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INTERNATIONAL

COUNCIL OF EUROPE

European Court of Human Rights: Diamant Salihu and others v. Sweden

A recent decision of the European Court of Human Rights (ECtHR) found that journalists who commit (minor) offences during newsgathering activities cannot invoke robust protection based on their rights to freedom of expression and information, as guaranteed by Article 10 of the European Convention on Human Rights (ECHR). Journalists of the Swedish newspaper Expressen had undertaken to demonstrate the easy availability of illegal firearms by purchasing one. The Swedish courts were of the opinion that the editor and the journalists could not be exempted from criminal liability as they had wilfully breached the Swedish Weapons Act. In a unanimous decision, the ECtHR confirmed the necessity of the journalists' criminal conviction. It declared the application for alleged breach of the right of journalistic newsgathering under Article 10 of the Convention manifestly ill founded.

In 2010, a series of shootings took place in southern Sweden, prompting lively public debate and calls for more stringent firearms control. Thomas Mattsson, Andreas Johansson and Diamant Salihu, the editor-in-chief, news editor and a journalist at the tabloid newspaper Expressen, decided to prepare a news story on the easy availability of illegal firearms. They successfully contacted several people who claimed that they could sell them a gun. Salihu bought one, while a photographer of Expressen was present during the transfer, with Johansson listening in via a mobile telephone for safety reasons. On arrival in their hotel, they called the police, photographed the weapon and put it in the hotel room's security box, until the police collected it half an hour later. The next day Expressen published an article portraying the events, including a large photograph of the firearm and a description of the contact leading up to its purchase.

Shortly after, the public prosecutor decided to press charges against the journalists, and all three were convicted for (incitement to) a weapons offence. The District Court and later the Court of Appeals found that the journalists had shown clear intent to commit punishable actions, and could not rely on the protection of Article 10 of the ECHR in this case. The journalists were not on trial for publishing an article, but for actions taken before the publishing. Furthermore, their actions appeared to be premeditated risk-taking to create sensational news, while it had not been necessary for the journalists to complete the purchase of the firearm and to subsequently transport it in order to fulfil their journalistic mission. Their aim - to investigate whether illegal weapons were easily accessible in Sweden - had already been achieved when Salihu received the offer to buy the firearm.

The Supreme Court upheld the journalists' conviction, removing the suspended sentences, but increasing the level of the criminal fines from 30 to 80 day fines, which amounted, in total, to approximately EUR 8,400 for Mattsson, EUR 5,700 for Johansson and EUR 4,400 for Salihu. The Supreme Court emphasised the strong societal interest in controlling the handling of weapons, although it also recognised the journalistic purpose behind the purchase of the firearm. According to the Supreme Court, the question of whether it was easy to buy weapons could, however, have been illustrated by other means, and the weight of the journalistic interest was not sufficient to justify completion of the purchase of the firearm. With regard to the proportionality of the sanction, the Supreme Court noted that the conviction was not for the actual publication of the article, and that the sentences imposed were below those normally prescribed for the crime, in view of the journalistic context and the precautions the journalists had taken after obtaining the weapon. The Expressen journalists subsequently lodged an application before the European Court of Human Rights, complaining that their conviction was unlawful (constituting a breach of Article 7 ECHR) and violated their rights as journalists guaranteed under Article 10 ECHR.

In its decision of 10 May 2016, the ECtHR dismissed the double complaint. With regard to the alleged violation of Article 10 of the Convention, the Court finds that the journalists' convictions were lawful and pursued the legitimate aims of the protection of public safety and prevention of disorder and crime. Regarding the decisive question of whether the interference was "necessary in a democratic society", the Court refers to the fundamental principles concerning this issue, elaborated in some of its Grand Chamber judgments such as in Stoll v. Switzerland (seeIRIS 2008-3/2) and recently in Bédat v. Switzerland (see IRIS 2016-5/1). Referring to its Grand Chamber judgment in Pentikäinen v. Finland (see IRIS 2016-1/2), it reiterated, "notwithstanding the vital role played by the media in a democratic society, journalists cannot, in principle, be released from their duty to obey the ordinary criminal law on the basis that, as journalists, Article 10 affords them a cast-iron defence. In other words, a journalist cannot claim an exclusive immunity from criminal liability for the sole reason that, unlike other individuals exercising the right to freedom of expression, the offence in question was committed during the performance of his or her journalistic functions".

Turning to the facts, the ECtHR endorsed the main arguments developed by the domestic courts: the journalists wilfully infringed ordinary criminal law, they could have illustrated the easy availability of firearms in other ways, and the weight of the journalistic inter-

est did not justify actually purchasing the firearm. The ECtHR furthermore observes that the question of the applicants' rights under Article 10 ECHR had been the subject of arguments, including during hearings, before all three domestic instances. The domestic courts had stressed the importance of journalists' role in society and made a balanced evaluation of all interests at stake. Taking into account the margin of appreciation afforded to the State in this area, and explicitly referring to the principle of subsidiarity, the ECtHR found that the reasons relied upon by the domestic courts were relevant and sufficient for the purposes of Article 10 ECHR, and that they struck a fair balance between the competing interests at stake. The conclusion is that the domestic courts were entitled to decide that the interference complained of was "necessary in a democratic society". The application was thus considered manifestly ill founded and therefore inadmissible.

• Decision by the European Court of Human Rights, Third section, case of Diamant Salihu and others v. Sweden, Application no. 33628/15 of 10 May 2016
http://merlin.obs.coe.int/redirect.php?id=18098 EN

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EUROPEAN UNION

European Commission: Support for private broadcasters in breach of EU state aid rules

On 5 August 2016, the European Commission concluded that a Spanish scheme to compensate terrestrial private broadcasters for carrying out parallel broadcasting during the digitisation of the terrestrial television signal was in breach of EU state aid rules (for related decisions, see IRIS 2014-10/2 and IRIS 2013-7/5). However, as no aid had been granted to date, no recovery was ordered.

The decision arose from a 2011 notification from Spain that it planned to compensate private broadcasters for certain costs associated with the switch from analogue to digital broadcasting. In particular, Spain had imposed a "simulcast" obligation on broadcasters, requiring them to broadcast both analogue and digital signals during the digital switchover transitional period, in order to avoid service disruptions for viewers. The scheme planned to compensate private broadcasters for costs incurred due to this simulcast obligation. However, in 2012, the Commission opened an investigation into the scheme.

In its decision, the Commission first noted that under EU state aid rules, member states may "support the reallocation of radio spectrum and to mitigate its impact on operators". Moreover, "they can, in particular, offer compensation for costs that operators, in the case of a proven market failure, could not be expected to carry themselves absent the need for the migration. To avoid any undue distortion of competition, such measures must be necessary for reaching the assigned objective. The aid granted needs to be proportionate to the goals and the measure must be technologically neutral." The Court of Justice confirmed the principle of technological neutrality in the Mediaset case T-177/07 (see IRIS 2011-8/4).

However, the Commission found that "Spain's support for the transition from analogue to digital TV broadcasting was offered only to digital terrestrial broadcasters to the detriment of alternative platforms, such as satellite, cable or IPTV (TV over Internet Protocol)". The Commission considered that "Spain did not substantiate why the principle of technological neutrality would not be justified in this case. Any exception to this principle would have to be duly justified, for example, on the basis of an ex ante independent study, combined with a market consultation, demonstrating the efficiency of the DTT platform over alternative platforms." The Commission concluded that the measure selectively favoured terrestrial broadcasters as well as platform operators to the detriment of broadcasters and operators representing alternative platforms, and thereby distorted competition in the Single Market.

• European Commission, "State aid: Commission finds Spain's support for private TV broadcasters in breach of EU rules", 5 August 2016
http://merlin.obs.coe.int/redirect.php?id=18099 DE EN FR
• European Commission, Compensation of costs for the liberation of the first digital dividend in Spain, SA.32619, 5 August 2016
http://merlin.obs.coe.int/redirect.php?id=18100 EN

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NATIONAL

BA-Bosnia And Herzegovina

Public broadcasting system no longer has revenue from subscription tax

On 19 July 2016, the Parliamentary Assembly of the House of Representatives failed to pass a proposed Act amending the Act on the Public Broadcasting system, which foresaw the collection of the TV subscription tax through electricity bills.

Bosnia and Herzegovina is composed of two federal units (entities) - Republika Srpska and Federation of Bosnia-Herzegovina. Three constituent peoples (Bosniaks, Serbs and Croats) make up 96 per cent of the population. For a law to be adopted, it is necessary for representatives of all three constituent peoples in the Parliamentary Assembly of the House of Representatives to vote for it. Thus, acts may only be elected by national consensus.

The public broadcasting system consists of three TV broadcasters: two entity broadcasters, Radio-Television of the Republika Srpska (RTRS) and the Radio-Television of the Federation of Bosnia and Herzegovina (RTV FBiH); and the state broadcaster, Radio and Television of Bosnia-Herzegovina (BHRT). Croat political institutions advocate a complete transformation of BHRT into three ethnic channels (Bosniak, Serb and Croat). Media experts believe this would additionally complicate, both politically and organizationally, the already complex broadcasting system in Bosnia-Herzegovina. Croat politicians have been pointing out for years that public service broadcaster do not reflect the political and cultural interests of Croats.

Until now, the compulsory TV tax was collected through telecom operators' landline bills. However, citizens are cancelling their landline connections on a daily basis, as this communication technology is becoming outdated. According to data from the Board of the Public Broadcasting System, this has nearly halved the service's revenue in the last two years.

Therefore, an act amending the Act on the Public Broadcasting system was proposed. It foresaw the collection of the TV subscription tax through the electricity bills instead of the telecom operator's landline bills. According to the proposal, submitted by representatives of the two ruling Bosniak parties - Party of Democratic Action (Stranka demokratske akcije - SDA) and Union for a Better Future of Bosnia-Herzegovina (Hrvatska demokratska zajednica Bosne i Hercegovine - SBB BiH) - funds collected from TV tax were supposed to be divided by giving 40 per cent to BHRT and 30 per cent each to RTRS and RTV. According to the previous model for distributing the TV tax, 50 per cent of the collected tax belonged to BHRT and 25 per cent to each entity broadcaster. However, delegates of the strongest Serb party, Alliance of Independent Social Democrats (Савез независних социјалдемократа - SNSD), did not support this solution, requesting that the amount collected from tax be shared equally among the three broadcasters because they believe the state television is no more important than the entity broadcasters. Delegates of Croat political parties did not support the proposal either, as they advocate total reconstruction of the broadcasting system over partial solutions. The Parliamentary Assembly did not pass the proposed Act.

