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of the European Audiovisual Observatory

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COUNCIL OF EUROPE

European Court of Human Rights: Endy Gęsina-Torres v. Poland

A recent decision by the European Court of Human Rights (ECtHR) confirms that journalists who are found guilty of a criminal offence during newsgathering activities cannot invoke robust protection based on their rights to freedom of expression and information, as guaranteed by Article 10 of the European Convention on Human Rights (ECHR). Following the decisions in the cases of Diamant Salihu and others v. Sweden (IRIS 2016-8/1), Brambilla and others v. Italy (IRIS 2016-9/1) and Boris Erdtmann v. Germany (IRIS 2016-9/1), the Court on this occasion dismissed a complaint lodged by an undercover television journalist who was fined for using forged documents and giving false testimony in court during proceedings concerning his placement in a refuge detention centre on the Polish border.

In 2013 Endy Gęsina-Torres was working as a journalist for Polish public television. Alarmed by the number of reports about the alleged ill treatment of aliens in a detention centre for refugees run by the Border Guard Service near the town of Białystok and about the conditions there, he decided to draw the attention of the public to the issue by making an undercover documentary about conditions in the refugee centre. Arriving at the border near Bialystok he was stopped by police officers who wanted to check his identity papers. Gęsina-Torres told the police officers that he had crossed the Polish border illegally after losing his documents. He gave them a fictitious name and was arrested. By a subsequent judicial decision, he was placed in the Border Guard Service's closed centre for aliens in Białystok. Gęsina-Torres stayed at the centre for three weeks, making recordings with a device placed in his watch. When his real identity was discovered, criminal proceedings were instituted against the journalist, and he was found guilty of using forged documents (by virtue of his having signed documents relating to his arrest and detention under a false name) and of giving false testimony (by making false statements about how he had illegally crossed the Polish border prior to his arrest). The Polish court was also of the view that Gęsina-Torres' conduct had jeopardised the administration of justice, as the court that had decided to place him in the detention centre for aliens had been misled about his identity. The fine was set at PLN 2,000, with the court noting that Gęsina-Torres did not have any criminal record; he was furthermore ordered to pay court costs of PLN 300.

Gęsina-Torres alleged before the ECtHR that finding him criminally responsible for the use of forged identity documents and giving false testimony in the context of investigative journalism had amounted to an interference with his right to freedom of expression, in breach of Article 10 ECHR. His arguments were supported by "Article 19", a non-governmental organisation intervening as a third party. According to "Article 19", it had been long recognised that in order to bring important information to the public notice, journalists might have to resort to unconventional forms of information gathering (such as undercover reporting, when undercover reporting was the only way to report on situations that public authorities were trying to cover up).

Although the domestic authorities did not interfere with the content of the programme, the ECtHR finds that Gęsina-Torres' criminal conviction may be regarded as interfering with his rights under Article 10 of the ECHR. The crucial question is whether this interference could be justified as being "necessary in a democratic society" under the terms of Article 10 § 2 of the ECHR.

The ECtHR reiterates that the protection afforded by Article 10 ECHR to journalists "is subject to the proviso that they act in good faith in order to provide accurate and reliable information in accordance with the tenets of responsible journalism", and that the concept of responsible journalism also embraces "the lawfulness of the conduct of a journalist, including, and of relevance to the instant case, his or her public interaction with the authorities when exercising journalistic functions. The fact that a journalist has breached the law in that connection is a most relevant, albeit not decisive, consideration when determining whether he or she has acted responsibly". The ECtHR refers to "the vital role played by the media in a democratic society", but it especially emphasises that "journalists cannot, in principle, be released from their duty to obey the ordinary criminal law on the basis that, as journalists, Article 10 affords them a cast-iron defence. In other words, a journalist cannot claim an exclusive immunity from criminal liability for the sole reason that, unlike other individuals exercising the right to freedom of expression, the offence in question was committed during the performance of his or her journalistic functions".

Applying these principles to the facts of the case, the ECtHR noted that the investigation carried out by Gęsina-Torres had concerned a matter of public interest, given that allegations of harsh treatment in closed detention camps for refugees and of breaches of fundamental rights by staff clearly fell within the ambit of that notion. However, as a journalist, Gęsina-Torres knew that by using forged documents and a false identity he would be acting in breach of the law. The ECtHR was of the opinion that the breach (namely lying about his identity) was the very foundation of his modus operandi and was not merely an accessory element of his actions in gathering information.

The ECtHR furthermore did not find the journalist's argument that this was the only manner that he could have used to gather information about the situation in the detention centres convincing, as by then this kind of information was already in the public domain. In the ECtHR's view, this showed that other means of gathering information had proved effective for disclosing and establishing facts concerning allegations of the ill-treatment of foreigners in the detention centres. The ECtHR was of the view that the domestic courts had been meticulous and that they had balanced the journalist's freedom of expression against another important interest - namely the interest that a democratic society had in preserving the authority of the judiciary. According to the ECtHR, the Polish courts had not overstepped their margin of appreciation and had made use of it in good faith, carefully and reasonably. Finally, the fine imposed on the journalist had certainly not constituted a "harsh sentence". Therefore, the ECtHR concluded that the domestic authorities, when justifying the interference concerned in the present case, had relied on grounds which had been both relevant and sufficient. The ECtHR found that there was no appearance of a violation of Article 10 ECHR and accordingly, it declared the journalist's application manifestly ill-founded, and therefore inadmissible.

• Decision by the European Court of Human Rights, First Section, case of Endy Gęsina-Torres v. Poland, Application no. 11915/15, notified in writing on 15 March 2018
http://merlin.obs.coe.int/redirect.php?id=19028 EN

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European Court of Human Rights: Mehmet Hasan Altan v. Turkey and Şahin Alpay v. Turkey

On 20 March 2018, the European Court of Human Rights (ECtHR) delivered two important judgments in cases brought by two prominent journalists detained in Turkey after the attempted coup d'état of 15 July 2016. In both cases it found a violation of the journalists' right to freedom of expression. The ECtHR clarified that the existence of a "public emergency threatening the life of the nation" cannot serve as a pretext for limiting the freedom of political debate, which is at the very core of the concept of a democratic society. Even in a state of emergency the Contracting States must bear in mind that any measures taken should seek to protect the democratic order from the threats to it, and every effort must be made to safeguard the values of a democratic society, such as pluralism, tolerance and broadmindedness." The ECtHR is of the opinion that the pre-trial detention and the criminal prosecution of the journalists will inevitably have a chilling effect on freedom of expression by intimidating civil society and silencing dissenting voices in Turkey.

Mehmet Hasan Altan is an economics professor and a journalist in Turkey. Prior to the attempted military coup of 15 July 2016, he presented a political discussion programme on Can Erzincan TV, a television channel that was closed down following the adoption of Legislative Decree no. 668, issued on 27 July 2016 in connection with the state of emergency that was declared by the Government on 20 July 2016. Şahin Alpay is a journalist who had been working for the daily newspaper Zaman, which was viewed by the Turkish government as the principal publication medium of the so-called "Gülenist" network. Zaman was also closed down in a move arising from the declaration of the state of emergency in Turkey. In the years leading up to the attempted coup, both Mehmet Hasan Altan and Şahin Alpay had been known for their critical views of the Government's policies. Both journalists had been arrested and held in pre-trial detention since the summer of 2016. They were charged, on the basis of articles written by them and their public statements, with attempting to overthrow the constitutional order, the Turkish Grand National Assembly and the Government by force and violence, and of committing offences on behalf of a terrorist organisation (without actually being members of it). Mehmet Hasan Altan was sentenced on 16 February 2018 by the Istanbul Assize Court to aggravated life imprisonment for attempting to overthrow the constitutional order.

However, the Turkish Constitutional Court in the meantime found that the journalists' initial and continued pre-trial detention could not be regarded as a necessary and proportionate interference in a democratic society and that their pre-trial detention could have a chilling effect on freedom of expression and freedom of the press, in so far as it had not been based on any concrete evidence (see IRIS 2018-3/31). The Istanbul Assize Court has rejected the judgments of the Constitutional Court, and both journalists remained in prison. While the proceedings were still pending, both journalists lodged a complaint with the ECtHR alleging the violation of their rights under Article 5 (right to liberty and security), Article 10 (right to freedom of expression) and Article 18 (limitation on the use of restrictions on rights) of the European Convention of Human Rights (ECHR). The journalists were supported in their claims by the Council of Europe Commissioner for Human Rights, the United Nations Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, and by a range of non-governmental organisations acting jointly, such as "Article 19", the Committee to Protect Journalists, the European Centre for Press and Media Freedom, the European Federation of Journalists, the International Federation of Journalists, the International Press Institute and Reporters Without Borders.

Apart from finding a breach of Article 5 § 1 of the ECHR

(specifically, the arbitrary pre-trial detention of the journalists, given that there had been a lack of reasonable suspicion that they had committed the criminal offences that they were charged with), the ECtHR came to the conclusion that the journalists' right to freedom of expression had been violated by the Turkish authorities. The ECtHR pointed to a general problem in Turkey concerning the interpretation of anti-terrorism legislation by prosecutors and the competent courts, as journalists have often been subjected to severe measures such as detention for addressing matters of public interest. According to the ECtHR, views expressed that do not constitute incitement to violence and do not justify the commission of terrorist acts or cannot be interpreted as likely to encourage violence by instilling deep-seated and irrational hatred towards specified individuals should not be restricted with reference to the aims set out in Article 10 § 2 — namely the protection of territorial integrity or national security or the prevention of disorder or crime.

The ECtHR recognises in particular the difficulties facing Turkey in the aftermath of the attempted military coup, as the coup attempt and other terrorist acts have clearly posed major threats to Turkey's vulnerable democracy. However, the ECtHR considers that one of the principal characteristics of democracy is the possibility it offers of resolving problems through public debate, and that democracy thrives on freedom of expression. In this context, it considers that criticism of governments and the publication of information regarded by a country's leaders as endangering national interests should not attract criminal charges for particularly serious offences such as belonging to or assisting a terrorist organisation, attempting to overthrow the Government or the constitutional order, or disseminating terrorist propaganda. Moreover, even where such serious charges have been brought, pre-trial detention should only be used as an exceptional measure of last resort when all other measures have proved incapable of fully guaranteeing the proper conduct of proceedings: the pre-trial detention of anyone expressing critical views produces a range of adverse effects, both for the detainees themselves and for society as a whole, since the imposition of a measure entailing deprivation of liberty will inevitably have a chilling effect on freedom of expression by intimidating civil society and silencing dissenting voices. Therefore, the ECtHR concluded that there had been a violation of Article 10 ECHR in both cases. Only the ad hoc national judge, Judge Ergül dissented, justifying the interferences with the journalists rights on the basis of the state of emergency after the attempted military coup and the severe danger posed to the democratic constitutional order, public security and respect for human rights, amounting to a threat to the life of the Turkish nation within the meaning of Article 15 ECHR (derogation in times of emergency). He also referred to certain media in Turkey that have played a significant role in legitimising the actions that gave rise to the "despicable attempted military coup by manipulating public opinion".

• Judgment by the European Court of Human Rights, Second Section, case of Mehmet Hasan Altan v. Turkey, Application no. 13237/17, 20 March 2018
http://merlin.obs.coe.int/redirect.php?id=19029 EN FR

• Judgment by the European Court of Human Rights, Second Section, case of Şahin Alpay v. Turkey, Application no. 16538/17, 20 March 2018
http://merlin.obs.coe.int/redirect.php?id=19030 EN FR

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European Court of Human Rights: Sinkova v. Ukraine

On 27 February 2018, the European Court of Human Rights (ECtHR) delivered its judgment in Sinkova v. Ukraine concerning a conviction for a performance-art protest at a war memorial, which had been filmed and published online. The performing artist was prosecuted and convicted of the "desecration of the Tomb of the Unknown Soldier". The ECtHR held, by four votes to three, that the interference by the Ukrainian authorities with the protestor's right to freedom of expression did not amount to a violation of Article 10 of the European Convention of Human Rights (ECHR).

The case concerns Anna Olegovna Sinkova, acting as a member of the artistic group the Brotherhood of St. Luke. In December 2010, Sinkova and three group members decided to protest "against the wasteful use of natural gas by the State while turning a blind eye to the poor living standards of veterans," and staged an artistic performance at a war memorial in central Kyiv. The performance involved Sinkova frying eggs over the Eternal Flame at the Tomb of the Unknown Soldier. A member of the group also filmed the performance. Two police officers approached the group and remarked that their behaviour was "inappropriate," but they undertook no further interference.

