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Legal Observations of the European Audiovisual Observatory

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COUNCIL OF EUROPE

European Court of Human Rights: Szima v. Hungary

The applicant in this case, Ms Judit Szima, was the chairperson of the Tettrekész Police Trade Union. She published a number of writings on the Trade Union's website, which was effectively under her editorial control. In some of these writings she sharply criticized the police management, also referring to outstanding remunerations due to police staff, alleged nepotism and undue political influence in the force, as well as dubious qualifications of senior police staff. In 2010 Szima was convicted for instigation to insubordination. The Military Bench of the Budapest Court of Appeal confirmed her sentence as a fine and demotion. It held that the publication of the posted articles and statements on Tettrekész's website had gone beyond Szima's freedom of expression, given the particularities of the armed body to which she belonged. According to the Hungarian authorities, the views contained in the website articles constituted one-sided criticism whose truthfulness could and should not be proven.

The Strasbourg Court confirms that the accusations by Szima of the senior police management of political bias and agenda, transgressions, unprofessionalism and nepotism were indeed capable of causing insubordination. The Court also observes that "it is true that Szima was barred from submitting evidence in the domestic proceedings - a matter of serious concern - however, in her attacks concerning the activities of police leadership, she failed to relate her offensive value judgments to facts". The Court is of the opinion that Szima "has uttered, repeatedly, critical views about the manner in which police leaders managed the force, and accused them of disrespect of citizens and of serving political interests in general", and that these views "overstepped the mandate of a trade union leader, because they are not at all related to the protection of labour-related interests of trade union members " (§ 31). In view of the margin of appreciation applicable, in order to maintain discipline by sanctioning accusatory opinions that undermine trust in, and the credibility of, the police leadership, the European Court accepts that there was a sufficient "pressing social need" to interfere with Szima's freedom of expression. It also found that the relatively mild sanction imposed on the applicant - demotion and a fine - could not be regarded as disproportionate in the circumstances. By six votes to one, the Court concluded that there has been no violation of Article 10 read in the light of Article 11 of the Convention.

The outcome of the case is somewhat surprising, as the Court firmly took as its starting point that "the members of a trade union must be able to express to their employer their demands by which they seek to improve the situation of workers in their company. A trade union that does not have the possibility of expressing its ideas freely in this connection would indeed be deprived of an essential means of action. Consequently, for the purpose of guaranteeing the meaningful and effective nature of trade union rights, the national authorities must ensure that disproportionate penalties do not dissuade trade union representatives from seeking to express and defend their members' interests" (§ 28).

As the sole dissent, the president of the Chamber, Judge Tulkens, vehemently disagreed with the reasoning of the Court. Tulkens refers to the finding by the Court's majority that Szima's critical remarks had overstepped the mandate of a trade union leader, because some of them were "not at all related to the protection of labour-related interests of trade union members". Tulkens wonders whether the Court itself has not overstepped its mandate by casting this judgment on the role of a trade union leader and on the "legitimate" scope of trade-union activities. In Tulkens' view, the majority of the Court dismissed artificially the trade-union dimension of this case and, also neglected the importance of freedom of expression in a democratic society.

• Judgment by the European Court of Human Rights (Second Section), case of Szima v. Hungary, nr. 29723/11 of 9 October 2012
http://merlin.obs.coe.int/redirect.php?id=16185 EN

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EUROPEAN UNION

European Parliament: Adoption of Resolution on Protecting Children in the Digital World

On 20 November 2012 the European Parliament adopted, by a large majority, a resolution inviting the member states of the European Union to step up their protection of children on the Internet. The Council of the European Union presented its conclusions on the subject in December 2011, and the European Commission presented a report on protecting children in the digital world (see IRIS 2011-9/8). The European Parliament Resolution was adopted on the date of the 53rd anniversary of the Declaration of the Rights of the Child.

The main areas for consideration presented in the Parliament's Resolution are access to and education in both the traditional and new media, children's entitlement to protection (from illegal and harmful content, but also from invasion of their privacy), and the right to digital citizenship.

Regarding access to and education in the media, the Parliament notes that the Internet occupies an increasingly large part of children's lives. Internet offers young people tools for communication, expression and learning, but it also exposes them to numerous risks (violence, fraud, scams, child pornography and harassment) which, in many cases, their parents are unaware of. The Parliament invites the member states and the Commission to take specific measures to create a safe on-line space. It urges the Commission to include in its main priorities the protection of children from aggressive or misleading TV and online advertising, and calls on member states to intensify their communication campaigns in order to make both children and adults aware of the potential dangers of the Internet.

The protection of children must be approached not only in terms of legislation, but also through education, by educating not only children but also parents and teachers as to how to combat illegal content. The Parliament invites the Commission and the member states to increase their cooperation (particularly with regard to the withdrawal of Internet pages showing illegal and harmful content) and pool their expertise and good practices.

The Resolution also emphasises the importance of the Internet in learning about citizenship, particularly because of the tools for communication and expression that the new media offer.

• Resolution of the European Parliament on protecting children in the digital world, 20 November 2012
http://merlin.obs.coe.int/redirect.php?id=16233 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 Parliament: Media Representatives See Media Freedom at Risk

On 6 November 2012, the European Parliament held a hearing with politicians and media experts on issues relating to media freedom. The main conclusions of a study conducted on behalf of the European Parliament by the Institute for European Media Law (EMR) provided a basis for discussions, especially given the restrictions on media freedom in many EU member states.

The Secretary General of the organisation Reporters Without Borders (RSF) said there was no EU state in which media freedom had not declined. Through political influence, police violence or arbitrary arrests, for example in Greece, Romania or Bulgaria, journalists were often put under pressure in order to suppress critical reporting.

Owing to these worrying trends, a representative of the Association of European Journalists (AEJ) called for the physical security of journalists to be safeguarded in compliance with the European Convention on Human Rights and the standards of the Council of Europe.

MEPs called for the European Commission to issue a statement on the subject. Owing to the difficult economic situation, less and less was being invested in journalism and, according to the conclusions of a study by the Open Society Foundation (OSF), significant pressure was being exerted on the media by the advertising industry. The protection of journalists' sources of information and the protection of individuals in public life against defamation were important standards that were currently insufficiently safeguarded.

Regarding media concentration, which, as a result of the influence of politicians and business people, is putting diversity of opinion at risk, the European Broadcasting Union (EBU) called for more transparency in regard to the ownership of media organisations. At any rate, when enacting future legal instruments the EU should take more careful account of, and provide better safeguards for, media freedom and editorial independence at the national level.

• Presse release of the European Parliament of 6 November 2012
http://merlin.obs.coe.int/redirect.php?id=16232 DE EN FR
CS DA EL ES ET FI HU IT LT LV MT
NL PL PT SK SL SV

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EIB/EBRD Prepared to support Eastern European Broadcasters

At a conference held in Vienna by the European Broadcasting Union (EBU) on 29 October 2012, representatives of the European Investment Bank (EIB) and the European Bank for Reconstruction and Development (EBRD) emphasised the advantages of digitisation and announced their intention to invest in the digitisation of public service broadcasting in Eastern Europe. The conference, on "Financing digitalisation in Eastern Europe: the challenge for public service broadcasters", was organised by the EBU's Vice President under the EBU Partnership Programme together

with the Austrian Federal Chancellery, the *Österreichischer Rundfunk* (Austrian Broadcasting Corporation ORF), the EIB and the EBRD.

High-ranking representatives of both banks regard the digitisation of Eastern European broadcasting as a worthwhile and workable business model. EBRD representatives pointed out to participants that Eastern European broadcasters should exploit the digital infrastructure in order to be able to respond to technological changes and safeguard the existing cultural heritage. The EBRD, they said, regarded digitisation as a way of opening up new potential sources of revenue, such as fees for the use of digital libraries, product placement and broadcasters' own productions. Other sources could be the use of the digital infrastructure for non-public purposes or the transmission of programmes for foreign broadcasters. The EBU's Director General essentially endorsed those remarks.

The conference's take-home message was clear: Eastern European public service broadcasters must urgently produce and transmit their programmes using digital technology and bring their obsolete tape-based archives up to the latest technological standards.

• Press release of the Asia-Pacific Broadcasting Union (ABU)
http://merlin.obs.coe.int/redirect.php?id=16220 EN

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General Court: ECB's refusal to grant access to documents lawful

In a judgment of 29 November 2012, the General Court of the European Union (EGC) ruled that the refusal of the European Central Bank (ECB) to grant access to documents relating to the economic situation in Greece was lawful.

In 2010, a journalist asked the ECB to give her access to two documents dealing with the economic situation in Greece. The first described the economic situation in that country as of March 2010; the second dealt with transactions effected by a company set up by the National Bank of Greece and its content was closely connected to that of the first document. The ECB refused to grant the journalist access to the two documents, giving as its reasons the protection of the economic policy of both Greece and the European Union and therefore the protection of public interests. The journalist challenged the decision before the ECB, arguing that there was a compelling public interest in the publication of the documents.

The ECB pointed out that it is obliged to refuse access to documents if the public interest may be undermined by their disclosure. No weighing up of that public interest against an "overriding public interest" is provided for by EU law. The EGC also noted that the ECB had not made a manifest error in its assessment of whether access to the documents could be granted. Although the documents described the situation of Greece as of March 2010 and the journalist did not make her request until October that year, the disclosure of the outdated documents could have led to negative consequences since it could not be reasonably ruled out that market players would have mistakenly regarded the outdated information as still valid. According to the EGC, such an error might have had negative consequences on Greece's access to the financial markets and therefore have affected the proper conduct of economic policy in Greece and the EU.

• Press release of the General Court of the European Union
http://merlin.obs.coe.int/redirect.php?id=17783 EN

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NATIONAL

AL-Albania

KKRT Issues Warning on Advertising of Medical Treatment

The *Keshili Kombetar i Radios dhe Televizionit* (National Council of Radio and Television - KKRT) has issued a warning to radio and television broadcasters regarding the advertising of medical products. The KKRT found that the broadcasters violate extensively against Albanian law.

According to Article 58 of the Law no. 8410, of 30.9.1998, "On public and private radio and television in the Republic of Albania", the broadcasting of advertising spots for medicine or medical treatment that is available only upon subscription is prohibited.

Based on this regulation, the KKRT has asked electronic media outlets to stop broadcasting advertising spots on medical treatment by different health institutions. This demand has emerged after a period of extensive advertising for several, mainly private hospitals and clinics, located both in Albania and abroad. The spots range from those for general hospitals to more specific ones, including cosmetic surgery.

