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OECD

Report on Role of Government Assistance in Broadband Infrastructure Deployment

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A recently-released Working Paper of the Organisation for Economic Co-operation and Development (OECD) examines the role of government assistance in broadband infrastructure deployment. The Working Paper combs through existing broadband technologies, before exploring and gauging government initiatives for broadband infrastructure deployment and proposing viable initiatives for the future.

A central thesis of the Working Paper is that competition fosters the spread and development of new technologies. Viewed through such a prism, government assistance should only occur when necessary and within a tight framework designed to limit possible distortions of the market. Government involvement should not, for instance, have the effect of reinforcing the dominant position of incumbents. Conversely, there is a certain onus on governments to remove unnecessary regulatory measures with the potential to restrict market-entry. As stated in the Conclusion of the Working Paper: "Care must be taken that government initiatives do not distort market incentives. Aggregation of traffic policies may be the most useful to develop competing infrastructures. In areas where it has become fairly clear that there will be no private investment, or that it can be a long time coming, assistance should be used in such a way as to promote market competition." ■

"Broadband Infrastructure Deployment: The Role of Government Assistance", Directorate for Science, Technology and Industry, Organisation for Economic Co-operation and Development, Working Paper by Atsushi Umino of 22 May 2002, Doc. No. DSTI/DOC(2002)15, available at:
http://www.olis.oecd.org/olis/2002doc.nsf/43bb6130e5e86e5fc12569fa005d004c/42158ef983225772c1256bc100560c01/$FILE/JT00126526.PDF

EN

COUNCIL OF EUROPE

European Court of Human Rights: Friendly Settlement in Altan v. Turkey

Since 1998, the European Court of Human Rights has come to the conclusion that there has been a violation of freedom of (political) expression in Turkey in more than 15 cases. All of these cases concerned the criminal convictions of journalists, editors, publishers, writers, lawyers, politicians or human rights activists for infringement of Articles 159 or 312 of the Criminal Code or of Articles 6-8 of the Prevention of Terrorism Act, nr. 3712. In all of these cases, the applicants were convicted in Turkey for inciting the people to hatred and hostility based on distinctions of race or religion, or for undermining territorial integrity and the unity of the nation. The Strasbourg Court, however, considered these convictions to be violations of Article 10 of the European Con-

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vention, as they failed to give due recognition to the importance of freedom of critical and political speech in a democratic society (see IRIS 1999-8: 4, IRIS 2000-4: 2, IRIS 2000-7: 2, IRIS 2000-8: 2, IRIS 2000-10: 3 and IRIS 2002-3: 2). On several occasions, the Committee of Ministers has requested the Turkish authorities to bring their legislation and jurisprudence into conformity with the case-law of the European Court of Human Rights.

In a judgment of 14 May 2002, the Court has now enacted a friendly settlement between a Turkish applicant and the Turkish Government in a case in which freedom of political expression was also at stake. Ahmet Hüsrev Altan, who is a writer and journalist for the national daily, *Milliyet*, was given a suspended sentence of one year and eight months' imprisonment and a fine of TRL 500,000 by the National Security Court in 1995, for incitement to hatred and hostility on the basis of a distinction based on membership of a race or a religion. Relying on Article 10, he complained in Strasbourg of an infringement of his right to freedom of expression. The Turkish authorities have now recognised that steps have to be taken at the domestic level in order to guarantee freedom of expression according to Article 10 of the Convention. Before the Court, the Turkish Government made the following statement: "The Court's rulings against Turkey in cases involving prosecutions under Article 312 of the Penal Code or under the provisions of the Prevention of Terrorism Act clearly show that Turkish law and practice urgently need to be brought into line with the Convention's requirements under Article 10 of the Convention. This is also reflected in the interference underlying the facts of the present case. The Government undertake to this end to implement all necessary reform of domestic law and practice in this area, as already outlined in the National Programme of 24 March 2001."

Referring to this commitment, the Court has decided to strike out the case following the friendly settlement in which the applicant is to be paid EUR 4,573.47 for any pecuniary damages and for costs and expenses incurred. ■

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Judgment (Friendly settlement) of the European Court of Human Rights (Former First Section), Case of Altan v. Turkey, Application no. 32985/96 of 14 May 2002, available at: http://www.echr.coe.int

FR

European Court of Human Rights: Case of McVicar v. the United Kingdom

In a judgment of 7 May 2002, the European Court of Human Rights ruled in a case in which the defamation of a well-known sports figure was the central issue. In September 1995, an article was published in the magazine, *Spiked*, in which the journalist John McVicar suggested that the athlete Linford Christie used banned performance-enhancing drugs. Mr. Christie brought an action in the High Court for defamation against McVicar. For the greater part of the proceedings, McVicar represented himself as he could not afford to pay legal fees because of the non-availability of legal aid for defamation actions. His defence was that the allegations made in the article were true in substance and in fact. The trial judge, however, refused to admit the evidence of two witnesses upon which McVicar wished to rely. The judge found that to allow both witnesses to give evidence would have been unfair to Mr. Christie as he would not have had time to call counter-evidence and further, he would only have been made aware of the details about his alleged drug-taking when the witnesses would have taken the stand. In 1998, the jury found that the article contained defamatory allegations and found that McVicar had not proved that the article was substantially true. McVicar was ordered to pay costs and was made the subject of an injunction preventing him from repeating the allegations.

McVicar lodged an application with the European Court alleging that the inability of a defendant in a libel action to claim legal aid constituted a violation of Articles 6 para. 1 (fair trial) and 10 (freedom of expression and information) of the European Convention on Human Rights. He also submitted that the exclusion of witness evidence at a trial, as well as the burden of proof which he faced in pleading a defence of justification, the order for costs and the injunction restricting future publication further violated Article 10 of the Convention.

The European Court was of the opinion that McVicar was not prevented from presenting his defence to the defamation action effectively in the High Court, nor that the proceedings were unfair by reason of his ineligibility for legal aid. The Court noted, *inter alia*, that the applicant was a well-educated and experienced journalist who would have been capable of formulating a cogent argument before the Court. Therefore, there had been no violation of Article 6 or of Article 10 of the Convention.

As for the exclusion of evidence, the order to pay the costs arising from the defamation proceedings and the injunction measure, the Court held that there had been no violation of Article 10 either. The Court considered the potential consequences of the allegations made in the article for an individual who had achieved fame and fortune purely as a result of his athletic achievements to be very grave. The Court also emphasised that the offending article in itself made no mention of any authoritative basis for the drug-taking allegation. For those reasons, the Court held unanimously that there had been no violation of Article 10 of the Convention either. ■

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Judgment of the European Court of Human Rights (First Section), Case of McVicar v. the United Kingdom, Application no. 46311/99 of 7 May 2002, available at: http://www.echr.coe.int

EN

European Commission against Racism and Intolerance: Media Provisions in Annual Report

The European Commission against Racism and Intolerance (ECRI) recently published its Annual Report for the year 2001. One of the "main trends" identified in the Report as meriting priority attention from ECRI in the future is the use of new technologies of mass communication, in particular the Internet, for the dissemination of racist material. In this connection, ECRI expresses its hope that the First Additional Protocol to the Council of Europe's Convention on Cybercrime (see IRIS 2001-5: 3, IRIS 2001-7: 2, IRIS 2001-9: 4, IRIS 2001-10: 3, IRIS 2002-1: 3 and IRIS 2002-3: 3) will be drafted imminently.

In the same vein, the Report also recalls ECRI's General Policy Recommendation No. 6: "Combating the dissemination of racist, xenophobic and anti-Semitic materiel via the internet" (sic). This Recommendation urges the governments of Member States, *inter alia*, to ensure that the perpetrators of racist, xenophobic and anti-Semitic

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offences committed via the Internet are subject to the same national legislation as the perpetrators of such offences committed in the off-line world and that they are pursued with equal vigour by the relevant law-enforcement authorities. The Recommendation also encourages governments to support a variety of self-regulatory measures introduced and promoted by the Internet industry to combat online racism (eg. hotlines, codes of conduct and filtering software).

