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INTERNATIONAL

COUNCIL OF EUROPE

European Court of Human Rights: Roşianu v. Romania

The European Court of Human Rights has again reiterated that collecting information and guaranteeing access to documents held by public authorities is a crucial right for journalists in order to be able to report on matters of public interest, helping to implement the right of the public to be properly informed on such matters. In the case of Ioan Romeo Roşianu, a presenter of a regional television programme, the Court came to the conclusion that the Romanian authorities had violated Article 10 of the European Convention on Human Rights by refusing access to documents of a public nature, which he had requested at Baia Mare, a city in the north of Romania. The Court's judgment clarifies that efficient enforcement mechanisms are necessary in order to make the right of access to public documents under Article 10 practical and effective.

In his capacity as a journalist, Roşianu had contacted the Baia Mare municipal authorities, requesting disclosure of several documents, as part of his investigation into how public funds were used by the city administration. His requests were based on the provisions of Law no. 544/2001 on freedom of public information. As the reply from the mayor did not contain the requested information, Roşianu applied to the administrative court. In three separate decisions, the Cluj Court of Appeal ordered the mayor to disclose most of the requested information. The Court of Appeal noted that, under Article 10 of the European Convention on Human Rights and Law no. 544/2001 on freedom of public information, Roşianu was entitled to obtain the information in question, which he intended to use in his professional activity. The letters sent by the mayor of Baia Mare did not represent adequate responses to those requests. The Cluj Court of Appeal ordered the mayor to pay the applicant EUR 700 in respect of non-pecuniary damages, and held that his refusal to disclose the requested information amounted to a denial of the right to receive and impart information, as guaranteed by Article 10 of the European Convention. Mr Roşianu applied for enforcement of the decisions, but the mayor refused to comply. The decisions delivered by the Cluj Court of Appeal remained unenforced.

Roşianu complained about the failure to execute the judicial decisions, relying on Article 6 §1 (right to a fair hearing). Relying on Article 10, he alleged that the failure to execute the decisions of the Cluj Court of

Appeal amounted to a violation of his right to freedom of expression.

With regard to the complaint under Article 6 §1 of the Convention, it is observed that the mayor had suggested that Roşianu should come in person to the town hall to obtain several thousand photocopied pages, which would have included having to pay for the reproduction costs, but that the domestic courts had concluded that such an invitation could not possibly be considered as an execution of a judicial decision ordering the disclosure of information of a public nature. The European Court found that the non-enforcement of the final judicial decisions ordering disclosure to Mr Roşianu of public information had deprived Roşianu of effective access to a court, which amounted to a violation of Article 6 §1 of the Convention.

With regard to the complaint under Article 10, the Court noted that Roşianu was involved in the legitimate gathering of information on a matter of public importance, namely the activities of the Baia Mare municipal administration. The Court reiterated that in view of the interest protected by Article 10, the law cannot allow arbitrary restrictions that may become a form of indirect censorship should the authorities create obstacles to the gathering of information. Gathering information is indeed an essential preparatory step in journalism and is an inherent, protected part of press freedom. Given that the journalist's intention had been to communicate the information in question to the public and thereby to contribute to the public debate on good public governance, his right to impart information had clearly been impaired. The Court found that there had not been adequate execution of the judicial decisions in question. It also observed that the complexity of the requested information and the considerable work required in order to select or compile the requested documents had been referred to solely to explain the impossibility of providing that information rapidly, but could not be a sufficient or pertinent argument to refuse access to the requested documents. The Court concluded that the Romanian authorities had adduced no argument showing that the interference in Roşianu's right had been prescribed by law, or that it pursued one or several legitimate aims, hence finding a violation of Article 10 of the Convention. The Court held that Romania was to pay the applicant EUR 4,000 in respect of non-pecuniary damage and EUR 4,748 in respect of costs and expenses.

• *Arrêt de la Cour européenne des droits de l'homme (troisième section), affaire Roşianu c. Roumanie, requête n° 27329/06 du 24 juin 2014* (Judgment by the European Court of Human Rights (Third Section), case of Roşianu v. Romania, Appl. No. 27329/06 of 24 June 2014)

<http://merlin.obs.coe.int/redirect.php?id=17158>

FR

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Committee of Ministers: Human Rights Guide for Internet Users

On 16 April 2014, the Council of Europe's Committee of Ministers (CM) adopted Recommendation CM/Rec(2014)6 to member States on a Guide to human rights for Internet users (hereafter, "the Guide"). Among the starting premises of the Recommendation are: (i) human rights standards, as elaborated by the Council of Europe, must be upheld on the Internet, and (ii) in safeguarding human rights, states' obligations include "the oversight of private bodies". The Recommendation stresses that "human rights, which are universal and indivisible, and related standards, prevail over the general terms and conditions imposed on Internet users by any private sector actor".

The Recommendation's primary aim is to "ensure that existing human rights and fundamental freedoms apply equally offline and online". To this end, it calls on States to: "actively promote" the Guide among relevant actors; "assess, regularly review and, as appropriate, remove restrictions" on the exercise of human rights online; ensure that Internet users have effective remedies for violations of their rights; encourage the private sector "to engage in genuine dialogue with relevant State authorities and civil society in the exercise of their corporate social responsibility".

Unusually, the Guide directly addresses "you, the Internet user", in keeping with its intention to serve as a tool for you "to learn about your human rights online, their possible limitations, and available remedies for such limitations". It sets out to synthesise and explain existing (Council of Europe) standards - not to create new ones.

The Guide addresses and is organised around the following themes: access and non-discrimination; freedom of expression and information; assembly, association and participation; privacy and data protection; education and literacy; children and young people, and effective remedies. The specific implications of each theme in an online context are teased out. There is recurrent attention given to the roles of public authorities and private actors in respecting human rights and providing redress for breaches of human rights.

The distinction between these roles is particularly relevant in respect of effective remedies as effective remedies "can be obtained directly from Internet service providers, public authorities and/or national human rights institutions". The Guide states that effective remedies "can - depending on the violation in question - include inquiry, explanation, reply, correction, apology, reinstatement, reconnection and compensation". Information about rights and remedies for breaches of those rights should be made available by various parties. The information should be accessible and explain "how to report and complain about interferences with your rights and how to seek redress".

• Recommendation CM/Rec(2014)6 of the Committee of Ministers to member States on a Guide to human rights for Internet users, 16 April 2014
<http://merlin.obs.coe.int/redirect.php?id=17191>

DE EN FR

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EUROPEAN UNION

Court of Justice of the European Union: Funding scheme of the national public service broadcaster in Spain confirmed

In its judgment of 11 July 2014, the Court of Justice of the European Union confirmed the current funding scheme of the Spanish national public service broadcaster *Corporación de Radio y Televisión Española* (RTVE). In particular, the Court analyses and validates the measures introduced by the Law number 8 of 2009. This Law modifies the regime originally established by the - still in force - Law number 17 of 2006 which generally regulates the provision of the national public broadcasting service in Spain.

The main and very important changes introduced by this Law include the elimination of commercial advertising and sponsorship as sources of income for RTVE, as well as the creation of three new taxes and levies in order to compensate for this loss of resources. These new fiscal measures cover three areas: a) the 3% levy on the annual income of open television operators - which goes down to 1,5% in the case of pay television - , b) the 0,9% levy on the annual income of electronic communications service providers, and c) the 80% of the tax on the use of the spectrum already paid by different operators. These measures were declared to be compatible with the internal market by the European Commission in June 2010 and confirmed by the Court in its decision.

It is worth noting that the second measure has been particularly problematic as in March 2010 the Commission asked Spain to eliminate it due to its incompatibility with the Directive of 7 March 2002 on the authorisation of electronic communications networks and services (Authorisation Directive). However, the analysis of the Commission and the Court in the present case was only based on the compatibility of the measures in question with the internal market in the exclusive terms of article 106 paragraph 2 of the Treaty on the Functioning of the European Union, that is to say without prejudice to the above-mentioned incompatibility.

Within this specific scope, the Court validates the changes introduced in the funding scheme of RTVE

on the basis that they do not represent the introduction of a new regime completely dissociated from the one originally set out by law in 2006. As the Court stresses, the new measures do not change the main parameters which determine that funds granted to RTVE must be calculated on the basis of the net costs of the provision of the public service, therefore avoiding any form of overcompensation. The fiscal measures introduced in 2009 do not change this basic scheme as the income derived from them does not determine the funding of RTVE, which is still calculated taking into account the parameters just mentioned. Moreover, the legislator introduces two additional safeguards: a) the general cap of 1,200 million euro vis-à-vis RTVE's annual income which cannot be surpassed in any case, and b) the provision according to which only in cases when the income derived from the fiscal measures is not sufficient to cover the net costs of the provision of the service, the Government should add the funding necessary in order to fully cover them - without prejudice to the cap mentioned in a).

In any case, this is a very relevant decision as it finally puts an end to a delicate controversy with political and economic implications, which has jeopardised the viability of the Spanish national public service broadcaster in the recent years.

• *Arrêt du Tribunal (troisième chambre), Telefónica de España, SA et Telefónica Móviles España, SA c. Commission européenne, Affaire T-151/1, 11 juillet 2014* (Judgment of the General Court (Third Chamber), Telefónica de España, SA and Telefónica Móviles España, SA v European Commission, Case T-151/1, 11 July 2014)

<http://merlin.obs.coe.int/redirect.php?id=17155>

FR ES

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Court of Justice of the European Union: Ruling on State Aid in the Case of the “Ciudad de la Luz” in Spain

On 3 July 2014, the General Court of the Court of Justice of the European Union confirmed that the decision of the Government of the Spanish region of Valencia (“Comunitat Valenciana”) consisting of a series of investments with regards to the project named “Ciudad de la Luz” (City of the Light) is incompatible with EU law. This project includes the creation and exploitation of new cinema studios and a school of cinema near the city of Alicante. The Court validates the decision adopted in May of 2012 by the European Commission, which declared such measures as being a State aid contrary to article 108 of the Treaty on the Functioning of the European Union and therefore were incompatible with the internal market.

The Court considers that the Commission made a good assessment about the nature of the national in-

vestments under analysis through a proper application of the well-known criteria of the diligent investor. Both the Commission and the Court concludes that the national authorities did not sufficiently justify that a private investor would have reasonably decided to make the injection of capital under scrutiny.

The most interesting part of the decision refers to the applicability of the exception contained in article 107, paragraph 3 (d) of the Treaty. According to this provision, State aid aimed to promote culture and heritage conservation is deemed compatible with the internal market inasmuch as such aid does not affect trading conditions and competition in the Union to an extent that is contrary to the common interest.

The Court confirms that the Spanish authorities were not able to justify that the activities of the City of the Light were of a cultural nature, against the opinion of the Commission, which found them to be purely commercial. In this sense, the Court finds it clear that the objective of the project - as clearly declared by the Spanish authorities - was to compete with big international cinema studios within an already existing highly competitive market. In addition to this, the Spanish authorities are neither able to mention or identify a market deficiency to be addressed by the project in question, particularly vis-à-vis the local Valencian audiovisual market, nor can they present any analysis to determine which is the most appropriate measure to be eventually implemented in such a case, according to the principles of necessity, proportionality and adequacy. Moreover, the Court also stresses the fact that the Spanish authorities have not been able to prove that the movies - and other audiovisual products, including commercial ads- produced by the studios had been subjected to any pre-established cultural criteria or requisites, thus confirming the impossibility to apply the cultural exception.

