IRIS
LEGAL OBSERVATIONS
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EDITORIAL

European Union: separation of telecom and cable activities Article 10 of the European Convention on Human Rights: A survey

Announced some months ago, the separation of telecommunications and cable distribution activities as a means of maintaining effective competition and optimum market development appears to be gaining ground and is the subject of a draft Directive which has just be published in the Official Journal of the EC. This EC proposal, once adopted, will have considerable consequences for the European industries concerned.

It is not the Commission's only crusade this spring, as the field of commercial communications is also being addressed in the hope of obtaining greater harmonisation of national regulations on the subject.

We reported last month on a decision by the European Court of Human Rights concerning the United Kingdom's compliance with Article 10 of the European Convention on Human Rights. This month we thought it would be worth taking a look at recent decisions by the Court on the freedom of expression, including the Bowman case once more.

Elsewhere, the right to news flashes, following certain developments and consecration in case-law by the Constitutional Court in Germany, is now making an appearance in positive law in Belgium.

Another subject often reported on in IRIS, and likely to be the subject of numerous developments in the future, is statutory licensing. An Austrian court has been dealing with the matter for the first time there, while at the same time in France the highest civil court recently confirmed a position which now appears to be considered a principle.

Lastly, this issue of IRIS gives a special place to the Ukraine, where there have been major developments recently in both the cinema and television sector.

Frédéric Pinard
IRIS Coordinator
ad interim

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Council of Europe

European Court of Human Rights: Four recent judgments on the freedom of expression and information

1. Zana vs. Turkey, 25 November 1997
In this case the European Court of Human Rights comes to the conclusion that there was no breach of Article 10 of the European Convention for the protection of human rights and fundamental freedoms. Zana was convicted to several months of imprisonment in Turkey because of the publication of an interview in the newspaper *Cumhuriyet*, in which he said to support the *PKK* movement, although he disagreed with the massacres. And he added to this statement : "Anyone can make mistakes, and the *PKK* kill women and children by mistake...". According to the Court this statement is both contradictory and ambiguous, because it is difficult simultaneously to support the *PKK*, "a terrorist organisation which resorts to violence to achieve its ends", and to declare oneself opposed to massacres. The Court notes that the interview coincided with murderous attacks carried out by the *PKK* on civilians in south-east Turkey at the material time and that the publication of the interview had to be regarded as likely to exacerbate an already explosive situation in the region. The Court accordingly considers that the penalty imposed on Zana could reasonably be regarded as answering a "pressing social need" and hence as necessary in a democratic society. So there is no breach of Article 10 of the Convention.

2. Grigoriades vs. Greece, 25 November 1997
This case concerns the conviction of a lieutenant of the crime of insult to the army, insult which was contained in a letter the applicant sent to his unit's commanding officer. A sentence of three months was imposed on Grigoriades. According to the Court, Article 10 of the Convention which guarantees the freedom of expression and information, applies to military personnel as to all other persons within the jurisdiction of a Contracting State. The Court notes that the contents of the letter indeed included certain strong and intemperate remarks concerning the armed forces in Greece, but those remarks were made in the context of a general and lenghty discourse critical of army life and the army as an institution. Nor did the letter contain any insults directed against the recipient of the letter or any other person. The Court decides that the letter had no objective impact on military discipline and that the prosecution and conviction of Grigoriades cannot be justified as necessary in a democratic society. The Court comes to the conclusion that in this case Article 10 is violated by the Greek authorities.

3. Guerra vs. Italy, 19 February 1998
In this case a group of inhabitants of Manfredonia complained of the fact that they had not received proper information from the authorities on the hazards of the industrial activity of a local chemical factory. Nor were they informed on the safety plans or emergency procedures in the event of an accident. The Court finds no infringment of Article 10 of the Convention. The Court argues that this article on the freedom of expression and information "basically prohibits a government from restricting a person from receiving information that others wish or may be willing to impart to him. That freedom cannot be construed as imposing on a State, in circumstances such as those of the present case, positive obligations to collect and disseminate information of its own motion". Hence, no violation of Article 10. However the Court is of the opinion that the Italian authorities, by not giving essential information to the population involved, did not take the necessary steps to ensure effective protection of the applicants' right to respect for their private and family life and consequently violated Article 8 of the Convention.

4. Bowman vs. United Kingdom, 19 February 1998 (*see* IRIS 1998-3: 3)
Mrs Bowman was prosecuted in the UK following the distribution of leaflets in election time. As the executive director of the Society for the Protection of the Unborn Child, Mrs Bowman campaigned against abortion. The leaflets contained information on the opinions of candidates standing for the general elections with regard to abortion. Mrs Bowman was charged with an offence under the Representation of the People Act 1983 which prohibits expenditure of more than five pounds sterling by an unauthorised person during the period before an election on conveying information to electors with a view to promoting of procuring the election of a candidate. Although Mrs Bowman at earlier occasions had been convicted for similar facts, this time she finally was acquitted by the Court. Nevertheless the European Court of Human Rights is of the opinion that the prosecution in itself can be regarded as an interference by the authorities in the applicants right of freedom of expression. The Court finds that the restrictive rule with regard to the distribution of leaflets in election time has the effect of a total barrier to Mrs Bowman's publishing information with a view to influencing the voters in favour of an anti-abortion candidate. At the same time there were no restrictions placed upon the freedom of the press to support or oppose the election of any particular candidate. The Court concludes that the restriction in question is disproportionate to the aim pursued ("securing equality between candidates") and hence violates Article 10 of the Convention.

These judgments are available in English and French on the website of the ECHR; http://www.dhcour.coe.fr/eng/-judgments.htm and via the Document Delivery Service of the Observatory.

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European Union

European Commission: Draft Directive on the separation of telecommunications and cable distribution activities

A few months ago, the European Commission announced its intention to draw up a draft Directive imposing a separation of telecom and cable activities when both are owned by a single operator (*see* IRIS 1998-1: 13). The draft Directive is now a reality as it has just been published in the Official Journal of the European Communities.
This Directive was developed in the light of a review by the Commission under competition rules bearing on the following two aspects:
- effect on competition of provision by a single operator of telecommunications and cable TV networks.
- restrictions on use of telecommunications networks for the supply of cable TV capacity.

This review was published as a Communication in which the Commission took great care to point out that the conclusions it reached concern only signal transmission and not the content of what is transmitted. The Commission finds that a concurrent provision of telecommunications networks and cable TV networks by a single operator is a situation that may hinder the development of telecom and multimedia applications and delay the emergence of effective competition. Separate bookkeeping of these two activities as required by Commission Directive 95/51/EC of 18 October 1995 amending Directive 90/388/EEC with regard to the abolition of the restrictions on the use of cable television networks for the provision of already liberalized telecommunications services (Cable Directive - *see* IRIS 1996-2: 7) is not sufficient, in the Commission's view, to reduce this risk. Concerning the second aspect, the Commission, although emphasising the fact that current relevant legislation is unclear in most Member States and that the existence of these restrictions may hinder an optimum development of the market (certain cable TV service providers may be prevented from using the capacity of the telecommunications network owned by the organisation in question), concludes that this situation does not require, in the present state of affairs, any compulsory measures.
Based on these conclusions, the Commission has thus drawn up the abovementioned draft Directive amending Directive 90/388/CEE on competition in the markets for telecommunications services to urge all Member States to ensure that exploitation, for the purpose of specific or exclusive rights, of these two types of network by a single operator is handled by separate legal entities. This fact does not in principle prevent a single company from owning both these entities.
The Directive will be adopted once the Commission has heard comments from all interested parties, the latter having two months as from publication date to present their observations (*i.e.* until 7 May 1998).