ECRI is a body of the Council of Europe that is committed to the advancement of the struggle against racism, xenophobia, anti-Semitism and other forms of intolerance in Europe. Its work can be divided into three main categories: a country-by-country approach (which involves the compilation and publication of individual country reports); work on general themes and engagement with civil society. This categorisation is also reflected in the structural division of its latest annual report. ■

Annual Report on ECRI's activities covering the period from 1 January to 31 December 2001, European Commission against Racism and Intolerance, 29 May 2002, CRI (2002) 19, available at:
http://www.coe.int/t/E/human_rights/ecri/1-ECRI/1-Presentation_of_ECRI/4-Annual_Report_2001/CRI%20(2002)%2019-1.pdf
General Policy Recommendation No. 6: "Combating the dissemination of racist, xenophobic and antisemitic materiel via the internet" (sic), European Commission against Racism and Intolerance, 15 December 2000, CRI (2001) 1, available at:
http://www.coe.int/T/E/human_rights/Ecri/1-ECRI/3-General_themes/1-Policy_Recommendations/Recommendation_N%B06/Rec%206%20en-7.pdf

EN-FR

EUROPEAN UNION

European Council: Adoption of "eEurope 2005" Action Plan

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The principal aim of the Action Plan, "*e*Europe 2005: An information society for all", adopted at the Seville European Council in June 2002, is to "stimulate secure services, applications and content based on a widely available broadband infrastructure". It will succeed the "*e*Europe 2002" Action Plan approved at the Feira European Council in June 2000 (see IRIS 2000-6: 5).

One of the key differences between the *e*Europe 2002 (see also IRIS 2001-7: 4-5) and the *e*Europe 2005 Action Plans is that the former concentrates on fostering the growth of Internet connectivity throughout Europe, whereas the latter will seek to build on the achievements of the former and thereby strive for greater economic productivity and greater accessibility of services.

It is hoped that the new Action Plan will be instrumental in realising a number of specific goals by 2005. Among these targets is the securing of: modern online public services (such as e-government, e-learning services and e-health services); a dynamic e-business environment; widespread availability of broadband access at competitive prices and a secure information infrastructure.

As for the methods to be applied, the promotion of good practices will be of central importance. As with the *e*Europe 2002 Action Plan, a benchmarking exercise will be undertaken. Much reliance will also be placed on relevant policy coordination at the European and national levels.

The immediate background to the present Communication and Action Plan can be traced back to March 2002 and the Barcelona European Council's call on the European Commission to draw up such a plan which would focus on: "the widespread availability and use of broadband networks throughout the Union by 2005 and the development of Internet protocol IPv6.… and the security of networks and information, *e*Government, *e*Learning, *e*Health and *e*Business". ■

"eEurope 2005: Taking the EU Information Society to next level", Press Release of the European Commission of 29 May 2002, IP/02/768, available at:
http://europa.eu.int/rapid/start/cgi/guesten.ksh?p_action.gettxt=gt&doc=IP/02/768|0|RAPID&lg=EN&display=

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"eEurope 2005: An information society for all", Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions, COM(2002) 263 final, available at:
http://europa.eu.int/information_society/eeurope/news_library/eeurope2005/index_en.htm

DA-DE-EN-ES-FI-FR-IT-PT-SV

European Parliament/Council of the European Union – Regulation on .eu Top Level Domain

On 22 April, the European Parliament and the Council of the European Union adopted Regulation No. 733/2002 on the implementation of the .eu Top Level Domain. From the perspective of the e-Europe initiative, this is viewed as a development which should lend further impetus to the advancement of electronic commerce.

The principal purpose of the Regulation is to implement the .eu country code Top Level Domain (ccTLD) within the European Union. To this end, it establishes the conditions of implementation and the general policy framework to underpin registration and related matters. This framework is coloured by public policy concerns and the specific rules are to be adopted by the European Commission. They will deal with, *inter alia*, an extra-judicial settlement of conflicts policy; the speculative and abusive registration of domain names; the possible revocation of domain names; issues of language and geographical concepts and the role of intellectual property and other rights.

The Regulation provides for a three-month period, effective from the date of its entry into force (i.e., 30 April 2002, the date of its publication in the Official Journal of the European Communities), during which Member States may notify the Commission and other Member States of "a limited list of broadly-recognised names with regard to geographical and/or geopolitical

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concepts which affect their political or territorial organisation" that may not be registered or may only be registered under a second-level domain name. The Commission will subsequently compile a list of notified names to which these criteria are to apply and communicate the list simultaneously to the Registry created by this Regulation and to Member States. The procedure for objecting to inclusions or omissions concerning the list of notified names is also set out in the Regulation.

According to the preambular section of the Regulation, the advent of the .eu TLD should ensure increased prominence on the Internet for the European Union, its activities and the Internal Market which it comprises. ■

Regulation (EC) No. 733/2002 of the European Parliament and of the Council of 22 April 2002 on the implementation of the .eu Top Level Domain (Text with EEA relevance), Official Journal of the European Communities L113/1, 30 April 2002, available at: http://europa.eu.int/eur-lex/en/oj/2002/l_11320020430en.html

DA-DE-EL-EN-ES-FI-FR-IT-NL-PT-SV

Council of the European Union: Resolution on Preservation of Digital Content

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In May, the Council of the European Union "recorded its agreement" on a Resolution on "Preserving tomorrow's memory – preserving digital content for future generations", pending the finalisation of the text of the Resolution.

The Resolution draws attention to the growing importance to contemporary society of the production and storing of information in digital form. It recognises the need for coordinated efforts to preserve digital content, in particular by specialised centres of knowledge such as archive collections, libraries and museums, for fear that the pace of technological change and other factors would adversely affect the longevity of such content, thus depriving future generations of the benefits of its exploitation.

The main proposals of the Resolution are three-fold. The first involves "stimulating the development of policies for preserving digital culture and heritage, as well as their accessibility". This could be achieved through the promotion of inter-State cooperative frameworks and mechanisms, which would allow for the organisation of coordinated initiatives as well as exchanges of information on policies, programmes and other issues of relevance. The need to support repositories for digital content was stressed, as was the importance of developing the organisational and technical foundations on which they rest.

The second main proposal of the Resolution involves awareness-raising and information-exchange. It also includes the adoption of appropriate standards. The third proposal is financial in character, and concerns models of investment (in particular, synergies between public and private funding) and questions of cost-effectiveness.

This Resolution is redolent of Council Resolution of 21 January 2002 on culture and the knowledge society and the earlier Resolution is referred to in its preambular section. ■

Council Resolution on "Preserving tomorrow's memory – preserving digital content for future generations", 8 June 2002, available at: http://multimedia.ue2002.es/infografiasActualidad/20020523/1879Ing.pdf
2427th Council Meeting (Culture/Audiovisual Affairs), Brussels, 23 May 2002, available at: http://ue.eu.int/pressData/en/cult/70787.pdf

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Council Resolution of 21 January 2002 on culture and the knowledge society, Official Journal of the European Communities C 32/1, 5 February 2002, available at: http://europa.eu.int/eur-lex/en/archive/2002/c_03220020205en.html

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European Commission: New UEFA Policy for Selling Champions League Media Rights to Be Approved

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The European Commission is set to approve the draft new rules of UEFA (the Union of European Football Associations) concerning the sale of broadcasting and related media rights to the Champions League.

The Commission had objected to the current rules, which had been notified for regulatory clearance, for the reason that competition would be distorted and that media concentration would be facilitated (see IRIS 2001-8: 5). The rules consist in the selling by UEFA of all the free and pay-TV rights to the Champions League on an exclusive basis to a single broadcaster per territory for a period of three or four years.

The fact is that the only broadcasters which can afford to purchase the bundled rights are the large media concerns, which are generally the dominant parties in the market. Apart from the restriction of competition, the joint selling can also lead to a delay in the use of new technologies since these big parties are not always eager to promote new techniques of image and sound transmission.

Under the new rules, UEFA will sell the rights in a number of packages for shorter periods of time and additionally, the individual football clubs will be able to provide new media services to their fans. Furthermore, UEFA will retain the right to sell the rights to live transmissions of the main matches, but if they fail to do so, the individual clubs in question will be given the opportunity to sell their matches separately. Unlike the existing situation, all of the media rights will be offered on the market, including the Internet and UMTS (Universal Mobile Telecommunications System) rights, which have not been exploited so far. As a result, a greater number of broadcasting companies (both radio and television), as well as Internet providers and UMTS operators, will have the opportunity to exploit the Champions League media rights.

The new joint-selling agreement will start with the 2003/2004 football season. ■

"Commission welcomes UEFA's new policy for selling the media rights to the Champions League", Press Release of the European Commission of 3 June 2002, IP/02/806, available at: http://europa.eu.int/rapid/start/cgi/guesten.ksh?p_action.gettxt=gt&doc=IP/02/806|0|RAPID&lg=EN

DA-DE-EN-ES-FI-FR-IT-NL-PT

"'Historic' TV rights agreement", Press Release of the Union of European Football Associations of 3 June 2002, available at: http://www.uefa.com/uefa/news/Kind=8192/newsId=25426.html

EN

European Commission: Proposed Directive on Re-use and Commercial Exploitation of Public Sector Information

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On 5 June 2002, the European Commission presented a proposal for a Directive on the re-use and commercial exploitation of public sector documents. The Commission recognises the development towards an information society in which digital content plays a predominant role. The information collected, processed and distributed by public sector bodies has considerable potential: it has great economic value from which both citizens and businesses can derive much benefit.

