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of the European Audiovisual Observatory

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European Court of Human Rights: Brambilla and others v. Italy

The legality and acceptability of some controversial practices by journalists was at the heart of a recent case before the European Court of Human Rights (ECtHR). The case concerns the conviction of three journalists in Italy who intercepted radio communications between police officers (carabinieri) in order to arrive quickly at crime scenes and report on them for their local online newspaper. Stressing the notion of responsible journalism and noting that the decisions of the domestic courts had been duly reasoned and had focused primarily on the need to protect national security and prevent crime and disorder, the Court confirms the duty of journalists to comply with domestic law, which prohibits the interception by any persons of communications not addressed to them, including those of law-enforcement agencies. The Court also notes that the penalties ordered by the domestic courts, consisting of the seizure of the radio equipment and the imposition of suspended custodial sentences, were not disproportionate. It emphasises that the newspaper and the journalists have not been prevented or prohibited from bringing news items to the attention of the public.

The applicants in this case were Mr Brambilla, the director of a local online newspaper, and Mr De Salvo and Mr Alfano, both journalists working for that newspaper. While using radio equipment to intercept the frequencies used by the police, they gained access to communications about a police patrol on its way to a location where weapons were being stored illegally. Mr De Salvo and Mr Alfano went to the scene immediately, but they were stopped and searched by the police on their arrival. The police found equipment in their car capable of intercepting radio communications between law-enforcement officers. A short time later, in the offices of Mr De Salvo and Mr Alfano, more items capable of intercepting police communications were seized. Subsequent criminal proceedings were instituted against the director of the newspaper and the two journalists, and all three were convicted, with suspended custodial sentences imposed. The Milan Court of Appeal, and finally the Court of Cassation, found that the communications had been confidential and that their interception was punishable under the Criminal Code, taking the view that the right to press freedom could not take precedence in a case concerning the illegal interception of communications between law-enforcement officers.

Relying on Article 10 of the European Convention on Human Rights (ECHR), the director of the newspaper and the two journalists complained about the search of their vehicle and their offices, the seizure of their radio equipment and their conviction. They argued that these actions and convictions amounted to a violation of their right to freedom of expression and information.

The European Court agrees with the domestic courts that the newspaper and the journalists have not been prohibited from bringing the news items to the public's attention, as their convictions were based solely on the possession and use of radio equipment to intercept communications between law-enforcement officers. The ECtHR reiterated that the notion of responsible journalism required that, where journalists acted to the detriment of the duty to abide by ordinary criminal law, they had to be aware that they risked being subjected to legal sanctions, including those of a criminal character. It noted that in seeking to obtain information for publication in a local newspaper, the journalists and the director of the newspaper had routinely intercepted police communications. This contravened the domestic criminal law, which in general terms prohibited the interception by any persons of conversations not addressed to them, including conversations between law-enforcement officers. The Court observed that the penalties imposed on the applicants consisted of the seizure of their radio equipment and the imposition of custodial sentences of one year and three months in the case of the two journalists and six months in the case of the director of the newspaper. However, as these sentences had been suspended, the penalties the ECtHR found that it were not disproportionate and that the Italian courts had made an appropriate distinction between the journalists' duty to comply with domestic law and the pursuit of their journalistic activity, which had not been otherwise restricted. Accordingly, the ECtHR held that there had been no violation of Article 10 of the Convention.

This is the third time in 2016 that the ECtHR has found no infringement of journalists' rights in cases related to illegal preparatory acts of newsgathering. The case of Boris Erdtmann v. Germany (Application no. 56328/10, 5 January 2016) concerned the conviction of a journalist for carrying a weapon on board an aeroplane. After the terrorist attacks of 11 September 2001 in New York, Mr Erdtmann researched the effectiveness of security checks at German airports and made a short television documentary about his investigation and findings, filmed with a hidden camera. The ECtHR found that the criminal conviction of the journalist was pertinent and necessary in a democratic society and that there was no appearance of a violation of the journalist's rights under Article 10 ECHR. Also in the case of Salihu and others v. Sweden (see IRIS 2016-8/1) the ECtHR held that the journalists' convictions for illegally purchasing a firearm were lawful and necessary, while they pursued the legitimate aims of the protection of public safety and

prevention of disorder and crime. In each of these cases however, the domestic courts, by deciding on the nature and severity of the criminal sanction, took into consideration the pursuit of journalistic activity, which had not been otherwise restricted. The interferences with the journalists' right to freedom of expression and information in each of these cases finally resulted in only lenient sentences or convictions for the journalists, while without the journalistic context more severe sanctions could have been imposed. In such circumstances, the ECtHR was satisfied that the interferences with the journalists' right to freedom of expression and information at issue do not discourage the press from investigating a certain topic or expressing an opinion on topics of public debate.

• *Arrêt de la Cour européenne des droits de l'homme, cinquième section, affaire Brambilla et autres c. Italie, requête n° 22567/09 du 23 juin 2016* (Judgment by the European Court of Human Rights, First section, case of Brambilla and others v. Italy, Application no. 22567/09 of 23 June 2016)
http://merlin.obs.coe.int/redirect.php?id=18139 FR

• Decision by the European Court of Human Rights, Fifth section, case of Boris Erdtmann v. Germany, Application no. 56328/10 of 5 January 2016
http://merlin.obs.coe.int/redirect.php?id=18140 EN

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EUROPEAN UNION

Court of Justice of the European Union: Judgment on the case Tobias Mc. Fadden v. Sony Music Entertainment GmbH

On 15 September 2016, the Court of Justice of the European Union (CJEU) delivered its judgment in Tobias Mc Fadden v. Sony Music Entertainment Germany GmbH, concerning the application of the intermediary liability regime under the E-Commerce Directive 2000/31/EC (ECD) to the operator of a shop which offers access to a Wi-Fi network free of charge to the public in relation to copyright infringements committed by users of that network.

Mr. Tobias Mc Fadden runs a shop selling and leasing lighting and sound systems, in which he offers access to a Wi-Fi network to the general public free of charge in order to draw the attention of potential customers to his business. In 2010, a musical work was unlawfully offered for downloading via that Wi-Fi network. Sony Music, the holder of the rights over the phonogram, gave Mr. Mc Fadden formal notice concerning the infringement of its rights. Mr. Mc Fadden brought before the referring court an action for a negative declaration (negative Feststellungsklage). Sony Music brought a counterclaim, seeking an injunction and damages. By judgment of 16 January 2014, the referring court dismissed Mr Mc Fadden's application and upheld the counterclaim. Mr Mc Fadden appealed against the judgment on the ground that he is exempt from liability under German law transposing Article 12(1) ECD. In the appeal, Sony Music asked the Court to uphold the default judgment and, in the alternative, to issue an injunction and order Mr Mc Fadden to pay damages and the costs of the formal notice on the ground of his indirect liability (Störerhaftung). The Landgericht München I (Regional Court, Munich) before which the proceeding was brought, takes the view that Mr Mc Fadden was not directly liable, but is minded to reach a finding of indirect liability (Störerhaftung) on the ground that his Wi-Fi network had not been made secure. However, the German court had some doubts as to whether the ECD precludes such indirect liability and decided to refer a series of questions to the Court of Justice.

As a reminder, the ECD exempts intermediate providers of mere conduit services from liability for unlawful acts committed by a third party with respect to the information transmitted, under three cumulative conditions: (i) the provider of the mere conduit service must not have initiated the transmission; (ii) it must not have selected the recipient of the transmission; and (iii) it must have neither selected nor modified the information contained in the transmission.

In its judgment, the CJEU first held that making a Wi-Fi network available to the general public free of charge in order to draw the attention of potential customers to the goods and services of a shop constitutes an 'information society service' under the directive. The Court then confirms that where the above three conditions are satisfied, a service provider such as Mr Mc Fadden,who provides access to a communication network, may not be held liable. Consequently, the copyright holder is not entitled to claim compensation nor reimbursement of costs on the ground that the network was used by third parties to infringe its rights. However, the directive does not preclude the copyright holder from seeking, before a national authority or court, to have such a service provider ordered to end, or prevent, any infringement of copyright committed by its customers. Finally, the Court holds that an injunction ordering the Internet connection to be secured by means of a password is capable of ensuring a balance between, on the one hand, the intellectual property rights of rightholders and, on the other hand, the freedom to conduct a business of access providers and the freedom of information of the network users. The Court notes that such a measure is capable of deterring network users from infringing intellectual property rights. However, in order to ensure that deterrent effect, users should be required to reveal their identity before obtaining the required password, so as to be prevented from acting anonymously. According to the Court, the directive expressly pre-

cludes the adoption of a measure to monitor information transmitted via a given network and to terminate the Internet connection completely without considering the adoption of measures less restrictive of the connection provider's freedom to conduct a business.

• Judgement of the Court (Third Chamber) in Case C-484/14, Tobias Mc Fadden v. Sony Music Entertainment Germany Gmbh, 15 September 2016
http://merlin.obs.coe.int/redirect.php?id=18167 DE EN FR
CS DA EL ES ET FI HU IT LT LV MT
NL PL PT SK SL SV HR

• Opinion of Advocate General Szpunar on Case C-484/14, Tobias Mc Fadden v. Sony Music Entertainment Germany Gmbh, 16 March 2016
http://merlin.obs.coe.int/redirect.php?id=18168 DE EN FR
CS DA EL ES ET FI HU IT LT LV MT
NL PL PT SK SL SV HR

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Court of Justice of the European Union: GS Media v. Sanoma Media Netherlands

On 8 September 2016, the Court of Justice of the European Union (CJEU) delivered its judgment in GS Media v. Sanoma Media Netherlands, on whether posting a hyperlink to a copyright-protected work freely available on another website, but without the copyright holder's consent, is a "communication to the public" within the meaning of the Copyright Directive (2001/29/EC).

The case arose when the publisher of Playboy magazine (Sanoma) brought a copyright action against a popular Dutch website GeenStijl.nl, over a November 2011 article entitled "Nude photos of 04046 Dekker". GeenStijl's article had included a link to a data-storage website where photos Playboy had intended publish in its forthcoming December 2011 edition had been illegally posted. The Amsterdam Court of Appeal (Gerechtshof) held that GeenStijl had acted unlawfully toward Sanoma by including the link, as visitors were encouraged to view photos which were illegally posted on the data-storage website, and without those links the photos would not have been easy to find.

The case reached the Dutch Supreme Court (Hoge Raad), which decided to refer a number of questions to the CJEU, including whether posting a link to a protected work, freely available on another website, but without the consent of the copyright holder, constitutes "communication to the public" within the meaning of Article 3(1) of the Copyright Directive. Under Article 3(1), member states are required to provide authors with the exclusive right to authorise or prohibit any communication to the public of their works.