According to the KKRT, this practice offends against the legal disposition and the media should refrain from broadcasting the mentioned spots. The Council underlined in its warning that the main criteria they

will use regarding any complaint will be the correct implementation of the law and the license terms. In the opposite case, the Council stated that its next steps would be in accordance with the law and sanctions might be imposed.

• *KKRT-ja, kërkon zbatimin e ligjit për reklamat.* (Press release of the KKRT of October 2012)
http://merlin.obs.coe.int/redirect.php?id=16228 SQ

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AT-Austria

Administrative Court Confirms "Facebook Ban" for the ORF

On 22 October 2012, the *Verwaltungsgerichtshof* (Administrative Court - VwGH), which has supreme administrative jurisdiction in Austria, confirmed the so-called "Facebook ban" in the case of the *Österreichischer Rundfunk* (Austrian Broadcasting Corporation - ORF) and dismissed an action brought by the ORF as unfounded.

In spring 2012, the *Kommunikationsbehörde Austria* (KommAustria), the authority responsible for regulating the ORF, established that the ORF's provision of a Facebook page constituted an infringement of the *ORF-Gesetz* (ORF Act) (see IRIS 2012-3/9). The legal remedy lodged by the ORF with the *Bundeskommunikationssenat* (Federal Communications Board - BKS), the supreme broadcasting authority, was unsuccessful, whereupon the ORF filed an action in the Administrative Court and the Constitutional Court.

The Administrative Court gave as the reason for its decision the purpose of the rule that "(the provision of) such online services must, for reasons of competition, be the preserve of other media undertakings". It went on to say that the wording of section 4f(2)(25) of the ORF Act (ban on co-operating with social networking sites) prohibited the ORF from engaging in "any form of co-operation [...] that has the same effect as the provision of a social networking service by the ORF itself". By using Facebook, it said, the ORF was able to exploit an existing popular global network, which was precisely what the legislature regarded as only being covered to a limited extent by the ORF's public service remit. Links to or co-operation with social networking sites were only allowed if there was a connection with its own "daily online news extracts", so the complaint had to be dismissed as unfounded.

On 16 November 2012, the *Verfassungsgerichtshof* (Constitutional Court - VfGH) allowed the effect of the decision to be suspended pending the outcome of the ORF's constitutional appeal. This enables the ORF to continue to operate the Facebook page for the time being. However, the VfGH stressed that its decision did not permit any conclusions to be drawn regarding the final ruling. If the constitutional appeal fails, the ORF's Director-General will consider further steps at the European level. Furthermore, the legislature is to be urged to amend the ORF Act. It is pointed out that the broadcaster would be denied access to one of the world's most important communications platforms, which would constitute an unparalleled restriction. It remains to be seen how the Constitutional Court will rule on the merits of the case.

• *Beschluss des Verwaltungsgerichtshofs vom 22. Oktober 2012 (Zl 2012/03/0070-12)* (Administrative Court decision of 22 October 2012 (Case Zl 2012/03/0070-12))
http://merlin.obs.coe.int/redirect.php?id=16213 DE

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KommAustria Does not Regard Tennis Davis Cup as a Premium Sports Competition

In a decision of 17 October 2012, the Austrian broadcasting regulator *Kommunikationsbehörde Austria* (KommAustria) dismissed a complaint by 13 private television broadcasters against the *Österreichischer Rundfunk* (Austrian Broadcasting Corporation - ORF). The case involved the transmission of tennis matches in the Davis Cup tie between Austria and Belgium on the ORF sports channel ORF Sport +.

According to section 4b(4) of the *Gesetz über den Österreichischen Rundfunk* (ORF Act), the ORF is prohibited from broadcasting so-called premium sports competitions on its sports channel, these competitions being defined as those given broad coverage in the Austrian media. The complainants were of the opinion that, given the earlier media reporting and the huge sporting interest in the aforementioned matches, the ORF could have expected the event, which involved one team dropping down from the World Group to the relegation group, to attract considerable media attention.

In its reasons for the decision, KommAustria referred to a ruling by the *Bundeskommunikationssenat* (Federal Communications Board) of May 2012, according to which "comparable media reporting in the past" should be consulted when classifying a sports competition as a premium event.

KommAustria first of all determined that not the entire Davis Cup but only individual meetings could be consulted for comparison purposes, pointing out that, especially in the case of sports that involved an entire competition within a series and, above all, those that

resulted in promotion to the group above or relegation to the one below, particular consideration should be given to the competition format, and therefore the actual standings of the participating teams. In order to make a comparative assessment, it went on, the 2009 Davis Cup tie between Austria and Chile should be considered because it too decided on relegation from the World Group.

After assessing the media coverage of the meeting concerned in comparison to premium sports competitions, KommAustria concluded that the extent of the newspaper reporting in this case did not permit any inferences to be drawn with regard to a general increase in media interest, noting that there had been no significant pre-event and post-event reporting in the print media.

An assessment of the television coverage made it clear that the extent of the reporting did not come close to what was necessary for the event to be classified as a premium sports competition. The channels ORF eins and ORF 2 had only run short reports on the tie, and only one of the commercial channels had broadcast a short report each day.

• *Bescheid der KommAustria vom 17. Oktober 2012 (KOA 11.263/12-016)* (KommAustria decision of 17 October 2012 (KOA 11.263/12-016))
http://merlin.obs.coe.int/redirect.php?id=16212 DE

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ORF's Special-Interest Channels must be fed into Analogue Networks

Following the media regulator KommAustria, the *Bundeskommunikationssenat* (Federal Communications Board - BKS), Austria's supreme broadcasting authority, reached the conclusion in its decision of 5 November 2012 that television cable network operators must feed the special-interest channel ORF Sport + into their analogue networks.

Liwest, Austria's second-largest cable network operator, had up to then fed the sports channel into its digital cable network only, and KommAustria ruled that ORF Sport + also had to be distributed in analogue networks in accordance with the "must carry rule" in section 20(1) of the *Bundesgesetz über audiovisuelle Mediendienste* (Federal Audiovisual Media Services Act - AMD-G). The legal remedy lodged with the BKS by Liwest against this decision was dismissed. The BKS pointed out that the statutory rules were clear and stated that "the cable network operator [had] no freedom to choose in what technical form it would like to comply with its commitment". The costs involved, it went on, were not disproportionately high.

Liwest reserves the right to appeal to the Constitutional Court or the Administrative Court. Following the decision, the ORF appealed to all cable network operators to feed ORF Sport + into their analogue networks, as Austria's largest cable network operator (UPC Austria) has done since July 2012.

• *Bescheid des BKS vom 5. November 2012* (BKS decision of 5 November 2012) DE

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Action Brought against RTL for Being Insulted as the "Monster from the Deep" Dismissed

According to media reports, the *Landesgericht Korneuburg* (Korneuburg Regional Court) dismissed on 8 November 2012 an action brought against RTL by a man from Lower Austria. The plaintiff had been accidentally filmed by the German TV broadcaster in November 2010 during his holiday on the Maldives, subsequently shown without his consent in the programme "Deutschland sucht den Superstar 2011 - Recall" (Germany seeks 2011 superstar - Recall"), and was referred to by one of the presenters as the "monster from the deep".

In order to avoid legal action, RTL paid the 70-year-old plaintiff a lump sum of EUR 9,000. He subsequently submitted a psychiatric report proving that he had suffered a mental illness as a result of the broadcast in which he had been insulted and requested the court to award him a further EUR 16,000. However, the judge held that the damages already paid were reasonable. Basing his decision on a comparison with similar defamation cases, he dismissed the action. The plaintiff's lawyer announced his intention to appeal.

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BA-Bosnia And Herzegovina

Approach to "Significant Value" Adopted

At its session held on 13 November 2012, the Council of the Communications Regulatory Agency (CRA) adopted the Code amending the Code on Commercial

Communications (Code) in order to reflect the newly taken approach to the legal understanding of a “significant value” of promoted goods and services. The Code, as now amended, considers any inclusion of goods and services in the audiovisual or radio programme as product placement, regardless of their value.

The Code has been in force since 1 January 2012. However, the application of provisions on product placement was postponed until 1 January 2013 in order to allow media service providers the necessary time to prepare for the implementation of such a major novelty in the regulatory framework (see IRIS 2012-1/9).

The Code originally considered the inclusion of goods and services that have been provided free of charge with the objective of their inclusion in an audiovisual or radio programme only as product placement if the goods and services involved are of significant value. The CRA was tasked with adopting a normative act defining the exact requirements of a significant value in the course of 2012. In line with this obligation, the CRA had collected and analysed data on actual production budgets as reported by the media service providers, as well as the approaches taken in other European countries. The analysis has shown that the best approach considering the specific situation in the audiovisual market in Bosnia and Herzegovina, in particular having in mind average production budgets, would be to deem the value of goods and services irrelevant and to consider any supply of props as product placement. In CRA’s view, only such a wide approach would guarantee the fundamental principles governing product placement such as safeguarding editorial independence, the avoidance of undue promotional effect, of undue prominence and the obligation to inform the viewers. The proposal was offered to public consultations and was not met with significant opposition.

The amended Code shall apply from 1 January 2013.

• *Kodeksa o komercijalnim komunikacijama* (Code on Commercial Communications)
http://merlin.obs.coe.int/redirect.php?id=16198 BS

Maida Ćulahović
Communications Regulatory Agency

BG-Bulgaria

Report on the Proportion of European Works and Independent Productions

On 1 November 2012, the Council for Electronic Media (CEM) published a report on the proportion of European works in Bulgarian television broadcasting for the year 2011. Article 16 of the Directive for Audiovisual Media Services (AVMSD) requires broadcasters to reserve a majority proportion of their transmission time, excluding the time appointed to news, sports events, games, advertising, teletext services and teleshopping, for European works. Article 17 AVMSD requires broadcasters to reserve a minimum proportion (at least 10%) of their transmission time, excluding the time appointed to news, sports events, games, advertising, teletext services and teleshopping, for European works created by independent producers.

The summary for the calendar year 2011 contains data of 47 television programmes with national coverage and 28 linear media services providers. A preliminary letter of request had been sent to all linear media providers. All, except for three, have responded to the letter.

27 programmes comply with Art. 16 AVMSD and the stipulated majority of European works in their overall broadcasting time. According to the report, the proportion of independent productions (Art. 17 AVMSD) has been adhered in 23 programs.

In only four of the television programmes, the percentage of time for European works, created by producers who are independent of broadcasters is below the required 10%. Two of them are programmes of the provider Fox International Channels. In its response, the provider "Fox International Channels Bulgaria" has explained the low percentage of European independent works in the programmes "Fox Crime" and "Fox Life" was due to their specificity, (the programs are special-interest channels, respectively for the "civil-legal and criminal-legal system in the United States” and “the American way of life"). In this context, the report emphasized Arts. 16 and 17 AVMSD, which require the designated minimal time for European (independent) productions in television programmes only where the proportion can be achieved practically and by appropriate means.