Commission Communication concerning a draft Directive amending Commission Directive 90/388/CEE in order to ensure that telecommunications networks and cable TV networks owned by a single operator are separate legal entities. OJEC of 7 March 1998 No C 71: 3.
Commission Communication concerning the review under competition rules of the joint provision of telecommunications and cable TV networks by a single operator and the abolition of restrictions on the provision of cable TV capacity over telecommunications networks. OJEC of 7 March 1998 No C 71: 4 - 23.
Draft Commission Directive amending Directive 90/388/EEC in order to ensure that telecommunications networks and cable TV networks owned by a single operator are separate legal entities. OJEC of 7 March 1998 No C71: 23 - 26.
Available in French, English and German via the Document Delivery Service of the Observatory.

(Frédéric Pinard,
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Europen Union: Commercial Communications - latest developments

Recently the European Commission published its Follow-up to the Green Paper on Commercial Communications in the Internal Market (Brussels, 4 March 1998; COM (1998) 121 final). The *Ligue International du Droit de la Concurrence* devoted its annual Colloquium to this subject (Brussels, 20 March); a summary will be published in the Ligue's International Review of Competition Law. A newsletter, Commercial Communications, The Journal of Advertising and Marketing Policy and Practise in the European Community, sponsored by DG XV, keeps interested parties informed of the developments in this field.
The problem of international commercial communications, as it is stated by the Commission, consists in the wide divergence of restrictions on advertising in the Member States. Regulations on sales promotions are always used as a striking example. The case law of the Court of Justice of the European Communities does not provide the Commission with sufficient tools to remove these obstacles to cross-border communications. The case of Keck (OJEC 24 November 1993, C-267/91 and C-268/91, ECR 1993, p. I-6097) shows that national authorities keep ample possibilities to create national restrictions on advertising.

Therefore the Commission seeks new ways to secure the growth of cross-border commercial communications. In its primary approach, the Commission chose an economic assessment methodology, the objective of which was to set out a complete picture of the economic impacts of the measure. In its Follow-up, two further criteria have been added in recognition of cultural and social differences in the Member States and the need to ensure coherence across public interest objectives. On the basis of the economic assessment, a legal assessment will need to be made as to whether the measure is proportional. The Commission hopes that these two steps, even if their application is not made mandatory, will be helpfull in considering cases of alleged infringement and in discussions on the regulatory problems relating to cross-border commercial communications. According to the proposals of the Commission, these discussions will be formalised in a Commercial Communication Expert Group, chaired by an official of the Commission, its members consisting of two representatives appointed by each Member State. Furthermore the Commssion will make available a Commercial Communications' contact point and information network and will set up a database, which can all be accessed through a Web site on commercial communications, which is a complement to the existing newsletter.

Communication from the Commission to the European Parliament, the Council and the Economic and Social Committe. Follow-up to the Green Paper on Commercial Communications in the Internal Market. Brussels, 4 March 1998; COM (1998) 121 final. Available in English, French and German via the Document Delivery Service of the Observatory.

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National

CASE LAW

Ireland: Supreme Court refuses injunction against television station

The Irish Supreme Court, in an important decision for the media and for investigative journalism, recently (*NIB v. RTE* - Supreme Court, 20 March 1998) lifted an injunction against RTE, the national public service broadcaster. In January, RTE had broadcast a news story to the effect that National Irish Bank (NIB) had operated offshore accounts designed to facilitate customers in evading tax. The Bank claimed that RTE's reports were ill-informed and that publication of the information would damage the relationship of trust and confidence between the Bank and its customers and damage irreparably the Bank's reputation. It therefore sought and got a temporary injunction preventing RTE from broadcasting information that would tend to identify customers or their accounts. The temporary injunction granted by the High Court was renewed several times over a period of five weeks. It was then discharged by the High Court and an interlocutory injunction refused. However, NIB immediately appealed that decision to the Supreme Court, which continued the temporary injunction until it could hear the appeal.

The Supreme Court, in a majority decision, recognised a duty and right of confidentiality between the bank and its customers, but concluded that, in the circumstances, the public interest in defeating wrongdoing outweighed the public interest in the maintenance of such confidentiality. However, the Court made clear that what it was vindicating was responsible journalism. It left it to RTE to decide whether to go ahead and name customers but warned that if it did so and wrongly named innocent investors, that would involve a serious libel on them and RTE would have to take the consequences.

Both the majority and minority judgments emphasised the role of the regulatory authorities, particularly the Revenue Commissioners. The minority would not have restrained RTE from passing the information to such authorities or indeed from pursuing the investigation they had legitimately undertaken. By reference to principles derived from English case-law, however, the minority judgment identified the essential issue as being whether RTE had established "a public interest in the disclosure of information which outweighs the public interest in confidentiality, and, if so, the extent of the disclosure which is legitimate". Having addressed that issue, the minority felt that RTE should not be free to disclose the names of customers and details of their accounts to anyone other than the Revenue Commissioners. The majority, on the other hand, were prepared to free RTE but issued a further warning that RTE, as the national broadcaster ("a State body"), should co-operate with the regulatory authorities.

While the decision itself was warmly welcomed by the media, it must be pointed out that the common law approach to the balancing of rights engaged in in this case does not follow that of the European Court of Human Rights. As Ireland has not incorporated the Convention, the courts, as in this case, do not often refer directly to the Convention or to the case law of the European Court of Human Rights.

Supreme Court, 20 March 1998 - *NIB v. RTE,* Available in English via the Document Delivery Service of the Observatory.

(Marie McGonagle,
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France: Tobacco Advertising – latest developments

Since the Evin Law of 10 January 1991 was voted to outlaw any direct or indirect advertising for tobacco or its products, judges have condemned any attempt to get around the law thus making it almost impossible to publicise any brand of tobacco. A judgement of the *Cour de cassation* on 19 November 1997 has confirmed for instance that tobacco advertising cannot be excluded from the scope of Article 10.1 of the European Convention on Human Rights, which lays down the principle of the freedom of expression, but that insofar as regulating tobacco advertising constitutes a measure necessary for the protection of health, the restriction on the freedom of expression is justified.
Three decisions handed down in the last few weeks are however to be noted in that all three override action by the *CNCT* (*Comité national contre le tabagisme* – National Committee Against Tobacco Abuse) by admitting that, in certain contexts, mention of a brand of tobacco may not be construed as an act of advertising and propaganda prohibited by Article L 355-25 of the Public Health Code (Code la Santé Publique).
In a first judgement of 29 January 1998, the Paris Court of Appeal accepted that advertising activity during the privatising of the *Seita* (*Société nationale de fabrication des produits du tabac* – National Tobacco Products Manufacturing Company), which used visuals mentioning tobacco, was not intended to advertise tobacco or a tobacco product and is not therefore included in the scope of the Evin Law.
In another decision of 12 February 1998, the same jurisdiction accepted that a scientific prize being sponsored by a brand of tobacco does not constitute covert advertising for tobacco as long as the promotional activity is "limited to the scientific community or mentioned in press releases that journalists are free not to pass on to the general public if they deem that these releases would tend to constitute illegal advertising for tobacco."
Finally, in a judgement handed down on 25 February 1998, the judges found that the provisions of the Evin Law and the Decree of 29 May 1992 enforcing this law do not forbid television channels from broadcasting pictures showing people smoking. The only unlawful act that these companies can be found guilty of is that of a breach of their obligation to provide a smoking area as required by the Decree.