• *Arrêt du Tribunal (septième chambre), Royaume d'Espagne, Ciudad de la Luz, SAU et Sociedad Proyectos Temáticos de la Comunidad Valenciana, SAU contre Commission européenne, Affaires jointes T-319/12 et T-321/12, 3 juillet 2014* (Judgment of the General Court (Seventh Chamber), Kingdom of Spain, Ciudad de la Luz, SAU and Sociedad Proyectos Temáticos de la Comunidad Valenciana, SAU v European Commission, Joined cases T-319/12 and T-321/12, 3 July 2014)

<http://merlin.obs.coe.int/redirect.php?id=17152>

FR ES

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Council of the EU: Human rights guidelines on free expression on- and offline

On 12 May 2014, the Council of the European Union (EU) adopted the EU Guidelines on Freedom of Expression Online and Offline. As the EU only has a limited set of home-grown standards on freedom of expression, one of the main aims of the Guidelines is

to “explain the international human rights standards on freedom of opinion and expression”. Another main aim is to provide “political and operational guidance to officials and staff of the EU Institutions and EU member states for their work in third countries and in multilateral fora as well as in contacts with international organisations, civil society and other stakeholders”. The Guidelines also seek to help EU officials and staff contribute to preventing potential violations of the right to freedom of opinion and expression.

In light of these central aims, the Guidelines do not purport to create new standards, but to synthesise and contextualise existing standards and set out how they could be used as a basis for action by the EU, including in the EU’s external affairs.

The Guidelines identify the following “priority areas”:

1. Combating violence, persecution, harassment and intimidation of individuals, including journalists and other media actors, because of their exercise of the right to freedom of expression online and offline, and combating impunity for such crimes;
2. Promoting laws and practices that protect freedom of opinion and expression;
3. Promoting media freedom and pluralism and fostering an understanding among public authorities of the dangers of unwarranted interference with impartial/critical reporting;
4. Promoting and respecting human rights in cyberspace and other information and communication technologies;
5. Promoting best practices by companies;
6. Promoting legal amendments and practices aimed at strengthening data protection and privacy online/offline.

Each of the priority areas is introduced with an explanatory section, followed by a list of measures to be taken by the EU to advance the priority in question. Under the Guidelines, the EU commits itself to “make use of all appropriate political and external financial instruments in order to further the promotion and protection of freedom of opinion and expression”. The Guidelines identify a wide-ranging set of “tools” for that purpose:

- Political dialogues and high level visits;
- Monitoring, assessing and reporting on freedom of expression;
- Public statements and demarches;
- Financial instruments;
- Public diplomacy in multilateral fora;
- Media freedom and pluralism in the EU enlargement policy;

- Promoting Council of Europe and OSCE acquis;
- Trade measures;
- Training and technical exchanges;
- Capacity building.

The Guidelines also contain a section focusing on their implementation and evaluation.

This article provides only a general sense of the Guidelines main focuses. It should therefore be noted that the substantive part of the Guidelines and the Appendices, in keeping with the Guidelines’ stated intention to explain and guide EU officials and staff in respect of freedom of expression issues, are detailed and practical in nature.

The Guidelines are part of the EU’s continuing series of comparable Guidelines on other human rights, e.g. the rights of the child; violence against women and girls and combating all forms of discrimination against them; human rights defenders; torture and the death penalty; human rights of Lesbian, Gay, Bisexual, Transgender and Intersex persons, and the right to freedom of religion or belief.

- Council of the European Union, EU Guidelines on Freedom of Expression Online and Offline, 12 May 2014
<http://merlin.obs.coe.int/redirect.php?id=17168>

EN

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UNITED NATIONS

United Nations: Human Rights Council urges Member States to improve internet security

On 20 June 2014, following the meeting of stakeholders held in Sao Paulo, Brazil on 23 and 24 April 2014, the UN Human Rights Council passed a resolution tabled by Brazil, Tunisia, Nigeria, Turkey, Sweden and the USA. The resolution calls on States to increase their efforts to improve Internet security in order to comply with Article 19 of the Universal Declaration of Human Rights. The resolution reflects the UN Human Rights Council’s concern, following the NSA affair, to protect fundamental rights such as freedom of expression and data protection on the Internet. It builds on a declaration made in 2012, in which the Council stressed that citizens’ rights must be protected “online” as well as “offline”. Since many audiovisual media services are distributed via the Internet nowadays, the issue of better Internet security is also relevant to the audiovisual sector.

The key message of the new resolution is that human rights that are guaranteed “offline”, i.e. in real life, must also be protected on the Internet, i.e. “online”.

The UN Human Rights Council notes that the exercise of human rights on the Internet is particularly important because the rapid pace of technological development is enabling individuals all over the world to use this technology. As a driving force for economic, social and cultural development, the Internet must be respectful of human rights if it is to remain global and open in nature.

Prompted partly by the NSA affair, the Human Rights Council therefore considers it important to build confidence in the Internet with regard to human rights so that its potential for development and innovation can be realised. This is particularly true in view of the Internet’s role in promoting the right to education.

In order to achieve these objectives, States are urged to facilitate access to the Internet. By taking steps to improve security and clearly allocating responsibility, they must also ensure that human rights are effectively guaranteed “online”. Through transparent processes involving all stakeholders, the UN Human Rights Council calls on States to formulate Internet-related public policies that protect the Internet and give priority to objectives such as universal access and enjoyment of human rights in cyberspace.

• UN Human Rights Council resolution, 20 June 2014
<http://merlin.obs.coe.int/redirect.php?id=17177>

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United Nations: The mission to Italy of the UN Special Rapporteur on freedom of opinion and expression

In November 2013 the UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue, undertook an official visit to Italy and on April 29, 2014 delivered his Report. Not surprisingly, the UN Special Rapporteur acknowledges that Italy protects freedom of opinion and expression and the Italian legal framework is in line with the relevant international standards. At the same time, the UN Special Rapporteur raises some concerns and recommends the adoption of certain measures.

Although Resolution 1577 (2007) of the Council of Europe Parliamentary Assembly recommended the decriminalisation of defamation, Italian law still treats libel and slander as crimes. The Italian Parliament is in the process to approve a bill according to which

defamation will be no longer punished with imprisonment. However, according to the UN Special Rapporteur’s recommendation, defamation should be decriminalised completely and transformed from a criminal to a civil action.

In addition, the Parliament should remove Article 341 bis of the Italian Criminal Code, which punishes insults directed to public officials in the presence of other people. The UN Special Rapporteur deems that criticism of public officials is essential for democracy, therefore public officials, whose function is subject to public debate, should not enjoy a stronger protection from criticism and insults than any other citizen.

The UN Special Rapporteur urges the Government to promote and protect media diversity and pluralism by preventing cross-ownership of print and broadcast media. Therefore, Mr. La Rue regrets the 2012 amendment that removed the ban on broadcasters who operate more than one national channel owning or purchasing shares in newspaper publishing companies. In addition, Mr. La Rue points out that the disclosure of information on ownership, control and sources of revenue of the media would contribute to preventing monopolies, cross-ownership and unlawful concentration of the media, and would also allow people to better interpret the position of various media groups.

The UN Special Rapporteur deems that the public broadcasting service can significantly contribute to enhancing plurality in the media. However, he stresses that out of 9 members of the board of directors of RAI (the Italian public broadcaster), 6 are nominated by the ruling coalition in Parliament and 2 (including the Chairman) are appointed by the Government. According to the opinion of the UN Special Rapporteur, RAI should be placed under the control of an independent body, and other measures should be implemented to prevent political interference in the management and editorial line of RAI.

The UN Special Rapporteur also criticises the current system of appointment of the board members of the Italian Communications Authority (AGCOM). The selection criteria for the AGCOM board membership, and information on the qualifications and professional experience of the applicants should be published and made accessible to the public, including on the Internet. The shortlisted candidates should be called to a public hearing in the Parliament and the final decision should be made through a public vote.

Furthermore, the UN Special Rapporteur believes that all regulations regarding constitutional rights should be approved by Parliament, in particular those affecting the right to freedom of expression and stigmatises that AGCOM may issue regulations based on generic legislation by Parliament. In particular, the UN Special Rapporteur takes a position on the new AGCOM regulation on the protection of copyright on the internet (see IRIS 2014-3/31). According to the UN Special

Rapporteur, the establishment of norms protecting intellectual property should remain exclusively within the purview of the Parliament and, although AGCOM may by law apply some limitations on online content, the removal of online content should be decided by the Court on a case-by-case basis, provided that there should never be any liability for the content by the intermediaries.

The UN Special Rapporteur is also concerned about threats and intimidation against journalists and the deteriorating working conditions of journalists (i.e., the proliferation of informal working arrangements through freelance contracts, and the low remuneration received in such cases), which might expose them to further harm and affect their independence.

Mr. La Rue also advises to forbid the ownership of media to members of the Government and elected office holders, to enact a full access to information law applicable to all public institutions with the fewest restrictions possible and to adopt a law on any form of hate speech, including discrimination against the lesbian, gay, bisexual and transgender population, misogynistic messages and incitement to violence against women and persons with disabilities.

In fine, Mr. La Rue reiterates the recommendations made in 2004 by the previous Special Rapporteur that the Italian Parliament should establish a national human rights institution.

In its response, the Italian Government emphasized that (i) criminal sanctions for defamation will be limited (however, no indication on entire decriminalisation was given); (ii) cross-ownership arrangements can foster development of the broadcasting sector and (iii) a set of measures to ensure a fair pay for journalists will be adopted.

• Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Mr. Frank La Rue - Addendum - Mission to Italy from 11 to 18 November 2013
<http://merlin.obs.coe.int/redirect.php?id=17153> EN

• Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Mr. Frank La Rue - Addendum - Mission to Italy: comments by the State on the report of the Special Rapporteur
<http://merlin.obs.coe.int/redirect.php?id=17154> EN

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UNESCO

UNESCO: Participants of the first European MIL Forum adopt Paris Declaration on Media and Information Literacy in the Digital Era

formation Literacy (MIL) in the Digital Era Forum was held at the UNESCO Headquarters in Paris to adopt the Paris Declaration. Together with the Global Alliance for Partnerships on Media and Information Literacy (GAP-MIL) a final version of the Declaration was adopted on 21 July 2014. The Paris Declaration calls for a renewed emphasis on MIL for the 21st century digital environment together with co-operation among stakeholders to effectively promote MIL to all citizens.

As a result of technological developments, a rising amount of (online) information and content is created and mediated. New challenges are introduced such as information overload and ethical questions. Digital convergence of media, information and education calls for new skills and competences such as critical thinking, creativity, and ethical use of media and information. The focus on the mere 'single literacy' of IT and computer skills is ineffective since both MIL and technological competences are complementary to the use of media and information in different contexts. For the digital era the MIL competences must be seen as being embedded in this wider context.

The Paris Declaration includes 10 recommendations to UNESCO, the European Commission and the community of multi-stakeholders. The Declaration represents renewed support to media and information literacy with a view to empowering individuals in the digital age. The recommendations underline the public interest value of the wider context of the MIL competences and the fostering of human rights, safety and security of the use of information, media and technology. They encourage stakeholders to co-operate with their policies and strategies on MIL. Public service media and governments are encouraged to strengthen their efforts and focus on MIL, with special attention to people with special needs, indigenous peoples and other underserved groups.

With the implementation of these recommendations by the stakeholders in MIL policy and practice, an inclusive entitlement for all citizens to media and information is presented for the 21st century.

• Paris Declaration on Media and Information Literacy in the Digital Era
<http://merlin.obs.coe.int/redirect.php?id=17156> EN

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On 27-28 May 2014, the First European Media and In-

NATIONAL

BG-Bulgaria

Request for the termination of licences for terrestrial broadcasting of two specialised programmes

On 20 May 2014, the Council for Electronic Media took decisions to terminate the licences for the distribution of two audiovisual media services. On the one hand, this concerned the audiovisual media service under the label „bTV Lady+1“, having a specialised profile (targeting the female audience), nation-wide territorial coverage and designed for distribution by means of terrestrial digital distribution networks. The other decision was directed towards the audiovisual media service under the label „440430435423.421423+1“ (RING.BG+1) having a specialised profile (in the fields of sports and entertainment), nation-wide territorial coverage and designed for distribution by means of terrestrial digital distribution networks.