Then, in the next session held on 1 August 2016, the opposition Social-Democratic Party (Socijaldemokratska partija Bosne i Hercegovine SDP) proposed continuing for another six months the old method of collecting the tax through telecom operators. However, the proposal failed to get majority support in the Parliamentary Assembly of the House of Representatives.

The discussion on issues related to the Public Broadcasting System will resume after the parliamentary summer recess. Practically, public services are left without their most important means of funding, which threatens to disrupt or discontinue broadcasting and to bankrupt them. As a first reaction, the General Director of the public broadcaster, BHRT, told journalists that the fate of the public broadcaster is uncertain: "There is a danger that we will become the only country in Europe without a public broadcasting service."

• *Okončana 33. sjednica Predstavničkog doma 19.07.2016* (Further information on the parliamentary session of 19 July 2016)
http://merlin.obs.coe.int/redirect.php?id=18125 BS

• *Okončana 34. sjednica Predstavničkog doma 01.08.2016* (Further information on the parliamentary session of 1 August 2016)
http://merlin.obs.coe.int/redirect.php?id=18126 BS

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BG-Bulgaria

Amendment in the regulations concerning the selection of General Directors of BNR and BNT

On 20 May 2016, immediately after the election of the General Director of the Bulgarian National Radio (BNR) on 17 May 2016, deputies of all Parliamentary groups submitted a bill for an amendment and supplement of the Radio and Television Act (RTA). According to the amendment, the General Director of BNR and the General Director of Bulgarian National Television (BNT) continue to exercise their rights after their mandates expire, until the new General Directors begin their duties.

On 2 June 2016, the text passed at the first and second reading in one plenary sitting, which is a precedent in the legislative practice of the National Assembly. The amendment was approved at the first reading without debates with 103 votes 'pro' and 12 'abstained from voting'. At the second reading the text was approved with 88 votes 'pro', 3 'con' and 30 'abstained'. The amendment was released in the 'State Gazette', issue 46, on 17 June 2016, and entered into force on 20 June 2016.

The norm is taken from a text of the RTA, which says that the members of the Council for Electronic Media (CEM) shall continue to perform their functions until

the representatives of the Parliament and the President who replace them begin their duties (Article 29, para. 3 of the RTA). CEM elects and dismisses the General Directors of the public media in Bulgaria (Article 32, para. 1, item 2 of the RTA). The law does not explain the method of the election - by means of a competition or nominations of the members of the supervisory body. Over the years, the competition procedure has developed in practice. The main purpose of the bill is to provide legal opportunity for the regulatory body to strictly execute the election procedure by means of competition, so that a gap in the management of BNT and BNR is not formed if the three-year mandate expires during the competition procedures.

The mandate of the General Directors of BNR and BNT respectively is 3 years (Article 66, para. 2 of the RTA). The General Directors of BNR, respectively BNT, can be elected on the same position for no more than two consecutive 3-year mandates (Article 66, Para. 3 of the RTA). The second mandate of the General Director of the BNT expires on 1 August 2016.

CEM started a procedure for the amendment of the regulation for the election of General Directors of BNR and BNT. The amendment does not envisage a competition procedure.

• Законът за радиото и телевизията е достъпен на адрес (The Radio and Television Act)
http://merlin.obs.coe.int/redirect.php?id=16008 BG

• Стенограма от пленарното заседание на Народното събрание е достъпна на адрес (The Shorthand record of the Plenary Session of the National Assembly)
http://merlin.obs.coe.int/redirect.php?id=18093 BG

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A report on the monitoring of personal information during broadcasts

On 21 June 2016, the Council for Electronic Media (CEM) came out with a report on an incident related to a contestant of the rhythmic gymnastics national team, in which a young woman fell out of an apartment on 6th floor. Without a confirmation by the official authorities, the media categorized the incident as an attempted suicide and reported it extensively.

The purpose of CEM's report is to trace whether the requirements of the Radio and Television Act (RTA) related to the personal life and privacy have been observed during the broadcast of the case, whether there is any risk of a secondary victimization, whether journalistic ethics standards are observed, or whether the media have exceeded professional norms by sensationalising a personal tragedy. CEM's express monitoring covers the central news broadcastings on 14 June 2016 and the morning news programmes on 15 June 2016. The conclusions are as follows:

1. There is overexposure of the topic by bTV and Nova TV (national private TV broadcasters). The focus on the personal drama, the multiple broadcastings from the hospital and the area of the incident, and the use of the whole morning-news programme in both television programmes on 15 June 2016 to cover the topic, are close to sensational reporting. In this way, the media exceeded the limits of normal professional reporting.

2. The broadcasted media content is not in favour of the public interest, and actually opposes it, creating prerequisites for curiosity and provoking the audience to be interested in more details. The news related to the tragic incident take priority in the news and sports news broadcastings (BNT 1, bTV and NOVA TV) and constitute a large, even main, part of the air-time in the morning-news programme (it is a main topic in bTV and NOVA TV).

3. bTV and NOVA TV broadcast details related to the incident and personality of the young girl, which can be perceived as aspects related to her family life and health status. In this respect, the monitoring showed that there were violations of Article 16, para. 1 of the RTA, according to which the media services providers cannot make and broadcast transmissions containing information related to the personal life of citizens without the consent of the persons concerened. Regardless of the fact that the interlocutors in the studio or on the phone revealed the information, the questions asked by the journalists urged for specific answers.

However, BNT1 (public TV broadcaster) broadcast information about the rhythmic gymnastics contestant (in the news broadcastings and morning-news programme), which avoided discussion of her personal life as well as the personal life of her relatives, as much as possible. The information about the incident in the radio programmes HORIZONT (public radio broadcaster), DARIK RADIO, and RADIO FOCUS is provided in a focused way within news programmes without discussing personal information.

4. Entering the personal life of the young girl and the speculations surrounding the incident violate the standards of journalism ethics. The broadcast media content brings a risk of a secondary victimisation of the relatives of the girl. The above-cited Code of Ethics requirements have been violated.

• ДОКЛАД - Относно наблюдение на Съвета за електронни медии върху отделни предавания за наличие на информация , свързана с личния живот и личната неприкосновеност , при отразяване на инцидента със състезателката по художествена гимнастика Цветелина Стоянова (CEM's Report, 21 June 2016)
http://merlin.obs.coe.int/redirect.php?id=18094 BG

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CH-Switzerland

Federal Council report on public-service electronic media

On 17 June 2016 the Federal Council published a much awaited report on the public-service electronic media. The report will be discussed in the Federal Parliament in the autumn, in a particularly tense political climate as the Swiss broadcasting company (Société Suisse de Radiodiffusion et Télévision - SSR) is being severely criticised regarding its funding and its mission as a public-service broadcaster.

The report begins by analysing the evolution of the audiovisual public service and the offer and consumption of electronic media in Switzerland. It also presents the technological, economic, legal, and financial framework in which the SSR and the private radio and television broadcasters operate. The Federal Council noted in particular that the public service has to face major challenges and substantial changes due to the digitisation and structural change affecting the media. Also, the Swiss market is too small for it to be possible to use only income from advertising to fund the production of television programmes and to meet the requirements of a quality public service. The Federal Council therefore was of the view that a licence fee remains essential if the economic and political independence of the public service in Switzerland is to be preserved.

The SSR currently receives most of the amount raised by the licence fee; the private broadcasters each receive approximately 4 to 6 per cent of the total. According to the Federal Council, it is essential for the SSR to be large enough to enable Switzerland to have the advantage of a quality audiovisual offer, capable of standing up to competition from foreign channels. Although audiences appreciate the SSR's own programmes, the proportion of the programmes it broadcasts that are produced by foreign television channels exceeds 60 per cent. Furthermore, a large number of foreign channels broadcast advertising directed at the Swiss market, accounting for 40 per cent of commercial revenue for television.

The report goes on to present the future guidelines the Federal Council intends to provide to the public audiovisual service. The Council believes that Switzerland, as a plurilingual and socially and culturally diverse country, cannot be without a public service financed by a licence fee, and that high-performance electronic media are indeed essential to encourage understanding, cohesion, and exchanges between the linguistic regions and the different communities in the country. The Federal Council also believes that the current model, with one large national undertaking (SSR) and a number of private regional broadcasters, is best able to meet the future demands of a quality public service. According to the report, the advantages of this system are greater than the economic inconveniences of a market distorted by the presence of one major national broadcaster. The Federal Council also advocates maintaining a mixed funding model, combining a licence fee and commercial advertising. This system is to the advantage of the SSR (70 per cent funded by the licence fee) and to those private broadcasters which hold a concession. Despite stricter requirements, the report nevertheless excludes any increase in the SSR's budget.

The Federal Council nevertheless believes that this model should be adapted to suit the digital environment. In particular, it would like the SSR to attract a larger audience of young people, who are moving away from traditional media in favour of offerings available on the Internet. This is a major challenge for the public service, which is supposed to be directed at the population as a whole and ought to be present wherever the public is to be found. The SSR should therefore propose offers which are relevant to young people in terms of content and modes of consumption. The Federal Council would also like the SSR to devote at least half the product of the licence fee to information; independent, quality information is essential for the smooth running of a democratic constitutional State, as it ensures the free formation of opinions and of the people's will. In this respect, the Federal Council believes that the SSR plays an essential role in performing the public-service mandate, more particularly because it reflects Switzerland's particularities.

According to the report, culture and sport ought to remain the SSR's central activities. The Federal Council also feels, however, that the SSR should revise its practices with regard to purchasing formats and foreign series, in order to accentuate the difference between its programmes and the offers put forward by the private broadcasters. Such a differentiation was indeed considered to be an important factor in the acceptance and legitimation of the public service.

Ultimately, the Federal Council wants the current legislation on radio and television to include electronic media. According to the report, independent regulation of broadcasting vectors is essential if online offerings are to be fully incorporated in the audiovisual public service.

• *Rapport d'analyse de la définition et des prestations du service public de la SSR compte tenu de la position et de la fonction des médias électroniques privés* (Report analysing the definition and services of the public service provided by the SSR in the light of the position and function of private electronic media)
http://merlin.obs.coe.int/redirect.php?id=18131 DE FR

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CY-Cyprus

TV organisations to continue operation with temporary licences for one more year

Five years after the switchover to digital television on 1 July 2011, operators will continue transmitting until June 2017 with temporary licences. This is provided in amending Act 77(I)/2016 of the Act on Radio and Television Organisations 7(I)/1998, published in the Official Gazette on 1 July 2016.

