothing more than the stringing together of a series of photographs.

The court also dismissed the plaintiffs' claim that individual still images from the footage used by the defendant were photographic works in the sense of Article 2(1)(5) and 2(2) UrhG. In the court's opinion, photographic works were generally characterised by the fact that, beyond the actual scene in the photograph, they captured an atmosphere particularly well, vividly portrayed a particular issue or caused the observer to think. This could be achieved, for example, through the choice of subject, detail or perspective, the distribution of light and shadow, use of contrast, definition or selection of the right moment to take the photograph. It was not impossible for individual still images from filmed footage to enjoy copyright protection as photographic works, as long as they had been produced using artistic methods, as was also the case with photographs. However, in the present case - as with regard to whether the footage constituted a cinematographic work - it was not apparent that the individual still images had been created using such artistic methods.

• *Urteil des KG Berlin vom 28. März 2012 (Az. 24 U 81/11)* (KG Berlin ruling of 28 March 2012 (case no. 24 U 81/11))
http://merlin.obs.coe.int/redirect.php?id=15977 DE

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Hamburg District Court Finds Blogger Liable for Embedded YouTube Video

On 22 May 2012, the *Landgericht Hamburg* (Hamburg District Court - LG) ruled that a blogger was liable for

a YouTube video that he had embedded on his website. The video showed a television report about the plaintiff, a doctor, broadcast on the ZDF magazine programme "WISO". In the report, the doctor was accused of using dubious methods to treat cancer patients. However, the report also included false allegations, for example, it claimed that there was no expert evidence verifying the effectiveness of the plaintiff's methods, which proved to be untrue. The doctor's complaint at the time was therefore upheld and ZDF was forbidden by a court from distributing the film.

The blogger accused in the present case had reported on his website about the legal dispute between the plaintiff and ZDF and, despite the court injunction imposed on ZDF, had embedded the TV report in his blog as a YouTube video. The doctor also lodged a complaint about this.

The court concluded that the blogger had failed to meet his duty to check the report's accuracy. For example, he had been aware of the legal dispute in which the doctor had sought an injunction preventing ZDF from distributing the television report. He had therefore known that the video's accuracy could not be trusted, especially as he had been aware that the plaintiff had already taken court action repeatedly against reports that he thought had infringed his general personality rights. The defendant should therefore have checked the accuracy of the television report before embedding the YouTube video in his blog.

According to the LG Hamburg, the principles of the 2003 *Paperboy* ruling, in which the *Bundesgerichtshof* (Federal Supreme Court - BGH) had expressly authorised so-called "deep links", i.e., links leading directly to a particular web page rather than to a website's home page (see IRIS 2003-8/32), were not relevant in the current case. The reason for this lay in the purpose of the respective complaints: whereas the *Paperboy* ruling dealt with copyright infringements, the current case concerned "the dissemination of expressions of opinion". It was also detrimental to the blogger's case that he had regarded the link as a reference to additional information and referred to the video in his article.

The ruling, which to a large extent runs counter to previous "opinion-friendly" case law of the BGH and the *Bundesverfassungsgericht* (Federal Constitutional Court - BVerfG), has attracted a considerable amount of criticism. The defendant has already declared his intention to appeal.

• *Urteil des Landgerichts Hamburg, Az.: 324 O 596/11* (Ruling of the Hamburg District Court, case no. 324 O 596/11)
http://merlin.obs.coe.int/redirect.php?id=15981 DE

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Act Strengthening Press Freedom Adopted

On 25 June 2012, the *Bundestag* adopted the Act strengthening the freedom of the press in the Criminal Code and Code of Criminal Procedure (PrStG). On 11 May 2012, the German *Bundesrat* (upper house of parliament) had approved the bill and the *Bundestag* (lower house of parliament) had previously voted to adopt the bill tabled by the Federal Government without any amendments (see IRIS 2012-5/13 and IRIS 2010-9/22).

Under the bill, press freedom will be strengthened through improved protection for journalists and their sources. To this end, Article 353b of the *Strafgesetzbuch* (Criminal Code - StGB; breaches of official secrecy and special secrecy obligations) and Article 97(5)(2) of the *Strafprozessordnung* (Code of Criminal Procedure - StPO; items that cannot be confiscated) are amended in journalists' favour.

• *Gesetz zur Stärkung der Pressefreiheit im Straf- und Strafprozessrecht vom 25. Juni 2012* (Act strengthening the freedom of the press in the Criminal Code and Code of Criminal Procedure (PrStG) of 25 June 2012)
http://merlin.obs.coe.int/redirect.php?id=15972 DE

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Bundestag Committee Approves Increased Barrier-Free Film Provision; FFA Decision in Principle on Film Aid

On 23 May 2012, the *Ausschuss für Kultur und Medien* (Culture and Media Committee) of the German *Bundestag* (lower house of parliament) voted by a majority to approve a proposal from the coalition parties to increase the provision of barrier-free films.

The proposal began by stating that there were around 9.6 million disabled persons living in Germany, who, according to the UN Convention on the Rights of Persons with Disabilities, for example, were entitled to participate in artistic and cultural life. For blind and deaf persons, subtitles and audio description helped to provide access to audiovisual works. Although the *Filmförderungsgesetz* (Film Support Act - FFG) had made provision for support for the production of barrier-free films since 2009 (see IRIS 2009-3/11), so far there was no reliable proof that these rules were being properly implemented. More detailed information should be available following the anticipated review of the application of the UN Convention. The number of applications received for rental

support was also small. The existing support available for modernisation work (e.g., digitisation) in cinemas also included measures to promote barrier-free access, such as the provision of wheelchair spaces. However, little response had so far been received to the offer of such support.

Efforts should therefore be made to raise awareness among all stakeholders in the audiovisual sector concerning current needs and to clarify their profitability - which was, in any case, expected in the medium term - by tapping into new target groups. Broadcasters were also obliged to act, particularly bearing in mind that persons with disabilities would have to pay the household licence fee for public service broadcasting from 2013 onwards. Sign language and plain language services should also be expanded.

Information on the effectiveness of the current rules in this area should therefore be taken into account in the planned amendment to the FFG,; awareness of these issues and needs should be raised within the film industry, the provision of barrier-free films and public service television programmes should be stepped up in cooperation with the *Bundesländer,* and cinema digitisation support programmes should be driven forward (see IRIS 2012-4/18).

According to reports, the *Filmförderungsanstalt* (Film Support Office - FFA) has taken a decision in principle under which film aid will, in future, be linked to its barrier-free status. A corresponding amendment to the film aid guidelines could enter into force this autumn, subject to the approval of the FFA authorities.

• *Mitteilung des BT-Ausschusses für Kultur und Medien vom 23. Mai 2012* (Press release of the *Bundestag* Culture and Media Committee of 23 May 2012)
http://merlin.obs.coe.int/redirect.php?id=15973 DE

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VG Media and Aerial Company Reach Settlement on Retransmission of Broadcast Signals

The *Gesellschaft zur Verwertung der Urheber- und Leistungsschutzrechte von Medienunternehmen* (Society for the Collection of Copyright and Performance Rights of Media Companies - VG Media) has published a press release announcing that it reached a settlement concerning the retransmission of broadcast signals before the *Landgericht Leipzig* (Leipzig District Court - LG) on 29 May 2012 with a Saxon company that receives the broadcast signals of various providers and distributes them to connected households (case no.: 05 O 3233/11).

According to reports, the parties could not agree as to whether operators of reception equipment needed a licence to retransmit the broadcast signals of private radio and television companies (see IRIS 2012-5/17 and IRIS 2010-4/15).

Under the settlement, the operator of a (small, private) aerial agreed to pay backdated fees to VG Media and to conclude a licensing agreement for future, related activities.

According to VG Media, the terms of the settlement reflect those of the legal action lodged by the collecting society.

• *Pressemitteilung der VG Media vom 29. Mai 2012* (VG Media press release of 29 May 2012)
http://merlin.obs.coe.int/redirect.php?id=15978 DE

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-Estonia

Appointment of the Estonian National Public Broadcasting Council's Expert Members

According to ENPB Act *Eesti Rahvusringhäälingu seadus* (Estonian National Public Broadcaster Act), the supervisory body of the public service broadcaster is the *Rahvusringhäälingu nõukogu* (Broadcasting Council, BC). The BC is composed of four independent experts and one member from each Parliamentary party. Experts are appointed by the Parliament for a five-year term, MPs are appointed for their four-year Parliamentary period.