In its response, first the CJEU considered its previous judgment on hyperlinking in the Svensson case (see IRIS 2014-4/3), stating that it had held that "posting hyperlinks on a website to works freely available on another website does not constitute a 'communication to the public'", a position that was also adopted in its BestWater order (see IRIS 2015-1/3). However, the CJEU then stated that Svensson was "intended to refer only to the posting of hyperlinks to works which have been made freely available on another website with the consent of the rightholder". According to the Court, Svensson and BestWater "confirm the importance of such consent" under Article 3(1).

However, the Court then noted that "it may be difficult" for individuals who wish to post links "to ascertain whether the website to which those links are expected to lead, provides access to works which are protected and, if necessary, whether the copyright holders of those works have consented to their posting on the internet". In this regard, the Court held that when determining the existence of a "communication to the public" under Article 3(1), and the linking to a work freely available on another website "is carried out by a person who, in so doing, does not pursue a profit", it is necessary to "take account of the fact that that person does not know and cannot reasonably know, that that work had been published on the internet without the consent of the copyright holder". However, if it is established that such a person "knew or ought to have known that the hyperlink he posted provides access to a work illegally placed on the internet, for example owing to the fact that he was notified thereof by the copyright holders, it is necessary to consider that the provision of that link constitutes a 'communication to the public".

The Court then considered the situation when the posting of links "is carried out for profit", and held that "it can be expected that the person who posted such a link carries out the necessary checks to ensure that the work concerned is not illegally published on the website to which those hyperlinks lead, so that it must be presumed that that posting has occurred with the full knowledge of the protected nature of that work and the possible lack of consent to publication on the internet by the copyright holder". Therefore, "and in so far as that rebuttable presumption is not rebutted, the act of posting a hyperlink to a work which was illegally placed on the internet constitutes a 'communication to the public' within the meaning of Article 3(1) of Directive 2001/29".

Having set out the principles, the Court addressed the main proceedings, noting that it was undisputed that GeenStijl operated its website and provided the links "for profit", and that Sanoma had not authorised the publication of those photos. Moreover, GeenStijl was aware of this, "and that it cannot therefore rebut the presumption that the posting of those links occurred in full knowledge of the illegal nature of that publication". Consequently, it appeared to the CJEU that by posting those links, GeenStijl had "effected a 'communication to the public', within the meaning of Article 3(1) of Directive 2001/29".

• *Arrest van der Hof (Tweede kamer), C-160/15, GS Media BV tegen Sanoma Media Netherlands BV, Playboy Enterprises International Inc., Britt Geertruida Dekker, 8 september 2016* (Judgment of the Court (Second Chamber) in Case C-160/15 GS Media BV v. Sanoma Media Netherlands BV and Others, 8 September 2016)

http://merlin.obs.coe.int/redirect.php?id=18145 DE EN FR

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European Commission: New proposals for the modernisation of EU copyright rules in the Digital Single Market

On 14 September 2016, the European Commission proposed two directives and two regulations to adapt the EU copyright rules to the realities of the Digital Single Market. This draft "copyright package" was published together with an explanatory Communication, as well as an extensive Impact Assessment on the modernisation of EU copyright rules.

A proposal for a Directive on copyright in the Digital Single Market (COM(2016) 593 final) and a proposal for a Regulation laying down rules on the exercise of copyright and related rights applicable to certain online transmissions of broadcasting organisations and retransmissions of television and radio programmes (COM(2016) 594 final) aim at increasing cultural diversity and content available online, while bringing clearer rules for all online players.

Through these proposals, the Commission pursues three general objectives: (i) allow for wider online access to protected content across the EU, focusing on TV and radio programmes, European audiovisual works and cultural heritage; (ii) facilitate digital uses of protected content for education, research and preservation in the single market; and (iii) ensure that the online copyright marketplace works efficiently for all players and gives the right incentives for investment in and dissemination of creative content.

The new set of proposals addresses a number of issues linked to the functioning of EU copyright rules in the Digital Single Market.

In relation to exceptions and limitations to copyright, the proposed Directive introduces three new mandatory exceptions: an exception for teaching activities covering digital uses undertaken in the context of illustration for teaching with the option for Member States to make it subject to the availability of adequate licenses covering the same uses (digital and cross-border); an exception for text and data mining applicable to research organisations acting in the public interest (e.g. universities, research institutes); and an exception for preservation purposes by cultural heritage institutions.

Concerning the functioning of the copyright marketplace, the Commission aims at ensuring a fair sharing of the value in the online environment, notably through the introduction of specific obligations on certain types of online services or on those contracting with authors and performers. In relation to the use of content by user uploaded content services, the Commission proposes to create a new obligation on online services storing and giving access to large amount of content uploaded by their users to put in place appropriate and proportionate technologies, and to increase transparency vis à vis right holders. The Commission also proposes the introduction in EU law of a related right for publishers (news, books, scientific, etc.) to receive a share in the compensation for uses under an exception. Finally, the Commission foresees the introduction in EU law of transparency obligations on the creators' contractual counterparties (notably producers and publishers), supported by a contract adjustment and dispute resolution mechanism.

In the area of access to content online, the Commission proposes in relation to online transmission of broadcasting organisations the application of the country of origin principle to the clearing of rights for their online services which are ancillary to their initial broadcast. The ancillary online services covered by the proposed Regulation are those services offered by broadcasting organisations which have a clear and subordinate relationship to the broadcast (e.g. so called catch-up services or services which give access to material which enriches or otherwise expands television and radio programmes broadcast). As for the digital retransmission of TV/radio programmes, the Commission proposes in the Regulation the application of the mandatory collective management of rights to retransmission services provided over "closed" electronic communications networks. The Commission proposes to achieve these objectives, through a Regulation, which will directly apply in the Member States, in order to reduce legal fragmentation and provide greater uniformity in the EU. The Commission shall undertake in the future a review of the Regulation in order to assess its impact on the cross border provision of ancillary online services in the EU.

For the licensing of VoD rights, the Commission proposes a European stakeholders' dialogue and a negotiation mechanism that would facilitate the conclusion of licenses for the online exploitation of audiovisual works by removing contractual blockages. Finally for out-of-commerce works, the Commission proposes to enable Member States to put in place specific legal mechanisms for the conclusion of collective licensing agreements for the use of these works by cultural heritage institutions and the introduction of a cross-border effect for such agreements.

At the same time, two legislative proposals have been adopted for the implementation of the WIPO Mar-

rackesh Treaty in EU law, to facilitate access to published works for persons who are blind, visually impaired or otherwise print disabled, to allow people with print disabilities to access books and other print material in formats that are accessible to them. A proposal for a Directive on permitted uses of works and other subject-matter protected by copyright and related rights for the benefit of persons who are blind, visually impaired, or print disabled will amend Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society (the "InfoSoc Directive"), by introducing a mandatory exception. It will be accompanied by a proposal for a Regulation aimed at permitting the cross-border exchange of such accessible-format copies between the Union and third countries that are parties to the Treaty.

• Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Promoting a fair, efficient and competitive European copyright-based economy in the Digital Single Market - COM(2016)592
http://merlin.obs.coe.int/redirect.php?id=18198 DE EN FR
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• Proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market, COM(2016) 593 final, 14 September 2016
http://merlin.obs.coe.int/redirect.php?id=18199 DE EN FR
CS DA EL ES ET FI HU IT LT LV MT
NL PL PT SK SL SV HR

• Proposal for a Regulation laying down rules on the exercise of copyright and related rights applicable to certain online transmissions of broadcasting organisations and retransmissions, COM(2016) 594 final, 14 September 2016
http://merlin.obs.coe.int/redirect.php?id=18202 DE EN FR
CS DA EL ES ET FI HU IT LT LV MT
NL PL PT SK SL SV HR

• Proposal for a Directive of the European Parliament and of the Council on certain permitted uses of works and other subject-matter protected by copyright and related rights for the benefit of persons who are blind, visually impaired or otherwise print disabled and amending Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society - COM(2016)596
http://merlin.obs.coe.int/redirect.php?id=18207 DE EN FR
CS DA EL ES ET FI HU IT LT LV MT
NL PL PT SK SL SV HR

• Proposal for a Regulation of the European Parliament and of the Council on the cross-border exchange between the Union and third countries of accessible format copies of certain works and other subject-matter protected by copyright and related rights for the benefit of persons who are blind, visually impaired or otherwise print disabled - COM(2016)595
http://merlin.obs.coe.int/redirect.php?id=18208 DE EN FR
CS DA EL ES ET FI HU IT LT LV MT
NL PL PT SK SL SV HR

• Commission Staff Working Document - Impact Assessment on the modernisation of EU copyright rules - Accompanying the document "Proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market" and "Proposal for a Regulation of the European Parliament and of the Council laying down rules on the exercise of copyright and related rights applicable to certain online transmissions of broadcasting organisations and retransmissions of television and radio programmes" - SWD(2016)301
http://merlin.obs.coe.int/redirect.php?id=18211 EN

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European Commission: Decision on funding of film production and distribution in Germany

On 1 September 2016, the European Commission issued its decision on measures Germany planned to implement for the funding of film production and distribution. The Commission found that the measures were compatible with the Treaty on the Functioning of the European Union (TFEU), and did not infringe the Audiovisual Media Services Directive (2010/13/EU) (AVMS Directive) (see also IRIS 2016-6/11). The decision concerned the amendment of section 66a(2) of the Film Support Act (Filmförderungsgesetz) (FFG). Currently, cinema operators, video suppliers and video-on-demand (VoD) providers have to pay a compulsory tax to the Federal Film Board ("Filmförderanstalt" - FFA) based on their income from film exploitation. The FFA redistributes the proceeds from these taxes for the production and distribution of films.

The amendment sought to subject VoD distributors located outside Germany to the tax. The tax would be charged on the turnover which they make "with possibly aided products, that is to say with offers via their German language internet appearance to customers in Germany, and only to the extent that this turnover is not subject to a comparable tax for cinematographic support at the place of the establishment of the provider". Of the funds generated by the tax on domestic and foreign video suppliers, 30 percent will be earmarked for the support of the distribution of films by video or VoD; the rest will, together with the contributions from cinemas and broadcasters, contribute to the support of film production or distribution via other channels. This earmarked 30 percent will be the only source of financing the aid for video distribution. Notably, at present, only suppliers of VoD services with a registered office or a branch office in Germany were entitled to obtain support from the FFA. However, under the amendments at issue, "video on demand suppliers without an establishment or agency in Germany may benefit in the same way for their offers via internet in German language addressed to customers in Germany".

The Commission's decision first considers whether the aid to VoD distribution violated the state aid rules contained in Article 107 TFEU. Article 107(1) provides that "aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market". However, Article 107(3)(d) provides that "aid to promote culture and heritage conservation where such aid does not affect trading conditions and competition in the Union to an extent that is contrary to the common in-

terest" may be considered to be compatible with the internal market. The Commission noted that it had already found the current scheme compatible with Article 107 in its Decision SA.36753 (3 December 2013), and stated that "the extension of the range of possible beneficiaries to firms established elsewhere does not negatively affect the compatibility assessment under that Article".