Sinkova posted the video of her performance online as an act of protest, with the commentary that "precious natural gas has been burned, pointlessly, at the Memorial of Eternal Glory in Kyiv for fifty-three years now. This luxury costs taxpayers about 300,000 hryvnias per month." Following the video's publication, a number of complaints were made to the police. In late March 2011, Sinkova was arrested and charged with the "desecration of the Tomb of the Unknown Soldier," which is an offence under Article 297 of Ukraine's Criminal Code. The District Court granted a request for Sinkova's pre-trial detention, as she was accused of a "serious offence punishable by imprisonment of between three and five years." Following three months in pre-trial detention, Sinkova was convicted of the offence. The District Court held that Sinkova's argument that her performance had not been meant to desecrate the tomb "had no impact on

the legal classification of her actions" and the "deliberate acts" had shown "disrespect for the burial place of the Unknown Soldier." The District Court imposed a three-year prison sentence, which was suspended for two years. The conviction was upheld on appeal, with the Kyiv City Court of Appeal rejecting Sinkova's argument that there had been a violation of her right to freedom of expression, ruling that her conviction was "in accordance with the law and pursued a legitimate aim." Sinkova subsequently made an application to the ECtHR, claiming that her pre-trial detention had violated her right to liberty under Article 5 ECHR and that her conviction had violated her right to freedom of expression under Article 10 of the ECHR. In respect of Article 5, the ECtHR unanimously found three separate violations concerning her pre-trial detention, including a violation arising from the fact that the courts "had maintained her detention on grounds which cannot be regarded as sufficient," and finding that her detention in June 2011 "was not covered by any judicial decision." However, in respect of Article 10, the ECtHR, by four votes to three, found that there had been no violation of Sinkova's freedom of expression.

The ECtHR judgment noted that the interference with Sinkova's Article 10 right to freedom of expression had been based on the sufficiently precise criminal code provision on "desecration;" and that the conviction had the legitimate aim of "protecting the morals and the rights of others." The main question was whether the conviction had been "necessary in a democratic society." The ECtHR held that Sinkova had been prosecuted and convicted "only" on account of her frying eggs over the Eternal Flame. The ECtHR pointed out that she had not been charged over the video, nor the content of the "rather sarcastic and provocative text" in the video. Thus, the applicant "was not convicted for expressing the views that she did"; rather, her conviction "was a narrow one in respect of particular conduct in a particular place" and based on a "general prohibition on contempt for the Tomb of the Unknown Soldier, [which formed] part of ordinary criminal law." Secondly, while the ECtHR stated that the domestic courts "paid little attention to the applicant's stated motives, given their irrelevance for the legal classification of her actions," it noted that the courts "did take into account the applicant's individual circumstances in deciding on her sentence." Thirdly, the ECtHR rejected Sinkova's argument that her conduct could not be reasonably interpreted as contemptuous towards those the memorial honoured, with the Court noting that "eternal flames are a long-standing tradition in many cultures and religions most often aimed at commemorating a person or event of national significance." The ECtHR held that there were many "suitable" opportunities for Sinkova to express her views, or participate in "genuine" protests, without breaking the criminal law, and without "insulting the memory of soldiers who perished and the feelings of veterans." Lastly, the ECtHR examined the "nature and severity of the penalty," and noted that "peaceful and non-violent forms of expression in principle should not be made subject to the threat of a custodial sentence." The ECtHR, however, found Sinkova's conviction acceptable and proportionate, as she was only "given a suspended sentence and did not serve a single day of it." The majority thus held there had been no violation of Article 10.

By contrast, the dissenting ECtHR judges found a violation of Article 10, partly in the light of the domestic courts' failure to address the "purpose of the applicant's performance" and the courts' disregard of the performance's satirical nature. Furthermore, the dissenting judges noted an "inconsistency" in the majority's position and the Court's prior case-law that a suspended prison sentence is "likely to have a chilling effect on satirical forms of expression." Given "the lack of adequate assessment by the national authorities of the applicant's performance from the standpoint of Article 10 of the Convention," and the "complete disregard of its satirical nature," in addition to the "disproportionate nature of the sentence," the dissenting judges found that Article 10 was violated in the present case.

• Judgment by the European Court of Human Rights, Fourth Section, case of Sinkova v. Ukraine, Application no. 39496/11 of 27 February 2018
http://merlin.obs.coe.int/redirect.php?id=19031 EN

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Committee of Ministers: Recommendation on media pluralism and transparency of media ownership

On 7 March 2018, the Committee of Ministers of the Council of Europe adopted a new Recommendation on media pluralism and transparency of media ownership, and follows the Committee of Ministers' previous Recommendation in 2007 on media pluralism and diversity of media content (see IRIS 2007-3/5). The new Recommendation opens with a preamble setting out the importance of media pluralism in a democratic society and of transparency of media ownership for safeguarding public debate. In particular, the Recommendation notes that fresh appraisals of existing approaches to media pluralism are needed in the light of a number of developments, including the acquisition by Internet intermediaries of increasing control over the flow, availability, "findability" and accessibility of information and other content online.

The Committee of Ministers make a number of recommendations to member states, including that member states should fully implement the new Guidelines on media pluralism and transparency of media

ownership, which are annexed to the Recommendation. Moreover, member states should remain vigilant and assess and address threats to media freedom and pluralism - such as that posed by a lack of transparency of media ownership - by regularly monitoring the state of media pluralism in their national media markets, and by adopting appropriate regulatory responses, including by paying systematic attention to such matters in the ongoing reviews of their national laws and practices. Furthermore, member states should promote the goals of the Recommendation at national and international levels, and review regularly the measures taken to implement this Recommendation with a view to enhancing their effectiveness.

As mentioned above, the Recommendation's annex sets out new Guidelines on media pluralism and transparency of media ownership, and is divided into five sections. The first section concerns the positive obligation on member states to foster a favourable environment for freedom of expression and media freedom, including that national legislative and policy frameworks should safeguard the editorial independence and operational autonomy of all media to ensure that they can carry out their key tasks in a democratic society. The second section concerns media pluralism and the diversity of media content, and contains guidelines on the general and specific requirements of pluralism, including diversity of content. Notably, as media content is not only distributed, but also increasingly managed, edited, curated and/or created by Internet intermediaries, member states should recognise the variety of their roles in content production and dissemination and the varying degrees of their impact on media pluralism. The third section moves on to the regulation of media ownership, and includes guidelines on ownership and control, and media concentration. Notably, the Guidelines state that relevant regulation of the media should take full account of the impact of online media on public debate, including by ensuring that the producers of media content distributed through online distribution channels and users are protected from possible anti-competitive behaviour on the part of online gatekeepers which adversely affects media pluralism. The fourth section of the Guidelines addresses transparency of media ownership, organisation and financing. The Guidelines contain the specification that member states should promote a regime of transparency of media ownership that ensures the public availability and accessibility of accurate, up-to-date data concerning direct and beneficial ownership of the media, as well as other interests that influence the strategic decision-making of the media in question or its editorial line. Lastly, section five addresses media literacy and education, and includes the specification that member states should introduce legislative provisions, or strengthen existing ones, that promote media literacy with a view to enabling individuals to access, understand, critically analyse, evaluate, use and create content through a range of legacy and digital (including social) media. This should encompass appropriate digital (technological) skills for accessing and managing digital media.

• Recommendation CM/Rec(2018)1 of the Committee of Ministers to member States on media pluralism and transparency of media ownership, 7 March 2018
http://merlin.obs.coe.int/redirect.php?id=19057 EN FR

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Committee of Ministers: Recommendation on the roles and responsibilities of Internet intermediaries

On 7 March 2018, the Committee of Ministers adopted a Recommendation on the roles and responsibilities of Internet intermediaries, and follows a draft Recommendation that was finalised by the Committee of experts on Internet intermediaries in 2017 (see IRIS 2018-1/5). The Recommendation begins with a Preamble, setting out the functions of Internet intermediaries, which are a wide, diverse and rapidly evolving range of players that facilitate interactions on the Internet between natural and legal persons by offering and performing a variety of functions and services. These services include connecting users to the Internet, enabling the processing of information and data, or hosting web-based services (including for user-generated content). Others aggregate information and enable searches; they give access to, host and index content and services designed and/or operated by third parties. Some facilitate the sale of goods and services, including audio-visual services.

In order to provide guidance to all relevant actors faced with the complex task of protecting human rights in the digital environment, the Recommendation then sets out a number of recommendations for member states, including that member states implement the "Guidelines for States on actions to be taken vis-à-vis Internet intermediaries with due regard to their roles and responsibilities" (which are annexed to the Recommendation) when devising and implementing legislative frameworks relating to Internet intermediaries. Furthermore, member states should engage in a regular, inclusive and transparent dialogue with all relevant stakeholders, with a view to sharing and discussing information and promoting the responsible use of emerging technological developments related to Internet intermediaries that impact the exercise and enjoyment of human rights and related legal and policy issues. Moreover, member states should encourage and promote the implementation of effective age- and gender-sensitive media and information literacy programmes to enable all adults, young people and children to enjoy the benefits (and minimise the exposure to risks) of the online communications environment.

As mentioned above, the Recommendation includes Guidelines for States on actions to be taken vis-a`-vis Internet intermediaries, which are set out in a seven-page appendix. The Guidelines firstly set out the obligations of States — including the obligation that any request, demand or other action by public authorities addressed to Internet intermediaries aimed at restricting access (including the blocking or removal of content), or any other measure that could lead to a restriction of the right to freedom of expression — shall be prescribed by law, pursue one of the legitimate aims foreseen in Article 10 of the ECHR, be necessary in a democratic society and be proportionate to the aim pursued. State authorities should carefully evaluate the possible impact (even if unintended) of any restrictions before and after applying them, while seeking to apply the least intrusive measure necessary to meet the policy objective. Notably, State authorities should obtain an order from a judicial authority or other independent administrative authority whose decisions are subject to judicial review, when demanding that intermediaries restrict access to content. Moreover, the Guidelines include provisions on legal certainty and transparency, safeguards for freedom of expression, safeguards for privacy and data protection, and access to an effective remedy. The second section of the Guidelines concerns the responsibilities of Internet intermediaries. For example, any interference by intermediaries with the free and open flow of information and ideas — be it by automated means or not — should be based on clear and transparent policies and be limited to specific legitimate purposes (such as restricting access to illegal content), as determined either (i) by law or by a judicial authority or other independent administrative authority whose decisions are subject to judicial review, or (ii) in accordance with their own content-restriction policies or codes of ethics, which may include flagging mechanisms. Lastly, there are detailed provisions on transparency and accountability, content moderation, the use of personal data, and access to an effective remedy.

• Recommendation CM/Rec(2018)2 of the Committee of Ministers to member States on the roles and responsibilities of internet intermediaries, 7 March 2018
http://merlin.obs.coe.int/redirect.php?id=19059 EN FR

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EUROPEAN UNION

Council of the EU: Regulation on cross-border portability of online content services takes effect

On 1 April 2018, the new EU Regulation on the cross-border portability of online content service (2017/1128) (Portability Regulation), adopted in June 2017, became applicable in all EU member states (see IRIS 2017-7/5). The purpose of the Portability Regulation is to ensure a common approach in the EU to the cross-border portability of online content services by ensuring that subscribers to portable online content services that are lawfully provided in their member state of residence can access and use those services when temporarily present in another member state. Thus, Article 3 of the Regulation states that the provider of an online content service provided against payment of money must enable a subscriber who is temporarily present in a member state to access and use the online content service in the same manner as when in the member State of residence, including by providing access to the same content, via the same range and number of devices, for the same number of users and with the same range of functionalities.

However, to comply with this obligation, the service providers are, under Article 5, offered a variety of means by which to verify the user's country of residence, such as payment details and IP address while ensuring that the means used are "reasonable, proportionate and effective." Given the intrusive nature of the means of verification, Article 8 provides that any data processing should be proportionate and necessary for achieving its purpose — that is to say, the verification of the user's place of residence.

Furthermore, under Article 7, contractual provisions — including (i) those between providers of online content services and holders of copyright or related rights, (ii) those holding any other rights in respect of the content of online content services, and (iii) those between such providers and their subscribers which are contrary to the Regulation (including those which prohibit the cross-border portability of online content services or which limit such portability to a specific time period) — shall be unenforceable.

Notably, under Article 9, the Regulation applies retroactively — that is to say it also applies to contracts concluded and rights acquired before the Regulation came into effect on 1 April 2018, if they are relevant after that date for the provision of, access to and use of an online content service, in accordance with Articles 3 and 6. In this regard, by 2 June 2018, the provider of an online content service provided against payment of money must verify the member state of residence of those subscribers who concluded

contracts for the provision of the online content service before this date.

The Regulation is binding in its entirety and directly applicable in all member states. It should be noted that a Corrigendum to the Regulation has been published in the Official Journal of the European Union, which amends a number of dates contained in Articles 9, 10 and 11 in Regulation.

