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EUROPÄISCHE AUDIOVISUELLE INFORMATIONSSTELLE

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of the European Audiovisual Observatory

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INTERNATIONAL

EUROPEAN UNION

Council of the EU: Adoption of the Orphan Works Directive

On 4 October 2012, the Council of the EU adopted the Orphan Works Directive. The legislative proposal for a directive on certain permitted uses of orphan works was published by the European Commission on 24 May 2011 (see IRIS 2011-7/5). On 8 June 2012 a compromise text was published, which provided solid ground for the adoption of the directive. The European Parliament approved the proposal by a large majority on 13 September 2012. With the approval of the Council of the EU, the Orphan Works Directive reached the final stage of its legislative procedure.

Considering the numerous amendments and the time that it took to establish the final subject-matter of the directive, reaching an agreement was a difficult task. In light of these difficulties, Commissioner Barnier welcomed the adoption of the Directive, stating that it is "a significant achievement in our efforts to create a digital single market." The adoption of this directive marks the final step in the process of providing a legal framework for Orphan works.

A total of 62 amendments were made to the proposal. The essence of the proposal, however, remains the same. The main purpose of the directive is to provide a legal framework for facilitating the digitisation and dissemination of works that are protected by copyright or related rights, but of which the author is not known or, if known, cannot be located. In order to determine the orphan status of a work, a diligent search must be carried out for which comprehensive rules are given in the directive. This diligent search must be recorded and made accessible in a single publicly accessible online database. This database will be managed by the Office for Harmonisation in the Internal Market.

The directive facilitates the cross-border online access to orphan works in publicly accessible archives. One condition is that the orphan work must be used for the public interest mission of the specific cultural institution using the work. It is important to note that rightsholders are able to put an end to the orphan status of a work at any time.

The Directive entered into force the day following its publication in the Official Journal of the European Union. From that date, member states will have two years within which to implement the directive. Three years after entry into force of this directive, the Commission shall submit a report about the possible inclusion of other works or protected subject-matter that is currently not within the scope of the directive.

• Directive 2012/28/EU of the European Parliament and of the Council of 25 October 2012 on certain permitted uses of orphan works
http://merlin.obs.coe.int/redirect.php?id=16172 DE EN FR CS DA EL ES ET FI HU IT LT LV MT NL PL PT SK SL SV

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European Commission: New Agreement between the EU and UNESCO with regard to Education, Culture, Science and Human Rights

On 8 October 2012, the European Union (EU) signed an agreement with the United Nations Educational, Scientific and Cultural Organization (UNESCO) on the topics of education, culture, science and human rights. UNESCO is a specialized organization of the United Nations whose objective in brief is to contribute to peace-building, sustainable development, intercultural dialogue and to fight against poverty. The organization tries to do so by improving education, science, culture and communication. The EU shares the same core values, including respect for human rights, human dignity, freedom, democracy, equality and the rule of law. The activities of the EU consequently cover all policy areas.

The Director-General of UNESCO, Irina Bokova, the EU High Representative for Foreign Affairs, Catherine Ashton, and the Development Commissioner, Andris Piebalgs signed a Memorandum of Understanding (MoU) to renew their partnership. The agreement means a more intense cooperation between the EU and UNESCO, and implies that the organizations commit themselves not only to cooperate on education, science and culture, but also on freedom of the press and human rights. Unlike previous commitments to cooperation, the content of the new agreement has a more political character, as it refers to shared universal values.

The main objective of the MoU is to provide a general framework for promoting cooperation between the two organizations and comprises the strategic goals to be followed. Both organizations promote human rights and fundamental freedoms as cornerstones of stability and development, and aim to accomplish this further through a more effective multilateral collaboration. The MoU acknowledges the need for an improved policy between the EU and UNESCO on matters of mutual interest, such as education, science and technology, culture, maritime policy and freedom of expression. The membership of the EU to UNESCO

offers new opportunities to combat rising challenges and a number of advantages, which is therefore a key instrument for the economic development of the EU and an essential concept for building an open and peaceful Europe.

• EU signs new partnership with UNESCO on education, culture, science and human rights, press release, 9 October 2012
http://merlin.obs.coe.int/redirect.php?id=16145 EN FR

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European Commission: Action against Belgium for Failure to Perform Obligations in its Incorrect Transposition of the Must-Carry Broadcasting Obligation into National Law

On 24 October 2012 the European Commission announced that it had applied to the Court of Justice of the European Union (CJEU) for an order against Belgium on the grounds of the lack of transparency in its scheme of must-carry obligations for TV and radio content, as provided for in Article 31 of the Universal Service Directive (2002/22/EC).

Article 31 authorises member states to impose must-carry obligations on cable operators and telecom companies for the public broadcasting of radio and television programmes. These obligations must be necessary for the pursuit of a general interest and be clearly defined, not disproportionate, and transparent.

In 2007, the CJEU had found against the must-carry obligations in force in the bilingual region of Brussels-Capital (case C-250/06, UPC Belgium and Others v. Etat Belge). It had affirmed that, in order to be transparent, the award of must-carry status had to be subject to the fulfilment of a number of criteria: it had to be founded on criteria known in advance, suitable for securing pluralism, and non-discriminatory.

In 2008, The European Commission warned Belgium that its procedure for designating channels subject to this obligation was not transparent, leaving network operators unable to ascertain their rights and obligations.

In 2009, the European Commission instigated an action against Belgium before the CJEU for failure to perform its obligations. In a judgment issued on 3 March 2011, the CJEU found that Belgium had incorrectly transposed Article 31 of the Universal Service Directive into its national legislation because of a lack of transparency in its must-carry scheme and had thereby failed in its obligations under European law (case C134/10, European Commission v. Kingdom of Belgium).

Having noted that Belgium had not amended its national legislation, and after having sent official notice to comply, the Commission brought further action before the CJEU for failure to perform its obligations. In application of Article 260 of the Treaty on the Functioning of the European Union, the Commission called on the CJEU to order Belgium to pay a flat-rate fine of EUR 5 397 per day (from the date of the first judgment to the date of the second) plus a fine of EUR 31 251.20) per day in respect of enforcement of the forthcoming CJEU judgment.

• European Commission press release, 24 October 2012
http://merlin.obs.coe.int/redirect.php?id=16178 DE EN FR
• Judgment in the case of UPC Belgium and Others v. Etat Belge, C-250/06, 13 December 2007
http://merlin.obs.coe.int/redirect.php?id=16180 DE EN FR
• Judgment in the case of European Commission v. Kingdom of Belgium, C-134/10, 3 March 2011
http://merlin.obs.coe.int/redirect.php?id=16181 DE EN FR

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European Parliament: Online Distribution of Audiovisual Works in the European Union

On 11 September 2012 the European Parliament adopted a resolution on the online distribution of audiovisual works in the European Union.

On 6 March 2012, rapporteur Jean-Marie Cavada of the Committee on Culture and Education drafted a first report on the online distribution of audiovisual works in the European Union. This own-initiative procedure became the endeavour of a cross-committee co-operation between the Committee on Culture and Education, the Committee on Industry, Research and Energy and the Committee of Legal Affairs.

The European Parliament's non-binding resolution states that there is currently a need for a transparent, flexible and harmonized approach at European level in order to advance towards the digital single market and emphasises that any proposed measure should seek to reduce the administrative burdens and transaction costs associated with the licensing of content. The resolution indicates as main topics of concern the online access to legal content, collective rights management, geographical controls, cooperation between rightsholders, online distribution platforms and internet service providers, net neutrality, unauthorised use, remuneration, licensing, interoperability, protection and promotion of audiovisual works and education.

Concerning accessibility and collective rights management, the European Parliament stresses that collective rights management is an essential tool for

broadcasters and calls on the European Commission to present a legislative initiative for the collective management of copyright (see the proposal made by the European Commission in IRIS 2012-9/6). In this regard it stresses the need to operate a clear distinction between licensing practices for different types of content, in particular between audiovisual/cinematographic and musical works. Subsequently, it invites member states to ensure that collective rights management is based on effective, functional and interoperable systems. Finally it points out the need to create legal certainty as to which legal system applies for the clearance of rights in cross-border distribution.