The Act amends Article 56 of the Law 7(I)/2015, extending the validity of TV licences for all operating service providers by an additional year. Temporary licences for digital transmission that replaced the then existing licences for analogue transmission were initially issued, valid until 30 June 2012. Pending amendments to the Law 7(I)/2015 to respond to the conditions of the new environment and enable the issuance of permanent licences, temporary licences have since been renewed each year (see IRIS 2015-9/7). Thus, validity is extended until 30 June 2017.

With the same amending Act, temporary licences for legal entities of public law are also extended for one year, even in the case that they do not fulfil all the requirements set by law. This is applicable to the Cyprus Telecommunications Authority (321301307΄367 Τηλεπικοινωνιών Κύπρου - CYTA), a semi-governmental organisation that operates IPTV. Its capital share and structure, as a legal entity of public law, deviates from the model set in the law, which requires inter alia capital share dispersion and a threshold of 25 per cent for shareholders. After having operated in an unregulated, analogue environment for online providers, CYTA benefited from a special provision, voted for in 2011, which enabled its operation in the digital environment.

Another provision in the amending Law authorises the Radio Television Authority to issue temporary licences to new applicants, also valid until the aforementioned date.

With the same amending law, Article 4 of the Law 7(I)/2015 was modified. Article 4 of the Law 7(I)/2015 regulates the appointment and the status of the Chairperson, the appointment of the vice-Chairperson, and the members of the Radio Television Authority (see IRIS 2016-8/8).

An amending draft law aiming at extensive changes to the Law 7(I)/2015, also to enable the issuance of permanent licences, was sent to the House of Representatives in 2013 (see IRIS 2013-10/13). The government later withdrew the draft law for further study, and major law amendments are still pending.

• Αριθμός 77(331) του 2016 ΝΟΜΟΣ ΠΟΥ ΤΡΟΠΟΠΟΙΕΙ ΤΟΥΣ ΠΕΡΙ ΡΑΔΙΟΦΩΝΙΚΩΝ ΚΑΙ ΤΗΛΕΟΠΤΙΚΩΝ ΟΡΓΑΝΙΣΜΩΝ ΝΟΜΟΥΣΤΟΥ 1998 ΕΩΣ (321341. 2) ΤΟΥ 2015 (Amending Law 77(I)/2016 of the Law on Radio and Television Organisations 7(I)/1998)
http://merlin.obs.coe.int/redirect.php?id=18095 EL

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Appointment of a new Board of the Radio Television Authority

On 13 July 2016, the Council of Ministers appointed a new governing board of the Radio Television Authority following the expiration of the mandate of the previous board in mid-June 2016. The new Chairperson, a former attorney and minister of Justice and Public Order, has already served in the same position. He served from 1998, the year of the establishment by law of the Authority, until 2004. One of the members of the previous board continues on the new board.

The appointments have been effected on the basis of recent amendments of the Law on Radio Television Organisations 7(I)/1998 affecting both the appointment procedure and the status of the Chairperson. Article 4 of the Law, providing for the appointment of the Authority's board, was amended by Law 77(I)/2016 as follows:

"While the Council of Ministers remains the appointing body, the appointment of the Chairperson and the vice-Chairperson is effected on a proposal by the President of the Republic to the Council of Ministers. Under the Presidential system of Cyprus, the President of the Republic appoints the "independent officers", namely the Attorney General, the Auditor General and others, while the Council of Ministers appoints the boards of legal entities of Public Law according to Article 54 of the Constitution."

The status of the Chairperson, serving since 2011 as "executive President" with full-time employment, is reverted to its previous form. Now, the Chairperson presides over the meetings and deliberations of the Authority with no executive status. Therefore, the Director of the Authority remains its sole executive agent.

The present composition of the Authority's board comprises three lawyers (including the Chairperson), two communication professionals, one chartered accountant and an electrical engineer.

The new board is expected, among other things, to proceed with the final touches on major amendments to the law and, following that, to work on the issuance of permanent operation licences in the digital environment established in July 2011.

• Αριθμός 77(331) του 2016 ΝΟΜΟΣ ΠΟΥ ΤΡΟΠΟΠΟΙΕΙ ΤΟΥΣ ΠΕΡΙ ΡΑΔΙΟΦΩΝΙΚΩΝ ΚΑΙ ΤΗΛΕΟΠΤΙΚΩΝ ΟΡΓΑΝΙΣΜΩΝ ΝΟΜΟΥΣΤΟΥ 1998 ΕΩΣ (321341. 2) ΤΟΥ 2015 (Amending Law 77(I)/2016 of the Law on Radio and Television Organisations 7(I)/1998)
http://merlin.obs.coe.int/redirect.php?id=18095 EL

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CZ-Czech Republic

Government has approved transition to the DVB-T2 standard

On 20 July 2016, the Czech government approved the strategy for the full transition of the digital terrestrial television to the DVB-T2 new broadcast standard.

The strategy envisages that the process of transition to DVB-T2 will be launched in autumn 2016, accompanied by an information campaign. On 1 February 2021, all existing DVB-T networks will be switched off synchronously. According to the government's strategy, an evaluation of the realisation of the transition to DVB-T2 has to be submitted each year on 31 January. The first evaluation should be submitted by 31 January 2017. In the assessment of 31 January 2020, information on the coverage of the population should be presented, so that the government can consider the possibility of extending the deadline for the completion of the transition to DVB-T2. The proposed deadlines are designed to be socially-respectful with regard to household expenditure.

The Association of mobile network operators (APMS) welcomed the adoption of the strategy, as this will release the 700 MHz band for broadband mobile data services. The 700MHz band should be partly reclaimed in 2020 by local mobile operators for LTE mobile networks. Terrestrial digital television broadcasting in the Czech Republic is the only way of accessing free-access television broadcasting. At the same time, it is the most powerful platform for TV broadcasting in the Czech Republic, and is used by more than 60 per cent of households, and by 40 per cent of households as the sole source of TV broadcasts.

After reaching the development goals and the successful transition to DVB-T2 broadcast standard, six nationwide DVB-T2 networks will broadcast digital terrestrial TV in the Czech Republic.

• *Usnesení vlády české republiky ze dne 20. července 2016 č. 648 o Strategii rozvoje zemského digitálního televizního vysílán* (Czech Government Resolution dated July 20, 2016 no. 648 the development strategy of terrestrial digital television broadcasting)
http://merlin.obs.coe.int/redirect.php?id=18127 CS

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DE-Germany

Federal Administrative Court rules that Sport1 breached ban on surreptitious advertising

The Bundesverwaltungsgericht (Federal Administrative Court - BVerwG) ruled, in a judgment of 22 June 2016 (Case 6 C 9.15), that a broadcaster is in breach of the ban on surreptitious advertising if it fails to identify advertising content in one of its programmes when the purpose of the programme does not provide sufficient justification for this.

The plaintiff, which operates the TV channel "Sport1", aired the programme "Learn from the Pros", originally produced for the American TV market, in which professional poker players provide tips for playing the game. The plaintiff had acquired the programme under licence and provided it with a German soundtrack. During much of the broadcast, the logo of an online poker service was visible because it was printed on the gaming chips and the backs of the playing cards, as well as on the boards belonging to the studio decoration. After the Bayerische Landeszentrale für neue Medien (Bavarian New Media Office) had objected to the programme because of a breach of the ban on surreptitious advertising, the Verwaltungsgericht München (Munich Administrative Court) dismissed the channel operator's appeal against the decision (judgment of 13 June 2013, Case M 17 K 11.6090). The plaintiff's appeal was dismissed by the Bayerischer Verwaltungsgerichtshof (Bavarian Administrative Court of Appeal - VGH) (Case 7 B 14.1605, see IRIS 2015-8/11).

The Federal Administrative Court held that showing the logo both objectively constituted advertising and indicated an intention to advertise, and accordingly dismissed the plaintiff's admissible appeal on points of law. In the judges' opinion, the fact that the logo concerned was shown many times and was almost always present on screen meant that attention was drawn to the online poker service in a way that could objectively be considered advertising. Furthermore, the judges held that the plaintiff had broadcast the programme with the intention of fulfilling an advertising purpose. The Court said that element of intention, which the law requires as evidence of surreptitious advertising, must be considered to exist when there are no programme or editorial requirements that justify the broadcast. Adopting the necessary case by case approach, the judges weighed up the channel operator's right, enshrined in Article 5(1) of the Grundgesetz (Basic Law), to freely determine the programme's editorial concept against the viewers' right, protected by the ban on surreptitious advertising, not to be misled by the events on screen. In this case, the judges

saw no editorial justification to incorporate advertising messages in a programme containing tips and hints on playing poker. The Munich Administrative Court had already established the considerable frequency of these messages. The Court found that the audience was also likely to be misled as to the purpose of the programme, because the online poker service's logo had been incorporated without it being appropriately identified.

• *Urteil des Bundesverwaltungsgerichts (Az.: 6 C 9.15) vom 22. Juni 2016* (Judgment of the Federal Administrative Court of 22 June 2016 (Case 6 C 9.15).)
http://merlin.obs.coe.int/redirect.php?id=18113 DE

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Filming of a hostage drama within the law despite murderer's personality rights

According to media reports, the Landgericht Aachen (Aachen Regional Court) ruled in a decision of 24 May 2016 (Case 8 O 168/16) that the planned filming of the Gladbeck hostage drama was within the law, and the personality rights of the person convicted of the hostage-taking and murder were no obstacle to carrying out the project.

In August 1988, the hostage-taker and another perpetrator robbed a bank in Gladbeck. While they were on the run through Germany and the Netherlands, two hostages and a police officer were killed. Both were sentenced to life imprisonment in 1991 by the Landgericht Essen (Essen Regional Court). In their decision, the judges dismissed the convicted murderer's application for legal aid. The purpose of the application by the prisoner who was held at Aachen prison, was to obtain the funds to apply for an injunction, to prevent a Berlin production company from making a film of the hostage taking. In principle, people on a low income can claim legal aid pursuant to Article 114(1), 1st paragraph, of the Zivilprozessordnung (Civil Code), but only when the legal action or legal defence has sufficient prospects of success. In this instance, the Aachen court denied the request, stating that although the film affected the offender's personality rights, those rights had to take a lesser position than freedom of expression and freedom of broadcasting.