• ДОКЛАДО тносно : 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 впрограмите на доставчиците на линейни медийни услуги (Report of the CEM of 1 November 2012)
http://merlin.obs.coe.int/redirect.php?id=16199 BG

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CZ-Czech Republic

Amendment of the Broadcasting Act

The Parliament of the Czech Republic approved an

amendment of the Broadcasting Act concerning the increased volume of commercials compared to the rest of television programming. For a long time, the Council for Radio and Television Broadcasting (the Council) has received a wide range of complaints from viewers dealing with increased commercial sound volumes during the broadcasting of commercials.

According to the amended Broadcasting Act, it is the responsibility of the Council to authoritatively intervene in any case of significant volume increases during television advertising. Previously, the Council could not take any such action against broadcasters, because the broadcasters were not obliged to maintain the same volume level for all parts of their programming.

The new legislation is based on a comparison of sound intensities of the transmission before and after advertising. Due to the practical application of the provisions, particularly the technical aspects of measuring sound intensity, the legislation authorises the Council to determine an implementing regulation for further details.

A television broadcaster now has to ensure that the sound volume of advertising, teleshopping and sponsorship does not increase when compared with programmes before and after parts of the programme containing commercial communications. This obligation applies to any audio-visual means of separating advertising and teleshopping from other parts.

• *Zákon ze dne 26. října 2012, kterým se mìní zákon è. 231/2001 Sb., o provozování rozhlasového a televizního vysílání a o zmìnì dalších zákonù, ve znìní pozdìjších pøedpisùí,* (Act No. 406/2012 Sb. amending the Act 231/2001 Coll., on radio and television broadcasting and to amend other Acts, as amended, 26 October 2012)
http://merlin.obs.coe.int/redirect.php?id=16200 CS

Jan Fučík
Ministry of Culture, Prague

DE-Germany

Administrative Court Criticises Award of Third-party Broadcasting Time

On 23 August 2012, the *Verwaltungsgericht* (Administrative Court) in Neustadt an der Weinstrasse ruled that the award of third-party broadcasting time by theRhineland-Palatinate *Landeszentrale für Medien und Kommunikation* (Regional Media and Communications Agency - LMK) in the case of the main broadcaster Sat.1 SatellitenFernsehen GmbH (Sat.1) was unlawful. It criticised virtually the entire selection and licensing procedure, especially owing to the failure to involve Sat.1.

According to section 26(5) of the *Staatsvertrag für Rundfunk und Telemedien* (Inter-State Agreement on Broadcasting and Telemedia - RStV), Sat.1 is obliged to provide broadcasting time for independent third parties. Pursuant to section 31(4), first sentence, RStV, the LMK invited tenders for this broadcasting time, which was - lawfully - divided into four broadcasting windows based on duration and time of day. Against the wishes of Sat.1, the third-party broadcasting licences were awarded to the current licensees, News and Pictures GmbH & Co. KG and DCTP Entwicklungsgesellschaft für TV-Programm mbH.

The Administrative Court considered this procedure unlawful for several reasons. In particular, the LMK had disregarded the requirement to reach agreement with the main broadcaster as required by section 31(4), third sentence, RStV. The efforts to agree on the selection with Sat.1 having failed, section 31(4), third to fifth sentences provides for a multi-stage selection procedure, which must be strictly adhered to. The LMK, the court said, had not taken sufficient account of Sat.1 in that procedure and accordingly breached the company's rights under the RStV to be consulted. Proper involvement in the selection procedure was, it pointed out, vitally important for ensuring the freedom of broadcasting of Sat.1 as enshrined in Article 5(1), second sentence, of the *Grundgesetz* (Basic Law - GG) and its freedom of ownership as guaranteed by Article 14 GG.

Furthermore, the court went on, awarding the licence to DCTP was unlawful as the strict requirement in section 31(5) RStV to reach agreement on the appropriate funding of the third-party programme had not been met. In connection with the award of the licence, the LMK had provided for the continuation of the remuneration agreement for the current licence period between Sat.1 and DCTP, but Sat.1. had considered the payment based on that agreement unreasonable. The LMK had failed to check whether the remuneration paid thus far was appropriate. Section 31(5) and (6) RStV did not empower the LMK, as a State body, to impose an agreement based on private law, as it had done in the instant case, as that was not compatible with the freedom of contract enshrined in Article 2(1) GG.

• *Urteil des VG Neustadt an der Weinstraße vom 23. August 2012 (5 K 417/12.NW)* (Judgment of the Neustadt an der Weinstrasse Administrative Court of 23 August 2012 (5 K 417/12.NW))
http://merlin.obs.coe.int/redirect.php?id=16218 DE

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"Tag des Glücks" Show Taken off Air following Ban

The TV show "Tag des Glücks" ("Day of Luck") run by

the lottery organisation *Süddeutsche Klassenlotterie* (SKL) was taken off air in October 2012. This was the response of the companies involved to several decisions of the *Kommission für Zulassung und Aufsicht* (Licensing and Monitoring Commission - ZAK), which had criticised the show and stopped its broadcasting on several occasions in the past few years.

The ZAK had repeatedly found that the programme had infringed the ban on the public advertising of gambling pursuant to section 5(3) of the *Glücksspielstaatsvertrag* (Inter-State Treaty on Gambling - GlüStV), stating that the advertorial nature of the programme was clear from the numerous times the lottery was mentioned during the presentation and from the extremely frequent on-screen displays of the relevant logos. The ZAK also criticised the fact that each contestant had to possess an SKL lottery ticket.

However, the lottery organisation has not completely given up disseminating the show: the hitherto last edition of the programme was streamed on the SKL website in early November 2012 and has been available there in full length ever since.

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Packages of Measures Decided by RBB to Increase Licence Fee Revenues

In the late summer of 2012, *Rundfunk Berlin-Brandenburg* (Berlin-Brandenburg Broadcasting - RBB) submitted to its statutory bodies a final report on the "Package of measures for increasing the potential number of licence payers in Berlin". The aim is to induce those consumers of broadcasting services who possess operational radio and television sets, but have not paid the licence fee up to now, to comply with this requirement.

The implementation of the package of measures was proposed in 2008 by the *Kommission zur Ermittlung des Finanzbedarfs der Rundfunkanstalten* (Commission for Establishing the Financial Requirements of Broadcasters - KEF). RBB submits annual reports on the implementation of its measures. With regard to the Berlin market, it has been able to establish that the city has benefited from, albeit low, economic growth. However, as the German capital suffers from high unemployment RBB's transmission area has the largest number of people who are exempt from the payment of licence fees. In order to increase the subscriber base in Berlin, RBB carries out numerous measures to raise public awareness. For example, it has held a "TV licence week" in the Spandau district, during which citizens were handed leaflets and shown advertisements and advertising banners on the internet as well as a TV commercial in the waiting rooms of the Spandau authorities. In addition, inhabitants were provided with information on the licence fees at street stalls, and some 800 new devices were registered as a result of this measure. Furthermore, RBB has created the post of *Kommunikationsbeauftragter* (Communications Commissioner) to handle the marketing aspects of collecting fees and contributions. He/she is responsible for all kinds of marketing measures on the issue of the requirement to pay the licence fee as well as for the operation of the public service broadcaster's fee website, which also involves sharing information with the other regional broadcasters. Another measure implemented by RBB has been to step up licence fee advertising in its programme schedule.

RBB has been able to increase the number of registrations of new types of broadcast receiving devices (e.g., internet enabled PCs or mobile telephones - see IRIS 2007-1/11) by approximately 11,000. Guided tours of its broadcasting facilities, during which visitors were informed about the requirement to pay licence fees and how the money is used, are also said to have helped to raise the number of new registrations.

Compared with 2010, RBB was able to post an increase in revenues of around EUR 270,000 in 2011. The package of measures is due to be adapted to the new licence "contribution" model.

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Government Decides to Introduce Compulsory Registration for Cinema Films

On 31 October 2012, the German government decided to amend the *Bundesarchivgesetz* (Federal Archive Act) to make it compulsory for producers and co-producers of German cinema films to register them in a Federal Archive database.

The aim of this obligation to register is to safeguard the national film heritage. According to the Federal Government, films are not only economic but also cultural goods and comprehensive registration is accordingly in the overall public interest. Up to now, copies of films funded with public money have had to be deposited with federal and regional (*Land*) film funding institutions, but the Federal Government believes that this is no longer sufficient and that it is necessary for all German films without exception to be centrally archived.

Registration must take place within twelve months of a film being exhibited for the first time. This is coupled with the obligation to let the Federal Archive know where an archivable copy of a film is located.

A precondition of the obligation to register a film is that it must be intended for public exhibition in a cinema or be shown at an important festival or awards ceremony. Films are considered German if their makers are established in Germany. Cinematographic works in which music predominates will not be registered, as copies of them must already be deposited with the German National Library. The Federal Government estimates the total number of registrations at 5,000 a year.

A fine of up to EUR 10,000 can be imposed for failure to comply with the requirement to register a film. Details of the procedure and the form of the compulsory registration are to be laid down in a statutory order by the *Staatsminister für Kultur und Medien* (Minister of State for Culture and Media).

The draft law was forwarded to the *Bundesrat* (Federal Council) for its opinion on 2 November 2012.

• *Pressemitteilung der Bundesregierung vom 31. Oktober 2012* (Federal Government's press release of 31 October 2012)
http://merlin.obs.coe.int/redirect.php?id=16215 DE

• *Gesetzentwurf der Bundesregierung* (Federal Government's draft law)
http://merlin.obs.coe.int/redirect.php?id=16216 DE

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Bundestag Votes additional EUR 100 Million for Culture

At its final meeting on the culture budget on 9 November 2012, the Budget Committee of the Bundestag voted an additional EUR 100 million for culture, an increase in funding of about eight per cent.

This means that the culture budget has been significantly increased for the eighth year running. According to the *Staatsminister für Kultur und Medien* (Minister of State for Culture and Media), this cannot be taken for granted given the current public sector austerity measures and the constitutionally mandated "debt ceiling".

The total budget will amount to EUR 1.28 billion. The promotion of film production in Germany will benefit significantly from these additional resources. The *Deutscher Filmförderfonds* (German Film Fund) will be given an increase of EUR 10 million to EUR 70 million a year (on the recent extension of the German Film Fund, see IRIS 2012-10:1/9). The *Kulturstiftung des Bundes* (Federal Cultural Foundation), which receives aid for films, the new media and cross-sectional projects, will also be supported to the tune of an additional EUR 5 million, thus bringing the total to EUR 40 million.