The five-year term of four independent expert members ended on 8 May 2012. Four new members were proposed by the Cultural Commission (CC) of the Parliament and appointed by the Parliament on the same day. New members were selected without any public open debate or discussion about a candidate's professionalism and political independence. After their appointment, it has been revealed, the CC agreed that each of all four political parties would put forward two candidates. As the coalition has the majority of seats in the Cultural Commission, it transpired that all the members finally selected by the secret vote were their candidates; candidates proposed by the opposition were rejected.

The three new expert members are the representative of commercial media entity Mart Luik, the director of theatre Paavo Nõgene (member of Reform Party), and the PR and communication specialist Agu Uudelepp. The mandate of the Investment and finance expert Rain Tamm was extended. During its first meeting, the Council elected Agu Uudelepp as chairman.

• *XII RIIGIKOGU STENOGRAMM III ISTUNGJÄRK Teisipäev, 8. mai 2012, kell 10:00* (Stenographic record of the Parliament session, 8 May 2012)
http://merlin.obs.coe.int/redirect.php?id=15990 ET

• *Eesti Rahvusringhäälingu tegevusvaldkonna tunnustatud asjatundjatest Eesti Rahvusringhäälingu nõukogu liikmete nimetamine* (Parliamentary decree of the appointment of Estonian National Broadcasting Council expert members, 8 May 2012, Riigiteataja RT III, 11.05.2012, 1)
http://merlin.obs.coe.int/redirect.php?id=15991 ET

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ES-Spain

Supreme Court Decides on the "Sinde Act"

On 29 May 2012, the Supreme Court issued a first decision on the appeal filed by the *Asociación de Internautas* (Association of Web Users) concerning the legality of the so-called Sinde Act (see IRIS 2012-4/22, IRIS 2012-2/18, IRIS 2011-3/17 and IRIS 2011-2/23).

The "Sinde Act" is actually a modification of the Spanish Intellectual Property Act which aims at speeding up the procedure for blocking or closing down websites which provide illegal access to copyrighted content. It creates a Commission on Intellectual Property at the Ministry of Culture in charge a.o. of safeguarding intellectual property rights. To this effect, it introduces a procedure whereby a rightsholder can apply to the Commission on Intellectual Property against an allegedly infringing website.

In February 2012, the Association of Web Users asked the Supreme Court to clarify the legality of the new wording of the Intellectual Property Act as well as the functions that the Spanish Commission of Intellectual Property can exercise. As a precautionary measure, the appellant Association also requested the suspension of the Sinde Act until the Court decides on the matter.

The Supreme Court decided that there were no legal grounds for the the suspension of the Sinde Act. The Supreme Court reminds that the closing down of a web page by the Commission on Intellectual Property can be appealed before the Tribunals, so the eventual damage of such a sanction is not considered by the Supreme Court as irreparable.

The Supreme Court has still to decide on the legality of the "Sinde Act", so the case remains open.

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New Decree-Law on the Administration Regime of RTVE Corporation

On 20 April 2012 the Council of Ministers approved a Royal Decree-Law that modifies the administration regime of the national public service broadcaster, Corporación de Radio y Televisión Española (CRTVE), which has been in place since changes were introduced by Law 17/2006 (see IRIS 2005-9/16 and IRIS 2006-6/19).

The Law stated that the Corporation had to be ruled by a Board of Management composed of twelve members from among whom the President would be chosen. These designations were for six years and subject to obtaining a two-thirds majority in a parliamentary appointment process. The current council members were appointed in January 2007, but after the resignation of successive Presidents of the Corporation in 2009 and 2011, and of two board members subsequently, it was decided that the presidency would rotate among the remaining members until new appointments were made by the Parliament.

In the context of a lack of consensus between the main parties, Partido Popular and Partido Socialista Obrero Español, the Government has decided to approve this new Decree-Law that:

- reduces the number of members of the Council to nine, thereby eliminating two that could be proposed by the most representative unions;

- establishes that in the case where candidate members do not obtain a two-thirds majority in the first round of voting, they can be appointed by absolute majority in a second round after 24 hours; and

- states that the President will be the only member of the Board with a full-time position for which he will be compensated (the others will only be allowed to claim expenses for attending Board meetings).

Additionally, the Decree amends the *Ley General de la Comunicación Audiovisual* (General Act of Audiovisual Communication, see IRIS 2010-4/21), to guarantee radio broadcasters free access to sports arenas in order to broadcast live sporting events.

• Real Decreto-ley 15/2012, de 20 de abril, de modificación del régimen de administración de la Corporación RTVE, previsto en la Ley 17/2006, de 5 de junio (Royal Decree-law 15/2012, of 20 April, on the modification of the administration regime of RTVE Corporation, as established by Law 17/2006, of 5 June)
http://merlin.obs.coe.int/redirect.php?id=15947 ES

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FI-Finland

Act concerning the Funding of Public Service Broadcasting

On 20 June 2012, the Act amending Act on Yleisradio Oy and Act on the State Television and Radio Fund was adopted by the Finnish Parliament.

Yleisradio Oy (YLE) is Finland's national public service broadcasting company. YLE operates four national television channels and six radio channels and services complemented by 25 regional radio programmes. YLE is 99.9 % state-owned and is supervised by a Supervisory Board appointed by the Parliament. It operates under the Act on Yleisradio Oy. Until the end of 2012, its activities are financed by the television license revenue. The annual television license in Finland is EUR 252.25 per household.

The revision of the Act guarantees the funding of YLE, clarifies the supervision of the company's public broadcasting service and specifies the task of the public broadcasting service.

The act replaces YLE's existing obligation to provide full public service broadcasting with an obligation to provide a diverse and comprehensive range of television and radio programmes for all citizens on equal terms. The services can be offered regionally as well. YLE will also have to produce, create, improve and store domestic culture, art and entertainment. Furthermore, programmes targeted at young people should be emphasized.

YLE will be funded by a tax collected by the Finnish tax authorities. The YLE tax will be 0.68 % of the total amount of employees' wages and capital income, but not more than EUR 140 annually. YLE tax paid by legal persons (for example, limited liability companies or cooperatives) will be EUR 350, if the business or agricultural revenues exceed EUR 400,000. If the revenue exceeds EUR 1 million, the YLE-tax will amount EUR 700. The money will be directed into a special radio and television fund. The money amassed by the fund will be used to finance YLE's public service operations and improve radio and television activity. The sum will be specific for each taxpayer, and no longer be tied to the ownership of a television set.

The funding level for the year 2013 is EUR 500 million. From 2014 onwards the funding level will be reviewed in order to meet the increase in annual costs. The new finance model is to be adopted at the beginning of 2013. The new scheme will replace the earlier license fee scheme that has been used for more than 80 years.

The Supervisory Board will be empowered to make a prior assessment of the YLE's new services and functions to ensure that they will not compete with services provided by the private sector while benefitting from money raised by taxes. Parliament´s access to information will be improved by obliging the Supervisory Board to provide the Parliament with an annual report on the public service activities.

The Finnish Communications Regulatory Authority (FICORA, Viestintävirasto) will oversee that there is no price undercutting or cross-subsidies. The Regulatory authority will also have to monitor that the prohibition on advertising or having sponsors is respected. The Act also includes provisions for sanctions.

• *Hallituksen esitys eduskunnalle laeiksi Yleisradio Oy:stä annetun lain sekä valtion televisio- ja radiorahastosta annetun lain muuttamisesta* (Act amending Act on Yleisradio Oy and Act on the State Television and Radio Fund, 20 June 2012)
http://merlin.obs.coe.int/redirect.php?id=15957 FI

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Act on Audiovisual Programmes and Act on the Finnish Centre for Media Education and Audiovisual Media

In June 2011, the Finnish Parliament adopted *Kuvaohjelmalaki 710/2011* (Act on audiovisual programmes) and *Laki Mediakasvatus- ja kuvaohjelmakeskuksesta 711/2011* (Act on the Finnish Centre for Media Education and Audiovisual Media). The Acts entered into force on 1 January 2012.