In order to prevent the film being made, the offender had sent the Berlin production company a cease-and-desist order, with which it did not comply. The company is of the opinion that the Gladbeck hostage drama of 1988 is one of the most spectacular crimes in post-war German history, and the perpetrators are accordingly people of relevance to contemporary history; they therefore must, like the RAF terrorists, tolerate a cinematic presentation of the events.

The prisoner responded that the film would jeopardise his social rehabilitation and that his reintegration into society would be made significantly harder as a result of the planned portrayal of the drama from the victims' perspective. Stating that his personality rights would be considerably impacted, he referred to the "Lebach judgment" of 5 June 1973 from the Bundesverfassungsgericht (Federal Constitutional Court) (case 1 BvR 536/72), which constituted a landmark decision on the relationship between freedom of broadcasting and personality rights. In that judgment, the Constitutional Court judges ruled that in principle the interest of the population in obtaining information concerning a criminal offence took precedence, and that freedom of broadcasting accordingly superseded the protection of the plaintiff's personality. However, that had to be rejected if the reporting jeopardised the offender's possible social rehabilitation because his personality rights, enshrined in Article 2(1) in conjunction with Article 1(1) of the Basic Law, then carried more weight.

The Aachen judges saw no evidence that this was the case in this instance. According to the Court, the planned film did in fact affect the plaintiff's personality rights, but the threat to his social rehabilitation was a secondary consideration and was of lesser significance than freedom of expression, freedom of broadcasting, freedom of the press and freedom of artistic creation. The plaintiff indicated his intention to appeal against the decision.

• *Pressemitteilung des LG Aachen zum Urteil vom 24. Mai 2016 (Az.: 8 O 168/16)* (Press release of the Aachen Regional Court on the judgment of 24 May 2016 (Case 8 O 168/16))
http://merlin.obs.coe.int/redirect.php?id=18115 DE

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No injunctive relief against rebroadcasting of child abuse drama

In a judgment of 3 June 2016 (Case 324 O 78/15), the Landgericht Hamburg (Hamburg Regional Court) ruled that a former pupil of the Odenwaldschule boarding school in Hesse, in which child abuse took place on several occasions, is not entitled to injunctive relief against the rebroadcasting by the TV station WDR and the production company of the feature film "Die Auserwählten" (The Favoured Few) depicting those events, despite the fact that he was himself a victim.

The Odenwaldschule was the focus of public attention when it came to light that systematic sexual abuse of pupils had been perpetrated by various members of staff for many years from the end of the 1990s onwards. The school filed for bankruptcy on 16 June 2015 and ceased teaching activities a few weeks later.

The film was shown at 8.15pm on 1 October 2014 on the channel Das Erste. Before it began, it was pointed out in on-screen text that the film did not tell the personal story of an individual but was about the abuse of at least 132 children by the then headmaster and other teachers, portraying this as an example of the phenomenon and exploring the basic mechanisms concerned. The plaintiff demanded that the defendants, WDR and the film production company, refrain from rebroadcasting scenes showing the character Frank Hoffmann. The proceedings involved no claim for damages.

In the Court's opinion, there were some indications that the film and its distribution breached the plaintiff's general personality rights. It was clear, according to the judges, that the accumulation of identifying features meant that those familiar with the plaintiff's school and personal environment could recognise that the character Frank Hoffmann had been modelled on the plaintiff. However, after weighing up all the interests involved, and particularly after taking into consideration the defendants' artistic freedom guaranteed by Article 5(3) of the Grundgesetz (Basic Law) and in issue here, the interference with the plaintiff's general personality right was not unlawful.

The film, the Court continued, was clearly a feature film and not a documentary, which might lay claim to supplying every detail of the facts. The important factors were therefore the extent to which the film departed from the facts and the resulting adverse effect on the plaintiff's personality rights, because the more a character differed from the actual individual on which he or she was modelled and became purely fictional, the more the holder of artistic freedom benefited from the application of standards specific to art. The actual events at the school contrasted with the portrayal of the character Erik and the biology teacher Petra Grust in the film. Taking into consideration all the circumstances of the individual case, those differences led to the conclusion that the film scenes in issue did not breach the law.

Moreover, the Court said, the plaintiff had in several ways brought up the subject in public himself. Furthermore, there was an overriding public interest in the broadcasting of the film. The plaintiff's personal privacy had not been violated, even if the broadcast had put a personal strain on him and he deserved particular protection as a child victim of serious criminal offences. The film is to be shown in schools, clubs and other facilities as part of educational and abuse prevention work.

• *Urteil des LG Hamburg vom 03. Juni 2016 (Az.: 324 O 78/15)* (Judgment of the Hamburg Regional Court of 3 June 2016 (Case 324 O 78/15))
http://merlin.obs.coe.int/redirect.php?id=18114 DE

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Users must be informed by manufacturers about data transfer in the case of smart TVs

According to the Landgericht Frankfurt (Frankfurt Regional Court) in a judgment of 10 June 2016 (Case 2-03 O 364/15), manufacturers of smart TVs must provide consumers with better information about the gathering of personal data and must not issue any unreasonably long terms and conditions or privacy policy.

The defendant was a manufacturer of internet-enabled smart TVs that operate on the HbbTV standard, which is usually activated by pressing the "red button". The HbbTV function was installed and switched on when the smart TVs were delivered. The defendant's smart TVs also feature a user interface called "Smart Hub", which enables various items of information to be called up on the TV set, contains a kind of digital video library, and possesses an App structure. After being set up, the smart TVs in issue establish a connection to a Samsung server via the IP address in order to check that the installed firmware is up to date and carry out updates if necessary. The region in which the user is located is identified in order to produce the correct language version of the terms and conditions. The installation instructions for the smart TV contain no information on the conditions of use or a privacy statement. The terms and conditions and privacy statement later used by the defendant are very extensive (covering more than 50 screen pages in each case). The plaintiff, the North Rhine-Westphalia Verbraucherzentrale (consumer advice centre) demanded that the defendant cease gathering and using consumers' personal data when a device is put into operation before the Smart Hub Terms and Conditions and Privacy Policy are agreed to, and before the Smart Hub function is activated. It also demanded that the company cease providing terms and conditions and details of its privacy policy that are so long that a consumer cannot reasonably be expected to comprehend them.

The Court partly allowed the consumer advice centre's complaint, stating that the defendant had to draw the attention of the purchaser of a smart TV to the fact that personal data was gathered and used when the device was connected to the internet. Some consumers, it went on, were not aware that after a smart TV had been connected personal data in the form of IP addresses could also be gathered when the device's internet function was not in use. Similarly, the consumer was generally not aware that personal data in the form of IP addresses could be gathered via the HbbTV function. Furthermore, the Court agreed with the consumer advice centre that the Terms and Conditions and Privacy Policy, comprising more than 50 screen pages in each case, were unreasonably long and difficult to read. Owing to the inadequate transparency with regard to the extent of the data transfer,

the defendant was prohibited from using numerous clauses in the terms and conditions.

However, the Court dismissed the action in respect of the plaintiff's demand that it prohibit the gathering of personal data in connection with the use of the HbbTV service and the installation of the smart TV if no agreement has been given for this to be done, pointing out that this data was not passed on to the defendant German company but, rather, to the operator of the HbbTV services and the foreign parent company, which was not a party to the legal action. As the action was therefore not directed against the correct defendant, the Court held that it did not have to decide whether the data transfer met the legal requirements.

This decision can be appealed.

• *Urteil des LG Frankfurt vom 10. Juni 2016 (Az 2-03 O 364/15)* (Judgment of the Frankfurt Regional Court of 10 June 2016 (Case 2-03 O 364/15))
http://merlin.obs.coe.int/redirect.php?id=18116 DE

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Who is entitled to the "kickback discounts" received by a media agency?

In its decision of 16 June 2016, on a final appeal on points of law in a dispute between Haribo and the media agency Mediaplus (Case III ZR 282/14), the Bundesgerichtshof (Federal Court of Justice - BGH) set aside the judgment of the Oberlandesgericht München (Munich Higher Regional Court - OLG München) of 23 August 2014 (Case 7 U 4376/13). OLG München had previously ruled that there was no obligation to disclose information and accordingly held that Mediaplus was entitled to the bulk advertising discounts and referred the case back to the appeals court for retrial and a new decision.

In a multistage action, Haribo demanded that Mediaplus disclose information and pass on any discounts, especially free advertising slots, granted by media providers between 2004 and 2008 to the media agency Mediaagentur MagnaGlobalMediaPlus (MGMP) on purchases of advertising time (so-called "kickback discounts"). Via the purchasing holding company MGMP, the media agencies Mediaplus and Interpublic pooled their purchasing volumes when concluding advertising purchase contracts with media. However, the only media agency contract was between Mediaplus and Haribo, and the latter had not signed a separate contract with MGMP.

Owing to the absence of a contractual relationship between MGMP and Haribo, the Munich Higher Regional Court ruled there was no obligation to disclose information about and pass on any kickback discounts that MGMP had obtained on behalf of Mediaplus with the Haribo budget. Since no contract had been concluded between Haribo and MGMP, there was no media agency contract from which the aforementioned obligation could be inferred.

The Federal Court criticised the Munich Higher Regional Court for failing to correctly assess MGMP's legal position, stating that it had not sufficiently clarified whether MGMP had somehow acted as a "front" for Mediaplus in order to obtain better terms and conditions for the two media companies involved, Mediaplus and Interpublic, by pooling purchases, or whether MGMP had provided a separate service of its own. Only in the latter case, the Court said, would the agency on no account have to pass on the discounts. However, if MGMP had acted as a "front", Haribo could be entitled to call for the discount to be passed on.

The Federal Court emphasised that, despite its fundamental importance for the media agency business, its decision related to an individual case and did not establish a precedent.

