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Legal Observations
of the European Audiovisual Observatory

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INTERNATIONAL

COUNCIL OF EUROPE

European Court of Human Rights: Haldimann and Others v. Switzerland

In a case concerning the conviction of four journalists for having recorded and broadcast an interview using hidden cameras, the European Court of Human Rights found, by six votes to one, that the Swiss authorities had violated the journalists' rights protected under Article 10 on freedom of expression of the European Convention on Human Rights. The Court emphasised that the use of hidden cameras by the journalists was aimed at providing public information on a subject of general interest, whereby the person filmed was targeted not in any personal capacity, but as a professional broker. The Court found that the interference with the private life of the broker had not been serious enough to override the public interest in information on denouncing malpractice in the field of insurance brokerage (on the use of hidden cameras, see also Tierbefreier E.V. v. Germany, IRIS 2014-3/2).

In 2003, the Swiss German-language television channel SF DRS prepared a documentary on sales of life insurance products, against a background of public discontent with the practices used by insurance brokers. One of the SF DRS journalists presented herself as a customer while meeting with an insurance broker. Two hidden cameras were placed in the room in which the meeting took place. At the end of the meeting the journalist revealed that the conversation had been in reality an interview that had been filmed for journalistic purpose. The broker tried to obtain an injunction against the programme, but that request was dismissed. A short time later, sequences from the recording were broadcast on television, with the broker's face and voice disguised. After a complaint by the broker, a prosecution was started against the journalists involved in the making and editing of the programme, on charges of illegal recording of a conversation by others. Although acknowledging the major public interest in securing information on practices in the field of insurance, the journalists were convicted for recording and communicating a conversation by others without authorisation. The journalists complained before the European Court of Human Rights that their sentence to a payment of between four to 12 day-fines amounted to a disproportionate interference with their right to freedom of expression as protected under Article 10.

The Court reiterated its case law on attacks on the personal reputations of public figures and the six criteria which it has established in its Grand Chamber judgment of 7 February 2012 in the case of Axel Springer AG v. Germany (see IRIS 2012-3/1), weighing freedom of expression against the right to private life: (1) contributing to a debate of general interest, (2) ascertaining how well-known the person being reported on is and the subject of the report/documentary, (3) that person's prior conduct, (4) the method of obtaining the information and its veracity, (5) the content, form and repercussions of the journalistic output, and (6) the penalty imposed. The Court applied those criteria to the present case, while taking into consideration that the broker was not a well-known public figure. The Court noted that the documentary in question had not been geared towards criticising the broker personally, but rather towards denouncing specific commercial practices and the inadequate protection of consumers' rights in the sector of insurance brokers. Hence the report concerned an issue of interesting public debate, while Article 10 protects journalists in relation to such reporting under the proviso that they are acting in good faith and on an accurate factual basis, while providing "reliable and precise" information in accordance with the ethics of journalism. The Court noted that the veracity of the facts as presented by the journalists had indeed never been contested and that it was not established that the journalists had deliberately acted in breach of the ethics of journalism. The recording on the other hand had been broadcast in the form of a report which was particularly negative in so far as the broker was concerned, using audiovisual media, which are often considered to have a more immediate and powerful effect than the written press. However, a decisive factor was that the journalists had disguised the broker's face and voice and that the interview had not taken place on his usual business premises. Therefore the Court held that the interference with the private life of the broker had not been serious enough to override the public's interest in receiving information on the alleged malpractice in the field of insurance brokerage. Despite the relative leniency of the penalties of 12 day-fines and four day-fines respectively, the criminal sentence by the Swiss court had been liable to discourage the media from expressing criticism, even though the journalists had not been prevented from broadcasting their documentary. The Court therefore concluded that there had been a violation of Article 10.

• *Jugement de la Cour européenne des droits de l'homme (deuxième section), affaire Haldimann et autres c. Suisse, requête n°21830/09 du 24 février 2015* (Judgment by the European Court of Human Rights (Second Section), case of Haldimann and Others v. Switzerland, Appl. No. 21830/09 of 24 February 2015)
http://merlin.obs.coe.int/redirect.php?id=17455 FR

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Parliamentary Assembly: Resolution on Media Freedom and Public Service Broadcasting Funding

On 29 January 2015, the Parliamentary Assembly of the Council of Europe (PACE) adopted a new resolution on the "Protection of the safety of journalists and of media freedom in Europe". The wide-ranging resolution details recent attacks on the media in Europe, while the Assembly urges member States to "step up their domestic and multilateral efforts" to protect the life, liberty and security of those working for and with the media.

Of particular note for audiovisual media, the resolution also discusses the importance of media pluralism and notes that "transparency of media ownership is necessary in order to monitor media concentration, to prevent media from being in the hands of a few and to enable pluralism of media ownership". In this regard, the Assembly proposes to publicise a "Media Identity Card" designed to "provide information about the owners of a media outlet and those who contribute substantially to its income, such as big advertisers or donors".

Moreover, concerning public service broadcasting funding and recalling its earlier Recommendation 1878 (2009) (see IRIS 2009-8/3), the Assembly expresses its alarm at "tendencies in some member States to erode the financial stability and the independence of public service broadcasters. Public service broadcasting remains an important element in a democratic society for providing the public at large with unbiased information and culture in an increasingly commercialised, economically weakened and politically controlled media landscape".

Finally, the Assembly invites national parliaments to hold annual public debates on the state of media freedom in their countries and reiterates that the Assembly considers it important that media freedom in Europe remains on the agenda of the Assembly and the Council of Europe as a whole.

• Parliamentary Assembly of the Council of Europe, Resolution 2035 (2015) on protection of the safety of journalists and of media freedom in Europe, 29 January 2015
http://merlin.obs.coe.int/redirect.php?id=17456 EN FR

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NATIONAL

AT-Austria

Broadcasting regulator grants short reporting right

In a decision of 12 February 2015 (case no. KOA 3.800/15-009), KommAustria, the Austrian broadcasting regulator, granted TV broadcaster oe24TV the right to broadcast short reports on the Austrian football league and ordered Sky Österreich, owner of the exclusive rights to the Austrian football league, to make the relevant signals available.

KommAustria laid down several conditions for the granting and exercise of the short reporting right, closely based on the provisions of the Audiovisual Media Services Directive (2010/13/EU) transposed into Austrian law by the Fernseh-Exklusivrechte-Gesetz (Exclusive Television Rights Act).

For example, reporting is limited to short news reports relating to the event and can only be broadcast in general news programmes. KommAustria pointed out that broadcasting short reports during a sports programme, as the broadcaster currently does in its programme "oe24.tv Sport", is prohibited.

The permitted length of short reports depends on the amount of time needed to convey the newsworthy information concerning a match, but should not exceed 90 seconds per match.

As regards the timing of short reports, KommAustria stipulated that they should not be broadcast before the start of the Sky Österreich programme covering the event or less than 60 minutes after the scheduled end of the individual match being reported on. However, a short report on a match should only be shown for as long and often as there is a general news interest in the event concerned.

oe24TV is also obliged to clearly name "Sky Sport Austria" as the source throughout the broadcast of the short report and to indicate beforehand that it is a short report being shown under the terms of the Fernseh-Exklusivrechte-Gesetz.

KommAustria also laid down rules governing the actual production of short reports by oe24TV. The broadcaster can either take the "clean-feed" signal from the back of the outside broadcast unit or record the "dirty-feed" satellite signal from Sky Österreich.