Concerning unauthorised content, the European Parliament calls on the European Commission to afford Internet users legal certainty for the use of streamed services. Subsequently, it calls on member states to promote respect for authors' and neighbouring rights and to combat the provision of unauthorised content.

Concerning licensing, the European Parliament encourages Member States to promote effective and transparent licensing and recommends efficient licensing schemes for the online use of audiovisual material (such as on demand content).

Concerning remuneration, the European Parliament calls on member states to ban buyout contracts, which contradict the principle of fair and proportional remuneration. It also calls on the Commission to urgently present a study on disparities among the different national remuneration mechanisms, in order to establish best practices.

Lastly, the European Parliament stresses that it is vital for MEDIA to continue to exist as a specific programme focusing only on the audiovisual sector.

It should be noted that the European Commission also issued a Green Paper on the online distribution of audiovisual works in the European Union on 13 July 2011 (See IRIS 2011-8/8).

• European Parliament resolution of 11 September 2012 on the online distribution of audiovisual works in the European Union
http://merlin.obs.coe.int/redirect.php?id=16147 DE EN FR CS DA EL ES ET FI HU IT LT LV MT NL PL PT SK SL SV

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NATIONAL

AT-Austria

Disclosure of IP Addresses under Security Police Act is Constitutional

On 29 June 2012, the Austrian *Verfassungsgerichtshof* (Constitutional Court - VfGH) ruled that the disclosure of the owner of an IP address to the security authorities under Articles 53(3a)(2) and (3) of the Austrian *Sicherheitspolizeigesetz* (Security Police Act - SPG) did not breach either the secrecy of telecommunications or the right to data protection.

The plaintiff had given the impression on an Internet chat site that he was offering under-age children ("7-11 year olds, or even younger if required") for sex. The Vienna police authorities were informed and took immediate steps to ascertain, firstly, the IP address that had been used to send the message and then, from the Internet service provider, the plaintiff's name and address, since they believed the safety of minors was in immediate danger. The plaintiff initiated legal proceedings with the VfGH, claiming breaches of telecommunications secrecy under Article 10a of the *Staatsgrundgesetz* (Basic Law - StGG) and of the right to data protection under Article 1 of the *Datenschutzgesetz 2000* (2000 Data Protection Act - DSG 2000) in conjunction with Article 8 of the European Convention on Human Rights (ECHR). In particular, he complained that no judicial warrant had been granted before the data had been accessed. Such a warrant was required for breaches of telecommunications secrecy according to Article 10a StGG.

However, the VfGH rejected the complaint. In its decision, it took the opportunity to state its general position on the scope of telecommunications secrecy. It considered that telecommunications secrecy covered "all content data" of a communication, but not "all telecommunications traffic". Under the SPG, the security authorities were entitled to investigate an IP address simply on the grounds of a message brought to their attention either by a communication partner or by an open Internet communication accessible to anyone. If the content of a communication was made known to the security authorities in this way, traffic data disclosed on this basis was not covered by telecommunications secrecy.

However, monitoring of Internet traffic or precautionary data storage were not authorised under Article 53(3a)(2) and (3) SPG. The VfGH therefore considered that this provision did not authorise the disclosure of content data and that, for that reason, it did not constitute a breach of telecommunications privacy.

Although the right to data protection had been breached, this had taken place on a specific legal basis that was entirely reasonable, in view of the security authorities' remit to ward off dangerous attacks, which was in the public interest. Finally, Article 8 ECHR did not state that a judicial warrant was required for every intrusion.

The *Oberste Gerichtshof* (Supreme Court - OGH) had previously ruled that the disclosure of master data belonging to a (known) IP address by a provider did not constitute a breach of telecommunications secrecy if it formed part of a criminal investigation. It was irrelevant whether the provider itself, in order to issue information on master data, also had to process traffic data internally, as long as the "secret was not leaked" (see IRIS 2011-7/7).

• *Erkenntnis des österreichischen Verfassungsgerichtshofs vom 29. Juni 2012 (Az. B 1031/11-20)* (Decision of the Austrian Constitutional Court of 29 June 2012 (case no. B 1031/11-20))
http://merlin.obs.coe.int/redirect.php?id=16149 DE

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KommAustria Criticises Lack of Variety in ORF Programmes

On 4 October 2012, the Austrian communications authority KommAustria upheld a complaint by the *Verband Österreichischer Privatsender* (Association of Austrian private broadcasters) and ruled that *Österreichische Rundfunk* (the Austrian public service broadcaster - ORF) had failed to fulfil its public service remit over an 18-month period. KommAustria also ordered that the complaints be read out on the two main channels concerned, ORF eins and ORF 2.

Referring to their own evaluations of its programmes during the period concerned, the plaintiffs had argued that, contrary to Article 4(2) of the *ORF-Gesetz* (ORF Act), ORF had failed to offer a well-balanced overall programme by devoting an appropriate proportion of airtime to information, culture, entertainment and sport. By broadcasting too many entertainment programmes, ORF had failed to transmit two comprehensive channels in accordance with Article 3(1)(2) in conjunction with Article 4(2) of the *ORF-Gesetz*. Finally, through the content and presentation of its television channels, ORF had not met the requirement for public service broadcasting to be distinctive.

In its reply, ORF referred primarily to the period covered by the complaint, which it considered insignificant, as well as to its various special-interest channels and other categories (science/education/self-help and family), which the plaintiffs had not taken into account in their evaluation. It also argued that, when assessing whether an "appropriate proportion" of coverage had been given to different categories, these proportions should not be treated in mathematical isolation, with no account taken of the "variety of interests".

Although, after detailed questioning of several experts, KommAustria rejected the last of the aforementioned complaints, it agreed with the rest of the plaintiffs' arguments.

The communications authority began by ruling that, when calculating the proportions of airtime allocated to the various categories, apart from the two main channels ORF eins and ORF 2, ORF could only take into account the special-interest channel ORF SPORT+, which during the period covered by the complaint had been broadcast initially to mobile devices only and subsequently with limited airtime. Its other special-interest channels were either commercial (TW1) or had not been broadcast at all during the period concerned (ORF III and ORF SPORT+ in its current 24-hour format). Furthermore, only one of the nine regional windows broadcast on ORF 2 could be taken into account.

With regard to the number of categories, KommAustria referred to the wording of Article 4(2) of the *ORF-Gesetz*, which mentioned the four categories of information, culture, entertainment and sport. If the legislator had wanted to leave room for additional categories, it would have made this clear in the wording of the provision, such as by using the word "particularly". When allocated to one of these categories, a "programme" was the smallest unit of a channel's broadcast content and could only be allocated to one category. KommAustria therefore rejected ORF's attempt to assign individual parts of a programme to different categories.

In order to differentiate it clearly from sport, information and entertainment, a narrow definition of culture should be adopted, essentially covering the fields of painting, art, music, theatre, opera, literature and philosophy, as well as modern art forms such as film and photography. A broad interpretation of culture would ultimately include all human performances and creations, and therefore cover all television content.

Finally, KommAustria explained that the *ORF-Gesetz* did not lay down any benchmarks from which concrete percentages could be derived to determine the "appropriate proportion" for each category. Moreover, rigid percentages would be problematic in view of the defendant's freedom as a public service television broadcaster, as enshrined under Article 10 of the European Convention on Human Rights. Nevertheless, it was undoubtedly admissible to define a general framework within which appropriate proportions would lie. As a starting point, it should be assumed that each of the four categories was equal in size. However, in view of its freedom, which was also guaranteed under constitutional law, ORF could make individual categories larger or smaller. This freedom,

however, was limited to the extent that there should be an appropriate balance between the categories. There would be no such balance if any one category accounted for more than 50% or less than 10% of the overall programme schedule. The evaluation of ORF's programmes had demonstrated that these limits had been significantly exceeded, with the result that ORF had failed to ensure an appropriate balance between the four categories during the period concerned and had therefore failed to provide a varied overall programme.

Concerning the provision of two comprehensive channels, KommAustria ruled that it was not necessary for all four categories to be covered by both main channels. Three categories were sufficient, as long as each represented more than 10% and none more than two-thirds of overall airtime. However, each of the four categories should account for at least 10% on either ORF eins or ORF 2.