Next, the Commission considered whether the tax violated Article 110 TFEU, which provides that "no Member State shall impose, directly or indirectly, on the products of other Member States any internal taxation of any kind in excess of that imposed directly or indirectly on similar domestic products [or] any internal taxation of such a nature as to afford indirect protection to other products". The Commission decided that the new tax did not infringe Article 110, as "foreign video on demand providers may benefit also in practical terms equally from the funding", and "[the] scheme provides for effective means to allow the foreign VoD providers to apply for distribution aid in the same way as their German competitors".

Finally, the Commission examined whether the measures violated the AVMS Directive. In this regard, Article 2(2)(a) contains the country of origin principle, and provides that "media service providers under the jurisdiction of a Member State are 04046 those established in that Member State in accordance with paragraph 3". While Article 13(1) concerns promotion of European works, and provides that member states must "ensure that on-demand audiovisual media services provided by media service providers under their jurisdiction promote, where practicable and by appropriate means, the production of and access to European works".

Two interested parties argued that the tax would constitute a measure to promote access to European works, in violation of the country of origin principle. However, the Commission decided that "validity of the application of the tax to certain VoD providers which provide their services from locations outside Germany" did not violate the AVMS Directive. The Commission stated that "an interpretation according to which the country of origin principle" applies to the tax at issue would lead "to situations in which providers active on the same market are not subject to the same obligations". Moreover, the Commission had regard to a proposed amendment to the AVMS Directive published by the Commission in May 2016 (see IRIS 2016-6/3), which "clarifies in particular that Member States have the right to require providers of on-demand audiovisual media services, targeting audiences in their territories, but established in other Member States, to make such financial contributions". The Commission decided that the proposal was "a clarification of what could already be possible under the Directive currently in force".

• *Europäische Kommission, Kommissionsbeschluss vom 01.09.2016 zum Beihilfemodell SA.38418 - 2014/C (ex 2014/N), welches Deutschland zur Förderung von Filmproduktion und -vertrieb umzusetzen gedenkt, C(2016) 5551 endg., 1. September 2016* (European Commission, Commission decision of 1.9.2016 on the aid scheme SA.38418 - 2014/C (ex 2014/N) which Germany is planning to implement for the funding of film production and distribution, C(2016) 5551 final, 1 September 2016)
http://merlin.obs.coe.int/redirect.php?id=18143 DE EN

• *Europäische Kommission, Kommissionsbeschluss vom 03.12.2013 zum Beihilfemodell SA.36753 (2013/N) - Deutsches Filmförderungsgesetz, C(2013) 8679 endg., 3. Dezember 2013* (European Commission, Commission decision of 3.12.2013 on the aid scheme SA.36753 (2013/N) - Germany Filmförderungsgesetz, C(2013) 8679 final, 3 December 2013)
http://merlin.obs.coe.int/redirect.php?id=18144 DE EN

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Body of European Regulators for Electronic Communications: guidelines on EU net neutrality rules

On 30 August 2016, the Body of European Regulators for Electronic Communications (BEREC) published its Guidelines on the Implementation by National Regulators of European Net Neutrality Rules. BEREC was established in 2010 under Regulation (EC) No 1211/2009 (see IRIS 2010-3/4), and one of its tasks under the recent Regulation on open internet access (2015/2120) is to issue guidelines to national regulators on their obligations concerning the safeguarding of open internet access (i.e. net neutrality).

Regulation 2015/2120 was adopted in November 2015, and Article 1 to Article 6 contain rules designed to safeguard equal and non-discriminatory treatment of traffic in the provision of internet access services and related end-users' rights. In particular, under Article 5, national regulatory authorities are required to "closely monitor" and "ensure compliance" with the rules, and in this regard, BEREC's guidelines are designed to provide guidance to these national authorities. Importantly, Recital 19 of the Regulation states that national regulators "should take utmost account of relevant guidelines from BEREC."

The 45-page Guidelines provide detailed guidance on each of the six articles in the Regulation concerning open internet access. The Guidelines first elaborate upon Articles 1 and 2, which concern the subject matter and scope of the Regulation, noting that "BEREC understands a sub-internet service to be a service which restricts access to services or applications (e.g. banning the use of VoIP or video streaming) or enables access to only a pre-defined part of the internet (e.g. access only to particular websites)". The Guidelines state that regulators "should take into account the fact that an ISP could easily circumvent the Regulation by providing such sub-internet offers", and

should "therefore be considered to be in the scope of the Regulation".

Next, the Guidelines turn to Article 3, which provides for the rights of users, and the obligations and permitted practices for internet service providers. Article 3(1) eshrines the right of users to access and distribute information and content, use and provide applications and services, and use terminal equipment of their choosing via their internet access service. While Article 3(2) provides that agreements between providers of internet access services and end-users, on commercial and technical conditions and the characteristics of internet access services such as price, data volumes or speed, and any commercial practices conducted by providers of internet access services, shall not limit the exercise of the rights of end-users.

The Guidelines provide examples of acceptable commercial practices, such as "application-agnostic offers where an end-user gets uncapped access to the internet (and not just for certain applications) during a limited period of time", or offering "free subscription to a music streaming application for a period of time to all new subscribers". However, the Guidelines then discuss "zero rating", which is "where an ISP applies a price of zero to the data traffic associated with a particular application or category of applications (and the data does not count towards any data cap in place on the internet accesses service)". The Guidelines provide detailed considerations to be taken into account on how regulators should assess such agreements, and notes that "a zero-rating offer where all applications are blocked (or slowed down) once the data cap is reached, except for the zero-rated application(s), would infringe [the Regulation]. "

In addition, Article 3(3) of the Regulation provides that "providers of internet access services shall treat all traffic equally when providing internet access services, without discrimination, restriction or interference, and irrespective of the sender and receiver, the content accessed or distributed, the applications or services used or provided, or the terminal equipment used". However, providers may implement "reasonable traffic management measures", and the Guidelines discuss what may be considered "reasonable", including being proportionate and not based on "commercial considerations". Importantly, paragraphs 108-115 of the Guidelines concern "specialised services", which are "services other than internet access services which are optimised for specific content, applications or services, or a combination thereof, where the optimisation is necessary in order to meet requirements of the content, applications or services for a specific level of quality". The Guidelines give examples of such specialised services, including "VoLTE and linear broadcasting IPTV services with specific quality of service requirements", and how regulators should ensure such services meet the requirements of the Regulation.

Finally, the Guidelines discuss Article 4, on the transparency requirements placed on providers of internet access services, and Articles 5 and 6 concerning supervision, enforcement and penalties under the Regulation.

• Body of European Regulators for Electronic Communication, BEREC Guidelines on the Implementation by National Regulators of European Net Neutrality Rules, BoR (16) 127, 31 August 2016
http://merlin.obs.coe.int/redirect.php?id=18141 EN

• Regulation (EU) 2015/2120 of the European Parliament and of the Council of 25 November 2015 laying down measures concerning open internet access and amending Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks and services and Regulation (EU) No 531/2012 on roaming on public mobile communications networks within the Union, L 310/1, 26 November 2015
http://merlin.obs.coe.int/redirect.php?id=18142 DE EN FR
CS DA EL ES ET FI HU IT LT LV MT
NL PL PT SK SL SV HR

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NATIONAL

AT-Austria

KommAustria establishes breach of ORF Act

On 17 August 2016 the media regulator KommAustria established that the online offering of the public service broadcaster ORF contained elements that could not be regarded as content accompanying a programme, and accordingly breach the ORF Act.

The live-sport portal Laola 1 Multimedia GmbH filed a complaint against the ORF service sport.ORF.at, including its Sports App, and against the online partial service sport.ORF.at/fussball, including its Football App, claiming that both the online reporting and the apps breached the ORF Act.

KommAustria partially upheld the complaint, ruling that several ORF items did not accompany a programme and thus broke the law. The in-depth reporting on European championship matches in the form of a live news ticker, the provision of statistics, the sections "Best of Social" and "Fanfacts" and the TV guide, which also contained information on other broadcasters' programmes, could neither be categorised as accompanying a broadcast nor as reporting on current affairs, and therefore breached sections 4a(1),(2) and (3) and 5a(4) of the ORF Act. KommAustria also found fault with the marketing of the video included in the ORF online service, pointing out that the frequency of so-called instream video advertisements run as part of the video was higher than that of advertisements shown in connection with the online service

Tvthek.ORF.at, so that the limits to ORF's service plan were exceeded. Apart from assessing the complaint filed, KommAustria established of its own motion that the ORF online service also broke the law outside the period mentioned in the complaint.

ORF was ordered to publicise the decision in the form of an announcement inserted for a period of one week into the homepage of its online services sport.ORF.at and sport.ORF.at/fussball, including the Sports App and Football App, and to do so within six weeks of the date on which the decision becomes legally final. The decision is not yet final, and ORF has announced its intention to appeal against the partially upheld parts of the complaint.

• *Entscheidung der KommAustria vom 17. August 2016 (Gz. KOA 11.260/16-019)* (KommAustria decision of 17 August 2016 (Ref. KOA 11.260/16-019))
http://merlin.obs.coe.int/redirect.php?id=18212 DE

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BA-Bosnia And Herzegovina

Parliament does not support extending collection of RTV tax

On 1 August 2016, the House of Representatives of the Parliamentary Assembly of Bosnia and Herzegovina in a session in Sarajevo did not accept a renewed request by Social-Democratic Party (SDP) delegates to extend the collection of radio and television (RTV) tax through telecom operators after 31 December 2016. Republika Srpska (Serb Republic) delegates blocked the initiative, since they had previously requested that funds from the tax be redistributed in a different way among the state broadcaster and the entity broadcasters.

The RTV tax is collected through landline bills, which citizens are cancelling on a large scale due to the popularity of mobile telephones and free online services. A proposal to collect the tax through electricity bills was not supported by an earlier majority vote and thus the latest SDP proposal had been to extend the current solution for several months until a comprehensive reconstruction of the public broadcasting system was agreed upon (see IRIS 2016-8/13). Croat political parties in particular are insisting on full reconstruction, as they maintain that the current broadcasting system does not fulfil the linguistic or political interests of Croats of BA.

After the House session, the Radio-Television of the Federation of Bosnia and Herzegovina (RTV FBiH) management announced that it was left without any funds because, in addition to losing the tax, the entity broadcasters are not paying their obligations to the national broadcaster. The monthly radio and television tax is KM 7,5 (EUR 3,8). In Europe, the tax is lower only in Serbia, but its public service also receives money from the state budget.