***Cour de cassation*, *chambre criminelle,* 19 November 1997, Serge July.**
Paris Court of Appeal, 29 January 1998, Govt Min. and *CNCT* v. Cayzac, Comolli, *Euro RSCG, Seita.*
Paris Court of Appeal, 12 February 1998, Govt Min. and *CNCT* v. Le Picard and others.
***TGI* Paris, 25 February 1998, *CNCT* and others. v. *France 2* and others. All these judgements are available in French via the Document Delivery Service of the Observatory.**

(Charlotte Vier,
Légipresse)

France: Illicit use of protected musical works on trailer sound tracks (continued)

The *Cour de cassation* handed down a judgement on 24 February 1998 which is going to prolong the debate on the very sensitive issue of musical works used in sound tracks for advertising or self-promotional commercials on television. IRIS reported on the most recent case law in its February 1998 issue (*see* IRIS 1998-2: 6). The present judgement delivered by the High Court asserts that, as things stand legally, the use of extracts from musical works to illustrate a broadcast of an advertising nature is an infringement of the author's copyright as protected by Article L 121-1 of the Intellectual Property Code (*Code de Propriété Intellectuelle*).

***Cour de cassation* 24 February 1998, *TF1* v. Sony Music. Available in French via the Document Delivery Service of the Observatory.**

(Charlotte Vier,
Légipresse)

Austria: Digitisation and storage of musical works on computer hard disk constitutes reproduction

The complainant *(Radio Melody GmbH)* holds a broadcasting licence under the terms of the Regional Radio Act (*Regionalradiogesetz*). It has organised its broadcasting in such a way that musical performances on sound carriers are digitised and stored electronically in a data processing unit from which they can be retrieved and broadcast completely automatically (and even repeatedly).
Radio Melody's main complaint against the performing rights company *(Austro-Mechana Gesellschaft zur Wahrnehmung mechanisch-musikalischer Urheberrechte GmbH)* was that, since the pieces of music on CDs and records are digitised in-house at the complainant's electronic data processing studio for the purpose of the complainant's broadcasting operation, they do not fall within the scope of the charges payable to the defendant as reproduction rights in accordance with Section 15 of the Copyright Act (*Urheberrechtsgesetz - UrhG*); secondarily, the complainant referred to the conclusion of an agreement authorising use for functional purposes.
The initial court delivered a partial judgment on the main complaint; the decision on the secondary complaint will be included in the final judgment.
In the justification of its judgment, the Commercial Court (*Handelsgericht*) in Vienna confirmed that reproduction copyright also applied to the digitisation and electronic storage on the hard disk of a data-processing unit. The fact of whether the sound vibrations were altered, involving a loss of quality, was just as irrelevant as the fact that the transformation/storage was carried out by the complainant in preparation for a broadcast; there was no technical justification for systematic transformation in order to broadcast a piece of music which was available on a sound carrier.

Partial decision of the Vienna Commercial Court *(Handelsgericht)* on 13.1.1998, ref.no. 24 Cg 174/96p *(Radio Melody GmbH v. Austro-Mechana Gesellschaft zur Wahrnehmung mechanisch-musikalischer Urheberrechte GmbH).* Available in German via the Document Delivery Service of the Observatory.

(Albrecht Haller,
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Germany: Federal Constitutional Court on position of private broadcasters in Bavaria

In a decision on 20.02.1998 the Federal Constitutional Court (*Bundesverfassungsgericht - BVerfG*) allowed the constitutional appeal made by a private Bavarian broadcaster against a judgment delivered by the Bavarian Constitutional Court of Appeal (*Bayerischen Verfassungsgerichtshofes*) and upheld the basic right to the freedom to broadcast in accordance with Article 5, para.1, sentence 2 of the Basic Law (*Grundgesetz - GG*) in respect of other private Bavarian broadcasters.
On the basis of Article 111a of the Bavarian Constitution (*Bayerischen Verfassung - BV*), broadcasting in Bavaria is a service rendered exclusively by public-sector carriers. Private offerers conclude contracts with media service companies for their broadcasting activities; these contracts have to be approved by the Bavarian Regional Office for the New Media (*Bayerische Landeszentrale für neue Medien - BLM*). If there is no agreement, the *BLM* makes arrangements for the inclusion of the private broadcasting station if the statutory requirements are met. Thus from a legal point of view the *BLM* is the sole broadcaster.
The Bavarian Constitutional Court of Appeal (*Bayerische Verfassungsgerichtshof*) had set aside an interim order of the Bavarian Administrative Court of Appeal which ensured the continuation of the complainant's broadcasting service temporarily. The case was taken to the administrative court of appeal because the *BLM* refused to make arrangements for the inclusion of the complainant's station.
The Bavarian Constitutional Court of Appeal set aside the interim order of the Administrative Court of Appeal on the grounds that the basic right to the freedom to broadcast which the *BLM* was meant to ensure had not been sufficiently taken into account. The Constitutional Court of Appeal held that the rule the *BLM* should apply in exercising its discretion in allowing access for private offerers was simply the rule of equality, thereby preventing any arbitrary decisions.
The *BVerfG* countered in its decision that the term "broadcaster" referred not only to carriers as far as the freedom to broadcast was concerned, but to anyone who actually decided on the structure of programmes, planned a programme schedule, put broadcasts together and offered them to the public under a single identity. According to the *BVerfG*'s decision, even applicants for a broadcasting licence could claim the basic right to the freedom to broadcast and thereby maintain the constitutionally ordered rules on choice and authorisation. The *BVerfG* concluded that, in its decisions on authorisation, the *BLM* must observe not only the principle of equal treatment but also the basic right of private broadcasters on the grounds of Article 5, para.1, sentence 2 of the *GG*; the decision of the Bavarian Constitutional Court of Appeal was thus founded on an assumption which was incompatible with the Basic Law.

Decision of the Federal Constitutional Court *(Bundesverfassungsgericht - BVerfG)* of 20.02.1998, ref. No 1 BvR 661/94. Available in German via the Document Delivery Service of the Observatory.