ORF had failed to meet these requirements on ORF eins by exceeding the two-thirds limit for sport and allocating less than 10% of airtime to information and culture. On ORF 2, meanwhile, both culture and sport were below the minimum threshold. Since the culture category had not reached the 10% mark on either ORF eins or ORF 2, it had not been given sufficient coverage on either of ORF's two comprehensive channels.

• *Bescheid der KommAustria vom 4. Oktober 2012 (GZ: 12.005/12-023)* (KommAustria decision of 4 October 2012 (GZ: 12.005/12-023))
http://merlin.obs.coe.int/redirect.php?id=16148 DE

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DE-Germany

Constitutional Court Confirms Broadcasting Tax Applies to Internet PCs

On 22 August 2012, the *Bundesverfassungsgericht* (Federal Constitutional Court - BVerfG) rejected a lawyer's complaint about the obligation to pay a broadcasting tax for his Internet-capable PC, which he used for his work.

The lawyer had claimed that his basic rights to freedom of information (Art. 5 of the *Grundgesetz* (Basic Law) - GG) and occupation (Art. 12 GG) had been infringed. He also complained that he had been treated unequally (Art. 3 GG) vis-à-vis people who did not own such reception equipment. The lawyer claimed that, although he used his PC for Internet applications at work, he did not receive any broadcast programmes through it. There were no other broadcast reception devices at his workplace.

Ruling shortly before the introduction of the new broadcasting tax, applicable regardless of reception equipment, the BVerfG confirmed that the levying of the previous broadcasting tax for an Internet PC used for work purposes did not infringe any basic rights.

The court ruled that the levying of broadcasting taxes for Internet-capable devices did not breach the fundamental right to freedom of information. Although it recognised that such a tax made it more difficult for the plaintiff to obtain information from the Internet, this intrusion was reasonable and therefore constitutionally justified. The broadcasting tax helped to finance public service broadcasting and was a suitable and necessary means of achieving this objective. Technical measures to block access to public service channels were a less effective means of funding public service broadcasting. They were easy to bypass and conflicted with public service broadcasters' duty to provide a universally accessible service.

The broadcasting tax for Internet PCs was also not unreasonable. The financial cost to the plaintiff was small in comparison with the vital importance of ensuring the proper functioning of public service broadcasting.

The court gave short shrift to the plaintiff's claim that his freedom of occupation had been infringed. Such freedom had clearly not been breached, since the tax had no direct impact on the lawyer's professional activity and therefore did not affect his occupation.

Finally, the court also rejected the argument that the general principle of equality had been breached. The equal treatment of owners of traditional and more modern broadcast reception devices was based on the sensible and reasonable principle that people should be prevented from "evading the broadcasting tax" and that the proper financing of public service broadcasting should thus be guaranteed.

The unequal treatment of Internet PC owners and people who did not own such devices was also justified. The benefit of having access to a reception device also constituted an objective distinguishing criterion.

• *Beschluss des Bundesverfassungsgerichts vom 22. August 2012* (Decision of the Federal Constitutional Court of 22 August 2012)
http://merlin.obs.coe.int/redirect.php?id=16150 DE

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Cologne District Court Bans Version of Tagesschau App

On 27 September 2012, the *Landgericht Köln* (Cologne District Court) banned the ARD and one of

its members, NDR, from distributing a particular version of the Tagesschau app. A total of 11 newspaper publishers that offer electronically accessible services had complained that the version of the application dated 15 June 2011 broke competition regulations.

The court rejected the plaintiff's initial argument that the Tagesschau app had not been granted the necessary approval. Rather, the application, as a telemedium, had passed the three-step test under Article 11f of the *Rundfunkstaatsvertrag* (Inter-State Agreement on Broadcasting - RStV) and had therefore been approved. A general ban on the application could therefore be ruled out. The provision of telemedia, as well as radio and TV services, was part of public service broadcasters' legal remit.

However, whether and in what form public service broadcasters were allowed to offer telemedia as well as radio and television services was determined in this case by Article 11d(2)(3) RStV. Under this provision, "press-like services not related to a programme" are forbidden. As for whether the disputed application was a "press-like service", the LG Köln said that it depended whether, from the user's point of view, it could function as a substitute for the press (in the form of newspapers or magazines), although for this to be the case it was not necessary for it to replace press publications completely. In the case at hand, the level of detail provided was similar to that of most newspapers and magazines. The fact that many of the articles were merely written versions of content originally broadcast as television or radio reports did not mean that the service was not "press-like". Users would only read the text in the form in which it was provided. The same applied to the inclusion of links and video clips in the text, which users would, at best, classify as additional services. It did not make the text any "less press-like".

The Tagesschau app, in its version of 15 June 2011, could also not be considered to be "related to a programme". The reports did not prompt a desire for further information, nor did they simply touch on the topics dealt with or refer the reader to additional information. Rather, the level of detail meant that the press-like texts were visually dominant, giving users the impression that they were complete articles. The court expressly pointed out that its ruling did not contain any general benchmarks as to how much detail should be allowed in such reports. Rather, its decision related only to the aforementioned version of the app that had been the subject of the complaint.

Nevertheless, the ruling may be considered to have more general significance, since in it the court explained its interpretation of the term "press-like".

• *Urteil des Landgerichts Köln vom 27 September 2012 (Az.: 31 O 360/11)* (Ruling of the Cologne District Court of 27 September 2012 (case no.: 31 O 360/11))
http://merlin.obs.coe.int/redirect.php?id=16151 DE

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German Film Fund Extended Until 2015

On 21 September 2012, the Federal Government announced that the *Deutsche Filmförderfonds* (German Film Fund - DFFF) would be extended for a further three years. As part of the arrangement, film producers will, in future, be obliged to produce barrier-free versions of subsidised films.

The DFFF was created on the basis of the Directive of the *Beauftragte der Bundesregierung für Kultur und Medien* (Federal Government Commissioner for Culture and Media - BKM) "*Anreiz zur Stärkung der Filmproduktion in Deutschland*" (incentive to strengthen film production in Germany) (DFFF Directive). According to the DFFF Directive and Articles 23 and 44 of the *Bundeshaushaltsordnung* (Federal Budgetary Regulations - BHO), the *Filmförderungsanstalt* (Film Support Institute - FFA) provides funding for film production (see IRIS 2007-1/3, IRIS 2006-8/17 and IRIS 2005-8/18). From 2007 until the end of August 2012, around EUR 329 million in film subsidies was granted. Since then, according to the Minister for Culture, the DFFF has been making a decisive contribution to the competitiveness of the German film industry; its activities have now been extended for an additional three years for the second time.

As part of the extension, a number of amendments were made to the DFFF Directive. For example, the minimum number of copies for cinema release was increased (Art. 6(1)), an application deadline of at least six weeks before the start of filming was laid down (Art. 16(2)), the sum paid to German Films (the German film industry's central body for the representation of German films abroad) for foreign sales was limited to EUR 50,000 and a provision was added requiring greater account to be taken of virtual shooting in the test of cultural characteristics (Art. 10 in conjunction with Appendix 2). One important amendment stressed by the Minister for Culture is the obligation to produce barrier-free films (Art. 5(4)). This rule means that the final version of a film must also be produced with German audio description and German subtitles. It is designed to help people with impaired hearing and vision to benefit from the results of film support. The FFA can grant an exemption from this obligation in exceptional cases.

The revised Directive will enter into force on 1 January 2013.

• *Richtlinie des BKM „Anreiz zur Stärkung der Filmproduktion in Deutschland" (Deutscher Filmförderfonds), Stand vom 17. September 2012* (BKM Directive "incentive to strengthen film production in Germany" (DFFF Directive), version of 17 September 2012)
http://merlin.obs.coe.int/redirect.php?id=16177 DE

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Remuneration of Scriptwriters for Commissioned Productions

According to unanimous reports by the parties involved, the *Verband Deutscher Drehbuchautoren* (Association of German Scriptwriters - VDD), *Allianz Deutscher Produzenten* (German Producers' Alliance) and *Zweites Deutsches Fernsehen* (German public service broadcaster - ZDF) have reached an agreement on the main provisions of contracts between commissioned producers and authors. The agreement is designed to bring existing contractual structures into line with the changing conditions of use in the digital world and to ensure that authors are fairly remunerated.