The Act on audiovisual programmes restricts the provision of audiovisual programmes in order to protect children. The Act applies to audiovisual programme provision and its supervision in Finland, if the programmes are provided by television operations or by on-demand services subject to the Act on Television and Radio Operations (744/1998), or by other providers who operate/function in Finland.

According to the Act on audiovisual programmes, an audiovisual programme provider must notify *Mediakasvatus- ja kuvaohjelmakeskus* (the Finnish Centre for Media Education and Audiovisual Media - MEKU) when beginning to provide audiovisual programmes. The notification must be submitted if programmes are provided for economic purposes and on a regular basis. No notification is needed if the programmes provided are exempt from classification.

The supervision of audiovisual programme provision and the coordination and promotion of national media education are handled by MEKU, which is subject to the Ministry of Education and Culture.

The Finnish Centre for Media Education and Audiovisual Media shall:

1) promote media education, children's media skills and the development of a safe media environment for children in cooperation with other authorities and corporations in the sector;

2) act as an expert in the development of the children's media environment and promote research related to the sector, as well as monitor international development in the field;

3) distribute information about children and the media;

4) take charge of the education and refresher training of audiovisual programme classifiers;

Audiovisual programmes supplied in Finland must be classified unless exempt from classification. An audiovisual programme may only be classified by a classifier trained and approved by MEKU as well as by MEKU´s officials. Programmes exempt from classification are for example those that include only educational material, music, sport, cultural events, religious services or other similar events or topical news issues.

Audiovisual programmes are considered to be detrimental to the development of children if, by virtue of violent or sexual content or elements causing anxiety or any other comparable features, they are likely to detrimentally affect children's development. When assessing the detrimental nature of a programme, the context and manner in which the programme's events are described must be taken into consideration. If an audiovisual programme is detrimental to the development of children, it shall be classified according to an age limit of 7, 12, 16 or 18, depending on the programme's content, and be given a symbol that describes the programme content. If there is no reason to consider the programme to be detrimental to the development of children, it shall be classified as suitable for all ages.

• Kuvaohjelmalaki 17.6.2011/710 (Act on Audiovisual Programmes, Act No. 710, of 17 June 2011)
http://merlin.obs.coe.int/redirect.php?id=15958 EN FI

• Laki Mediakasvatus- ja kuvaohjelmakeskuksesta 17.6.2011/711 (Act on the Finnish Centre for Media Education and Audiovisual Programmes, Act No. 711, of 17 June 2011)
http://merlin.obs.coe.int/redirect.php?id=15959 EN FI

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FR-France

All TF1's Complaints against YouTube Rejected

On 29 May 2012, in a judgment running to 34 pages, the regional court in Paris rejected the claims brought by TF1 and its subsidiaries (the channel LCI, TF1 Vidéo and TF1 International, responsible for video editing and acquiring and distributing rights) against YouTube on the grounds of infringement of copyright, unfair competition and parasitic use. In addition to requesting a ban, the channel was also claiming damages - calculated at EUR 150 million - for the prejudice caused by YouTube putting on-line a whole range of films, series, sports events and broadcasts it felt it had rights to, including some prior to any broadcasting or commercial use in France.

The first stage in the proceedings involved the court examining whether the applicant companies had sufficiently and correctly identified the content at issue. It deliberated on this according to the qualities of the said companies and according to the grounds invoked (copyright and neighbouring rights) for each item of content at issue. It found that the applicant parties had not produced proof of the rights they invoked. Thus, contrary to its claims, TF1 Vidéo was not the economic beneficiary of the producers of the videograms at issue since it had only acquired the right to use them and failed to provide proof of the exclusivity it claimed. Similarly, the company TF1 Droits Audiovisuels, depending on the works involved, either did not establish its qualification as the producer of an audiovisual work or a videogram, or did not provide proof that it had reached an agreement with the other co-producers or had their authorisation to act alone. The applications brought by these two companies were therefore inadmissible. Concerning the channels TF1 and LCI themselves, as they were audiovisual communication companies, reproducing their programmes and making them available to the public were subject to their authorisation, in accordance with Article 216-1 of the Intellectual Property Code (CPI). The court recalled however that there was no presumption of ownership of rights as required in order to be able to benefit from this protection. It was for the party claiming it to demonstrate the existence of the programme and the proof that it had been broadcast before it was allegedly shown again on YouTube. In the present case, the court deemed the documents produced in favour of the channels (programme schedules, press files, etc.) insufficient, and the claims brought by the channels on the basis of Article L. 216-1 of the CPI were declared inadmissible except for seven sports events for which the required elements of proof had been produced. Similarly, on the grounds of copyright, the channels did not provide proof of the originality of the programmes (including the television news) they claimed YouTube should not have put on-line.

Once the ownership of the rights had been examined, the court turned to the status of the video sharing platform. In a manner that has now become classic, the applicant parties claimed that the status of editor should apply to the platform, since it played an active part in users putting content on-line. YouTube claimed the status of host, within the meaning of Ar-

ticle 6-1-2 of the Act of 21 June 2004 (LCEN). In rejecting the claims brought by TF1 and LCI, and upholding YouTube's status as a host, the court recalled the provisions of the LCEN and the position adopted by the Court of Cassation in line with that of the CJEU, examined the conditions for using the service that were in force at the time proceedings were initiated, and recalled that hosts were within their rights to make use of advertising; doing so did not deprive them of their status. In application of Articles 6 and 7 of the LCEN, the court went on to examine the case brought against YouTube in its capacity as host and recalled the requirement to withdraw disputed content promptly once this has been notified. In the present case, the court found that YouTube had taken too long, taking five days "at best" to remove the videos of the seven sports events at issue, which "could not be qualified as reasonable" and was therefore at fault. In a final observation on this point, however, the court noted that in any event the conditions set out in Article L. 216-1 of the CPI were not met for noting fault on the part of YouTube, since the condition regarding payment of an entrance charge was not met, because no charge was made for accessing the site. In conclusion, the court observed that YouTube had concluded an agreement with TF1 on 16 December 2011 that permitted it access to the "Content ID" service which allowed rightsholders, once content had been notified, to achieve the definitive withdrawal of a video notified as being disputed. The applicants had not noted any infringement since that date. Did that mean the dispute was actually over? There is still the possibility of an appeal04046

• *TGI de Paris (3e ch. 1re sect.), 29 mai 2012 - TF1, LCI et autres c/ Youtube* (Regional court in Paris (3rd chamber, 1st section), 29 May 2012 - TF1, LCI et al. v. YouTube)
http://merlin.obs.coe.int/redirect.php?id=15997 FR

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Results of Application of the Act of 5 March 2009 Reforming the Public-Sector Audiovisual Scene

Three years after the adoption of the Act of 5 March 2009 on audiovisual communication, and with France's new Government announcing reform of the public-sector audiovisual scene, it is worth noting the publication of a report by Senators David Assouline and Jacques Legendre on behalf of the commission for supervising application of legislation. On the basis of the preparatory work for the Act, and after hours of debate and hearings, the rapporteurs have highlighted the objectives set out in the 2009 Act and compared them with the results actually achieved. There are comments on nearly all the measures concerned, presented in thematic form. The results of the application of the Act are in fact equivocal. The key measure - the abolition of advertising - was at the heart of the debate. According to Mr Assouline, however, "it is emblematic above all in its failure". It has to be said that it has only been partially applied: advertising during the evening was supposed to be abolished by the end of 2011 but this did not happen, for financial reasons. Indeed the present Government will have to settle the matter quickly. The report also highlights a cultural model that swings between audience figures and programme quality, even though the type of programme has not changed, contrary to the intention of the reform. The rapporteurs believe the new governance of France Télévisions has had a number of positive effects, such as the reorganised administrative board, while other results are more questionable, as for example the appointment of the chairmen of the public-sector audiovisual undertakings by France's President, which the new President François Hollande has announced he wants to reform. The part of the reform concerning which application is the most worrying, according to the rapporteurs, involves financing - the yield of the taxes introduced to compensate for the abolition of advertising has not reached the anticipated amount, thus costing the State 180 million euros per year. What is more, there is a serious risk that the European authorities will cancel the "telecoms" tax (250 million euros per year) and require the repayment of the tax received from the operators (a billion euros!). "The financing of the reform by introducing new taxes has thus been a failure". The transposition into national law of the Directive on Audiovisual Media Services is also analysed at length. The rapporteurs consider this has been applied fairly satisfactorily and relatively comprehensively, particularly with regard to promoting French diversity and the accessibility of programmes. It has also made it possible to bring catch-up TV and video on demand - which are already part of our everyday lives - within the scope of French law. In conclusion, the rapporteurs note that the modernisation of audiovisual law, particularly with regard to the digital revolution, is under way, and that the reform of the public-sector audiovisual scene is still in hand.