KommAustria promised that the original broadcaster, Sky Österreich, would be entitled to demand compensation for additional costs linked directly to its grant-

ing of access to the signal for short reporting purposes. If the signal is taken from the back of the outside broadcast unit, no additional costs are incurred. If the satellite signal is used, Sky Österreich is entitled to charge the broadcaster the usual fee for the relevant decoding equipment and subscription.

KommAustria did not decide whether the broadcaster is entitled to distribute its general news programme, including short reports, via its on-demand audiovisual media service (www.oe24.at). It referred to the preliminary ruling procedure currently pending with the ECJ in case C-347/14 and adjourned the current procedure until the announcement of that ruling.

• *Entscheidung der KommAustria vom 12.2.2015 (Gz.: KOA 3.800/15-009)* (KommAustria decision of 12 February 2015 (case no. KOA 3.800/15-009))
http://merlin.obs.coe.int/redirect.php?id=17484 DE

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DE-Germany

Tenants can object to dummy surveillance cameras

On 29 January 2015, the AG Frankfurt am Main (Frankfurt am Main District Court - case 33 C 3407/14) ruled that tenants of a flat do not have to accept dummy video surveillance cameras installed by their landlord in either the building lobby or stairwell. The court ruled in favour of a tenant who had felt intimidated and threatened by the dummy devices.

The landlord had originally installed the dummy video cameras exclusively to deter potential criminals. He claimed that, for this reason, combined with the fact that the camera did not work, the tenant's privacy rights had not been breached. However, the court shared the tenant's view that even the threat of being under constant surveillance was sufficient to restrict his freedom of action and that of visitors to his flat. This therefore infringed the tenant's general privacy rights.

Last year, the AG Berlin-Schöneberg (Berlin-Schöneberg District Court), in a ruling of 30 July 2014 (case no. 103 C 160/14), expressed the opposite view. It ruled that general privacy rights were not breached if the landlord told the tenants that the surveillance cameras were dummies.

On 11 November 2013, the Landgericht Frankfurt am Main (Frankfurt am Main Regional Court) stated in an indicative ruling (case no. 2-13 S 24/13) that a property owners' association could not require a flat owner to remove a dummy camera that he had installed on his balcony. Although the installation of the camera had represented a structural change to the jointly owned property, it had not infringed the other flat owners' general privacy rights because the camera had not been working. The mere fear of being filmed by the camera was not sufficient to establish an infringement, according to the Frankfurt court.

In a ruling of 16 March 2010 (case no. VI ZR 176/09), the Bundesgerichtshof (Federal Supreme Court - BGH) stressed that the use of surveillance cameras on properties should be judged on a case-by-case basis. The fear of being watched by surveillance cameras could be justified if, based on concrete circumstances, it appeared understandable, for example, if a dispute between neighbours had escalated or if there were objective grounds for suspicion. In such circumstances, the privacy rights of people who thought they were being watched could be infringed on the basis of the suspicion alone. However, the hypothetical possibility of being watched by video cameras and similar surveillance devices did not on its own breach the general privacy rights of people who could be affected.

• *Urteil des AG Frankfurt am Main vom 29. Januar 2015 - 33 C 3407/14* (Ruling of the Frankfurt am Main District Court of 29 January 2015 - case no. 33 C 3407/14) DE

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Analogue transmission of ARD-Alpha not compulsory for Kabel Deutschland

Following an application from Kabel Deutschland Vertriebs und Service GmbH & Co. KG, the Bayerische Landeszentrale für neue Medien (Bavarian New Media Office - BLM) has decided that there are no grounds in media law to prevent the ARD-Alpha analogue feed being withdrawn from the cable network.

In accordance with the official procedure for programme reassignment in the cable network, Kabel Deutschland had announced its intention to withdraw the analogue feed of the ARD-Alpha (previously BR-Alpha) TV channel from its cable service in Bavaria at the end of 2014 and requested confirmation that there would be no objections to this decision under media law. Kabel Deutschland did not consider ARD-Alpha a priority channel as defined by law. It claimed that Bayerische Rundfunk, once it had changed the name of BR-Alpha to ARD-Alpha, could no longer rely on the must-carry status of BR-Alpha, which was laid down in law.

In a decision of 8 January 2015, the BLM, the regional media authority concerned, confirmed this legal opinion, since the channel's name change from

BR-Alpha to ARD-Alpha had coincided with a change of programming that had not been agreed upon. However, the BLM, while confirming that the decision was acceptable under media law, thought it was up to the legislative body to decide how much importance should be attached to the decision to replace the "Rundschau" news programme with "Tagesschau" in the ARD-alpha schedules, for example.

The BLM nevertheless ruled that the legislative body should decide whether the new ARD-Alpha, which was primarily aimed at a national audience, should be given must-carry status, a decision that would restrict the cable network operator's choice of which channels to carry.

Furthermore, under the Bayerische Mediengesetz (Bavarian Media Act), the retransmission of a channel was expressly dependent on copyright. The system governing which TV channels were carried via the cable network therefore did not intrude on the private-law relationships between broadcasters and cable network operators, but depended on them being in agreement with each other.

In the BLM's view, cable network operators are only obliged to offer to carry must-carry channels under reasonable conditions; they are not obliged to provide cable transmission as a telecommunications service without request. Since Bayerische Rundfunk has declared orally and in writing that it is not asking Kabel Deutschland to provide a telecommunications service, the BLM cannot force Kabel Deutschland to provide such a service.

Bayerische Rundfunk has criticised the decision and announced its intention to appeal.

• *Pressemitteilung der BLM vom 12. Januar 2015* (BLM press release of 12 January 2015)
http://merlin.obs.coe.int/redirect.php?id=17477 DE

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KJM gives positive assessment of additional Internet age verification system

At its meeting on 28 January 2015, the Kommission für Jugendmedienschutz (Committee for the Protection of Young People in the Media - KJM) gave a positive assessment of the "[verify[U+2010]U]face[U+2010]to[U+2010]face" module, an additional age verification system devised by Cybits AG for closed user groups in telemedia.

According to the Jugendmedienschutz-Staatsvertrag (Inter-State Agreement on the Protection of Young People in the Media - JMStV), certain telemedia services that are harmful to minors may only be distributed within a closed user group. As a result, telemedia providers are required to ensure that access data for such content is only given to people who have been identified as being over the age of majority.

According to KJM rules, reliable age verification systems must comprise two stages. Firstly, it must be verified through personal contact (a face-to-face check) that the person is over the age of majority, and secondly, an authentication procedure must be completed every time the service is used.

The system examined by the KJM uses a "face-to-face check" via webcam as part of the multi-stage identification procedure.

In this system, simple identification via webcam as the initial age check each time the service is used is supplemented with additional security measures. Users are only given access to the service they require after entering their details on the content provider's website, proving their identity through an existence check and an electronic ID card check, submitting their ID card details and participating in a video-conference with qualified Cybits AG staff, who check that all the information that they have provided is consistent.

At present, a total of 33 age verification concepts or modules have been positively assessed by the KJM. In addition, age verification systems currently form part of six general youth protection concepts.