Both requests for the licences termination were lodged by „bTV Media Group“ in front of the Council for Electronic Media on 7 March 2014. The reason for the requests for the licence terminations lies in a business decision of the company. This decision is taken with regard to the fact that the broadcasting of specialised programmes (limited size of the target TV audience) by terrestrial means is financially unviable. In economic terms the payment of fees to obtain terrestrial broadcasting is very expensive. That is the reason why these specialized programmes only continue to be broadcast via cable and satellite.

The regulatory body was hesitant and discussed on several occasions the issue at its meetings held on 25 March, 1 April, 8 April, 15 April and 24 April 2014, which resulted in the initiation by „bTV Media Group“ of judicial proceedings against the silent refusal of the administrative body to act under Article 121 (1) No. 4 of the Radio and Television Act, according to which the licence may be terminated in advance upon a request made by the licence holder. This provision constitutes the legal basis for the licence termination by the Council for Electronic Media.

• Решение № РД -05-67 от 20 май 2014 г. за прекратяване на индивидуална лицензия за доставяне на аудио - визуална медийна услуга , издадена на " БТВ Медиа Груп " ЕАД (Decision no RD-05-67 du 20 May 2014)
<http://merlin.obs.coe.int/redirect.php?id=17132>

BG

• Решение № РД -05-68 от 20 май 2014 г. за прекратяване на индивидуална лицензия за доставяне на аудио - визуална медийна услуга , издадена на " БТВ Медиа Груп " ЕАД (Decision no RD-05-68 du 20 May 2014)
<http://merlin.obs.coe.int/redirect.php?id=17133>

BG

Rayna Nikolova
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Report on the compliance with the prohibition for offshore companies to own media in Bulgaria

On 1 July 2014, the prohibition for offshore companies to own media or to take part in the ownership of media entered into force. The prohibition refers to periodical, radio and/or television (for more details see IRIS 2014-3/9). The ban is applicable to companies, who are registered in countries with a preferential tax regime and applies to any person related to them as well as their beneficial owners.

On 14 July 2014, the Council for Electronic Media ("CEM") presented an expert report, in which the owners of the television companies, that are offshore companies, are listed as follows: bTV Media Group EAD, Nova Broadcasting Group AD, TV Seven EAD, Balkan Bulgarian Television EAD, Eurofootballprint EOOD and Pink BG EOOD.

The CEM has addressed requests to the above-mentioned media companies. The aims of these requests are to clarify the ownership relationships on media companies and to control the implementation of the statutory prohibition in the practice of the media. In case of non-compliance with the legal requirements a pecuniary sanction of BGN 50,000 to BGN 100,000 (approximately EUR 25,000 to EUR 50,000) may be imposed.

• Доклад за съответствието на радио - и телевизионните доставчици с изискванията на ЗИФОДРЮПДРСЛТДС (CEM Report on the compliance with the prohibition for offshore companies to own media in Bulgaria)
<http://merlin.obs.coe.int/redirect.php?id=17140>

BG

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CEM report on the 2014 European Parliament elections

On 10 June 2014, the Council of Electronic Media ("CEM") published its report on the 2014 European Parliament elections. The Election Code of Bulgaria for the first time requires the identification of both

the free of charge political campaigning and the paid forms of political campaigning (Article 179 of the Election Code). The monitoring has demonstrated, as regards TV programmes, that there is a trend to distinguish in a clearer manner paid content from non-paid content.

Part of the media service providers (Nova television, bTV, TV 7, Bulgaria on air, Eurocom Tsarevets, bTV Action, TV Plus) have fulfilled the requirement under Article 180 of the Election Code to disclose on their Internet sites information regarding the contracts concluded with both political parties, coalitions and initiative committees that have registered candidates and/or other contractors with regard to the election campaign including the cases where the contract is concluded by an intermediary. As a result of the monitoring, it was established that there were providers (Eurocom, Plovdiv Trace Television), who have not disclosed the information concerning their contracts, whereas in other places the relevant data did not concern the specified time-limits or were incomplete. All these irregularities make the assessment difficult, whether the campaigning forms in the programmes represent paid or non-paid content (TV Europe, Channel 3).

As a positive trend, as regards some of the TV programmes (bTV, TB 7, News 7, Nova television, Bulgaria on air), it could be demonstrated that the time on air provided for the non-paid participation of the candidates in the European Parliament elections and the political parties representatives outweighs the time that was provided for the paid participation (the criterion for this assessment is the calculated time on air in minutes). Calculated according to their number, the scope of the paid material is greater than the scope of the non-paid material. This is the trend in the case of BNT.

On 13 May 2014, the Central Election Commission ("CEC") suspended an election video clip of the political party Ataka, in which the world is portrayed as divided into two value systems - the Euro Atlantic ones, coloured in blue, and the Orthodox ones, coloured in red. In the clip there is a contrast between the Euro Atlantic and the Orthodox Christian values, which is placed for the purposes of illustration at the side of the former sins such as paedophilia, incest and intervention and values like traditions, family life and religious belief.

The CEC determined this was a violation of the prohibition to use agitation materials, which run counter to morality in the course of the European Parliament elections, and suspended the broadcasting of the above-mentioned clip both in the electronic media and on the Internet.

There was one more video clip concerning a child participation in political agitation. The clip showed people, who the political party Ataka provided with free of charge medical treatment. At the end of this clip there is a child that addresses a political message towards

the leader of the political party Ataka ("He should win and lead Bulgaria"). The video clip was broadcast on Nova television, bTV and Alfa TV. The CEC established that there was an infringement of the law, in particular that in an election video clip a child is used to make political messages, and suspended the further use of that agitation material. Consequently, the clip was edited and modified, whereupon the child participation was removed from its content.

The CEM report also assesses that the election campaigns in the electronic media as a whole were not very active. They were focussed more on domestic discussions and issues rather than on messages and topics of European nature.

• Доклад за Евроизбори 2014 г. (CEM report on the 2014 European Parliament elections)
<http://merlin.obs.coe.int/redirect.php?id=17141>

BG

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CH-Switzerland

Order On MEDIA Compensatory Measures

On 16 June 2014, the Federal Department of the Interior (DFI) adopted an order aimed at partially offsetting the negative effects of Switzerland's non-participation in the MEDIA European programme for encouraging the audiovisual sector (Order on MEDIA compensatory measures). The Order, which came into effect retroactively on 1 January 2014, defines the objectives of the support granted by the Federal authorities, the instruments, and the criteria for allocating the compensatory measures. Although these are close to the European criteria, the new provisions will nevertheless not give Switzerland full access to the European market and to its network.

Switzerland joined the MEDIA programme in 2006. The aid allocated under the programme constituted an essential supplement for professionals in the Swiss audiovisual sector. Since 1 January 2014, the date on which the new 'Creative Europe' framework programme came into force, combining the Culture and MEDIA programmes, Switzerland's participation in the MEDIA programme has been suspended.

The compensatory measures make it possible to obtain financial aid to develop projects for audiovisual works with potential for exploitation across Europe, the distribution of European films in Switzerland, easier market access for European film-makers and their works, continuous training programmes at the European and international levels, and film festivals presenting European films. Financial aid may only

be granted, however, if the project concerned does not receive any other support from the MEDIA programme.

In 2014 the value of these measures amounts to about five million Swiss francs (4.12 million euros), corresponding to the amount earmarked for Switzerland's participation in the MEDIA programme. Thus the MEDIA compensatory measures supplement the financial aid provided for in the schemes to encourage the cinema sector for the period from 2012 to 2015.

The Federal Office for Culture (OFC) is the authority responsible for implementing the measures. To do so, it will work in conjunction with MEDIA's Switzerland Desk, to which applications for support must be sent for preliminary examination. European experts will examine the applications, which are to include details on project development. Management of the credits and formal decision-making will be the responsibility of the OFC.

The purpose of the Order is to set up an interim solution in order to ensure the continuation of the projects in hand and facilitate Switzerland's participation in the 'Creative Europe' programme, if possible from 1 January 2015. To achieve this, discussions with the European Union's Commission on Switzerland's participation in 'Creative Europe' began in May 2014.

• *Ordonnance du DFI sur les mesures compensatoires MEDIA, 16 juin 2014 (DFI Order on MEDIA compensatory measures, 16 June 2014)*
<http://merlin.obs.coe.int/redirect.php?id=17178> DE FR IT

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Nationalrat votes for network neutrality to be enshrined in legislation

According to media reports, on 17 June 2014, the Swiss Nationalrat (the larger of the two chambers of the Swiss Federal Parliament, comprising 200 members) passed a motion that the requirement for network neutrality be enshrined in the Fernmeldegesetz (Telecommunications Act) by a 111-61 majority, with 18 abstentions.

Under the motion, the Bundesrat (Swiss Federal Government) which, according to Article 174 of the Bundesverfassung (Federal Constitution), is the supreme governing and executive authority of the Confederation, is required, as part of the planned partial revision of the Telecommunications Act, to enshrine the network neutrality principle in the new Act, in order to guarantee the transparent and non-discriminatory transfer of data via the Internet. Under such a motion, the Bundesrat is obliged to table a draft decree or take an alternative measure.

The motion considers network neutrality a foundation stone of the right to freedom of information and expression on the Internet, whether via fixed or mobile networks.

The motion also requires the approval of the Ständerat, the smaller chamber of the Swiss Federal Parliament, which represents the individual cantons and has 46 members. However, the Christian Democratic People's Party of Switzerland (CVP) and the Liberals (FDP), both of which voted against the motion in the Nationalrat, have a majority in the Ständerat. Before the Ständerat votes, the motion will be discussed by one of its committees (it has 11 standing, 9 legislative and 2 supervisory committees) which, based on those discussions, will then submit a recommendation to the Ständerat.

• *Medienberichte zur Annahme des Antrags auf gesetzliche Festschreibung der Netzneutralität durch den Schweizer Nationalrat (Media reports on the approval by the Swiss Nationalrat of the motion that network neutrality be enshrined in legislation)*
<http://merlin.obs.coe.int/redirect.php?id=17192> DE

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Ständerat approves universal broadcasting charge

After the Nationalrat (the larger of the two chambers of the Swiss Federal Parliament, comprising 200 members) had already given the green light, media reports indicate that on 19 June 2014 the Ständerat (the smaller chamber of the Swiss Federal Parliament, which represents the individual cantons and has 46 members) also agreed to the introduction of a universal broadcasting charge, which all companies and private households will have to pay, whether they own a reception device or not. Like the broadcasting charge that replaced the licence fee in Germany at the start of 2013, the new Swiss broadcasting charge is a universal charge that every household will have to pay.

In the context of a changing technological environment, in which television can now be viewed on mobile phones, for example, the Bundesrat (Swiss Federal Government) is endeavouring to update the Swiss broadcasting fee system by amending the Radio-und Fernsehgesetz (Radio and Television Act - RTVG). In view of the increased revenue that the new system is expected to generate, the Bundesrat plans to reduce the current annual charge of CHF 462 (EUR 380) per household to around CHF 400 (EUR 330).

Although its decision represents a significant step towards the introduction of a new broadcasting charge, the Ständerat believes some minor amendments are required.

Whereas the Nationalrat had wanted to support households without a television set by exempting them from the new charge for five years, the Ständerat, like the Bundesrat, opposes this interim arrangement on account of the fact that 99.4% of households have some form of reception device. The Ständerat and Bundesrat agree that the notion of a simple system that does not require expensive control mechanisms is incompatible with the granting of individual exemptions.

The Ständerat also removed a provision that had been added to the draft Act by the Nationalrat, under which 36% of the revenue from the charge would have been used to fund radio and 64% to finance television. It thought that such a requirement could prove to be a hindrance in a dynamic media landscape.

On account of the amendments proposed by the Ständerat, the matter has now been referred back to the Nationalrat.