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Germany: Frankfurt Regional Court on centralised marketing of motor sport events

In a judgment on 18.03.1998 the Regional Court (*Landgericht*) in Frankfurt-am-Main set aside a default judgment against the *Fédération Internationale de l'Automobile* (*FIA*) and dismissed the claim of a television production and marketing company. The case concerned the *FIA*'s decisions on 20.10.1995 and 11.06.1997 amending the provisions of Article 26 of its "General Prescriptions" to the effect that from 01.01.1997 all broadcasting rights in respect of all motor sport series taking place in more than one country lay with the *FIA*. The *FIA* had entrusted the exclusive marketing of these broadcasting rights to International Sportsworld Communicators Ltd (ISC).
One of the complaints of the plaintiff company concerned the infringement of Articles 85 and 86 of the EC Treaty and of the provision contained in Section 1 of the Act against Restrictions on Competition (*Gesetzes gegen Wettbewerbsbeschränkungen - GWB*).
The Court held that as joint organiser the *FIA* was joint original proprietor of broadcasting rights, and that the complainant could not claim that Article 85 or 86 of the Treaty or Section 26, para.3 of the *GWB* were being infringed on the grounds of insufficient local involvement in economic and decision-making terms on the part of the organiser, as the disputed provisions were not directed against the protection afforded to the complainant, which was only indirectly affected. There were however grounds for a claim based on Section 823, para.2 of the Civil Code (*Bürgerliches Gesetzbuch - BGB*) or Section 35, para.1 of the *GWB*.
The Court ignored the question of whether a local organiser who was affected could successfully take action against central marketing. With a decision on 11.12.1997 the Federal High Court (*Bundesgerichtshof - BGH*) had confirmed a decision of the Federal Cartel Office (*Bundeskartellamt*) prohibiting the central marketing of football broadcasting rights, on the grounds that central marketing constituted a restriction of competition within the meaning of Section 1, para.1, sentence 1 of the *GWB* (*see* IRIS 1998-1:7). Meanwhile, with the Commission investigating its television practices, the *FIA* has released 32 out of 36 race series for marketing by their organisers. The financially lucrative Formula 1 and World Championship Rally, however, are not among them.

Decision of the Regional Court *(Landgericht)* in Frankfurt-am-Main on 18.03.1998, ref. No 2/6 O 134/97. Available in German via the Document Delivery Service of the Observatory.

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Germany: Cologne Regional Court on inadmissibility of legal advice in consumer broadcasts

In a judgment delivered on 23 December 1997, the Regional Court (*Landgericht - LG*) in Cologne ordered the television broadcaster *RTL* to refrain in future from acting in a legal advisory capacity in a broadcast on consumer affairs.
The broadcaster in question had been taken to court by the largest German association of lawyers on the grounds of unauthorised legal counselling. The complaint was basically that these broadcasts, in which the defendant acted on behalf of citizens, presenting their predicament or what they felt was ill treatment on the part of authorities or commercial undertakings, constituted the exercise of legal counselling activities.
In the programme, in the course of which a lawyer appeared and gave information on the legal position, considerable emphasis was placed each time on the broadcaster's efforts to contact the party in question directly, using a recording of the conversation, in order to change or resolve the situation.
The Court now finds, despite the involvement of a lawyer in the planning of the broadcast and a notice at the beginning of the disputed section, that the lawyer acting in the case had (also) been advising the defendant within the meaning of the Legal Counselling Act (*Rechtsberatungsgesetze - RBerG*). The professional handling of external legal matters required authorisation from the authorities in the Federal Republic of Germany, regardless of whether this was carried out as a principal or ancillary occupation, and whether or not any remuneration was involved (Section 1, para.1, sentence 1 of the *RBerG*). This requirement does not apply to the activities of lawyers. According to case-law, the act of dealing with external legal matters specifically includes any activity aimed directly at dealing with specific legal matters.
As the defendant uses a technique called the "pillory threat" (*i.e.* it attempts to influence the legal state of play by exerting pressure by reporting on a case on television with the resulting effect this has on the public), the *LG* finds that it is acting in a legal counselling capacity. The Act is also infringed by anyone who is understood by the clientele approached to be offering or advertising legal advice in individual cases. There is no doubt in the case at issue that this applies to the structure of the broadcast and the tenor of the presentation. The broadcast tended quite deliberately to give the overall impression that the successful outcome was achieved by the broadcaster and not the lawyer, whose dealings on behalf of the citizen in question are in no way specified.
The professional nature of the legal counselling arose from the fact that there was an intention of repetition, as the defendant had already broadcast many broadcasts of this type and intended to continue doing so in future.

Decision of the Cologne Regional Court on 23.12.1997 - Case No 31 O 601/97 - not enforceable at law. Available in German via the Document Delivery Service of the Observatory.

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Hungary: *IRISZ TV* loses case against Hungarian National Radio and TV Board

On 30 June 1997, the Hungarian National Radio and Television Board (NRTB) awarded two national terrestrial licenses to the Hungarian-Swedish *MTM-SBS* and the Luxembourg-based German-Hungarian-American company, *CLT-Ufa*'s *MAGYAR RTL* (*see* IRIS 1997-9: 14). The *IRISZ TV* proposal, submitted by the First Hungarian Commercial Television Stock Co. (the company behind *IRISZ TV*), majority-owned by the US based Central European Media Enterprises, lost its bid. On 4 July 1997, *IRISZ TV* filed a law suit against NRTB asking the Economic Department of the Budapest Court to annul the Board's decision and to instruct the Board to duly complete the selection process for the television licence proposals. *IRISZ TV* claimed an amount of 17 billion Hungarian Forints - about 8.5 million USD - for damages. This is the very first court case in Hungary filed against an agency which is entitled to award terrestrial licenses. *IRISZ TV* based its petition on three major arguments. First of all *IRISZ TV* claimed that *MAGYAR RTL* failed to keep the application deadline of the Invitation because it submitted its proposal three hours too late. As a result *MAGYAR RTL*'s proposal should be deemed invalid.
Secondly, the petitioner also emphasized that the NRTB's decision considered *IRISZ TV*'s bids for two national terrestrial licenses as one unified bid which was contrary to the Invitation.
Finally, referring to the Minutes of the NRTB meeting *IRISZ TV* argued that the Board ignored the selection process required by Paragraphs 45 and 46 of Act I of 1996 on Radio and Television Broadcasting and voted first about the winners and then evaluated the bids according to the preliminary decision. According to *IRISZ* sources, this illegal voting process was initiated by the Chairman of NRTB, who emphasized to the members of the Board that if a decision could not be reached by qualified majority, then according to Paragraph 45 section 1 point c) of Act I of 1996, the Board should be dismissed while he himself would remain in his post. Thereafter the chairman had named his candidates.
On 12 November 1997, at the request of the Board, the judge granted a closed hearing, quoting that the documents to be presented in the trial included business secrets and should not be disclosed. The court also asked the parties to submit further evidence and set the date of the trial to 25 March 1998.
On 25 March 1998, the Economic Department of Budapest Court decided in favour of the Hungarian National Radio and Television Board and *IRISZ TV* lost the legal battle on the first instance level.
The Court accepted that *MAGYAR RTL* failed to keep the application deadline of the Invitation. However the judge argued that NRTB, in accordance with 99. u section 3 of the Hungarian Act on Radio and Television Broadcasting, asked for the completion of deficiencies inccurred in *MAGYAR RTL*' bid. Furthermore, the judge argued that there were no cogent rules governing the principles and guidelines for evaluating the bids. In the meantime, the Court did not find evidence of violation of the competition rules by NRTB.
In the opinion of *IRISZ TV* the Court agreed with almost all claims of the petitioner, but came to different conclusions. As a result, *IRISZ* filed an appeal against the decision with the Hungarian Supreme Court. The decision of the highest court of Hungary is expected after the national elections which will be held in mid-May 1998.