• European Commission, Digital Single Market, Cross-border portability of online content services, 1 March 2018
http://merlin.obs.coe.int/redirect.php?id=19062 EN

• Regulation (EU) 2017/1128 of the European Parliament and of the Council of 14 June 2017 on cross-border portability of online content services in the internal market,
http://merlin.obs.coe.int/redirect.php?id=19035 EN

• Corrigendum to Regulation (EU) 2017/1128 of the European Parliament and of the Council of 14 June 2017 on cross-border portability of online content services in the internal market
http://merlin.obs.coe.int/redirect.php?id=19036 EN

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European Commission: Final Report of the High Level Expert Group on Fake News and Online Disinformation Published

In January 2018, a High Level Expert Group was set up by the European Commission to advise on policy initiatives to counter online fake news and disinformation (see IRIS 2018-1/8). On 12 March 2018, its Final Report on Fake News and Online Disinformation was published. The Report aims to identify key principles and general, short- and long-term objectives for future action. It maps out the existing measures taken by various stakeholders, reiterates principles and case-law in respect of fundamental freedoms (particularly freedom of expression), and establishes possible responses in the light of the principles and objectives set out therein.

The Report initially clarifies the definition of the problem. "Disinformation", for the purposes of the Report, includes all forms of false, inaccurate, or misleading information designed, presented and promoted to intentionally cause public harm or for profit. It does not deal with illegal content that is already regulated by other regulatory remedies under EU or national laws or with satire or parody. Moreover, the Report explicitly avoids the words "fake news", as that term is regarded both as inadequate to address the problem of disinformation and as misleading, given the fact that it is often used as a weapon to undermine the integrity of the independent news media.

After drawing attention to the multifaceted quality of the problem of disinformation, which is embedded in a complex but often opaque ecosystem, the Report continues by specifying various problems of disinformation in the EU. These include foreign and domestic political actors serving as transmitters of disinformation, the lack of a common understanding of media freedom, differing standards of professionalism and editorial independence among media outlets, citizens acting both as "watchdogs" and as disseminators of false content, highly polarised vulnerable groups serving as targets for false information, and platforms acting not only as enablers and gatekeepers of information but also as enablers of the production and distribution of disinformation. Against this background, the Report proposes a multi-dimensional and self-regulatory approach consisting of inter-dependent actions that strike a balance between the increasing resilience of European societies against disinformation and maintaining an open environment for the free circulation of ideas and information. The second part of the Report outlines the measures already taken by various stakeholders. These are grouped according to three key good practices: (i) transparency and accountability-enhancing practices, (ii) trust-enhancing practices and algorithm changes and (iii) media and information literacy. All of them are examined by laying out the specific actions taken by three key stakeholders — namely, online platforms, news publishers and broadcasters, and independent source and fact checkers.

Recognising its commitment to freedom of expression and safeguarding its effective exercise within the EU, the Report establishes two general objectives. The first objective is increasing the long-term preparedness of EU citizens, communities, news organisations, member states and the EU as a whole for the proactive recognition of various forms of disinformation. The second objective is ensuring that responses are kept up-to-date by regular monitoring of the problems and by designing adequate responses accordingly. Against this background, the recommended intervention areas identified by the Report are based on five pillars, namely (a) enhancing the transparency of the online digital ecosystem, (b) promoting and sharpening the use of media and information literacy, (c) developing tools for empowering users and journalists and fostering a positive engagement with fast-evolving information technologies, (d) safeguarding the diversity and sustainability of the European news media ecosystem, and (e) calibrating the effectiveness of the responses through continuous research into the impact of disinformation in Europe. Whereas ensuring transparency, algorithm accountability and trust-enhancing practices (thus contributing to the empowerment of users and journalists) are identified as short- to medium-term recommendations, improving media and information literacy in Europe and supporting the diversity and sustainability of the news media ecosystem are recognised as long term recommendations.

• A multi-dimensional approach to disinformation: Report of the independent High level Group on fake news and online disinformation, 12 March 2018
http://merlin.obs.coe.int/redirect.php?id=19032 EN

• European Commission, Final report of the High Level Expert Group on Fake News and Online Disinformation, 12 March 2018
http://merlin.obs.coe.int/redirect.php?id=19061 EN

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European Commission: Notice on Brexit and EU rules in the field of audiovisual media services

On 19 and 21 March 2018, the European Commission published two Notices to stakeholders setting out the effect of the withdrawal of the UK from the EU under Article 50 of the Treaty on the European Union. The first Notice concerned the withdrawal of the UK and EU rules in the field of audiovisual media services, while the second Notice concerned the withdrawal of the UK and EU legislation in the field of geo-blocking. The Notices explained the implications for private parties — in particular providers of audiovisual media services.

The Notice concerning audiovisual media services firstly states that following the withdrawal of the UK from the EU, all EU primary and secondary law will cease to apply to the United Kingdom from midnight on 30 March 2019 (unless a ratified withdrawal agreement establishes another date). The UK will then become a third country, and the EU rules in the field of audiovisual media services will no longer apply to the UK. The Notice sets out the consequences of the UK withdrawal.

Firstly, in relation to country of origin and jurisdiction, the Notice states that the Audiovisual Media Services Directive (2010/13/EU) (AVMSD) relies on the so-called "Country-of-Origin" principle," which means media service providers are generally only subject to the law and jurisdiction of their EU member state of origin. In this regard, the Notice states that as of the withdrawal date, audiovisual media services providers currently under the jurisdiction of United Kingdom authorities (for example because they are established in the United Kingdom, within the meaning of the Directive) may fall under the jurisdiction of one of the EU-27 member states if the criteria laid down in Article 2 of the AVMSD are fulfilled. Moreover, EU-27 member states will be free to take whatever measures they will deem appropriate with regard to audiovisual media services coming from the United Kingdom as a third country and not satisfying the conditions laid down in Article 2 of the AVMSD, provided that they comply with Union law and the international obligations of the Union and, where applicable, within the limits of the European Convention on Transfrontier Television (ECTT) (see IRIS 1998-9/4 and IRIS 2015-1/2).

Secondly, the Notice also sets out the consequences for the country-of-origin principle and freedom of transmission/reception. From the date of withdrawal, audiovisual media services from the UK received or retransmitted in the EU "will no longer benefit from the freedom of reception and retransmission laid down in Article 3 of the AVMSD. Therefore, EU-27 member states will be entitled, on the basis of their own national law and, where applicable, within the limits of the ECTT, to restrict the reception and retransmission of audiovisual media services originating from the United Kingdom.

Finally, the second Notice concerns Regulation (EU) 2018/302 on addressing unjustified geo-blocking (see IRIS 2018-4/3), and states that the Regulation applies to all traders operating within the EU, regardless of whether those traders are established in the EU or in a third country. Thus, UK businesses who "offer their goods or services to customers in the EU will continue to be bound by the rules established by the Regulation (EU) 2018/302 in respect of those activities."

• European Commission, Notice to Stakeholders: Withdrawal of the United Kingdom and EU Rules in the field of Audiovisual Media Services, 19 March 2018
http://merlin.obs.coe.int/redirect.php?id=19033 EN
• European Commission, Notice to Stakeholders: Withdrawal of the United Kingdom and EU Legislation in the field of Geo-Blocking, 21 March 2018
http://merlin.obs.coe.int/redirect.php?id=19034 EN

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NATIONAL

AT-Austria

Austrian Federal Administrative Court confirms KommAustria's Champions League decision

In Vienna on 23 January 2018, the Austrian Bundesverwaltungsgericht (Federal Administrative Court) ruled that Österreichische Rundfunk (Austrian Broadcasting Corporation - ORF) had not paid an inflated price for the rights to broadcast the UEFA Champions League and had therefore acted in accordance with the Bundesgesetz über den Österreichischen Rundfunk (Federal Act on the Austrian Broadcasting Corporation - ORF-Gesetz) (Case no. W120 2111451-1).

The legal dispute followed a disagreement between ORF and the Austrian private television broadcaster PULS 4 TV GmbH, which is owned by Munich-based

ProSiebenSat.1 Media SE. The private broadcaster claimed that ORF had violated the ORF-Gesetz by paying too much for the football broadcasting rights. The ORF-Gesetz sets out the responsibilities and legal framework of public service broadcasters in Austria, requiring them to ensure that their programming is market-compliant. Under Article 31c(1)(1) of the ORF-Gesetz, ORF may not acquire broadcasting rights at excessive prices which cannot be justified by commercial principles. Funds accruing to the broadcaster out of the programme fee may not be used in a manner that distorts competition.

PULS 4 TV GmbH argued that this requirement had not been met when ORF acquired the UEFA Champions League broadcasting rights for the 2015/16, 2016/17 and 2017/18 seasons and lodged a complaint in the first instance with the Austrian regulator KommAustria. Founded in 2001, KommAustria regulates broadcasting and audiovisual media in Austria, as well as acting as the legal supervisory body for ORF (website: www.rtr.at).

To answer the complaint, KommAustria had to determine what would have been considered a reasonable price for the Champions League rights. Having conducted a confidential survey of bids for UEFA rights in the Austrian market, the media authority was able to prove that ORF had not acted in a manner that distorted competition by bidding for the rights. In a business simulation exercise, KommAustria treated ORF as a private broadcaster with no income from programme fees. It took into account the advertising income likely to be generated by Champions League coverage, as well as the value of strategic effects such as viewer loyalty and image enhancement. On the basis of this report, the media authority concluded that ORF would have been able to afford the price it had paid for the UEFA rights without its programme fee income, so the price was justified by commercial principles. Since competition had not been distorted, KommAustria rejected the complaint as unfounded (24 June 2015, KOA 10.300/15-028).

The Federal Administrative Court upheld this decision. It considered the business simulation and the calculation method used by KommAustria as necessary and conclusive. It dismissed the argument put forward by PULS 4 GmbH that ORF's purchase of the rights had not been 'necessary' to fulfil its public service remit - on the basis that the opposite had not been proven - and rejected alternative calculations designed to show that competition had been distorted.

However, the court allowed an appeal to the Verwaltungsgerichtshof (Higher Administrative Court) in Vienna. It said that, although Article 31c of the ORF-Gesetz was based on European law and European case law, there was no comparable situation anywhere in Europe to which KommAustria could refer and there was no supreme court case law concerning the matters in question.

The Federal Administrative Court rejected a complaint by ORF about KommAustria's investigation, in particular the extent of the documents that it had required the broadcaster to release and an alleged violation of ORF's trade secrets, as inadmissible.

• *Entscheidung des Bundesverwaltungsgerichts, Aktenzeichen W120 2111451-1, 23 Januar 2018* (Decision of the Federal Administrative Court, Case no. W120 2111451-1, 23 January 2018)
http://merlin.obs.coe.int/redirect.php?id=19045 DE

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Media law aspects of the ÖVP/FPÖ coalition agreement

The Austrian government coalition between the People's Party (ÖVP) and the Freedom Party (FPÖ), which has been in power since the last parliamentary elections, has included a number of issues relevant to media law in its coalition agreement; notably, both parties are keen to promote technical innovation in the form of digitisation as well as traditional media policy measures to support the country's media.

As far as digitisation is concerned, the coalition partners are pursuing a comprehensive research strategy with a treaty on research, technology and innovation, along with measures to improve governance structure. The current research strategy will be updated and the EU framework programme for research will be used to benefit Austria. The feasibility of setting up a state technology transfer organisation, designed to put unused patents and copyrights owned by public institutions to profitable use, will also be examined. The ÖVP and FPÖ also want to strengthen open innovation and social innovation. For example, a Digitisation Ethics Board will be created to examine social issues linked to digitisation and to act as an advisory body to the federal government, in partnership with the Robotics Council of the Federal Ministry of Traffic, Innovation and Technology (BMVIT).

The coalition agreement also sets out plans to support digital infrastructure, which is the basis of digitisation. In practical terms, the coalition partners are committed to the rapid development of a modern, efficient telecommunications infrastructure providing Gigabit transmission rates and 5G mobile services throughout the country by 2025. Austria will become a 5G pilot country by 2021 and its current broadband expansion strategy will be reviewed. The new Austrian Government intends to earmark future proceeds from spectrum auctions exclusively for the expansion of digital infrastructure.

The ÖVP and FPÖ also want to digitise administrative processes and push through 'smart regulations'

for a better service and greater interaction with citizens and businesses. For example, they plan to create a higher level of legal certainty for digitisation opportunities and the use of new systems. The new government also hopes to be a proactive participant in the development of future data protection regulation at EU level. The ePrivacy Regulation in particular should create greater transparency for citizens in relation to their publicly accessible data. The coalition agreement also makes provision for additional measures to digitise education, business and security, including the development of a detailed cyber-security strategy.