• *Medienberichte zur Billigung der Einführung einer allgemeinen Rundfunkgebührenpflicht durch den Schweizer Ständerat* (Media reports on the approval of the introduction of a universal broadcasting charge by the Swiss Ständerat)

<http://merlin.obs.coe.int/redirect.php?id=17169>

DE

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Swiss Government Wants To Modernise Copyright

The Federal Council (Switzerland's Government) is to adapt the country's legislation on copyright in keeping with the new demands placed on it by the Internet. It intends to adopt measures affecting Internet access providers (IAPs) as well as performers and consumers. The aim of the revised legislation is to strengthen the position of performers without affecting consumers' rights. On 6 June 2014, the Federal Council therefore invited the Federal Department of Justice and Police to draw up draft legislation by the end of 2015, to be submitted to the parties concerned for consultation. The draft could take up the recommendations made by the working party on copyright (AGUR12), and should also take into account the conclusions of an interdepartmental working party set up to look into the civil liability of platform operators and IAPs.

The AGUR12 working party has been instructed by the Federal Council to draw up recommendations for improving the collective management of copyright and neighbouring rights, and to adapt the legislation to the present state of the art. The members of the working party represent performers, producers, users, consumers, and the Federal Administration. AGUR12's mission included identifying involuntary restrictions

on use, and undesirable barriers to competition. It was also to draw up proposals aimed at improving the effectiveness of collective management and reducing its cost, while at the same time combating piracy and ensuring fair remuneration for the use of protected content; it published its final report on 6 December 2013.

AGUR12 believes that the IAPs should adopt measures to remove from their platforms any content which infringes copyright, and prevent it being made available again. In the event of serious violation, and at the request of the authorities, they should block access to unlawful content and sources. In exchange for these new obligations, aimed at stepping up the fight against piracy on the Internet, AGUR12 proposes waiving the liability of IAPs.

AGUR12 also recommends sending a message to consumers who seriously breach the ban on sharing protected content (by using a peer-to-peer network, for example) informing them of the possible consequences of their acts, and inviting them to alter their behaviour. If they persist, their identity is to be communicated to the rightsholders concerned, so that they can uphold their rights. The Federal Council is in favour of the principle behind this proposal, but would like to carry out an in-depth examination of the conditions and methods for implementing this approach.

While the sharing and uploading of protected works will still be illegal, downloading for private purposes will be authorised. Particular attention will be paid to data protection and the guarantee of legal redress (access to the courts). Lastly, the Federal Council does not wish to introduce general flat-rate remuneration covering all forms of use on the Internet, preferring rather the present approach, which combines more or less flat-rate collective remuneration and individual management.

• *Communiqué du Conseil fédéral suisse, « Le Conseil fédéral veut moderniser le droit d'auteur », 6 juin 2014* (Communiqué from Switzerland's Federal Council: 'The Federal Council wants to modernise copyright', 6 June 2014)

<http://merlin.obs.coe.int/redirect.php?id=17193>

DE FR IT

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DE-Germany

Federal Supreme Court confirms obligation to interpret comments in context

In a ruling of 27 May 2014 (case no. VI ZR 153/13), the Bundesgerichtshof (Federal Supreme Court - BGH)

decided once again that, when considering whether a comment should be classified as disparaging, the comment must always be interpreted in the context in which it was made. Comments must not be interpreted in isolation or out of context.

Even though the comment in the case at hand was published in a newspaper, the ruling is also relevant to the interpretation of comments made on television or in other audiovisual media.

The plaintiff, who edits a German daily newspaper, was interviewed by the authors of the book "Die vierte Gewalt", who wanted to include the interview in their book. However, the plaintiff later withdrew her consent for the interview to be published. After withdrawing her consent, however, she told the authors of the book that the interview had been "well transcribed". The defendant, who was the publisher of another German newspaper, published a story about this incident, giving the plaintiff's full name, describing the dispute over consent to publish the interview and outlining the positions of the plaintiff on the one hand and of the book's authors on the other. In the newspaper article, the plaintiff was also accused of behaving in a manner that had been condemned in a campaign run by her own newspaper, criticising the lunacy of the consent rule that applied to press interviews.

The BGH rejected the plaintiff's appeal against the decision of the Landgericht Berlin (Berlin District Court) of 26 February 2013 (case no. 27 S 13/12).

The BGH explained that the article in question did not infringe the plaintiff's personality rights. The defendant's comment complained about by the plaintiff, who had been accused in the article of praising the quality of the transcription before then refusing to authorise its publication, had no significance whatsoever in the context of the article as a whole, and therefore was not detrimental to the plaintiff's public reputation.

It also made no difference that, when taken in isolation, the disputed sentence gave the impression that the plaintiff had contradicted herself by initially praising an article before suddenly preventing its publication for no comprehensible reason, and that she was therefore unreliable and weak-minded - character traits that could be harmful to someone in her professional position.

Rather, the decisive factor was the perspective of the average reader, who, on reading about the opposing positions of the plaintiff and of the books' authors, would have considered the article to be an unbiased account of the dispute over consent to publish the interview. According to the BGH, the article then pointed out that the plaintiff's behaviour was inconsistent with a campaign run by her newspaper against the lunacy of the consent rule that applied to press interviews.

In the overall context of the article, this was the actual accusation against the plaintiff, which was merely de-

rived from the fact that, by refusing to authorise the publication of an interview she had given, she had herself had behaved in a manner that had been criticised by a campaign in her own newspaper.

• *Bundesgerichtshof, Urteil des VI. Zivilsenats vom 27.5.2014 - VI ZR 153/13 - (Federal Supreme Court, ruling of the 6th civil chamber, 27 May 2014 - VI ZR 153/13 -)*

<http://merlin.obs.coe.int/redirect.php?id=17171>

DE

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Saarland Constitutional Court rules that Education Minister's description of NPD Members as "Modern-Day Nazis" and "The Brown Mob" does not violate Constitution

In a ruling of 8 July 2014 (case no. Lv 5/14), the Verfassungsgerichtshof des Saarlandes (Saarland Constitutional Court - SVerfGH) decided that a Bundesland's education minister is allowed to describe supporters of a legitimate, extreme right-wing German political party as "the brown mob" and "modern Nazis" at a school anti-racism event.

Even though the remark in the case at hand was made at an event, the court's decision is also relevant to comments made by politicians about parties and their members on television or in other audiovisual media.

Saarland's education minister had attended an event at the main studio of Saarländischer Rundfunk (Saarland broadcasting corporation) in Saarbrücken on 21 May 2014. The event was held to mark the 10th anniversary of the "Schule ohne Rassismus - Schule mit Courage" ("Schools without racism, schools with courage") project, in which schoolchildren were encouraged to fight xenophobia. In his welcoming speech, the minister said, among other things, that the members of the National Democratic Party of Germany (NPD) were "modern-day Nazis" and "nothing other than the reincarnation of the former Nazis, who used to exclude and murder more people than just the Jews." He also stressed that society should "keep saying no if this mob brings its ideas out into the open again, if this brown mob climbs back up again." Both the event itself and the minister's speech were reported in the media.

The NPD claimed that the minister's speech, given during the European and local election campaign, had violated both the principle of equal opportunities for political parties in elections, enshrined in Article 21(1)(1) of the Grundgesetz (Basic Law - GG) in conjunction with Article 63(1) of the Saarländische Verfassung (Saarland Constitution - SVerf), and the obligation of State neutrality enshrined in Articles 60(1)

and 61(1) SVerf. It argued that the minister had unlawfully interfered in the political debate and wilfully belittled the NPD by likening it to the National Socialists.

The education minister, meanwhile, claimed that it had been a one-off, project-related speech that he had given as part of his duties as the minister for education and culture. Moreover, the elections had already taken place.

The SVerfGH rejected the NPD's complaint against the Saarland education minister and accepted the minister's arguments. It explained that the subject-matter of the speech at the event in question had not been the NPD's quest to win votes, but the need for young people to promote tolerance in civil society. It was true that the use of the terms "mob", "brown mob" and "modern-day Nazis" had negative connotations and were disparaging of NPD members. However, by giving the speech, the minister had acted in accordance with his constitutional responsibilities and duties, which included the duty to promote the principle of non-discrimination enshrined in Article 21 of the European Union Charter of Fundamental Rights and Article 14 of the European Convention on Human Rights. Furthermore, the NPD itself did not engage in moderate, pertinent political debate with other parties and State bodies, but repeatedly made disparaging and disdainful statements about them. If party members behaved in this way, they could not expect State bodies to be restrained in the language they used to describe them.

In its decision, the SVerfGH also expressly referred to a recent ruling (case no. 2 BvE 4/13) of the Bundesverfassungsgericht (Federal Constitutional Court - BVerfG) of 10 June 2014. The BVerfG had considered that comments by the Federal President about the NPD as a legitimate political party were only unlawful if they went beyond the realms of a pertinent debate and could be described as offensive abuse. The Constitution was therefore not violated if the Federal President called NPD members "nutters", "ideologists" or "fanatics", since these were collective terms for people who did not understand history and who, ignoring the devastating consequences of National Socialism, held extreme right-wing, nationalistic and anti-democratic beliefs.

• *Entscheidung des Verfassungsgerichtshofes des Saarlandes*, Lv 5/14, 8.7.2014 (Decision of the Saarland Constitutional Court, Lv 5/14, 8 July 2014)

<http://merlin.obs.coe.int/redirect.php?id=17172>

DE

• *Entscheidung des Bundesverfassungsgerichts*, 2 BvE 4/13 vom 10. Juni 2014, Absatz-Nr. (1 - 33) (Decision of the Federal Constitutional Court, 2 BvE 4/13, 10 June 2014, para. 1 - 33)

<http://merlin.obs.coe.int/redirect.php?id=17173>

DE

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Lower Saxony Administrative Court of Appeal overturns immediate effect of dctp licence to broadcast on RTL Programme

In a decision taken on 11 July 2014 (case no. 10 ME 99/13), the Niedersächsische Oberverwaltungsgericht (Lower Saxony Administrative Court of Appeal - OVG) quashed an order that a licence granted to dctp to broadcast a third-party window as part of the RTL programme should take immediate effect.

On account of its high viewing figures, RTL is obliged to make airtime available to independent third parties in the form of a window programme. For a five-year period beginning in July 2013, the Niedersächsische Landesmedienanstalt (Lower Saxony media authority - NLM) therefore invited tenders for a total of 105 minutes of airtime per week. As well as dctp, which is already a licensed window programme provider - and whose window programme covers, among others, Spiegel-TV and parts of stern-TV- and Focus TV, which wants to broadcast its own programme and other productions, submitted a bid to the NLM. In June 2013, the NLM assembly chose dctp and the NLM director implemented the assembly's decision by granting the licence to dctp. At the same time, he ordered that dctp's licence should take immediate effect. Focus TV appealed to the Verwaltungsgericht Hannover (Hanover Administrative Court - VG Hannover) against the NLM's decision to grant the licence and applied for interim measures to lift the order that the licence should take immediate effect.

The VG Hannover rejected Focus TV's urgent application on 27 November 2013 (case no. 7 B 5663/13). However, overturning the VG's decision following a further appeal by Focus TV, the OVG quashed the order that dctp's licence should take immediate effect.

The OVG explained that the order giving the licence immediate effect should have been issued by the NLM's assembly, which had chosen and licensed the third-party window provider, rather than by its director. The OVG also queried the assembly's decision that the licence should take immediate effect, taken in February 2014, since it was not sufficiently clear whether the decision had been taken independently and in an open, unbiased way. The assembly should therefore take a new decision on whether the dctp licence should take immediate effect. Until such a decision was reached, RTL was not obliged to broadcast the dctp window programme.

The OVG's decision cannot be appealed.