The starting point is the selection of one of a number of model contracts, under which authors will receive a fixed sum for works used in ZDF programmes and online services for a set period of time.

In addition, it is possible to opt for the so-called "repeat royalty model", under which, as well as a basic fee, authors receive a share of the proceeds from any further use (repeats). The rate of remuneration for such use was halved, although this reduction was offset by the inclusion of other types of secondary exploitation.

In particular, screenplay writers will, in future, be entitled to a share of the proceeds from commercial exploitation of films. This includes proceeds from foreign sales, DVD sales, Video-on-Demand and other Internet-based forms of exploitation.

• *Eckpunkte der vertraglichen Zusammenarbeit für durch das ZDF vollfinanzierte Dokumentationen zwischen Zweites Deutsches Fernsehen und Allianz Deutscher Produzenten - Film & Fernsehen in der Fassung vom 1. Oktober 2012* (Main principles of contractual cooperation between Zweites Deutsches Fernsehen and the German Producers' Alliance - Film & Television for documentaries fully financed by ZDF, version of 1 October 2012) DE

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ES-Spain

Supreme Court Cancels all DTT Licences Awarded for Valencia in 2006

On 18 July 2012, the Spanish Supreme Court declared null and void all local allocations of Digital Terrestrial Television (DTT) granted at the beginning of 2006 by the *Generalitat Valenciana* (Valencian regional government). The Court found that the Generalitat had lacked objectivity and impartiality in the allocation process.

The plaintiff at the action is Tele Elx, the first local television that had broadcast in the Valencian Community. In first instance, the *Tribunal Superior de Justicia de Valencia* (Valencian High Court) rejected its complaint, whereas the Supreme Court has upheld its arguments.

The Supreme Court reminds that Article 88 of the Royal Legislative Decree No. 2/2000 imposes an obligation on the licensing panel to evaluate the candidates' offers according to the criteria laid down in the tenders. However, this function was outsourced by the licensing panel to a private company.

The Court considers possible the use of external advice but this cannot mean that the assessment of applicants would be systematically made by an external company. Otherwise the licensing panel would not fulfill its role in the assessment of the different bids.

According to the Court, a private entity may have an undisputed technical competence to assess applicants, but lacks objectivity and impartiality to do so. The situation would have been different if, from the assessment made by the private consultant, the licensing panel would have shaded, modulated or corrected these criteria, i.e., the ex-ante evaluation would have been sufficient, based on the knowledge and expertise of the private consultant.

The Supreme Court believes that the private consultant only assumed the numerical score on the basis of which it granted the licences. The Court concludes that the appellant Télé Elx could not know why its tender had not been selected, even though Article 88 of the *Texto Refundido de la Ley de Contratos de las Administraciones Públicas* (Public Administrations Contracts Act) requires that an explaination should be given for the reasons for agreeing or refusing the grant of a licence.

• *Sentencia del Tribunal Supremo, Sala de lo Contencioso-Administrativo, Sección séptima, Recurso Núm.: 5128/2008, 18 de Julio de 2012* (Judgment of the Supreme Court of 18 July 2012)
http://merlin.obs.coe.int/redirect.php?id=16183 ES

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FR-France

Conseil d'Etat Confirms Numbering of New DTV Channels

On 3 July 2012, the audiovisual regulatory authority (*Conseil Supérieur de l'Audiovisuel* - CSA) authorised six new free-view high definition (HD) channels on terrestrially-broadcast digital television (HD1, L'Equipe TV, 6 ter, Tvou la Télédiversité, RMC Découverte, Chérie HD). On 24 July 2012, in the presence of representatives of the channels, the authority drew lots for allocating numbers to these six new channels, which are to start broadcasting on 12 December 2012. The new numbering is the result of firstly the allocation of the logical numbers 1 to 29 to the national television services previously broadcast in analog mode and to the unencrypted services broadcast terrestrially in digital mode, which were previously numbered 1 to 19. Local television services broadcast terrestrially, which were previously numbered 20 to 29, have now been allocated the numbers 30 to 39. However, a number of organisations, representing about forty local channels, referred the CSA's decision to shift the numbers allocated to them up by ten in order to leave room for the six new channels to the Conseil d'Etat under the urgent procedure. The applicants called for the suspension of enforcement of the CSA's deliberation, on the grounds that it was a serious and immediate infringement of the interests of the other local free-view channels and of the interest of viewers, by changing the logical number - a fundamental feature of channel identification - particularly when there were other solutions for numbering the new channels. They also argued that no text gave the CSA the right to revoke a decision attributing a logical number, and that the deliberation at issue disregarded the principles of equality of treatment, non-discrimination, and free competition.

In its order of 23 October 2012, the Conseil d'Etat recalled that the provisions of Article 30-1 of the Act of 30 September 1986 gave the CSA the power to authorise the use of broadcasting resources for television services, including the organisation of broadcasting these services by laying down the rules for the logical numbering of the channels - and therefore also the power to change them. Consequently, the claims based on the disputed deliberation, which is in the form of regulations, would have no legal foundation, and could not give rise to "serious doubt as to its legality", which is a prerequisite for the administrative courts under the urgent procedure ordering the suspension of performance of an administrative decision. Similarly, the Conseil d'Etat found that preparatory investigation of the case did not show that the deliberation of the CSA, which must also ensure the uniform nature of the numbering of the services, had disregarded the principles of equality and non-discrimination, or the principle of free competition. Nor were any of the other arguments raised against the disputed deliberation able to create a serious doubt as to its legality. Thus, and without even needing to pronounce on the conditions of urgency, the administrative judge found that the applicants had no grounds for requesting the suspension of the decision at issue.

The applicants said that they were "consternated" by the order, which "encouraged them to pursue their action on the merits of the case". For its part, the CSA issued a communiqué confirming "the commencement of the broadcasting of these six new channels on 12 December 2012 and their gradual extension to the whole of mainland France".

- *Conseil d'Etat (ord. réf.), 23 octobre 2012 - Association Bocal et a.* (Conseil d'Etat (order under the urgent procedure), 23 October 2012 - the association Bocal et al.) FR
- *Communiqué du CSA, Calendrier de déploiement des nouvelles chaînes HD de la TNT, 25 octobre 2012* (CSA communiqué. Schedule for deployment of the new HD channels on DTV, 25 October 2012) http://merlin.obs.coe.int/redirect.php?id=16157 FR

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TPS-CanalSat Merger: Application under Urgent Procedure for Suspension of Competition Authority Authorisation Rejected

On 22 October 2012 the Conseil d'Etat judge sitting in urgent matters rejected the application made by Canal+ under the urgent procedure for the suspension of the decision by the competition authority (*Autorité de la Concurrence*) on Vivendi Universal and Groupe Canal Plus taking exclusive control of TPS and CanalSatellite. It will be remembered that the decision of the Minister of the Economy on 30 August 2006 authorised the companies Groupe Canal Plus and Vivendi Universal to gather together within the company Canal Plus the activities of the pay television channel TPS and of the Canal Plus group. In its decision of 20 September 2011, the competition authority decided to withdraw the authorisation, on the basis of Article L.430-8 of the Commercial Code, and imposed a fine of EUR 30 million. Further to this decision, the Canal Plus/Vivendi group entered another notification of the concentration operation, which the competition authority authorised on 23 July 2012, adding new injunctions to it, "such as to re-establish sufficient competition on the markets for pay television" (see IRIS 2012-8/25). Further to this decision, the companies Canal Plus and Vivendi therefore referred to the courts under the urgent procedure to obtain a suspension order. The applicants felt that the condition of urgency was fulfilled because performance of the injunctions issued by the competition authority in

conjunction with its decision would have an immediate and serious harmful effect on their activities, and would have effects it would be difficult to reverse if the decision were to be cancelled subsequently.