Turning to audiovisual media policy, the coalition agreement begins by stating that the media landscape is undergoing radical change as a result of digitisation and that the media market is already global. The coalition partners therefore want to step up efforts to protect media services with specifically Austrian content. To this end, they hope, firstly, to further develop and fine-tune the remit of public service broadcasters to ensure that they promote the work of Austrian artists, sportsmen and producers. While both parties reject the idea of selling off individual channels, they want to define the public service remit in law and to tighten transparency rules in order to guarantee objective, independent reporting. Young Austrian artists and productions will also be given more airtime.

The coalition partners also plan to continue developing Austria's role as a media capital and secure its long-term future in the digital world by creating a modern legislative framework and adapting subsidy systems. For example, they would like to establish a common digital marketing platform for the Austrian media industry. This would include both ORF and private operators, and would strengthen Austrian public value content with national and regional relevance in the digital sphere. The new government also wants to evaluate the Privatradiogesetz (Private Radio Act) in order to drive forward digitisation and Austria-wide programming. The coalition agreement also proposes the adoption of a must-carry rule for cable, satellite and terrestrial services with regard to TV channels that show Austrian content.

In the coalition agreement, the two parties also state their intention to create fair basic conditions in a global digital market. National solutions for performance rights and copyright in the digital sphere will therefore be developed in case no agreement is reached at European level. The ÖVP and FPÖ also want to clarify how Internet aggregators and platforms should be treated under media law and to create e-privacy exemption rules to exclude media services from the EU General Data Protection Regulation in order to counter a possible competitive disadvantage compared with US-based online companies.

The coalition agreement provides for the structural reform of media institutions and supervisory bodies, as well as a public debate on basic media policy issues in the form of a media inquiry in the spring of 2018. The inquiry will, in particular, help to draw up guidelines for a new ORF-Gesetz (Federal Act on the Austrian Broadcasting Corporation) and define the principles for establishing Austria as a media capital in the digital age.

• *Koalitionsvertrag* (Coalition agreement)
http://merlin.obs.coe.int/redirect.php?id=19070 DE

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DE-Germany

Broadcasting fee compatible with EU law

In a decision of 1 March 2018 (Case no. 7 A 11938/17), the Oberverwaltungsgericht Rheinland-Pfalz (Rhineland-Palatinate Higher Administrative Court - OVG Rheinland-Pfalz) ruled that the German broadcasting contribution fee is compatible with European law. A private individual from Trier had complained about the levying of outstanding payments by Südwestrundfunk (SWR), arguing that the fee was incompatible with European law because it gave public service broadcasters an unfair advantage over their private competitors. However, this argument was rejected by the court.

In its decision, the OVG stated that the conformity of the broadcasting contribution fee - in its new form introduced in 2013 - with EU law had already been established by the Bundesverwaltungsgericht (Federal Administrative Court - BVerwG) in 2016 (ruling of 18 March 2016, BVerwG 6 C 6.15). According to that decision, the introduction of the fee in the private sector did not require the European Commission's consent and was also compatible with the Audiovisual Media Services Directive. Since the coexistence of public service and private broadcasters was acknowledged in the recitals of the directive, the OVG considered that they would inevitably be financed in different ways. However, this did not necessarily mean that public service broadcasters were given an unfair advantage because, unlike private broadcasters, they were subject to much more restrictive advertising rules and were therefore financially dependent on the broadcasting fee.

However, this decision does not constitute conclusive clarification of the admissibility of the broadcasting contribution fee under European law. Last year, for example, the Landgericht Tübingen (Tübingen Regional Court, decision of 3 August 2017, case no. 5 T 246/17 and others) ruled that the fee breached EU law and

submitted a number of related questions to the European Court of Justice (ECJ), where the request for a preliminary ruling is being dealt with under Case no. C-492/17. The Tübingen court held that the broadcasting fee was an unlawful tax and that it breached the principle of equal treatment in so far as, for example, people living alone were burdened more heavily than people living in a shared household. The ECJ has therefore not yet resolved the issue (although it is, to some extent, questionable whether the European Union's requirement for equal treatment and ban on discrimination are suitable criteria to be applied to the German broadcasting contribution system), although the BVerwG should have submitted the matter to the ECJ if it had doubted the fee's conformity with EU law.

• *Pressemittelung des Oberverwaltungsgerichts Rheinland-Pfalz vom 07. März 2018* (Press release of the Rhineland-Palatinate Higher Administrative Court, 7 March 2018)
http://merlin.obs.coe.int/redirect.php?id=19073 DE

• *Vorlagefragen des Landgericht Tübingen an den EuGH* (Questions submitted by the Landgericht Tübingen (Tübingen Regional Court) to the ECJ)
http://merlin.obs.coe.int/redirect.php?id=19047 DE

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Vodafone must block kinox.to

In its ruling of 1 February 2018 (Case no. 7 O 17752/17), the Landgericht München (Munich Regional Court - LG München) decided that Vodafone Kabel Deutschland must block its customers from accessing the streaming portal kinox.to. In injunction proceedings, film producer Constantin Film had requested that the streaming portal be blocked for Vodafone customers because films including 'Fack Ju Göhte 3', for which Constantin Film holds the exploitation rights, could be viewed via the portal without the rightsholders' permission. In March 2014, the Court of Justice of the European Union had ruled that Internet providers could be required to block illegal websites such as streaming portals that distributed copyright-protected content.

The defendant in the case, Vodafone Kabel Deutschland, appealed against the complaint on the grounds that the decision issued by the Bundesgerichtshof (Federal Supreme Court - BGH) on 26 November 2015 (Case no. I ZR 174/14) on access providers' indirect liability (available at http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&nr=74010&pos=0&anz=1) was no longer applicable because the law had been amended under the Dritte Gesetz zur Änderung des Telemediengesetzes (Third Act Amending the Telemedia Act - TMGÄndG). It claimed that access providers no longer held such liability and that their obligation to block Internet services was regulated under Article 7(4) of the Telemediengesetz (Telemedia Act - TMG). Through the addition of Article 8(1)(2) TMG, the legislator had extended the privileges of service providers within the meaning of Article 8 TMG. This rule applied to all service providers that transmitted information via a communications network or provided access to such information for others to use. Furthermore, IP blocking created the risk of 'overblocking', that is to say, the blocking of unrelated websites, since a huge number of websites could be accessed via a single IP address.

The LG München disagreed. It examined in detail whether the new version of the TMG exempted access providers from indirect liability. In the Munich court's view, the current wording of Article 8(1)(2) TMG did not contradict the application of the indirect liability principle. The wording of this provision should be interpreted narrowly to the extent that Article 8(1)(2) TMG only applied to the privileged users mentioned in Article 7(4) TMG. Otherwise, there would be a clear contradiction with the explanatory memorandum. In the Third Act Amending the Telemedia Act, the legislator had only sought to regulate the liability of WLAN network providers. The indirect liability principle therefore still applied to access providers. In the court's opinion, this restrictive interpretation was also supported by European law provisions.

Since a previous claim by kinox.to had been rejected and the provider had no obvious right to protection, the defendant was prohibited from distributing the film 'Fack Ju Göhte 3' to its customers via the Internet, in so far as the film could be viewed via the Internet service currently known as 'kinox.to'.

• *Urteil des LG München vom 01. Februar 2018 (Az. 7 O 17752/17)* (Ruling of the Munich Regional Court of 1 February 2018 (Case no. 7 O 17752/17))
http://merlin.obs.coe.int/redirect.php?id=19046 DE

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ARD examines partnership with StreamOn and Vodafone Pass

The Arbeitsgemeinschaft der öffentlich-rechtlichen Rundfunkanstalten der Bundesrepublik Deutschland (association of German public service broadcasters - ARD) is examining the possibility of working with the zero-rating services StreamOn (provided by Deutsche Telekom) and Vodafone Pass. These services enable users to stream programmes over the mobile Internet without using up any of their data allowance. While Zweite Deutsche Fernsehen (ZDF) and the German overseas broadcaster Deutsche Welle (DW) already work with StreamOn, the ARD is still examining

whether a partnership is feasible. In particular, the streaming providers would need to bring their technical parameters and conditions into line with the ARD's requirements. This is a complex process, since the ARD is a union of nine regional broadcasting authorities, so a large number of different services would need to be adjusted in order to make them available to streaming customers.

The ARD's current examination process follows a decision taken in October 2017 by the Bundesnetzagentur (Federal Network Agency - BNetzA). It had been suggested that zero-rating models were incompatible with net neutrality, a principle initially enshrined in German law under the Telekommunikationsgesetz (Telecommunications Act) and, since 30 April 2016, under the Open Internet Regulation (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). The Bundesnetzagentur concluded that zero-rating services were admissible in principle, subject to certain conditions being met by providers. For example, in order to avoid conflict with the 'Roam Like at Home' principle, StreamOn must be as equally accessible to users in other EU countries as it is in Germany. Content providers must also have equal access to such services, while video streaming must be available without throttling. However, the Bundesnetzagentur's decision is not yet in force and Deutsche Telekom has appealed against it.

Meanwhile, responding to the Bundesnetzagentur in accordance with their mutual cooperation obligations, the regional media authorities have stated that, in the context of their platform regulation processes, they have not yet found any breach of net neutrality rules by zero-rating agencies.

Similar decisions have been taken by other European regulators, most recently by Austria's Telekom-Control-Kommission concerning the Free Stream service in December 2017 (see decision of 18 December 2017, Case no. R 5/17-11, https://www.rtr.at/de/tk/R5_17_Bescheid_-18122017/R_5_17_Bescheid_A1-FreeStream.pdf).

• *Stellungnahme der Landesmedienanstalten* (Statement of the regional media authorities)
http://merlin.obs.coe.int/redirect.php?id=19071 DE

• *Pressemitteilung der Bundesnetzagentur zur grundsätzlichen Zulässigkeit von Zero-Rating-Modellen vom 15. Dezember 2017* (Press release of the Federal Network Agency on the admissibility of zero-rating models, 15 December 2017)
http://merlin.obs.coe.int/redirect.php?id=19072 DE

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FR-France

Court of Cassation upholds court decision against creator of illegal eMule downloading site

The founder of the Internet site eMule Paradise, one of the most popular downloading sites in France at the time, was prosecuted for having proposed and managed a catalogue of counterfeited films, television series and cartoons between 2005 and 2007, and - having provided access to its site via links and indications - making it possible to install and parameter eMule's illegal downloading software. Presentations of the films available for downloading were also available on the Internet site at issue; these were updated constantly. Over a period of two years, these activities generated at least EUR 416,638 of undeclared income. The site's founder was found guilty by the criminal court in 2015 of infringement of copyright in respect of 7,713 creative works and videograms and complicity in infringing copyright. He was also found guilty of making available to the public software that was manifestly intended to make protected works available to the public without authorisation, an offence covered by Article L. 335-2-1 of the French intellectual property code (Code de la Propriété Intellectuelle - CPI). Upholding the judgment, the court of appeal sentenced the site's founder to fourteen months' imprisonment (suspended) and payment of damages to the other parties, and confiscated the material at issue, whereupon the party concerned lodged an appeal with the Court of Cassation.

By a decision delivered on 27 February 2018, the Court of Cassation firstly upheld the court of appeal's finding the party guilty of infringing copyright by reproducing a set of film covers without authorisation. Having noted that the facts had been established by means of a search, during which the police had found a large number of files containing the covers on a CD-ROM bearing as its title the name of the disputed site, the court of appeal was thus able to determine that it was not possible to consider that the covers were merely for personal use. The court of appeal had already been right in finding that the party concerned was guilty of infringing copyright in respect of more than 7,000 protected works and videograms. Exercising its sovereign power, the court had been able to appreciate the original nature of the creative works in the light of the elements of proof debated in court in the presence of the parties.

The Court of Cassation also noted that the court of appeal, in upholding the offence covered by Article L. 335-2-1 of the CPI, had stated that the access available to the public on the disputed eMule software site was manifestly intended to make protected works and

objects selected by the site available to the public. Although it did not store the eMule software, the site included an e-Mule sub-file on its homepage, providing public access to the equivalent of a guide for parametering and using the software. This was manifestly intended to be used for the unauthorised downloading of protected films and software. The Court of Cassation held that any service communicating protected works to the public on-line without having obtained the required authorisations or making available any software intended for the purpose was covered by the provisions of Article L. 335-2-1 of the CPI. The court of appeal had justified its decision by holding that the defendant should be convicted on the charge of complicity in counterfeiting works and related rights and that the interested party, by making the litigious site available to the public, both by inciting and providing aid and assistance, facilitated the infringement of copyright in the form of unlawful downloads by Internet users.