The Radio-Television of the Republika Srpska (RTRS), the entity public television of the Republika Srpska, is every day strengthening its direct collection service through door to door collectors. In August, this public service also launched a campaign to collect the tax through bank standing orders for people who have jobs. However, the funds that are collected this way are not shared at a ratio of 25 percent for each entity television and 50 percent for the state public service as in the previous model for distributing the TV tax.

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BE-Belgium

Flemish Media Regulator issues several decisions on sponsoring

In May and June 2016, the General Chamber of the Flemish Media Regulator issued six decisions that relate to the provisions in the Flemish Media Decree on sponsorship. In five cases the Chamber concluded that an infringement had occurred (for previous decisions, see IRIS 2015-6/6).

Four of those five cases concerned a violation of Article 2 (41) of the Flemish Media Decree which contains the definition of sponsorship ("every contribution by a public or private company, the authorities, or a natural person not engaged in providing broadcasting services or producing audiovisual or audio works, to the financing of broadcasting services or programmes, with the aim of raising awareness of its name, trade mark, image, activities or products"). At issue in those decisions was the difference between a "commercial" ("reclameboodschap") and a sponsoring statement (which, according to Article 91(3°), must precede and/or follow a sponsored programme, in order to inform viewers of its sponsored nature). Although a sponsoring statement may contain promotional elements, according to the Chamber, it cannot directly encourage consumption or contain a message which directly promotes the purchase of goods or services. In two cases (2016/028, 2016/38) the sponsoring message did contain such a message, by inciting consumers to use or buy the advertisers' services or products, by means of visual and/or auditive elements (e.g. "We sell your house. No results! No costs!";

"Fancy a heartwarming bowl of soup? Liebig Délisoup. Tonight we soup."). In two other cases (2016/029; 2016/031) the Chamber also found specific promotional elements that lead the viewer to consume (e.g. "Finish off bad smells. The Swirl anti-odour pedal bin liners with special formula diminish nasty smells."; images of a woman who seems tired and regains energy by pressing a space bar on which the word "Promagnor" is visible). These cases resulted in fines (ranging from EUR 2,000 to 10,000) or a warning, depending on whether previous infringements occurred. A fifth decision also considered a potential violation of Article 2(41) but the Chamber came to the conclusion that the wording used ("If you think about cooking, you think about our cooking shop") was only mentioned auditively and was rather vague, and, hence, did not incite the viewer to consumption. No violation was found.

A final case (2016/030) concerned Article 91(2) of the Flemish Media Decree, which states that sponsored programmes must not "directly encourage listeners or viewers to buy or lease goods or services, by specifically promoting these goods or services". The general Chamber took into account the fact that the positive characteristics of the product in question were emphasised (e.g. "ideal to kick your sugar habit", "the same sweet taste as sugar", "you have to use much less than regular sugar"), that the product was the only ingredient that was visible for the full duration of the preparation of the recipe, and that the chef held the ingredient for a duration of fourteen seconds in a prominent manner. It concluded that Article 91(2) had been violated, and issued a warning to the broadcaster.

- *Vlaamse Regulator voor de Media, Algemene Kamer, Decision 2016/028* (Vlaamse Regulator voor de Media, Algemene Kamer, Decision 2016/028)
http://merlin.obs.coe.int/redirect.php?id=18146 NL
- *Vlaamse Regulator voor de Media, Algemene Kamer , Decision 2016/029* (Vlaamse Regulator voor de Media, Algemene Kamer, Decision 2016/029)
http://merlin.obs.coe.int/redirect.php?id=18147 NL
- *Vlaamse Regulator voor de Media, Algemene Kamer, Decision 2016/030* (Vlaamse Regulator voor de Media, Algemene Kamer, Decision 2016/030)
http://merlin.obs.coe.int/redirect.php?id=18148 NL
- *Vlaamse Regulator voor de Media, Algemene Kamer, Decision 2016/031* (Vlaamse Regulator voor de Media, Algemene Kamer, Decision 2016/031)
http://merlin.obs.coe.int/redirect.php?id=18149 NL
- *Vlaamse Regulator voor de Media, Algemene Kamer, Decision 2016/038* (Vlaamse Regulator voor de Media, Algemene Kamer, Decision 2016/038)
http://merlin.obs.coe.int/redirect.php?id=18150 NL
- *Vlaamse Regulator voor de Media, Algemene Kamer, Decision 2016/041* (Vlaamse Regulator voor de Media, Algemene Kamer, Decision 2016/041)
http://merlin.obs.coe.int/redirect.php?id=18151 NL

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BG-Bulgaria

Extending the mandates of the members of management boards of the public media

The People's Assembly has passed an amendment to the Radio and Television Act (RTA), published in "Official Gazette" and in force since 5 August 2016, which extends by law the mandate of the management board.

With the first amendment of the RTA, published in "Official Gazette" from 17 June 2016, a similar change had been introduced for the General Directors of the Bulgarian National Radio (BNR) and the Bulgarian National Televesion (BNT). According to the amendment, the General Director of BNR and the General Director of BNT can continue to exercise their rights after their mandates expire, until the new General Directors begin their duties. The main purpose of the bill was to avoid a gap in the management of BNR and BNT in case the mandate of the General Directors expired before the election of a new General Director (see IRIS 2016-8/4).

The reason for the current second amendment is that, one month after the expiration of the mandate of the General Director of the BNT, the mandates of the members of the management board also expire. Since the People's Assembly examined and passed the text of the first amendment at first and second reading in one meeting, nobody submitted any proposals to extend by law the mandates of the members of the management boards as well. The new provision extends the mandate of the members of the management boards of BNR and BNT until the establishment of a new management board by the Council for Electronic Media (CEM).

The present General Director of BNT has no right to a third consecutive mandate according to the law. CEM undertook a procedure on determining new regulations for the nomination of General Directors, which is available on the website for one month for public discussion, as required by the Administrative Procedure Code.

- Допълнението на Закона за радиото и телевизията е достъпно на адре (Amendment of the Radio and Television Act published in Official Gazette, vol. 61 from 5 August 2016)
http://merlin.obs.coe.int/redirect.php?id=16008 BG
- Проектът на процедура за избор на генерален директор на БНТ е достъпен на адрес (CEM's procedure on determining new regulations for nomination of general directors)
http://merlin.obs.coe.int/redirect.php?id=18192 BG

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DE-Germany

Accreditation rules of the Bavarian Football Association lawful

The Bayerischer Fußballverband (Bavarian Football Association) may continue to charge licence fees and demand that footage of amateur matches be provided free of charge. This was ruled by the Landgericht München (Munich District Court) in a decision of 11 June 2016 (Case 17 HK O 7308/15).

Several newspaper publishers had obtained an injunction against the Bavarian Football Association. These publishers also use film footage to report on various amateur matches and objected to the Association's accreditation rules, which state that camera crews may only access matches if they pay a licence fee or provide their footage free on the Association's own, commercially operated platform, bfv. The fees range from between EUR 250 for Landesliga (State League) matches and EUR 1000 for Regionalliga (Regional League) matches. After camera crews had been denied access to various games with reference to the accreditation rules, the publishers applied to a court for an injunction. This was refused, as was their appeal against that decision.

The publishers accused the Association of breaching Section 19(2)(1) of the Gesetz gegen Wettbewerbsbeschränkungen (Restraints on Competition Act - GWB) claiming that it exploited its monopoly position using its accreditation rules. Furthermore, the publishers were deliberately impeded in their work pursuant to Section 4(10) of the Gesetz gegen den unlauteren Wettbewerb (Unfair Competition Act - UWG) as the association was allegedly only interested in promoting its own video portal, which was in direct competition with the publishers' own offerings, and therefore abused its position as a non-profit association. The Association pointed out that associations were entitled to deny access to their premises, and emphasised that it acted solely in the interests of its member associations by creating fair rules for all clubs with regard to video reporting on specific games. The Court found that the clubs had a right to exploit not only the games of the top three national professional football leagues, but also the amateur leagues.

The Munich District Court dismissed the publishers' objection, stating that there had been no "deliberate" impediment to competition within the meaning of section 4(10) of the Unfair Competition Act. As any activity by a company to promote its own sales always had an adverse impact on the opportunities for fellow competitors to develop their competitive capabilities, other grounds were necessary to fulfil the definition of unfair competition. However, none were discernible in the instant case. The Association's intention was to promote its own video offerings, and therefore, in particular, not only to affect its rivals' competitive development. Furthermore, after weighing up all the interests of both parties, the Court concluded that the Association's action was not unreasonable. In particular, the Bundesgerichthof (Federal Court of Justice - BGH) had acknowledged that a football association could ensure the exclusive economic exploitation of video reporting by either referring to the owner's right to deny or authorise access in order to prevent footage being produced by third parties, or by only permitting that by charging them a fee. In that connection, the right to deny or authorise access served to ensure the exploitation of the services rendered by the sports event's organisers. In addition, the publishers were not completely prohibited from reporting on the matches, but had only been required to meet certain conditions. Section 19(2)(1) GWB could not have been breached as the restrictions on access that emerged from the accreditation rules had the same impact on all companies and the commercial exploitation of their matches was a legitimate interest of all association members.

The publishers have already announced their intention to appeal against the decision.

• *Entscheidung des LG München I vom 11. Juni 2016 (Az. 17 HK O 7308/15)* (Decision of the Munich District Court of 11 June 2016 (Case 17 HK O 7308/15))
http://merlin.obs.coe.int/redirect.php?id=18169 DE

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ES-Spain

CNMC reported about the fulfilment of the public service duties of RTVE

On 27 July 2016, Spain's National Authority for Markets and Competition (Comisión Nacional de los Mercados y la Competencia - CNMC) published the first report on the fulfilment of the Spanish Public Corporation (Corporación de Radio y Televisión Española - CRTVE) public interest duties and funding, corresponding to 2014. The 2006 National Public Radio and Television Act imposes the duty on an independent authority to assess the effectiveness of the public service broadcaster in delivering the public service purposes set out in the Law. Nevertheless, the absence of such authority before the creation of CNMC (October 2013) resulted in the lack of effective supervision until now.

While CRTVE has broadly fulfilled the public obligations set out in the audiovisual Spanish framework,

the report identifies the need to revise the financing mechanism entered into force in 2009, in order to guarantee CRTVE's future budgetary stability.

Law 8/2009 amended the financing mechanism of CTRVE, introducing a prohibition on advertising, teleshopping, merchandising and pay-per-view services as sources of revenue. By way of compensation, CRTVE receives additional public funding generated from the revenues of a tax on free-to-air commercial broadcasters (3percent), pay-TV broadcasters (1.5 percent); electronic communications operators (0.9percent), and a share of 80percent of the already existing levy on radio spectrum use, up to a maximum amount of EUR 330 million.