In its order, the Conseil d'Etat recalled that Article 521-1 of the Code of Administrative Justice requires two conditions to be fulfilled for a judge sting in urgent matters to be able to allow an application for suspension: firstly, the urgency of the situation must be evident, and secondly, there must be an argument that, at that stage in the preparatory investigation of the case, a serious doubt is created as to the legality of the decision at issue. In the present case, it was noted that the disputed decision made authorisation by the competition authority dependent on the implementation of 33 measures taking effect on dates spread over a period of time - while some were to take effect as soon as the contested authorisation was notified, others were not to take effect until three months later. From the preparatory investigation of the case, it transpired - more particularly from the elements submitted at the actual hearing - that the implementation of the injunctions, of a scope exceeding that of the undertakings the Canal Plus group proposed to the competition authority in summer 2012, was likely to cause harmful effects for the applicant companies. The judge sitting in urgent matters nevertheless observed that examination of the merits of the applications with a view to cancelling the decisions of 20 September 2011 and 23 July 2012 was scheduled for 14 December 2012. The Conseil d'Etat did not feel there was any risk that implementing the disputed injunctions would have irreversible harmful effects on the economic and financial situation of the Canal Plus group before judgment was delivered on the merits of both these cases. Since the condition of urgency required for justifying the immediate suspension of the contested decision was not fulfilled, the application was rejected. To be continued04046

• *Conseil d'Etat (ord. réf.), 22 octobre 2012, Société Groupe Canal Plus et Société Vivendi Universal* (Conseil d'Etat (order under the urgent procedure), 22 October 2012, the companies Groupe Canal Plus and Vivendi Universal)
http://merlin.obs.coe.int/redirect.php?id=16166 FR

Amélie Blocman
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CSA Prohibits Several Television Channels Broadcasting the Same Programme

On 16 October 2012, the audiovisual regulatory authority (*Conseil Supérieur de l'Audiovisuel* - CSA) published a deliberation "on the simultaneous broadcasting of a single programme by a number of national terrestrially broadcast television channels". The text is directed specifically at D8, Canal+ group's new free-view channel (see IRIS 2012-9/21) which, since its launch last month, has been broadcasting the news programme of i>Télé, the 24-hour news channel belonging to the same shareholder, every morning from 6 to 8 a.m. The heads of the competitor channel BFM TV were concerned, as they felt that such a practice constituted a distortion of competition. However, there is currently nothing to prevent such relay broadcasting. The CSA therefore intervened to lay down the principle of not allowing multiple terrestrially broadcast national television services to broadcast all or part of the same programme simultaneously, or deferred by less than one hour, without first obtaining written authorisation from the CSA. Simultaneous broadcasting was indeed likely to infringe the pluralism of socio-cultural expression and did not contribute to the diversity of programmes, which the CSA was required to ensure under Articles 1 and 3-1 of the 1986 Act. The deliberation states that the simultaneous broadcasting of a programme means the broadcasting by a number of channels of a programme with identical characteristics in terms of image and sound. This means that it does not cover, for instance, the simultaneous broadcasting of a football match by two channels (for example, France 2 and W9) with different commentaries. Similarly, the ban refers exclusively to "national terrestrially broadcast channels", thereby allowing, for example, the regional France 3 channels to show certain national France 3 programmes, or for the public-sector channel to show Euronews programmes, which were broadcast by cable and satellite.

Exceptionally, however, the CSA has authorised the simultaneous or slightly delayed broadcasting of all or part of a same programme where it is of particular interest for the public, such as the broadcasting of a ceremony, debate, or action on the part of a public figure. Similarly, the ban does not concern either the images illustrating news items or brief extracts of events of major importance. Nor does it apply to the broadcasting of the major debates mentioned in Article 45 of the terms of reference of the company France Télévisions (such as parliamentary debates).

These rules will come into force on 30 November 2012, in order to leave D8 enough time to reschedule its morning programmes. There is no doubt they will also discourage the activities of the six new DTV channels that are to start broadcasting on 12 December, which might have been tempted to adopt the practice.

• *Délibération du CSA du 16 octobre 2012 relative à la diffusion simultanée d'un même programme par plusieurs chaînes hertziennes terrestres à vocation nationale* (CSA deliberation of 16 October 2012 on the simultaneous broadcasting of a single programme by a number of national terrestrially broadcast television channels)
http://merlin.obs.coe.int/redirect.php?id=16165 FR

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GB-United Kingdom

ASA Adjudication on Channel Four Television Corporation's Posters Advertising a Documentary

On 3 October 2012, the UK's Advertising Standard Authority (ASA) ruled against Channel Four Television for its posters advertising its documentary based on the film My Big Fat Gypsy Wedding.

The posters featured the words "Bigger. Fatter. Gypsier" over an image of a young boy looking directly at the camera and others of two teenagers wearing low-cut bra tops and three young girls dressed for their first Holy Communion standing in front of a caravan.

The ASA, on advice from the Equality and Human Rights Commission reviewed the matter in light of the provisions of the UK Code of Non-broadcast Advertising, Sales Promotion and Direct Marketing (CAP Co Edition 12), specifically Clauses 1.3 (Marketing communications must be prepared with a sense of responsibility to consumers and to society); 4.1 (Marketing communications must not contain anything that is likely to cause serious or widespread offence. Particular care must be taken to avoid causing offence on the grounds of race, religion, gender, sexual orientation, disability or age. Compliance will be judged on the context, medium, audience, product and prevailing standards. Marketing communications may be distasteful without necessarily breaching this rule. Marketers are urged to consider public sensitivities before using potentially offensive material. The fact that a product is offensive to some people is not grounds for finding a marketing communication in breach of the Code.); 5.1 (Marketing communications addressed to, targeted directly at or featuring children must contain nothing that is likely to result in their physical, mental or moral harm) and 6.1 (Marketers must not unfairly portray or refer to anyone in an adverse or offensive way unless that person has given the marketer written permission to allow it.)

ASA decided that:

- the advertisements featuring the young boy and the low-cut top-wearing teenagers could enforce prejudicial views against the gypsy and traveller community

- the ads were likely to cause serious offence to some members

- Channel 4 acted irresponsibly by depicting a child - one of the two young teenagers pictured in low-cut tops - in a sexualised way

- two other adverts showing a man leading a horse across a field with caravans in the background and the three young girls dressed for Holy Communion did not breach the advertising code.

The decision was to take no further action in relation to the ad showing a man leading a horse across a field with caravans visible in the background and the ad showing three young girls dressed for their first Holy Communion standing in front of a caravan.

However two ads were ordered not to be shown again: one, featuring a close-up of a young boy looking directly at the camera and the other showing two young women wearing low-cut bra tops.

There are two rather unusual aspects of this adjudication by the Advertising Standards Authority. First, it does not concern programme content as such, but four poster advertisements for the (documentary) programme. Second, the ASA Executive assessed the ads in February 2012 and recommended to the Council (which agreed with the Executive) that the complaints did not warrant investigation. However, the Irish Traveller Movement in Britain and eight co-complainants sought an Independent Review of Council's decision. The case was re-opened and investigated.

• ASA Adjudication, A12-197451, 3 October 2012
http://merlin.obs.coe.int/redirect.php?id=16146 EN

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HR-Croatia

CEM Imposes Fines on Croatian Broadcasters

The Electronic Media Act (EMA), in Article 69, Paragraph 1, Subparagraphs 12 and 16, prescribes that the Council for Electronic Media (CEM) ensures the supervision over the implementation of provisions on the programming principles and obligations determined by the EMA and a special regulation, save for electronic publications. The CEM also considers the complaints of citizens on the media services providers' behaviour with regard to the implementation of acts and takes measures in compliance with the EMA.

Pursuant to the aforementioned provisions of the EMA, by maintaining continuous supervision as well as on the basis of citizen complaints, the CEM has determined on 30 August 2012 and on 12 September 2012 that two broadcasters operating on the national level - the Croatian Radio Television (HRT - the national PSB) and RTL Croatia (a commercial broadcaster) - had violated the provisions of the Croatian Radio Television Act and the EMA.

Upon having conducted the prescribed procedure and receiving the respective broadcaster's statement on the matter, the CEM issued, on the basis of Article 69, Paragraph 1, Subparagraph 6 of the EMA and Article 229, Paragraph 1, Subparagraph 3 of the Misdemeanour Act, several misdemeanour warrants to the broadcasters and their responsible persons.