On the other hand, regarding the applications made by the SACEM (the collective rights management company which was also party to the case), the Court of Cassation found that the court of appeal had been wrong to dismiss the method for assessing the material prejudice that the SACEM was claiming, on the grounds that the figures used by the various parties to the case were uncertain and contradictory. The court of appeal had given no explanations as to the criteria that ought to be taken into consideration and had not assessed the compensation due to a party whose moral rights in respect of a creative work had been infringed. Because there was no justification of the decision on this point, the appeal judgment was overturned on this point only. All the remaining provisions were upheld.

• *Cour de cassation (ch. crim.), 27 février 2018 - Vincent X. c/ SACEM* (Court of Cassation (criminal chamber), 27 February 2018 - Vincent X. v. SACEM) FR

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Conseil d'Etat, asked for opinion by government, lays down method for new Radio France president taking up post

On 10 April 2018 the French government decided to publish the opinion it had asked the Conseil d'Etat to provide regarding the method for ensuring the continuity of the presidency of the national media companies (France Télévisions, Radio France, and France Médias Monde) "in the event of the early end of a president's term of office". The question does indeed arise, with the removal of Mathieu Gallet as president of Radio France by the national audiovisual regulatory authority (Conseil Supérieur de l'Audiovisuel - CSA), while the CSA was to interview candidates for his succession on 10, 11 and 12 April.

The issue concerns more particularly the scope of the provisions adopted by the legislator in 2013 with a view to setting up an arrangement for an overlap between two presidents. Given the fact that under these arrangements - i.e. in accordance with Article 47-4 (3) of the Act of 30 September 1986 on freedom of communication - the appointments of the presidents of the national media companies are to be made "three to four months before the post is effectively taken up", is it possible, in the event of a delay in the appointment procedure or an unexpected vacancy in the post to be filled, to make an appointment that takes effect less than three months after the date of the decision?

The Conseil d'Etat reiterated that the purpose of these provisions, as confirmed by the parliamentary work preceding their adoption, was to allow a newly-appointed president enough time to examine or prepare with his/her predecessor (while the latter was still in-post) the strategic decisions affecting the life of the undertaking, particularly those concerning the audiovisual sector and measures on programming. This overlap period is therefore only meant to apply when the term of office of the president of a national programme company expires on its anticipated date or on another foreseeable date, such as in the case of his or her reaching the age limit. On the other hand, the Conseil d'Etat considered that in cases - such as the case at issue - of an unexpected cessation of function for whatever reason, the legislator had not intended to specify any time lag between the date of appointing a new president and the date of him/her actually taking up the post. Thus, it was possible for a person appointed under such circumstances to take up his/her post immediately on being appointed.

In the present case, the Conseil d'Etat concluded that, in order to ensure the effectiveness of the arrangement provided for in the Act, it was for the CSA to adopt the necessary measures to ensure that the appointment was made at least three months before the end of the term of office to be renewed. As it had indicated that it would, the CSA appointed the new president of Radio France immediately after interviewing the candidates. On the basis of Article 47-4 of the Act of 30 September 1986, the CSA, meeting in plenary session on 12 April 2018, appointed Ms Sybile Veil for a five-year term of office, starting on 16 April 2018. In accordance with the recommendations of the Conseil d'Etat, she will therefore take up her post immediately.

• *Avis consultatif du Conseil d'Etat rendu public le 10 avril 2018* (Consultative opinion of the Conseil d'Etat made public on 10 April 2018) http://merlin.obs.coe.int/redirect.php?id=19053 FR

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

IRIS

Legal Observations
of the European Audiovisual Observatory

Court suspends all-audience certificate issued to the film Fifty Shades Freed

On 18 February 2018 an association applied to the administrative court of appeal in Paris under the urgent procedure, calling for the suspension of the Minister for Culture's decision to issue a cinematographic exploitation visa for the film Fifty Shades Freed that authorised its showing to all audiences.

The applicant claimed firstly that the condition of urgency required by Article L. 521-1 of France's Administrative Justice Code had been met, since it was likely that the film shown in cinema theatres would be seen by minors. The Minister for Culture claimed that the application had been lodged more than ten days after the film's release and that no such urgency existed. The court in interlocutory proceedings noted that on the date of the issuance of the Ministry of Culture's decision, the film was still being shown in dozens of cinemas in France. The film includes sex scenes, and although it had been authorised for showing to all audiences the situation was urgent in the light of the need to ensure that children were protected, even though the film had already been appearing in cinemas for five weeks.

The administrative court also noted that the film, which shows the life of a young couple, contains a number of scenes representing sadomasochistic sexual practices. Although these scenes are simulated and account for a relatively small proportion of the film, they are treated complaisantly and could be perceived by very young audiences as describing commonplace practices in a loving relationship. In view of this, although suspending the disputed exploitation visa in toto was not justified, the argument that the Minister for Culture had committed an error of assessment with regard to the requirement to protect children and young people (since she had not placed a restriction on the exploitation visa banning the showing of the film to children under the age of 12) was deemed, at that stage of the investigation, to cast serious doubt on the legality of the decision. The court concluded that the association was justified in requesting the suspension of the execution of the cinematographic exploitation visa for the film Fifty Shades Freed to be suspended only in as much as it did not prohibit the film being shown to minors under 12 years old.

• *Cour administrative d'appel de Paris (ord réf.), 15 mars 2018, Association Promouvoir* (Administrative court of appeal in Paris (sitting in urgent matters), 15 March 2018, the association Promouvoir) FR

Amélie Blocman
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Fake news bill submitted to Parliament

As announced by the President of the Republic at the start of the year, a bill on the fight against false information was submitted to the National Assembly on 21 March, along with a draft implementing act ensuring that the bill will apply during the presidential election campaign. According to its explanatory memorandum, the bill "aims to counteract any attempts at destabilisation that could emerge during the forthcoming elections". Three areas of reform are planned, the first of which involves the introduction of new tools aimed at combating the spread of such information.

During pre-election and election periods (i.e. from the date on which the decree calling the election is published), Internet platforms will be subject to tighter transparency obligations designed, firstly, to enable the public authorities to detect any destabilisation campaigns involving the distribution of false information and secondly, to enable Internet users to identify the backers of sponsored content. The courts will also be able to quickly put a stop to the distribution of such material under emergency proceedings. To this end, a special procedure will be applicable if false information (excluding parody or satire) likely to affect the integrity of a future election is artificially distributed online on a massive scale (in particular, through content that is sponsored or promoted using automated tools known as "bots"). Civil courts will, within forty-eight hours, be able to issue an emergency ruling ordering the delisting of the site concerned, the permanent removal of the disputed content, the closure of the account of a user who has repeatedly helped to distribute such content, and even the blocking of access to the website concerned.

Part II of the bill is designed to enable the Conseil Supérieur de l'Audiovisuel (the national audiovisual regulator - CSA) to prevent, suspend or stop the distribution of television services controlled by a foreign state that violate the fundamental interests of France or participate in efforts to destabilise its institutions, in particular through the distribution of "false news" within the meaning of the 1881 Act. The CSA can take into account the conduct of all companies linked to the company responsible for the channel and the content of all electronic public communication services (in particular social networks or online press sites) in order to understand all the strategies that might be used by certain states. The bill also establishes a special procedure for the suspension of an approved service during election periods if its activities are designed to affect the integrity of an election. It gives the CSA powers to withdraw a broadcaster's licence and creates an audiovisual administrative summary procedure enabling the courts to suspend the distribution of a service at short notice for the same reasons as those entitling the CSA to withdraw its licence.

Lastly, the bill also strengthens the cooperation obligations of technical intermediaries. Part III creates a new article within the Loi pour la confiance en l'économie numérique (Act on Confidence in the Digital Economy) of 21 June 2004, adding the fight against false information to the cooperation obligations of technical intermediaries. This broader cooperation requirement adds to the obligations of the relevant service providers. As well as the obligation to promptly remove any illicit content brought to their attention ("notice and take down"), the bill requires service providers to set up an easily accessible and visible tool through which, firstly, anyone can notify them of content that constitutes false information, and secondly, the relevant public authorities can be promptly informed of such complaints. Lastly, service providers must disclose to the public the steps they are taking to combat the distribution of false information. This third obligation cuts across the first two, requiring the relevant measures to be taken in a transparent manner.

The government announced that the bill would be examined under the accelerated procedure, which means that it will only receive a single reading in each chamber of parliament. In view of the National Assembly's busy timetable, the plenary discussion may not take place until the week of 11 June.

• *Proposition de loi "relative à la lutte contre les fausses informations* (Bill on the fight against false information)
http://merlin.obs.coe.int/redirect.php?id=19048 FR

Amélie Blocman
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GB-United Kingdom

High Court awards damages against Channel 5 for failing to obtain consent and infringing filmed parties' privacy

On 22 February 2018, Mr Justice Arnold of the High Court awarded GBP 20 000 in damages to Shakir Ali and Shanida Aslam (the Claimants) against Channel 5 Broadcast Limited (Channel 5), for breaching the Claimants' privacy and not satisfactorily obtaining their consent to be filmed for the reality television show Can't Pay? We'll Take It Away (CPWTIA). The series is made by Brinkworth Films Ltd (BFL) with broadcaster Channel 5 having final editorial responsibility.

CPWTIA follows Direct Collection Bailiffs Ltd (DCBL) as they enforce court judgments against debtors and eviction orders against tenants in rent arrears. The episode which was first transmitted on 4 April 2015 depicted the enforcement of a court eviction order against Mr Ali and Mrs Aslam and their family, thus making them homeless. Their landlord was Rashid Ahmed. Mr Ali's health issues prevented him from working; however, he had a certain profile within his community for his involvement with a Pakistani political group. The episode was screened 36 times up to December 2016, with an accumulative audience of 9.56 million viewers.

BFL granted DCBL consent to film the bailiffs (who were also wearing body cameras - GoPros). BFL did not fully comply with their production bible about what to do if people refused their consent to being filmed. The eviction of Mr Ali and Mrs Aslam occurred on 2 April 2015 between 8.23 a.m. and 9.47 a.m. At 8.23 a.m., DCBL's representatives, Mr Bohill and Mr Short, were let into the premises by the landlord's son. They proceeded to the bedroom where Mr Ali had just awoken and was wearing his pyjamas. Mr Bohill explained the repossession but made no mention of the fact that they were being filmed. Mr Ali got dressed and asked about the filming. The cameraman, Mr Rea, tried to explain but was interrupted by Mr Bohill, so no explanation was given. Mr Bohill explained to Mr Ali that the property had been repossessed. Mr Ali phoned his wife who was returning from the school run. Mr Ali said his wife had refused to be filmed. Mr Ahmed, the landlord, arrived and an argument ensured between him and Mr Ali over the rent sum due and the possession date; Mr Ali denied the landlord's allegation of subletting. The cameraman, Mr Rea, suggested that Mr Aslam give his version of events to the camera, however, Mr Ali beckoned the crew to leave their bedroom. At 9.03 a.m., Police Constable Stowers arrived and consented to being filmed. The cameraman attempted to interview Mr Ali and Mrs Aslam but they refused to be filmed. At 9.31 a.m., PC Stowers persuaded Mr Ali to be interviewed by the cameraman. Mr Ali objected to the landlord's son filming, so the tenants vacated the house. The landlord's son's footage was posted on social media, thus prompting Mr Ali to contact BFL who said that they had no control over social media footage, whilst decisions on broadcasting remained with Channel 5. The tenant's daughter was also bullied at school.

Mr Justice Arnold first held that Mr Ali had unequivocally withdrawn consent before the first broadcast, and that the consent given at 9.31 a.m. had been effectively given under protest and not informed, as the couple had had absolutely no knowledge of the programme being filmed, of who would broadcast it or of the body cameras worn by the bailiffs. Mr Justice Arnold recognised that the question was whether the claimants had a reasonable expectation of privacy in respect of the information in question, and noted that, according to Lord Hope in Campbell v MGN Limited (see IRIS 2011-3/1) "The question is what a reasonable person of ordinary sensibilities would feel if she was placed in the same position as the claimant and faced with the same publicity." Mr Justice Arnold held that Mr Ali and Mrs Aslam and their children had a right (pursuant to Article 8 of the European Convention on Human Rights - ECHR) to respect for their pri-

vate and family life and their home, even whilst being evicted, and this had to be balanced against Channel 5's Article 10 ECHR right to freedom of expression. First, Channel 5's freedom to report on court proceedings was upheld, but the Court considered that there was a limit as to the necessary disclosure of information so as to preserve a person's privacy. Secondly, the programme CPWTIA did not focus upon public interest issues such as homelessness or the judicial process allowing eviction, but instead on the conflict between landlord and tenant. Thirdly, the Court held that Channel 5's editorial discretion did not allow use of private information unless justified as contributing to a debate of general interest. In this regard, Rule 8.1 of the Ofcom Broadcasting Code states that infringement of privacy must be warranted for public interest purposes such as crime detection.