• *Pressemitteilung 2/2015 der KJM vom 5. Februar 2015* (KJM press release 2/2015 of 5 February 2015)
http://merlin.obs.coe.int/redirect.php?id=17478 DE

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FR-France

Conseil d'Etat cancels decree extending national collective agreement for cinematographic production sector

On 24 February 2015, the Conseil d'Etat announced the cancellation of the decree extending the application of the national collective agreement for the cinematographic production sector, signed in July 2013, to the entire profession (see IRIS 2013-7/12). The agreement lays down the remuneration for workers and technicians in the cinema sector; it was originally signed in January 2012 by the employees' trade unions and the association of independent producers (Association des Producteurs Indépendants - API),

after ten years of negotiations and against a background of serious inter-professional tension. Various employers' organisations opposed to the text had appealed to the Conseil d'Etat on the grounds that powers had been exceeded. They called for the decree extending the collective agreement to be cancelled due to the lack of representativeness of the signatory employers. Although most of the applicant parties withdrew after the producer-employers' organisations signed a codicil in October 2013 introducing a waiver mechanism for low-budget films (see IRIS 2013-10/24), the association of producers of publicity films (Association des Producteurs de Films Publicitaires) maintained the appeal.

In its decision, the Conseil d'Etat recalled that according to the first paragraph of Article L. 2261-15 and Article L. 2261-27 of the Employment Code if a sector agreement has not been signed by at least one organisation of employers and one organisation of employees which is representative of its field of application, it cannot legally be extended. It noted that the API, the only employers' organisation to have signed the national collective agreement for cinematographic production on 19 January 2012, included just four groups (Pathé, Gaumont, UGC and MK2) in its membership, representing a total of nine cinematographic production companies out of a total of more than 2,000, in 2011. In recent years, these four groups have accounted for the production of approximately 3.5% of films originating in France (representing just 6% of the total number of casual workers employed), and have produced neither documentaries, advertising films or shorts. Moreover, distributing films and operating cinema theatres form an essential part of their activity, and neither falls within the cinematographic production sector. As a result, on the date on which it signed the national collective agreement for the cinematographic production sector, the API could not be considered as "representative" of the field of application of the agreement. The fact that, subsequent to the decree at issue, a number of organisations representing employers had joined the agreement was considered to be irrelevant. The decree was therefore deemed flawed and was cancelled. The Conseil d'Etat indicated that there was no need to limit the effects of the cancellation, since the clauses in fixed-term contracts laying down the remuneration to be paid to technicians under the agreement were still applicable despite the cancellation, and that application of the equivalence scheme in the sector was the result of a later decree and not of the extended agreement.

Reacting to this cancellation, the Minister for Culture insisted on "recalling the long process of negotiation which made it possible for the social partners to reach the conclusion of an appropriate agreement structure". Since a number of representative professional organisations in the sector had joined the agreement, the Government has embarked on a new procedure for extending the agreement and its codicil. The Minister announced that the corresponding decree ought to be published sometime in March, and that the aim of the procedure was to ensure that the agreement was unquestionably valid from a legal point of view.

• *Conseil d'Etat, 24 février 2015 - Association des producteurs de cinéma et autres* (Conseil d'Etat, 24 February 2015 - Association des Producteurs de Cinéma and others)
http://merlin.obs.coe.int/redirect.php?id=17479 FR

Amélie Blocman
Légipresse

The right to be forgotten: first decision delivered in application of CJEU jurisprudence

The Google Spain decision delivered by the Court of Justice of the European Union (CJEU) on 13 May 2014 upheld the possibility, subject to certain conditions, for Internet users to ask search engine operators to de-reference links appearing in hits for searches on their names. The operators, starting with Google, have put de-referencing request forms online for Internet users to fill in. Since operators have not always complied with these requests, a number of French courts have been called on to deal with a number of cases involving the CJEU's criteria, and the first judgments under the urgent procedure have been handed down.

In a judgment in a case brought under the urgent procedure before the regional court (Tribunal de Grande Instance - TGI) in Paris, delivered on 19 December 2014, an applicant obtained an order for Google to de-reference a page detailing a sentence imposed on the applicant party for fraud. In this case, the sanction in question, which dated back to 2006, appeared as the top hit when the party's name was entered into Google search. The party concerned served official notice on Google ordering it to delete the link in question. Google did not delete the link as it claimed it was in the public interest. A second link also appeared in the intervening period. The applicant party then summoned Google to appear before the court under the urgent procedure on the basis of Article 38 of the Information Technology and Liberties Act of 6 January 1978 as amended, so that the deletion of the link at issue could be ordered. The judge referred to the decision delivered by the CJEU on 13 May 2014 recalling that the court was required to reconcile the right to protect personal information with the right to freedom of information, and the right to seek a fair balance between the legitimate interest of Internet users in having access to information and the rights of the person concerned. He noted firstly that the publication in 2006 of the press article at issue, reporting the sanction imposed on the applicant party for fraud, was legitimate, and that the party had not opposed its publication. The fact that the applicant did not bring a case against the editor of the article did not deprive her of the right to request de-referencing directly from

the search engine operator. The court went on to examine the arguments put forward by the applicant party in support of the applicant's case, including the claim that the results shown by Google were damaging to the applicant's job-hunting. The judge found that, in view of the length of intervening time since the sanction was imposed more than eight years ago, and the fact that the sanction was not indicated on the person's criminal record, the applicant party's claims were legitimate and overrode the public's right to information. The court concluded that the request to be de-referenced was justified, and enjoined Google to de-reference or delete the links to the newspaper sites at issue.

On the other hand, in a case under the urgent procedure on 21 January 2015 at the TGI in Toulouse, Google provided proof that it was in the public interest to have access to the information at issue. This case involved three links referring to acts of harassment on the part of the applicant, in respect of employees. Although the facts were not proven, the person concerned had been dismissed and was contesting the lawfulness of this in pending legal proceedings. The court dealing with the matter under the urgent procedure recalled that the CJEU's decision applied various levels to the entitlement to being de-referenced according to the person's prominence in public life or other reasons justifying the existence of overpowering public interest in having access to the information at issue. It found that none of the disputed links were to information concerning the applicant's private life, but solely to the complaints expressed by his employer; the information concerned his professional life, and have given rise to legal decisions which had been handed down in public, which were freely accessible, and had been reported in the media. Additionally, the facts at issue were recent (2011), and it could not be claimed that they were inaccurate, inadequate, irrelevant or excessive. Indeed 'the mere fact that legal proceedings are in hand does not suffice to establish their falsity'. The application was rejected, and in this case the court found that the right of the public to be informed about a current legal case took precedence over an individual's 'right to be forgotten'.

• *TGI de Paris (ord. réf.), 24 novembre et 19 décembre 2014 - Marie-France M. cl Google France et Google Inc.* (Regional court of Paris (under the urgent procedure), 24 November and 19 December 2014 - Marie-France M. v. Google France and Google Inc.) FR

• *TGI de Toulouse (ord. réf.), 21 janvier 201 - Franck J. c/ Google France et Google Inc.* (Regional court of Toulouse (under the urgent procedure), 21 January 2015 - Franck J. v. Google France and Google Inc.) FR

Amélie Blocman
Légipresse

Piracy on the Internet - Government action plan

On 11 March 2015, Minister for Culture and Communication Fleur Pellerin presented the Government's strategy for combating piracy on the Internet to the Council of Ministers. Apart from the graduated response applied to illegal downloading implemented by France's high authority for the distribution of works and the protection of rights on the Internet (Haute Autorité pour la Diffusion des Oeuvres et la Protection des Droits sur Internet - HADOPI), which remains in place, the action plan is also aimed at streaming sites and referencing, which benefit from pirated works. Three series of measures were presented.