The general principle of the proposed Directive is that where public sector bodies allow the re-use of documents that are generally accessible, these documents shall be re-usable for commercial or non-commercial purposes. If and when adopted, the Directive shall apply to all documents ("any content whatever its medium") that are "generally accessible". This means that, for example, documents to which third parties hold intellectual property rights or documents containing personal data, will not be affected by this Directive.

Member States must guarantee transparency and non-discrimination with regard to costs and other conditions for re-use. Additionally, the re-use of information must be open to all potential actors in the market and there will be a prohibition on exclusive arrangements between the public sector bodies holding the documents and third parties, whenever such arrangements would amount to "an unjustified restriction of competition or the re-use of the information". Furthermore, public sector bodies are obliged, where possible and appropriate, to make their documents electronically available in any pre-existing format or language.

Requests to public sector bodies for re-use must be treated within a reasonable time which will be, in case of absence of a specific time-limit, within three weeks. If any charges are exacted, the income from the re-use of these documents shall not exceed the cost of (re)producing or distributing them, together with an acceptable return on investment.

The certainty and transparency which the Directive creates will, in the Commission's opinion, help to make the establishment of European information services based on public sector information possible. Besides that, the Directive will improve an effective cross-border use of public sector information by private companies for added-value information products and services and will restrict distortions of competition on the European market. ■

Proposal for a European Parliament and Council Directive on the re-use and commercial exploitation of public sector documents (presented by the Commission), 5 June 2002, COM (2002) 207 provisional version, available at:
ftp://ftp.cordis.lu/pub/econtent/docs/public_sector_proposal_for_directive_en.pdf
DE-EN-FR

European Parliament: Directive on Data Protection for Electronic Communication

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On 30 May 2002, the European Parliament voted to accept a compromise on the proposed Directive concerning the processing of personal data and the protection of privacy in the electronic communications sector. The compromise had been negotiated between the Spanish Presidency of the European Union, the European Commission and the European Parliament. The formal adoption of the proposed Directive will take place in the next few months and is expected to take effect by the end of the year.

The proposed Directive aims to ensure that consumers and users obtain the same level of protection for their personal data and privacy, regardless of the technology used for the transmission of their electronic communications. It will replace Directive 97/66/EC concerning the processing of personal data and the protection of privacy in the telecommunications sector, which was adopted by the European Parliament and the Council on 15 December 1997. It will adapt and update the existing provisions to take account of new and foreseeable developments in electronic communications services and technologies.

By adopting the proposed Directive, the European Union will set a major precedent with its harmonised "opt-in" approach to unsolicited commercial e-mail, SMS messages and other electronic messages received on a mobile or fixed terminal. Further, a right is created for citizens to decide whether or not their phone numbers (mobile or fixed), e-mail addresses and physical addresses will feature in public directories.

Users of mobile electronic communication services are given the right of explicit consent for the use of privacy-sensitive location data indicating their exact whereabouts and besides that, these users should have the possibility to temporarily block the processing of the location data at any time. Invisible tracking devices for gathering information on Internet users (eg. cookies) may only be used if sufficient information about the purposes of such tools is supplied to the users. Internet users should also have the option of rejecting such tracking devices ("opt-out").

The retention of traffic data for law enforcement purposes is the subject of a newly worded section of the text that increases the human rights safeguards that must go along with national measures. Legally-binding provisions that would allow or prevent these measures are, however, not within the scope of the proposed Directive. ■

"Commission welcomes European Parliament's vote to accept directive on data protection rules for electronic communications sector", Press Release of the European Commission of 30 May 2002, IP/02/783, available at:
http://europa.eu.int/rapid/start/cgi/guesten.ksh?p_action.gettxt=gt&doc=IP/02/783|0|RAPID&lg=EN
DE-EN-FR

Proposal for a Directive of the European Parliament and of the Council concerning the processing of personal data and the protection of privacy in the electronic communications sector COM(2000) 385 and its legislative history, available at:
http://europa.eu.int/prelex/detail_dossier_real.cfm?CL=en&DosId=158278
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EPRA

Overview of 15th Meeting

On 16 and 17 May 2002, the 15th meeting of the European Platform of Regulatory Authorities (EPRA) took place in Brussels. The meeting, which was hosted jointly by the Belgian *Conseil supérieur de l'audiovisuel de la Communauté française* (CSA) and the *Vlaams Commissariaat voor de Media* (the regulatory authorities of the French and Flemish speaking Communities), attracted a total of 119 participants from 35 countries. 45 regulatory

authorities were represented and were joined by observers from the Council of Europe and the European Commission.

Since its last meeting in September 2001 (see IRIS 2001-10: 3), EPRA membership has remained stable with 42 regulatory authorities.

The plenary session focused on the (direct and indirect) influence of politics on broadcasting. Professor Ian Hargreaves, from the University of Cardiff, opened the session by providing a detailed analysis of the very complex and fluctuating relationship between politics and broadcasting. He illustrated his analysis by commenting on some current manifestations of political influence on television in Italy, France, the United Kingdom, and Germany. This stimulating presentation was followed by a lively debate between the participants during which the modes of appointment of members of regulatory authorities, the rules regarding conflicts of interest and the issue of accountability were recurring themes. Some participants also emphasized that broadcasting content was much less endangered by politics than economics.

Thereafter the participants split into two working groups that met simultaneously to discuss, on the one hand, digital terrestrial television (DTT) and, on the other hand, advertisement and programme windows.

The working group on DTT opened with a presentation by Mr Olof Hultén from *Sveriges Television* (Swedish Television – SVT), on the current challenges of DTT for viewers, traditional broadcasters and national governments. He characterised the present and medium term perspective on the conversion to digital television in Europe as rather chaotic and uncertain, due to a lack of consultation with the viewers and a lax attitude on the part of engineers and politicians. Still, he considered that DTT was a good idea in the long run. As an illustration of the topic, Ms Lisa di Feliciantonio, from the AGCOM, briefly introduced the main features of the DTT regulatory framework in Italy. During the course of the discussion, DTT pioneers, i.e. the UK, Sweden, Spain and Finland, shared their experience with representatives from other countries about to launch DTT. The lack of realism of many switch-off dates set by national governments was also emphasized.

In the second working group, Ms Évelyne Lentzen, President of the Belgian CSA, presented different scenarios of cross-border advertisement and programme windows currently existing in Europe. The examples ranged from programmes transmitted in their entirety though a different language version, pan-European channels transporting different advertisement messages for each receiving state, advertisements transmitted from a neighbouring country but originating in a third country and exclusively targeting the receiving state, programmes especially made for and transmitted into a single target country etc. An intense discussion centered on the question whether the Convention on Tranfrontier Television should, if it does not do so already, protect smaller countries against the loss of audience share and advertisement revenues resulting from programme windows transmitted by broadcasters licenced in significantly larger neighbouring countries. The point was illustrated with the example of the Swiss advertising window of M6, a French broadcaster, exclusively targeting the French-speaking part of Switzerland. Currently, the French *Conseil d'Etat* is reviewing the compatibility of the French licence under which M6 operates with Article 16 of the Convention.

The meeting was rounded off by two reports on current developments in European media policy given by representatives of the Council of Europe (Media Division) and the European Commission (DG Education and Culture and DG Internal Market).

EPRA will hold its next meeting on 24 and 25 October 2002 in Ljubljana upon the joint invitation of the Slovenian Broadcasting Council and the Broadcasting Agency of the Republic of Slovenia. ■

Emmanuelle Machet
Secretary to EPRA
&
Susanne Nikoltchev
European Audiovisual Observatory

Background Papers of the 15th EPRA Meeting, held in Brussels on 16-17 May 2002 can be found on the public domain of the EPRA site at http://www.epra.org/content/english/press/back.html

EN-FR

NATIONAL

BROADCASTING

CH – Dispute Between *Cablecom* and *Teleclub*

As part of *Swisscable*, the umbrella association of Swiss cable operators, *Cablecom* is offering its customers its own set-top box so that they can receive the digital TV package *Swissfun* and the new *Cablecom Digital Cinema* service. Another digital pay-TV provider, *Teleclub AG*, is also offering its clients its own set-top box so that they can receive its programmes. After the Swiss *Bundesrat* (Council of Ministers), in a decision of 5 June 2001, banned *Teleclub AG's* proprietary set-top box for its pay-TV service and demanded an open standard (see IRIS 2001-7: 7), *Teleclub* is now giving its subscribers the box free of charge.