• *Pressemitteilung des Staatsministers für Kultur und Medien vom 9. November 2012* (Press release of the Minister of State for Culture and Media of 9 November 2012)
http://merlin.obs.coe.int/redirect.php?id=16217 DE

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FI-Finland

ISP not Granted Leave to Appeal in The Pirate Bay Case

On 29 October 2012, the Supreme Court of Finland did not grant the telecommunications and ICT service provider Elisa Corporation leave to appeal in the case concerning The Pirate Bay (TPB). In the aftermath of the Swedish TPB case, an interim injunction was sought against Elisa in May 2011. The Copyright Information and Anti-Piracy Center (CIAPC) filed the application on behalf of the Finnish National Group of International Federation of the Phonographic Industry (IFPI). The aim was to prevent the continuance of copyright infringements.

The application was based on Section 60c of the Finnish Copyright Act (404/1961): According to paragraph 1, a court may, in trying a case and upon request of a rightsholder, order an intermediary to discontinue the making available of allegedly copyright-infringing material to the public (injunction to discontinue). It is to be regarded reasonable in view of the rights of the alleged infringer, the intermediary, and the author. Paragraph 2 provides for the situation where legal action against the alleged infringer (ref. in §60b) is not yet taken. Then, a court may issue an interim injunction. It may be issued without hearing the alleged infringer if deemed necessary for the urgency of the case. The injunction remains in force until further notice. The alleged infringer shall be reserved an opportunity to be heard without delay and the court shall decide whether the injunction remains in force or is cancelled. (Para. 3) The injunction shall not prejudice the right of a third person to send and receive messages. It shall enter into force when the applicant provides the security to the execution officer. The interim injunction shall expire if a legal action has not been taken within one month from its issuing. (Para. 4)

On 26 October 2011, the Helsinki District Court ruled in favor of IFPI Finland. An interim injunction was issued and Elisa was obliged under the penalty of a fine (EUR 100,000) to remove TPB domains from its servers and to block access to IP-addresses used by TPB. The measures regarding subscriptions were

taken in January 2012 following the enforcement order. Elisa appealed the ruling of the district court, but on 15 June 2012, the Helsinki Court of Appeal did not alter the decision. An interim injunction was found necessary in the view of the evidence on the effectiveness of legal measures and the accessibility of the alleged infringer. The court also stated that the interim injunction may become long term if the defendants in the main issue cannot be summoned. That however does not per se render it unlimited in duration. Elisa finally requested leave to appeal to the Supreme Court to obtain a judicial precedent, but it was not granted.

• *Helsingin käräjäoikeuden päätös, 26/10/2011, No 41552* (Decision of the District Court of Helsinki, 26 October 2011, No 41552)
http://merlin.obs.coe.int/redirect.php?id=16227 FI

• *Helsingin hovioikeuden päätös, 15/06/2012, No 1687* (Decision of the Court of Appeal of Helsinki, 15 June 2012, No 1687) FI

• *Korkeimman oikeuden päätös, 29/10/2012, No 2187* (Decision of the Supreme Court, 29 October 2012, No 2187) FI

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FR-France

Absence of Liability on the Part of an Internet Site Offering Access to Catch-up TV Programmes via Deep Hypertext Links

In a decision delivered on 31 October 2012 the Court of Cassation rejected the appeal by the M6 group against the decision of the court of appeal rejecting all its applications in its dispute with the company that operates the TV-replay.fr site, which is an online guide to catch-up TV sites (see IRIS 2011-6/17). The M6 group, which operates a number of channels including M6 and W9 and their catch-up TV services M6replay and W9replay, complained that TV-replay.fr was giving direct access to its programmes by means of deep hypertext links without first directing viewers to the home pages of M6replay and W9replay. M6 claimed this violated the general conditions for using its catch-up TV services and infringed its rights as the originator and producer of a database, and felt that the behaviour of TV-replay.fr constituted unfair competition and free-riding.

The Court of Cassation firstly approved the court of appeal's acceptance that merely putting on-line the general conditions for using the M6 and W9 sites, which could be accessed by means of a half-concealed tab in the lower part of the screen, was not enough to place the users of the services offered under contractual obligation, and that the letter of formal notice the M6 group had sent to the defendant company, which edited the TV-replay.fr site, requiring it to observe the general conditions for use did not give rise to any contractual obligation on the part of the latter to comply with them.

The Court of Cassation also found that the court of appeal had been right to state that the M6 group's production companies, which held the rights for the programmes broadcast, could not collectively claim the infringement of undifferentiated rights, and that they did not establish which of them held the rights for the works the defendant company was making accessible on its TV-replay.fr site after they had been broadcast on television. The Court also rejected the argument of infringement of the rights of the M6 group in its capacity as producer of databases. Lastly, the decision notes that users of the disputed site were directed to the programme sought, which was presented in a navigation window on the channels' catch-up TV sites giving access to all the functions of the sites and to their advertising banners. The court of appeal found that the complaint, based on the circumvention of the normal navigation process, was unfounded and that no proof of any free-riding activity had been provided, and used this as the legal grounds for justifying its decision. The Court of Cassation's decision puts an end to the dispute, which nevertheless raises the question of the means available to rightsholders to oppose access to their content via hypertext links.

• *Cour de cassation (1re ch. civ.), 31 octobre 2012 - Société Métropole Télévision* (Court of Cassation (1st civil chamber), 31 October 2012 - the company Métropole Télévision) FR

Amélie Blocman
Légipresse

Lawfulness of Clause in Contract for Production of a Film Authorising its Termination on the Grounds of Failure to Obtain Financing

An unusual decision by the court of appeal in Paris on 16 March 2012 deserves mention, in that it gives details of the parameters of the obligation to use incumbent on the producer of an audiovisual work as defined in Article L. 132-27 of the French Intellectual Property Code (*Code de la Propriété Intellectuelle* - CPI), and more specifically its reference to an "obligation of production". The actual production of a film does indeed depend on the possibility of the producer finding the necessary financing.

In the case at issue, two directors had been entrusted with producing a full-length animated film adaptation of the musical tale "Piccolo, Saxo et Compagnie", and had signed a contract ceding their rights as writer-directors to a production company. The contract was suspended the following year because of financial difficulties alleged by the latter. Despite the suspension,

the producer signed a separate contract ceding copyright with one of the writer-directors covering a set of graphic creations. Six months later, the production company informed the writers that the project was definitively dropped and that the contract ceding their rights was terminated. Four years later, however, the film "Piccolo, Saxo et Compagnie", produced with the intervention of two other co-producers, was being shown in cinemas. The directors therefore summoned not only the co-writers of the audiovisual work but also the production companies on the grounds of infringement of copyright, failure to observe the obligations of good faith and contractual fairness, and the abusive termination of their contracts.

The appellant parties claimed mainly that the clause in their writers' contract according to which it could be terminated "if the producer was unable to obtain the necessary financing to cover the cost of the film and start production" was void because it was potestative. (Article 1174 of the French Civil Code indeed provides that "An obligation is void where it was contracted subject to a potestative condition on the part of the one who binds himself.") They claimed that the termination was founded on fallacious grounds, as no proof was presented of the alleged impossibility of sourcing finance to cover the cost of the film up to the production stage. The court of appeal found that while a purely potestative condition was void where the performance of the obligation did not depend on the desire of just one of the contracting parties, there was no such condition in the case at issue, inasmuch as the entire financing of the film was not dependent on the production company summoned to appear in court but on a third party it had to convince to provide support. The court analysed in detail the chronology of the facts and reached the conclusion that the producer, despite the efforts made, had not been able to obtain the financing necessary for covering the cost of producing the film as it had been developed, and that no proof had been provided in either court of the existence of the alleged fraudulent manoeuvring. The termination of the writer-directors' contracts was therefore not abusive. One of the appellant parties who had also signed a separate contract covering all the graphic creations also claimed that the termination of the writer-director contract resulted in the termination of the contract covering the graphic elements. The Court upheld the judgment in its rejection of this claim, considering that the aforementioned contracts were legally independent and did not have the same object.

• *Cour d'appel de Paris (pôle 5, ch. 2), 16 mars 2012 - Olivier B. et Laurent B. c. Haut et Court et a.* (Court of appeal of Paris (centre 5, chamber. 2), 16 March 2012 - Olivier B. and Laurent B. v. Haut et Court et al.) FR

Amélie Blocman
Légipresse

Government Considers Possible Convergence of CSA and ARCEP

On 21 August 2012 the Prime Minister announced he was considering the convergence of the audiovisual regulatory authority (*Conseil Supérieur de l'Audiovisuel* - CSA) and the electronic communications and postal authority (*Autorité de Régulation des Communications Electroniques and des Postes* - ARCEP). He has instructed a number of Ministers to send him proposals by the end of November on the changes in legislation and regulations that would be necessary. There is indeed no doubt that as audiovisual content is being increasingly shown on fixed and mobile Internet devices it is necessary to consider the effectiveness of the methods of regulating electronic communications and the audiovisual scene. At the moment, the terrestrial broadcasting of audiovisual programmes is covered by regulation on content, one of the purposes of which is to ensure quality and diversity, whereas content circulated via the Internet is covered by regulations that are more limited and sometimes inappropriate.

The two authorities each submitted their position on the issue to the Prime Minister in October. For ARCEP, the main issue is the need to adapt regulation of the audiovisual scene, as instituted by the Act of 30 September 1986. It believes there are three main possible hypotheses. The first consists of retaining strong regulation of audiovisual content, in the spirit of cultural exception, but based on new foundations taking into account the upheavals caused by the Internet. In this case, the missions and tasks of the audiovisual regulator and those of the electronic communications regulator would remain very disparate and there would be no real justification for convergence of the two authorities. On the other hand, the Authority found that it might be worth adopting legislation to create a single body for the two regulators, comprising all or some of the members of each, in order to deal with areas of common interest and to have decision-making powers. In the second scenario, ARCEP would be responsible for regulating the technical and economic aspects of the two sectors and the CSA would be responsible for regulating audiovisual content. The third scenario involved favouring mainly economic regulation of the stakeholders in the audiovisual sector. Merging the authorities would then make sense, but it would be preferable for the authority created in this way to have the right to claim competitive rights and incorporate all or part of the missions for managing the broadcasting spectrum currently in the hands of the national frequency agency (*Agence Nationale des Fréquences*). This would bring it close to the United Kingdom's OFCOM. In all three hypotheses, ARCEP notes that the element of audiovisual regulation involving cultural exception would depend more particularly on the conclusions of the mission entrusted to Pierre Lescure.