• *Urteil des BGH vom 16. Juni 2016 (Az. III ZR 282/14)* (Judgment of the BGH of 16 June 2016 (Case III ZR 282/14))
http://merlin.obs.coe.int/redirect.php?id=18112 DE

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FR-France

LCI and Paris Première on freeview DTTV: Conseil d'Etat validates CSA decisions

In two decisions delivered on 13 July 2016, the Conseil d'Etat (France's highest administrative tribunal) rejected the appeals brought against decisions made by the national audiovisual regulatory authority (Conseil Supérieur de l'Audiovisuel - CSA) in December 2015. The decisions authorised the channel LCI to switch to freeview DTTV and refused the request from Paris Première to do so. Article 42-3 of the Act of 30 September 1986, amended by the Act of 15 November 2013, allows the CSA the possibility, under certain conditions, of authorising a pay DTTV channel to switch to freeview, waiving the common-law procedure which provides for freeview DTTV frequencies to be allocated after a call for tenders (the "open procedure"). In the case at issue, BFM TV, one of LCI's competitors, and the company Nextradio TV, of which it is a subsidiary, had called on the Conseil d'Etat to cancel the CSA's decision granting approval to LCI. Paris Première and M6 had also called for the decision

refusing approval to be overturned. In both its decisions, the Conseil d'Etat stated that, in accordance with Directive 2002/20/CE (Authorisation Directive), it was for the CSA to appreciate whether the imperative of diversity and public interest justified application of this specific procedure, whenever it received a request for approval pursuant to Article 42-3 of the Act of 30 September 1986 from a pay DTTV operator wishing to switch to freeview. Furthermore, it was for the CSA to consider whether, consequently, the matter did indeed fall within the scope of the waiver provided for in the legislation. The Conseil d'Etat recalled that the CSA had to take account of the risk of the applicant channel's disappearance, the impact that switching to freeview might have on the other channels, the respective contributions of the channels to the diversity of the sector, and the quality of programmes. Any change in the authorisation with regard to conditions for funding the service should then be seen as necessary to achieving a general interest objective, in accordance with the Directive.

Thus with regard to LCI the Conseil d'Etat, in rejecting the appeal brought by BFM TV and Nextradio, noted more specifically that the CSA had not been fought in considering that its continuation as a pay channel carried a serious risk of the channel's disappearance, and that the economic viability of BFM TV would not be jeopardised by a switch to freeview. It also found that the CSA had indeed taken into account the undertakings entered into by LCI with regard to developing its programme schedule, and offering a news channel format that was different from that of the existing freeview channels. The CSA had thus been right to consider that such broadcasting would result in greater diversity and improved programme quality.

With regard to Paris Première, the Conseil d'Etat found that the CSA had been right to consider that although the channel did indeed risk disappearing from the DTTV scene if it were to remain a pay channel, it would not necessarily disappear altogether, since it was also broadcast on cable satellite and telecommunications networks. Thus by appreciating the risk of the service's disappearance not solely on DTTV but on all the networks on which it was distributed, the CSA had not committed a legal error. The Conseil d'Etat found that the service was not at risk of disappearing in the short or medium term, although it admitted the possibility of an unfavourable development in operating conditions which would justify the lodging of a new application for approval. The CSA had also been right in finding that the channel's contribution to diversity and to programme quality was limited, specifically given a high proportion of repeat showings, a relatively low volume of new programmes, and a large proportion of tele-shopping programmes. The Conseil d'Etat further found that the CSA had been right in considering that, in the light of these elements, there was no justification for allowing the waiver procedure, under which pay DTTV channels could switch to freeview, to be applied to Paris Première.

• *Conseil d'Etat, 13 juillet 2016, BFM TV Nextradio* (Conseil d'Etat, 13 July 2016, BFM TV Nextradio)
http://merlin.obs.coe.int/redirect.php?id=18134 FR

• *Conseil d'Etat, 13 juillet 2016, Métropole Télévision Paris Première* (Conseil d'Etat, 13 July 2016, Métropole Télévision Paris Première)
http://merlin.obs.coe.int/redirect.php?id=18135 FR

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Paul Eluard's poem 'Liberté' used in a film by David Cronenberg: conflicting rights

On 25 February 2016, the regional court in Paris delivered an unusual but noteworthy decision on the delicate matter of the conflict between copyright protection and creative freedom. In the case at issue, the publishing house which holds the rights for the representation, reproduction, and audiovisual adaptation of the work of surrealist poet Paul Eluard, including more particularly his famous poem entitled 'Liberté', and the poet's daughter instigated proceedings on the grounds of infringement of copyright against the producer and distributor of a film directed by David Cronenberg. The case was brought after the film, 'Maps to the Stars', was presented at the Cannes Film Festival in May 2014, when the applicant's discovered that six verses of the famous poem were used in the trailer for the film and in the film itself.

The rightsholders claimed more particularly that the defendant companies had, without their authorisation, carried out a first audiovisual adaptation in violation of their rights, and had distorted the work. They contested the use of the poem as the foundation for the scenario of a violent film on the themes of incest and the personal failings of a number of Hollywood stars. The defendants argued that the link created between the poem and the film was the fruit of the artistic liberty of its director, David Cronenberg. The Court noted that the film showed extracts from the poem on a number of occasions; the extracts were spoken or read by the characters in the film, without the authorisation of the work's rightsholders. The fact of infringement of copyright was therefore established. The poet's daughter also claimed that the defendants had made changes to the extracts from the poem, both in the French-language subtitles and in the English translation. The Court noted that many changes, substitutions, and additions had indeed been made, particularly in the French (such as "sur le sable de neige" instead of "sur le sable sur la neige"). It found that, since a poem was involved, it was evident that each word was of particular importance in terms of both meaning and rhythm: these mis-readings were deemed sufficiently significant so as to constitute an infringement of respect for the author's work.

The Court went on to pronounce on the complaint that the work had been distorted because of the themes,

scenario, and meaning of the film in which the poem had been used, as the complainants felt this altered the poem substantially. The defendants argued the principle of freedom of expression and claimed that the director had expressed a new version of the poem and indeed paid tribute to its author. The Court found that "an author's freedom of expression allows the creation and distribution of a composite work including all or part of a first protectable work, on condition that the right of the initial author is respected in both financial and moral terms". Moreover, the author of the second work should therefore be able to exercise his freedom of expression without the first work being confined to the historical or factual context in which it had been created. Nor could this freedom of expression be limited by a subjective appreciation of the merits of the second work by the persons who held the moral rights for the work. In the case at issue, however, the director had had an opportunity to state to the press that his film offered a "new meaning" to the poem 'Liberté'. Thus, while he offered a different reading of the work, the director did not deny the quality of the poem but incorporated it into his own creation as a work. The Court found that it was not proven that the way in which the film dealt with the theme of liberty constituted an infringement of Paul Eluard's thinking as expressed in the work. Thus the director's use of the poem did not appear to be prejudicial to the author or his work, and was not in any way damaging to either the nature or the quality of the poem. As a result, the Court did not agree that the spirit of the work had been jeopardised; it awarded EUR 10 000 in compensation for the moral prejudice suffered and EUR 4 000 Euros in compensation for infringement of the author's moral right.

• *Tribunal de grande instance, Paris, (3e ch., 4e sect.), 25 février 2016, C. Eluard-Boaretto et Editions de Minuit c/ SBS Productions et a.* (Regional court, Paris, (3rd chamber, 4th section), 25 February 2016, C. Eluard-Boaretto and Editions de Minuit v. SBS Productions and others) FR

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Legislation on freedom of creation published

The Act on the Freedom of Creation, Architecture, and Heritage was published in the Journal Officiel on 8 July 2016. The first article of its section on 'freedom of creation' refers to the freedom of artistic creation and its circulation, which is to be exercised "with due regard for the principles governing freedom of expression and in accordance with the first section of the Intellectual Property Code". Infringement of this right is to attract criminal punishment: "Hampering, in a concerted fashion and under threat, exercise of the freedom of artistic creation or the freedom to circulate artistic creation shall be punishable by a one-year prison sentence and a fine of EUR 15 000". In response to the far-reaching economic changes brought about by the new uses made of digital devices, the Act was intended to update and render more transparent relations between stakeholders in the musical and cinematographic fields.

The new Act therefore includes in the French intellectual property code (Code de la Propriété Intellectuelle - CPI) a section on "Contracts concluded between a performer and a phonogram producer". This section is aimed at allowing the long-term development of online music, ensuring that performers receive a minimum remuneration (proportional in the case of unforeseen and unforeseeable use), separate for each mode of use (streaming, webcasting, etc), and greater transparency in relations with producers for sharing the remuneration.

The new Act also aims to improve transparency in the production and operation accounts for cinematographic works, as advocated in the Bonnel report in December 2013. The Act amends the Cinema and Animated Image Code (Code du Cinéma et de l'Image Animée) to institute a duty of economic transparency applicable to the entire audiovisual and cinematographic sector, in exchange for benefiting from the financial aid paid by the CNC. This new obligation requires production as well as operation accounts to be circulated. The former must be sent to the co-producers, the television channels which contributed to the funding, and any other party with which the producer concluded a contract conceding a share in revenue from use of the work, conditional on amortisation of production costs. Operation accounts must be sent out by the distributor, the dealer, or the producer's agent, who must then send them to the co-producers or to anyone involved in operating revenue. It is intended that the form of these production and operation accounts should be decided under professional agreements, or by decree if no agreement is reached within one year of the Act being promulgated. Accounts could be audited by the CNC, and there is provision for administrative sanctions in the event of any shortcomings.

It should be pointed out that the new Act also makes provision for the ways in which video recording functions could be developed in the cloud.

• *Loi n°2016-925 du 7 juillet 2016 relative à la liberté de la création, à l'architecture et au patrimoine, Journal officiel, 8 juillet 2016* (Act No. 2016-925 of 7 July 2016 on the freedom of creation, architecture and the heritage, published in the Journal Officiel on 8 July 2016)
http://merlin.obs.coe.int/redirect.php?id=18133 FR

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

IRIS

Legal Observations
of the European Audiovisual Observatory

GB-United Kingdom

Requirement of a television licence extended to cover BBC on-demand services

In the UK, the BBC (and S4C, the Welsh language broadcaster), are funded by a licence fee. This is a fee payable by the owner of any television receiving equipment, including laptops, mobile phones, and tablets. It is a criminal offence to install or use a TV receiver if this has not been authorised by a TV licence. Under the Communications Act 2003 and regulations made under it in 2004, the requirement applied to equipment used for streaming live television services online ('linear' television) but not for 'on-demand' services, viewed at a different time from the broadcast, or provided on-line only (see IRIS 2003-8/10). This included watching television through the BBC iPlayer. The result was that, as viewing habits move away from linear television, viewers who watch it increasingly subsidise the content enjoyed by many others who view it through on-demand services only.