Budapest Court, Economic Department, 25 March 1998, *IRISZ TV* v. National Radio and Television Board (NRTB). Available in Hungarian via the Document Delivery Service of the Observatory.

(Gabriella Cseh
Constitutional & Legislative Policy Institute - COLPI)

LEGISLATION

Ukraine: New Act "on Cinematography" enters into force

On 13 February 1998, a new Act "on Cinematography" entered into force in Ukraine. The Act which consists of seven Chapters, regulates the production, distribution, storage, and exhibition of films. The Act introduces obligatory governmental licensing of activity on distribution and exhibition of movies. All movies that are to be distributed and exhibited in Ukraine will be required to obtain a licence and to register in a State registry (Art. 15). The Government will provide subsidies to Ukrainian producers through a special fund. A system of privileged taxation and custom tariffs and reduced communications rates shall support national film production, as well as co-productions with foreign companies (Chapter 4). All foreign films (including Russian ones) will need to be dubbed, or subtitled in the Ukrainian language before they are distributed (Art. 14). The law requires that a minimum of 30 percent of exhibition time in the theatres and of airtime devoted to films on TV, is reserved for Ukrainian films (Art. 22). The law explicitly upholds all copyright obligations accepted by Ukraine under international treaties, which appear in the national law on copyright and neighbouring rights,

Act "on Cinematography" *(Zakon Ukrainy "Pro kinematografiyu"* No 9/98-BP). Signed on 13 January 1998. Published in *Holos Ukrainy,* the Offical Journal of Ukraine, on 13 February 1998. Available in Ukrainian via the Document Delivery Service of the Observatory.

(Andrei Richter,
Moscow Media Law and Policy Center)

Ukraine: Public Broadcasting Act enters into force

After a debate between the Parliament and the President over some provisions of the Public Broadcasting Act (*see* IRIS 1997-10: 12), Ukraine has finally adopted a law providing the legal basis for the creation of a public broadcasting system in this country. The Ukrainian Parliament adopted and the President of Ukraine signed into law, the Act "on the System of Public Television and Radio Broadcasting of Ukraine", which consequently entered into force on 5 November 1997.
The system has been created in the name of an all-round satisfaction of the information needs of society and to provide for a pluralistic broadcasting environment, while taking into account the national traditions and the moral and ethical standards of the People of Ukraine, - says the Act in its preamble.
The Act contains ten Articles. It establishes Public Broadcasting as a TV and radio organization - an independent legal entity - that has a status of a nationwide unitary and non-profit system of mass communication and is an object of property of the people of Ukraine (Art.1). The statute of the public broadcasting organisation as well as its general programme concept are to be approved by the Supreme *Rada* (Parliament). The Supreme *Rada* will also have a role in the creation of the governing bodies of the public broadcaster. The activities of the public broadcasting organisation will be monitored by the "Public Council". Members of the "Public Council" are to represent all political parties in Parliament, nationwide artistic and public societies, and a number of government departments (Art. 3, 4). A Council for quality control is to be established, which will advise the Public Council on the professionalism of the candidates to the Administrative Council (Art. 5). The latter will come under the authority of the Public Council and will be in charge of the day-to-day management of the public broadcasting organisation (Art. 6).
The public broadcasting organisation will be financed from the revenues of a licence fee, procurement fees for the programmes produced for the Government, commercial activity related to broadcasting, and other sources. Advertising will be prohibited. (Art. 7). The establishment of the public broadcaster and its activities in the first year of existence are to be financed from the general national budget (Art. 10).

***Zakon Ukrainy «O sisteme Obshchestvennogo televideniya i radioveshaniya Ukrainy»* (No 485/97-BP). Signed on 18 July 1997. Published in *Golos Ukrainy*, the Official Journal of Ukraine, on 5 November 1997. Available in Russian via the Document Delivery Service of the Observatory.**

(Andrei Richter,
Moscow Media Law and Policy Center)

Ukraine: New law establishing the National Television and Radio Broadcasting Council

The Act "on the National Television and Radio Broadcasting Council", adopted by the Supreme *Rada* (Parliament) of Ukraine on 13 June 1997 and vetoed by the President of Ukraine on 25 July 1997, was adopted again by the *Rada* on 23 September 1997 with the amendments requested by the President. Consequently it was signed into law by the President. The Act entered into force on 17 October 1997 on the date on which it was published in the Official Journal "Holos Ukrainy". The law was discussed in IRIS 1997-8: 12.

Act "on the National Television and Radio Broadcasting Council" *(Pro Natsionalnu Radu Ukrainy z pytan telebachennya I radiomovlennya).* Adopted by the Supreme *Rada* of Ukraine on 23 September 1997; published in *Holos Ukrainy*, the Official Journal of Ukraine, on 17 October 1997. Available in Ukrainian via the Document Delivery Service of the Observatory.

(Andrei Richter
Moscow Media Law and Policy Center)

Germany: legislation on compensation for victims adopted

On 4 March 1998 the German Federal Parliament (*Bundestag*) adopted the Victims Compensation Act (*Opferanspruchssicherungsgesetz - OASG*) in order to provide civil-law compensation for victims of crime (for report on Bill, *see* IRIS 1997-3: 12).
The Act gives legal entitlement to receive damages from a perpetrator of or participant in a crime in respect of sums received from third parties for portrayal in the media. The purpose of the Act is to prevent perpetrators of crimes deriving immoral profits from the commercialisation of their crime in the media, for example in the form of income from film treatment, appearances on chat shows and portrayal in the press.
Entitlement is open to anyone with a claim to damages from the perpetrator of or participant in a crime. This civil-law entitlement on the part of the injured party also obtains where the person of perpetrators or their personal circumstances or particular conduct are portrayed in public and where the crime is the determining factor for portrayal in the media.
Previously there was no systematic compensation for victims, although publicising the crime could be held to constitute an invasion of privacy in respect of the individual.
The Act makes it compulsory to inform perpetrators, participants, third parties involved in publication and other beneficiaries of the existence and scope of entitlement.
The media's freedom to report is not restricted by this new measure (*see* comments on this in IRIS 1997-3: 12)

Victims Compensation Act *(OASG).* Available in German via the Document Delivery Service of the Observatory.

(Wolfgang Cloß,
Institute of European Media Law - EMR,
Saarbrücken/Brussels)

Belgium/Flemish Community: Decree on the right of free newsgathering and short reporting of events by Flemish broadcasting organisations

On 4 March 1998, the Flemish Parliament voted on a new Decree guaranteeing a right of free newsgathering for the Flemish audio-visual media. This right includes a right of access to events taking place in the Flemish Community and the right to take images and sound of the event, as well as the right of short reporting by any Flemish broadcasting organisation, even if another broadcasting organisation holds exclusivity rights on this event. The right of access can be restricted only in extraordinary circumstances. Short reporting of events by broadcasters other than the holder of exclusive rights is only allowed in news or regularly scheduled current affairs programmes. The duration of short reports of an event should not be longer than strictly necessary and in any casy may not exceed a time limit of 3 minutes (or 15 minutes in the case of the short reporting of a competition day). The Decree also contains some specific rules with regard to the reporting of sports events. It belongs to the competence of the Flemish media authority (*Commissariaat voor de Media*) to control the application and to sanction infringments of this new Decree.