Mr Justice Arnold concluded that the Claimants had a reasonable expectation of privacy concerning inclusion of private information and that Channel 5 had no justification to include the details as it was not of general public interest. A restriction on freedom of expression was therefore proportionate in this case. The Court awarded damages for misuse of private information and subsequent distress, and aggravated damages for Channel 5's handling of the claim. The factors taken into account were: the viewing figures; the use of the fairly sensitive information; the voyeuristic quality of CPWTIA; and the Claimants' standing in the community.

• Shakir Ali and Shahida Aslam v Channel 5 Broadcast Limited [2018] EWHC 298 (Ch), 22 February 2018
http://merlin.obs.coe.int/redirect.php?id=19037 EN

Julian Wilkins
Blue Pencil Set

The Government ends the Leveson Inquiry

On 1 March 2018, the UK Government announced its decision to formally close the Inquiry into the Culture, Practices and Ethics of the Press pursuant to section 14(1)(b) of the Inquiries Act 2005. As a result of the emerging scandal of "phone hacking" by the News of the World, a two-part inquiry was ordered in November 2011 by the then Prime Minister David Cameron. Chaired by Lord Justice Leveson, part one examined the relationship of the press with the public, police and politicians. It commenced its hearings in November 2011 and ended in July 2012, culminating with the publication of the Leveson Report on how future concerns about press behaviour, media policy, regulation and cross-media ownership should be dealt with (see IRIS 2013-2/29). Part two was meant to investigate unlawful conduct within media organisations and the relationship between journalists and the police. This was, however, postponed in 2012 to avoid prejudicing the then ongoing police investigations into phone hacking and corrupt payments.

By November 2016, the future of press regulation seemed dependent on a new consultation launched by the Government to seek views from all interested parties on the best course of action relating some outstanding issues from the the Leveson Inquiry and its implementation. The consultation, which ended in January 2017, sought to gauge public feeling on whether to terminate the Inquiry without undertaking Part Two and whether to commence or repeal the controversial section 40 of the 2013 Crime and Courts Act. Section 40 relates to awards of costs in court cases taken up against the press. Its provisions, which were enacted but not brought into force along with the rest of the statute, are loosely based on some of the key recommendations of the Leveson Report. They were introduced by Parliament as an incentive to encourage publishers to join the new system of voluntary press self-regulation. Had they ever come into force, they would have obliged unregulated news publishers to pay the legal costs of libel, privacy and harassment claims, regardless of whether they won or lost. Section 40 was fiercely opposed by the newspaper industry on the grounds that it had the potential to expose newspapers to costly financial penalties if any investigative stories were challenged in the courts.

In the snap General Election of 2017, the Conservative Party manifesto promised to repeal section 40 and cancel the second stage of the Leveson Inquiry. The results of the consultation apparently supported this approach, with 66% of respondents thinking that the Leveson Inquiry should be discontinued and 79% of them favouring the full repeal of section 40. On 1 March 2018, Secretary of State for Digital, Culture, Media and Sport Matt Hancock told the House of Commons: "We do not believe that reopening this costly and time-consuming public inquiry is the right way forward." According to the Government, the terms of reference of Part Two have been largely addressed through the comprehensive nature of the first phase of the Inquiry, changes to press self-regulation, extensive criminal investigations, and civil claims and reforms to policing practices. Moreover, the amount of public money that had already been spent investigating phone hacking (GBP 43.7 million on police investigations and GBP 5.4 million on Part One), the potential future cost to the public and the alleged need for solutions to address "the most pressing problems facing the future of news media," led the Government to conclude that holding Part Two of the Inquiry was "no longer appropriate, proportionate or in the public interest." As well as cancelling Leveson Part Two, Mr Hancock announced that the Government would find a suitable legislative vehicle to repeal section 40 of the 2013 Act in order to help protect the free press and the tradition of investigative journalism.

Sir Brian Leveson, who was formally consulted (as required by the 2005 Inquiries Act) on the future of

Part Two of his Inquiry, explained in a letter published alongside the consultation response that he "fundamentally disagree[d]" with the Government's conclusion and stressed that the public and alleged victims of phone hacking "were promised" a "full public examination" of the circumstances that allowed this wrongdoing to develop. Some of the press, including The Sun and The Telegraph, welcomed the Government's decision. The Guardian, which had blown the whistle on phone hacking, also endorsed the abandonment of Leveson Part Two, with several commentators denouncing its stance as a betrayal of press abuse victims and the paper's values.

• Department for Digital, Culture, Media & Sport and the Home Office, The Leveson Inquiry and its Implementation: Section 40 of the Crime and Courts Act 2013 and Part II of the Leveson Inquiry, 1 March 2018
http://merlin.obs.coe.int/redirect.php?id=19063 EN

• Secretary of State for Digital, Culture, Media and Sport Matt Hancock's statement on the Leveson Consultation Response (Oral Statement to Parliament delivered on 1 March 2018)
http://merlin.obs.coe.int/redirect.php?id=19064 EN

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IE-Ireland

Data Protection Commissioner and Google Ireland win High Court appeal on first 'right to be forgotten' case

On the 9 February 2018, the High Court overturned a finding by the Circuit Court in favour of a former local election candidate, in the first "right to be forgotten" case in Ireland concerning internet postings. In 2014, an election candidate, Mark Savage, had objected to a thread on a website, Reddit.com, describing him as a "homophobic candidate." Reddit.com is an online discussion website. A contributor to the website called "Soupynorman" had uploaded Mr Savage's election leaflet which referred inter alia to "gay perverts cavorting in flagrante on the beach in broad daylight" and stated that the "hedonistic" activity in gay culture of "crusin" [sic] on a Dublin beach denigrates the institution of marriage. The posting of Mr Savage's election leaflet received quite a number of responses. Mr Savage participated in this discussion forum later, posting three lengthy contributions and objecting to being labelled as homophobic. One of Mr Savage's posts stated inter alia "I have the same compassion for homosexuals as I do for heroin addicts and prostitutes who all belong to the same category of being barred for life from ever donating blood by virtue of their destructive lifestyles."

Mr Savage made a complaint to Google in August 2014, stating that when his name was typed in the Google search bar, the results included a reference to him being a "homophobic candidate" and this was "completely inaccurate and defamatory." Google responded in October 2014, stating that when a person chooses to willingly run for public office, "the legitimate interest in providing access to information and of the public, in being able to search for information which is directly relevant to that candidate's political, economic and cultural stances which may be of relevance to potential voters, and constituents' ability to make informed decisions about political candidates vastly outweighs the data subject's right to privacy." Google pointed out that even though Mr Savage had failed to win office, he might run again in the next election and this information still retains a strong public interest value in identifying the political and cultural positions of the past candidates for this office."

Following Google's refusal to de-index the thread, Mr Savage complained to the Data Protection Commissioner (DPC), who found that Google's refusal to remove the Uniform Resource Location (URL) did not breach the Data Protection Acts 1988 and 2003. Mr Savage appealed the DPC's decision to the Circuit Court. The Circuit Court found it likely that Internet users would consult online discussion forums such as Reddit as a source of verified facts and ruled that Mr Savage's fundamental rights and legitimate interests were prejudiced. The Data Protection Commissioner and Google Ireland Ltd subsequently appealed that decision under section 26 on points of law, contending that the Circuit Court erred in law in its application of the Court of Justice of the European Union's Google Spain case (see IRIS 2014-6/3) and had erred in law in finding that the content of the URL title was factual in nature and not an expression of opinion.

In the High Court, Justice Michael White stated that the Circuit Court Judge "in applying the jurisprudence of Google Spain had a duty to consider the underlying article the subject of the search." Justice White noted that the Circuit Court did refer to this matter by indicating that if that Reddit.com discussion was considered, it would become clear that the original post by Soupynorman was an "expression of opinion" and the Circuit Court judge was "incorrect in law to consider the URL heading in isolation." Justice White stated that "if the court had considered the underlying discussion thread it could not have come to the conclusion that it was inaccurate data and factually incorrect, or an appearance of fact."

The High Court Judge found that Google Ireland Ltd or its parent company "does not carry out any editing function in respect of its activities" and "to mandate a search engine company to place parenthesis around a URL heading would oblige it to engage in an editing process which is certainly not envisaged in the Google Spain decision." Accordingly, the High Court vacated the order of the Circuit Court and reinstated the original determination of the Data Protection Commissioner.

• Savage v Data Protection Commissioner and Google Ireland Ltd [2018] IEHC 122, 9 February 2018
http://merlin.obs.coe.int/redirect.php?id=19040 EN

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Copyright and Other Intellectual Property Law Provisions Bill 2018 published

On 9 March 2018, the Minister for Business, Enterprise and Innovation, published the Copyright and Other Intellectual Property Law Provisions Bill 2018. The Bill amends the Copyright and Related Rights Act 2000 (see IRIS 2000-8/28) to take account of certain recommendations for amendments to that Act contained in the Report of the Copyright Review Committee entitled 'Modernising Copyright' published by that Committee in October 2013 (see IRIS 2014-2/24); and also to take account of certain exceptions to copyright permitted by Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001, on the harmonisation of certain aspects of copyright and related rights in the information society (the "InfoSoc Directive"). The Bill also contains some amendments necessary for the transposition of the EU Directive (2017/1564) allowing the European Union to ratify the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled (see IRIS 2017-9/4).

The Bill is intended to enhance provision for copyright and other intellectual property (IP) protection in the digital era and to enable "rightsholders" to better enforce their IP rights in the courts. To tackle the issue of intellectual property infringement, Section 5 of the Bill extends the jurisdiction of the Circuit Court and District Court to include IP claims. This makes it easier for rightsholders to bring lower-value intellectual property infringement claims for relief in civil proceedings within the monetary jurisdiction of the limits of those courts.

The Bill also provides for a number of exemptions, as permitted by the InfoSoc Directive. Section 11 of the Bill amends the Copyright and Related Acts 2000 to provide an exemption from copyright infringement for criticism or review of a work, provided that "such use is not expressly reserved" and that "the copy and communication are accompanied by a sufficient acknowledgement." Section 12 creates an exception for use of copyright works to allow for "caricature, parody or pastiche." Section 21 pertains to the use of notes or recordings of spoken words in certain cases. This amendment will align Ireland more closely with the scope of exceptions permissible under Article 5(3)(f) of the InfoSoc Directive, resulting in newspapers and broadcasters receiving greater protection with regard to reporting on current events.

Section 23 clarifies the position and rights of a person acting on behalf of a broadcaster with regard to the copying of a work. By the insertion of this section, the Bill allows copying for the purpose of extending the broadcast or cable programme to a person acting on behalf of and under the responsibility of the broadcaster.

Sections 24, 25 and 26 of the Bill jointly expand the existing exception to copyright for persons with a disability as endorsed by the InfoSoc Directive. Collectively, these sections provide that persons with a disability can gain access to a wider range of copyright material in accessible formats. Several technical amendments are contained within these sections, such as the broadening of the definition of disability and the creation of a definition for "relevant work", and the identification of the acts permitted by a designated body. These sections also make some of the necessary legislative amendments to allow Ireland to transpose the Directive permitting the European Union to ratify the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled.

The Bill is currently before the Lower House of Parliament (Dáil Éireann) - First Stage - and is expected to progress through Parliament in the coming months.

• Copyright and Other Intellectual Property Law Provisions Bill 2018 [No.31 of 2018], 9 March 2018
http://merlin.obs.coe.int/redirect.php?id=19038 EN
• Copyright and Other Intellectual Property Law Provisions Bill 2018: Explanatory Memorandum, 9 March 2018
http://merlin.obs.coe.int/redirect.php?id=19065 EN

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Broadcasting Authority publishes updated guidelines in advance of upcoming referendum

On 13 March 2018, the Broadcasting Authority of Ireland (BAI) published updated Guidelines in Respect of Coverage of Referenda (for previous Guidelines, see IRIS 2015-5/19, IRIS 2013-8/27 and IRIS 2011-9/24). The guidelines have been published in advance of the planned referendum on the 36th Amendment of the Irish Constitution and further referenda on constitutional amendments and reforms to local government over the next number of years. The Broadcasting Act 2009 details the legal requirements placed on broadcasters in respect of their coverage of news and current affairs issues, including referenda. The updated guidelines set out the requirements for broadcasters in respect of their coverage of referenda and apply in addition to the rules of the BAI Code of Fairness, Objectivity and Impartiality in News and Current Affairs.