• *Beschluss des Niedersächsischen Oberverwaltungsgerichts, Az. 10 ME 99/13, 11. Juli 2014* (Decision of the Lower Saxony Administrative Court of Appeal, case no. 10 ME 99/13, 11 July 2014)
<http://merlin.obs.coe.int/redirect.php?id=17174>

DE

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Hanover Administrative Court rules that 2011 Episode of “Die Super Nanny” breached human dignity

In a decision of 8 July 2014 that is yet to be published in full (case no. 7 A 4679/12), the Verwaltungsgericht Hannover (Hanover Administrative Court - VG) ruled that an episode of the RTL television series “Die Super Nanny” broadcast in 2011 breached human dignity.

Both the programme itself and trailers for the series repeatedly showed several scenes of brutality in which a single mother shouted at, threatened and hit her children a number of times. In the programme, the “Super Nanny” persuaded the mother to stop treating her children with such extreme violence and to attend a suitable course of therapy.

After receiving numerous complaints from viewers, the Kommission für Jugendmedienschutz (Youth Protection Commission - KJM) decided that the transmission of the programme had breached human dignity and complained to the Niedersächsische Landesmedienanstalt (Lower Saxony media authority - NLM), which is responsible for RTL television programmes. On the basis of the KJM’s decision, the NLM in turn decided to lodge an official complaint.

The broadcaster RTL appealed to the VG against this decision and argued that the KJM’s decision, on which the NLM’s decision had been based, was ill-founded. RTL also claimed that the previous decision of the Freiwillige Selbstkontrolle Fernsehen e.V. (voluntary self-regulatory body for television - FSF), which had deemed the broadcast of the programme after 8 p.m. acceptable, meant that, from a legal point of view, an official complaint could not be made.

The VG dismissed RTL’s appeal against the NLM’s decision to lodge a complaint. It considered the programme a violation of the children’s human dignity under Article 1(1) of the Grundgesetz (Basic Law - GG), which could not be justified “by the programme’s obvious educational objective of changing the family’s situation for the better”. If Article 20(3)(1) of the Staatsvertrag über den Schutz der Menschenwürde und den Jugendschutz in Rundfunk und Telemedien (Inter-State Agreement on the Protection of Human Dignity and Minors in Broadcasting and Telemedia - JMStV) was interpreted in accordance with the Constitution, it was clear that the FSF’s decision did not

prevent a complaint being lodged if human dignity had been breached. The KJM’s decision to complain about the programme was sufficiently well-founded, since the minutes of the relevant KJM meeting showed that it had been taken unanimously following a detailed discussion and a full assessment of the FSF’s decision. According to the VG, in such circumstances, if there was unanimity, it was sufficient for the KJM members to adopt a draft decision at their meeting.

On account of the fundamental importance of this case, the VG decided that an appeal could be lodged with the Niedersächsische Oberverwaltungsgericht (Lower Saxony Administrative Court of Appeal - OVG).

• *Pressemitteilung des VG Hannover vom 8. Juli 2014* (Hanover Administrative Court press release, 8 July 2014)
<http://merlin.obs.coe.int/redirect.php?id=17175>

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FR-France

Competition Authority Suspends Agreement Allocating Exclusive Broadcasting Rights For French Rugby Championship Matches to Canal Plus

By a decision on 30 July 2014, the Competition Authority suspended the agreement between the national rugby league (*Ligue Nationale de Rugby* – LNR) and Groupe Canal Plus, which allocated exclusive broadcasting rights to the group for the matches in the French first division rugby championship (‘Top 14’) for five seasons, from 2014 to 2018. In December 2013, at the end of fruitless private negotiations with Canal Plus on upgrading television rights for the Top 14, the LNR decided on the early termination of the contract between it and Canal Plus, and announced the start of a tendering procedure for the broadcasting rights for the four seasons thereafter (2014/2015 to 2017/2018). Canal Plus reacted by referring the matter to the regional court in Paris under the urgent procedure, calling for the tendering procedure to be cancelled. Without waiting for the court’s decision, the LNR then interrupted the tendering procedure and on 14 January 2014, after private negotiations, attributed to Canal Plus total exclusivity for five seasons (2014 to 2019). The channel beIN Sports, Canal Plus’ main competitor for broadcasting sports events, contested the conditions under which the rights had been attributed and submitted a complaint to the Competition Authority, together with an application for interim protective measures (on the basis of Article L. 464-1 of the French Code of Commerce). On completing

its investigation, the Authority noted that broadcasting the Top 14 attracted large numbers of subscribers to the pay-TV channels. The broadcasting rights for the competition could therefore be qualified as premium rights, meaning that marketing could be for a limited period only, and subject to transparent, non-discriminatory conditions, in accordance with case-law. The fact that the LNR and Groupe Canal Plus had successively engaged in private negotiations in the autumn of 2013 to extend Groupe Canal Plus' exclusivity, abandoned the tendering procedure without waiting for offers to be submitted, and resumed exclusive negotiations in January 2014 in order to conclude an agreement granting Groupe Canal Plus the entire rights for the Top 14 for a lengthy period (five years), were characteristic of counter-competition activity. Canal Plus' competitors, which include the applicant party beIN Sports, had not been allowed to take part in the attribution of the rights to broadcast the rugby championship and will not be able to obtain any of the rights for the next five years. The Authority found that this constituted a serious and immediate infringement of the interests of both the pay-TV sector and consumers, as the effect of allocating all the rights regarding the Top 14 to Groupe Canal Plus for five years would be to reserve the matches in the competition for those viewers capable of paying a monthly subscription of about EUR 40 and to bar even partial access for broadcasts to those consumers interested in a mid-range subscription at about EUR 12 per month, as offered by beIN Sports. The Qatari channel is deemed "the only newcomer likely to give rise to competition for pay-TV sports broadcasting". The audiovisual regulatory authority (*Conseil Supérieur de l'Audiovisuel* – CSA) was consulted on the justification for the provisions of Article R. 463-9 of the Code of Commerce, and on 23 May 2014 delivered an opinion in which it considered that the private negotiations between the LNR and Groupe Canal Plus had enabled the latter, without actually being exposed to competitive pressure from the beIN sports channels, to acquire all the rights for broadcasting the Top 14. According to the CSA, this could be equivalent to de facto pre-emption, giving Groupe Canal Plus the benefit of total exclusivity for particularly attractive rights for a period of eight years. The Competition Authority therefore decided to suspend enforcement of the agreement between Canal Plus and the national rugby league. So as not to disturb the championship, which will be starting shortly, the suspension will not take effect until after the 2014/2015 season has been broadcast. A new tendering procedure for allocating the rights for the following seasons, under transparent, non-discriminatory conditions, and for a length of time that is not inordinately long, will have to be organised by 31 January 2015 at the latest. The Authority also called on Groupe Canal Plus to stop all communication activities, whether external or directed at its subscribers, mentioning exclusive attribution for the next five seasons of the rights for the Top 14, through to the 2018/2019 season.

• *Autorité de la concurrence, décision n°14-MC-01 du 30 juillet 2014 relative à la demande de mesures conservatoires présentée par la société beIN Sports France dans le secteur de la télévision payante* (Competition Authority, Decision no. 14-MC-01 of 30 July 2014 on the application for interim protective measures submitted by the company beIN Sports France in the pay-TV sector)

<http://merlin.obs.coe.int/redirect.php?id=17182>

FR

Amélie Blocman
Légipresse

CSA Refuses Authorisation For Three Digital TV Channels To Move From Pay-TV to Freeview

On 29 July 2014, at the end of a thorough investigation, the audiovisual regulatory authority (*Conseil Supérieur de l'Audiovisuel* – CSA) found that the conditions for authorising the move from digital pay-TV to freeview requested by three channels (LCI – Groupe TF1, Paris Première – Groupe M6) and Planète Plus (Groupe Canal Plus) were not met. The channels are suffering a serious drop in income, which is generated mainly by the fees received from distributors offering the channels to their subscribers (CanalSat, Numericable, etc).

The Act of 15 November 2013 amended Article 42-3 of the Act of 30 September 1986, and instituted the possibility for the CSA to authorise a move from pay-TV to freeview (or vice versa). Any change in a channel's method of financing requires the CSA's approval, and this is conditional on respect for diversity, observation of the equilibria of the advertising market, and promotion of the quality and diversity of programmes. The CSA therefore considered the consequences of the applications, taken individually and as a whole, with regard to their effect in terms of both competition and editorial content, carrying out an impact study, covering the economic aspects in particular, holding a public hearing of the applicants, and hearing all the third parties who wished to be heard. It also obtained the opinion of the Competition Authority. The CSA referred firstly to the prevailing situation of the advertising market, which features a substantial drop in the television services' income from advertising. It considered that the arrival of one or more additional freeview channels could not currently be borne by market growth. The CSA also took account of the financial situation of the existing digital freeview channels, which it found to be fragile. Lastly, in terms of the offer and demand for television consumption, it found that the arrival of one or more additional freeview channels, with 25 channels already present, would result in audience transfer phenomena likely to be detrimental to the existing freeview channels. What is more, it also found that allowing the applications might have an adverse effect on the editorial diversity of the channels currently broadcasting on freeview digital TV. Thus, regarding the application for LCI, the CSA noted that the

arrival of a third freeview continuous news channel financed exclusively by advertising might destabilise the two news channels already in existence (I>Télé and BFM TV), one of which had recently reached a point of equilibrium, while the other was currently operating at a loss. Regarding the application for Paris Première, the CSA felt that this might affect the economic and financial viability of freeview digital channels in similar formats which were directed at similar audiences. Regarding Planète +, the CSA felt it was too soon to authorise a second documentary channel, since RMC Découverte, which began broadcasting in 2012, had not yet reached a financial equilibrium. While the CSA felt that the conditions for authorising the move of the three channels to freeview broadcasting were not met at present, it indicated that favourable developments in market conditions might justify re-examination of the applications at some time in the future.

TF1, which presented the LCI's move to freeview as a matter of survival in its application to the CSA, has reacted to the CSA's decision by announcing that the channel will shut down at the end of the year.

• *Conseil supérieur de l'audiovisuel, Décision n°2014 - 357 du 29 juillet 2014 relative à la demande d'agrément de la modification des modalités de financement du service de télévision hertzienne terrestre La Chaîne Info (LCI)* (CSA Decision no. 2014-357 du 29 July 2014 on the application for approval of a change in the method of financing the terrestrially broadcast television service La Chaîne Info (LCI))

<http://merlin.obs.coe.int/redirect.php?id=17179>

FR

• *Conseil supérieur de l'audiovisuel, Décision n°2014 - 358 du 29 juillet 2014 relative à la demande d'agrément de la modification des modalités de financement du service de télévision hertzienne terrestre Paris Première* (CSA Decision no. 2014-358 du 29 July 2014 on the application for approval of a change in the method of financing the terrestrially broadcast television service Paris Première)

<http://merlin.obs.coe.int/redirect.php?id=17180>

FR

• *Conseil supérieur de l'audiovisuel, Décision n°2014-359 du 29 juillet 2014 relative à la demande d'agrément de la modification des modalités de financement du service de télévision hertzienne terrestre Planète +* (CSA-Decision no. 2014-359 du 29 July 2014 on the application for approval of a change in the method of financing the terrestrially broadcast television service Planète +)

<http://merlin.obs.coe.int/redirect.php?id=17181>

FR

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GB-United Kingdom

Ofcom takes steps to ensure BT provides level playing field for its rivals in the provision of superfast broadband

On 19 June 2014, Ofcom proposed new measures in order to ensure that the major UK telephone and

broadband provider, BT, takes steps to promote competition in the increasing market for superfast broadband amongst retail customers.

BT controls and maintains a significant part of the broadband infrastructure or network within the United Kingdom, and as such effectively influences the prices it charges to third party rivals, such as Virgin, to use its infrastructure- this use of BT's network by other providers is known as 'virtual unbundled local access' (VULA). BT can offer very competitive pricing for its own customers by pricing end-service prices close to the wholesale price of offering the service; in other words BT can work in theory on the narrowest of margins to offer cheap rates to its customers, and thus undercut rivals who rely on the BT network to provide broadband supply.