The use of these two set-top boxes is now being fiercely disputed. *Cablecom*, Switzerland's largest cable operator, is refusing to include *Teleclub's* digital channels in its cable network and is demanding that *Teleclub* integrate its complete service into the digital TV platform *Swissfun* (NB using *Cablecom's* own set-top box). For its part, *Teleclub* is arguing that *Cablecom* customers could receive the channels using *Teleclub's* own set-top box, since *Teleclub* is offering these customers the appropriate Conditional Access Module (CA) free of charge. The dispute had not been resolved at the time of going to press. In the meantime, *Teleclub AG* has also lodged a complaint with the Swiss Competition Commission, alleging restraint of trade; no decision has yet been taken. ■

Oliver Sidler
Lawyer, Zug

CH – Largest Swiss Cable Operator Granted Digital TV Licence

Cablecom GmbH has been given the green light to proceed with its plans for digital television in Switzerland. The *Bundesrat* (Council of Ministers) has granted Switzerland's largest cable operator a national TV licence for the provision of pay-TV.

Cablecom plans to set up an encrypted digital TV service known as *Cablecom Digital Cinema*, which will be offered to cable customers for an additional payment. A key feature of the package is a so-called Near-Video-on-

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Lawyer, Zug

Demand service, whereby feature films in particular are broadcast simultaneously on several different channels. Since the start times are staggered, customers can tune in to the service whenever is convenient for them. The service is provided on a pay-per-view basis, ie customers pay for what they actually watch.

However, in order to guarantee diversity in the cable networks, the Government has laid down various conditions in *Cablecom's* licence and has also demanded that it promote Swiss films. In the licence, the *Bundesrat* has also taken account of the fact that Switzerland's largest network operator (with a 50% market share) will now also become a content-provider. In order to ensure a certain level of diversity in television, *Cablecom* may, for example, use no more than 10% of its network capacity for its own programmes. A series of provisions relating to the set-top box should ensure that market conditions are fair for other providers. ■

Press release of the Bundesrat (Council of Ministers), available at: http://www.admin.ch/cp/d/3d197f61_1@fwsrvg.bfi.admin.ch.html

DE-FR-IT

DE – Professional Football Clubs Entitled To Radio Reporting Fee

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In a first instance ruling of 26 April, the *Landgericht Hamburg* (Hamburg District Court) decided that professional football clubs are entitled to charge radio broadcasters who report live or otherwise from their stadia. The private radio broadcaster *Radio Hamburg* therefore lost a test case in which it had claimed that the clubs had no transferable or exploitable "radio rights".

On the contrary, the Hamburg District Court ruled that the clubs were entitled to control reporting from their respective stadia independently and that they therefore owned a commercial good which they were free to exploit. However, these rights were not directly derived from Article 1 of the *UWG* (Act against Unfair Competition) nor from the right to an established commercial enterprise, protected by Art. 823 of the *BGB* (Civil Code). Rather, they were part of the clubs' rights as "householders" over their own premises. The purchase of a match ticket alone could not entitle the holder to report from the stadium concerned, since radio reporters exploited football matches to a far greater extent than normal spectators, in particular in order to enhance the programme of the broadcaster for whom they worked. Therefore, football match organisers were entitled, as part of their rights as "householders", to demand a fee for allowing live or other kinds of reporting, above and beyond the simple reimbursement of costs. Match organisers could also prevent reporters who refused to pay such a fee from carrying out such activities.

In the Court's view, the radio broadcaster could not rely on the right to free reporting, protected by Article 5.1.2 of the *Grundgesetz* (Basic Law - *GG*), because this conflicted not only with the organiser's rights as "householder", but also with the freedom to choose an occupation, enshrined in Article 12 of the Basic Law. The organisers of professional football were dependent on revenue from the sale of broadcasting rights.

Radio Hamburg intends to appeal. ■

Ruling of the *Landgericht Hamburg* (Hamburg District Court), 26.4.2002 (case no. 308 O 415/01)

DE

DE – *ARD* Exempted From Digital Broadcasting By Cologne Administrative Court

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In a judgment of 4 June 2002, the *Verwaltungsgericht (VG) Köln* (Cologne Administrative Court) refused to issue a temporary order against broadcaster *ARD*, under which the latter would have been obliged to broadcast the football World Cup digitally via satellite.

The Kirch Group had sold some of the broadcasting rights for the 2002 football World Cup in Germany to public service broadcasters *ARD* and *ZDF*. According to the contract, these rights only covered digital satellite broadcasting if it did not breach the exclusive broadcasting rights of licence-holders in other countries. However, satellite broadcasts could also be received in other European countries (see IRIS 2002-4: 6). The Kirch Group subsequently offered to purchase the digital satellite broadcasting rights and transfer them to the broadcasters concerned. However, it demanded immunity from any compensation claims made by foreign licence-holders. *ARD* and *ZDF* refused to take on such a risk, so in the end the 2002 World Cup was broadcast via satellite in analogue format only and not digitally. Viewers with a digital satellite set-top box could not watch the World Cup.

By means of a temporary order issued under the terms of Art. 123.1.2 of the *Verwaltungsgerichtsordnung* (Rules of the Administrative Court - *VwGO*), one such viewer hoped to force *ARD* to broadcast the World Cup digitally. The Court began by considering whether a right to view broadcasts of certain sports events could be claimed under the right to freedom of information protected by Article 5 of the Basic Law. However, it thought this was irrelevant, since *ARD* had neither acquired the digital satellite broadcasting rights, nor had it been obliged to do so. Rather, as a public service broadcaster, it had to make do with revenue from licence fees. It had therefore been under no obligation to grant the Kirch Group immunity from paying compensation claims by foreign licence-holders. This was particularly true because the number of households with digital satellite receivers was small in relation to the overall number of households with television.

The Court also ruled that the principle of equality set out in Art. 3.1 of the Basic Law did not give individuals the right to receive broadcasts of particular sports events. From a constitutional point of view, it did not matter if households with digital satellite receivers were treated differently from those with analogue receivers or cable connections. ■

***Verwaltungsgericht Köln* (Cologne Administrative Court), judgment of 4 June 2002, case no. 6 L 1308/02**

DE

DE – Berlin and Brandenburg Public Broadcasting Authorities Merge

On 11 June 2002, the respective governments of the German *Bundesländer* of Berlin and Brandenburg decided to authorise the merger of the two broadcasting authorities, *Sender Freies Berlin (SFB)* and *Ostdeutscher Rundfunk Brandenburg (ORB)*. The merger was officially confirmed by the *Staatsvertrag über die Errichtung einer*

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gemeinsamen Rundfunkanstalt (Inter-State Agreement on the establishment of a joint broadcasting authority - *RBB-StV-E*), which was signed on 25 June. The new body will be known as *Rundfunk Berlin-Brandenburg (RBB)*.

The broadcaster's official headquarters will be in Berlin and its director will be based in Potsdam. The authority will be responsible for providing radio and television services and may also offer media services and other services with predominantly programme-related content. It should provide a balanced service for both *Länder*, bearing in mind regional programming needs. In this respect, the Inter-State Agreement takes into account for the first time the preamble to the *6. Rundfunkänderungsstaatsvertrages* (6th Inter-State Broadcasting Agreement), which stipulates that analogue terrestrial broadcasting may be replaced gradually by digital transmission (Articles 2 and 3 of the *RBB-StV-E*).

The Inter-State Agreement still needs to be approved by the *Land* parliaments. When the *RBB* director takes office, no later than 1 June 2003, the transfer of powers will be complete and *RBB* will take full responsibility for programming (Art. 40 of the *RBB-StV-E*). ■

***Entwurf des Staatsvertrags über eine gemeinsame Rundfunkanstalt in Berlin und Brandenburg* (Draft Inter-State Agreement on a joint broadcasting authority in Berlin and Brandenburg), 4 June 2002**

DE

DE – Media Authorities Issue Legal Guidelines on Election Advertising

In the run-up to the forthcoming *Bundestag* elections, the *Direktorenkonferenz der Landesmedienanstalten* (Congress of *Land* Media Authority Directors - *DLM*) has published a paper containing legal guidelines on important principles governing political party election broadcasts on national commercial television. Under Article 42.2 of the *Rundfunkstaatsvertrag* (Inter-State Broadcasting Agreement - *RStV*), political parties taking part in elections should, subject to certain conditions, be granted a reasonable amount of transmission time. Taking into account the relevant literature and case-law, the document provides broadcasters with guidelines on how to ensure the required equality of treatment, on the beginning, extent, number and timing of party election broadcasts, on admissible content and on questions concerning the reimbursement of costs and related legal proceedings.