For its part, the CSA has presented two scenarios of possible evolution. The first consists of gradual convergence with ARCEP, in two separate stages. This would involve firstly keeping the two present authorities separate but creating a joint regulatory body with decision-making powers, whose members would come from both authorities. Indeed one possibility would be for all the members of both authorities to be members of the new joint body. This new body would deliberate on matters of common interest, such as management of the spectrum, economic regulation, and the regulation of on-line services, which could be defined by legislation. The second stage would involve setting up a single authority in two parts, one for content and diversity, and one for infrastructures and networks, to be chaired by a single person. The CSA believes convergence of this kind would have many advantages - it would facilitate the optimisation of the operational management of frequencies, it would improve the broadcasting of content on fixed and mobile data networks, it would provide an answer to the question of identifying which authority was competent to deal with disputes involving difficulties in accessing on-demand audiovisual media services (on-demand AMSs), and it would ensure that the financing of audiovisual and cinematographic production was taken into account when implementing the principle of the networks' neutrality. The second, more radical, scenario proposed by the CSA in its report would consist of creating a single institution forming a single unit. The CSA nevertheless observed that there was considerable opposition to this option, which might appear premature. The main points raised involved the risk of economic and competition issues taking precedence over aspects relating to culture and society.

In the light of these conclusions, the Government should make an announcement soon on the future of the plans for convergence.

• *ARCEP, Réflexions sur l'évolution, à l'ère d'internet, de la régulation de l'audiovisuel et des communications électroniques et sur ses conséquences, octobre 2012* (ARCEP, Thinking on the evolution, in the age of the Internet, of the regulation of the audiovisual scene and electronic communications, and on its consequences, October 2012)
http://merlin.obs.coe.int/redirect.php?id=16224 FR

• *CSA, Contribution à la réflexion sur l'évolution de la régulation de l'audiovisuel et des communications électroniques, octobre 2012, 16 pages* (CSA, Contribution to thinking on the evolution of the audiovisual scene and electronic communications, October 2012, 16 pages)
http://merlin.obs.coe.int/redirect.php?id=16234 FR

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CSA Takes up the Issue of Scripted Reality

The audiovisual regulatory authority (*Conseil Supérieur de l'Audiovisuel* - CSA) has announced that, starting on 19 November 2012, it will hold hearings of the professionals concerned (producers, TV channels, scriptwriters, authors' societies) regarding "scripted reality" programmes. The first broadcast of this type, "Le jour où tout a bascule", which reconstructs stories based on true events, was broadcast on the public-sector channel France 2 in July 2011. Since then this inexpensive format, combining fiction, news and reality television, is presented on a daily basis on a large majority of channels, in both the private and public sectors, giving rise to some concern among professionals. The question currently facing the CSA is in fact whether these programmes should be considered as fiction, and be counted as such in the channels' broadcasting quotas and receive aid from the national cinema centre (*Centre National du Cinéma* - CNC). There is no agreement. On one hand, fiction professionals plead in favour of scripted reality not being recognised as fiction, as this would result in a drop in orders for stock programmes (fiction programmes, documentaries and animated films) from the channels. Some channels, including TF1, declare their scripted reality broadcasts to the CSA as fiction. Whereas one of the CSA's members has in fact declared in favour of these programmes being included in the channels' quotas for fiction, the chair of the CSA's committee on audiovisual production has recalled that the CSA considers each programme individually when deciding what may be classed as a fiction work, i.e. a work with writers, directors and actors. The committee also disregards the quality of the works. The Minister for Culture and Communication has for her part pointed to another issue by affirming that scripted reality has no place on public-service television. The position of the CSA on the matter is awaited more eagerly than ever.

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GB-United Kingdom

Competition Appeal Tribunal Decision on Pay TV

The UK Competition Appeal Tribunal, a specialist court hearing appeals from the decisions of the competition authorities, has published its judgment relating to the decision of the communications regulator, Ofcom, to impose a wholesale must-carry remedy on Sky. This required Sky to offer wholesale its Sky Sports 1 and 2 channels to rival pay TV retailers at a price set by Ofcom (see IRIS 2010-5/26). Appeals were entered against the decision by Sky, Virgin Media, BT and the Premier League.

Sky appealed on three grounds. First, that Ofcom had no power to intervene in the Pay-TV market as it was

concerned with retail competition rather than competition in the provision of licensed services or connected services, as set out in the Communications Act 2003. The Tribunal rejected this argument, deciding that the latter phrase includes retail competition. Second, Sky argued that, in identifying the competition concerns, Ofcom had failed to adhere to an approach based on competition rules under EU law and the Competition Act 1998. This argument was also rejected by the Tribunal, which held that Ofcom was not required to apply those rules (and in particular those relating to abuse of a dominant position) in exercising its powers under the Communications Act.

Sky's third argument was that Ofcom's findings in relation to Sky's alleged practices of failing to engage constructively with other retailers and withholding wholesale supply, were unfounded. The Tribunal examined the evidence relating to negotiations with rival retailers in considerable detail, and found that it had been misinterpreted by Ofcom and that some of Ofcom's key findings of fact were inconsistent with the evidence. The Tribunal found that one the whole Sky did engage constructively with other retailers, despite having a strong preference for self-retailing. It thus upheld Sky's third argument and allowed the appeal. In view of this decision, the Tribunal did not find it necessary to examine grounds of appeal raised by other parties.

• British Sky Broadcasting Limited, Virgin Media, The Football Association Premier League and British Telecommunications plc v. Office of Communications, [2012] CAT 20, 8 August 2012
http://merlin.obs.coe.int/redirect.php?id=16196 EN

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HU-Hungary

Major Private Broadcasters Launch new Channels

In October 2012, the RTL Group's new channel, RTL II, as RTL Klub's twin channel, was launched in Hungary and was followed shortly in November by SuperTV2, the twin channel of TV2, the second largest commercial broadcasting channel in Hungary. In recent years, the Hungarian programme selection has grown continuously as part of the provider's economic growth. Typically, this meant new channels owned by the mother company registered outside Hungary, such as Film+, Sorozat+ or Cool TV by the RTL Group, or Fem3 and Pro4 by TV2. The smaller providers followed suit.

Audience data collected by Nielsen Audience Measurement Kft. shows that in 2011 the RTL Group and TV2 together reached 38.8% of television audiences in Hungary, down significantly from the 67.3% registered in 2000. The reason behind the drop in the shares of the two largest commercial stations with nationwide coverage is the rise of special-interest channels targeting niche audiences. Accordingly, the owners of the RTL Group and TV2 decided to launch their own new channels. As a result, viewers deserting the two nationwide stations ultimately remained "in house" and continued to generate revenues for the two players in Hungarian broadcasting.

As a new development the startup stations stick to their original name (RTL Klub - RTL II; TV2 - SuperTV2). Both companies have made a commitment to keeping and expanding the brand. Apart from the name itself, key programming and widely recognized faces will certainly lay bare the connection between the respective channels and any failure of the new channels would harm the RTL Group or TV2 brand as a whole.

The launch of the two new channels also indicates the ongoing process of change in broadcasting business models. RTL Klub and TV2 continue to be offered free of charge via the analogue terrestrial platform and thus do not yield any revenue from the alternative platforms of cable, satellite, or IPTV, wheras RTL II and SuperTV2 benefit from household fees paid to the cable/satellite operators. Hence, the broadcasters build their operation increasingly on more reliable household fees and no longer purely on rather unpredictable advertising revenues.

From the perspective of the providers, however, the two new stations will offer the major benefit of being registered outside Hungary and thus complicating the regulation by the Hungarian Media Council. The problem is hardly new. The majority of Hungarian-language channels are now operated from headquarters registered outside the country.

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Mertek Media Monitor

IE-Ireland

Psychic Readings Live in Repeated Breaches of Broadcasting Code

At their September and October 2012 meetings, the Compliance Committee of the Broadcasting Authority of Ireland (BAI) upheld a series of complaints made by viewers of Psychic Readings Live, which is broadcast by TV3. The complaints were made in accordance with section 48 of the Broadcasting Act 2009 and claimed that the broadcasts breached a number of sections of the BAI General Commercial Communications Code (see IRIS 2011-7/29).

Commercial communications for fortune tellers and psychic services are permitted under section 8.10 of the BAI General Commercial Communications Code, provided that the service is clearly identified as an entertainment service (section 8.10.1). Such programmes are prohibited from making claims pertaining to matters of health (section 8.10.4) or claims that presenters make contact with deceased persons (section 8.10.3). Any claims relating to the prediction of future events must be clearly indicated as a matter of opinion and not as a matter of fact (section 8.10.2). Commercial communications of this nature must also be prepared with a sense of responsibility both towards the individual and to society and shall not prejudice the interests of either (section 3.1).

The programme, which takes live calls from members of the public, was aired for the first time in June 2012 and was the subject of six separate complaints relating to seven separate broadcasts during the period from 21 June 2012 to 27 August 2012. The BAI upheld three complaints under section 8.10.4 of the Code relating to claims pertaining to matters of health. These related to broadcasts where:

- the presenter told a caller she was prone to depression;

- the presenter told a caller she would conceive twins and further future pregnancies were also predicted; and

- the presenter addressed a caller's query regarding breast cancer test results she was awaiting by using tarot cards.

The BAI accepts that there exists an entertainment industry that revolves around so-called fortune tellers and psychics. The programme now includes a scrolling text at the bottom of the screen indicating that "all statements are matter of opinion not fact" and it is also identified as an "Entertainment Service" in the top left corner of the screen. However, in upholding specific complaints under sections 8.10.1 and 8.10.2 of the Code, the Compliance Committee held that where the presenter makes persistent and repeated on-air claims regarding their ability or accuracy in predicting the future, these references, when taken as a whole, undermine and contradict the scrolling text and on-screen identification of the show as an entertainment service and are in breach of the Code.

The Compliance Committee also held that, for four specific broadcasts, the programme failed to meet the requirements of section 3.1 of the code that commercial communications shall be legal, honest, decent and truthful, shall protect the interests of the audience and shall be prepared with a sense of responsibility both to the individual and to society.

• Broadcasting Authority of Ireland (BAI), Broadcasting Complaints Decisions (October 2012)
http://merlin.obs.coe.int/redirect.php?id=16188 EN

• Broadcasting Authority of Ireland (BAI), Broadcasting Complaints Decisions (November 2012)
http://merlin.obs.coe.int/redirect.php?id=16189 EN

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Revision of General and Children's Commercial Communications Codes

On 12 October 2012 the Broadcasting Authority of Ireland (BAI) announced the outcome of consultations on the revision of the General and Children's Commercial Communications Codes (see IRIS 2011-7/29). The revised Codes will deal, in particular, with the approach to be taken to products that are high in fat, salt and sugar (HFSS).