Firstly, measures to decrease the financing of sites specialising in infringing copyright on works distributed on the Internet, as recommended by Ms Imbert-Quaretta in her report on the tools to combat commercial online piracy presented to the Minister in May 2014 should be implemented. A charter bringing together the representatives of advertising rightsholders and stakeholders, to achieve an undertaking from the latter to voluntarily evict sites which fail to respect copyright and neighbouring rights should be signed at the end of March, under the auspices of the national centre for cinematography (Centre National de la Cinématographie - CNC). Negotiation should then begin with a view to the stakeholders in online payment signing a charter by next June.

Secondly, the Government also intends to 'make use of every possible court procedure to monitor, in a sustained fashion, the effectiveness of all the sanctions, including blocking, imposed on technical intermediaries'. It recalls that rightsholders must re-apply to the courts if the measures ordered by a court have not been complied with. The Minister has also announced the appointment next June of 'contact judges' (magistrats référents) competent to deal with complex cases involving infringement of copyright. The follow-up of reports on Pharos, the public platform dedicated to reporting illegal content, will also be reinforced.

The third and final series of measures is aimed at video-sharing platforms which, in addition to hosting, also distribute and 'editorialise' some content. The Minister repeated that it was necessary to start thinking about their status, to be able to establish a number of simple, effective undertakings, starting with their legal domiciliation. The procedures for reporting illegal content, withdrawal and monitoring should also be simplified and made accessible to rightsholders. This should also be carried out on a European scale, as the Government feels it is necessary to redefine the perimeter of the status of hosts. In his report on the revision of Directive 2001/29/EC on copyright, Pierre Sirinelli advocated not accepting the principle

of this revision without also considering revising Directive 2001/31/EC on e-commerce, particularly Articles 12 to 15, so that a new status could be created for certain technical intermediaries. Fleur Pellerin said, 'We will not be able to agree to the Directives being amended without this subject being dealt with.'

• *Communiqué de presse, ministère de la culture et de la Communication, 11 Mars 2015* (Press release, Ministry of Culture and Communication, 11 March 2015)
http://merlin.obs.coe.int/redirect.php?id=17480 FR

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GB-United Kingdom

Regulator Refuses to Suspend Auction for Premier League Football Rights

The rights to broadcast the matches in the Premier League, the top tier of English football, are of an extraordinary value to broadcasters. They are sold as a package by the Premier League. In November 2014, following a complaint by Virgin Media, Ofcom, the UK Communications Regulator, commenced an investigation on whether the arrangements for the packaging of the rights constitutes a restriction or distortion of competition in breach of the Competition Act 1998 and/or Art. 101 of the Treaty on the Functioning of the European Union (TFEU).

An invitation to tender was issued by the Premier League for the rights to the 2016/17 to 2018/19 seasons in December 2014, with the first round of bids to be made on 6 February 2015. Virgin Media applied to Ofcom asking it to issue interim measures to suspend the action. Ofcom has power to do so under section 35 of the Competition Act 1998, if it considers that it is necessary as a matter of urgency in order to prevent significant damage to a person or category of persons or to protect the public interest. Virgin Media argued that the approach taken to the sale of the rights would lead to significant harm to television subscribers, as it would amount to an output restriction and would reduce price competition. It would also harm the public interest through eliminating competition between rights holders, distorting competition between broadcasters, restricting the number of games broadcast, leading to excessive retail prices, and damaging consumers.

Ofcom refused to grant the order to suspend the auction. The investigation into the original complaint is still ongoing and there will be a gap of around 17 months between the auction and the broadcasting of the relevant matches. Ofcom did not consider that the contracts between the Premier League and broadcasters would prevent it from imposing remedies in time to prevent harm to consumers. Ofcom has the necessary powers to require the Premier League and its clubs to take action within the time available. The Premier League had confirmed that it will put in place arrangements in contracts with broadcasters to address the consequences of a potential infringement decision. Moreover, it was not clear that a delay in the auction would address the concerns in the original complaint.

The result of the auction was that the rights were retained by Sky and BT, the current holders, but with a 71% increase in the price to £5.1 billion.

• Ofcom, "Ofcom rejects Virgin Media application to delay Premier League auction", 4 February 2015
http://merlin.obs.coe.int/redirect.php?id=17457 EN

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BBC Breaches Offensive Language Rules

Ofcom has a statutory duty pursuant to the Communications Act 2003 to set standards for broadcast content as appear to it best calculated to secure the standards objectives, one of which is that "persons under the age of eighteen are protected". This is also reflected in Ofcom's Broadcasting Code. As such, the early morning broadcast on BBC's Radio 1's breakfast show of a song that included in the lyrics the word "fuck" was in breach of the Code, as children were most likely to be listening at that time.

BBC Radio 1's show "Breakfast with Nick Grimshaw" played at about 7:55 a.m. a session recording of the Foo Fighters' new song "Something From Nothing", that had been part of a session recorded for the BBC and first broadcast the previous evening at about 8 p.m. on Radio 1's Zane Lowe show on 5 November 2014.

The lyrics to one song included the word "fuck" and the song was played during the Zane Lowe show. His normal producer and assistant producer were not available that evening and a substitute team responsible for checking the output did not pick up immediately on the fact that the song included an offensive word. Normally, a session track is listened to and checked for compliance purposes by both the live session staff and then again by the production team responsible for the first broadcast, i.e. Zane Lowe's production team. The members of his substitute team had each assumed the other had checked the song and it was duly uploaded on to the Radio 1 Music Store without any annotation warning of the offending word.

During the Zane Lowe live play of the Foo Fighter's song, the use of the offending word was noticed and

an apology was issued, whilst during the second play the word was faded out. A warning was placed on the iPlayer (BBC's online catch-up service) version of the Zane Lowe show and a general warning was issued to all Radio 1 production staff, warning them of the offensive language in the track. Despite this, the usual producer was unaware that an unannotated version of the song had been placed on Radio 1's Music Store.

The unannotated version was played the next day during Nick Grimshaw's breakfast show. During the play, the production staff were busy discussing other items on the show and only after the airing was it noticed the Foo Fighter song had included the offensive word. An apology was immediately issued at 8:04 a.m.

The BBC conducted an internal inquiry to see why such a breakdown in its vetting procedures had occurred. The BBC said the incident was unprecedented and as a consequence stressed compliance procedures at Radio 1's monthly all-staff meeting, as well as discussing the issue with the staff involved.

Ofcom gave regard to its Communications Act 2003 duty to protect the interests of children and also the application of Rule 1.14 of the Ofcom Broadcasting Code, which states that the most offensive language must not be broadcast on radio when children are particularly likely to be listening.

Ofcom considered that playing a song at about 7:55 a.m. meant it was most likely to be heard by children. Whilst Ofcom recognised the steps taken by the BBC to apologise and undertake an enquiry to ascertain why the offensive word had been inappropriately broadcast at a time likely to be heard by children, nevertheless, the BBC was held liable for the breach.

• Ofcom Broadcast Bulletin, "The Radio 1 Breakfast Show with Nick Grimshaw", Issue 272, 2 February 2015, 5-7
http://merlin.obs.coe.int/redirect.php?id=17458 EN

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Blue Pencil Set

IE-Ireland

Broadcasting Authority Is Not Required to Release Investigation Documents under FOI Law

The Information Commissioner has issued its decision on whether the Broadcasting Authority of Ireland (BAI) is required under freedom of information law to release certain documents compiled during its investigation into a public broadcaster's current-affairs programme. The Commissioner held that the BAI was justified in refusing access to interview notes with journalists and written submissions from the public broadcaster RTÉ.