The HRT violated the following norms:

- Article 17, Paragraph 1 of the EMA, prescribing the requirements that are to be fulfilled by the sponsored audiovisual media services and programmes. The CEM held that the broadcaster acted contrary to the said provision when broadcasting several episodes of the feature *Vježbajmo zajedno* (Let's stay fit together), which is a regular part of the HRT programme *Dobro jutro Hrvatska* (Good Morning, Croatia), by not informing the viewers clearly of the existence of sponsorship agreements while presenting and highlighting food products of the Nestlé company as well as the "Fitness by Vem" logo. On the basis of Article 83, Paragraph 1, Subparagraph 2 and Paragraph 2 of the EMA, the broadcaster has been fined in the amount of HRK 10,000 (about EUR 1,346.17) and the responsible person (the Director General) in the amount of HRK 5,000 (about EUR 673.08);

- Article 29, Paragraph 1 of the EMA, prescribing that advertising and teleshopping must be readily recognisable and distinguishable from editorial content and that, without prejudice to the use of new advertising techniques, advertising and teleshopping must be kept distinct from other parts of the programme by optical, acoustical and/or spatial means. The CEM held that the broadcaster acted contrary to the said provision when broadcasting a feature during the informative programme *Dnevnik* (Daily News), which presented an interview with the Croatian waterpolo player Dubravko Šimenc, who was wearing a t-shirt with clearly prominent name "Karlovačko pivo" (Karlovac Beer) and declared in his statement that he was "grateful to the Karlovac Brewery". On the basis of Article 82, Paragraph 1, Subparagraph 14 and Paragraph 2 of the EMA, the broadcaster was fined to the amount of HRK 100,000 (about EUR 13,461) and the responsible person (the Director General) with the amount of HRK 10,000 (about EUR 1.346);

- Article 37, Paragraph 2 of the Croatian Radio Television Act, prescribing that the duration of advertising spots in any HRT programme in the general programme channels must not exceed 9 minutes within any programme hour, whereas in the period from 18:00 to 22:00 the maximum duration is reduced to 4 minutes per hour. The CEM has determined, on the basis of an HRT programme analysis, that the broadcaster had exceeded the permitted duration of advertising spots within HRT1 and HRT2 programmes in June 2012. On the basis of Article 46, Paragraph 1, Subparagraph 4 and Paragraph 2 of the Croatian Radio Television Act, the broadcaster has been fined in the amount of HRK 100,000 (about EUR 13,461) and the responsible person (the Director General) with the amount of HRK 10,000 (about EUR 1,346).

RTL Croatia violated the following norms:

- Article 38, Paragraph 1 of the EMA, prescribing that the legally determined minimum of in-house productions must amount to at least 20 % of daily broadcast time of each audiovisual programme channel of a television broadcaster, out of which at least 50 % must be broadcast in the period from 16:00 to 22:00, unless otherwise stipulated by the Act. On the basis of an RTL TV programme's analysis, the Council has determined that the broadcaster has provided an insufficient proportion of in-house productions during 9 days in June 2012. Pursuant to Article 82, Paragraph 1, Subparagraph 20 and Paragraph 2 of the EMA, the broadcaster has been fined to the amount of HRK 100,000 (about EUR 13,461) and the responsible persons (the President and the member of the Management Board) to the amount of HRK 10,000 (about EUR 1.346) each.

• *Zapisnik s 46-12 sjednice Vijeća za elektroničke medije, održane dana 30. kolovoza 2012.* (46-12 Minutes of meetings of the Council for Electronic Media, held on 30 August 2012 (HRT))
http://merlin.obs.coe.int/redirect.php?id=16131 HR

• *Zapisnik s 48-12 sjednice Vijeća za elektroničke medije, održane dana 12. rujna 2012* (48-12 Minutes of meetings of the Council for Electronic Media, held on 12 September 2012 (RTL))
http://merlin.obs.coe.int/redirect.php?id=16132 HR

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IT-Italy

Amendments to Agcom DTT Regulation

On 2 August 2012, by Deliberation no 350/12/CONS, the *Autorità per le garanzie nelle comunicazioni* (Italian Communications Authority - Agcom) has amended the Regulation on Digital Terrestrial Television adopted by Deliberation no. 353/11/CONS (see IRIS 2011-10/28). The amendments concern the requirements of share capital and the number of employees for the release of authorizations during the switch-over period and after switch off and the types of companies that may be holders of authorizations.

• *Delibera n. 350/12/CONS, Modifiche al regolamento relativo alla radiodiffusione televisiva terrestre in tecnica digitale approvato con delibera n. 353/11/CONS* (Deliberation no. 350/12/CONS, Amendments to the Regulation on Digital Terrestrial Television approved by Resolution no. 353/11/CONS)
http://merlin.obs.coe.int/redirect.php?id=16176 IT

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AGCOM Technical Board for the Protection of Minors in on Demand Services

Following the amendments to the Italian AVMS Code introduced in July 2012 by the Legislative Decree no. 120/2012 (see IRIS 2012-8/32) and pursuant to the new Article 34 of the Code, regarding the protection of minors, Agcom adopted on 4 October 2012 a deliberation establishing a technical board to adopt, through co-regulation procedures, the technical measures regarding the protection of minors on VOD services, to prevent them from viewing content that "might seriously impair" the physical, mental or moral development of minors; these are considered to be, in particular, programmes that involve pornography or programmes with scenes of gratuitous, insistent or brutal violence, including cinematographic works classified as unsuitable for minors under 18.

Among the measures technically feasible, Article 34, para 5, of the Code envisages the employment of a personal identification number (PIN) to be applied by default, but which can be deactivated by the use of a secret code. The technical measures need to be implemented according to the following general criteria:

a) adult content may be offered with a parental control feature that prevents access to the content. The user may disable the parental control by entering a special secret code;

b) the secret code must be communicated confidentially to the adult signing the contract for receiving the content or the service, along with a warning about its responsible use and storage.

The aim of the technical board is to detect the possible procedures to communicate personal identification numbers (PIN) and to use filtering or identification systems, in order to agree upon solutions involving all interested stakeholders (e.g. industry, audiovisual media services providers, associations of citizens, and associations for children rights).

The technical board should conclude its work and adopt a definitive regulation within 30 days starting from the publication of the aforementioned deliberation no. 224/12/CSP on the Italian Official Journal.

• *Delibera n. 224/12/CSP "Costituzione del Tavolo tecnico per l'adozione della disciplina di dettaglio sugli accorgimenti tecnici da adottare per l'esclusione della visione e dell'ascolto da parte dei minori di trasmissioni rese disponibili dai fornitori di servizi di media audiovisivi a richiesta che possono nuocere gravemente al loro sviluppo fisico, mentale o morale ai sensi dell'articolo 34 del Decreto legislativo 31 luglio 2005, n. 177, come modificato e integrato in particolare dal Decreto legislativo 15 marzo 2010, n. 44, come modificato dal Decreto legislativo 28 giugno 2012, n. 120"* (Deliberation no. 224/12/CSP "Establishment of a technical board for the adoption of the implementation rules on the technical measures to be adopted in order to prevent minors from viewing and listening to adult content made available over on-demand audiovisual media services providers, pursuant to Article no 34, legislative decree no. 177/2005, as amended by legislative decrees no. 44/2010 and no. 120/2012")
http://merlin.obs.coe.int/redirect.php?id=16143 IT

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Agcom Launches a Public Consultation on the New Logical Channel Numbering Plan

Agcom has issued a public consultation on the new logical channel numbering plan (LCN) for digital terrestrial television pursuant to the four judgments of the *Consiglio di Stato* (the Italian High Administrative Court) that declared void the plan adopted by decision n. 366/10/CONS (see IRIS 2012-9/28).

The draft of the new plan confirms the general approach of assigning the numbers in ten blocks and the special reserve of the first positions to the historical ex analogue broadcasters, and amends the provisions of the old plan according to the remarks made by the *Consiglio di Stato*.

Agcom has now asked for comments on the proposed set of new criteria for assigning positions to local channels, following the principles of audience share, quality of programmes and the number of employees. The other relevant modification is related to the definition of semi-generalist channels, in order to avoid circumvention.

The decision also establishes new criteria for the assignment of numbers to national channels in case of several requests for the same position.

Finally for the general definition of the new plan and for the assignment of positions 7, 8 and 9 to national or local channels, Agcom will follow the results of a new survey on the users' preferences that will be conducted on a minimum sample of 20.000 individuals (in so doubling the sample of 10.000 used in the survey conducted of the old plan).