The BAI is required under section 42 of the Broadcasting Act 2009 to develop advertising codes to protect the general public health interests of children and may prohibit the advertising in a broadcasting service of a particular class or classes of foods. Prior to the first stage of a two-stage consultation process begun in September 2011, the BAI convened an Expert Working Group to examine health concerns for children in Ireland and to determine if the promotion to children of HFSS foods and drinks should be restricted (see IRIS 2011-7/29).

The Expert Group Report recommended the Nutrient Profiling Model, developed by the UK Food Standards Agency specifically for broadcast regulation (see IRIS 2007-1/20), as the mechanism for defining HFSS food and drink. The first stage of the consultation sought the public's views on the Expert Group Report. Informed by this consultation the BAI accepted the Nutrient Profiling Model to define HFSS food and drink and prepared Draft General and Children's Commercial Communications Codes that contained specific rules to restrict the promotion of less healthy HFSS food and drink. As required by section 44 of the Broadcasting Act 2009, the Draft Codes were then issued for consultation.

This second stage of the consultation process sought further views on the Nutrient Profiling Model and the specific rules and restrictions contained in the Draft Codes. Resulting from this stage of the consultation process, cheese, which was initially included, has been exempted from the nutrient profiling model. This change was made on the recommendation of the Department of Health due to the health benefits of cheese and the economic and cultural significance of cheese in the Irish context. Advertisements for cheese will, however, include an on-screen message indicating the recommended daily consumption limits.

Following the second consultation the specific rules proposed in the Draft Children's Commercial Communications Code have been finalised by the BAI. This means that commercial communications for HFSS food and drink shall not:

- be permitted in children's programmes as defined by the code;

- include celebrities or sports stars;

- include children's programme characters;

- include licensed characters, for example characters and personalities from cinema releases;

- contain health or nutrition claims; or

- include promotional offers.

The BAI also finalised the General Commercial Code rules, which will limit HFSS advertising so that no more than 25 percent of advertising sold by a broadcaster can be for HFSS food and drink. Also, only one in four advertisements for HFSS products will be permitted in any advertising break. The revised Codes will be formally launched in January 2013 and following a lead-in period will come in to effect from 1 July 2013.

• Broadcasting Authority of Ireland, BAI Signals new rules to govern advertising of food and drink in children's advertising, 12 October 2012
http://merlin.obs.coe.int/redirect.php?id=16186 EN

• Broadcasting Authority of Ireland, Draft BAI General and Children's Commercial Communications Codes Consultation Document, March 2012
http://merlin.obs.coe.int/redirect.php?id=16187 EN

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Digital Switchover of Terrestrial Television Complete

At 10:00 am on 24 October 2012 Ireland's analogue television signal was switched off. Analogue technology had been used to transmit and receive television signals in Ireland since television broadcasting started in 1962. This completes Ireland's digital switchover from analogue to digital television services and meets the European Union target of 2012 for analogue switch-off.

The switchover was coordinated with the digital switchover in Northern Ireland. A Memorandum of Understanding (MOU) was signed between the Irish Minister for Communications, Energy and Natural Resources and the United Kingdom's Secretary of State for Culture, Media and Sport. Under the terms of the Memorandum the widespread availability of RTÉ services and TG4 in Northern Ireland will be facilitated on a free-to-air basis and BBC services will be available in Ireland on a paid-for basis.

• Department of Communications, Energy and Natural Resources, Digital Switchover website
http://merlin.obs.coe.int/redirect.php?id=16190 EN

• Department of Communications, Energy and Natural Resources, Memorandum of Understanding between the United Kingdom of Great Britain and Northern Ireland and the Government of Ireland regarding the Digital Switchover and the provision of television services in Northern Ireland and Ireland (1 February 2010)
http://merlin.obs.coe.int/redirect.php?id=16191 EN

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LU-Luxembourg

Bill on the Creation of a New Media Authority

On 15 October 2012, the Minister for Communication and Media of Luxembourg published a bill on the creation of the Independent Audiovisual Authority of Luxembourg and modifying several laws (Bill ALIA). The Bill ALIA is now in the legislative procedure at the *Chambre des Députés* (Luxembourg Parliament).

The reform of the Luxembourg media authorities has been debated for a few years and there had already been an earlier draft in 2008 that was retracted (Projet de loi N°5959). Due to an increased workload stemming from the adaptation of the national legal framework to the EU Audiovisual Media Services Directive and in view of a simplification of the regulatory system the reform was seen as necessary. The Bill ALIA also purports to enhance the effectiveness and credibility of the bodies and institutions charged with the supervision of the audiovisual sector.

The Bill ALIA proposes to establish the "Autorité luxembourgeoise indépendante de l'audiovisuel" (Independent Audiovisual Authority of Luxembourg - ALIA), which would be a public body with legal personality exercising its functions in full independence. It would be financed by the state budget based on a request by the authority. Its bodies would be an Administration Council, headed by a director and a Consultative Assembly, the latter being composed of 25 representatives of society. ALIA would replace the three regulatory bodies currently involved in the monitoring of the electronic media. Thus, ALIA would be consulted by the Government before the granting of licenses and permissions to audio and audiovisual media services and would then be in charge of the supervision of the services including the rules concerning commercial communication and promotion of European works. In contrast with its predecessors, ALIA would have well-defined sanctioning powers in order to effectively exercise its functions. A graduated system of sanctions

would be introduced encompassing mechanisms such as warnings, fines (of EUR 250-25.000), suspensions of transmission and withdrawals of licenses.

With regard to the legal framework, the Bill ALIA would amend further acts. Most importantly, the "Loi du 27 juillet 1991 sur les medias électroniques" (Electronic Media Law of 1991, Law of 1991) would be changed to establish the legal basis for the creation of ALIA. Apart from the modified references to ALIA as the competent regulatory authority throughout the text, a new Art. 35 would be introduced for this purpose. Art. 35 to Art. 35sexies Law of 1991 would set out the institutional framework and organisational details of ALIA. In addition, the "Loi du 6 avril 2009 relative à l'accès aux représentations cinématographiques publiques" (Law on access to cinematographic works of 2009, Law of 2009) would be amended to allow ALIA to control the self-classification of films by cinemas and its implementation (new Art. 6 Law of 2009).

• *Projet de loi (N°6487) portant création de l'établissement public Autorité luxembourgeoise indépendante de l'audiovisuel et modification de la loi modifiée du 27 juillet 1991 sur les médias électroniques, de la loi modifiée du 22 juin 1963 fixant le régime des traitements des fonctionnaires de l'Etat et de la loi du 6 avril 2009 relative à l'accès aux représentations cinématographiques publiques. Date de dépôt : 15 octobre 2012* (Draft law on the creation of the Independent Audiovisual Authority of Luxembourg, Draft law ALIA, 15 October 2012)
http://merlin.obs.coe.int/redirect.php?id=16211 FR

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LV-Latvia

Amendments to Electronic Media Law under consideration

On 18 October 2012 the *Saeima* (the Latvian Parliament) adopted important amendments to the Latvian Electronic Media Law in the first reading. These amendments focus on the regulation of digital terrestrial broadcasting services as from 2014. The draft also includes potentially controversial new powers of the media regulatory authority.

Currently, digital terrestrial broadcasting is provided by one operator chosen in the course of a tender organized by the Cabinet of Ministers (see IRIS 2010-2/27). The exclusive rights of this operator expire on 31 December 2013. According to the transition rules of the Electronic Media Law, the Cabinet of Ministers has to develop a new framework for the operator selection procedure for 1 January 2014.

On 26 April 2012 the Cabinet of Ministers approved a concept "On the Distribution of Terrestrial Digital Television Programmes as of 2014", which provides different distribution modes for free TV and pay TV programmes. According to the concept, the state owned company Latvian Radio and Television Centre will ensure the distribution of free national and regional television programmes, whereas the pay TV programmes will be distributed by one or more commercial operators selected on the basis of a tender organized by the Cabinet of Ministers.

However, the details of the new regulation are still unclear, since the Cabinet of Ministers has not yet made the fundamental choice whether the distribution of pay TV programmes could be entrusted to only one operator (as is the current situation) or more.

Another important proposal in the draft amendments relates to the powers of the National Electronic Media Council (the Council), the media regulatory authority. It is proposed that the Council would have the right to approve the list of the programmes included in pay TV packages to be distributed by digital terrestrial means. This approval would be based on criteria previously established in the National Strategy for the Development of Electronic Media Sector.

This proposal arises from concerns about the insufficient use of the Latvian language in electronic media and the formation of two linguistically different information flows (Latvian and Russian). The proposal was challenged by left wing Saeima members as being contrary to free speech and akin to subtle censorship. Moreover, it was claimed that this proposal would be contrary to the Audiovisual Media Services Directive, as it would result in the hindering of free movement of audiovisual services. Since the approval for pay TV packages would not apply to satellite and internet protocol television, there are also concerns regarding fair competition.

• *Likumprojekts "Grozījumi Elektronisko plašsaziņas līdzekļu likumā"* (Draft Amendments to the Electronic Media Law)
http://merlin.obs.coe.int/redirect.php?id=16201 LV

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NL-Netherlands

Bill to Amend the Media Act 2008

On 8 October 2012, the Dutch Minister of Education, Culture and Science introduced a bill to amend the Media Act 2008, with regard to "the distribution of television and radio programme channels through broadcasting networks and broadcasting transmitters and the determination of the minimum size of the standard package television and radio programme channels".

By changing the Media Act 2008, the government aims to achieve a broader and technology neutral

foundation. The draft law contains a more modern regulation, since the rules of the current Media Act no longer fit the technical and economic reality, which has been changed significantly for television distribution by changes in the market.

With the bill, the government aims to adjust the minimum size of the digital standard package. The bill sets out that the digital standard package cannot be less than 30 television programme services. Only when the number of television programme services exceeds this number, the package providers may spread channels over plus packages. For the standard package, distribution of public broadcasters is also required (must-carry). It is therefore mandatory to include the most important public radio and television programme services in the standard package. For the rest, the package providers themselves determine the composition of the standard package. For radio there is, apart from the compulsory distribution of public radio programme services, no minimum number of channels.

Furthermore, cable companies, commercial broadcasters and municipalities have objections to the system of local program councils. The latter now advise about the analog cable package. The cable companies, commercial broadcasters and municipalities characterise this advice by program councils as cumbersome and sometimes opaque, consider that it is no longer in line with the supra-regional exploitation of cable networks and think that it increasingly leads to disputes. When the amendments of the Media Act 2008 take effect, the local program councils therefore disappear.