The guidelines provide direction and advice to television and radio broadcasters in the Republic of Ireland as to how fairness, objectivity and impartiality can be achieved in their coverage of forthcoming referenda campaigns. In this respect, the guidelines request broadcasters to have regard to 'Diversity of Views', 'Audience Participation' and 'Issues of Balance and Allocation of Airtime'. In addition, broadcasters are asked "in their approach to coverage" of referenda, to have regard to the 'Critical Examination of Views' and 'Conflicts of Interest' that may exist or arise. The guidelines state that "decisions in respect of editorial coverage of referenda rest solely with broadcasters." In this regard, the guidelines state that "broadcasters should develop mechanisms in respect to their approach to coverage that are open, transparent and fair to all interests and to the public." While the guidelines apply only to broadcasters within the jurisdiction of the Republic of Ireland, the BAI "encourages" broadcasters outside of the jurisdiction, whose services are receivable in the Republic and who cover Irish news and current affairs, "to be mindful of the Guidelines, where appropriate, when deciding on their approach to coverage of the referenda." Furthermore, the guidelines apply "only in the case of broadcast content that makes reference to a referendum or referenda, for example, news and current affairs content or other content such as a light entertainment programme covering the topic or an advertisement which makes reference to the topic." The guidelines do not apply to print, social media or online print/audiovisual content.

The updated guidelines do, however, contain sections on how social media, opinion polls and advertising (among other features), should be treated by broadcasters. The effective date for the guidelines will be announced by the BAI in advance of each referendum being held, and the guidelines provide for a moratorium on coverage which comes into effect from 2 p.m. on the day prior to voting and ends following the closure of polling stations on the day of the ballot.

• Broadcasting Authority of Ireland, Guidelines in Respect of Coverage of Referenda, March 2018
http://merlin.obs.coe.int/redirect.php?id=19039 EN

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IT-Italy

Italian Competition Authority approves, subject to licensing conditions, the award of all Serie A's broadcasting rights to Mediapro

On 14 March 2018, the Italian Competition Authority (Autorità Garante della Concorrenza e del Mercato - AGCM or "ICA") agreed to Lega Nazionale Professionisti Seria A (the major Italian Football League, or the "IFL") awarding the broadcasting rights, on an exclusive basis on any platform, of all the Serie A football matches for seasons 2018 to 2021 to Mediapro Italia Srl ("Mediapro"). Legislative Decree No. 9/2008 - which is the law governing the marketing of football's TV rights in Italy - assigns to the ICA and to the Italian Communication Authority (AGCOM) ex ante powers to approve or reject the procedures and criteria for the assignment of the broadcasting rights, which must be mandatorily set out by the IFL and notified prior to execution.

Pursuant to Article 7(4) of Legislative Decree 9/2008, as an alternative to the awarding of rights packages to a number of licensed "operators of communications", the IFL can license all rights relating to the Serie A tournament to an "independent intermediary", provided that the intermediary is identified through a competitive tender and that such a solution is aimed at achieving the "best outcome" in marketing the audiovisual rights on the national market.

Operators of communications are defined in Legislative Decree 9/2008 as operators that have "editorial responsibilities" over the licensed content and provide audiovisual media or electronic communications services to customers (Article 2, paragraph 1, letter z of Legislative Decree 9/2008). The "no single buyer rule" only applies to such operators. Intermediaries, by contrast, are defined as operators that are not under the control of, nor are they intertwined with operators of communication or organisers of football matches. Article 7(4) also provides that the assignment of the rights to the intermediary is subject to the ICA's approval within 45 days of the IFL notifying the details and minutes of the tender and of its outcome. Moreover, Article 11(8) expressly provides that the intermediary must sub-license the licensed rights to operators of communications at Fair, Reasonable And Non Discriminatory (or "FRAND") terms and without modifying the packages as set out by the IFL, unless expressly authorised by the ICA.

In the case at hand, before assigning the global package of rights to a single intermediary, the IFL had attempted to assign smaller packages (split as to contain the same matches for each broadcasting platform, namely, DTT, DHT and Internet/Mobile) on an exclusive basis to a number of operators of communications through an auction system. The IFL guidelines setting out the tender rules and the criteria for the formation and award of the packages had previously been approved by the ICA. However, both auctions organised by the IFL to this end in May 2017 and January 2018 fell through because the offerings by operators of communications were under the minimum amount required by the tender rules. Thus, once the second auction yielded no results, the IFL started the procedure for the intermediaries, in which only Mediapro participated. On 5 February 2018, the ICA designated Mediapro as assignee, since it accepted to pay

the minimum threshold purchase price for the global package (that is, EUR 1.05 billion), and submitted the procedure to the ICA for approval under Article 7(4) of Legislative Decree 9/2008.

Against this background, the ICA has ascertained that Mediapro met the requirements to be characterised as a mere "intermediary" since it is neither controlled by nor intertwined with "communication operators" active in Italy. Furthermore, the ICA clarified that an intermediary, to be characterised as such under Legislative Decree 9/2008, cannot hold "editorial responsibilities" on the licensed content. Hence, the ICA approved the assignment of the rights to Mediapro on the condition that, for the whole duration of the licence, Mediapro: (i) acts and will continue acting in the Italian market as a mere upstream intermediary in the commercialisation of the broadcasting rights (without competing downstream in the markets for the wholesale or retail distribution of the rights); (ii) does not retain any editorial responsibility and will not carry out any activity entailing such responsibility over the licensed content; (iii) does not modify the packages of rights as originally awarded by the IFL (save for prior approval from the ICA); and (iv) does sub-license the broadcasting rights to operators of communications at FRAND terms.

Notably, as expressly stated by the ICA, the approval is without prejudice to the ICA's power to intervene ex post, pursuant to Article 101 or 102 of the Treaty on the Functioning of the EU, against either the IFL, Mediapro or other parties involved in the process in case the actual implementation of the assignment process infringes Legislative Decree 9/2008 and/or competition rules, or does not fulfil the conditions attached to the ICA's decision.

• *Autorità Garante della Concorrenza e del Mercato, Delibera del 14 marzo 2018 nella procedura SR33 - Diritti TV per la Seria A 2018/2021* (Italian Competition Authority, Resolution of 14 March 2018 on the assignment of Serie A audiovisual rights for seasons 2018/2021 to Mediapro and setting out conditions for compliance with competition and regulatory requirements)
http://merlin.obs.coe.int/redirect.php?id=19041 IT

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NL-Netherlands

AG opinion on the blocking of The Pirate Bay

On 16 March 2018, the Advocate General (AG) of the Dutch Supreme Court, van Peursem, delivered his opinion in the Pirate Bay case, in which he concluded that blocking access to The Pirate Bay (TPB) was legitimate. This opinion should guide the Dutch Supreme Court in its future ruling in the case between BREIN, a foundation which protects the rights and interests of Dutch copyright holders, and Ziggo and XS4ALL, ISPs which give their end-users access to TPB. The AG mostly based his opinion on both the Dutch Supreme Court's interlocutory judgment of 2015 and the EU Court of Justice's (CJEU) preliminary ruling of 14 June 2017 (see IRIS 2016-1/22, IRIS 2017-3-1, and IRIS 2017-7/4). In the former judgment, it was found that blocking measures are effective in cases where they render it more difficult for end-users to access illegal works. In the latter judgment, it was found that administrators of a platform such as TPB make an "act of communication to the public", within the meaning of Article 3 subsection 1 of the InfoSoc Directive (Directive 2001/29) and therefore breach the authors' exclusive rights.

Concerning the costs of the proceedings, the AG is of the opinion that The Hague Court of Appeal applied the wrong test for finding out whether XS4ALL's costs statement should have been disregarded because of late submission. According to the AG, instead of merely focusing on the procedural time limits, the Court should have primarily looked at whether such a late submission had affected BREIN in its defence rights, which does not seem to be the case. Moreover, the AG distinguished between the formal and material scope of application of Article 1019h Rv (Civil Procedures Code) and concluded that it was debatable whether or not the Article applied to the case at hand. According to the AG, the application of that Article, under which the losing party shall reimburse the proceedings costs to the winning party, could have a serious and undesirable chilling effect for ISPs.

With regard to the balancing exercise between the different human rights at stake which helps to ascertain whether or not a blocking measure is proportionate, the AG clarified that this is a task for a court of facts and not for the Dutch Supreme Court. Consequently, the latter can only provide the lower courts with further guidance on how to carry out such a balancing exercise. In order to balance the right to property (Article 17 of the EU Charter of Fundamental Rights) against the freedom to conduct a business (Article 16 of the Charter) and the right to freedom of information (Article 11 of the Charter), the AG makes reference to different CJEU case law, such as Promusicae or Telekabel Wien (see IRIS 2008-3/4 and IRIS 2014-5/2), under which a blocking measure must meet three conditions. First, ISPs should be free to choose which technical means to use in order to comply with the blocking order. Secondly, the measures taken may not unnecessarily deny Internet users the possibility to obtain legitimate access to the available information. Finally, the purpose of the measure must be to end and prevent the infringement of copyright and must be reasonably effective in pursuing that objective. The last requirement implies that the measure does not per se need to put an end to the copyright infringements at issue. By referring to foreign judgments, the AG concluded that the result of the bal-

ancing exercise would mostly depend on the circumstances of the case at hand.

In light of the foregoing, the AG advised the Dutch Supreme Court to set aside the 2014 judgement of The Hague Court of Appeal (see IRIS 2014-3/37). If this turns out to be the case, the case will have to be reviewed from the start by a new court in order to reach a final decision concerning, inter alia, the procedural costs and the balancing exercise between the different rights at stake. In the meantime, following an interim injunction obtained by BREIN in September 2017, access to TPB is temporarily blocked by the two ISPs until a final decision has been reached (see IRIS 2017-10:1/29).

• *Advocaat-generaal G.R.B. van Peursem, Conclusie inzake Stichting Brein tegen Ziggo B.V. en XS4ALL Internet B.V. 14/02399, 16 Maart 2018* (Advocate General G.R.B. van Peursem, 14/02399, 16 March 2018)
http://merlin.obs.coe.int/redirect.php?id=19066 NL

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Raad voor Cultuur recommendations on Dutch audiovisual media sector

According to the Raad voor Cultuur (Dutch Council for Culture), the government's legal advisory body on art, media and other cultural matters, platforms such as Netflix, Google, Facebook, Apple and Amazon that exploit their works in the Netherlands must invest in Dutch audiovisual productions. In February 2018, the Council presented a Recommendation to the Dutch Government in which it states that the Dutch audiovisual sector delivers diverse, high-quality audiovisual media works which contribute to the formation of a pluralist society and which play an important role in the independent provision of news. Furthermore, the sector gives Dutch citizens the possibility of exploiting their creative abilities and to significantly boost the economy. However, Dutch citizens watch less and less of these Dutch audiovisual productions. The majority of Dutch citizens prefer to watch foreign productions, in particular American audiovisual works, with the result that Dutch creative producers experience difficulties in earning their living with their productions.

In order to stimulate the production of high-quality media and to remain a competitive player in the market for audiovisual productions, the Council proposes several mechanisms to boost the Dutch audiovisual sector. The Council is of the opinion that Dutch policy and legislation related to audiovisual media is outdated and that it must be adjusted to current developments in the sector. A few examples given in the Recommendation are the stimulation of media literacy through education; the provision of financial aid in order to improve the quality of the Dutch audiovisual sector; and the stimulation of collaboration between broadcasters as a means to improving accessibility to audiovisual works. Another mechanism proposed by the Council is a circular finance system ("circulair financieringssysteem") to protect and stimulate local producers. The Council proposes a levy for platforms that exploit their works in the Netherlands. At the moment, Dutch citizens directly pay the international platforms the due remunerations to watch these works. Inspired by other countries, the Council suggests introducing a levy for the exploitation of audiovisual media productions within the Netherlands. Platforms would be obliged to pay the levy if they wished to exploit their works by means of sale, rental or the offering of subscriptions, or through cable connections, cinemas and advertising income. The Council proposes a levy of approximately 2-5% of the income generated by works that are accessible in the Netherlands, which would be used as financial aid to improve the quality of the Dutch audiovisual media sector.

The Council considers it crucial to introduce these mechanisms in order to allow Dutch audiovisual media producers to remain competitive in the rapidly changing market and not to become irrelevant. These measures form a solution to preserve a sector that represents high-quality, pluralist and profitable audiovisual productions.