The Communications (Television Licensing) (Amendment) Regulations 2016 are the result of an agreement by the Secretary of State for Culture, Media and Sport and the BBC to extend the scope of the TV licence to cover BBC on-demand services, most notably the iPlayer. The regulations extend the licence requirement to cover the streaming or downloading of a programme or part of a programme on any on-demand service provided by the BBC, on any device. The requirement does not extend to on-demand services provided by other public service broadcasters, nor to on-demand services produced by the BBC's commercial subsidiaries, such as BBC Worldwide and BBC Store. Nor do they apply to the streaming or downloading of BBC programmes on other on-demand service, such as Netflix or Amazon Prime.

The regulations also make minor changes to permit the withdrawal of universal free TV licences for the elderly in the Isle of Man and Guernsey following changes in priorities for social support. All the provisions come into effect on 1 September 2016.

• The Communications (Television Licensing) (Amendment) Regulations 2016, S.I. 2016/704
http://merlin.obs.coe.int/redirect.php?id=18102 EN

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HR-Croatia

New portal for media literacy

The Croatian regulatory authority, the Agency for Electronic Media (AEM), and UNICEF, in cooperation with the Academy of Dramatic Arts, the Faculty of Political Science, the Institute of Lexicography, the Croatian Audiovisual Centre (HAVC), and the Croatian Film Association (amateur film and film schools) have launched an online portal for media literacy. The portal broadens the recent campaign of the AEM and UNICEF, entitled "Let's choose what we watch", which has shown through various examples the potential impact of media on children and parents (IRIS 2016-1/17).

The portal is intended to inform and educate parents, childcare providers and teachers about media literacy with a view to empower them to actively seek knowledge and information about media and ways in which they can influence the development of children. It provides information on the impact of different types of media and genres on children, and covers various topics such as Internet safety, violence presented in media, stereotypes, and the influence of media on the development of children and youth, in addition to offering a variety of tips on how to proceed in specific real-life situations. The intention is also to involve visitors in the creation of the portal's contents, thus ensuring that the displayed topics meet the needs of parents and children as much as possible.

The online portal, as a comprehensive national Internet website, is a part of the larger project on media literacy launched in 2015 by AEM in cooperation with UNICEF. The project aims to emphasize the importance of media literacy and encourage the media education of adults as well as children and youth, the protection of whom from potentially harmful a media contents is crucial in this global convergent media world.

• *http://www.medijskapismenost.hr/* (Portal for Media Literacy)
http://merlin.obs.coe.int/redirect.php?id=18097 HR

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IE-Ireland

Court of Appeal dismisses appeal by ISP against court-ordered graduated response system for copyright infringement

The Irish Court of Appeal has dismissed an appeal by the Internet service provider (ISP) UPC Communications Ireland Ltd (UPC) concerning the jurisdiction of the High Court to grant graduated response system (GRS) injunctions to support the enforcement by music companies of copyright infringements against ISPs subscribers. The term "GRS" refers to "types of steps which an ISP may be required to take against copyright infringers, ranging from warning letters at one [end] of the spectrum to orders blocking access to particular websites at the other".

The case originated in 2014 when music companies, Sony Music, Universal Music and Warner Music issued injunctive proceedings against UPC (now Virgin Media Ireland Ltd), seeking an order that UPC implement a graduated response system (GRS) in response to alleged copyright infringement as a result of illegal file sharing on the UPC network.

In March 2015, Justice Cregan in the High Court made an order compelling UPC, "a non-infringing intermediary ISP", to implement a form of graduated response system (GRS) within its network for the benefit of the relevant copyright holders Sony, Universal and Warner. The High Court GRS order is "a very detailed one but, in essence, the order requires UPC to send each relevant subscriber a 'cease and desist' letter upon receipt of notification of the first and second copyright infringement notifications which it receives from the rightholders." On receipt of the third copyright infringement notice, UPC is then obliged "to send the relevant rightholders a notification that the particular subscriber has been the subject of three such notifications." The rightholders are then "entitled to apply to court for an order terminating the subscriber's Internet broadband service." The GRS order further provides that "the rightholders are required to pay 20 per cent of any capital expenditure incurred by UPC with a cap of EUR 940,000 on each such expenditure." This was the first time that a court ordered or "common law" GRS had been imposed anywhere in European Union.

UPC appealed the decision, contending that the High Court had "no jurisdiction to make an order of this kind", and further submitted that "the order actually made is more appropriate to that of a specialist regulator vested with appropriate expertise and which is best placed to make policy decisions of this kind and that the order is not one which a court required to make judgments based only on legal rights (including equitable rights) and wrongs could appropriately make."

According to Justice Hogan in the Court of Appeal, the appeal presented "issues of enormous importance as far as the effective protection of copyright is concerned" and also raised "important questions concerning the jurisdiction of the High Court to grant injunctions and the inter-action national and EU procedural law".

Sony Music however argued that the effect of both Article 8 (3) of the Information Society Directive 2001/29/EC (as transposed into national law by S.I. No. 59/2012 - European Union (Copyright and Related Rights) Regulations 2012, and the enactment of the new section 40 (5A) of the Copyright and Related Acts 2000, is to grant such jurisdiction (see IRIS 2012-4/31).

The Court of Appeal agreed with Sony Music, stating that the effect of Article 8 (3) of the 2001 Directive, as transposed by s.40 (5A) of the 2000 Act), "certainly changed the substantive law in relation to injunctions" so far as Ireland is concerned. Justice Hogan stated that "[W]hile it is true that Article 8 (3) did not quite do so in express terms, a series of judgments of the CJEU ... has clearly confirmed that Article 8 (3) has had this effect by requiring national courts in appropriate cases to grant injunctions against non-infringing ISPs" (see for example, IRIS 2012-1/2).

The Court of Appeal pointed out that from a legal perspective UPC "has committed no legal wrong", stating that Section 40 (3) of the Copyright and Related Acts 2000 which corresponds to the parallel provisions of Article 12 of the 2000 Directive provides that "Member States shall ensure that ISPs are not liable for copyright infringement where they are the "mere conduit" of the internet service". Justice Hogan stated "[A]s a matter of general law the courts have no jurisdiction to grant an injunction against a defendant who has committed no cognisable legal wrong or where such a wrong is not threatened." Article 8 (3) of the 2001 Directive however states that "Member States shall ensure that rights-holders are in a position to apply for an injunction against intermediaries whose services are used by a third party to infringe a copyright or related right".

The Court of Appeal ultimately upheld the decision of the High Court. However, Justice Hogan did amend two aspects of the High Court order: the requirement for a five year review was removed from the order and the provision that UPC would not seek its costs with regard to any future Norwich Pharmacal applications (i.e. disclosure order) made on the foot of the information disclosed to rights holders under the GRS. The Court of Appeal's decision clarifies which steps the courts may require ISPs to adopt in order to assist rights holders in challenging online copyright infringement.

• Sony Music Entertainment (Ireland) Ltd., Universal Music Ireland Ltd and Warner Music Ireland Ltd v UPC Communications Ireland Ltd [2016] IECA 231
http://merlin.obs.coe.int/redirect.php?id=18107 EN

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BAI launch public consultation on draft General Commercial Communications Code

The Broadcasting Authority of Ireland (BAI) has launched a public consultation on a draft General Commercial Communications Code. The draft code "sets out the rules for Irish radio and television stations with regard to airing advertising, sponsorship, product placement and other forms of commercial broadcasting." The Code clarifies for broadcasters the definitions and exclusions of various forms of paid-for communications.

The BAI General Commercial Communications Code was introduced in 2010 under section 42 of the Broadcasting Act 2009 (see IRIS 2011-7/29). The BAI is required to review the effect of a broadcasting code every four years, under Section 45(3) of the Act. In 2015 the BAI completed a statutory review of the Code, which encompassed a number of strands of research including a legal and jurisdictional review of regulation in other countries and an operational review of the effect and impact of current Code. The key finding from the statutory review is that the current code is "broadly effective and its principles respected and understood". However, certain areas of the code require "consideration and modification". The rules on sponsorship and the extent to which the public engages with the Code are two such areas under consideration in the revised draft Code.

The revised draft code is divided into 22 sections and sets out the general rules and principles, definitions, and requirements regarding particular products and services on both radio and television. The code does "not apply to websites, online players or apps." The Code covers inter alia the advertising of food, alcohol, medicines, health services, financial services and products, cosmetic treatments, gambling, premium-rate telecommunications' services, teleshopping and prohibited communications. The draft code has proposed a series of changes to its rules, including removing a restriction on gambling companies mentioning "betting odds" in their adverts, although the draft code retains a ban on the mention of "promotional offers of odds". Rule 19.4 of the draft code states that "Commercial Communications that seek to promote services to those who want to gamble ... shall not contain anything deemed to be a direct encouragement to gamble". The word "direct" is not defined in the draft Code.

The draft code also contains a new prohibition in relation to commercial communications for electronic cigarettes (Rule 22.3), which derives from the Tobacco Products Directive (2014/40/EU) that was recently transposed into Irish Law under the European Union (Manufacture, Presentation and Sale of Tobacco and Related Products) Regulations 2016 (see also IRIS 2016-5/21).

A key proposed change in the draft Code on the rules concerning "Sponsorship on Television, including competitions" is the addition of a new rule (rule 7.3). This new rule sets out a clear distinction between sponsorship and product placement, "wherein references to products or services built into the action of a programme will be considered product placement not sponsorship (where they meet the definition of paid or prop placement)". In contrast, sponsor announcements or references may be shown during a programme but must not be part of the plot or narrative of the programme. The draft Code also distinguishes between two types of product placement as provided for in the Audiovisual Media Services Directive (2010/13/EU) (Articles 1 and 11).

The closing date for public consultation on the draft General Commercial Communications Code is 20 September 2016.

• Broadcasting Authority of Ireland, BAI Draft General Commercial Communications Code - Consultation Document, July 2016
http://merlin.obs.coe.int/redirect.php?id=18108 EN
• Broadcasting Authority of Ireland, "BAI launches public consultation on draft General Commercial Communications Code", 1 August 2016
http://merlin.obs.coe.int/redirect.php?id=18109 EN

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Minister designates new television channel as a public service

On 23 June 2016, the Minister for Communications, Energy and Natural Resources signed an order designating recently established Irish TV as a television service "having the character of a public service" under section 130 of the Broadcasting Act 2009. The designation means that Irish TV will now be available on Saorview, the free-to-air digital terrestrial television service (see IRIS 2014-2/25).