The bill determines which existing rules of the Media Act 2008, as well as of the Telecommunications Act, will change. Concerning the Media Act 2008, it is intended that Article 1.1 of chapter 1, "Definitions and scope", and Article 2.146 of section 2.6.1, "General financing entitlement", will be amended. Also section 6.3.1, "Use broadcasting transmitters and broadcasting networks", including paragraph 6.3.1.1, "Dissemination program service", paragraph 6.3.1.2, "Must-carry obligations of broadcasting networks" and paragraph 6.3.1.3, "Program councils", will be subject to changes. Concerning the Telecommunications Act, Article III, part B, will expire.

The bill even contains transitional provisions with regard to the offered programmes and objections and appeals. Finally, the amendments will, aside from some exceptions, enter into force with effect from a date to be determined by Royal Decree, which may be determined differently for the various articles or parts thereof.

• *Voorstel van wet, 8 October 2012, Kamerstuk 33426 nr. 2* (Bill to amend the Media Act 2008, 8 October 2012, Kamerstuk 33426 nr. 2)
http://merlin.obs.coe.int/redirect.php?id=16230 NL

• *Memorie van Toelichting, 8 October 2012, Kamerstuk 33426 nr. 3* (Explanatory Memorandum, 8 October 2012, Kamerstuk 33426 nr. 3)
http://merlin.obs.coe.int/redirect.php?id=16231 NL

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NO-Norway

The First Ex Ante Test Completed

On 9 November 2012 *Kongen i statsråd* (Norwegian King in Council - highest administrative level of the executive power) approved that Norsk rikskringkasting AS (the Norwegian public service broadcaster - NRK) could include a new travel and route planner in its public service remit. The new service is a co-operation between NRK, the Directorate of Public Roads, Trafikanten Ltd and Ruter Ltd.

In 2009 the Norwegian Broadcasting Act was amended by a regulation requiring a pre-consent from the Government for any significant new service that NRK wants to include in its public service remit. The regulation specifies that 'only services that meet the democratic, social and cultural needs of society' may be added to the public service remit, and the NRK Statutes further define the scope of activities that fall within the remit.

NRK submitted its first ex ante application in April 2011, which initialized assessments in four steps. First, the Norwegian Media Authority assessed (a) that the new travel and route planner had to be subject to an entrustment procedure because it represented a significant change from NRK's existing services, (b) that there was an existing market as well as a potential future market for this type of service and (c) finally, that the costs of the service were considered to be substantial. In the next step, NRK's application was submitted to a public consultation, in which several actors in the media market expressed concerns about the market impact of NRK's expansion with new media services and the broad definition of NRK's public service remit. The Norwegian Competition Authority's assessment concluded that NRK's planned travel and route planner would have 'a substantial negative impact on existing commercial actors that are in the process of developing Internet search engines which provide travel and route planners, and also Internet portals that compete with nrk.no' and that it could 'reduce commercial actors' incentives to invest in both establishing Internet travel and route planners and development and improvement of existing services'.

The Media Authority carried out the overall assessment in the third step of the procedure. In its advisory statement to the King in Council, the Media

Authority concluded that, even though the travel and route planner could contribute towards achieving certain socio-economic purposes by providing travel and route information on one website, it could not clearly be justified within the democratic, social and cultural needs of society as these are defined by NRK's public service remit. The Media Authority, therefore, did not recommend that the travel and route planner should be included within NRK's remit, and meant that it was necessary to look at the media political aims that NRK's remit is supposed to maintain in order to give a clear and precise delimitation to NRK's mandate.

In the fourth and final step, the King in Council decided that NRK could include the traffic and route planner in its public service remit on certain conditions, mainly linked to equal access to public data and commercial aspects. The Royal decree of the King in Council determines that the traffic and route planner can be justified within NRK's Statutes and that the new service contains an element of added public value relative to the potential commercial offers already existing in the market. In the weighing against the potential restrictive impact of the service on competition, the conclusion is that the added value of the service exceeds such eventual effects.

• *Medietilsynets vurdering av Trafikkportalen, rådgivende uttalelse av 12. juli 2011* (Media Authority (12 July 2011) The overall assessment of the new traffic and route planner, advisory statement)
http://merlin.obs.coe.int/redirect.php?id=16209 NO

• *Norsk rikskringkastings søknad om å innlemme Trafikkportalen i allmennkringkastingsoppdraget, 09/11/2012* (Royal Ministry of Culture (9 November 2012), The Royal decree to King in Council)
http://merlin.obs.coe.int/redirect.php?id=16210 NO

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PL-Poland

Draft Amendment to the Broadcasting Act

On 5 September 2012 the Polish Government presented to the Parliament its draft Act amending the Broadcasting Act. This amendment aims at the full transposition of the Audiovisual Media Services Directive (AVMSD) into national law. The proposal basically concerns content regulation of on-demand audiovisual media services (video on demand - VoD). Provisions regarding linear services had been implemented earlier (see IRIS 2010-8/41). Poland thus follows the European Commission's assessment that the Polish implementation of the AVMSD was not sufficient (see IRIS 2012-8/6, IRIS 2011-5/5, and IRIS 2010-8/4).

On 12 October 2012 the Act amending the Broadcasting Act was adopted by the Sejm (Lower Chamber of the Parliament) and presented to the Senat (Second Chamber). The Senat's Commission of Culture and Mass Media began to work on the draft on 16 October 2012.

General quality standards as outlined in the AVMSD had already been transposed into Polish law. However, by introducing new content regulation on the VoD market, the lawmaker made all possible efforts to keep the VoD market subject to light regulation and put as little administrative burden on service providers as possible. Accordingly, there is no obligation of authorisation, registration or notification for providers of VoD services.

The Draft Act provides only minimal reporting obligations: two annual reports to the regulatory authority outlining (1) the realisation of protection of minors (e.g., technical measures to prevent access to harmful content) and (2) the promotion of European works (e.g., proportion of European works in the catalogue).

The responsible regulatory authority will be the National Broadcasting Council (NBC). It is in charge of monitoring the VoD market in order to identify VoD service providers (established within Polish jurisdiction) and their compliance with the obligations imposed by the Broadcasting Act. In case of violations, the NBC will issue a note of caution. If the infringement is not ceased, the NBC may impose a fine up to PLN 1,000 (approx. EUR 250). The fine may be repeated.

The NBC's tasks also include the initialisation and the support of self- and co-regulation of VoD service providers. The Act strongly supports the development of so-called Codes of Best Practice, e.g., in the area of specific requirements for technical measures protecting minors. The Act yields precedence to self-regulation in this respect. In case providers do not agree on self-regulation codes or if the latter prove to be an ineffective implementation of the AVMS Directive, the Minister of Administration and Digitalisation may specify, by legislative regulation, the technical requirements.

• *Rządowy projekt ustawy o zmianie ustawy o radiofonii i telewizji* (Draft Act amending the Broadcasting Act)
http://merlin.obs.coe.int/redirect.php?id=16202 PL

• *Sprawozdanie Komisji o projekcie ustawy o zmianie ustawy o radiofonii i telewizji - trzecie czytanie* (Minutes of the Sejm adoption of the Draft Act of 12 October 2012)
http://merlin.obs.coe.int/redirect.php?id=16229 PL

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RO-Romania

Severe Sanctions for more Romanian TV Stations

On 6 and 8 November 2012, the *Consiliul Naţional al Audiovizualului* (National Council for Electronic Media - CNA) imposed severe sanctions on four commercial Romanian television stations (PRO TV, Acasă TV, Kanal D and Antena 1) for violating the law on audiovisual services. Three stations (PRO TV, Kanal D, Antena 1) were obliged to interrupt their programmes and to broadcast for 10 minutes the text of the CNA's sanctions. The fourth channel, Acasă TV, was fined RON 100,000 (about EUR 22,000), the second biggest legal financial sanction ever imposed. Acasă TV also was obliged to interrupt its programme for 10 minutes, but the station appealed the sanction (see inter alia IRIS 2012-1/38, IRIS 2011-1/44, IRIS 2012-2/32, and IRIS 2012-4/36).

The broadcasters were sanctioned over tabloid TV shows because of insulting language repeatedly used by guests, the re-runs of the shows despite of the inappropriate language used and the broadcasting of shows that could harm minors at improper times.

The stations violated Art. 3 (1) of the *Legea audiovizualului nr. 504/2002, cu modificările şi completările ulterioare* (Audiovisual Law no. 504/2002, with further modifications and completions), which provides that political and social pluralism, cultural, linguistic and religious diversity, information, education and public entertainment are accomplished and ensured by the broadcasters.

At the same time, some broadcasters violated Art. 39 (2) of the mentioned law, which stipulates that broadcasting of programmes that are likely to impair the physical, mental or moral development of minors may be performed only if minors in the transmission area under usual conditions do not have access to those programmes.

Furthermore, the Council found that the stations breached Art. 40 (3) of the Codul Audiovizualului, Decizia nr. 220/2011 privind Codul de reglementare a conţinutului audiovizual, cu modificările şi completările ulterioare (Audiovisual Code - Decision no. 220/2011 concerning the regulation of audiovisual content, with further modifications and completions), which requires the moderators of the programmes not to use or tolerate insulting language or instigate violence.

Between 1 January and 30 September 2012, the CNA issued 274 sanctions, including 166 public warnings, 101 fines amounting to RON 2,755,500 (about EUR 601,650), two decisions obliging the broadcasters to read out the text of the sanction issued by the Council for 10 minutes during the regular programme (19:00-19:10), one decision obliging accordingly for 3 hours (18:00-21:00) and three decisions reducing the remaining validity of the broadcaster's licence.

• *Decizii de sancţionare Privind programele de radio sau TV, publicitatea şi societăţile de cablu care nu au respectat legislaţia audiovizuală* (CNA Decisions)
http://merlin.obs.coe.int/redirect.php?id=16204 RO

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RU-Russian Federation

Resolution of the Supreme Commercial Court on Transparency of Justice

On 8 October 2012, Высший Арбитражный суд Российской Федерации (The Supreme Commercial Court of the Russian Federation) adopted at its plenary session Resolution " Об обеспечении гласности в арбитражном процессе " (On Provisions of Glasnost in Commercial Court Procedure).

The Resolution instructs the judges (about 4,000 in total) of such courts that text reporting from the court sessions via social media and Internet with the use of personal technical means is allowed without any special permission or notification of the presiding judge or sides of the parties in the proceedings.

The Supreme Commercial Court establishes a presumption of the permissibility of photo, video or film recording of the open court proceedings, as well as their live transmissions by means of radio, TV or Internet. A ban on such recordings is allowed only to protect fundamental human rights.

In case of recording and/or live TV and webcasting no permission of those present in the courtroom to use their images is necessary. Such recordings may be used as proof of possible procedural violations in the case.