The respondents will have to send their comments on the draft plan to Agcom within 30 days of publication in the official gazette.

• *Delibera n. 442/12/CONS, Consultazione pubblica sullo schema di provvedimento recante il nuovo piano di numerazione automatica dei canali della televisione digitale terrestre* (Deliberation no. 442/12/CONS, Public consultation on the new logical channel numbering plan for the digital terrestrial television)
http://merlin.obs.coe.int/redirect.php?id=16144 IT

Giorgio Greppi
Autorità per le garanzie nelle comunicazioni (AGCOM)

KZ-Kazakhstan

Must-carry Selection Rules Approved

On 26 July 2012 the Government of the Republic of Kazakhstan adopted an ordnance titled "On approval of the Rules for competition on selection of the must-carry television and radio channels". This ordinance was necessitated by the recent broadcasting law (see IRIS 2012-3/28). Earlier, on 6 June 2012, the Commission on Development of Broadcasting was established as such by the Government with the Minister of Culture and Information as its chair and his vice-minister as the deputy chair.

The rules entrust the procedures of selection of broadcasting channels for the line-up to the Committee on Information and Archives of the Ministry of Culture and Information. The competition itself will be conducted by the Commission on Development of Broadcasting that reviews programme policies, technical specifications and financial resources of the applicants.

The selection criteria for the competition include the "social importance of proposed programmes, availability of broadcasts on culture, educational programmes, those aimed at youth and children, coverage of Sate policies in the social and economic development of the country". As other criteria the Rules list the general format of a channel, a proportion of programmes to be produced by the applicants, a percentage of programmes in Kazakh language, availability of professionals, and an average length of broadcasting per day.

The Commission's decisions on the results of the competition are to be approved by the Government within one month after it is held.

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http://merlin.obs.coe.int/redirect.php?id=16170 KK

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LV-Latvia

Changes to the "Must-Carry" Rules in Latvia

On 4 October 2012 the *Saeima* (Latvian Parliament) adopted amendments to the Electronic Media Law, partially abolishing the "must-carry" rules applicable to cable television operators.

Before these amendments, the Electronic Media Law provided that cable television operators must include in their packages programmes of the public television broadcasters as well as programmes of the national commercial television broadcasters whose terrestrial programmes are available to viewers free of charge. Consequently, the cable television operator could not request a payment from the television broadcasters whose programmes it was transmitting due to the "must-carry" rule. The television broadcasters whose programmes were included in the "must-carry", in turn could not request a payment from the cable operator for the retransmission rights. This regulation caused complaints by the national commercial television broadcasters who were missing income from retransmission rights due to these "must-carry" rules.

In the amendments adopted the Saeima decided to temporarily exclude the application of the "must-carry" rule to the programmes of national commercial television broadcasters. The rule remains in force with respect to programmes of public television broadcasters. However, the exclusion is temporary, and will be applied within the period from 31 March 2013 to 31 December 2013.

In the annotation to the draft amendments it is explained that the current situation is unfair to commercial broadcasters, as the cable television operators nevertheless request a payment for even the smallest programme packages offered to their subscribers, but the commercial television broadcasters do not receive a share of this income. The situation is also unfair in comparison to foreign broadcasters who are entitled to receive a payment for the retransmission rights from the cable operators.

Initially, the draft suggested abolishing the relevant "must-carry" rule without a temporary limitation. However, there were concerns that the new regulation would raise costs for the households, which are cable television subscribers. In addition, as of 1 January 2014 new regulations on the digital terrestrial broadcasting must come into force, as the existing framework (the digital terrestrial broadcasting is provided by one operator) is valid only until 31 December 2013. Thus a compromise was achieved by a temporary abolishment of the "must-carry" rule regarding commercial broadcasters. The issue will be addressed

again along with the new framework for digital terrestrial television.

• *04.10.2012. likums "Grozījumi Elektronisko plašsaziņas līdzekļu likumā" ("LV", 166 (4769), 19.10.2012.)* (04/10/2012. Law on "Amendments to the Law on Electronic Media" ("LV", 166 (4769), 19.10.2012.))
http://merlin.obs.coe.int/redirect.php?id=16175 LV

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MK-"the Former Yugoslav Republic Of Macedonia"

Libel and Defamation to Be Decriminalised

After years of debate between professional journalists, NGO's, legal experts and governmental representatives and supported by the Council of Europe, the draft text of the Act on Civil Responsibility for Libel and Defamation has entered the Parliamentary procedure.

The public discourse of the so-called "decriminalisation of libel and defamation" is multi-facetted: the national Government, which proposed the law, states that during the preparation of the draft text "the remarks of the Council of Europe expert Gavin Millar ... and the rich jurisprudence of the European Court for Human Rights" have been incorporated, including the Document 11305 (2007) of the Parliamentary Assembly of the Council of Europe, titled "Towards Decriminalisation of Defamation". Also a comparative analysis of the respective law in other countries has been made.

In addition, it was decided that the 325 pending criminal charges for libel and defamation against journalists will be stopped and transferred to the civil courts.

The current Criminal Code, which regulates defamation, sets no limit to the possible financial sanctions that the Court can impose on the affected journalists. This led to the imposition of sanctions of even EUR 30,000 or more, which is a huge amount in a country with an average salary of about EUR 300. Now, the new law foresees to set the limit at a maximum of EUR 27,000, out of which the author of the text would pay EUR 2,000, the editor in chief EUR 10,000 and the owner of the media outlet EUR 15,000. Hence, the responsibility in future would be distributed among several persons. This may entail a risk of influence by company owners and chief editors on the reporters' work and jeopardize the environment of free journalistic investigation and reporting.

However, according to Article 8 of the bill, the author of a text will not be held responsible, if he proves that he was ordered to write the text by the company or in a case where the text was significantly altered by the editor.

The bill also regulates internet portals, websites and blogs. Information society experts have located shortcomings in Article 11 of the draft, which could endanger the freedom of expression. The non-governmental Metamorphosis Foundation comments "Given that every online service provider or website administrator has the technical capabilities to control all content (the form of control can ultimately be deletion or removal of the website from the internet), contrary to the principle of presumption of innocence, with this Article (Article 11) the owners are put in a situation to have to prove that they were innocent, instead of the plaintiff(s) having to offer evidence for their guilt or malicious intent." Furthermore, according to Article 23 of the bill, courts are given the possibility to stop a journalist from publishing information, by means of so-called 'temporary judicial measures': "04046this leaves a space for misuse during the implementation (of the law), in order to limit the freedom of expression", claims a representative of the Journalists' Trade Union. In general, the Association of Journalists of Macedonia is satisfied with the proposed text and hopes that by the time the bill will be voted by the Parliament, all shortcomings and gaps will have been corrected based on the on-going public debates.

• Предлог закон за граѓанска одговорност за навреда и клевета (Bill on Civil Responsibility for Libel and Defamation)
http://merlin.obs.coe.int/redirect.php?id=16134 MK

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Act on Electronic Communications Enters into Force

The new *Legea Nr. 140 pentru aprobarea Ordonanţei de urgenţă a Guvernului nr. 111/2011 privind comunicaţiile electronice* (Act no. 140/2012 on electronic communications) recently entered into force in Romania. The Act approves, with modifications and completions, the Government Emergency Decree no. 111/2011 with regard to electronic communications. The Act is set to transpose the EU legislation and to unify the diverse domestic regulations in the field. On the other hand, the Romanian Parliament rejected a draft which was intended to set up the State's common electronic communications infrastructure (see IRIS 2011-2/35).

The new Act on electronic communications was not discussed in public because of the harsh political fight

which took place in Romania during the summer of 2012 due to the suspension and the dismissal of Romania's President.

The amendments adopted are intend to improve the conditions for granting licenses for radio frequencies, use, the conditions to introduce products to the market and to set up the radio and electronic communications equipments. The granting of licences is conducted in the course of a competitive and comparative selection procedure. The amendments also regulate the licensee's obligation to pay licence fees, the conditions for the *Autoritatea Naţională pentru Administrare şi Reglementare în Comunicaţii* (National Authority for Administration and Regulation in Communications and telecom watchdog - ANCOM) to renew the licenses without prevention, restriction or distortion of competition.