Irish TV is a local and international channel, which offers live and recorded programming relevant to Irish people in Ireland and abroad. It began broadcasting in May 2014 under a licence issued by the UK communications regulator Ofcom; however, in September 2014, Irish TV entered into a broadcasting contract with the Broadcasting Authority of Ireland under section 71 of the Broadcasting Act 2009.

Irish TV 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 (see IRIS 2015-4/14).

• Broadcasting Act 2009 (Section 130(1)(a)(iv) Designation) Order 2016
http://merlin.obs.coe.int/redirect.php?id=18104 EN

• Decision of the Minister for Communications, Energy & Natural Resources regarding the request from Irish TV for designation under section 130(1)(a)(iv), Broadcasting Act 2009
http://merlin.obs.coe.int/redirect.php?id=18105 EN

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IT-Italy

The Mediaset Premium-Calcion case

On 27 July 2016 the Tribunal of Milan partially rejected the request for interim measures filed by Mediaset Premium S.p.A. (Mediaset), the pay-TV arm of the Mediaset group, against the TLC companies Telecom Italia S.p.a., Vodafone Omnitel n.v., Fastweb S.p.a., Tiscali Italia S.p.a., H3G Italia S.p.a. and Wind Telecomunicazioni S.p.a. (TLC Operators).

The dispute arose from the illegal live streaming by the online portal Calcion, available at the domain name "calcion.at", of several clips related to football games the exclusive rights of which were owned by Mediaset. In the past, Calcion's previous domain names have been taken down. As a consequence, Mediaset sought for a judicial order to take down (i) the website available at the domain name "calcion.at" and (ii) any other "aliases" of the online portal Calcion (i.e., any domain using the word "calcion" in connection with any internet top-level domain extension) which might be created in the future, regardless of their IP addresses.

According to the Court, since Mediaset sought the removal of the future Calcion websites on a case-by-case request (i.e., Mediaset would provide to the intermediaries the list of the domains), the demand filed by Mediaset is not inconsistent with the general exclusion of a monitoring obligation of the 'mere conduit' providers set forth in Article 17 of legislative decree 31/2000 and in Article 15 of Directive 2000/31/CE.

Nevertheless, the Court ruled that it is impossible to order the take down of a website that does not exist at the time of the judicial decision, since non-existing websites cannot cause any damage. Furthermore, the Court highlighted that such a "blanket" measure would assign to the TLC Operators the power to assess the unlawfulness of the content available on the website.

For these reasons, the Court granted the judicial decision ordering the taking down of the website available at the domain name "calcion.at", but rejected the request for the take down of other future websites hosting the online portal Calcion.

• *TRIBUNALE DI MILANO, SEZIONE SPECIALIZZATA IN MATERIA DI IMPRESA, SEZIONE A, ordinanza 27/07/2016* (Tribunal of Milan, judicial order of 27 July 2016)
http://merlin.obs.coe.int/redirect.php?id=18111 IT

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AGCOM report on OTT operators and consumer communication services

Over recent years, the widespread deployment of broadband access services from both fixed line and mobile network brought the development of a new set of services and advanced equipment. This increased users' demand for Internet access and stimulated investments in network capacity, as well as the development of new services and apps.

In this regard, and in line with the current debate at EU level (see IRIS 2015-10/4), on 28 June 2016 the Autorità per le garanzie nelle comunicazioni (Italian Communications Authority - AGCOM) published the findings of the survey concerning the development of digital platforms and electronic communication services. This survey focused on consumer communication services mainly used through mobile devices, i.e. those services generally provided over the Internet and consisting of apps allowing the exchange of voice calls, messages, pictures and video between two or more users, such as WhatsApp, Facebook Messenger, Skype, and iMessage ("consumer communications services").

Through such survey, AGCOM: (a) dealt with the current legal and regulatory framework, focusing on the definition of electronic communications services ("ECS") (according to AGCOM, the consumer communications services seem not to fall within the ECS definition since they do not entail any transmission of signals on the fixed or mobile network); and (b) analysed the technological and market environment where the Consumer Communications Services are spread, highlighting the steady increase in users of the social apps against the reduced use of traditional voice and SMS services.

In light of the analysis carried out, the AGCOM suggests for the provision of a new definition of ECS at EU level, aimed at reaching a "level playing field" between traditional players and over-the-top operators involved. Furthermore, it describes the regulatory issues deriving from the development of consumer communications services, as well as potential remedies at EU and national level, identifying related risks and opportunities.

• *INDAGINE CONOSCITIVA CONCERNENTE LO SVILUPPO DELLE PIATTAFORME DIGITALI E DEI SERVIZI DI COMUNICAZIONE ELETTRONICA, Allegato A alla delibera n. 165/16/CONS* (Italian Communications Authority, Resolution no. 165/16/CONS, Annex A, May 2016)
http://merlin.obs.coe.int/redirect.php?id=18129 IT

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MT-Malta

Administrative sanctions and broadcasting law

On 7 February 2012, in Smash Communications Limited v. Broadcasting Authority et al, decided by the Civil Court, First Hall, the Court concluded that the present system established in the Broadcasting Act regulating the imposition of administrative sanctions by the Broadcasting Authority was in breach of the principle of natural justice nemo iudex in causa propria (no person may be a judge in his/her own cause; see IRIS 2012-5/33). The defendants (the Broadcasting Authority and its Chief Executive) appealed this decision and on 24 June 2016 the Court of Appeal delivered its judgment.

The defendants pleaded that they acted in accordance with the Broadcasting Act, the relevant law in this case. The appellate court held that according to section 469A(1)(a) of the Code of Organization and Civil Procedure, which governs judicial review of administrative action, the Civil Court, First Hall, in its ordinary jurisdiction could annul an administrative act if the latter violates the Constitution. However, the competence that the Civil Court enjoys is limited to the administrative act, not to the law under which that act is made. Thus, if the administrative act is made in conformity with the law (as the defendants claimed in these proceedings), and the law allows no discretion as to how that administrative act can be exercised, the Civil Court cannot conclude that the law, in terms of which that administrative act has been made, is without effect once such power is conferred upon that court. This is not the case when it acts in its ordinary jurisdiction, as was the case under review, but when it acts in its extraordinary (that is, constitutional) jurisdiction. This does not imply that when the law allows the exercise of discretion and the public authority exercises it in such a way as to breach the Constitution, that act cannot be annulled in terms of section 469A(1)(a) of the Code. This is because discretion allowed by law may still be exercised in an unconstitutional fashion. This implies that if the law does not allow any form of choice to the public authority as to how it has to implement the law, it is only the Civil Court, sitting in its constitutional jurisdiction (and, on an appeal, the Constitutional Court), which can annul that administrative act, by declaring the law under which that action was performed as being without effect.

The Court of Appeal further held that the Civil Court, First Hall, has constitutional competence in terms of the Constitution (in addition to its ordinary competence). However, in the instant case, the Court of Appeal found that the Civil Court had failed to exercise such extraordinary competence. Further, the plaintiffs, on their part, had not filed their proceedings before that Civil Court sitting in its constitutional competence.

The Court of Appeal then examined whether the defendants could have acted differently; that is, whether the charge against Smash Communications Limited could have been issued by an organ of the Broadcasting Authority (its Chief Executive), so that the Authority could determine the administrative proceedings. Section 41 of the Broadcasting Act provides that it is the Authority which issues the charge and which decides it. There was no other alternative contemplated in the law, other than for the Broadcasting Authority or one of its organs to issue the administrative charge and for the Authority to decide the charge following the observance of the guarantees of a fair and public trial. Therefore the Civil Court in its ordinary jurisdiction misapplied the law. The Court of Appeal concluded by confirming the judgment of the court of first instance, in which the latter declared that the Chief Executive of the Broadcasting Authority was an officer of that Authority, but revoked the remaining part of the judgment in which the court of first instance found against the defendants. This judgment has left undecided the merits of the case; that is, whether the Broadcasting Authority is in breach of natural justice when it issues and determines administrative offences.

• Judgment of the Court of Appeal, Ref. No. 481/2004, 24 June 2016
http://merlin.obs.coe.int/redirect.php?id=15275 EN

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Review of must-carry obligations

On 4 July 2016, the Malta Communications Authority published a consultation document entitled "Re-

view of Must-Carry Obligations". The aim of this consultation document was to gather feedback from the public on the review of the television broadcast networks subject to must-carry obligations, by 8 August 2016. Currently, must-carry obligations apply only to the sole digital cable television network operator. This is because, in 2013, the cable operator was no longer required to carry analogue television channels on its cable television network. Essentially, what the Malta Communications Authority proposed in its July 2016 consultation document, was to extend must-carry obligations onto the sole fixed-line internet protocol television network which has, since the last review took place, substantially increased its subscribers, as detailed in the consultation document itself.

In Malta, must-carry obligations apply with regard to general interest obligation (GIO) television services. The consultation document states that: "GIOs equate to a public service remit". This remit is performed primarily by the national public service broadcaster television channels, TVM and TVM 2, and the other public service channel that carries parliamentary sittings, Parliament TV. There is also a number of private commercial television stations which carry public service content in their programming, namely: f Living, Net TV, One TV, Smash TV and Xejk. Each of these eight television channels are categorised in Malta as GIO television channels, which all enjoy a must-carry status. All GIO channels are carried on the GIO network operated by the public service provider, Public Broadcasting Services Ltd., on a free-to-air basis.

• Malta Communications Authority, Review of Must-Carry Obligations, MCA/C/16-2611, 4 July 2016
http://merlin.obs.coe.int/redirect.php?id=18130 EN

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RU-Russian Federation

TV audience measurement restricted

On 22 June 2016 the State Duma (parliament) of the Russian Federation adopted a statute that amends the statutes on Mass Media (see IRIS 2001-9/25) and on Advertising (see IRIS 2006-4/34) by introducing rules for TV audience measurement services.

In particular, the amendments prohibit foreign entities, foreign governments, international organizations, as well as Russian entities under their control or with foreign participation or foreign capital exceeding 20 percent, from engaging in television audience measurement services. From now on this activity will be allowed only under special authorization of Roskomnadzor, a governmental watchdog in the sphere of media and communications (see IRIS 2012-8/36). The licenses it grants are valid for up to three years, subject to renewal and checking of the applicant's annual reports, submitted to Roskomnadzor (Article 1). Advertisers and TV companies shall be allowed to co-operate only with "authorized" companies in this field (Article 2).

The law enters into force on 1 September 2016. The list of entities that will be authorized to conduct audience measurement services shall be compiled by Roskomnadzor by 31 December 2016 (Article 3).