The assessment also identifies several aspects of CRTVE which could be improved in the forthcoming years, and provides some recommendations:

- To promote a better balance, both quantitatively and qualitatively, of the various political forces in the news;

- To maintain national production goals, making an effort to reach most of the citizens in terms of social profitability and audience;

- To ensure accessibility quotas are met and to promote the representation of people with disabilities;

- Finally, to contribute to the preservation of historical audiovisual heritage.

• *Informe sobre el cumplimiento de las obligaciones de servicio público por la corporación de radio y televisión española y su financiación, año 2014* (CNMC reported about the fulfilment of the public service duties of RTVE)
http://merlin.obs.coe.int/redirect.php?id=18191 ES

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FR-France

Luc Besson's film 'Lock-Out' plagiarises pre-existing film: judgment upheld on appeal

In a decision delivered on 10 June 2016, the Court of Appeal in Paris upheld a sentence for plagiarism that hit the headlines when it was delivered in the initial proceedings, and substantially increased the amounts awarded in damages. In the case at issue, an American director claimed that the film 'Lock-Out', released in 2012, was very similar to the film 'Escape from New York' (French title: 'New York 1997'), released in 1981, which he had co-written. The French production company of the film 'Lock-Out' and the film's writers were summoned to appear in court to answer charges of plagiarism. The regional court found that the disputed film had indeed plagiarised the film 'Escape from New York', and ordered the defendants in the case to pay EUR 20 000 to the director, EUR 10 000 to his co-screenwriter, and EUR 50 000 to the company holding worldwide rights for the film, in compensation for their respective prejudice suffered. The defendants in the case appealed against the court's decision.

The Court of Appeal began by recalling that plagiarism was appreciated not in terms of the differences but in terms of the similarities between the works at issue, and that consideration of the motivations of the parties bringing the case, as requested by the appellant parties, was irrelevant. The Court considered whether the film 'Lock-Out' used the same combination of various elements comprising the initial work, 'Escape from New York', even if taken in isolation, as this would constitute an infringement of copyright. The Court therefore examined these elements individually: the development of the plot, the cinematographic treatment, the principal and secondary characters, characteristic scenes in the films at issue, and lastly the message put across by the two works. The Court found that, disregarding the common theme of hostage-taking in a prison, which could hardly be deemed to constitute an appropriation, plagiarism was evidenced by the substantial borrowing by the writers of 'Lock-Out' of key elements in the initial work which when combined, as the result of arbitrary choices, constituted infringement of copyright. The Court added that film critics had all agreed on this in their press articles when the film was released. The writer of one of these articles, for example, felt the film was "closer to plagiarism than homage", and that the plot "cribbed from the original film". The judgment that plagiarism had indeed taken place was upheld, but was overturned regarding the evaluation of the prejudice suffered. The Court noted in particular that the co-writers of the initial work, who were invoking their entitlement to acknowledgement of paternity and respect for the work 'Escape from New York', had suffered moral prejudice. Furthermore, the Court found that the earlier date of the film (released in 1981) was not to be taken into account, which the judges in the initial proceedings had appeared to have done, since moral right is imprescriptible.

The defendants were ordered jointly and severally to pay the director the sum of 100 000 euros and the co-scriptwriter the sum of EUR 40 000 in compensation for the moral prejudice suffered, and to pay EUR 300 000 to the rightsholding company in compensation for the pecuniary prejudice suffered.

• *Cour d'appel de Paris, (pôle 5 - ch. 2), 10 juin 2016, SA Europacorp et a. c/ J. Carpenter et a.* (Court of Appeal in Paris (section 5, chamber 2), 10 June 2016, Europacorp S.A. and others v. J. Carpenter and others.) FR

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France Télévisions cannot oblige its journalists to carry out editing tasks, or its editing staff to carry out editorial work

In France, the audiovisual sector's return to work after the summer break was marked by the launch, on 1 September 2016, of the new public-service news channel 'France Info', using the name of the new global offer of public news. This is the fourth continuous news channel in France on digital freeview television, after BFM-TV (NextRadioTV group), i-Télé (Canal+ group), and LCI (TF1 group). France Télévisions has recruited 176 people for the project, half of them internally, but there have been social problems, and on 13 September, the regional court in Paris was called on to adjudicate on one of them.

Since France Télévisions is not covered by any collective agreement, its social status was harmonised in 2013 by means of a company collective agreement. In 2016, the public-sector group embarked on a procedure for consulting its 'central works council' on the plan to launch a continuous public-service news channel, and began negotiations with the representative unions on the 'complementary skills' of the news channel's employees. Even though no organisation has signed the draft codicil to the collective agreement proposed by the public-sector audiovisual group, the group decided to apply unilaterally the draft codicil's provisions on job evolution and the conditions governing accompaniment and remuneration. The company's journalists' unions then had their employer summoned to appear before the regional court in Paris, where it was ordered to prevent the continuous news channel's journalists from being obliged to have and use additional complementary skills.

They claimed that, without having concluded an agreement revising the collective agreement, the management of France Télévisions was not able unilaterally to demand additional complementary skills of its journalists (specifically, "receiving, sequencing and editing their subjects; selecting sequences; defining editing plan; editing video modules on digital support as required") or editing staff (who were being asked to exercise the skill of devising editorial content, in terms of design, editorial work, and production), who were going to work for the new news channel. The Court was required to decide on whether increasing the number of complementary skills employees were expected to have required following the revision procedure as defined in the Labour Code (Code du Travail), or might be the result of a unilateral decision on the part of the employer.

In the case at issue, apart from the "activities among those habitually carried out" by the employees, the signatory parties have made provision, for both technical and administrative staff, including editing staff, and journalists, for the possibility of adding "complementary skills" to their job descriptions. In this respect, the agreement states in its article on journalists that "the list of and methods for exercising complementary skills [...] shall be negotiated". The same applies for technical and administrative staff, including editing staff. The Court found that by laying down an obligation to negotiate, the parties to the collective agreement intended to submit amendments affecting complementary skills and the conditions for their exercise to the revision procedure. Furthermore, since the provisions at issue were supplemented by the addition of a complementary skill, that in fact meant amending the criticised collective agreement.

As a result, the Court ordered that, in the absence of a revision of the 2013 collective agreement, the company France Télévisions could not require journalists intended to be working for the continuous news channel to carry out editing tasks, or editing staff to produce editorial content.

• *Tribunal de grande instance, Paris, (1e ch. sect. sociale), 13 septembre 2016, SNJ et CFDT Médias de France Télévisions c/ France Télévisions* (Regional Court in Paris (1st chamber, social section), 13 September 2016, SNJ and CFDT Médias de France Télévisions v. France Télévisions) FR

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New tax credit for expenditure on delegated production of cinematographic and audiovisual works

With the appearance of Decree No. 2016-1191 of 31 August 2016, new arrangements regarding tax credit for expenditure on the delegated production of cinematographic and audiovisual works have come into force. Article 111 of the 2016 Finance Act amended Article 220 sexies of the General Tax Code, which governs these arrangements, under which cinematographic or audiovisual production companies subject to company tax which take on the function of delegated production companies are able to benefit from a tax credit. This tax credit relates to certain items of production expenditure, listed in the legislation, corresponding to operations carried out with a view to producing full-length cinematographic works or audiovisual works (fiction, documentaries, or animated works).

Firstly, the 2016 Finance Act indicates that certain films are able to benefit from the tax credit even if they do not meet the requirement of the film being made principally in the French language. This refers to animated films, fiction films with substantial visual effects, and works produced in a language other than French for screenplay-related reasons. Secondly, the rate of the tax credit is increased to 30 per cent for films produced in French and for animated films,

which are assimilated works with substantial visual effects. The upper limit of tax credit for a cinematographic work has been increased to EUR 30 million. Lastly, for audiovisual fiction works, the rate of the tax credit has been increased to 25 per cent and the ceiling determined according to the cost of production, subject to a maximum of EUR 10,000 per minute produced and delivered.

Article 111 (III) of the 2016 Finance Act provides that these measures should enter into force on a date to be determined by a decree which was to be passed within six months of the European Commission's decision on the arrangements; the Commission authorised all the changes in its decision on 21 March 2016. The Decree as presented lays down the date on which the arrangements are to enter into force as being the day after its own publication, i.e. 3 September 2016. The new arrangements will therefore apply to tax credits calculated for financial years commencing on or after 1 January 2016.

Lastly, with regard to the new category of cinematographic works introduced by Article 111 of the new Act, namely cinematographic fiction works with substantial visual effects, the Decree provides the possibility of waiving the requirement that most of the image treatment work must be carried out in France, to take account of the specific artistic features of certain projects.

• *Décret n°2016-1191 du 31 août 2016 fixant l'entrée en vigueur des dispositions relatives au crédit d'impôt pour dépenses de production déléguée d'œuvres cinématographiques ou audiovisuelles prévues à l'article 111 de la loi n°2015-1785 du 29 décembre 2015 de finances pour 2016 et modifiant la partie réglementaire du code du cinéma et de l'image animée* (Decree No. 2016-1191 of 31 August 2016 determining the entry into force of the arrangements for tax credit in respect of delegated production expenditure on cinematographic audiovisual works provided for in Article 111 of Act No. 2015-1785 of 29 December 2015 (2016 Finance Act) and amending the regulatory part of the Cinema and Animated Image Code)
http://merlin.obs.coe.int/redirect.php?id=18213 FR

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Classification of films shown in cinemas and on television: CSA study

At the end of February 2016, the Chair of the Commission for the Classification of Cinematographic Works, submitted to the Minister for Culture a report on the classification of cinematographic works with regard to minors between 16 and 18 years of age. The report follows on from a number of controversies connected with the courts' suspensions of approval certificates for films including scenes of extreme violence or non-simulated sex. The public authorities are indeed currently reconsidering "the automatic nature of banning showing [such content] to minors, which is the result of current law as appreciated in jurisprudence, so that classification takes better account of the singular nature of works and of their impact on the public". The report outlined particularly the role of the CSA and the coordination of its recommendations for warnings regarding young people and programme classification with the decisions of the Commission for the Classification of Cinematographic Works, as the hearings of professionals seemed to indicate that the CSA has some influence on film classification. The CSA was asked to interview the various parties involved, and subsequently published a report on the hearings at the end of the summer.