As such, to avoid BT having an unfair advantage in the market place and also to ensure both profitability and competition for broadband providers, Ofcom's recent proposals include BT maintaining a sufficient margin between its wholesale price and retail superfast broadband charges so as to enable parity for all broadband providers.

Ofcom proposes the introduction of a regulatory condition on BT to ensure that the margin between its wholesale VULA charges and its retail superfast broadband prices are set at a level that rival operators can compete with and make a profit from.

BT has established a sports channel, BT Sport, which is free to its superfast broadband customers, whereas for example Sky Sports charge a subscription. Effectively, BT are subsidising BT Sport or running it as a loss leader to win new broadband customers. The new proposed rules would mean that the costs and revenues of running BT Sport would need to be included when calculating the margin that BT has to maintain between wholesale cost and retail charges.

It should be noted that these Ofcom proposals are separate from their recent provisional decision, dated 19 June 2014, in which it rejected a complaint brought by broadband provider Talk Talk that BT were in breach of the Competition Act 1998, as well as Article 102 of the Treaty on the Functioning of the European Union by failing to maintain a sufficient margin between its VULA wholesale and superfast broadband retail prices. Ofcom investigated the complaint pursuant to section 25 of the Competition Act 1998 to see if BT had abused its dominant position under the UK and or EU competition law.

The provisional investigation indicates that on this occasion there was no abuse of a dominant position by BT to cause an abusive squeeze on margins so as to make providing services unprofitable for other broadband providers unless prices to retail customers were increased by non-BT providers with the consequence that they became uncompetitive as compared to BT.

• Ofcom announcement, 19 June 2014

<http://merlin.obs.coe.int/redirect.php?id=17160>

EN

• Complaint by Talk Talk Telecom Group Plc
<http://merlin.obs.coe.int/redirect.php?id=17161>

EN

Julian Wilkins
Blue Pencil Set

Ofcom determines when factual TV becomes promotional and gives undue prominence to a business's service

In its decision of 28 July 2014, Ofcom, considered that ATN Bangla's programme 'Business Talk with Sufi' had breached the Code of Conduct by using a factual current affairs programme for promotional purposes, as well giving undue prominence to the services of a restaurant being depicted in the programme without editorial justification for such detail.

Pursuant to the Communications Act 2003, Ofcom has a statutory duty to set the standards for broadcast content for radio and TV, and this includes ensuring compliance with the Audiovisual Media Services (AVMS) Directive which sets out the EU standards for advertising on TV and radio services. The AVMS Directive is reflected in Section Nine of Ofcom's Broadcasting Code.

Ofcom's guidance on Rule 9.4 of the Broadcasting Code states: "In general, products or services should not be referred to using favourable or superlative language and prices and availability should not be discussed"

Guidance on Rule 9.5 of the Code states: "Whether a product, service or trade mark appears in a programme for solely editorial reasons...or as a result of a commercial arrangement between the broadcaster or producer and a third-party funder⁰⁴⁰⁴⁶there must be editorial justification for its inclusion. The level of prominence given to a product, service or trade mark will be judged against the editorial context in which the reference appears."

ATN Bangla, owned by ATN Bangla UK Limited, is a news and general entertainment channel serving the British Bangladeshi Audience. Its programme, 'Business Talk with Sufi' depicts successful Bangladeshi businesses in the UK and the 8th April 2014 broadcast concentrated on a London restaurant called Riverside Lounge.

The owners of the Riverside Lounge made various comments during the broadcast about the restaurant including: "The charge is £13.99. You can eat as much as you want without drink. You need to purchase drink as a separate item. But we give 25% discount, so it is £10.50 and we also give discount in drink..."

Another comment made by the owners was: "Please come between Monday-Thursday and we will give you 25% discount. It will be on all items."

There was a phone in-section during the broadcast and most of the callers gave praiseworthy references about the restaurant. Two of the callers were another director of the Riverside Lounge and a representative of ATN.

The presenter, Sufi, did try to encourage critical comment and there was some criticism of the car-parking facilities and the cost of drinks.

The restaurant owners did use some of the airtime to speak about the difficulty of setting up a restaurant and the reality of not making money in the first year, including the need to have good cash provision.

However, Ofcom considered that the predominant feature of the programme was that in respect of Rule 9.4 of the Ofcom rules, the broadcaster had breached the rules as most of the content was promotional, highlighting the services and prices of the restaurant, as opposed to an objective analysis of setting-up and running a successful business.

Ofcom further decided that ATN Bangla had also breached Rule 9.5 by allowing too much prominence to the services of the restaurant without editorial justification. The editorial justification had to be looked at in the overall context in which the references to services are made. Whilst Ofcom recognised that the programme was focusing on successful businesses, and that some reference had to be made as to what the business did and how it did it, the overall content of this particular programme was biased towards promoting or advertising the services and the quality of the restaurant for instance - "You can eat as much as you want. Many families come and they really enjoy it. We have Mr Naga within the sauces. Four, five tins of Mr Nagas finish in a day."

Ofcom also took account of the fact that there had been previous breaches of Rules 9.4 and 9.5 by ATN Bangla and sought a meeting with the channel to discuss compliance procedures.

• Ofcom broadcast bulletin, "Business Talk with Sufi", Issue 259, 28 July 2014, p.26
<http://merlin.obs.coe.int/redirect.php?id=17162>

EN

Julian Wilkins
Blue Pencil Set

Self-regulatory body issues reprimand for "Dungeon Keeper" freemium game ad

On 2 July 2014, the British advertising industry's self-regulatory body, the Advertising Standards Authority (ASA), reprimanded the electronic game manufacturer Electronic Arts (EA) for an advertisement for its "Dungeon Keeper" game.

The “Dungeon Keeper” game is a so-called Freemium game, i.e. the game is, in principle, free, but players can acquire equipment, credits and so on, via in-app purchases in order to progress further in the game.

The ASA acknowledged that, in principle, it was possible to complete the game without spending money. However, it would take much longer and limit gameplay to such an extent that players were likely to repeatedly find themselves in a situation where they felt compelled to make in-app purchases. EA had previously explained that there was no need for players to spend money and that “Dungeon Keeper” was similar to many other Freemium games. However, the ASA disagreed and ruled that the e-mail advertising campaign in which EA had called the game “free” should be considered misleading.

According to the ASA’s decision, EA may no longer advertise the game in this way and, in future, must tell customers that playing it without in-app purchases can limit gameplay as mentioned above.

• ASA adjudication, 2 July 2014
<http://merlin.obs.coe.int/redirect.php?id=17176>

EN

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HU-Hungary

The new tax on the media and advertising sector

In summer 2014, the legislator in Hungary introduced a special tax. This special tax could significantly reshape the entire domestic media market. The advertising tax law, which entered into effect in mid-July, imposes a new levy on income from advertising. The range of subjects, who must pay this tax, is rather broadly defined. The new special tax has elicited protest by all market players. In addition to electronic, print and online press products, it also extends tax liability on outdoor and internet advertising. Pursuant to the legislative intent, the tax needs to be paid not only by companies that are established in Hungary, but also by other corporations that provide services in Hungarian language, but pay their taxes abroad. The applicable rate of the special tax rises progressively. Below an advertising income of 0.5 billion HUF (circa 1.6 million Euros), the prevailing rate is 0%. Then it rises to 1% for income over 0.5 billion, but less than 5 billion. Above 5 billion, the rate is 10% and increases by another 10% for each additional 5 billion, up to a maximum rate of 40%, which kicks in at an advertising income of 20 billion or more.

In the third week after the adoption of the law the original provisions were amended to expand the range of entities that are potentially liable to pay the tax. This expansion was instituted to block potential avenues of tax avoidance. If the entity that disseminates the advertisement fails to pay the tax on his/her advertising revenue, then the tax owed must be paid by the person who ordered the advertisement. In that scenario the tax rate is a flat of 20%, which must only be paid for advertising expenditures in excess of 2.5 million HUF (circa 8 000 EUR) a month. This amendment primarily aims at collecting tax payments on advertising placed on multinational internet surfaces, such as Facebook, or for ads on channels registered abroad, which display content in Hungarian language and whose services are focused on the Hungarian market (this applies to 75% of the Hungarian television market). For the time being, it is unclear, whether a practical implementation of this legislative provision is possible and what degree of administration it entails for the authorities involved.

There are significant doubts as to the rationality of the new special tax. For one, from a budgetary perspective the anticipated yield is rather modest. At the same time, the tax imposes vast administrative obligations on a wide range of commercial enterprises, while simultaneously expanding the range of tax liabilities, which will also lead to extra administrative costs, because the tax authority has to monitor the compliance with the law.

The uncertainties in the media market are exacerbated by the fact that it is unclear, whether internet-based multinational providers will pay the advertising tax, or whether effectively only Hungarian media companies will be subject to the tax, because it simply cannot be collected from foreign providers.

• 2014. évi XXII. törvénya reklámadóról (Advertising tax law)
<http://merlin.obs.coe.int/redirect.php?id=17143>

HU

• 2014. évi XXXIV. törvénya reklámadóról szóló 2014. évi XXII. törvény eltérő szöveggel való hatálybalépéséről és azzal összefüggő egyes adótörvények módosításáról (Amendments to the new advertising tax law)

<http://merlin.obs.coe.int/redirect.php?id=17144>

HU

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IE-Ireland

Complaint in relation to same-sex marriage broadcast upheld

At its meeting of June 2014, the Compliance Committee of the Broadcasting Authority of Ireland (BAI) upheld a complaint made on behalf of the Family and Media Association, a group which promotes Catholic

family values in the media. The complaint concerned an item discussing civil partnership in Ireland, broadcast on RTÉ Radio One's Mooney Show on 20 January 2014, during which the presenter invited views from his guests on a referendum to change the law and introduce same-sex marriage.

Under section 48 of the Broadcasting Act 2009, listeners can complain about broadcasting content which they believe is not in keeping with broadcasting codes and rules. The complainant claimed that the broadcast on civil partnership in Ireland breached the BAI Code of Fairness, Objectivity and Impartiality in News and Current Affairs (IRIS 2013-5/32). It was claimed that in the course of the discussion the presenter and guests made several statements implicitly and explicitly supporting same-sex marriage and no voices were heard opposing same-sex marriage. It was also claimed that the programme presenter openly expressed his own views by stating 'I hope you do get gay marriage 04046 I hope it does come in'.

The broadcaster advised that the discussion was prompted by the release of figures for the number of civil partnerships which had taken place in Ireland since the first ceremonies in 2011. As part of the broadcast, RTÉ Radio invited two guests to discuss and explore their experience of civil partnership. Mr. Murphy told his story as one of the first persons in the country to enter into a civil partnership and Mr. Brady of the Gay and Lesbian Equality Network was invited to give a wider perspective of the gay community.

In upholding the complaint the Compliance Committee noted that aspects of the programme were factual and of a human interest nature, particularly in respect to the personal experiences of Mr. Murphy and of the practical aspects of Civil Partnership. Nevertheless, the discussion of same-sex marriage constituted current affairs content on an issue that was of current public debate and controversy. This was so even though there was no referendum campaign underway to change the law to permit same-sex marriage.

As the same-sex marriage discussion constituted current affairs content the general requirements for fairness, objectivity and impartiality in current affairs were applicable. On reviewing the broadcast the Compliance Committee concluded that the programme guests and the presenter clearly favoured such a change in Irish law. In the absence of alternative views on this topic, a matter of current public debate and controversy, the role of the presenter was to provide alternative perspectives to those of his guests and that this requirement was not met on this occasion.