The amendments are also intended to provide customers and subscribers of electronic communications networks and services with the necessary information such as prices and tariffs for connection and installation, payment methods, conditions of signing a contract, promotions, provider's obligation to notify in advance of unilateral amendments to the contracts.

At the same time, the Act requires the providers of conditional access services to ensure access to the radio and TV services providers for final users which is fair, reasonable, non-discriminatory and compliant with the principles of free competition.

Besides that, the Chamber of Deputies (lower chamber of the Romanian Parliament) rejected the Government Emergency Decree no. 117/2011, which aimed to set up the state's common electronic communications infrastructure (Act no. 139/2012 on rejection of the above mentioned Government Emergency Decree). The Ordinance had been approved by the upper chamber, the Senate, but the rejection decision of the deputies was final.

The common infrastructure was meant to connect in an efficient, secure and rapid way the data networks of beneficiaries to the State's administrative integrated electronic communications network and to the European Union's administrative communications network. The beneficiaries would have been public institutions and authorities, national companies and companies owned or controlled by those institutions. The diplomatic communications networks of Romania were not included in the common infrastructure. The services provided by the common infrastructure would not have been commercial services.

• *Legea Nr. 140 din 18.07.2012 pentru aprobarea Ordonanţei de urgenţă a Guvernului nr. 111/2011 privind comunicaţiile electronice* (Act no. 140 of 18 July 2012 for the approval of the Government Emergency Decree no. 111/2011 with regard to the electronic communications)
http://merlin.obs.coe.int/redirect.php?id=16138 RO

• *Legea 139 din 18 iulie 2012 pentru respingerea Ordonanţei de urgenţă a Guvernului nr. 117/2011 privind constituirea infrastructurii comune de comunicaţii electronice a statului* (Act no. 139 of 18 July 2012 for the rejection of the Government Emergency Decree no. 117/2011 with regard to the set up of the state's common electronic communications infrastructure)
http://merlin.obs.coe.int/redirect.php?id=16140 RO

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Spectrum Auction Successfully Concluded

Five mobile communications and Internet providers for the Romanian market have been granted a total of 485 MHz frequencies blocks in the 800 MHz, 900 MHz, 1800 MHz and 2600 MHz bands, the radio frequencies suitable for broadband voice mobile communications and Internet. The *Autoritatea Naţională pentru Administrare şi Reglementare în Comunicaţii* (National Authority for Administration and Regulation in Communications and telecom watchdog - ANCOM), successfully concluded the spectrum auction on 24 September 2012 (see IRIS 2011-2/35, IRIS 2011-4/33, IRIS 2012-2/34).

Five operators have won 485 MHz (out of 575 MHz tendered). The amount of spectrum available for mobile communications has increased by 77% through this tendering procedure.

Cosmote Romanian Mobile Telecommunications has won 10 blocks amounting to 100 MHz, Orange Romania 20 blocks (175 MHz), RCS&RDS one block (10 MHz), Vodafone Romania 19 blocks (170 MHz), and 2K Telecom 2 blocks (30 MHz).

The most part of the licenses are valid from 2014 until 2029 and they open the way for the introduction of 4G services, probably starting at the end of 2012. There were also some short term licenses granted (valid from 1 January 2013 until 5 April 2014). The license fees, accounting for a total of EUR 682,136,036 are to be paid by 30 November 2012, respectively by 30 June 2013, depending on the frequency blocks.

The president of ANCOM stated that mobile communications in Romania had entered a new era: the available spectrum resources allow the introduction of the 4G technology. Additionally, the 900 MHz band is distributed more efficiently. For the operators, the auction ensures security of investments and efficiency of the spectrum use. For users, the auction brings access to 4 national networks, better coverage, faster data transfer and better services provided at competitive prices.

For the first time in Romania, operators covering 30% of the population with their own radio access network may benefit from national roaming for at least three

years. Moreover, following this auction, 676 rural localities currently underserved by broadband mobile communications networks are to benefit with priority from coverage.

The bands will be released by the *Ministerul Apărării Naţionale* (Romanian Ministry of National Defence - MApN) until 31 December 2013 at the latest. The Ministry will be reimbursed with EUR 30 Million directly by ANCOM. The rest of the money regarding the release costs for the bands will come from the license fees paid by the winners of the auctions.

As an EU member state, Romania accordingly complies with the obligation to consolidate the single market of electronic communications services through radio waves.

• *Licitaţia de spectru s-a finalizat cu succes; comunicat de presă ANCOM 24.09.2012* (ANCOM press release of 24 September 2012)
http://merlin.obs.coe.int/redirect.php?id=16141 RO

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A Report on the Quota of European Works

In regard to the application of Articles 16 and 17 of the Directive for Audiovisual Media Services (AVMS Directive), respectively Article 19a of the Bulgarian Radio and Television Act (RTA) for 2011 on the quota of European works in programmes of the linear media services providers, the members of the съвет за електронни медии (Council for Electronic Media (CEM)) adopted a report in the beginning of November 2012.

The summary for the period from 1 January to 31 December 2011 contains data about 47 television programmes with national coverage and 28 linear media services providers. A letter of request was sent to the linear media services providers and nearly all of them have answered the letter. Only 3 linear media providers have not responded.

More than half (27) channels fulfilled the quota of broadcasting time for European works. According to the data, the quota for independent productions was fulfilled by 23 channels.

In only 4 television programmes the percentage of time for European works was less than 10 %. Two of them are programmes of the provider “Fox International Channels”. In his response, the provider “Fox International Channels Bulgaria” has explained that the low percentage of European works in the programmes “Fox Crime” and “Fox Life” is due to their thematic specialty (the programmes represent "the civil- and criminal-legal system in the United States” and “the American way of life").

In CEM’s report it is also emphasized that the designated time for European works in television programmes according to the AVMS Directive should be reserved "when it is practically possible". The conclusion in CEM’s report is that the principle "when it is practically possible" set in the Directive gives a ground to a more liberal interpretation of the provisions which are perceived as desirable by the Directive.

• Приложение : Форма с попълнени данни за прилагането на членове *16* и *17* от Директивата за аудиовизуални медийни услуги за *2011*463476464470475460, респективно , чл .*19*460 от Закона за радиото и телевизията – европейски произведения в програмите на доставчиците на линей (CEM-report, November 2012)
http://merlin.obs.coe.int/redirect.php?id=17309 BG

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Agenda

Recent Developments of the Russian and Western European Film Markets
30 November 2012 Organiser: European Audiovisual Observatory in collaboration with Nevafilm Venue: World Trade Center, Moscow

Book List

Bellut, Th., Jugendmedienschutz in der digitalen Gesellschaft: Fakten und Positionen aus Wissenschaft und Praxis 2012, Kopäd ISBN 978-3867362849 http://www.kopaed.de/
Baumgartner, U., Ewald, K., Apps und Recht 2012, Beck Juristischer Verlag ISBN 978-3406634925 http://www.beck-shop.de/Baumgartner-Ewald-Apps-Recht/productview.aspx?product=9988671
Künzler, M., Mediensystem Schweiz 2012, UvK ISBN 978-3867641517 http://www.uvk.de/buecher/db/titel/details/mediensystem-schweiz////ch/e3db95ca89ce01405ba2d434879bfe19/
Perlo, N., Le droit public du cinéma en France et en Italie 2012, Presses universitaires d'Aix-Marseille ISBN 978-2731408324 http://www.puam.univ-cezanne.fr/
Hoebeke, S., Le droit de la presse : Presse écrite, presse audiovisuelle, presse électronique 2012, Anthemis ISBN 978-2874555466 http://www.anthemis.be/index.php?id=202&tx_ttproducts_-pi1[backPID]=61&tx_ttproducts_-pi1[product]=3180&cHash=99d13d9450
Gutwirth, S., European Data Protection: Coming of Age 2012, Springer ISBN 978-9400751842 http://www.springer.com/law/international/book/978-94-007-5184-2
Karppinen, K., Rethinking Media Pluralism (Donald McGannon Communication Research Center's Everett C. Parker Book Series) 2012, Fordham University Press ISBN 978-0823245123 http://fordhampress.com/index.php/rethinking-media-puraism-paperback.html