The CSA's recommendation of 7 June 2005, amended in 2014, on signing regarding young people and programme classification sets out the framework for the classification of television programmes. Television editors are required to classify the content broadcast by referring to the categories defined in the recommendation, to add a warning to the programme, and to adapt the timing of broadcasting accordingly. Regarding cinematographic works, editors are required to refer to the classification given for screening in cinemas, checking this classification can be transposed unchanged for broadcasting on television and, if appropriate, upgrading it. This is because the conditions for broadcasting on television are not the same as those for the cinema, particularly in terms of access, and make it necessary to provide additional protection for young audiences. The CSA's report indicates that 34 per cent of films classified as being for 'all audiences' by the Film Classification Commission were broadcast with the CSA's stepped-up signing (including 32 per cent as 'not suitable for anyone under 10 years of age'). Similarly, 17 per cent of films not to be shown in cinemas to anyone under 12 years of age received a stepped-up classification on television ('not suitable for anyone under 16 years of age'), and 58 per cent of the films approved on the condition that they were not to be shown to anyone under 12 years of age and with a warning in cinema theatres were signed as 'not suitable for anyone under 16 years of age' when broadcast on television.

After these numbers, the CSA reported in its study on the hearing it held with the professional organisations in the cinema sector (BLIC and BLOC), which felt that broadcasters were too often overly strict in their classification of films. They called for a better coordination of classification for screening in cinemas and broadcasting on television, as they felt the current situation generated serious uncertainty regarding the fate of certain films. The CSA recalled, however, that initial assessment of programme classification lay with the television channels, by virtue of the principle of editorial freedom that went hand in hand with editorial responsibility. The BLOC had made proposals aimed at achieving greater flexibility for the broadcasting of films carrying a restriction on television, but the CSA had felt that the proposals ran counter to the duty to protect young audiences conferred on it by law. For their part, the television channels recalled their attachment to an arrangement for

classifying films suited to their audience and the use it made of television. They were generally in favour of greater flexibility, nevertheless. The National Cinema Centre (National Centre du Cinéma) and the Minister for Culture were also consulted.

In summing up this cycle of hearings, the CSA noted that it appeared to be important to retain a degree of independence between the classification of films screened in cinemas and their signing on television, in view of the differences between the two different ways of being able to watch the works. It was generally considered that the arrangement for classifying films shown on television was balanced and achieved the aim of protecting young audiences. The CSA said it was nevertheless attentive to the possible consequences that amendment of the Cinema Code with regard to the classification of cinematographic films might have; an amendment has been announced and is expected.

• *Contribution du Conseil à la réflexion sur la classification des œuvres cinématographiques* (CSA contribution to discussion on the classification of cinematographic works)
http://merlin.obs.coe.int/redirect.php?id=18170 FR

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GB-United Kingdom

Regulator closes investigation into Premier League football rights

Ofcom, the UK communications regulator, has decided to close an investigation into how the Premier League sells live UK audiovisual media rights for Premier League football matches. The investigation was carried out under the Competition Act 1998, and examined whether the selling arrangements of the Premier League restrict or distort competition. This followed a complaint by Virgin Media about the arrangements for auctioning rights (see IRIS 2015-4/10). In 2006 the Premier League had given undertakings to the European Commission in relation to the joint selling of media rights, but these expired at the end of the 2012/13 season.

In deciding to close the investigation, Ofcom took into account the recent decision of the Premier League to increase the number of matches available for live broadcast in the UK to a minimum of 190 per season from the start of the 2019/20 season, an increase of at least 22 matches per season compared to 2015. This builds on the earlier commitments made to the European Commission. The next auction will include a "no single buyer" rule by which more than one broadcaster must be awarded rights. At least 42 matches per season will be reserved for a second buyer, of which a minimum of 30 will be available for broadcast at the weekend.

Ofcom also took into account the preferences of match-going fans established according to market research it had undertaken. A high proportion considered that the day and time of the live match was of great importance, favouring a Saturday 3pm kick-off time, which had to be balanced against the benefits of releasing more matches for live broadcasting, resulting in rescheduling. This would be necessary because of the "closed period" set by the Football Association to protect attendances at matches by prohibiting broadcasting between 2.45pm and 5.15pm on a Saturday. The consumer research is published alongside the decision.

As a result of the factors described above, Ofcom decided that its resources could be used more effectively on other priorities to protect consumers and competition.

• Ofcom, "Ofcom Closes Investigation into Premier League Football Rights", 5 September 2016
http://merlin.obs.coe.int/redirect.php?id=18185 EN

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RT's Going Underground programmes breaches Ofcom's Broadcasting Code on due impartiality

On 4 July 2016, Ofcom determined that RT's current affairs series Going Underground, broadcast on 5 and 26 March 2016, had breached Rule 5.5 of Ofcom's Broadcasting Code by failing to ensure due impartiality. RT is a Russian global news and current affairs channel funded by the Federal Agency for Press and Mass Communications of the Russian Federation, and in the United Kingdom is broadcast by satellite and digitally by licensee TV-Novosti.

Going Underground ran a series of interviews and presentations asserting that the Turkish government was pursuing an "ethnicide" policy against the Kurds and effectively the government was supporting the extreme terrorist Islamist group, ISIS, by not endorsing the Kurds in their campaign against the terrorists. RT presented a number of contributors who were opposing Turkey's stance and also Great Britain for appearing in support to the Turkish approach.

Concerning balance in the reporting, RT, through TV-Novosti, asserted in their response to Ofcom that no one from the Turkish government was available for comment. RT denied that they were in breach of Rule 5.5 of Ofcom's Code, which states "Due impartiality on matters of political or industrial controversy and

matters relating to current public policy must be preserved on part of any person providing a service. This may be achieved within a programme or over a series of programmes taken as a whole".

RT's response relied upon Rule 5.9 which includes: "However, alternative viewpoints must be adequately represented either in the programme , or in a series of programmes taken as a whole". The broadcaster contended that the two programmes had to be considered in conjunction with their regular news bulletins, which had over a number of weeks included interviews and references from the Turkish government's standpoint relating to the Kurds and ISIS. Also, RT argued that given the difficulty in obtaining comment from the Turkish government the broadcaster had had to use other editorial techniques to ensure due impartiality, and in doing so referred to paragraph 1.37 of Ofcom's published Guidance to Section Five of the Code, which states: "It is an editorial matter for the broadcaster as to how it maintains due impartiality. Where programmes handle, for example, controversial policy matters and where alternative views are not readily available, broadcasters might consider employing one or more of the following techniques".

RT relied upon paragraph 1.37, arguing that the two programmes had included the opinions of other countries, some pro-Turkey and others critical of their approach towards the Kurds, and as such the lack of direct comment from the Turkish government did not denude the programmes of due impartiality. RT relied upon section 320 (4) (a) of the Communications Act 2003, which refers to a broadcast preserving due impartiality over "a series of programmes taken as a whole". The method for determining due impartiality was by viewing both programmes and additionally RT's news bulletins. Ofcom's definition of "impartiality" meant not favouring one side over another, whilst "due" meant adequate or appropriate to the subject and nature of the programme. The presentation of differing standpoints need not be an equal division of time but a fair representation of each party's position.

Ofcom determined that their statutory duty was to ensure that broadcast news was presented with due impartiality and the standards were contained in section 320 of the Act and Section Five of Ofcom's Code. When considering the application of these rules Ofcom was mindful of Article 10 of the European Convention on Human Rights (ECHR) which provides for both the broadcaster's and audience's right to freedom of expression.

Ofcom recognised it was not always possible for a broadcaster to acquire all viewpoints and that the rules allowed for suitable editorial techniques to address this issue. However, in viewing the two programmes, Ofcom determined that they were predominantly one-sided. Ofcom considered that the comment in the 5 March 2016 transmission, that the Turkish government was not available, was not sufficient given the swell of adverse comment in the broadcast. The use of editorial techniques in both programmes to ensure impartiality were not sufficient as effectively there was only one indirect comment reflecting Turkey's standpoint.

Ofcom stated that Going Underground was pre-recorded, and was not "editorially linked" with the news bulletins so as to be considered as a whole by the viewing audience. Ofcom considered that RT had not reflected Turkey's position and it would have been possible for them to have done so even allowing for the lack of direct Turkish government comment. The programmes had to be considered in respect to how they will be perceived by the audience and their expectation for RT to reflect both standpoints; the content of the two programmes insufficiently lacked alternative viewpoints to display due impartiality, and as such Rule 5.5 had been breached.

• Ofcom Broadcast and On Demand Bulletin, Issue number 308, 4 July 2016, p. 5
http://merlin.obs.coe.int/redirect.php?id=18153 EN

Julian Wilkins
Blue Pencil Set

Section Six of Ofcom Broadcast Code engaged during UK Referendum about EU

On 23 June 2016, polling stations in the UK were open from 07.00 to 22.00 to enable voters to participate in the referendum on whether the UK should stay in the European Union or not. Section 6.4 of the Ofcom Broadcast Code states that "discussion and analysis of election and referendum issues must finish when the poll opens (this refers to the opening of actual polling stations. This rule does not apply to any poll conducted entirely by post.)".

A Fox News programme was the subject of a complaint under Section 6. Fox News is a news channel originating in the USA, broadcast on the digital satellite platform and licensed by Ofcom in the UK. The licence for this channel is held by Fox News Network Limited Liability Company ("FNN" or the "Licensee").

The complainant objected that a programme discussed the referendum on the UK's membership of the EU on the day of the vote, while the polls were still open. The programme was "Your World with Neil Cavuto", a weekday business and financial news programme. At 21:05 p.m. there was a news item, lasting approximately five minutes, relating to the EU Referendum; at 9:50 p.m., there was a further brief news item, which included statements referring to the referendum.

The Licencee argued that due weight should be given to the interest in freedom of expression and Article 10 of the European Convention on Human Rights (ECHR);

that the programme was oriented to the United States and what its audience there would find interesting; that it was a financial/business programme and therefore that it was unlikely to affect any UK voters - citing paragraph 1.26 of Ofcom's published Guidance to Section Six of the Code. This states that "[t]he purpose of Rule 6.4 is to ensure that broadcast coverage on the day of the election does not directly affect voters' decision". FNN argued that "[i]n light of the business focus of the [p]rogramme, and its airtime in the UK, it is unlikely that the programme 'directly affect[ed] voters' decision" in relation to the EU Referendum.

Ofcom decided that this content was in breach of Section 6.4 of the Code. As regards Article 10, Ofcom stated that the right to freedom of expression is not absolute. Notwithstanding the business aspect of the programme and its focus on the American audience, Ofcom took the view that "this programme contained a number of statements that constituted discussion and analysis of issues related to the EU Referendum." Further, it took the view that Section 6.4 is not qualified by reference to context. Thus, given that the statements were made during the period whilst the polls were still open - content which concerned various aspects of the EU referendum including: the likelihood of a vote to leave the EU; issues debated during the period before the EU referendum vote such as immigration; how the Bank of England would react in relation to a British exit from the EU; and, how an exit from the EU could potentially benefit British trade relationships with the rest of the world.

The decision does not seem to have been accompanied by any sanction.