Private broadcasters must provide a fair party election broadcast structure. Accordingly, the *DLM* recommends that a suitable broadcasting plan be drawn up. By offering transmission time, the broadcasters fulfil their obligation under Article 42.2 of the *RStV*. In general, a party which fails to use its allotted election broadcast slot has no right to demand that the broadcaster provide additional transmission time.

The *DLM* also points out that, in most *Bundesländer*, the content of party election broadcasts is not the responsibility of the broadcasters themselves, but of the parties concerned (eg Art. 19.6 of the *Landesrundfunkgesetz Nordrhein-Westfalen* (North Rhine-Westphalia Broadcasting Act)). Broadcasters have little control over content, mainly on account of the privileges granted to political parties under Article 21 of the *Grundgesetz* (Basic Law - *GG*). Party election broadcasts should only be rejected if they clearly breach general law, particularly criminal laws (eg Articles 130 and 131 of the *Strafgesetzbuch* (Criminal Code), which deal with incitement of the people and the portrayal of violence). However, broadcasters may also reject them if they breach human dignity, as protected by Article 1 of the Basic Law.

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With regard to the transmission time allotted to each party and the number of times their broadcasts are shown, the parties are not treated with absolute equality, but according to a grading system. The *DLM* justifies this with reference to Art. 5.1.2 of the *Parteiengesetz* (Political Parties Act), which states that the amount of transmission time granted may be graded according to the size of the party. This is calculated largely on the basis of the last election result (see Art. 5.1.3 of the Political Parties Act), although other factors such as the age of the party, the size of its membership and how its members are spread across the parliaments are also taken into account. New political groups must also be taken into consideration.

The document also states that, under Article 42.3 of the *RStV*, the obligation to provide transmission time for party election broadcasts only applies to national commercial broadcasters. *Land* or regional channels are governed by similar regulations in the respective *Land* media acts, such as Art. 24 of the *Bayerisches Mediengesetz* (Bavarian Media Act); in many *Bundesländer*, the transmission of party election broadcasts and the allocation of transmission time on regional channels are at the discretion of the broadcasters. If broadcasters choose to provide such transmission time but are not obliged to do so under Article 42 of the *RStV* or under regional laws on the provision of transmission time for party election broadcasts, the aforementioned principles must be respected (eg Art. 24.3 of the Bavarian Media Act stipulates that "if a provider offers transmission time to a party or group of electors in the run-up to an election, it must, on request, provide all other parties and groups of electors that fulfil the conditions governing party election broadcasts for the election concerned with reasonable transmission time, depending on their size"). ■

Legal guidelines from the DLM concerning transmission time allocated to political parties by national commercial broadcasters, 27 May 2002, available at:
http://www.alm.de/bibliothek/anlage_beschluss1002_rechtl_hinweise_wahlwerbung.doc

DE

DK – New Agreement on Media Policy

On 3 June 2002, the Danish Government and the *Dansk Folkeparti* (Danish Popular Party) concluded a *Mediepolitisk aftale for 2002-2006* (agreement on Media Policy for 2002-2006). The agreement will be politically binding from 3 July 2002 until 31 December 2006. It will have to be implemented by law in order to have legal force.

The Agreement is based on a booklet entitled "*Kvalitet, klarhed og konkurrence. Danskernes radio og tv i fremtiden. Regeringens udspil til ny mediepolitik – maj 2002*" ("Quality, Clarity and Competition. Radio and TV for the Danes in the Future. The Government Draft for a New Media Agreement – May 2002"). The booklet was issued on 13 May 2002 by the Minister of Culture, Brian Mikkelsen. The main points of the Agreement are as follows:

- In light of increased globalisation and competition on the international media market, the Government has stated its intention to liberalise the radio and television regulatory framework. Quality requirements have to be laid down in simple and precise public service contracts with the existing public service broadcasters, *Danmarks Radio* (DR) and TV2. The broadcasters have to compete, and free competition in the advertising and publicity market has to

be introduced. The public service based on Danish language and culture has to be supported and a solid private commercial media sector has to enjoy the best possible conditions for its activities as well. The regulation of regional and local broadcasting activities has to be liberalised.

- Concerning DR, the public-service contract between it and the government shall include provisions on film and music production. It will be required that 21% of programme production be provided by independent producers, in particular in relation to contributions to Danish film production and to orchestra and choir progammes. DR shall be managed by a board of directors. Six members of the Board will be appointed by the *Folketinget* (Parliament); three by the Minister and one by the permanent DR-staff.

- TV2 shall be established as a State company with limited liability and will have to be converted into a private limited company as soon as possible. TV2 will still have to comply with public service obligations, but such requirements shall be limited to programmes dealing with news and current affairs. However, special obligations shall be imposed in relation to programmes for children, as well as drama, film and similar programmes. The Agreement includes a repurchase clause, in case the future owner of TV2 intends to resell the company. TV2 receives the full income from advertising relating to broadcasting activities on the national as well as on the regional level. The regional TV2 broadcasters shall operate as economically independent institutions financed by the payment of licence fees and placed as "windows" in the TV2 broadcast area.

- The local commercial broadcasters shall only be obliged to transmit local news for half-an-hour daily, instead of the actual requirement of a daily hour of news. "Grass roots" programmes broadcast in the "grass-roots windows" shall be moved from the attractive evening slots to daytime broadcasting before 15.00h, corresponding to the local television broadcasting possibilities which are available at DR.

- In order to break the monopoly of DR, a fifth radio channel with public service obligations will be established, as well as a sixth radio channel. Licences for both channels shall be offered to commercial broadcasters.

- The rules on advertising and sponsorship shall be liberalised and shall correspond to the minimum requirements of the EU "Television without Frontiers" Directive. Television advertising for beer and for medicine that is available without a prescription shall be permitted. However, certain restrictions on advertising will remain. It will still be prohibited to interrupt programmes with advertising blocs. Special regard will be given to the protection of children against misleading advertising. Advertisements for alcohol, medicine and vitamins and other food supplements, etc., may not be placed around children's and youth programmes.

- In order to make television and digital television services available to the whole Danish population, a commercial digital broadcasting network shall be built up, managed and distributed to broadcasters by a commercial "multiplex"-operator, a so-called "gatekeeper".

- The licence payment shall be regulated according to price and wage increases. The payment will decrease when TV2 is converted into a private company.

The intention of the Government to increase competition within the radio and television sector is supported by the *Konkurrenceredegørelse 2002* (Competition Report 2002), issued by the *Konkurrencestyrelsen* (Danish Competition Authority) on 22 May 2002. The Report states in Chapter 5 on TV that actual competition in the Danish television market is weak. ■

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***"Mediepolitisk aftale for 2002 – 2006"* ("Agreement on Media Policy for 2002-2006"), 3 June 2002, available at:**
http://www.kum.dk/kum.asp?lang=1&color=2&file=/./dk/2_STD_2815.asp
***"Kvalitet, klarhed og konkurrence. Danskernes radio og tv i fremtiden. Regeringens udspil til ny medieaftale – maj 2002"* ("Quality, Clarity and Competition. Radio and TV for the Danes in the Future. The Government Draft for a New Media Agreement – May 2002"), available at: http://www.kum.dk/upload/downloadarkiv/427/Mediepjece.pdf**
"Konkurrenceredegørelse 2002" *(Competition Report 2002)*, available at:
http://www.ks.dk/publikationer/2002/kr2002/forside.htm

DK

FI – New Legislation on Communications Market

On 14 June 2002, the *Laki telemarkkinalain muuttamisesta* (Act on the amendment of the Telecommunications Market Act), the *Laki televisio- ja radiotoiminnasta annetun lain muuttamisesta* (Act on the amendment of the Act on Television and Radio Operations), the *Laki valtion televisio- ja radiorahastosta annetun lain muuttamisesta* (Act on the amendment of the State Television and Radio Fund), the *Laki Yleisradio Oy:stä annetun lain muuttamisesta* (Act on the amendment of the Act on the Finnish Broadcasting Company) and the *Laki viestintähallinnosta annetun lain muuttamisesta* (Act on the amendment of the Act on Communications Administration) were ratified. The Acts entered into force on 1 July 2002.

The changes that have now been made represent the first phase of the reform of legislation concerning the communications market. Some of the changes relate to the goal of promoting the development of digital television, as originally proposed by a working group representing the main political parties and appointed by the Ministry of Transport and Communications. A draft bill representing the second phase of the reform has been published for consultation. The government bill is expected in August 2002. This second phase will, for example, implement the EU regulatory framework for all electronic communications.