• *Communication audiovisuelle et nouveau service public de la télévision : la loi du 5 mars 2009 à l'heure du bilan, Rapport d'information de MM. David Assouline et Jacques Legendre* (Audiovisual communication and new public-sector television service: taking stock of the Act of 5 March 2009, an information report by David Assouline and Jacques Legendre)
http://merlin.obs.coe.int/redirect.php?id=15971 FR

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SACEM and France Télévisions Sign Agreement

On 15 June 2012, the French company of authors, composers and editors of music (Société des Au-

teurs, Compositeurs et Éditeurs de Musique - SACEM) and France Télévisions announced they had signed an agreement on the broadcasting of works listed in SACEM's repertoire on all the channels in the France Télévisions group. This agreement replaces the previous agreements, which had covered use by the various channels, with a single contract. This simplifies matters considerably, since it applies to all the channels operated by France Télévisions, which became a single undertaking by virtue of the Act of 5 March 2009. The agreement covers the widest possible broadcasting of musical works, including not only linear use by the France Télévisions TV channels and radio stations, but also non-linear services and their new screens (streaming on their Internet sites, catch-up TV, preview TV, and Francetv pluzz), for which negotiations had been in hand but had not yet been concluded.

The agreement covers the repertoires of musical works, musical documentaries and clips, voice-overs and subtitling, humour, poetry and sketches. It takes into account the requirement of fair remuneration for authors, composers and editors of music (without publication being involved), and institutes a new structure for financing France Télévisions featuring an increase in the proportion of public resources and its transformation into a single undertaking. The agreement is valid until the end of 2015. Although France's new Government appears to have announced a number of plans for reforming the public-sector audiovisual scene, these should not in theory jeopardise the progress made in this respect.

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GB-United Kingdom

High Court Orders Internet Service Providers to Block Access to The Pirate Bay

On 2 May 2012, the English High Court made an order under the Copyright, Designs and Patents Act 1988 to require the major internet service providers to block customer access to The Pirate Bay peer-to-peer file sharing website. The Act (as amended) implements the 2001 Information Society Directive 2001/29/EC. The case was brought by record companies on their own behalf and on behalf of the British Recorded Music Industry and Phonographic Performance Ltd.

The Act empowers the High Court to grant an order against a service provider where the latter has 'actual knowledge' of another person using their service to infringe copyright. The court had already made such an order in relation to the website Newzbin2, and in an earlier decision had determined that both the users and operators of The Pirate Bay infringed the copyrights of those seeking the orders (see IRIS 2011-9/21 and IRIS 2012-4/28). In this case, it considered that the ISPs had actual knowledge of the copyright infringement as this had been given to them by the record companies and in the earlier judgment. To grant the order would not be contrary to Art. 10 of the European Convention on Human Rights or Art. 11 of the Charter of Fundamental Rights of the European Union. The orders would represent a proportionate response as their terms had in fact been negotiated between the parties, who were professionally represented, and were proportionate in relation to the users of the ISP services for reasons given in the earlier cases. Thus orders were granted to require IP address blocking, which was feasible as The Pirate Bay did not share an address with anyone else.

• Dramatico Entertainment et al v. Brisith Sky Broadcasting et al, [2012] EWHC 1152 (Ch)
http://merlin.obs.coe.int/redirect.php?id=15944 EN

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High Court Decides that Broadcasters Do not Have to Give Film of Violent Disorder to the Police

On 17 May 2012, the English High Court overturned the decision of a lower court that had required a number of broadcasters, including Sky, the BBC and Independent Television News, to hand over to the police footage of violent disorder accompanying the eviction of the inhabitants of a travellers' site. The police had applied under s.9 of the Police and Criminal Evidence Act 1984, which empowers a court to grant access to 'special procedure material', including journalistic material, if there are reasonable grounds for believing that a serious offence has been committed, if the material would be of substantial value to the investigation and likely to be relevant evidence, if there was no other means of obtaining the evidence and if it was in the public interest to make the order. Chelmsford Crown Court had made an order for disclosure of over 100 hours of footage in order to help identify the perpetrators of the violence, who had worn masks during the disorder.

The High Court considered that the order should not have been granted, on three grounds. First, there was insufficient evidence before the judge for him to have been satisfied that the footage would be likely to be of substantial value to the investigation. No adequate reasons for the order had been given by the judge, and a 'speculative' or 'scattergun' approach had been taken in identifying the material sought. It had merely been suggested that the film might help in identifying

the perpetrators if it showed them unmasked later; there was no evidence that it did so. Secondly, the court should have balanced the need for the material against the rights of the broadcasters under Art.10 of the European Convention of Human Rights, and in particular against the inhibiting effect of disclosure on the ability of broadcasters to carry out their work. No reasons were given by the judge to suggest that requiring disclosure would amount to a proportionate balancing of these opposing considerations. Finally, as no material had been produced clearly showing why the order should be granted, the broadcasters had no opportunity to show why much of the material would not be of assistance.

• R (on the application of British Sky Broadcasting et al) v. Chelmsford Crown Court and Essex Police [2012] EWHC 1295 (Admin)
http://merlin.obs.coe.int/redirect.php?id=15945 EN

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IE-Ireland

Public Service Broadcaster Sanctioned

On 4 May 2012 the Broadcasting Authority of Ireland (BAI) issued its statement of findings and determination following an investigation into apparent breaches by RTÉ - the national public service broadcaster - of sections of the Broadcasting Act 2009 arising from a broadcast in 2011. The programme "Mission to Prey" was broadcast on 23 May 2011 and formed part of the long-running "Prime Time Investigates" series on RTÉ Television. The programme included a segment which wrongly alleged that a Catholic priest, currently in ministry in Ireland, had in the 1980s abused a teenage girl in Africa, that she had borne his child and that he subsequently abandoned her and the child.

The segment was given considerable prominence through heavy trailing and by leading the second half of the programme. The broadcast included a reconstruction, images of the priest fulfilling his ministry in Ireland (which were obtained through secret filming), and a doorstep interview. The allegations were broadcast despite strong denials from the priest and his legal representatives, and in circumstances where he had offered to take a paternity test to provide a definitive answer to the allegations. The allegations were also repeated, by the same broadcaster, on national radio on 24 May 2011.

Following the broadcasts the priest was temporarily removed from his ministry and he instigated defamation proceedings. Upon completion of the paternity tests, which confirmed that the priest had not fathered the child, RTÉ issued an apology on 6 October 2011. The defamation proceedings were settled on 17 November 2011 with a correction order issued, in accordance with section 30 of the Defamation Act 2009, requiring the broadcaster to publish a correction of the defamatory statements. RTÉ also paid undisclosed damages to the priest, widely reported to be just under EUR 1 million.

Upon the conclusion of the defamation proceedings the Minister for Communications, Energy and Natural Resources asked the BAI's Compliance Committee to initiate an investigation under section 53 of the Broadcasting Act 2009 to determine whether RTÉ had met its statutory responsibilities regarding objectivity, impartiality and fairness with respect to the broadcast (s.39 of the Act).

The Committee on 29 November 2011 concluded that there were circumstances that warranted an investigation and they appointed a former Controller of BBC Northern Ireland as the Investigating Officer. This was the first such investigation initiated under section 53 of the Broadcasting Act. The investigation was generally limited to the segments of the broadcast featuring the priest and the circumstances surrounding the commissioning, production and transmission of the programme. In her 34-page report the investigator formed the view that breaches of the Act had occurred and recommended that the Compliance Committee find that RTÉ had seriously breached the Act.

Having considered this report and further submissions from RTÉ, the BAI concluded that there was a significant failure of editorial and managerial controls within RTÉ, that the broadcast of seriously defamatory allegations was unfair, and that the means employed in making the programme encroached upon the individual's privacy. The BAI further concluded that these serious breaches warranted a financial sanction of EUR 200,000. The maximum provided for in the Broadcasting Act is EUR 250,000.