On 4 May 2012, the BAI published a determination on RTÉ's television programme "Prime Time Investigates - A Mission to Prey", which had included allegations that an Irish priest had abused a teenage girl in Africa in the 1980s, that she had borne his child, and that he subsequently abandoned her and the child. The BAI found violations of section 39 of the Broadcasting Act 2009, including that the broadcast of seriously defamatory allegations was unfair and that the means employed in making the programme encroached upon the individual's privacy. The BAI imposed a financial sanctions of EUR 200 000 on RTÉ (see IRIS 2012-7/27).

A member of the public made a request to the BAI under the Freedom of Information Acts 1997-2003 to have access to the BAI's records relating to its investigation into the "Prime Time Investigates" programme. The BAI granted access to some documents, but refused access to other documents, including interview notes with journalists and written submissions from RTÉ. The applicant subsequently made an application to the Information Commissioner, which has the statutory power to review decisions to refuse access to records under freedom of information law (see IRIS 1997-10/13).

The Information Commissioner agreed to review whether the refusal to release the interview notes with journalists and written submissions was justified. The applicant argued that there was a "strong public interest" in addressing certain "unanswered" questions, "particularly in light of the large amount of money that RTÉ is believed to have paid out in settlement of the defamation". The BAI argued that "disclosure of the requested records would be likely to cause significant prejudice to its future investigations, because the journalists and other employees of RTÉ cooperated and assisted with the investigation, including revealing source material, upon the basis that such information would remain confidential".

Under section 21 of the Freedom of Information Act 1997, a public body may refuse access to records if it is reasonably expected that access will "prejudice the effectiveness of tests, examinations, investigations, inquiries or audits conducted by or on behalf of the public body concerned or the procedures or methods employed for the conduct thereof". But access to such records should be granted where "the public interest would, on balance be better served by granting" access.

The Information Commissioner considered the arguments and concluded that "further openness with respect to the making and broadcasting of the programme could not be achieved without violating the journalistic privilege recognised by the courts, breaching trust, prejudicing the procedures and methods employed by the BAI in carrying out investigations and related inquires under the Broadcasting Act, and further invading the privacy of certain third parties in

a manner that would be entirely unwarranted". Thus, the "public interest" would not be served by granting access, and the BAI had been justified in refusing access.

The Information Commissioner's decision was issued under the Freedom of Information Acts 1997-2003, and while these Acts have now been replaced by the Freedom of Information Act 2014 (see IRIS 2015-1/25), the decision is still of significance for broadcasters under the 2014 Act, as the Commissioner's role remains.

• Office of the Information Commission, "Mr. X and the Broadcasting Authority of Ireland", 17 November 2014
http://merlin.obs.coe.int/redirect.php?id=17467 EN

• Broadcasting Authority of Ireland, "Investigation Pursuant to Section 53 of the Broadcasting Act 2009 - In Respect of the Programme 'Prime Times Investigates - Mission to Prey' Broadcast on 23 May 2011", 29 February 2012
http://merlin.obs.coe.int/redirect.php?id=15951 EN

• Broadcasting Authority of Ireland, "Statement of Findings Issued Pursuant to Section 55(2) of the Broadcasting Act 2009", 4 May 2012
http://merlin.obs.coe.int/redirect.php?id=15950 EN

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New Broadcasting Funding Scheme

On 3 February 2015, the Broadcasting Authority of Ireland (BAI) launched its new broadcasting funding scheme entitled "Sound & Vision III", which has been recently approved by the Minister for Communications, Energy and Natural Resources. The scheme makes available nearly EUR 24 million in funding for specific television and radio programmes over the next two years (for previous schemes, see IRIS 2005-10/7).

The new scheme is made under section 154 of the Broadcasting Act 2009, which requires the Authority to prepare a funding scheme to support a number of objectives, including new television or radio programmes on Irish culture, heritage and experience, programmes to improve adult or media literacy, programmes which raise public awareness and understanding of global issues impacting on Ireland and other countries, and the development of archiving of programme material produced in Ireland.

The scheme will be funded from the annual net receipts of the television licence fee and the Authority has published a 17-page document detailing the operation of the scheme, eligibility requirements and assessment criteria. Under section 158 of the Broadcasting Act 2009, the Authority will be required to review the operation of the funding scheme periodically. The next deadline for applications will be 9 July 2015.

• Broadcasting Authority of Ireland, "Sound & Visions 3: A Broadcasting Funding Scheme", January 2015
http://merlin.obs.coe.int/redirect.php?id=17461 EN

• Broadcasting Authority of Ireland, "BAI Launches New Broadcasting Funding Scheme: Sound & Visions III", 3 February 2015
http://merlin.obs.coe.int/redirect.php?id=17462 EN

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Minister Designates New Television Channel as a Public Service

On 2 December 2014, the Minister for Communications, Energy and Natural Resources signed an order designating a new television channel, UTV Ireland, as a public service under the Broadcasting Act 2009. On 1 January 2015 the channel began broadcasting free-to-air in Ireland. UTV Ireland will be a general entertainment channel and its schedule includes a nightly news and current affairs programme.

In November 2013, UTV Ireland applied for a licence under section 71 of the Broadcasting Act 2009, which allows the Broadcasting Authority of Ireland to grant a television "content provision contract". On 27 February 2014, the Authority signed a ten-year television contract with UTV Ireland (see IRIS 2014-4/21).

UTV Ireland also submitted a request to the Minister for a designation as a public service, under section 130(1)(a)(iv) of the Broadcasting Act in June 2014, and the Minister has now published his decision, approving the request. The Minister took into account a range of factors, including the range and variety of programming, the contribution to democratic and public engagement, and support for local production and investment in local talent. The designation means that UTV Ireland will be available on SAORVIEW, the free-to-air digital terrestrial television service (see IRIS 2014-2/25).

• Broadcasting Act 2009 (Section 130(1)(a)(iv) Designation) Order 2014, S.I. No. 542/2014
http://merlin.obs.coe.int/redirect.php?id=17463 EN

• Decision of the Minister for Communications, Energy and Natural Resources Regarding the Request from UTV Ireland for Designation under Section 130(1)(a)(iv), Broadcasting Act 2009, 1 December 2014
http://merlin.obs.coe.int/redirect.php?id=17464 EN

• Broadcasting Authority of Ireland, "BAI Signs Content Contract with 'UTV Ireland", 27 February 2014
http://merlin.obs.coe.int/redirect.php?id=17465 EN

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OBSERVATOIRE EUROPÉEN DE L'AUDIOVISUEL
EUROPEAN AUDIOVISUAL OBSERVATORY
EUROPÄISCHE AUDIOVISUELLE INFORMATIONSSTELLE

IRIS

Legal Observations
of the European Audiovisual Observatory

IT-Italy

AGCOM Finalises Text on Television 2.0 Convergence

On 13 January 2015, the Italian Communications Authority - AGCOM (Autorità per le garanzie nelle comunicazioni) approved, by Resolution no. 19/15/CONS, the final text of the investigation related to the drafting of a White Paper on "Television 2.0 in the Age of Convergence".

The investigation was launched by AGCOM by means of Resolution no. 93/13/CONS of 6 February 2013, with the aim at carrying out an in-depth analysis of the general issues related to new television services through IP protocol in the electronic communications sector.