The changes that are in effect as of 1 July 2002 include the following:

- the regulation concerning telecommunications networks and digital television and radio distribution networks has been made uniform;
- the digital television and radio distribution networks have been opened up to Information Society services;
- instead of the present operating licences for digital broadcasting, there will be separate network licences and programme licences;
- the regulation concerning the digital radio and television networks has been moved to the Telecommunications Market Act, the name of which has been changed to the Communications Market Act;
- the regulations on radio and television programme operations remain in the Act on Television and Radio Operations and have not been changed;
- the holders of network licences are obliged to provide the distribution capacity needed by the Finnish Broadcasting Company and the holders of programme licences;
- the operating licence fee paid by the commercial television companies has been cut by 50%;
- no operating licence fee will be imposed on digital television operations during the ongoing licence period (i.e., until 31 August 2010);
- the operating licence fee for commercial radio companies has been abolished altogether (previously, it was supposed to come into effect on 1 January 2004);
- new elements have been specified in the public service remit of YLE, the Finnish Broadcasting Company. It

has now been stated that the remit includes special and additional services and that they can be offered by means of different communications networks. If such material is offered by means of networks other than radio and television networks, separate accounts must be kept for these operations;

- all advertising on YLE's channels has been forbidden (previously, exemptions could be granted by the *Valtioneuvosto* (Council of State (the Government)), which happened on a small scale, for instance during the transmission of the Olympic Games, etc.);

- the percentage of transmission time on all terrestrial television channels (except local television stations) required to be reserved for programmes produced by independent production companies has been increased from 10% to 15%;

- the duties of the *Viestintävirasto* (Finnish Communications Regulatory Authority, FICORA) (see IRIS 2001-8: 14) have been increased.

The assets of the State Television and Radio Fund are used for financing the activities of YLE. The main source of revenue for the fund is the television licence fees paid by households. The other source is the operating licence fees. To compensate for the decline in the latter, increases are to be made annually in the television licence fee, beginning in 2004. Decisions on the amount of the television licence fee are not made through legislation but by the Council of State, based on proposals made by YLE's Administrative Council, elected by Parliament. The changes made through legislation concerning the operating licence fee were proposed by the working group. At the same time, the working group suggested that increases be made in the television licence fee. The group suggested that the increase in 2004 should take account of the costs of developing new content services and the rate of inflation since the last increase. From the beginning of 2005, the television fee would be raised annually to meet the inflation rate and an increase of 1% would be added to cover the costs of overlapping analogue and digital broadcasting and the development of content services. This increase of 1% would remain in force until the overlapping analogue and digital operations cease. Until these changes occur, the gap in YLE financing will be covered by the income received when YLE sold 49% of its subsidiary Digita to *Télédiffusion de France, S.A.* (TDF). Digita owns the national radio and television transmission networks.

On 16 June 2002, three licences for digital television networks and two licences for digital radio networks were declared open for application by the Ministry of Transport and Communications. Restrictions on the amount of capacity used for data transmissions will be abolished in the licences. Applications were also invited for three digital television programme licences. The licences are given free of charge. Decisions on the granting of the licences are made by the Council of State and are expected in the autumn of 2002. ■

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Acts No. 489/2002, 490/2002, 491/2002, 492/2002 and 493/2002 of 14 June, available at: http://www.finlex.fi

FI-SV

FR – Opinion of the *Conseil d'État* on Article 40 of the Act of 30 September 1986 as Regards Canal +

Article 40 of the Act of 30 September 1986 is intended to protect audiovisual communication companies from excessive foreign influence, thereby assuring a degree of cultural protection in the sector. It prohibits any one person (natural or legal) of foreign nationality from holding, either directly or indirectly, more than 20% of the company capital or voting rights at general meetings of shareholders of a company holding an authorisation to provide a French-language sound or television broadcasting service using Hertzian terrestrial technology. The arrival last December of the American company Liberty Media among the holders of the capital of Vivendi Universal, which has a 49% stake in Canal +, had forced the CSA to call on the Government to apply to the *Conseil d'État* for its opinion on the applicability of Article 40 (see IRIS 2002-6: 9). Two questions were raised. Firstly, was it enough, in order to assess the given threshold of 20%, to ascertain the nationalities of the shareholding companies, or was it necessary to go further and isolate within their company capital those shareholders from outside the European Union and include them in the calculation of the 20%? The *Conseil d'État* delivered its opinion on 27 June; it began by stating that, in keeping with Community law, case-law at the European Court of Justice and precedent at the *Conseil d'État*, natural or legal persons from a European Community member State other than France were to be treated on a par with persons of French nationality, particularly concerning the assessment of compliance with the statutory threshold of 20%. The *Conseil d'État* went on to state that, in order to be considered a company having French nationality, it was not enough for the company to have its registered office in France; there must also be a degree of control, ie the majority of the company capital or the voting rights at general meetings of shareholders must be held by persons of French nationality. If these latter were companies, it was necessary to determine their nationality by applying the same criteria (registered office and control), and this investigation should be continued further down the line if these companies were in turn held by others, until the indirect holders of shares in the company holding the authorisation to broadcast were known for sure.

The second question raised by the CSA involved the quoting of companies on the stock market, which did not begin until after the Act was adopted in 1986; should the threshold of 20% refer to the fixed part of the body of shareholders or to all the capital? The *Conseil d'État* provides a clear answer to this in its opinion – the "floating" capital should be taken into account, ie that part of the capital that was constantly on the move on the market (small shareholders), when determining if the threshold of 20% had been reached. At the invitation of the *Conseil d'État* the Government immediately passed the opinion on to the CSA which, in its capacity as the authority with responsibility for ensuring compliance with the provisions of Article 40 of the 1986 Act, called on Canal + to provide it with the necessary information concerning its shareholders to enable it to ensure, in keeping with the opinion of the *Conseil d'État*, that the threshold of 20% of shareholders from outside the European Union was not being exceeded, and that not more than 50% of the shareholders of Vivendi Universal were from outside the European Union. Last December Vivendi Universal stated that 5.3% of the shareholders of Canal + were from outside the European Union and that 73% of the capital of Vivendi Universal was European, including floating capital. The CSA will nevertheless have to consider more recent figures, particularly as the resignation of the managing director of Vivendi Universal on 2 July could result in further changes in the composition of the capital of the majority shareholder of Canal +. ■

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***Conseil d'État* (domestic section), session of Thursday, 27 June 2002 – Opinion taken from the register of deliberations of its general assembly**

FR

FR – Minister of Culture and Communication and CSA Postpone Initial Schedule for Terrestrially-broadcast Digital Television

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In a letter dated 29 May to the Chairman of the *Conseil supérieur de l'audiovisuel* (the audiovisual regulatory body – CSA) concerning terrestrially-broadcast digital television, the Minister of Culture and Communication proposed that "co-operation between the CSA and the Ministry should be embarked upon as quickly as possible and at the most appropriate level in order to discern more clearly the nature of the technical, economic and legal difficulties and the solutions envisaged for overcoming them to best advantage". At the top of the list of these difficulties are the problems involved in the distribution of the future digital service, marketing, and financing for setting up the distribution infrastructures. In a recent press interview, the Minister recalled that terrestrially-broadcast digital television involved considerable expense, particularly on the part of the public-service audiovisual sector, and that the schedule drawn up eighteen months earlier was proving unrealistic (selection of candidates in early August and signature of agreements at the end of November – see IRIS 2002-2: 8). The CSA, which had begun hearing the 66 candidates on 17 June, decided therefore to postpone choosing the channels from the end of July to the end of October.

Although the private Hertzian channels and associations of producers and directors welcomed the postponement, they called for a suspension of the terrestrially-broadcast digital television procedure until "the entire audiovisual sector in France has stabilised" and "the economic viability of terrestrially-broadcast digital television has been checked, its financial resources ensured and funding for creation guaranteed". They also wanted "the sector to be assured that the advent of terrestrially-broadcast digital television would not involve serious imbalances damaging to those channels that provide the major part of funding for creation of new works".

The managing director of the company TowerCast, which is proposing to install a dozen medium-powered transmitters in the Île-de-France region as it feels that the TDF sites do not provide comprehensive cover for the whole of France, is also in favour of this postponement. He believes that it would provide better conditions for launching terrestrially-broadcast digital television, and establishing cover for the whole of the country.

Of the 33 future terrestrially-broadcast digital television channels, eight have already been allocated by the Public Service Act (see IRIS 2002-6: 8) and three will be allocated to local channels. ■

CSA, press release no. 495 "Terrestrially-broadcast digital television – hearing and selection of candidates", 11 June 2002. Available at:
http://www.csa.fr/actualite/communiques/communiques_detail.php?id=8616

FR

GB – New Details of Reforms of Broadcasting Regulation and Ownership Rules Published

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The UK Government has published further information to supplement its draft Communications Bill, which is currently the subject of detailed consultation (see IRIS 2002-6: 9).