• Broadcasting Authority of Ireland (BAI), Statement of Findings issued pursuant to section 56 of the Broadcasting Act 2009 [Mission to Prey Determination], (4 May 2012)
http://merlin.obs.coe.int/redirect.php?id=15950 EN
• Broadcasting Authority of Ireland (BAI), Investigators Report issued pursuant to section 53 of the Broadcasting Act 2009 [Mission to Prey Investigation], (29 February 2012)
http://merlin.obs.coe.int/redirect.php?id=15951 EN

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Revised Television Access Rules Launched

On 14 May 2012 the Broadcasting Authority of Ireland (BAI) launched revised Access Rules for Irish television broadcasters. The Rules have immediate effect and replace the previous Broadcasting Commission of Ireland (BCI) Access Rules, which had been in place since

1 March 2005. The Rules determine the levels of subtitling (including captioning), sign language and audio description that broadcasters will be required to provide. The Rules apply to certain broadcasters within the State and do not apply to broadcast services commonly received in Ireland but licensed in other jurisdictions.

Section 41(3)(c) of the Broadcasting Act 2009 provides that the BAI shall prepare and revise rules that require broadcasters to take steps to promote the understanding and enjoyment of programmes for persons who are deaf, have a hearing impairment or are blind or partially sighted or a combination of these. Section 43(3) of the Act further provides for the rules to specify a percentage of programmes broadcast that must be accessible.

The BAI began a review of the Access Rules in 2011 and used research commissioned by its predecessor the BCI as the basis for a consultation document. The consultation process also included briefing sessions and workshops with broadcasters, representatives of the deaf, hard of hearing and vision-impaired communities and the general public.

The revised Rules set a range of percentage targets for each broadcast service (television station) for the five-year period from 2012-2016. The target range is increased annually for each applicable broadcast service on an incremental basis over the five-year term. Targets for subtitling (on-screen text that represents what is said on the screen) are based on an 18-hour broadcast day from 7am to 1am. No programme genres, types or time-blocks are prioritised.

Targets for Irish Sign Language and Audio Description (commentary that provides a verbal description of what is happening on screen) are applicable to the national public service broadcaster's services on RTÉ One and RTÉ Two only. In line with section 43(3) of the Broadcasting Act 2009, broadcasters are also required to indicate and promote through standard symbols, both on-screen and in programme listings, those programmes for which an access provision is available. In order to assist broadcasters and users, a set of Guidance Notes outlining the general and technical standards required in relation to the various modes of access provision was also published by the BAI.

During the consultation process the BAI had agreed to adopt and include in the Rules a proposal that a User Consultative Panel be established to assist with its assessment of compliance and future reviews of the Rules. However, no reference to such a panel has been included. The revised Rules do confirm that they will be reviewed in 2014 and 2016. This is in line with the requirements under section 43(6) of the Broadcasting Act 2009.

• Broadcasting Authority of Ireland (BAI), Access Rules, (May 2012)
http://merlin.obs.coe.int/redirect.php?id=15952 EN
• Broadcasting Authority of Ireland (BAI), BAI Access Rules: Statement of Outcomes, (May 2012)
http://merlin.obs.coe.int/redirect.php?id=15953 EN
• Broadcasting Authority of Ireland (BAI), BAI Guidelines - Audio Description, (May 2012)
http://merlin.obs.coe.int/redirect.php?id=15954 EN
• Broadcasting Authority of Ireland (BAI), BAI Guidelines - Irish Sign Language, (May 2012)
http://merlin.obs.coe.int/redirect.php?id=15955 EN
• Broadcasting Authority of Ireland (BAI), BAI Guidelines - Subtitling, (May 2012):
http://merlin.obs.coe.int/redirect.php?id=15956 EN

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IT-Italy

ECJ to Vet the Italian stricter hourly Advertising Limits for Pay-TV

On 7 March 2012 the Second Chamber of the Regional Administrative Court of Latium referred to the European Court of Justice (ECJ) for a preliminary ruling on the question as to whether Directive 2010/13/EU (the AVMS Directive) and EU primary law should be interpreted as precluding the asymmetric hourly advertising limits for pay-tv operators provided by Italian law.

The so-called Romani Decree, adopted by the Italian Government to implement the AVMS Directive (see IRIS 2010-4/31), includes a number of provisions having no exact match in the AVMS Directive. In particular, Article 38, para. 5, of the Consolidated Law on Audiovisual and Radio Media Services (CLARMS) as amended by the Romani Decree provides that pay-tv operators must comply with a hourly advertising limit of 16% in 2010, 14% in 2011, and 12% from 2012 onwards.

The order for reference by the Regional Administrative Court of Latium was adopted in the context of legal proceedings brought by the Italian pay-tv operator Sky Italia against the Italian Communications Authority (Agcom) to challenge the validity of Agcom decision no. 233/11/CSP establishing a breach by Sky Sport 1 of the advertising limits for pay-tv operators and imposing a fine.

According to Agcom, the goal of the contested legislation is to safeguard the interests of pay-tv users, who are subject to a double burden: the payment of a fee to the pay-tv operator and the exposure to advertising. The referring court, however, raised doubts as to whether such a differential degree of protection for pay-tv users is in line with EU legislation applicable to audio-visual media services. In particular, the referring court noted that the protection of viewers from excessive advertising is a legitimate goal insofar as it extends to all viewers, without distinction as to their willingness to pay for the enjoyment of audiovisual media services.

In the referring court's view, therefore, the contested legislation's real aim is to increase the advertising revenues of free-to-air operators by limiting the sale of advertising by pay-tv operators. That aim, however, is not envisaged by the AVMS Directive: unlike local broadcasters, whose particular situation is expressly acknowledged by the Directive, free-to-air broadcasters are not at a comparative disadvantage relative to pay-tv operators, thus no asymmetric regulatory measures are required under the AVMS Directive.

Moreover, the referring court questioned the consistency of the contested legislation with the principle of freedom of expression, as enshrined in the EU Charter of Fundamental Rights and in the European Convention on Human Rights. While the referring court conceded that the freedom of expression can be balanced against other imperative social requirements, it did not regard the increase of free-to-air broadcasters' advertising revenues as a goal warranting the imposition of asymmetric regulatory obligations upon pay-tv operators.

Furthermore, the referring court noted that the Italian contested legislation, by unjustifiably discriminating against pay-tv operators, substantially impinges upon internal market fundamental freedoms by hindering the sale of advertising space by pay-tv operators to companies established in other member States, by making the establishment in Italy of additional pay-tv operators less attractive, and by reducing the incentives for EU investment in Italian pay-tv operators.

Finally, the referring court observed that the contested legislation significantly distorts competition by diverting advertising demand from pay-tv operators to free-to-air broadcasters, which can ensure comparably broader visibility and reach to advertised services, products, and brands.

The referring court, therefore, resolved to stay proceedings and to seek a preliminary ruling from the ECJ as to whether the AVMS Directive, the principle of equality, the principle of freedom of expression, and the internal market fundamental freedoms should be interpreted as precluding national legislation, such as that at issue in the main proceedings, setting out stricter hourly advertising limits for pay-tv operators relative to their free-to-air counterparts, thereby distorting competition and facilitating the creation or the strengthening of dominant positions in the television advertising market.

• Tribunale Amministrativo Regionale per il Lazio (Seconda Sezione), ordinanza del 7 marzo 2012, ricorso n. 9422/2011 (Regional Administrative Court of Latium (Second Chamber) Order of 7 March 2012, application no. 9422/2011, 7 March 2012)
http://merlin.obs.coe.int/redirect.php?id=15996 IT

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LV-Latvia

Competition Authority Allows Merger of Commercial TV Broadcasters

On 11 May 2012 the Latvian Competition Council (CC) adopted an eagerly awaited decision on the merger clearance application submitted by Latvia's two largest commercial television broadcasters, TV3 and LNT. The decision permitted the merger, but subject to strict conditions.