The decision of the Compliance Committee has been criticised by the National Union of Journalists (NUJ). The NUJ has written to the BAI expressing concern that the decision means that broadcasters are required to seek out alternative views or ensure that presenters can provide a counter-balance to the views of guests in a wide range of programme settings.

• Broadcasting Authority of Ireland, Broadcasting Complaints Decisions, August 2014
<http://merlin.obs.coe.int/redirect.php?id=17167>

EN

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Internet Content Advisory Group report published

On 24 June 2014 the Minister for Communications, Energy and Natural Resources published the report of the Internet Content Advisory Group. The Group, which consisted of experts in the fields of child safety and online behaviour, as well as legal, technical and industry experts, and a student representative, considered emerging issues in the area of online content and its general impact on the lives of children and young people (see IRIS 2014-4/22).

The Group were asked to consider a number of issues arising for society, and in particular for children and young people, from the dramatic growth in Internet use. The Minister sought recommendations from the Group on the existing national regulatory and legislative frameworks, and policy responses to issues of internet content governance, specifically in relation to online abuse and the accessing of potentially harmful content.

In order to inform the policy recommendations a public consultation was undertaken and 59 responses were received from citizens, industry, not for profit organisations and representative groups. The Group also met with a number of the major international companies based in Ireland who operate in this space, including Facebook, Google, Twitter and Three Ireland.

The Report makes a series of recommendations that the Group believe will bring about better coordination of existing governance measures and that will target guidance and support to where it is needed most. They also recommend the consolidation of national governmental capacity to manage both the opportunities and inevitable risks that arise from convergence around the global Internet.

A total of 30 specific recommendations are made by the Group, these include:

- revising the role of the Office for Internet Safety to deal exclusively with issues of law enforcement and illegal online content;
- charging the Department of Communications Energy and Natural Resources with coordinating Internet content policy at government level;
- assigning responsibility for the implementation of the provisions of the Audiovisual Media Services Di-

rective, in relation to on-demand media services, to the Broadcasting Authority of Ireland;

- establishing an inter-agency working group to identify appropriate mechanisms to ensure Internet safety and digital literacy skills are taught as a core element of the curriculum at both primary and post-primary levels;

- amending of the Communications Regulation (Amendment) Act 2007 to include 'electronic communications' within the definition of measures dealing with the 'sending of messages which are grossly offensive, indecent, obscene or menacing';

- encouraging Internet service providers and mobile network operators to include parental control products and services as part of their consumer offering; and

- a series of awareness-raising measures in order to highlight ways to prevent children from accessing age-inappropriate content.

Following publication of the Report the Minister announced the formation of an implementation group chaired by the Department of Communications, Energy and Natural Resources and comprising representatives of the Departments of Children and Youth Affairs, Education and Skills, Justice and Equality, and Health, who will agree on and oversee the implementation of the recommendations.

• Report of the Internet Content Governance Advisory Group, May 2014

<http://merlin.obs.coe.int/redirect.php?id=17163>

EN

• Department of Communications, Energy and Natural Resources, Press Release: Communications Minister announces new framework for the oversight of internet content, 24 June 2014

<http://merlin.obs.coe.int/redirect.php?id=17164>

EN

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Ireland launches 4G and Eircom TV

On 28 May 2014, the European Commission approved the EUR 780 million takeover of O2 Ireland, the second largest mobile operator in the country, by Three Ireland, the smallest and most recent operator. The deal brings Three Ireland's share of the market to 37%.

When the proposed acquisition was notified to the Commission in October 2013, the Commission considered that, without remedies, it would lead to higher prices and less competition. Hutchison (trading as Three Ireland) proposed a number of commitments to resolve the EC's competition concerns. The takeover, therefore, was made conditional on Three Ireland facilitating the entry of two new mobile virtual network operators (MVNOs) into the Irish market, with one of

them - but not both - to be given the option to become an equal player as a mobile network operator (MNO), the option to be available for 10 years starting from 1 January 2016. Another requirement for Three Ireland is that they dedicate up to 30 per cent of the merged company's network capacity to the new operators at fixed payments. The Commission says this 'model is more effective than the typical pay-as-you-go model that MVNOs currently use in Europe and under which they pay for network access according to the actual usage of their subscribers.' The Commission's investigation in this case also showed that 'the model is viable for the Irish telecoms market.' A further condition is that Three Ireland must offer improved terms to Eircom (Meteor) on network sharing to ensure it remains a competitive mobile network operator in Ireland. Eircom was the first to roll out 4G in September 2013 and hopes to increase coverage to 90 per cent of the population within three years. Vodafone launched its 4G data service in October 2013, followed by Three at the end of January 2014, putting the delay down to their acquisition of O2. Three is now expected to go ahead with a separate deal with UPC Ireland that will see the broadband operator launch a new mobile service on Three's network.

The Commission for Communications Regulation (ComReg), however, 'remains of the strong view that the behavioural commitments are insufficient to address the structural competition deficit identified as likely to result from the Proposed Acquisition. Nevertheless, ComReg welcomes the end to the uncertainty surrounding the acquisition and looks forward to the anticipated network investment.'

Another service area that has lacked competition in Ireland has been television service provision. Until recently the television network service area has been dominated by two main companies UPC and Sky. Eircom Ireland has injected some competition into the market, becoming the first service provider to bring quadplay to Ireland in October 2013. Quadplay is a service providing broadband, TV, phone, and mobile all in one.

In a further development, UTV Ireland Limited (UTV), which already owns several radio services operating in Ireland, has signed a ten-year television content provision contract with the Broadcasting Authority of Ireland (BAI), under section 71 of the Irish Broadcasting Act 2009. UTV has an agreement with ITV in the United Kingdom that will give UTV the exclusive broadcasting rights for ITV Studios programmes, including popular soaps, for the Republic of Ireland audience. UTV will commence broadcasting its new Irish service in January 2015.

• Press release of the European Commission, 'Mergers: Commission clears acquisition of Telefónica Ireland by Hutchison 3G, subject to conditions', 28 May 2014

<http://merlin.obs.coe.int/redirect.php?id=17159>

DE EN FR

• Commission for Communications Regulation (ComReg), Information Notice ComReg 14/53, 28 May 2014
<http://merlin.obs.coe.int/redirect.php?id=17187>

EN

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IT-Italy

AGCOM launches a public consultation on promotion of European works by on-demand audiovisual media service providers

On 6 May 2014 the Autorità per le garanzie nelle comunicazioni (Italian Communications Authority - AGCOM) launched, by Resolution no. 151/14/CONS, a public consultation on the obligations to promote European works applicable to non-linear (i.e., on-demand) audiovisual media service providers (VOD providers).

Article 4-bis of the Regulation approved by AGCOM Resolution no. 66/09/CONS, requires VOD providers to alternatively:

(i) ensure that their catalogue contains at least 20 per cent European works, calculated in terms of the total number of hours of programming made available each year in the same catalogue; or (ii) allocate an annual financial contribution to the production of, or purchase of rights to, European works for their catalogues, representing at least 5 per cent of the revenue specifically attributable to the public provision of on-demand audiovisual content within the same catalogues in the preceding year.

For VOD providers that own or control more than one catalogue, compliance with the two requirements is determined on the basis of all catalogues provided. VOD providers may implement the above requirements gradually, within four years of the regulation entering into force (i.e., May 5, 2011).

The draft amendment proposed by AGCOM and subject to public consultation aims at (a) clarifying that the content and investment quotas apply also to VOD providers who are exempted from the duty to apply for a general authorization, and (b) introducing the option (not the obligation) for the VOD providers to display European works with a certain prominence within the catalogue.

VOD providers will be free to decide whether to adopt measures aimed at giving prominence to European works. VOD providers who will implement such measures (to be set forth through co-regulatory procedures) will benefit from a 20% reduction of the relevant quotas (either content or investment quotas, depending on the choice of the provider, as said above).

The deadline for submission of the responses expired on 4 June 2014; targeted respondents include audiovisual media service providers, associations representing the industry and consumers' associations. AGCOM already held in June a hearing with the operators and is going to schedule another hearing in September, to discuss the possible measures suitable to give prominence to European works.

• *Delibera n. 151/14/CONS, Consultazione pubblica sullo schema di modifiche e integrazioni al regolamento in materia di obblighi di programmazione ed investimento a favore di opere europee e di opere di produttori indipendenti approvato con delibera n. 66/09/CONS* (Resolution no. 151/14/CONS Public consultation on the draft amendment to the regulation on programming and investment quotas of European works and works made by independent producers approved by Resolution no. 66/09/CONS)

<http://merlin.obs.coe.int/redirect.php?id=17165>

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• *Allegato A alla delibera n. 151/14/CONS: Schema di modifiche e integrazioni al Regolamento* (Annex A to Resolution no. 151/14/CONS: Draft amendment to the Regulation)

<http://merlin.obs.coe.int/redirect.php?id=17166>

IT

Ernesto Apa

Portolano Cavallo Studio Legale

ME-Montenegro

First Multiplex Operator licensed

The Montenegrin Public Enterprise Radio-difuznom centru (Broadcasting Centre - BC) has promoted the national operator of the first multiplex for digital terrestrial broadcasting ("operator"), which presents an important prerequisite for completion of the process of digitalisation in the country. On 19 June, the approval for the provision of on demand audiovisual media services was issued to the BC by the Agency for Electronic Media. These services include distribution of catalogues of radio and TV programmes to the end-users. The operator is required to provide coverage of 85% of the population by 17 December 2014.

In the first phase, the catalogue of the first multiplex will include two television and two radio programmes of the national public broadcaster "Radio Television of Montenegro", whose Broadcasting Centre is obliged to distribute the programmes at no charge, through free access. Other commercial television channels will be able to exercise their right of access to the first multiplex after the announcement of public tender in the second half of 2014.

With this prerequisite fulfilled, Montenegro is hoping to finish the process of digitalization by June 2015, as envisaged by the EU and the Montenegrin law on broadcasting.

The National Digital Switchover Strategy was adopted in 2008, but the process of digitalisation has been

postponed several times due to the lack of financial and institutional capacities. The procurement of digital TV broadcasting equipment in Montenegro has been funded by the Delegation of the European Union in 2011, but the equipment was not operational until late 2013, due to complaints and a lawsuit alleging misconduct by the EU Delegation during the tender procedure. The complaints were solved in favour of the EU Delegation, but have caused significant delay in project implementation.

- 1. RDC Odobrenje za AVM usluge br. O-AVMD-10 (Approval for the provision of audiovisual media services)

<http://merlin.obs.coe.int/redirect.php?id=17591>

SR

- Press release of the EU delegation in Montenegro, "Support to the digitalization of the Montenegrin public broadcasting - supply of equipment", 28 March 2014

<http://merlin.obs.coe.int/redirect.php?id=17146>

EN

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New addenda to the Law on audio and audiovisual media services

In July 2014, the national Parliament adopted in an urgent and shortened procedure addenda to the Law on Audio and Audio-Visual Media Services (Закон за аудио и аудио - визуелни медиумски услуги). The new amendments decrease the number of representatives of the Association of Journalists of Macedonia (AJM) in the Programme Council of the Public Broadcasting Service (Macedonian Radio and Television - MRT) from two to one. One seat in the MRT Programme Council - as envisaged in the amendments - should belong to the recently established second biggest professional association of journalists - Macedonian Association of Journalists (MAJ), which is regarded as pro-government.

AJM's main remark is that the Government had proposed the addenda to the Parliament without prior public consultations with the journalists and the media community in the country.

The latest changes to the law also envisage exemptions of the social cases from paying broadcasting fee, which - according to the expectations of the Government - would decrease the financial pressure on about 34,000 families. The Minister for Information Society and Administration explained the necessity of reforming the broadcasting fee collection system as follows: "The costs (for collection of broadcasting fees), which the Public Revenue Office has, are bigger than the collected amount in the budget. That is why we made a political decision to exempt these citizens from the obligation to pay the broadcasting fee for a lifetime

and continue to work on establishing a Public Broadcasting Service according to the model of the other Balkan countries." (the Minister was quoted in a press release, that was issued by the ruling political party VMRO DPMNE).