The first document concerns the controversial question of the extent to which the new single communications regulatory body, the Office of Communications (OFCOM), will be able to regulate the BBC. The Government sets out proposed amendments to the BBC Agreement with the Secretary of State, currently the basis for its regulation. It is proposed that the amended agreement will bring the BBC within the "first tier" of regulation applying to all broadcasters and administered by OFCOM (see IRIS 2001-1: 8). The new regulator will issue codes on programme content standards relating to the protection of children; the exclusion of material likely to encourage crime or disorder; impartiality and accuracy in news reporting; protection from offensive or harmful material and the prohibition of subliminal messages. These will apply to the BBC, with the exception of the requirements of accuracy and impartiality, which will be regulated solely by the BBC's Board of Governors. Complaints will be handled by the Governors.

Second-tier, quantitative, public service broadcasting requirements will also be set out by OFCOM and applied to the BBC; these will include the 25% quota for independent productions and quotas and targets for original productions and regional productions and programmes.

For the first two tiers of regulation, no decision has yet been taken on whether OFCOM will be able to impose financial penalties on the BBC as it will be able to do in the case of private broadcasters.

The third tier of regulation, the qualitative requirements of public service broadcasting, will remain the responsibility of the Governors. Like private broadcasters, they will have to prepare a statement annually on programme policy and consider guidance and reports from OFCOM. The latter will, however, have no enforcement powers in this area of regulation; these will remain with the Secretary of State.

The Government has also issued draft clauses relating to media ownership for the Bill. As referred to earlier (IRIS 2002-6: 9), these will considerably simplify and liberalise current restrictions, notably by lifting the ban on non-EEA ownership, permitting the formation of a single company to run Channel 3 (ITV) and reducing the number of restrictions on cross-media ownership. ■

Draft Communications Bill: Proposed Amendments to the BBC Agreement, Department of Trade and Industry and Department for Culture, Media and Sport, June 2002, available at:
http://www.communicationsbill.gov.uk/pdf/proposed_amendments_to_bbc.pdf
Draft Communications Bill - Further provisions, June 2002, available at:
http://www.communicationsbill.gov.uk/pdf/dcb_provisions1.pdf

IE – Election Guidelines

Prior to the General Election held on 17 May 2002, the Broadcasting Commission of Ireland (BCI) published guidelines indicating the general approach to be adopted by independent broadcasters in their coverage of the election. The guidelines were in addition to the statutory provisions already in existence. The Radio and Television Act, 1988, requires all news to be reported in an objective and impartial manner without any expression of the broadcaster's own views. In addition, it requires the broadcast treatment of current affairs to be fair to all sides (section 9(1)). Party political broadcasts are permitted under the Act, but time must be allocated to them in a manner which will not give an unfair preference to any political party (section 9(2)). Advertisements directed towards any political end are not permitted (section 10(3)).

The guidelines covered issues such as taking care to balance the exposure given to the non-political activities of candidates or interest groups, such as attendance at func-

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tions, sporting events, etc. (Guideline No. 5). In current affairs programmes intended to focus on candidates or electoral interests, all candidates and electoral interests had to be invited, with reasonable notice, to be represented either in the same programme or in a series of programmes (Guideline No. 6). During the final twenty-four hours and on election day, no coverage of candidates or electoral interests was permitted and stations were required to ensure that broadcast output did not include any material which might be reasonably considered to have the potential to influence the outcome of the election (Guideline No. 9).

Meanwhile, during the election campaign, the national public service broadcaster, *RTÉ*, decided to drop a radio advertisement by *An Taisce* (the national heritage protection organisation) that criticised the government's housing and environmental record. The legislation under which *RTÉ* operates also bans advertisements directed towards any political end (Broadcasting Authority Act, 1960, section 20(4)). ■

General Election Guidelines: General Election 2002, Broadcasting Commission of Ireland, April 2002, available at: http://www.bci.ie/electguide.htm
The Radio and Television Act, 1988 and the Broadcasting Authority Act, 1960, are both available at: http://193.120.124.98/front.html

IE – Establishment of Forum on Broadcasting

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The Minister for Arts, Heritage, Gaeltacht and the Islands recently announced the establishment of a Forum on Broadcasting. The seven members of the Forum come from broadcasting, business, academic and arts fields.

The Minister has directed the Forum to examine a number of topics and to make recommendations on them. The topics concern the roles of public and commercial/independent broadcasting services, and whether these roles differ at national, regional and local levels; the funding of public service broadcasting ("but excluding issues specifically related to the adequacy or otherwise of the current RTÉ (*Radio Telefís Éireann*, the national public service broadcaster) licence fee" – see IRIS 2002-4: 7 and 2001-8: 11); the appropriate role of the independent audiovisual production sector; the responsibility – if any - of broadcasters to develop and broadcast programmes in the Irish language and programmes with cultural content; and the responsibilities – if any – of different broadcasters to make and conserve national audiovisual heritage.

In carrying out its work, the Forum is to have regard to: the need to foster an environment that encourages the establishment and maintenance of high quality Irish radio and television services; the need to ensure plurality and diversity; the current legislative framework (both Irish and EU) concerning the provision of broadcasting services; the need to protect independent and impartial journalism; and emerging trends in the technological and commercial environments.

The Forum is due to make its recommendations by 31 July 2002. ■

"New Forum on Broadcasting", Press Release of the Department of Arts, Heritage, Gaeltacht and the Islands, 22 March 2002, available at: http://www.ealga.ie/en/PressReleases/2002/March/d5150.en.v1.0.t4.html

LU – Advertising Revenue to Be Allowed for Cable TV Stations

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Following a major policy change of the Luxembourgish Government, decided on 25 January 2002, cable television stations in Luxembourg will be allowed to derive income from advertising in the near future.

Until now, it had been the Government's policy to allow only the country's main broadcaster *RTL Tele Lëtzebuerg* to broadcast television advertisements. The terms and conditions of the local television stations' broadcasting permits prohibited advertising, even though the sponsoring of shows was allowed. In the past, this had led to discussions on how to differentiate between advertising and sponsorship.

Following a decision of the Council of Government in March 2002, the authorities are in the process of drafting new charters to implement the new policy, most probably as of 15 September 2002. Information currently available indicates that the limitations on the type and permissible amount of advertising in those charters will be similar to those in the RTL Charter, which remains unchanged. ■

Decision of the Luxembourgish Government of 25 January 2002

PL – Youth Protection and Big Brother

Małgorzata Pęk
National Broadcasting Council Warsaw

On 13 March 2002, the Chairman of the National Broadcasting Council imposed a fine of PLN 300,000 (over USD 73,000) on the private television station TVN for showing violent and erotic scenes during protected time (the blocks were transmitted between 11.30h – 13.15h and 20.00h – 20.45h) on its „Big Brother – Battle" program.

Article 18 para. 5 of the Broadcasting Act of 29 December 1992 (as amended) states that programmes or other broadcasts which may threaten the physical, mental or moral development of minors, may not be transmitted between 6:00h and 23:00h. In order to implement this rule, on 20 November 2001 the NBC also issued a regulation containing detailed methods of classifying, transmitting and announcing such programmes.

The decision stated that the programme promoted violence. It depicted scenes of violence and group behaviour contrary to morality, presented in a positive context; furthermore it contained scenes contrary to moral responsibility regarding actions relating to the erotic sphere of human life. Moreover the programme contained commentaries indicating that such behaviour would be considered correct and normal. ■

Decision of the National Broadcasting Council of 13 March 2002
PL

PT – New TV Law Vetoed by President

The President of the Portuguese Republic, Jorge Sampaio, has vetoed the new proposed Television Law due to its unconstitutional nature. On 17 June 2002, the President referred *Decreto nº 3/IX, Segunda alteração à Lei nº 31-A/98, de 14 de Julho, alterada pela Lei nº 8/2002,*

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de 11 de Fevereiro (Decree nº 3/IX, second amendment to the Act n. 31-A/98 of 14 July, previously amended by Act no. 8/2002 of 11 February) back to the Parliament for re-examination. This move is part of an on-going and highly controversial process related to the centre-right government's intention to reduce public service broadcasting. In May 2002, the Council of Ministers decided to set up a new public service television company with a single general channel and appointed a five-member top management team to implement the decision. However, the RTP's Advisory Council – which had the power to veto the team – has not accepted the government's proposal. The government perceived the Advisory Council's position to be illegal and amended the Television Law in order to reduce the Council's power (see IRIS 2002-6: 11).