The merger proposal involves the full acquisition of the LNT group companies by the MTG group. MTG is a Swedish broadcasting group, represented in Latvia by TV3 Latvia, which owns the largest commercial free-to-air television channel TV3. MTG also owns Viasat, which is acting both on the wholesale level by offering Pay-TV channels, such as the general interest channels TV6 and 3+, and the special interest channels Viasat Explorer, Viasat Sport, TV1000 and others, as well as on the retail level offering a satellite reception facility directly to consumers. LNT is a locally-owned media group, comprised of the second-largest commercial free-to-air television channel LNT, a paid general interest channel TV5 and a specialist music channel LMK. The CC distinguished the following affected product markets in the territory of Latvia to be assessed as part of the merger evaluation procedure:

- Free-to-air television channels distribution market (TV3 and LNT channels);

- Pay-TV general interest channels wholesale distribution market (TV6, 3+, and TV5);

- Pay-TV specialist channels wholesale distribution market (Viasat channels and LMK);

- Advertising placement within the television channels market;

- Content purchasing market.

According to Competition Law, the CC prohibits a merger if it creates a dominant position or otherwise impedes free competition in any of the affected markets. Initially, the CC established that the merger would not significantly influence the situation in the pay-TV specialist channels wholesale distribution market and in the content purchasing market. However, in the other identified markets the situation might change after the merger. Turning to the analysis of the relevant markets, the CC established that there are significant barriers to entry in all of the identified television channels wholesale distribution markets. The financial barriers include the necessity of having the relevant technical means for broadcasting or the necessity to pay for the inclusion of programmes in the

free-to-air package. Also, the purchase of high quality content requires substantial investment. Other barriers include administrative requirements, such as the obligation to obtain a broadcasting or retransmission license. Therefore it is unlikely that there could be new entrants to either the free-to-air or pay-TV general interest channels markets.

Furthermore, it was established that the TV3 and LNT channels are market leaders in the free-to-air television channels distribution markets. In fact, they are the only nationwide commercial free-to-air channels. The other two nationwide channels are the PSB channels. Thus, after the merger MTG would control more than 67% of the audience share of the free-to-air channels. A new entrant to this market is highly unlikely due to the huge financial barriers (payment for inclusion in the free-to-air package is close to EUR 1 million per year). Therefore, as a result of the merger media plurality would decrease, as the joint commercial channels would have less motivation to develop competing content and high quality plurality of opinions. Also, the merger might facilitate the new merged entity to leave the free-to-air market and become a pay channel.

As regards the pay-TV general interest channels wholesale distribution market, the CC established that the merger would bring about a situation in which one entity controlled most of the channels that are most in demand by the audience. Therefore there is a threat that this entity would be able to strengthen its position and perhaps apply unfair terms with respect to its customers, the pay-TV operations by cable television network providers. There is also a threat that MTG could refuse to supply other operators, as MTG itself is also offering its channels on a retail level through a satellite distribution platform.

Finally, as a result of the merger MTG would control more than 60% of the television advertising market, thus enabling it to raise prices and bundle channels.

After the analysis of the potential impediments to competition, the CC analysed the potential efficiency defence. It established that the failed firm argument may be partially applied, as LNT is performing poorly financially, it is in negative equity, and it is highly likely that it might leave the market if the merger does not take place. This would also be harmful to media plurality. In addition, there are several efficiency benefits from the merger, such as the potential to improve the quality of content and to reduce costs.

The merger participants offered commitments to remedy potential negative effects on competition, and as a result the CC decided to allow the merger subject to numerous binding behavioural commitments, including:

- Both the TV3 and LNT channels must remain in the free-to-air platform at least until the end of 2013;

- Pay-TV channels must not be offered in bundled form to pay-TV operators; any bundle discount may not exceed 20%; the channels must be offered to operators without intermediaries on fair and non-discriminatory terms;

- The existing advertising contracts must remain in force and any price increase may be applied only as of 2013 and not exceed the official inflation rate; this must be reported to the CC, based on independently audited accounts; no bundled advertising conditions;

- LNT and TV3 must maintain independent current affairs editorial boards and the amount of current affairs broadcasts must not be decreased; editorial independence from MTG must be ensured; original content produced in Latvia must be not less than 21%.

The binding commitments are in force until the end of 2017. Moreover, the CC retains the right to apply structural commitments until then. It is as yet unclear whether the merger participants will accept the decision and the imposed commitments. The merger clearance is in force until 31 December 2012. Alternatively, the merger participants may appeal the decision within one month.

• *Konkurences padome, Lēmums Nr. 42, Lieta Nr.90/12/03.01./2* (Decision of the CC No.42 of 11 May 2012 "On the merger of market participants", Case No.90/12/03.01./2 "On the notification of MTG Broadcasting AB on the merger of market participants")
http://merlin.obs.coe.int/redirect.php?id=15934 LV

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MT-Malta

Shifting of Ministerial Responsibility for Classification of Films, Drama and other Stage Productions

On 9 March 2012, following the publication of a consultation document on film and stage classification (see IRIS 2012-3/29), the Minister responsible for Culture published a Bill to amend various laws relating to the classification of films and of dramatic and other stage productions. In actual fact, the Bill aims to 'facilitate the establishment of a system of cinema and dramatic and other stage productions, and to transfer the laws regulating the classification of cinema and dramatic and other stage productions from the competence of the Ministry responsible for the Police to the competence of the Ministry responsible for Culture'.

The Bill proposes the repeal of paragraph (e) of Subarticle (1) of Article 203 of the Code of Police Laws, which states that the Minister responsible for the Police may make regulations concerning the 'appointment and functions of censors; the payment to them

of such fees as the Minister responsible for the Police may establish from time to time; and an appeal from decisions of the censors'.

It then proposes to amend the Malta Council for Culture and the Arts Act, Chapter 444 of the Laws of Malta, through the insertion of a new Sub-article (4) in Article 33 empowering the Minister responsible for culture to 'make regulations in respect of the classification of cinema and dramatic and other stage productions and the procedure related thereto.'

This Bill is essentially an enabling provision which, if approved, will shift responsibility for the classification of cinema and dramatic and other stage productions from the responsibility of one Ministry to another. It does not however state what the regulations will contain, even though a draft version of these regulations has been published during the consultation process.

- *ATT biex jemenda diversi liāijiet li g147andhom x'jaqsmu malklassifikazzjonital-films u l-palk* (A Bill entitled an act to amend various laws relating to the classification of films and of dramatic and other stage productions, Malta Government Gazette of 9 March 2012)
http://merlin.obs.coe.int/redirect.php?id=15946 EN MT

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NL-Netherlands

Amendment of the Telecommunications Act

On 8 May 2012 the Netherlands adopted a legislative proposal amending the *Telecommunicatiewet* (Telecommunications Act), thereby laying down the principle of net neutrality (Article 7.4a) in Dutch law. The Netherlands is only the second country in the world (the first was Chile) to adopt net neutrality in its legislation.

The principle of net neutrality means that all Internet traffic should be treated as equal by Internet access providers. It secures consumers' free access to the Internet and prohibits blocking services or prioritising certain types of Internet traffic. In the Netherlands concerns about net neutrality arose after it became known that Dutch mobile operators used Deep Packet Inspection to analyse electronic traffic, as they planned on charging users extra for using services like WhatsApp and Skype.

The Dutch regulation on net neutrality is part of an amendment to the Dutch Telecommunications Act implementing the revised European telecommunications legislative acts (Directive 2009/136/EC, Directive 2009/140/EC and Regulation (EC) 1211/2009). The proposal to include net neutrality in the new Dutch Telecommunications Act was filed by members of the Democratic Party D'66 on 31 May 2011 (see IRIS 2011-7/33).

The Act has been adopted as proposed. Accordingly, under Dutch law, Internet access providers may not slow down or block services or applications on the Internet, save when an exception applies. The exceptions concern inter alia congestion, security and spam. Blocking particular websites or content by order of the court remains possible under the new legislation.

Apart from net neutrality the Amendment of the Dutch Telecommunications Act also features rules on cookies, data breaches and frequency policy. Parts of the amendment entered into force on 5 June 2012, however the net neutrality rules will not come into effect before 1 January 2013.

Concerning cookies, Article 11.7a of the Dutch Telecommunications Act implements Article 5.3 of the e-Privacy Directive (Directive 2002/58/EC, amended by Directive 2009/136/EU), sometimes called the cookie clause.

In short, Article 11.7a only allows the storing and reading of cookies after obtaining the informed consent of the user. Consent cannot be inferred from browser settings, unlike what appears to be the case in some other member states. Furthermore, the Dutch legislator added a legal presumption about tracking cookies and similar technologies. Such use of cookies is presumed to entail the processing of personal data.