The civil society organization Media Development Centre (MDC) criticized the non-transparent and hasty procedure of amending the law without participation of the broad professional public. MDC expressed its concerns especially in regard to the lowered collection of the broadcasting fee, which could affect the reform of MRT into a professional public broadcaster (comparable with the private broadcasters). In its Progress Report for 2013, the EU Commission also noted the need for further democratisation of MRT. According to the opinion of the EU Commission in the Progress Report, "the public service broadcaster has improved its offer in terms of content, but providing pluralistic and balanced news coverage is not yet embedded in its policies and practices, as seen in the lack of balanced coverage during the 2013 municipal election campaign".

- Закон за изменување и дополнување на Законот за аудио и аудиовизуелни медиумски услуги од 7 јули 2014 (Amendments to the Law on Audio and Audio-Visual Media Services, 7 July 2014)

<http://merlin.obs.coe.int/redirect.php?id=17186>

MK

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Dutch public service broadcaster sanctioned for violating cookie-rules

The Autoriteit Consument en Markt (ACM), the Dutch authority for consumers and the market, decided on 15 July 2014 that the Dutch Broadcasting Organisation NPO (Nederlandse Publieke Omroep) has violated the cookie-rules of Article 11.7a of the Telecommunicatiewet (Dutch Telecom Act). The enforcement of the cookie-rules is of special interest for governmental websites such as the NPO, considering their role model function in complying with the law.

The NPO uses, amongst others, analytical cookies and tracking cookies on their websites in order to comply with the Mediawet (Dutch Media Act). Since September 2012, the ACM had been in contact with the NPO for violating the cookie-rules of Article 11.7a of the Dutch Telecom Act. According to this cookie-provision there is a duty to inform users clearly and completely about the purpose of placing cookies on their devices. After being informed, the user must give permission for the placing of the cookies on their devices.

The ACM cooperated with the College Bescherming Persoonsgegevens (CBP), the Dutch Data Protection Authority, in interpreting the provisions of the cookie-rules. The websites of NPO first contained a cookie-wall, whereby users can only enter the website after agreeing with the terms of the cookie-wall. The CBP held that the use of a cookie-wall by a publicly-funded website of the NPO deprives users from making a free choice in entering the website, considering the lack of equal or alternative websites.

As a result of the conversations between the ACM and the NPO on complying with the cookie-rules, the NPO made adjustments to the use of cookies on their websites by replacing the cookie-wall with a cookiebanner. A cookiebanner provides users with information about the use of cookies, and at the same time provides access to the website of the NPO. The ACM, however, found that the websites of the NPO were still not in accordance with the provisions of the Dutch Telecom Act due to the fact that permission of the users is implied as they enter the website without the users having to give explicit permission.

The ACM held that the NPO was in violation of the cookie provisions of Article 11.7a of the Dutch Telecom Act by not sufficiently informing the users of their websites and by not asking explicit permission for placing cookies on users devices. According to the ACM, several websites such as www.uitzendinggemist.nl and www.npo.nl lack information on what personal data can be collected and the purposes for collecting personal data. Due to the inadequate informing of the users of NPO's websites, the users are unaware of what they are giving permission for.

The user's permission must be given freely and must be specific and informed according to the Dutch Telecom Act. The permission must be given explicitly as an opt-in from an action such as clicking on the website. No permission can be obtained by the NPO from a user through simply surfing on the website, therefore the cookiebanner system used by the NPO was found not to be in conformity with an active act of giving permission. The ACM has imposed an order for periodic penalty payments on the NPO (EUR 20,000 per week).

• *Besluit van de Autoriteit Consument en Markt op grond van artikel 15.2, tweede lid, van de Telecommunicatiewet in samenhang gelezen met artikel 5:32, eerste lid, van de Algemene wet bestuursrecht tot het opleggen van een last onder dwangsom aan de Stichting Nederlandse Publieke Omroep wegens overtreding van de verplichtingen opgenomen in artikel 11.7a van de Telecommunicatiewet. uitspraak van 15 juli 2014* (Decision of the Dutch authority for consumers and the market based on Article 15.2 (2) of the Dutch Telecom Act in conjunction with Article 5:32 (1) General Administrative Law Act on imposing an order for periodic penalty payments for violating Article 11.7a of the Dutch Telecom Act, decision of 15 July 2014)

<http://merlin.obs.coe.int/redirect.php?id=17188>

NL

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RU-Russian Federation

Advertising law changes to affect pay TV

On 21 July 2014 President Putin of the Russian Federation signed into law several federal statutes that amend certain important regulations of TV advertising.

The Federal Statute "On amendments to Article 14 of the Federal Statute On Advertising" was passed by the State Duma on 4 July 2014. It prohibits commercials on encoded and/or pay television channels if these channels do not hold a terrestrial broadcasting licence or are not on the list of must-carry programmes (see IRIS 2013-6/31). The ban enters into force on 1 January 2015. The justification of the amendments was the need to stop unfair competition on the market, where the pay channels supposedly benefit from mixed funding schemes (subscription fees and commercials) while the open access channels do not have such a privilege.

The OSCE Representative on Freedom of the Media Dunja Mijatović expressed her concern about the new legislation, which "could lead to cutting off private small- and medium-scale channels from their principal source of revenue which is advertising". Mijatović also noted that amendments would negatively affect media plurality with the coming digital switchover, when hundreds of regional broadcasters will lose their terrestrial licences and, under the amendment, there will be no economic rationale to broadcast in cable systems or even online.

The Federal Statute "On amendments to the Federal Statute "On Advertising" was also passed by the State Duma on 4 July 2014. It abolished provisions, such as para 3.1-3.3 of the same Article 14. Introduced in 2009, these norms then banned large advertising sales houses that control 35 percent or more of the television advertising on Russia's nationally broadcast TV stations. As of 1 January 2015 no specific media ownership provisions shall exist in the TV market, although general competition rules remain intact.

Finally, the Federal Statute "On amendments to Article 21 of the Federal Statute "On Advertising", which was also passed on 4 July 2014, made an exception in the current general ban on advertising of alcohol on TV. Advertising of beer and beer products on TV was made part of the ban from 23 July 2012. As of 22 July 2014 the law allows for advertising beer and beer products to be placed during broadcasts (live or recorded) of sports events, as well as at any time on sports channels.

• О внесении изменений в статью 14 Федерального закона "О рекламе" (Federal Statute of 21 July 2014 N 270-FZ "On amendments to Article 14 of the Federal Statute On Advertising, Rossiyskaya gazeta official daily, N 6438, 23 July 2014)

<http://merlin.obs.coe.int/redirect.php?id=17134>

RU

• О внесении изменений в Федеральный закон "О рекламе" (Federal Statute of 21 July 2014 N 264-FZ "On amendments to the Federal Statute "On Advertising", Rossiyskaya gazeta official daily, N 6438, 23 July 2014)

<http://merlin.obs.coe.int/redirect.php?id=17135>

RU

• О внесении изменений в статью 21 Федерального закона "О рекламе" (Federal Statute of 21 July 2014 N 270-FZ "On amendments to Article 21 of the Federal Statute "On Advertising", Rossiyskaya gazeta official daily, N 6435, 23 July 2014)

<http://merlin.obs.coe.int/redirect.php?id=17136>

RU

• Law amendments on advertising in Russia further endanger media pluralism and free flow of information, says OSCE representative, press release of 7 July 2014

<http://merlin.obs.coe.int/redirect.php?id=17137>

EN

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Personal data to be stored in Russia only

On 21 July 2014 President Putin of the Russian Federation signed into law a federal statute that amends in particular the Federal Statute "On Personal Data" (see IRIS 2006-10/29).

The focus of the changes lies in the demand that all service providers of the Internet are responsible to collect, process, and store personal data of the citizens of the Russian Federation in databases which are located on the territory of Russia. This rule which apparently would first and foremost affect foreign social networks, mail services, and services to book hotel rooms and plane tickets, has a few exceptions, such as when such processing is performed in accordance with international treaties, in the interests of the judiciary or governmental bodies of the Russian Federation, or for journalistic purposes.

The statute requires that Roskomnadzor, the governmental agency for the media and communications (see IRIS 2012-8/36), monitors if the location of processing personal data of the Russians falls under national jurisdiction. A violation of this rule becomes yet another instance when Roskomnadzor shall block access to online resources.

The amendments enter into force on 1 September 2016.

• О внесении изменений в отдельные законодательные акты Российской Федерации в части уточнения порядка обработки персональных данных в информационно - телекоммуникационных сетях (Federal Statute of 21 July 2014 N 242-FZ "On amendments to particular legal acts of the Russian Federation related to the specifics of the order of processing personal data in information-telecommunication networks", Rossiyskaya gazeta official daily, N 6435, 23 July 2014)

<http://merlin.obs.coe.int/redirect.php?id=17138>

RU

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Anonymous access to internet denied

Prime Minister Dmitry Medvedev of the Russian Federation signed on 31 July 2014 Ordinance of the Government that amends current rules of access to Internet effectively banning availability of this service to anonymous users.

The Ordinance refers to the recently adopted changes in the laws related to information online (see IRIS 2014-6/31) and demands from those providing universal Internet service in points of collective access, as well as from any other Internet service providers at public spots including wi-fi, to demand identification of the users, collect and store this data for a six-month period.

The Ordinance enters into effect on 13 August 2014.

• О внесении изменений в некоторые акты Правительства Российской Федерации в связи с принятием Федерального закона "О внесении изменений в Федеральный закон "Об информации, информационных технологиях и о защите информации" и отдельные законодательные акты Российской Федерации по вопросам упорядочения обмена информацией с использованием информационно - телекоммуникационных сетей" (Ordinance of the Government of the Russian Federation of 31 July 2014 N 758 "On amending certain acts of the Government of the Russian Federation in respect of the adoption of the Federal Law "On Amendments to the Federal Statute 'On Information, Information Technologies and Protection of Information' and Specific Legal Acts of the Russian Federation on the Issues of Regulation of Information Exchange with the Use of Telecommunication Networks)

<http://merlin.obs.coe.int/redirect.php?id=17139>

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US-United States

Supreme Court prohibits online television service Aereo

On 25 June 2014, the Supreme Court issued a ruling

that online television service Aereo, Inc. (“Aereo”) violated the Copyright Act (“Act”) by allowing its subscribers to watch television programmes over the Internet without obtaining consent from the programmes’ copyright owners.

The Supreme Court agreed with the contention of the programmes’ copyright holders that Aereo infringed their right to “perform” their works “publicly” within the meaning of the Copyright Act. The Supreme Court explained that Aereo performs the works within the meaning of the Act by transmitting the copyrighted works over its own equipment and housing in a centralised warehouse outside of its users’ homes.

Aereo’s defence centered around the argument that it does not transmit the works “to the public” within the meaning of the Act, because it only sends a private transmission that is available only to that subscriber and creates a subscriber-specific copy of the programme. The Supreme Court rejected this argument, finding that an entity transmits a performance to the public even if it is done through one or several transmissions as long as the performance is of the same works and the images and sounds are contemporaneously visible and audible on the subscriber’s computer. The Supreme Court therefore explained that Aereo transmitted the works to the public by communicating the same contemporaneously perceptible images and sounds to a large number of people who are unrelated and unknown to each other.

• Judgment of the Supreme Court , American Broadcasting Cos., Inc., et al. v. Aereo, Inc., Fka Bamboomlabs, Inc., 25 June 2014
<http://merlin.obs.coe.int/redirect.php?id=17151>

EN

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Agenda

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Tricard, S., *Le droit communautaire des communications commerciales audiovisuelles* Éditions universitaires européennes, 2014 ISBN 978-3841731135
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