• Ofcom Broadcast and On Demand Bulletin, Issue number 31, 22 August 2016, p. 8
http://merlin.obs.coe.int/redirect.php?id=18154 EN

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Tender for digital television licences held

The issue of licensing television stations remains of high political importance in Greece. As mentioned in a previous IRIS article (IRIS 2016-5/20), this procedure was not held by the competent independent authority (Ethniko Symvoulio Radiotileorasis - National Council of Radio and Television) but by a special committee the members of which were appointed by the government.

The invitation to tender for the granting of four licences to content providers of nationwide, free-to-air, digital terrestrial, with general informative content, was issued at the end of May by the Minister of State Nikos Pappas. All existing seven channels and four new companies filed an application, but three of the existing channels did not participate in the auction due to deficiencies in the dossier.

The auction procedure lasted three days (30 August 2016 - 1 September 2016), during which the representatives of the candidates were isolated in the building of the Secretary General of Communication, totally cut off from the outside world. The four licences were allocated for EUR 43.6 million to EUR 79.9 million (in total EUR 246 million) to two companies owning active television stations and two new companies. The newcomers not only will have to pay the agreed price within 24 months but will also have to make adequate investments according to the law. There are many persons that seriously question the viability of these companies, given the fact that the Greek economy is still in recession and the price is considered as too high.

All existing broadcasting companies have filed applications for the annulment of the call for tender before the High Administrative Court. These cases were heard during June 2016 and the Court is expected to rule in October 2016. According to government sources, existing operators (four channels of nationwide coverage) who failed to secure a licence will have 90 days after the auction announcement before going off air.

• Minister of State, Invitation to tender number 1/2016 - Invitation to tender for the granting of four (4) licences to content providers of nation-wide free-to-air digital terrestrial television broadcasting in high-definition with general-content information program, for nationwide coverage of the Greek territory, for a period of ten years, 17 May 2016
http://merlin.obs.coe.int/redirect.php?id=18155 EN

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IE-Ireland

New access rules for broadcasters

On 4 August 2016, the Broadcasting Authority of Ireland (BAI) published its updated Access Rules, which set out the rules on providing subtitling, captioning, Irish sign language and audio description for broadcasters in Ireland (for the previous rules, see IRIS 2015-3/18).

In particular, the rules include targets for three new public service broadcasters, namely Oireachtas TV,

UTV Ireland and Irish TV (see IRIS 2015-4/14 and IRIS 2016-8/14). Under the rules, a range of percentage targets are set for each new broadcaster that they must provide for the period 2016-2018. The target range is increased annually for each broadcaster on the following incremental basis:

For Oireachtas TV, its subtitling targets are 5-6 percent in 2016, 12-14 percent in 2017, and 16-18 percent in 2018; while its sign language targets are 1 percent in 2016, 2 percent in 2017 and 3 percent in 2018. The rules provide that Oireachtas TV may set off any sign language provision against the targets for subtitling in 2016. For UTV Ireland, its subtitling targets are 46-52 percent in 2016, 52-56 percent in 2017, and 56-60 percent in 2018. Finally, Irish TV's subtitling targets are 3 percent in 2016, 4 percent in 2017, and 6 percent in 2018.

A review of the rules will take place in early 2017.

• Broadcasting Authority of Ireland, Access Rules, August 2016
http://merlin.obs.coe.int/redirect.php?id=18159 EN

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BAI media research funding scheme 2016

On 30 August 2016, the Broadcasting Authority of Ireland (BAI) launched its Media Research Funding Scheme 2016, with funding being made available for research projects on themes of relevance to the broadcasting sector and the BAI.

The Scheme is set out in a 19-page document, which identifies a number of areas of interest: first, gender in the media, including identifying the research gaps in gender in radio and television in Ireland; identifying gender performance indicators or broadcasters; and other relevant gender topics. Second, broadcast media and society, including the extent to which the Irish broadcasting landscape reflects and shapes Irish society; diverse and culturally relevant Irish content in a changing media environment: challenges and opportunities; and to what extent there is diversity in the voices and viewpoints in Irish broadcasting. The third area of interest is Irish language in broadcasting. However, the document states that these themes are only indicative, and "applicants are also invited to submit applications relating to any other theme that may be considered as supporting the BAI's strategic goals and objectives".

The Scheme is made under section 26(2) of the Broadcasting Act 2009, which states that the BAI's responsibilities include: "to collect and disseminate information on the broadcasting sector in the State", "to initiate, organise, facilitate and promote research relating to broadcasting matters", and "to undertake, encourage and foster research, measures and activities which are directed towards the promotion of media literacy, including co-operation with broadcasters, educationalists and other relevant persons". A total of EUR 50,000 is being made available under the 2016 scheme, and the deadline for receipt of applications is noon on 14 October 2016.

• Broadcasting Authority of Ireland, Media Research Funding Scheme 2016, September 2016
http://merlin.obs.coe.int/redirect.php?id=18156 EN

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IT-Italy

Decree on the television advertising of gaming

On 19 July 2016, the Ministry of Economy and Finance (Ministero dell'Economia e delle Finanze) issued a decree to identify the "specialised media" to which the general prohibition of gaming advertising on television and radio broadcasts between 7 a.m. and 10 p.m. does not apply. The Decree has been published in the Official Journal on 8 August 2016.

Restrictions on gaming advertising were introduced by Legislative Decree no. 158 of 13 September 2012 ("Decreto Balduzzi"). In addition, Section 1, paragraph 939 of Law no. 208 of 28 December 2015 sets forth the prohibition on "generalist radio and television broadcasts" including gaming advertising from 7 a.m. until 10 p.m. The same statute established that some "specialised media" shall not comply with that prohibition; such specialised media are to be identified by a decree of the Ministry of Economy and Finance. As stated above, such a Decree was issued on 19 July 2016. According to the Decree, the generalist broadcasts (subject to the prohibition) are the TV channels qualified as generalist by section 32 of Legislative Decree no. 177 of 30 July 2005 (Consolidated text on radio and audiovisual media services - "Testo unico dei servizi di media audiovisivi e radiofonici") (see IRIS 2005-9/24), i.e. the national free-to-air former analogue digital terrestrial TV channels broadcasting generalist programming.

The Decree identifies the specialised media as: (i) free-to-air digital terrestrial TV channels other than generalist channels; (ii) TV channels broadcast on platforms different from digital terrestrial TV (e.g., satellite channels); (iii) pay channels and services (e.g., pay-TV, pay-per-view, on-demand services); (iv)

local TV channels; and (v) local and national radio stations.

The Decree excludes from the definition of specialised media the TV channels and radio stations aimed exclusively or primarily at children.

• *Ministero dell'Economia e delle Finanze - Decreto 19 luglio 2016 - Individuazione dei media specializzati ai fini della pubblicita' di giochi con vincite in denaro* (Decree of 19 July 2016, Identification of specialised media for gaming advertising)
http://merlin.obs.coe.int/redirect.php?id=18186 IT

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NL-Netherlands

Interactive digital television provider ends data protection violations

On 12 August 2016, the Dutch data protection authority (Autoriteit Persoonsgegevens - AP) announced that a provider of interactive digital television, XS4ALL (a subsidiary of KPN), had ended a number of practices which violated the Dutch Data Protection Act (Wet bescherming persoonsgegevens - WBP) (for a previous decision, see IRIS 2015-7/25). The AP also published the conclusions of its investigation into the practices of XS4ALL's digital interactive television in a 104-page report.

The AP found that KPN and XS4ALL process data about the viewing behaviour of customers in a number of ways, including when customers (a) subscribe to its service; (b) watch (linear) television through a set top box; (c) watch (linear) television through a website; (d) use the interactive options such as video-on-demand, and watch programmes at times outside of the regular schedule, such as delayed or forward watching; and (e) use personal storage space on the servers of KPN (network video recorder).

The AP stated that "data about the viewing behaviour, and the data that are related to it, are personal data", as defined in Article 1(a), of the WBP. The data was also "data of a sensitive nature, which may provide an intrusively revealing overview of someone's behaviour and interests". AP then examined a number of the practices.

First, in relation to the creation of television ratings, KPN collected and stored personal data about television viewing behaviour via the set top box for a period of 60 days until October 2015. KPN translated this data into television ratings, to be able to negotiate with the broadcasting organisations and to determine the channel package. Moreover, XS4ALL extracted data from its webserver to create WebTV ratings until March 2016, and provided the ratings to SKO (a foundation created by content providers in the Netherland). The AP found that "because of the sensitive nature of the data about the TV viewing behaviour, and because of the lack of guarantees such as adequate information, effective (immediate and irreversible) anonymisation, or an opt-out possibility, the interests of KPN and XS4ALL to generate TV ratings did not prevail over the right of data subjects to the protection of their private life (as laid down in Article 8, sub f, of the Wbp)". However, KPN has now ended the processing of personal data to generate ratings about TV viewing via the Set Top Box, and XS4ALL has stopped providing these ratings to SKO.

Second, in relation to video-on-demand, KPN stored detailed information about the delayed viewing of television, previews of programmes and video on demand on an individually identifiable level in several log files, including the use of options such as the pausing and forwarding of programmes. The AP found that "because of the lack of guarantees such as anonymisation, adequate information, and an opt-out possibility, because the retention period was longer than necessary, and because data about viewing behaviour is data of a sensitive nature, the interests of KPN and XS4ALL to collect data about the viewing behaviour of video-on-demand and to process this data into ratings did not prevail over the right of data subjects to the protection of their private life". Therefore KPN and XS4ALL had also infringed the WBP in this regard. However, KPN and XS4ALL now only process data about viewing behaviour "for technical, strictly necessary purposes", with additional anonymisation.

• Dutch Data Protection Authority, Conclusions Dutch Data Protection Authority of the investigation into KPN and XS4ALL digital interactive TV, 20 June 2016
http://merlin.obs.coe.int/redirect.php?id=18187 EN
• Dutch Data Protection Authority, XS4ALL and KPN end privacy violations digital TV, 12 August 2016
http://merlin.obs.coe.int/redirect.php?id=18188 EN
• *Autoriteit Persoonsgegevens, KPN en XS4ALL: Onderzoek naar de verwerking van persoonsgegevens via interactieve televisie van XS4ALL, 20 juni 2016* (Dutch Data Protection Authority, KPN and XS4ALL: Investigation into the processing of personal data through interactive television by XS4ALL, 20 June 2016)
http://merlin.obs.coe.int/redirect.php?id=18189 NL

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RU-Russian Federation

FSB details new rules for telecom sector

On 19 July 2016 the Federal Security Service (FSB) of the Russian Federation adopted a set of rules to facilitate its remote access to decoding information

from "organizations that distribute information" online (Internet and telecom providers), such as all text, voice, graphic, sound, video, and any other messages of their customers. It follows the recently adopted amendments to the federal statutes "On Communications" and "On Information, Information Technologies, and Protection of Information" (see IRIS 2016-8/31).