• *Raad voor Cultuur, Sectoradvies Audiovisueel: Zicht op zoveel meer, February 2018* (Dutch Council of Culture, Advice for the audiovisual sector: Sight on so much more, February 2018)
http://merlin.obs.coe.int/redirect.php?id=19067 NL
• *Raad voor Cultuur, "Forse maatregelen nodig voor versterking Nederlandse audiovisuele sector," 22 February 2018* (Dutch Council of Culture, "Strong measures are necessary to strengthen the Dutch audiovisual sector", 22 February 2018)
http://merlin.obs.coe.int/redirect.php?id=19068 NL

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PL-Poland

Controversial Holocaust Act enters into force

Poland's controversial Holocaust law entered into force on 1 March 2018. Under the new law, it is a punishable offence to accuse the Polish nation or the Polish State of being responsible for or complicit in the crimes committed by the Nazi regime. Whereas the Polish Government has said that the law is only designed to punish manifestly false phrases such as 'Polish death camps', its opponents doubt this is the case, fearing that the government could use it to silence political opponents. The law has faced particular criticism in Israel, where it has been suggested

that it restricts the freedom of expression of Holocaust survivors. Diplomatic relations between the two countries have deteriorated in recent weeks as a result of the new law.

The governing PiS party has been planning the law for a long time, with initial drafts dating back several years. Serious doubts about the law's constitutionality were raised during the legislative process. Immediately after signing it, for example, president Andrzej Duda submitted it to the Polish Constitutional Court to be reviewed under the so-called 'follow-up' procedure. This raised the question as to whether the law would be applied before it had been reviewed. While the Ministry of Justice commented that the law was now valid, the Senate said that no prosecutions would be brought until the Constitutional Court had issued its decision. However, the question of the law's applicability has, in the meantime, been answered since, on 4 March, the Argentinian newspaper 'Pagina 12' was sued on account of a report published in December 2017. The report concerned the massacre in Jedwabne in 1941, when Nazis and locals murdered at least 340 Jews. Images of anti-Communist resistance fighters who were said to have participated in the massacre were published. It remains to be seen how the Constitutional Court will view the law and to what extent it will be applied by the country's courts and prosecution authorities.

• *Ustawa z dnia 26 stycznia 2018 r. o zmianie ustawy o Instytucie Pamięci Narodowej - Komisji Ścigania Zbrodni przeciwko Narodowi Polskiemu, ustawy o grobach i cmentarzach wojennych, ustawy o muzeach oraz ustawy o odpowiedzialności podmiotów zbiorowych za czyny zabronione pod groźbą karyasd* (Act of 26 January 2018 amending the Act on the Institute of National Remembrance - Commission for the Prosecution of Crimes against the Polish Nation, the Act on War Graves and Cemeteries, the Act on Museums, and the Act on the Liability of Collective Entities for Prohibited Offences)
http://merlin.obs.coe.int/redirect.php?id=19076 PL

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Multimedia Polska changes illegal contract practice following competition authority's criticism

The Polish Urząd Ochrony Konkurencji i Konsumentów (Competition and Consumer Protection Office - UOKiK) has issued a fine against telecommunications operator Multimedia Polska, which provides various services, including Internet access and television subscriptions.

In 2015 and 2016, the consumer protection office had expressed doubt over the legality of the way in which Multimedia Polska concluded and renewed contracts with its customers. It therefore analysed the company's telephone sales calls before instigating proceedings at the end of 2016. One of the reasons for this was that Multimedia Polska had told its subscribers that the cooling-off period for telecommunications service contracts was ten days, shorter than the 14-day period stipulated by Polish consumer rights legislation.

The same piece of legislation also entitles customers to withdraw from their contract if they are already using the telecommunications services, however, Multimedia Polska did not allow its customers to do this. Finally, customers did not receive the company's terms and conditions after placing orders over the telephone and were therefore unable to verify the actual conditions of the contract.

After being threatened with a fine by the UOKiK, Multimedia Polska agreed to change the criticised practices to benefit customers and to remove the effects of these practices. For example, it will inform consumers of their right to compensation. Customers who were unlawfully prevented from withdrawing from their contract will receive a refund of two months' subscription fees. Some customers will receive benefits in the form of additional services, such as free access to Multimedia Polska's film catalogue, 50 minutes of mobile calls or 5 GB of Internet data. These benefits are also available to customers who ceased using the company's services as a result of its unlawful practices.

In the end, the UOKiK decided not to enforce the fine because Multimedia Polska had agreed to correct all the infringements mentioned by the consumer protection office and had given customers fair compensation.

• Press release
http://merlin.obs.coe.int/redirect.php?id=19074 EN

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Consultations on opening cable networks to competitors

The Polish telecommunications regulator, Urząd Komunikacji Elektronicznej (UKE), has opened talks with Polish cable network operators with the aim of persuading them to open up their networks to competitors.

According to the UKE, the talks involve Warsaw-based operators Orange Polska, Netia, UPC Polska and Vectra Investments, as well as Multimedia Polska (based in Gdynia), Toya (based in Lodz) and Inea (based in Poznan). The talks mainly concerned the conditions under which cable network operators can be expected

to allow others to use their technical infrastructure. In the regulator's opinion, the draft decisions drawn up as part of the consultation should bring Poland closer to the Gigabit Society. They also reflect the UKE's strategy for the 2017-2020 period, as well as the Digital Agenda for Europe and the Europe 2020 strategy.

The UKE hailed the talks as generally positive, providing grounds for hope that the suggestions and comments put forward could form a helpful basis for the development of universally applicable conditions under which broad access to the operators' infrastructure could be provided. The success of the talks was important because it would give providers non-discriminatory access to the networks. The reduction in costs that this should create, together with expected increases in investment, should benefit not only the telecommunications companies but, most importantly, their customers.

• *UKE - Konsultacje projektów decyzji dotyczących kanalizacji kablowej oraz kanalizacji telekomunikacyjnej budynków* (UKE press release)
http://merlin.obs.coe.int/redirect.php?id=19075 PL

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RO-Romania

Public consultation on the allotment of radio spectrum for terrestrial digital broadcasting

The Autoritatea Naţională pentru Administrare şi Reglementare în Comunicaţii (National Authority for Management and Regulation in Communications, ANCOM) launched a public consultation on 13 March 2018 to assess the market interest in acquiring rights of use for the available spectrum in the VHF and UHF band for terrestrial digital broadcasting services (see inter alia IRIS 2009-9/26, IRIS 2010-3/34, IRIS 2010-9/35, IRIS 2012-8/34, IRIS 2013-6/30, IRIS 2014-4/26, IRIS 2014-5/29, IRIS 2014-9/27, IRIS 2015-5/33, IRIS 2015-7/28, IRIS 2016-2/26, IRIS 2017-1/29, IRIS 2017-4/32).

The views expressed during this consultation - open until 11 April 2018 - will serve in defining ANCOM's decisions on awarding the rights of spectrum use for terrestrial digital broadcasting services.

Currently, in Romania, based on the technical approval issued by the Authority under Government Ordinance No. 21/2016, there are still public television networks' analogue terrestrial television transmitters operating in the VHF band, which are to be turned off on 31 December 2019. Taking into account the provisions of the Geneva 2006 Agreement, these transmitters have not enjoyed protection from primary services in the band since 17 June 2015.

Since 2014, the DTT multiplex in the VHF band, together with the national and regional multiplexes in the UHF band, have been auctioned out in 4 successive selection procedures organised by the Authority, and so far, no operator has shown interest in acquiring the rights of use for it. Following the auctions organised by ANCOM between 2014 and 2017, one national licence and two other national licences, 13 regional licences and two local licences have been awarded in the UHF band. The total amount of licence fees was approximately EUR 1 190 000.

One national multiplex and several regional multiplexes have not been awarded in this band. Following ANCOM's international coordination actions, the regional multiplexes still available, together with those newly obtained, can make up a national multiplex. The Authority has developed a questionnaire addressed to all the providers interested in these multiplexes in order to find out their opinion on the manner and conditions for awarding the rights of use for these frequencies as well as the existing market players' or potential new entrants' intentions as regards their participation in a possible competitive selection procedure for allotting the available spectrum.

Interested parties are invited to express their views on how the VHF digital television multiplex should end up (whether it should keep its initial purpose - as a national DVB-T2 multiplex - or whether it should be transformed into four national T-DAB+ multiplexes). Moreover, representatives of industry ähave been consulted on the combination of multiplexes (one or several national DVB-T2 multiplexes, one or several national T-DAB+ multiplexes and several national multiplexes and/or regional multiplexes) to be auctioned; on the service coverage obligations for T-DAB+ and DVB-T2; and on the deadline for commissioning the networks and launching appropriate content.

• *The Consultare publica privind alocarea spectrului radio pentru servicii digitale terestre de radiodifuziune in Romania - comunicat 13.03.2018* (Public consultation on the allotment of radio spectrum for terrestrial digital broadcasting services in Romania - press release of 13 March 2018)
http://merlin.obs.coe.int/redirect.php?id=19044 RO

Eugen Cojocariu
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RU-Russian Federation

Cinema fined for comedy exhibition

On 22 February 2018, a Justice of the Peace in Moscow made a decision on an administrative case in relation

to an offence committed by Centromobile Pioner, a limited liability company which owns a Moscow cinema called "Pioner". The case centred around the violation of paragraph 1 of Article 14.58 of the Code on Administrative Offences (see IRIS 2002-6/34), entitled "Exhibition of a film and/or showing of a film without an exhibition licence").

The case relates to the incident on 23 January 2018 when the Russian Ministry of Culture withdrew the licence to exhibit "The Death of Stalin", a 2017 UK/France political satire comedy, initially issued by the Ministry on 29 December 2017. The film was screened in the Pioner on 25 and 26 January.

In court, the defendants claimed that they had not been aware of the fact that the licence had been withdrawn, as the film distributor, "Volga Film", had not informed them on time. The judge ordered an administrative fine of 100 000 RUB (about EUR 1 400) for each screening on 25 January and of 80 000 RUB for each screening on 26 January 2018. The decision was not appealed.

• Номер дела : *05-0207/208/2018* (Resolution of the Justice of the Peace of the District Court No. 208 of Dorogomilovo rayon of the city of Moscow N.P.Smelyanskaya in administrative case No. 05-0207/208/2018 of 22 February 2018)
http://merlin.obs.coe.int/redirect.php?id=19042 RU

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TM-Turkmenistan

Broadcasting Law Adopted

On 5 January 2018, President Berdymukhamedov of Turkmenistan signed the law "On Television and Radio Broadcasting", the first in the country's history. The law preserves the current governmental system of licensing and control.

In addition to the current monopoly of state broadcasting, the law envisages the establishment of public television and radio entities, as well as private broadcasters, "to satisfy the informational requirements of the population" (Article 18 paragraph 1). The law formally provides a set of requirements for the state broadcaster, including the possibility of free expression for different "groups of population" (Article 16 paragraph 3). It envisages a must-carry package for all broadcasting platforms, to be composed as a result of a contest (Article 23).

The law introduces a formal ban on direct foreign TV and radio transmissions, including via satellite and the Internet, without prior permission from the authorities (Article 51) and an outright ban on pornography (Article 15 paragraph 6). The individual reception of satellite TV, the most popular method of watching foreign programmes today, is severely restricted through a system of special "certificates of compatibility" and local rules (Article 26). Collective satellite dish antennas need a licence (Article 27).

The law provides an obligation to offer access to digital TV and radio in all settlements with a population of over 1 000 inhabitants (Article 7 paragraph 8).

It introduces a quota of less than 50 percent airtime for programmes in languages other than Turkmen for all types of broadcasters, as well as less than 25 percent for national broadcasters (understood as available to 90 percent of the population). It includes a demand to provide voiceover in Turkmen for all programmes available for the population, including via satellite platforms (Article 42 paragraphs 2 and 3). There is now also a quota of 50 percent for national products and national music for Turkmen-based channels (Article 44 paragraph 1).

In his public statement on 27 March 2018, the OSCE Representative on Freedom of the Media, Harlem Désir, noted the timeliness of the law, which reflects major shifts in the media sphere, and establishes a legal framework for future private and public service broadcasting.

"The law upholds a number of commitments of Turkmenistan in the field of media freedom," said the Representative. "Yet, there are several provisions that require improvement to meet international standards on freedom of broadcasting media. These provisions include the independence of the licensing agency and that of the public service broadcaster," he said. The Representative called on the Turkmen authorities to take measures to support a pluralistic media landscape and freedom of expression.

• Закон Республики Туркменистан «*О* телевидении и радиовещании » (Act of the Republic of Turkmenistan "On Television and Radio Broadcasting", published on 13 January 2018 by the national news agency)
http://merlin.obs.coe.int/redirect.php?id=19043 RU

• "Following adoption of broadcasting law in Turkmenistan, OSCE representative Désir presents legal review, calls for improvements to the media situation". Press statement, 27 March 2018
http://merlin.obs.coe.int/redirect.php?id=19069 EN

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Agenda

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