For ease of reading the word "cookies" is used below. But the scope of the provision is broader. It applies to any "storing of information" or "accessing information already stored" in the terminal equipment of a user. The Dutch legislative history shows that the provision also applies to technologies such as flash cookies or device fingerprinting. Terminal equipment includes for example computers and phones.

The general rule of Article 11.7a is as follows. Anyone, whether based in the Netherlands or not, that stores a cookie on a user's device must obtain the prior informed consent of the user. The user must be provided with clear and complete information.

Consent is defined as any freely given, specific, and informed expression of will. During the Dutch legislative history it was noted that consent for cookies cannot be inferred from browser settings, because current browsers are not suitable for expressing consent. For instance, most browsers accept all cookies by default. A party that obtained consent to store a cookie on a user's device does not have to ask consent again when accessing the cookie. According to the Dutch National Regulatory Authority (OPTA), consent can be obtained through a pop-up window.

Two categories of functional cookies are exempt from the consent requirement. First, no consent is needed

for cookies having the sole purpose of carrying out a communication over an electronic communications network. Second, no consent is needed for a cookie that is strictly necessary for providing a service that the user requested. An example is a cookie for a digital shopping cart.

The Dutch provision adds a legal presumption about tracking cookies and similar technologies for behavioural targeting, the tracking of people's online behaviour for targeted advertising. Such use of cookies is presumed to entail the processing of personal data. In most cases this means that the prior "unambiguous" consent of the user is required. In principle, a party using tracking cookies could prove it does not process personal data. This legal presumption enters into effect on 1 January 2013. The rest of the provision entered into effect on 5 June 2012.

• Wet van 10 mei 2012 tot wijziging van de Telecommunicatiewet ter implementatie van de herziene telecommunicatierichtlijnen (Amendment to the Dutch Telecommunications Act implementing the revised Telecommunications Directives of 10 May 2012)
http://merlin.obs.coe.int/redirect.php?id=15994 NL

• *Wet van 21 mei 2012 tot wijziging van de Wegenverkeerswet 1994 op een aantal punten van uiteenlopende aard, van de Wet personenvervoer 2000 ten aanzien van het openbaar-vervoerverbod en enkele technische wijzigingen, van de Wet advies en overleg verkeer en waterstaat in verband met wijzigingen in de vorm waarin betrokkenen en organisaties bij het beleidsproces worden betrokken, wijziging van de Wet op de economische delicten, de Wet luchtvaart, de Binnenvaartwet, de Wet capaciteitsbeheersing binnenvaartvloot, de Wet belastingen op milieugrondslag, de Waterwet, de Invoeringswet Waterwet, de Waterschapswet en de Crisis- en herstelwet op enkele punten van technische aard, alsmede van de Telecommunicatiewet ter herstel van een abuis (Verzamelwet Verkeer en Waterstaat 2010)* (Nota bene: a wrongly adopted exception (Article 7.4a (1.e)) has been corrected in the following law)
http://merlin.obs.coe.int/redirect.php?id=15995 NL

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PT-Portugal

New Act on Cinema and Audiovisual Media

On 6 July 2012, the *Assembleia da República* (Portuguese Parliament) adopted the Act on Cinema and Audiovisual Media, which defines a set of State principles for the development and protection of the art of cinema and of audiovisual activities. This document will modify the Portuguese framework for the cinema and audiovisual sector, as established by Law no. 42/2004, of 18 August 2004.

The main amendment introduced by this Act relates to the financing model of the sector. It aims to increase the sources of funding, including the direct involvement of television broadcasters.

Moreover, it defines a programme for cinema designed to provide financial incentives for the writing, development, production and co-production as well as for the exhibition and distribution of national cinematographic works. Another programme for the support of the audiovisual and multimedia sector is provided in order to financially assist independent productions and to promote television broadcasting. A specific audiovisual programme is also considered with the main purpose of complementing, with funding from the *Instituto do Cinema e do Audiovisual* (Institute of Cinema and Audiovisual Media – ICA), the support given to television broadcasters for the writing and production of films, series and documentaries. Nevertheless, this funding comes mainly from fees collected from TV broadcasters: a fee applied to the exhibition of commercial advertising (namely by cinema theatres and TV broadcasters), which is 4% of the price paid, a fee of EUR 5 for each subscription applied to TV subscribed broadcasters, and an annual contribution of EUR 1 for each individual subscription for on-demand broadcasters. On one hand, the income from exhibition fees is 3.2% of ICA's revenue and 0.8% of the revenue of the *Cinemateca Portuguesa – Museu do Cinema* (Portuguese Cinema Museum). On the other hand, revenues from the other mentioned fees become part of the ICA's own funding.

One of the main purposes of this new act is to promote media literacy. Therefore, the objective is to contribute to the education and training of different sectors of the public through support for cinema festivals, the promotion of exhibitions of cinematographic activities in municipalities and cultural associations and, above all, to encourage media literacy in schools. This measure includes pedagogic content for schoolteachers considering a connection with curricular programmes and also digital access to foreign films of high repute.

• *Lei do cinema e audiovisual, 6 de julho de 2012* (Act on Cinema and Audiovisual Media, 6 July 2012)
http://merlin.obs.coe.int/redirect.php?id=16001 PT

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Parliament Adopts Act on Retention of Data

On 22 May 2012, the Romanian Chamber of Deputies adopted by a large majority the Law on the retention of data generated or processed by electronic communications public networks providers and by the electronic communication services for the public, the

so called "Big Brother" Law (see IRIS 2012-2/33 and IRIS 2012-5/35).

The Chamber of Deputies was the last parliamentary Chamber to decide upon the Act that was rejected on 21 December 2011 by the upper Chamber, the Senate. The Parliament adopted in November 2008 the first version of the Act but the Constitutional Court declared it unconstitutional in October 2009, for breaches of fundamental rights and freedoms. The European Commission began an infringement procedure against Romania in 2011 for not implementing the Data Retention Directive 2006/24/EC and the Romanian Minister of European Affairs repeatedly warned the Government and Parliament that Romania would have to pay large financial compensation if the Court of Justice of the EU would so decide for not transposing the above-mentioned Directive into national legislation until 31 May 2012.

According to the Act, telecom services providers will have to store for six months certain data regarding phone calls, text messages and electronic messages, to be used as tools for investigating crimes. The Law will cover individuals and legal persons. Data will be stored about the source and destination of a mobile or fixed phone communication (number of caller, number of call's receiver, number to which the call was redirected, names of those persons), along with data regarding the date, hour and duration of the communication. As for Internet services, data will be retained about the user, the telephone service used, the caller's and the receiver's phone numbers, the names and addresses of subscribers, and the identity of the equipment used. Data will be stored for six months after the communication. Afterwards the data have to be irreversibly destroyed. The Act expressly provides that the retention does not target the content of communication, nor the information sought during the use of an electronic communication network. Information stored by the providers will be used for the prevention, research, discovery and prosecution of serious crimes, for solving cases of missing persons or for the execution of an arrest warrant or execution of sentence. Data have to be sent upon request to the authorities with competence in the field of national security, usually within 48 hours. The person whose data are retained has to be informed 48 hours after the retention request was sent, unless that person is involved in actions that could endanger national security.

Several human rights NGOs are opposed to the law and harshly criticise it for its effects on the rights to private life and family, secrecy of correspondence and freedom of expression.

• Legea nr.82/2012 privind reţinerea datelor generate sau prelucrate de furnizorii de reţele publice de comunicaţii electronice şi de furnizorii de servicii de comunicaţii electronice destinate publicului, precum şi pentru modificarea şi completarea Legii nr. 506/2004 privind prelucrarea datelor cu caracter personal şi protecţia vieţii private în sectorul comunicaţiilor electronice. Publicat in Monitorul Oficial, Partea I nr. 406 din 18/06/2012 (Act no. 82/2012 on the retention of data generated or processed by electronic communications public networks providers and by the electronic communication services for the public)
http://merlin.obs.coe.int/redirect.php?id=15935 RO

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Instructions and Sanctions for Local Elections Campaign Coverage

In May 2012 the *Consiliul Naţional al Audiovizualului* (National Audiovisual Council - CNA) issued several instructions regarding the rules to be observed by audiovisual media during the electoral campaign for the local elections on 10 June 2012. The Council also issued a large number of sanctions due to legal infringements (see IRIS 2011-9/31, IRIS 2011-10/36 and IRIS 2012-3/30).