According to AGCOM, there were three main points to be investigated: distribution and technology aspects, market aspects and regulatory aspects. As for the distribution and technology aspects, the Authority reports that the number of people who have a smart TV is gradually increasing (in Italy, for 2013, such numbers reached 17% of the population). With reference to the regulatory aspects, AGCOM focuses in particular on: (i) issues related to prominence, recalling for such purposes the definition of prominence proposed by the European Commission (COM(2013) 231, see IRIS 2013-6/5), and on (ii) data protection and IT security issues, remarking on the risks of break-in, unlawful access to personal data and abusive activation of cameras associated with the use of smart TVs.

In light of the results of the foregoing investigation, AGCOM pointed out that it will be required: (a) to verify the correspondence between the current national and European regulatory framework and the dynamics of a market which changes constantly and (b) to understand, from a regulatory perspective, how to manage the current technological trends and innovations. With reference to the first point, AGCOM highlights that the main issues regard the regulatory asymmetry between TV broadcasters and Over-The-Top services. With reference to the second point, AGCOM underlines that the development of proprietary interfaces by manufacturers requires the analysis of certain potential issues related to middleware, user interface and users' guides.

• *Delibera n. 19/15/CONS, Chiusura dell'indagine conoscitiva in vista della redazione di un libro bianco sulla "televisione 2.0 nell'era della convergenza"* (Resolution no. 19/15/CONS, "Closing of the Investigation in Light of the Drafting of a White Book on 'Television 2.0 in the Age of Convergence'")
http://merlin.obs.coe.int/redirect.php?id=17468 IT

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New Grand-Ducal Regulation on Protection of Minors in Audiovisual Media Services

The Government of Luxembourg adopted a Grand-ducal regulation on the protection of minors in audiovisual media services (Règlement grand-ducal relatif à la protection des mineurs dans les services des médias audiovisuels) on 8 January 2015. In 2013, the European Commission had initiated infringement procedures against Luxembourg for failure to implement Article 12 and 27 of the Audiovisual Media Services Directive (AVMSD). The regulation thus specifies the measures providers of audiovisual media services are required to take to ensure the protection of minors in accordance with said rules of the AVMSD, which had been transposed previously by Article 27ter (3) and Article 28quater of the Law on Electronic Media (Loi sur les médias électroniques).

The draft regulation, which was proposed on 25 July 2014 (see IRIS 2015-2/27), largely corresponds with the newly adopted regulation. Accordingly, it establishes a system of classification for linear as well as non-linear audiovisual media services. The regulation sets out five age groups (programmes for all audiences and programmes not suitable under 10/12/16 and 18 years), which correspond to five categories of programme types (e.g. category I implies programmes appropriate for all audiences). The regulation also prescribes duties of labelling transmission times for linear service providers (so-called watershed rules), as well as information for viewers (Articles 1-7 regulation). The pictograms are outlined in the annex of the regulation and show the age group (-10, -12, -16 or -18) in black letters within a white circle on a black background. For providers of on-demand services, the installation of parental controls is mandatory (Article 10 regulation). In addition, programmes considered harmful to minors aged below 18 (material of category V) are to be presented in a separate part of the website, which is only accessible after it has been verified that the user is of age (Articles 11 and 12 regulation). Service providers are responsible for applying the classification and respective additional measures (Articles 7 and 9 regulation).

The regulation also stipulates rules for service providers established in Luxembourg, but principally targeting the public of other Member States. This rule takes into account that Luxembourg hosts many service providers disseminating their programmes throughout the EU. Such providers may opt for the classification system operated in the receiving state, provided that an equivalent level of protection is accomplished there (Articles 8 (1) and 9 (1) of the regulation). Providers of on-demand services may also

chose to retain the classification obtained in the country where the programme was produced (Article 9 (1) regulation). It is the responsibility of the service provider to notify the chosen regime of protection to the Luxembourg regulator, the Independent Audiovisual Authority of Luxembourg, ALIA (see IRIS 2013-10/32), which approves (or refuses) the alternative system. In the draft regulation of July 2014, it fell to the Minister responsible for the media to make the final decision on the applicable system, ALIA merely having a consultative function. Hence, this modification further strengthens the position of ALIA (for more details about the substantive rules contained in the regulation see IRIS 2015-2/27).

• *Règlement grand-ducal du 8 janvier 2015 relatif à la protection des mineurs dans les services de médias audiovisuels, Mémorial du 15 janvier 2015, A - n°7, page 44* (Grand-ducal regulation of 8 January 2015 concerning the protection of minors in audiovisual media services, Mémorial 15 January 2015, A - N°7, p. 44)
http://merlin.obs.coe.int/redirect.php?id=17469 FR

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Court Suspends the Dutch Telecommunications Data Retention Act

The Dutch Telecommunications Data Retention Act (Wet bewaarplicht telecommunicatiegegevens) has been suspended as of 11 March 2015. The Act required providers of public telecommunications services and networks to retain traffic and location data of telephone and internet communications, for the purpose of investigating serious crimes. Telephone data had to be retained for twelve months; internet data for six months. The Act implemented the Data Retention Directive (2006/24/EC) (see IRIS 2006-3/110), which the Court of Justice of the European Union (CJEU) invalidated in the Digital Rights Ireland case (C-293/12).

A coalition of Dutch organisations brought preliminary relief proceedings against the Act in the District Court of The Hague. The Court agreed with them that the obligation to retain data interfered with the fundamental rights to privacy and the protection of personal data, guaranteed by Articles 7 and 8 of the Charter of Fundamental Rights of the European Union (the Charter) respectively. It was uncontested that Digital Rights Ireland did not imply that the Act was invalid too.

In the view of the Court, interferences with these fundamental rights was not unacceptable in every case. It adopted as a starting point that the obligation to retain data is necessary and effective to investigate serious crimes. Then the Court observed that the Act, like the Data Retention Directive, covered all users of electronic communications services without any differentiation. Consequently, it applied even to persons for whom there is no evidence suggesting that their conduct relates to serious crime. Moreover, the Act did not require any relationship between the data whose retention is provided for and a threat to public security. Still, the Court held it did not follow from Digital Rights Ireland that such a broad obligation is disproportional per se.

The main objection was that the interference was not limited to what is strictly necessary. In Digital Rights Ireland, the CJEU stated that the legislation should contain objective criteria by which to determine the limits of the access by the national authorities to the data and their subsequent use, for the purpose of law enforcement concerning offences that are sufficiently serious to justify an interference with Articles 7 and 8 of the Charter. The Court considered that the Act included offences that were not sufficiently serious in that sense. The Government stated that it did not request data lightly. Nevertheless, the Court held that the Act did not ensure that access to the data is actually limited to what is strictly necessary for the investigation of serious crimes.

This was all the more problematic, since the Act did not subject access to the data retained to ex ante review carried out by a court or an independent administrative body. Contrary to what the Government argued, the Court held that the Dutch Public Prosecution Service could not be regarded as an independent administrative body. The Court inferred from Digital Rights Ireland that the CJEU found this a serious objection.

On the basis of all this, the Court concluded that the Act constituted an unacceptable interference with Articles 7 and 8 of the Charter and suspended it. The Government is still considering bringing an appeal.