Decree of 4 March 1998 on the right of free newsgathering and short reporting of events by Flemish broadcasting organisations. Available in Dutch and French via the Document Delivery Service of the Observatory.

(Prof. Dirk Voorhoof,
Media Law Section of the Department of Communication Sciences,
Ghent University)

France: Conditions for authorising the encrypting of telecommunications

The Act of 26 July 1996 reorganised the regulations on telecommunications in France; its purpose, specifically, is to bring the sector into line with European law. The Act includes provisions concerning encrypting. An implementing decree concerning the 1996 Act, dated 24 February 1998, has now defined the conditions for making declarations and granting authorisations in respect of encrypting means and services. Encrypting makes it possible to scramble the signal transmitted by a means of telecommunication and make it accessible only to persons with a decoder. The decree of 24 February 1998 sets up three legal systems for encrypting:
- no preliminary formalities required for encrypting services which do not ensure confidentiality functions;
- a system of declaration for the supply, import and export of a means of encrypting or a service which does not ensure confidentiality functions but which, unlike the first system, could do so (subject to the free circulation of services within the European economic area);
- a system of authorisation for other encrypting means and services.

Decree No 98-101 of 24 February 1998 defining the conditions for making declarations and granting authorisations in respect of encrypting means and services, *Journal Officiel* of 25 February 1998. Available in French via the Document Delivery Service of the Observatory.

(Bertrand Delcros
Légipresse)

LAW RELATED POLICY DEVELOPMENTS

Spain: Bill to implement the revised "Television without Frontiers" Directive

The Spanish Government has recently presented a Bill in order to implement the revised "Television without Frontiers" Directive. The Bill proposes to amend the Spanish Law 25/1994, which implemented the original "Television without Frontiers" Directive. The Bill introduces some important amendments concerning *inter alia*: the scope of application of the provisions of the law (it would apply to terrestrial, satellite and cable TV, and to all public and private broadcasters); the criteria used to determine in which country a broadcaster is established; the new rules on advertising (especially during sports events), sponsorship and teleshopping; the adoption of special measures for self-promotional and teleshopping channels; the increase of the possible fines in case of infringement of the law, etc. Apart from implementing the revised "Television without Frontiers" Directive, the Bill establishes new obligations for the broadcasters, like the obligation not to change the announced programme planning unless there is a justifiable reason and the obligation to establish a rating system for the TV programmes.

***Proyecto de Ley de modificación de la Ley 25/1994, de 12 de julio, por la que se incorpora al ordenamiento jurídico español la Directiva 89/552/CEE, sobre coordinación de disposiciones legales, reglamentarias y administrativas de los Estados miembros relativas al ejercicio de actividades de radiodifusión televisiva, Boletín Oficial de las Cortes Generales (BOCG)-Congreso de los Diputados, VI Legislatura*, 24 February 1998, nº A-104. Available in Spanish via the Document Delivery Service of the Observatory.**

(Alberto Pérez Gómez,
Departamento de Derecho Público,
Universidad Alcalá de Henares)

The Netherlands: Refusal of broadcasting organisations to license their television listings in breach of Competition Act

In his report of 13 March 1998, the Director-General of the Dutch Competition Authority (DCA) rendered his provisional opinion on the complaint of *De Telegraaf* (publisher of a vast number of newspapers and magazines) with respect to the refusal of both *NOS* (Dutch Broadcasting Foundation) and *HMG* (Dutch Media Group) to grant *De Telegraaf* a licence to publish their lists of television programmes in a weekly television guide. The Director-General considers this refusal to be a breach of the new Dutch Competition Act, which was introduced on 1 January 1998.

This case resembles to a certain extent the Magill case in which the European Court of Justice decided that a refusal to grant a licence constituted an abuse of a dominant position within the meaning of Article 86 EC (*see* IRIS 1995-5: 5). In the Magill case, however, no comprehensive weekly TV guide was available on the market. Each of the broadcasting organisations published a TV guide which only contained its own programmes.

Up until now, Dutch courts had decided that a refusal to grant a licence did not constitute a breach of competition law. In, for example, the *TV Krant op Zondag* decision (Pres. Rb. Amsterdam, 16 April 1992, *MediaForum* 1992-5, B35) the court held that refusing a licence was not an abuse of a dominant position.

According to the Director-General of the DCA a mere refusal to provide third parties with information does not in itself constitute an abuse of a dominant position. In this case, however, there are exceptional circumstances that make the refusal a breach of competition law. Fundamentally, the policy of *NOS* and *HMG* to grant licences is meant to shield the market for weekly programme guides from competition. Granting licences only to other broadcasters is not justified because in doing so, the market for weekly television guides is strictly reserved to broadcasters, to the exclusion of non-broadcasters, which amounts to discrimination. Access of third parties to the market for comprehensive weekly TV guides is denied and therefore, competition is being hampered considerably.

Public broadcasting organisations in the Netherlands are being awarded broadcasting time on the basis of the number of members they have. Subscribers to their TV guides become members automatically. As of 1 February 1998, as a result of the revised Media Act, subscription to a programme guide and membership of a broadcasting organisation are no longer related. The Director-General, therefore, does not accept the argument of *NOS* that the public broadcasting system would be undermined by this decision.

Dutch Competition Authority, report of the Director-General, No 1/40.R44, 13 March 1998. Available in Dutch via the Document Delivery Service of the Observatory.

(Annemique de Kroon,
Institute for Information Law,
University of Amsterdam)

The Netherlands: One national licence for public broadcasting

In a letter to the Dutch Parliament, the Minister of Culture, Mr Aad Nuis, announced that a Bill is being prepared to amend the Media Act in order to replace the existing multiple licence system for the national public broadcasting sector with one single licence to be granted to the *NOS* (Dutch Broadcasting Foundation). At present the *NOS* has responsibilities in particular with regard to the common programming of all the broadcasting organisations operating in the public broadcasting system of The Netherlands, such as news and sports. However, individual broadcasting organisations, each of which represents specific interests within the Dutch society, also hold licences. These licences will expire in the year 2000. Although their role will change, the proposal does not imply that the individual broadcasting organisations will have to disappear.

The present Government will not present the Bill to change the Media Act before the upcoming elections (scheduled in May). It is considered as a matter that needs to be dealt with by the new Government.

Letter from the Minister of Culture to the Dutch Parliament, TK 1997-1998, 25.600 VIII, nr. 67. Available in Dutch via the Document Delivery Service of the Observatory.

(Nico van Eijk,
Institute for Information Law,
University of Amsterdam)

The Netherlands: Guidelines on side-line activities of broadcasters

The Dutch Media Authority (*Commissariaat voor de Media*) issued guidelines on side-line activities of broadcasters operating in the public broadcasting system (*i.e.* on activities other than the provision of their programme). These guidelines introduce criteria for the monitoring of the activities of broadcasters broadcasting in the public broadcasting system and increase the possibility for those broadcasters to develop their side-line activities. The guidelines apply to new activities of broadcasting organisations such as pay-TV, Internet and other new services. For activities concerning the Internet there is a special regime which explicitly grants permission to finance these activities from public means.
Under the recently modified Media Act all side-line activities are, in principle, allowed. Side-line activities do not require the Media Authority's prior permission, unless a television programme addresses the audience with regard to these side-line activities, *e.g.* when the public is asked to subscribe to a television programme guide. This will not be permitted, with the exception of those appeals that are made in conformity with regular market prices and are broadcast as regular advertising spots.
The Media Authority only evaluates *post facto*. It can determine afterwards whether the side-line activities meet all legal requirements, which are that side-line activities need to be related to the main task of broadcasters, namely broadcasting and that they should not distort competition.