The Resolution also instructs the judges that they may not stop citizens from being present in the courtroom during open hearings if the there are no available seats. In cases when no courtroom can seat all those wishing to attend, a live broadcast of the session may be arranged.

• ПОСТАНОВЛЕНИЕ Пленума Высшего Арбитражного Суда Российской Федерации Москва *№61 8* октября *2012* г . Об обеспечении гласности в арбитражном процессе (Resolution of the Plenary Session of the Supreme Commercial Court of the Russian Federation 8 October 2012 No. 61 On Provisions of Glasnost in Commercial Court Procedure)
http://merlin.obs.coe.int/redirect.php?id=16184 RU

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Radio and Televisions Act Applies to Newspapers' Web TV Services

On 29 October 2012, *Granskningsnämnden för radio och TV* (the Swedish Broadcasting Commission - SBC) delivered four decisions regarding the application of Radio- och TV-lagen (The Radio- and Televisions Act - RTL) in relation to Web TV sections on newspapers' websites. The cases concerned more or less similar circumstances for the websites of the newspapers Aftonbladet, Dagens Nyheter, Helsinborgs Dagblad and Norran.

Firstly the SBC had to decide whether the RTL applied to a Web TV service as such. According to the *travaux préparatoires* of the RTL, which refer to the Audiovisual Media Services Directive 13/2010/EU, the primary objective of a service must be to provide a programme in order for the service in question to fall within the definition of an audiovisual media service. The SBC found that the TV programmes on the websites constituted separate services compared to other content on the newspapers' websites. Moreover, the programmes were made available to the general public at the request and at the time chosen by the user, and programmes were also classified in catalogues such as "Sports" and "News". In light of these facts, SBC established the Web TV sections of the newspaper websites were on-demand TV (non-linear audiovisual media services) and thereby subject to the RTL.

Secondly, as a consequence, the newspapers must follow the rules on unfair promotion of commercial interests and advertisements under the RTL. In this respect all four newspapers were able to successfully defend themselves that they had not breached the rules on unfair promotion of commercial interests.

However, the SBC considered that Aftonbladet had not provided indications that clearly differentiated the advertising from the rest of the content and had accordingly breached the RTL. When it came to sanctions, this time, the SBC found no reason to impose a special fine on Aftonbladet.

The cases are interesting as they clearly state that the scope of the RTL will cover newspapers' Web TV services in many cases. Newspapers must therefore consider and adhere to the RTL's rules on promotion of commercial interests and advertisements.

• *Granskningsnämnden för radio och tvs beslut i Dnr 12/00777 av den 29 oktober 2012* (Swedish Broadcasting Commission's decisions in Case No. 12/00777 of 29 October 2012)
http://merlin.obs.coe.int/redirect.php?id=16192 SV

• *Granskningsnämnden för radio och tvs beslut i Dnr 12/00778 av den 29 oktober 2012* (Swedish Broadcasting Commission's decisions in Case No. 12/00778 of 29 October 2012)
http://merlin.obs.coe.int/redirect.php?id=16193 SV

• *Granskningsnämnden för radio och tvs beslut i Dnr 12/00779 av den 29 oktober 2012* (Swedish Broadcasting Commission's decisions in Case No. 12/00779 of 29 October 2012)
http://merlin.obs.coe.int/redirect.php?id=16194 SV

• *Granskningsnämnden för radio och tvs beslut i Dnr 12/00780 av den 29 oktober 2012* (Swedish Broadcasting Commission's decisions in Case No. 12/00780 of 29 October 2012)
http://merlin.obs.coe.int/redirect.php?id=16226 SV

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SK-Slovakia

"Media Partnership" as Remuneration for Advertising

In recent months the Council for Broadcasting and Retransmission of the Slovak Republic (Council) has received complaints about an excessive amount of advertising within certain programmes of the major commercial TV broadcaster in Slovakia.

In the case at hand an examination carried out by the monitoring department of the Council revealed two advertising breaks that together lasted exactly 12 minutes within the examined hour. However, another announcement of 20 seconds about a forthcoming musical at the state theatre was broadcast within this period.

Although placed outside the commercial break among other trailers this announcement contained short extracts of the musical along with phrases such as "full of fun and emotion", "musical that was long waited for" etc. Due to the promotional nature of this announcement the Council started a legal investigation in view of a possible violation of the legal maximum of 12 minutes of advertising during one hour of broadcasting.

In its response the broadcaster claimed that the announcement merely informed the audience about the forthcoming musical. The state-owned theatre cannot be treated as a regular commercial enterprise and the promotion therefore cannot be qualified as advertising. The purpose of this announcement was solely to promote Slovak culture, carried out free of charge.

Hence, it should be considered as "a message broadcast in the public interest".

On 21 February 2012, the Council disagreed and imposed a fine of EUR 3,319. It stated that the announcement fulfilled the definition of advertising and thus had to be taken into account for the total time of advertising. Besides merely informing about the premiere, the announcement was worded clearly in a promotional manner. Furthermore, in cases where it is clear that the purpose of the announcement is to promote the supply of goods or services there is no other logical reason for a broadcaster to air such announcements than to gain profit of some kind.

The Council also stated that even though the theatre is state-owned the revenues of its plays form a considerable part of its income. In this context, the remuneration for broadcasting the advertising does not necessarily have to be provided in cash payment. Similar consideration also includes any form of bartering deals or partnerships. These may never appear in the account books of the broadcaster and thus are untraceable but find expression in any kind of "media partnership" whatsoever.

The broadcaster repeated its argument in its Supreme Court appeal. The Court, however, fully upheld the Council's decision and its conclusions in its ruling of 11 September 2012 and followed the opinion that the remuneration for advertising is not limited to cash payment. Hence, the Court also confirmed that "media partnership" fully qualifies as a form of "similar consideration" for TV advertising.

- Council's decision of 21 February 2012 NN
- Supreme Court's decision of 11 September 2012 NN

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US-United States

Court Denies Preliminary Injunction against Ad-Skipping Services

On 7 November 2012, a United States District Court in Los Angeles rejected a petition for a preliminary injunction filed by Fox Broadcasting ("Fox") that asked the Court to block DISH Network ("DISH") from providing its advertising-skipping DVR services "AutoHop" and "PrimeTime Anytime" (collectively "Services") to its customers. The new Services allow DISH's customers to record primetime television shows on broadcast networks, save them for up to eight days, and skip past commercials in the recorded shows. Fox argued that DISH should be blocked from providing the Services because they are a "bootleg, commercial-free video-on-demand service that would irreparably harm the television industry by threatening the billions of dollars spent each year on commercials". DISH countered, however, that the Services are merely an improvement on existing recording devices that enable customers to record commercial-free programming, which have been accepted by the industry and judicially approved as "fair use" under the federal Copyright Act.

Even though DISH hailed the ruling, which was placed under seal to allow both parties to redact confidential trade information, as a "victory for common sense and customer choice", it remains unclear whether the ruling is a complete victory for DISH because the Court also found that DISH likely committed copyright infringement and breached its contract with Fox by making copies of Fox's programming.

In a statement released shortly after the decision was announced, DISH's Executive Vice President and General Counsel praised the ruling as an important decision that underscores "the U.S. Supreme Court's decisions that consumers have a right to enjoy television as they want, when they want, including the reasonable right to skip commercials, if they so choose". The statement also shed further light on the decision, noting that the Court found it likely that: (1) Fox has not established that is has suffered irreparable harm as a result of DISH's making the quality assurance copies; (2) DISH customers using "PrimeTime Anytime" cannot be liable for copyright infringement; (3) copies made using "PrimeTime Anytime" do not infringe on Fox's exclusive reproduction rights under Federal copyright laws; (4) AutoHop does not violate the Video-On-Demand provisions of the 2010 retransmission consent agreement between Fox and DISH ("RTC"); and (5) neither of the Services constitutes unauthorized distribution under Federal copyright laws. Fox has already appealed the decision, acknowledging that it was "disappointed the court erred in finding that Fox's damages were not suitable for a preliminary injunction".

- Statement by Dish Executive Vice President and General Counsel
http://merlin.obs.coe.int/redirect.php?id=16207 EN
- Appeal filed by Fox
http://merlin.obs.coe.int/redirect.php?id=16208 EN

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DE-Germany

BGH declares retention of reports on suspected offenders in online archives lawful

In a judgment of 30 October 2012 (Case VI ZR 4/12) the Bundesgerichtshof (Federal Court of Justice - BGH) ruled that the retention of reports on suspected offenders in online archives is lawful.

The plaintiff worked as a "special operations officer" for the Ministry of State Security in the German Democratic Republic (GDR). However, in civil proceedings he made a statutory declaration that he had never worked for that ministry. As a result of this false testimony, the public prosecutor's office instituted criminal investigation proceedings against him, which were subsequently discontinued against payment of a sum of money.

A daily newspaper reported on the investigation proceedings, mentioning the plaintiff's name, and later placed the article in its online archive, which is freely accessible via the newspaper's website. After the proceedings had been discontinued, the newspaper wrote a postscript to the article on the discontinuation of the investigation proceedings against payment of a sum of money.

The plaintiff considered that keeping the article available in the newspaper's online archive violated his general personality rights and brought a cease-and-desist action against the newspaper. Having lost on appeal, the defendant filed an appeal on points of law with the BGH, which dismissed the action, stating that the interference with the plaintiff's general personality rights by retaining the article in the newspaper's online archive was not unlawful as the plaintiff's interest in his own protection had to take second place to the public interest in information and the defendant's right to freedom of expression. The court pointed out that the original publication in 2008 had been lawful as there had been a significant public interest in the circumstances of the criminal offence of which the plaintiff had been accused. The subsequent discontinuation of the investigation proceedings had changed nothing in that regard and, according to the BGH, the comparatively insignificant harm done to the plaintiff's general personality rights had to be a secondary consideration.

• *Das Urteil des Bundesgerichtshofs vom 30 Oktober 2012 (Az.: VI ZR 4/12)* (Judgment of the Federal Court of Justice of 30 October 2012 (Case VI ZR 4/12))
http://merlin.obs.coe.int/redirect.php?id=17785 DE

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Agenda

MEDIADEM final European Conference Media freedom and independence: Trends and challenges in Europe
7 February 2013 Organiser: European Platform of Regulatory Authorities (EPRA), Hellenic Foundation for European and Foreign Policy, Association of European Journalists Venue: Brussels
http://www.mediadem.eliamep.gr/mediadem-final-european-conference-in-brussels/
Welcome to Internet 2013 – a venue for discussions on freedom of expression online
14 - 15 February 2013 Organiser: OSCE Representative on Freedom of the Media Venue: Vienna
http://www.osce.org/event/internet2013

Book List

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