• *Rechtbank Den Haag, 11 maart 2015, Stichting Privacy First ea tegen de Staat der Nederlanden, C/09/480009 / KG ZA 14/1575, ECLI:NL:RBDHA:2015:2498* (District Court of The Hague, 11 March 2015, Stichting Privacy First ea v. the State of the Netherlands, C/09/480009 / KG ZA 14/1575, ECLI:NL:RBDHA:2015:2498)
http://merlin.obs.coe.int/redirect.php?id=17460 NL

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Court Rejects Broadcaster's Appeal Over European Works Quota

On 13 January 2015, the District Court of Amsterdam declared the appeal by the broadcaster Sapphire against a decision refusing to grant it exemption from the European works quota for the years 2008-2012

inadmissible, as exemptions cannot be granted retrospectively.

The Audiovisual Media Services Directive mandates that broadcasters are required to include a certain percentage of European works in their programming schedules. TV channels in the Netherlands should reserve more than half of their transmission time for European works, on the basis of Article 3.20 of the Dutch Media Act (Mediawet). Under paragraph 2 of that Article, the Dutch Media Authority (Commissariaat voor de Media - CvdM) may grant temporary partial exemption from the obligation to fulfil the European works quota in special circumstances.

Sapphire Media International B.V. is a broadcaster of adult entertainment. Sapphire requested full exemption from the obligation to comply with the European works quota for the year 2008 and partial exemption for the years 2009-2011. On 4 December 2012, the Dutch Media Authority denied the request for exemption for 2008 because, under Article 7, paragraph 5 of the Authority's Policy on Programme Quotas (Beleidsregels programmaquota), exemption cannot be granted retrospectively. Sapphire appealed this decision, but the appeal was declared unfounded and the original decision was upheld.

Sapphire appealed this decision before the Amsterdam District Court, stating that it breached the principle that a decision must contain a statement of reasons, the principle of equality, European law, and the principle of equal consideration of interests. Sapphire noted that it was unlikely that other commercial media companies specialising in broadcasting American programmes, such as the Disney Channel and HBO, would have met the quota. Thus, according to Sapphire, to exempt them from the obligation to comply with the European works quota and not grant exemption to Sapphire would constitute a breach of the principle of equality. Sapphire stated that its main interest in appealing lies in receiving an explanation of the Policy on Programme Quotas.

However, the District Court ruled that it is only required to assess the content of an appeal filed against a decision of a governing body if the applicant has shown sufficient actual and current interest in the matter. If sufficient interest is not shown, as is the case when the interest has expired, the administrative court may dismiss the case.

The Dutch Media Authority has not started any proceedings against Sapphire for breaching the Dutch Media Act and has made clear that it would not pursue enforcement. The decision regarding the exemption for the years 2008-2012 therefore cannot lead to any legal consequences. The court concluded that the applicant lacks the necessary interest in appealing the decision.

- *Rechtbank Amsterdam, 13 januari 2015, Sapphire Media International B.V. tegen Commissariaat voor de Media, ECLI:NL:RBAMS:2015:105* (Amsterdam District Court, 13 January 2015, Sapphire Media International B.V. v. Commissariaat voor de Media, ECLI:NL:RBAMS:2015:105)

http://merlin.obs.coe.int/redirect.php?id=17470 NL

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Court Rules on Right to be Delisted from Search Engines

On 12 February 2015, the Amsterdam Court ruled on a case where the plaintiff requested that Google modify its search results based on search queries containing certain words including, but not limited to the plaintiff's name. This is the second occasion where the Amsterdam Court has been asked to rule on this subject, popularly referred to as the "right to be forgotten" (see IRIS 2014-10/25).

The facts of the case were the following. The plaintiff, a well-known partner at the auditing company KPMG, became involved in a dispute with his contractor, who was reconstructing the plaintiff's home. The contractor was of the opinion that the plaintiff failed to fulfil his payment obligations, after which the contractor effectuated his right of retention by changing the locks of the plaintiff's home. The contractor and the plaintiff eventually managed to settle on an agreement. However, the dispute caught the attention of the media, resulting in search queries based on certain words, including the plaintiff's name, using Google search, retrieving several search results leading to news articles concerning the dispute between the contractor and the plaintiff.

The plaintiff unsuccessfully requested Google to de-index search results based on his name and other words regarding certain characteristics of the dispute. Upon denial of the plaintiff's request by Google, the plaintiff engaged summary proceedings before the Court of Amsterdam, requesting that Google de-index certain search results leading to the news articles reporting on his dispute with the contractor.

The Court stated that services like Google search have an important societal function. Therefore, the Court was of the opinion that any limitations on the functioning of search engines require strict scrutiny. Furthermore, the Court ruled that Google, in its capacity as a data-controller, can justify the processing of personal data on the legitimate interest ground, following from Article 8(f) of the Dutch Data Protection Act (DDA). Consequently, the judge stated that a data-subject has the right to request that a data-controller suspend the processing of personal data following from Articles 36 and 40 of the DDA, read in conjunction with the EU

Court of Justice's (CJEU) Costeja ruling (see IRIS 2014-6/3)

The Court implemented the Costeja ruling by examining if the search results based on search queries containing the plaintiff's name could be deemed inadequate, irrelevant and/or excessive within the meaning of Article 36 of the DDA. Furthermore, the Court assessed if the plaintiff, as a data-subject, had compelling and/or legitimate reasons to object to the processing of his personal data by Google search under Article 40 of the DDA.

The Court ruled in favour of Google, explicitly stating that "the right to be delisted" merely concerns the search results shown by a search engine. A substantive review of the subject matter of the news articles requires judicial action based on defamation grounds. The Court stated that "the right to be delisted" therefore cannot be used to circumvent a defamation judicial procedure directed at the authors of the news articles. The Court went on to assess if the search results could be deemed inadequate, irrelevant and/or excessive. By taking into consideration that the search results should be read in conjunction with other media reports concerning financial affairs of KPMG, the judge was of the opinion that the search results could not be deemed excessive and/or irrelevant. The Court explicitly stated that the circumstances presented before the Court differed from those that were presented to the CJEU in the Costeja ruling, stating that search results in that case lead to an article that had been published sixteen years earlier and could thus be deemed irrelevant.

The Court went on to review if the specific circumstances of the plaintiff justified removal of the search results. The Court stated that Google's "freedom of information" should be the leading principle and that any limitation on this right, such as the right to be delisted, should be considered as an exemption from this leading principle. Due to the fact that the news reports could not be deemed defamatory, the Court again ruled in favour of Google.

Lastly, the Court made a remark regarding the plaintiff's claim, stating that an order for the delisting of search results can never be based on search queries other than the plaintiff's name. The plaintiff's claim to delist search results based on search queries other than his name should always be rejected, as information other than a person's name cannot be considered to be personal data under the DDA.

• *Rechtbank Amsterdam, 13 februari 2015, [eiser] tegen Google Inc., ECLI:NL:RBAMS:2015:716* (Amsterdam Court, 13 February 2015, [plaintiff] v. Google Inc., ECLI:NL:RBAMS:2015:716)
http://merlin.obs.coe.int/redirect.php?id=17471 NL

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Court Rejects Application to Prevent Broadcast of Programme on Healthcare Inspectorate

In a judgment on preliminary relief proceedings on 16 January 2015, the District Court of Midden-Nederland refused to prevent a television broadcast that might harm someone's personal and business interests. The case demonstrates how Dutch courts balance freedom of expression and the right to respect for privacy. The plaintiff worked as a physiotherapist and was convicted for possessing child pornography in 2007. The defendant intended to devote attention to the plaintiff's conviction in a television broadcast about the Dutch Health Care Inspectorate. The plaintiff claimed that the defendant should be prevented from paying attention to his conviction in any way.