Guidelines on side-line activities of broadcasters operating in the public broadcasting system, *Staatscourant* 1998, 49, p. 10. Available in Dutch via the Document Delivery Service of the Observatory.

(Mediaforum)

France: Tasks of the *CSA*

In a decision of 7 January 1998 the French broadcasting supervisory body (*Conseil supérieur de l'Audiovisuel - CSA*) has presented the new arrangements for its internal organisation and the tasks these involve. The *CSA* now has six departments: the audio-visual operators department, responsible for radio, television and cable authorisations and agreements; the new programmes department, which is to check that the obligations required of broadcasters regarding programming and production are complied with; the technical and new communications technologies department which will monitor the use of frequencies and infrastructures and pay particular attention to technological developments; the legal department, which has an advisory capacity, drafts the *CSA*'s decisions, recommendations and opinions, and is responsible *inter alia* for following up disputes concerning the body's activities; the other two departments cover the *CSA*'s administrative and financial management and communication and planning. The reform reflects a desire to simplify structures and should enable the *CSA* to adapt to new requirements, particularly in respect of economic regulation.

Decision no.98-P-2 of 7 January 1998 concerning the organisation and tasks of the services of the *CSA*. Available in French via the Document Delivery Service of the Observatory.

(Charlotte Vier
Légipresse)

France: Heading for Digital Audio

Digital Audio Broadcasting (DAB), although still in its experimental stage, will necessarily grow. The EBU, aware of this trend, has set up an internal organisation named World DAB.
In France, digital radio is doing its utmost to attract listeners. The legal framework is the Law of 10 April 1996 on experimentation in the field of information technology and services (*loi du 10 avril 1996 relative aux expérimentations dans le domaine des technologies et services de l'information*) and the Law of 30 September 1986 on the freedom of communication (*loi du 30 septembre 1986 relative à la liberté de communication*). In 1997, a first experiment was launched in the Paris region. In a decision of 10 February 1998, the *Conseil supérieur de l'Audiovisuel* (the French media authority) announced the extension of this experiment to Lyon, Marseille, Nantes and Toulouse. This will be done by an invitation for applications to handle two sections, one of which could be on offer to the public sector and the other to private radios.

Decision No 98-34 of 10 February 1998 *relative à un appel aux candidatures pour un ensemble de services de radiodiffusion audionumérique par voie hertzienne.* Available in French via the Document Delivery Service of the Observatory.

(Bertrand Delcros,
Légipresse)

IRIS LEGAL OBSERVATIONS
OF THE EUROPEAN AUDIOVISUAL OBSERVATORY

News

Bulgaria: Broadcasting Act before Constitutional Court again

While the establishment of broadcasting regulations in Bulgaria looked extremely unlikely at the end of 1996 as a result of the Constitutional Court's judgment No 21 of 14.11.1996, which found that major, central aspects of the Radio and Television Act infringed the Constitution (*see* IRIS 1997-1: 10), there have been new developments which will at the very least delay the fundamental legal provision coming into force.
A group of Members of Parliament has applied to the Constitutional Court again for investigation of the constitutionality of a large number of provisions contained in last November's amendment of the Act. These concern once again provisions on the composition and appointment procedure for members of the National Broadcasting Council and generally the accusation of serious infringement of the requirements of the European Convention on Transfrontier Television, which Bulgaria ratified recently, although the instrument of ratification has not yet been deposited with the Secretary General of the Council of Europe so that the Convention will not yet enter into force for Bulgaria (*see* IRIS 1998-3: 9). The new version of the Act also excludes cable television operators from its scope of application for public and private organisers; the repeal of previous regulations also means that there are no conditions covering the licensing procedure and the competent licensing and supervisory authorities.
Last year the setting up of the Broadcasting Council gave rise to another case before the Constitutional Court; in July, the Court found the appointment of two directors contrary to the Constitution.

(Alexander Scheuer,
Institute of European Media Law - EMR,
Saarbrücken/Brussels)

Spain: More sanctions to Spanish broadcasters when infringing advertising rules

Despite the criticisms made by consumer groups and some newspapers which tried to prove that Law No 25/1994 on the implementation of the "Television without Frontiers" Directive was systematically being violated, between 1994 and 1997, there has been only one reported case in which a sanction was imposed for violating of the Spanish Law: in February 1995 the competent authority, the *Ministerio de Fomento* (Ministry of Development) gave a fine of 10 million pesetas (approx. 65.000 ECU) to *Antena 3* and *Tele 5* for exceeding the advertising time limits.
In 1997, the Government acknowledged these alleged infringements of the law publicly, by saying that if the broadcasters did not start respecting the Law by themselves, the Government would have to take measures. The European Commission, in its second report on the implementation of the Directive, which was presented in October 1997 (*see* IRIS 1997-10: 5), stated that the national authorities in some countries were not applying the Directive, and that this could lead to the opening of infringement proceedings before the Court of Justice of the European Communities. In a press release of the same day, the Commission indicated that Spain was among these countries (IP/97/913, of 24.10.1997).
Since then, the *Ministerio de Fomento* has changed its attitude. In January 1998, fines were imposed on all national broadcasters for infringement of the Spanish rules on the advertising of alcoholic beverages above 20° (Art. 8.5 Spanish Law on Advertising, No 34/1988, of 11 november 1988 - *see* IRIS 1998-2: 15). Now the Ministry has imposed new sanctions, this time for exceeding the advertising time limits, and also for new infringements of Art. 8.5 of the Spanish Advertising Law. The broadcasters fined are *Telecinco*, *Antena 3* and the two national public channels of *RTVE, TVE-1* and *La 2*. The level of the fines is in all cases, 10 million pesetas (approx. 65.000 ECU). The Ministry is currently studying alleged infringements of the advertising rules during the Christmas season.

(Alberto Pérez Gómez,
Departamento de Derecho Público,
Universidad Alcalá de Henares)

United Kingdom: Reduction of payments by UK Channel 4 to Independent Television Commission

An order is now in effect in the UK to reduce the payment made by the UK Channel 4 to the Independent Television Commission from its excess revenues from 50% to 33%. The payment is a remnant of the 'safety net' introduced to protect Channel 4 because of its special obligations to meet minority tastes by providing financial support if its advertising revenues fell below a specified figure. However, the Channel's commercial success has resulted in the reverse occurring with the Channel having to make payments rather than receiving support. The order is a partial step in remedying this.

Channel 4 (Application of Excess Revenues) Order 1997, SI 1997 3019. Available in English at http://www.hmso.gov.uk/si/si1997/97301901.htm.