• О внесении изменений в Закон Российской Федерации " О средствах массовой информации " и статьи *5* и *38* Федерального закона " О рекламе " (Federal Statute of 3 July 2016 N 281-FZ "On amendments to the Statute of the Russian Federation "On the Mass Media" and articles 5 and 38 of the Federal Statute "On Advertising")
http://merlin.obs.coe.int/redirect.php?id=18091 RU

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Must-carry provisions for regional TV

The State Duma (parliament) of the Russian Federation adopted on 22 June 2016 amendments to the statutes "On the Mass Media" (see IRIS 2011-7/42) and "On Communications" that provide for guidance in selecting regional TV channels for must-carry purposes. The President signed the amendments into law on 3 July 2016.

The amendments specify that the audience of each region (or province) of the Russian Federation will have one TV channel as part of the must-carry free set of channels provided with the digital switchover. Such a channel shall be selected in accordance with a special procedure to be established by the Government of Russia from among those that already broadcast to at least 50 per cent of the population of the region. It shall comply with the national product restrictions, similar to those introduced in 2015 (see IRIS 2015-3:1/27), though stricter. It is now a necessity that at least 75 per cent of programmes broadcast are created by Russian individuals or companies duly registered in Russia or under intergovernmental treaties of the Russian Federation. Such programmes will need a certificate from Roskomnadzor, the governmental watchdog (see IRIS 2012-8/36). Tranlsated, dubbed and subtitled foreign programmes will not constitute a national product. Such a channel shall take spot N 21 of the second DTV multiplex after the 10 selected by Decree of the President for MX1 (see IRIS 2013-6:1/31) and 10 selected by the Government (see IRIS 2011-6:1/26; IRIS 2015-9:1/23) for MX2. The amendments take force on 18 July 2016.

• " О внесении изменений в статью 321 427460472476475460 Российской Федерации " О средствах массовой информации " и статью 46 Федерального закона " О связи " *of 3 July 2016, N 280-FZ. Published in the official daily Rossiyskaya gazeta on 8 July 2016 — N 149* (Federal Statute of the Russian Federation "On amendments to Article 321 of the Statute of the Russian Federation 'On Mass Media' and Article 46 of the Federal Statute "On Communications" of 3 July 2016, N 280-FZ. Published in the official daily Rossiyskaya gazeta on 8 July 2016 — N 149)
http://merlin.obs.coe.int/redirect.php?id=18124 RU

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New rules for telecom sector

The State Duma (parliament) of the Russian Federation adopted on 24 June 2016 a set of amendments to the Federal Law "On Counteraction to Terrorism" (See IRIS 2006-5:19/33) and other laws that shall affect telecom sector in Russia. The President signed the amendments into law on 6 July 2016.

Among other things, the law makes additions to the 2003 Federal Statute "On Communications" and to the Federal Law "On Information, Information Technologies and Protection of Information" (see IRIS 2014-3/40 and IRIS 2014-6/31), adding requirements for Internet and telecom providers to store (in Russia) for six months recordings of all text, voice, graphic, sound, video and any other messages belonging to their customers. In addition, the law requires telecom providers to store all metadata for at least three years, and ISPs - for at least one year (Article 13 and 15 of the amendments). Russia's Security Services shall have remote access to this information (Articles 2, 3 and 4 of the amendments). ISP shall also provide possibilities for deciphering all encoded electronic messages to the Federal Security Service (FSB) (Article 15).

Article 11 of the new law amends the Code of the Russian Federation on Administrative Offences by adding administrative fines of up to 1 million roubles (approximately EUR 14,300) for violating of these provisions.

• О внесении изменений в Федеральный закон " О противодействии терроризму " и отдельные законодательные акты Российской Федерации в части установления дополнительных мер противодействия терроризму и обеспечения общественной безопасности " (Federal Statute of the Russian Federation "On amendments to the Federal Statute 'On Counteraction to Terrorism' and other legislative acts of the Russian Federation regarding establishing additional mechanisms to counteract terrorism and provide for public security" of 6 July 2016, N 374-FZ. Published in the official daily Rossiyskaya gazeta on 8 July 2016 — N 149)
http://merlin.obs.coe.int/redirect.php?id=18123 RU

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New Aggregators restricted in picking news

The State Duma (parliament) of the Russian Federation adopted on 10 June 2016 amendments to the Federal Law on Information, Information Technologies and Protection of Information (see IRIS 2014-3/40, 2014-6/31) and the Administrative Code. These amendments require owners of Internet search engines ("news aggregators") with more than one million daily users to be accountable for the faithfulness of content "essential for the public", except when such content represents a verbatim reproduction of materials published by media outlets registered in Russia. Such materials, if distributed by aggregators in Russian, other languages of the peoples of the Russian Federation, or even in foreign languages - if the website is used to disseminate advertising targeting Russian clients, are subject to restrictions earlier imposed in the Russian mass media law, such as a ban on extremism, propaganda or pornography, cult of violence, use of curse words, defamation, etc.

The news aggregators shall store all news information, including its source and duration of dissemination, for 6 months. They should enable Roskomnadzor, a governmental watchdog for media and communications, to access the data stored. In turn Roskomnadzor shall compile an official register of such aggregators and control observance of the new provisions.

According to the amendments, Russian-language Internet search engines, search engines in other languages of the Russian Federation, and those potentially advertising their products and services for Russian audiences, shall only be owned by Russian companies or citizens (Article 1 of the Statute).

Violation of the statute carries high administrative penalties (Article 2 of the Statute). It enters into force 1 January 2017.

Dunja Mijatović, the OSCE Representative on Freedom of the Media, noted in her statement on the bill that the amendments are worded vaguely, which could increase the already high number of interventions by state authorities in the activities of online service providers.

• О внесении изменений в Федеральный закон " Об информации , информационных технологиях и о защите информации " и Кодекс Российской Федерации об административных правонарушениях (Federal Statute of the Russian Federation "On amendments to the Federal Statute 'On Information, Information Technologies and Protection of Information' and to the Code of the Russian Federation on Administrative Offences" of 23 June 2016, N 208-FZ. Published in the official daily *Rossiyskaya gazeta* on 28 June 2016 — N 139)
http://merlin.obs.coe.int/redirect.php?id=18122 RU

• Press release of the OSCE Representative on Freedom of the Media "Law regulating news aggregators in Russia might negatively affect freedom of information on Internet, OSCE Representative says," 13 June 2016
http://merlin.obs.coe.int/redirect.php?id=18092 EN

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US-United States

Google and its use of Java software

On 26 May 2016, a federal jury in San Francisco at the District Court for the Northern District of California found that Google's use of Oracle Corporation's ("Oracle") Java software in its mobile products did not violate copyright law (Case no.: C 10-03561 WHA). The ruling is the latest development of a case that began in a multi-billion dollar lawsuit filed by Oracle against Google in December 2010 for its use of 11,000 lines of Java software code in its Android software.

The verdict, which was issued on 26 May 2016, comes on the heels of an earlier ruling by a federal appeals court that found that Oracle could copyright the Java software. Google argued in this case that its use was a permitted "fair use" of the copyrighted material, noting that the executives at Java's creator, Sun Microsystems Inc., did not believe Google needed a license to use Java. Oracle countered that Google knew it needed a license to use the Java APIs but decided to use them without a license anyway, and showed the jury Google emails in which executives discussed needing a license. The Court found that the test of whether a use is protected depends upon whether the amount of material used is substantial. It found that Google's use was not substantial, even though it used 11,000 lines of Java code, because it was less than 0.1% of Android's 15 million lines of code.

Google hailed the verdict as "a win for the Android ecosystem, for the Java programming community, and for software developers who rely on open and free programming languages." Oracle vowed to appeal, lamenting that the verdict hurts innovation by weakening intellectual-property protections for software and discouraging tech companies from investing in the creation of new programmes.

• Instructions to the jury from the judge
http://merlin.obs.coe.int/redirect.php?id=18128 EN

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IT-Italy

Data Protection Authority approves targeted advertising by Sky Italia

On 13 July 2016, the Italian Data Protection Authority issued a decision ruling that the processing of users' personal data by the Italian satellite pay-TV operator Sky Italia, aimed at providing targeted advertising to some of its subscribers (Adsmart project), is in line with the Italian Data Protection Code (legislative decree No. 196 of 30 June 2003).

Targeted advertising is a new advertising technique that enables the broadcaster to replace the advertising spots included in the linear feed with different, targeted advertising spots that are stored in the user's decoder box. Thus, broadcasters can show different advertising to different clusters of users watching the same programme.

In its decision, which was issued upon Sky Italia's request, prior to implementing the Adsmart project, the Data Protection Authority found that the provision of targeted advertising in the context of the said project involves a twofold processing of personal data: the anonymisation of participating users' data, and their allocation to different user clusters, based on criteria (for example, age, location, type and length of subscription, payment method) specified by Sky Italia.

Accordingly, the Data Protection Authority ruled that the above processing of personal data can be regarded as in line with Italian data protection laws subject to two conditions: first, participating users must be duly informed of the purpose of data processing (that is to say, profiling-based marketing), of the processing methods (that is to say, only in aggregate and anonymised form), and of their statutory right to oppose data processing; and secondly, the Authority ruled that participating users must be allowed to easily opt out of the Adsmart project through any of the following means: (i) via their remote control, (ii) through their profile page on Sky Italia's website, or (iii) by e-mail or Sky Italia's customer care number.

The Data Processing Authority added that an appropriate notice to that effect must be displayed when the decoder box is turned on after software update, as well as on two subsequent occasions, so as to ensure that several family members are made aware of their participation in the Adsmart project and of their right to opt out.

The Authority also enjoined Sky Italia to communicate the steps taken to ensure that the above requirements are fulfilled.

• *Garante per la protezione dei dati personali, Invio di spot pubblicitari mirati. Verifica preliminare - 13 luglio 2016 [5408313]* (Italian Data Protection Authority, Targeted advertising - Preliminary verification, 13 July 2016 [5408313])
http://merlin.obs.coe.int/redirect.php?id=18749 IT

Amedeo Arena
Università degli Studi di Napoli "Federico II"

Agenda

Media Ownership: Market Realities and Regulatory Responses
12 October 2016 Organiser: European Audiovisual Observatory Venue: Microsoft Innovation Centre, Rue Montoyer 51, Brussels, Belgium Information & Registration: alison.hindhaugh@coe.int

Book List