The Court noted that the plaintiff had a right to respect for his honour and good name, which conflicted with the defendant's right to freedom of expression. Article 7 of the Constitution of the Kingdom of the Netherlands and Article 10 of the European Convention on Human Rights (ECHR) protect the right to freedom of expression. Article 10, paragraph 2 of the ECHR states that the exercise of the right to freedom of expression may be subjected to restrictions as are prescribed by law and are necessary in a democratic society for the protection of the reputation or rights of others. Under Article 6:162 of the Dutch Civil Code, a violation of someone else's right is a tortious act. Therefore, a judicial order to prevent the broadcast would be "prescribed by law", if the contested broadcast could be considered a tortious act. In that case, to decide whether or not the restriction would be "necessary in a democratic society", the judge had to balance the interests of the plaintiff and the defendant.

The Court considered that in principle both interests have the same weight and that the particular circumstances of the case should be decisive. On the one hand, the Court recognised the plaintiff's interest not to be in the news in relation to a conviction dating from 2007. On the other hand, the Court found that the defendant had an interest in paying attention to the functioning of the Dutch Health Care Inspectorate in general. In particular, the defendant intended to expose an abuse in the inspection system. The broadcast would show that in the Netherlands there is no effective procedure to inform the inspectorate in cases where a healthcare professional is convicted and where the conviction might affect his performance. In addition, the Court attached importance to the fact that the inspectorate recently started an investigation into the plaintiff's case. The Court considered that, with regard to the topic and the content of the broadcast, there was no ground to impose a preventive ban on the broadcast. It did not matter that renewed attention for the plaintiff's conviction could cause additional harm to his personal and busi-

ness interests, as "after all, his right to be left alone after his criminal conviction is not absolute".

• *Rechtbank Midden-Nederland, 16 januari 2015, Karl Noten tegen KRO-NCRV B.V., C/161384710 I KL ZA 15-11* (Midden-Nederland District Court, 16 January 2015, Karl Noten v. KRO-NCRV B.V., C/161384710 I KL ZA 15-11)
http://merlin.obs.coe.int/redirect.php?id=17472 NL

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Dutch Media Authority Becomes Supervisor for Netflix in Europe

On 3 March 2015, the Commissariaat voor de Media (Dutch Media Authority - CvdM) published its decision of 3 February 2015 with regards to the application of Netflix as a commercial on-demand audiovisual media service. In this decision, the Dutch Media Authority accepted Netflix's application. The result is that Netflix is, from now on, supervised by the Dutch Media Authority in Europe and should adhere to the Dutch Media Act (Mediawet 2008).

On 1 January 2015, Netflix International B.V. changed its place of establishment, switching from Luxembourg to the Netherlands. On 9 January 1015, Netflix International B.V. applied to the Dutch Media Authority with a request to classify and register Netflix as a commercial on-demand audiovisual media service within the meaning of the Dutch Media Act.

In its decision of 3 February 2015, the Dutch Media Authority accepted Netflix's application. Thereby, Netflix's European branch is now under the auspices of the Dutch Media Authority instead of that of Luxembourg.

As a consequence, Netflix's European branch should now adhere to the provisions with regard to commercial on-demand audiovisual media services of the Dutch Media Act. These provisions regulate, inter alia, the use of advertisements, sponsoring and product placement. Furthermore, the Dutch provisions on commercial on-demand audiovisual media services state that the provider of such a service should promote the production of and access to European productions.

Moreover, Netflix voluntarily affiliated itself with the Netherlands' Institute for Classification of Audiovisual Media, NICAM, the organisation responsible for coordinating the "Kijkwijzer" scheme (see IRIS 2004-4/30). The Kijkwijzer scheme aims at protecting minors from (unexpected) content which might seriously impair their physical, mental or moral development. Kijkwijzer is mostly known for its icons, which reveal the nature of the content involved (depicting e.g. "violence", "fear" or "discrimination") and are generally shown before the user watches the audiovisual content involved. Netflix's users will primarily notice the company's newly-forged affiliation by means of the use of Kijkwijzer icons in its video services.

• *Commissariaat voor de Media, "Commissariaat voor de Media toezichthouder op Netflix in Europa", 3 maart 2015* (Dutch Media Authority, 'Dutch Media Authority supervisor for Netflix in Europe', 3 March 2015)
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• *Commissariaat voor de Media, 'Besluit van het Commissariaat voor de Media inzake het verzoek van Netflix International B.V. tot classificatie en registratie van Netflix als commerciële mediadienst op aanvraag als bedoeld in artikel 3.29a van de Mediawet 2008', kenmerk 640202/641357, 3 februari 2015* (Dutch Media Authority, 'Decision from the Dutch Media Authority with regards to the application of Netflix International B.V. to classify and register Netflix as a commercial on-demand audiovisual media service within the meaning of article 3.29a of the Dutch Media Act', reference 640202/641357, 3 February 2015)
http://merlin.obs.coe.int/redirect.php?id=17474 NL

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Competition Court Upholds Regulator's Decision on Sports Broadcaster

On 28 January 2015, the Competition Court upheld the Competition Authority's (Autoridade da Concorrência - AdC) decision regarding the prohibition of the distribution of Sport TV shares between three Portuguese media companies. Controlinveste Media, NOS (the former Zon Optimus) and Portugal Telecom (PT) where planning this procedure, known as a "triangle operation", designed to split the Sport TV capital stock. The strategy was to sell 25 per cent to NOS (of the 50 per cent that PT owns in Sport TV), while keeping the remaining 50 per cent under the purview of Controlinveste.

Following this and after advancing to an in-depth investigation, the body responsible for ensuring the implementation of competition policy in Portugal, the Competition Authority, had decided to prevent the acquisition by NOS of Sport TV's shares. This resolution, adopted on 31 July 2014, was grounded on the assumption that it could create significant barriers to competition in the broadcasting market and, in particular, in the field of broadcasting rights for premium sports' content under subscription.

Under these circumstances, a judicial appeal was brought to the Competition Court by the media companies, whose intention was to get the tacit approval of the operation. The argument put forward was based on the lack of compliance with the deadline for the media content regulator's determination (called

Entidade Reguladora para a Comunicação Social - ERC) (see IRIS 2008-8/28), a binding opinion in cases where it is negative, as in the case at hand. In order to justify the delay and the request to extend the established deadline, the ERC alleged difficulties in assessing the merger, as well as the need to gather additional data. However, the Court rejected the media companies' appeal and upheld the Competition Authority's decision.

The Competition Court, called Tribunal da Concorrência, Regulação e Supervisão (TCRS), was created in 2011 and its competence is for appeals from independent administrative bodies with regulatory and supervisory functions, such as the Bank of Portugal, the Portuguese Market Commission of Securities (CMVM), the telecommunications regulator (ANACOM), the ERC or the Insurance Institute.

• *Autoridade da Concorrência, Tribunal dá razão à AdC na ação intentada por Controlinveste, Zon e PT no âmbito da operação triângulo, de 18-02-2015* (Competition Authority, "The Court rules in favour of the PCA in the action brought by Controlinveste, Zon and PT as part of the "Triângulo" Operation", 18 February 2015)
http://merlin.obs.coe.int/redirect.php?id=17476 PT

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Agenda

Summer Course on Privacy Law and Policy
6-10 July 2015 Organiser: Institute for Information Law (IViR), University of Amsterdam Venue: Amsterdam
http://www.ivir.nl/courses/plp/plp.html

Book List

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