(Tony Prosser,
School of Law,
University of Glasgow)

Germany: European Commission finds cable occupation regulations contrary to Community law

As early as 1995 the European Commission spoke out against the procedure introduced by the Federal Republic of Germany, as it felt that foreign television organisers were being prevented from retransmitting their channels by the regulations operative in a number of Federal *Länder* on the occupation of space available on broad-band cable. The Commission held this to be an infringement of the freedom to provide services contained in Article 59 of the EC Treaty in that the reference to specific characteristics constituted camouflaged discrimination.
In January 1996 the Federal Government then responded to the complaint with the opinion that the purpose of the disputed requirements - particularly in the context of the duties allocated to the legislator by the Federal Constitutional Court - was to ensure an overall offer providing for the plurality of opinion in broadcasting. While the priority given to domestic channels was connected with the guarantee of the formation of a free, individual, public opinion and plurality of opinion, it was also linked to the core area of the cultural and social function of broadcasting. Provided such connections took account of the organisation of German-language channels or reporting on political, economic, social and cultural affairs in the Federal *Länder*, there was no infringement of the basic freedom contained in the Treaty. Even as regards regulations, which included among the legally specified organisers - and thus given priority for broadcasting - those which were authorised to broadcast out of one of the *Länder* because that was its place of origin, the Treaty was not being infringed as this provision could also be applied to organisers based in another of the Federal *Länder*, so there was no connection with specific nationality.
DG XV (the Directorate-General for the Internal Market) however holds the view that in the case of the characteristic of a "German-language channel" there is no obvious connection between the language used in the medium and the possible contribution to the plurality of opinion, but that in nearly all the Federal *Länder* concerned up to nine public-sector channels were being retransmitted, enjoying priority and making a considerable contribution to the plurality of opinion. Although the Commission acknowledges in principle the aim pursued in its recognition of the importance of the general interest, it rejects the relative nature of the measure.
Moreover, the Commission holds the view that making licensing in the Federal *Länder* dependent on the operator having its headquarters, main administrative offices, most of its editorial offices and its technical department and studios there could have the result of obliging foreign operators to comply with the relevant local legislation as well as the provisions applicable in the Member State to which they belong.
This would mean - observing the criteria referred to in connection with the re-drafting of Article 2 of the revised "Television without Frontiers" Directive (Directive 97/36/EC) - that they would need to set up a subsidiary, thereby negating the freedom to provide services.
The Federal Government now has until mid-April to adopt its position on the questions raised.

(Alexander Scheuer,
Institute of European Media Law - EMR,
Saarbrücken/Brussels)

Germany: European Commission expresses doubts on merger of companies for digital pay-TV

The European Commission's DG IV (the Directorate-General concerned with competition) has expressed doubts on the merger of the German pay-TV broadcaster *Premiere* (*Bertelsmann AG/CLT-UFA*) and *DF1* (*Kirch Group*) in consultation with *Deutsche Telekom* (*see* IRIS 1998-1: 14).
The intended alliance for the purposes of digital pay-TV infringes the investigation principle of Council Regulation (EEC) No 4064/89 on the control of concentrations between undertakings in respect of cartel and competition law. It was thought that there was a danger of the market opportunities of private cable network operators and the creation of a free cable market being influenced, as the development of separate, new digital programme offers might be hindered by Telekom's market leadership, in particular as regards offers on cable networks.
Concerning the mergers between *Bertelsmann* and the *Kirch Group*, doubts were expressed about the possibility of a monopoly being created. The European Commission was critical of the possible development of the broadcasters *RTL*, *SAT.1* and *ProSieben*, previously received on non-paying TV, being able to take advantage of their competitive situation to put lucrative films and sport coverage into *Premiere*'s digital pay-TV programme as jointly created, thereby withdrawing them from non-paying reception. There was criticism of the possibility of preferential treatment in the purchasing and distribution of programme rights. The EU also found fault with the fact that the intended introduction of the digital decoder (D-box) was no guarantee of non-discriminatory access for programme offerers or of a developing market for equipment manufacturers. The European Commission intends to reach a decision on the digital pay-TV merger by May.

(Wolfgang Cloß,
Institute of European Media Law - EMR,
Saarbrücken/Brussels)

Germany: Minister Presidents reach agreement on "Sports List"

The agenda for the Conference of Minister Presidents of the *Länder* held in Berlin mid-March included a number of items concerning broadcasting legislation and the transformation of the broadcasting regulations into a fourth version of the Agreement between the Federal States on Broadcasting (*see* IRIS 1998-3: 10). The only item on which a consensus was reached was the drafting of a list of important social events which must be shown on television freely accessible to all (*see* IRIS 1998-2: 12). The Minister Presidents are seeking the transposition of Article 3a of the revised Television without Frontiers Directive (Directive 97/36/EC - *see* IRIS 1997-7: 6) into Section 5a of the new Agreement between the Federal States on Broadcasting adding to the list of events to be shown on freely accessible television the finals of the football European Cups if a German team is playing. It has also been decided that Germany will not adopt the method used by other Member States which include a host of other sports as well as football in the list and seek to include cultural events as well.
The *Länder* agreed to set up a working party on the other changes to the Agreement between the Federal States; the group would produce procedural proposals in May, for the Minister Presidents to decide on in early June.

(Alexander Scheuer,
Institute of European Media Law - EMR,
Saarbrücken/Brussels)

United Kingdom: Govenorships for the BBC are publicly advertised

For the first time ever, press advertisements will invite applications for Governorships for the British Broadcasting Corporation. This reflects the Secretary of State's desire to widen the pool from which potential Governors can be chosen. The first adverts, to appear from 1 March 1998, will relate to the positions of Vice-Chairman and two Governors (one of whom will chair the English National Forum). The appointments are for four-year terms.

(David Goldberg,
IMPS-School of Law,
University of Glasgow)

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AGENDA

EMR-Expertengespräch: Rundfunk-föderalismus – Programmvielfalt und funktionsgerechte Finanzausstattung
7 May 1998, 3pm - 7pm
Venue: Maritim Hotel, Bonn, Deutschland
Information & Registration:
Tel: +49/ (0) 681/51187
Fax: +49/ (0) 681/51791

XII th Conference on International Audiovisual law What happens when contracts go wrong ?
15 & 16 May 1998
Organiser: International Chamber of Commerce, International Bar Association
Venue: Palais des Festivals, Cannes
Information & Registration:
Tel: +33 (0)1 49 53 28 91
Fax: +33 (0)1 49 53 29 42
E-mail: conf@iccwbo.org

Les citoyens et l'avenir de la radiotélévision publique
18 & 19 mai 1998
Organiser: Le Conseil mondial pour la radiotélévision et les associations allemandes pour la promotion de la radiotélévision publique
Venue: Locaux de la Deutsche Welle
Information & Registration:
Tel: +41 21 808 5704
Fax: +41 21 808 6677
E-mail: h.bujard@sefanet.ch

EMR-Expertengespräch: Digital Audio Broadcasting – Aktuelle Bestandsaufnahme und zukünftige Entwicklung
28. Mai 1998, 9am - 5pm
Venue: Saarbrücken, Deutschland
Information & Registration:
Tel: +49/ (0) 681/51187
Fax: +49/ (0) 681/51791

Community Law and Telecommunication and Broadcasting Networks: Legal Protection of Companies and Users in the Information Society
4 & 5 June 1998
Organisers: Academy of European Law Trier and Catholic University of Louvain
Venue: Hôtel de Lyon Métropole, Lyon, France
Information & Registration:
Tel: +49/ (0) 651 147 1023
Fax: +49/ (0) 651 147 1020
E-mail: eratrier@msn.com