The procedures approved by the FSB stipulate that the Organization and Analytics Department of the Research and Technology Service of the FSB shall be authorised to claim and obtain information essential for decoding. Such a demand from the FSB shall be provided in writing, signed by the head of the department (or his deputy), and sent by registered mail with a return receipt requested. The demand will specify the address to which the information should be provided on a magnetic disk, or whether the provider should organise remote access to the decoding information (cipher) required. No court decision is necessary to verify the legitimacy of such a demand. If the demand is ignored there is a legal possibility to block access to such service or website.

The register of "organizations that distribute information" online is compiled by the governmental supervisory authority, Roskomnadzor (see IRIS 2012-8/36). Currently it consists of 65 Russian entities, including the "big four": Yandex, Mail.ru, Rambler, and VKontakte. It is collected in either a voluntary or compulsory manner. At the same time, FSB is not limited to address its demands only to those on the Roskomnadzor list: accoridng to press reports such demands will likely be addressed to companies that use https encoding.

• Об утверждении Порядка представления организаторами распространения информации в информационно - телекоммуникационной сети " Интернет " в Федеральную службу безопасности Российской Федерации информации , необходимой для декодирования принимаемых , передаваемых , доставляемых и (или) обрабатываемых электронных сообщений пользователей информационно - телекоммуникационной сети " Интернет " (Order of the Federal Security Service of the Russian Federation adopted on 19 July 2016, No. 432 "On approving the Procedures for provision by the organizers of information dissemination in the information and telecommunication network Internet to the Federal Security Service of the Russian Federation of information necessary to decode electronic messages by the users of the information and telecommunication network Internet as taken, sent, delivered and/or processed [by the organizers]"). The Order is registered at the Ministry of Justice of the Russian Federation on 12 August 2016, No 43217)
http://merlin.obs.coe.int/redirect.php?id=18162 RU

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Rules on using social media for civil servants

The State Duma (Parliament) adopted on 22 June and President signed into law on 30 June 2016 amendments to the federal statutes "On state civil service of the Russian Federation" (2004) and "On municipal service in the Russian Federation" (2007), that relate to the use by state and municipal servants of social media and other websites and/or webpages that may identify them.

The new rules demand from civil (municipal) servants and applicants to the positions of civil (municipal) servants that thay provide their employer with information on the addresses of the websites and webpages where they posted information that is publicly accessible, and data that enables to identify them.

Such information shall be provided by the servants annually by 1 April of next year. Applicants shall submit such information for a 3-year period prior to the year of their applications. Exceptions to this requirement shall be made for those civil (municipal) servants who disseminate online information as part of their official duties.

By a decision of the employer certain civil servants may be authorized to verify the data submitted as well as to "process" the information on the websites (webpages) posted by the civil (municipal) servants and/or applicants.

• О внесении изменений в Федеральный закон " О государственной гражданской службе Российской Федерации " и Федеральный закон " О муниципальной службе в Российской Федерации " ("On amendments to the Federal Statute "On state civil service of the Russian Federation" and to the Federal Statute "On municipal service in the Russian Federation". Published in the official daily Rossiyskaya gazeta on 4 July 2016 — N 144)
http://merlin.obs.coe.int/redirect.php?id=18190 RU

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SE-Sweden

The Swedish Press and Broadcasting Authority's newest report on accessibility requirements for broadcasters in Sweden

According to Section 5(12) of the Swedish Radio and Television Act (Radio- och TV-lagen - RTL), which implements Directive 2010/13/EU on Audiovisual Media Services (AVMS Directive) (see IRIS 2010-5/36), the media service providers of television broadcasting, on-demand television, and searchable text TV shall design their service in such a way that it becomes available to persons with disabilities through subtitling, interpretation, spoken text or a similar technique.

On 26 April 2016, the Swedish Press and Broadcasting Authority completed a report in which they present a decision model for the accessibility requirements for

television broadcasting for persons with disabilities, to be applied from 1 July 2016. The requirements include subtitling, sign-language interpretation, and spoken text. The decision model is based partly on the impact that the requirements have had so far and the views put forward by disability organisations, broadcasters, and other interested parties; and partly on a number of considerations that the Authority has made about who the requirements should cover and how the obligations should be constructed.

In a manner similar to that which currently applies, media service providers of television broadcasting in the terrestrial network, via satellite or by wire will be covered by the accessibility requirements. The requirements will henceforth be divided into two types of obligations, based on the programme service's audience share.

For service providers with an audience share of less than one percent, general obligations will be imposed to promote the availability of TV broadcasts in Swedish for people with disabilities. The service provider shall have the discretion to decide which of the techniques mentioned above is to be used, and on which platforms the accessibility is to take place, and to what extent. In connection with an annual report on how the requirements have been met, service providers will have to account for how the accessibility work has been undertaken during the year.

Media service providers with an audience share of at least one percent will have specific obligations to make programmes available. The specific obligations have now changed as they now include requirements for annual increases in quotas for each kind of technology, rather than per sound and image. However the specific obligations do not need to be met to the extent that the cost of the obligation exceeds one percent of the provider's net sales for the current programme service, based on the calendar year preceding the year in which the current level begins. The provider is afforded some discretion to decide the allocation between which platforms the different techniques are to be used. There are however some restrictions, since a certain amount of the services' availability should be done linearly on all platforms. Service providers under the specific obligations also have to account for how the accessibility work has been undertaken during the year.

The new requirements also introduce the possibility to get partial credit for accessible programmes on on-demand television. Furthermore, the Authority already intends in the first year of the decision mode to examine whether there is potential to increase the quotas for the spoken text for providers with specific obligations.

• *Krav på tillgänglighet till tv-sändningar för personer med funktionsne* (Swedish Press and Broadcasting Authority, Requirements for access to television broadcasts by persons with disabilities, 1 July 2016)
http://merlin.obs.coe.int/redirect.php?id=18161 SV

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US-United States

US Law only applicable in the US

The US Court of Appeals for the 2nd Circuit in New York issued a ruling on 14 July 2016 that quashed a warrant issued under Section 2703 of the Stored Communications Act ("SCA" or the "Act") by the United States (US) Government against Microsoft. The warrant directed Microsoft to produce the contents of an email account it maintains for a customer who uses the company's electronic communications services. Although the data requested is stored in the US, to comply with the warrant Microsoft must access customer content that it stores in Ireland and import the data into the US. The Court agreed with Microsoft's contention that the Act does not authorise the US Government to require the production of information stored overseas.

The Court explained that warrants traditionally carry territorial limitations, citing the long held dictate that law enforcement officers may only be directed by a court[U+2010]issued warrant to seize items at locations in the US and in US[U+2010]controlled areas. It thus explained that Congress neither explicitly nor implicitly envisioned the application of its warrant provision overseas because it passed the Act three decades ago, at a time when international boundaries were not as routinely crossed as they are today and service providers were not as reliant on worldwide networks.

• Ruling of the US Court of Appeals for the 2nd Circuit of New York of 14 July 2016
http://merlin.obs.coe.int/redirect.php?id=18193 EN

Jonathan Perl
Locus Telecommunications, Inc.

Gameplay videos have to be labeled as advertisements

The United States Federal Trade Commission (FTC) announced on 11 July 2016 that it had reached a settlement with Warner Brothers Entertainment ("Warner

Brothers") to resolve allegations that it deceived consumers during a marketing campaign for a video game. The FTC's complaint stems from an online marketing campaign that Warner Brothers undertook in 2014 to generate publicity within the gaming community for the new release of Middle Earth: Shadow of Mordor, a fantasy role-playing game. Warner Brothers paid "influencers" tens to hundreds of thousands of dollars and told them how to promote the game. The FTC alleged that Warner Brothers deceived its consumers by failing to adequately disclose that it paid online "influencers" and required the "influencers" to promote the game in a positive way without disclosing any bugs or glitches. The complaint also alleged that any disclosures were deceptive because they were in a description box below the video that were visible only if consumers clicked on a "Show More" button, and when "influencers" posted YouTube videos on Facebook or Twitter, the postings did not include the "Show More" button.

Under the proposed FTC order, Warner Brothers is required to make such disclosures in the future, accurately represent sponsored content, and clearly and conspicuously disclose any material connection between Warner Brothers and any "influencers" or endorser. It also outlines specific steps they must take in conducting similar marketing campaigns in the future. The settlement agreement is subject to public comment for 30 days, after which it will decide whether to make the proposed consent order final.

• Agreement containing concent order of the United States Federal Trade Commission in the matter of Warner Bros. Home Entertainment Inc., File No. 152 3034, 11 July 2016
http://merlin.obs.coe.int/redirect.php?id=18194 EN

Jonathan Perl
Counsel, Regulatory Affairs, Locus Telecommunications, Inc.

Preservation of Personal Privacy Act only applies to paying customers

The United States Court of Appeals for the Ninth Circuit in Michigan issued a unanimous ruling on 6 July 2016 that the free music sharing app Pandora Media, Inc. (Pandora) did not violate the Preservation of Personal Privacy Act (PPPA, and also commonly known as the "video rental privacy act or VRPA") by publically disclosing personal information concerning its customers' music preferences to third parties without their consent.

The Court was asked to determine whether Pandora's actions violated the PPPA, which prohibits the disclosure of "any record or information concerning the purchase, lease, rental, or borrowing of books or other written materials, sound recordings, or video recordings by a customer that indicates the identity of the customer." The Court concluded that Pandora's actions were not in violation of the PPPA because its listeners do not qualify as customers under the PPPA. The Court considered the characteristics of the transaction and found that the listeners neither rent nor borrow the content provided by Pandora because they do not provide a payment to Pandora in exchange for the recordings and there was no promise, implied or expressed, that they would return the recordings or equivalent to Pandora. The Court thus concluded that it would be more apt to characterize the transactions as only involving "the delivery of a sound recording to the listener."

• Ruling of the United States Court of Appeals for the Ninth Circuit in Michigan from 6 July 2016
http://merlin.obs.coe.int/redirect.php?id=18165 EN

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Twitter is not liable as a publisher

A United States District Court in San Francisco dismissed a lawsuit against Twitter which alleged it had violated the federal Anti-Terrorism Act for "knowingly permitting the terrorist group ISIS to use its social network as a tool for spreading extremist propaganda, raising funds and attracting new recruits."

The case was filed in January 2016 by a relative of a victim of a terrorist who may have received support or inspiration from one of the terror group's many Twitter handles.

The Court dismissed the suit, finding that Twitter is not liable as a publisher of the information because it is provided by another content provider. However, the Court left open the possibility that Twitter may be liable even though it doesn't qualify as a publisher, should the plaintiffs revise their lawsuit. This was subsequently done on 30 August 2016.

• United States District Court Northern District of California, Case No. 3:166cv-00213-WHOSecond amended complaint, 30 August 2016
http://merlin.obs.coe.int/redirect.php?id=18195 EN

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Agenda

Book List