188 television and 142 radio stations decided to cover the electoral campaign. The instructions determine more precisely the stipulations of electoral legislation. According to *Instrucţiunea nr. 1 din 10.05.2012* (Instruction no. 1 of 10 May 2012) the respective television shows have to be indicated for the entire duration with the sign „electoral show" or „electoral debate". As regards radio stations, such electoral shows have to be announced at the beginning of the programme and after every advertising break. On the other hand, *Instrucţiunea din 17.05.2012* (Instruction of 17 May 2012) provides that on Saturday and Sunday the results of electoral polls shall be released on informative shows only. Audiovisual coverage of the electoral campaign is permitted from Monday to Friday. Electoral shows have to ensure for all competitors equal conditions to present their political programmes and electoral offers, as well as freedom of expression and pluralism of opinion. Moderators of electoral shows are obliged to maintain the debate within the frame of the interests of the campaign and of the scheduled discussion themes. Airtime for competitors may be granted only on the basis of definitive lists of candidates. Radio and television stations have to communicate the same electoral shows schedule to the candidates as to the Council and are not allowed to refuse electoral competitors or representatives the right to attend such shows. The programme schedule for the electoral campaign cannot be modified.

At the same time, the Council issued about 80 sanctions (public warnings and fines), of increasing severity, for breaches of electoral legislation by central and local stations. The Council sanctioned them for

infringements of Art. 3 (1) and (2) of Audiovisual Law 504/2002, with further completions and modifications, regarding correct and objective information and pluralism of opinion. There were also infringements of Law no. 67/2004 on local elections: Art. 63 (2), which rules that broadcasters are obliged to ensure a fair, balanced and correct electoral campaign for all competitors; Art. 65 (4), according to which candidates benefit from free access to public and private radio and television services within electoral shows; and Art. 66, which rules that electoral competitors can only attend electoral programmes and debates during the electoral campaign, and that candidates/representatives of competitors may not be producers, directors or anchors of audiovisual shows.

The most frequent breaches of the Audiovisual Code were those of Arts. 34 (1) and 40 (1), both on the right to one's own image, and of Art. 139 on political advertising. As to Decision no. 195/2012 on the principles and rules for the electoral campaign on radio and television stations for the local elections, most breaches concerned Art. 3 on a fair, balanced and correct electoral campaign for all competitors; Art. 4 (2), which says that during the electoral campaign the candidates/representatives of competitors can attend only electoral programmes and debates; Art. 5 (2), which provides that the campaign is allowed from Monday to Friday and that electoral shows have to be clearly indicated; and Art. 10 (1) on how to present electoral polls.

• Instrucţiune nr. 1 din 10.05.2012 privind condiţiile de prezentare a emisiunilor electorale şi de dezbateri electorale (Instruction no. 1 of 10 May 2012)
http://merlin.obs.coe.int/redirect.php?id=15936 RO

• Instrucţiune privind principiile şi regulile de desfăşurare a campaniei electorale din anul 2012 pentru alegerea autorităţilor administraţiei publice locale prin intermediul posturilor de radio şi de televiziune, 17.05.2012 (Instruction of 17 May 2012)
http://merlin.obs.coe.int/redirect.php?id=15937 RO

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Social Network VKontakte Fined for Piracy

On 25 May 2012, the Thirteen Arbitrage Appeal Court of St. Petersburg (commercial court of second instance) upheld a ruling of the court of first instance that found the popular social network VKontakte liable for a violation of the intellectual property rights of two record label companies (S.B.A. Music Publishing and S.B.A. Production). A fine of RUB 210,000 (approximately EUR 5,000) was imposed upon VKontakte for the act of placing on the social network's website and making available to the public the music and phonograms of 17 songs of the Russian pop groups "Maksim" and "Infinity".

The act of posting content without the permission of the rightsholders (i.e., illegally) on the website vkontakte.ru was not denied by either the plaintiffs or the defendant, however the Court did not get a clear answer as to whether it was VKontakte's administration or a user of the social network who technically posted the counterfeit content. So far the central question of the court proceedings has become whether VKontakte's administration was liable for making illegal content available to the public (according to the Russian Civil Code's definitions, was it VKontakte's fault) or not.

The Court of Appeal reasoned its decision according to the guiding principles of the highest arbitrage instance - the Presidium of the Supreme Arbitrage Court - that were formulated in its Resolution of 1 November 2011. The latter decision introduced key points to be taken into consideration by the ordinary arbitrage courts when making decisions concerning the liability of Internet video hosting websites.

The Court of Appeal put forward several basic positions in favour of finding the VKontakte administration at fault in this case. Firstly, the Court stated that the content was available to the general public, but not to specified groups of persons, as the defendant pleaded. The paid registration procedure, which is mandatory for vkontakte.ru users, is available and accessible to any representative of the general public and does not establish any specific target audiences or closed groups as being consumers of the content. Secondly, the Court dealt with the content uploading policy of the VKontakte website. Although due to user agreement provisions the participants of the online community vkontakte.ru are duly informed about their obligation to ensure the legality of the content that they upload, VKontakte provides a number of technical facilities that allow the uploading of counterfeit content. The existence of such facilities was considered to be proof of VKontakte's fault. The court also ruled that the existence of the above-mentioned facilities makes the website vkontakte.ru more preferable for advertising companies posting advertising materials on the World Wide Web and so far provides potential growth for Vkontakte's profits. The court emphasised that the existence of benefits (even potential ones) arising from the illegal use of intellectual property was to be considered as evidence of Vkontakte's fault.

Finally, the Court of Appeal underlined that VKontakte's reaction to the plaintiffs' demands to cease unlawful activities was passive and not effective. The defendant claimed that no information confirming that the plaintiffs were genuine rightsholders was provided in their official claims as delivered to VKontakte. The Court rejected this position and argued that the defendant had had opportunities to check the

legal status of the plaintiffs (for instance, by requesting copies of license agreements and other necessary documents). Moreover, the defendant could not be uninformed of the illegality of the content, because the issue of dissemination of the counterfeit content on the VKontakte social network became a sufficient part of public discussion, including in the mass media.

The Decision of Thirteen Arbitrage Appeal Court of St. Petersburg may be appealed in the courts of higher instance.

• Постановление Тринадцатого арбитражного апелляционного суда 25 мая 2012 года по делу № А 56-57884/2010 (Decision of 25 May 2012 Thirteen Arbitrage Appeal Court of 25 May 2012 (Case No A 56-57884/2010))
http://merlin.obs.coe.int/redirect.php?id=15989 RU

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ZAK Determines Violations of Lottery Statute in Sports Channel Sport1

In its meeting on 26 June 2012, the Commission for Approval and Supervision of the Media Authorities (Kommission für Zulassung und Aufsicht - ZAK) decided that the sports channel "Sport1" has to pay a total amount of EUR 28,000. The reasons for this decision were several deceptions and illusions of the viewers in various editions of the show "Sports Quiz".

In a first step, the ZAK ordered that "Sport1" has to pay EUR 24,000. This amount corresponds to the amount "Sport1" has earned with the inadmissible presentation of sweepstakes in the show "Sport Quiz". In addition, the ZAK imposed in a second step a fine of EUR 4,000 against an executive director, an editor and two moderators of the channel "Sport1".

In January 2012, "Sport1" has made misleading informations with regard especially to the difficulty of the games and the selection process for the participants of the quiz. Furthermore, "Sport1" infringed its obligation to provide the consumers with complete informations. Particularly with regard to the game mode of the show and the conditions for participation in the quiz, "Sport1" did not give the viewers comprehensive informations.

At the meeting of 26 June 2012, the ZAK criticized the violations of the law by the channel "Sport1" and in five cases initiated an offense proceedings. The initiated administrative proceedings allowed the imposition of the fine against the managing director, the editor and the two moderators as well as the absorption of the unlawful profit.

• *Pressemitteilung 20/2012 der ZAK* (Press release No. 20/2012 of the ZAK)
http://merlin.obs.coe.int/redirect.php?id=17300 DE

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Agenda

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