Uncertain about the constitutionality of Decree nº 3/IX, the President of the Republic did not promulgate it and sent it to the Constitutional Court instead. The Court found that Decree nº 3/IX violated the Constitution and therefore the President had no alternative but to send it back to the Parliament. ■

Letter from the President of the Republic, Jorge Sampaio, to the President of the Parliament, João Mota Amaral (Lisbon, 17 June 2002), made available by the Portuguese Parliament.
***Decreto nº 3/IX, Segunda Alteração à Lei nº 31-A/98, de 14 de Julho (Aprova a Lei da Televisão), alterada pela Lei nº 8/2002, de 11 de Fevereiro* (Decree nº 3/IX, second amendment to the Act n. 31-A/98 of 14 July, previously amended by Act no. 8/2002 of 11 February), available at:**
http://www.assembleiadarepublica.pt/legis/texto_final_inic_legis/20020523.09.1.0003.2.00.0000.0
***Deliberação do Conselho de Ministros sobre a Comunicação Social do sector público* (9 de Maio de 2002) (Deliberation of the Council of Ministers about public sector media (9 May 2002)), available at:**
http://www.portugal.gov.pt/PortalDoGoverno/ConselhoMinistros/Documentos/20020509DeliberacaoCM.htm

PT

RO – Electronic Media Act Adopted

Mariana Stoican
Radio Romania International

On 25 June, the draft Electronic Media Act, which had already been adopted by the Senate, was approved by the Romanian Parliament (see also IRIS 2002-6: 11).

In addition to the principles previously established, the Act regulates the ban on censorship in the audiovisual media and legally recognises and ensures the editorial independence of TV and radio editors. Natural and legal persons from Romania or abroad are prohibited from interfering with the form or content of programmes. The principles laid down by the *Consiliul National al Audiovizualului* (regulatory body for audiovisual activities – *CNA*) are not considered to be interference and must be respected, along with all other legal provisions and standards governing respect for human rights and freedoms contained in international agreements that have been ratified by Romania. Professional codes of conduct drawn up by journalists' associations and institutions are also not considered to interfere with freedoms insofar as they correspond with laws currently in force. Journalists are allowed to keep their sources confidential.

The *CNA* will be controlled by Parliament and comprise 11 members. Contrary to the draft text published in May, three members will be appointed by the Senate, five by the Parliament, one by the Romanian President and two by the Government. Their term of office will be four years. Members of the *CNA* will not be allowed to hold any other public or private offices, except as teachers, although even this must not lead to any conflict of interest. They may not belong to any political party or organisation during their mandate. The Parliament will examine the *CNA*'s activities by checking its annual accounts, which must be published no later than 15 April in the year following that to which they refer.

The list of events considered to be "of particular importance to society" will be drawn up by the *CNA* and forwarded to the European Commission by the Government.

Private broadcasters are considered to be legal persons and must adopt the structure of commercial companies.

A broadcaster will be considered to have a dominant market position in Romania if it has a 30% national market share.

Licences in the audiovisual sector, both for television and radio broadcasters, will be valid for nine years. The *Autoritatea Nationala de Reglementare in Comunicatii* (National Regulatory Authority for Communication) will draw up a national broadcasting frequency plan and allocate frequencies. The plan will have to make provision for at least four national radio frequency networks and three national television networks. ■

Draft Electronic Media Act

RO

SK – Amendment of the Act on Broadcasting and Retransmission of 2000

Eleonora Bobáková
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In March 2002 the *zákon o vysielaní a retransmisii* (Act on Broadcasting and Retransmission of 2000) was amended by *zákon č. 206/2002* (Act No. 206/2002), which came into force on 8 May 2002.

The amendments mainly concern the legal status of the Council for Broadcasting and Retransmission as now being entitled to impose fines for breaches of provisions concerning programmes and commercials without a warning only in defined cases:

"The Council can impose a fine without prior warning, if the obligation pursuant to Art. 16 letter c) (Breach of the rules covering elections), Art. 19 (Protection of human dignity and humanity), Art. 20 (Protection of minors) sections 1 and 3, Art. 30 (Breach of the right to short report (pursuant to the list of major events), red.) was violated, as well as in cases of broadcasting without permission (Art. 2 par. 1 letter b) or in cases of retransmission without authorisation (Art. 2 par. 1 letter c)."

Furthermore a new section 6 to Art. 64 of the Act on Broadcasting and Retransmission shall ensure a more transparent procedure in the case of an appeal to the Supreme Court of the Slovak Republic against a fine imposed by the Council of Broadcasting and Retransmission. The duration of the appellate procedure in the Court will not be included into the one-year's term for the Council to decide the case (Art. 64 section 3: "(3) The sanction may be imposed within six months from the day on which the Council has learnt about the breach of the obligation pursuant to paragraph 1, but not later than one year from the date of the breach.") Before this amendment there were two cases rejected for exceeding the one-year period. ■

***Zákon č. 206/2002 Z.z. NR SR, ktorým sa mení a dopĺňa zákon č. 308/2000 Z.z. o vysielaní a retransmisii a o zmene a doplnení zákona č.195/2000 Z.z. o telekomunikáciách v znení neskorších predpisov* (Act No. 206/2002 adopted on March 20 2002 amending the Act 308/2000 Z.z. on broadcasting and Retransmission and on the amendment of the Act 195/2000 Z.z. on telecommunication as amended). Issued on 20 March 2002 in *Zbierka zákonov* - Z.z. - section 87/2002 p. 2059**

SK

FILM

RO – Cinema Act Adopted

Mariana Stoican
Radio Romania International

On 25 June 2002, the *Proiectul Legii Cinematografiei* (Draft Romanian Cinema Act), which had already been adopted by the Senate, was approved by the Romanian Parliament.

The Act sets out the powers of the *Centrul National al Cinematografiei* (National Film Centre - *CNC*), which will operate under Government control and whose Chairman will hold the position of State Secretary. The Act regulates the *CNC*'s extra-budgetary revenue, which is to be used to create a national cinema fund ("*Fondul cinematografiei*"). Under the provisions of the Act, the *CNC* will receive 3% of the advertising income of public and private television companies in Romania. In addition, all cable network operators will have to pay the *CNC* 3% of the advertising revenue generated by their own TV channels. The Act stipulates that video cassette distributors must pay 2% of their income to the fund. Further payments must be made by persons or companies which show foreign films in Romanian cinemas and public places, whereas Romanian productions are exempt from this tax. In return for the exploitation rights for Romanian films, the *CNC* will receive a fee of 25% and, for foreign productions filmed in Romania, 1% of the film budget. TV companies which devote more than 60% of their pay-TV transmission time to feature films will pay the *CNC* 1% of their subscription revenue.

The Act also regulates how the *CNC* should provide loans for film production. In order to receive funding from the *CNC*, the applicant must employ Romanian citizens in the shooting of the film, while at least two-thirds of the filming must take place in Romania. ■

***Proiectul Legii Cinematografiei* (Draft Romanian Cinema Act)**

RO

NEW MEDIA/TECHNOLOGIES

FR – First Case-law on the Right to Reply On-line

Amélie Blocman
Légipresse

Exercise of the right to reply on the Internet comes up against the problem of the lack of specific rules and some judges have been wondering, in the absence of any precedent, about the possibility of transposing to the Internet the existing arrangements for the right to reply, whether in the written press (Art. 13 of the Act of 29 July 1881) or in the audiovisual sector (Art. 6 of the Act of 29 July 1982 and the Decree of 6 April 1987). On 5 June the Regional Court in Paris was called on for the first time ever to deliberate in a case on this point. The applicant, who considered that certain documents on the Internet site "gotha.fr" concerning the succession of the King of Romania were incomplete and incorrect, more particularly as they denied him his title as "Prince of the Royal Houses", had applied to the editor of the site claiming the right to reply. As this elicited no response, the applicant referred the matter to the Regional Court sitting in urgent matters so that it would order the editor to post the reply in question. In support of his claim, the applicant argued in his writ of summons that the disputed section of the Internet site constituted a press publication within the meaning of the Act of 1 August 1986, ie "a service using a written means of circulation of thought made available to the general public or to categories of the public and appearing at regular intervals". The applicant was thus implicitly indicating that the text of his reply ought to be published in application of the provisions of Article 13 of the Act of 1881 governing the right to reply in regard to the written press. The Court however found that this article was directed only at the "periodical press" and that the applicant had not proved the periodical nature of the disputed electronic service which indeed, by its nature, involved continual updating and in any event did not constitute a regular periodical publication. The provisions concerning the right to reply in the written press therefore appeared to be inappropriate in the present case, as did – according to the Court – the provisions concerning the right to reply in the audiovisual sector. The practical measures prescribed for the circulation of the reply in the audiovisual sector were not suitable for an on-line communication service; furthermore, problems arose in determining exact dates as required by the legislation for broadcasting the reply. The judge sitting in urgent matters, holding that the legal argument invoked by the applicant was too uncertain, or indeed non-existent, declared that the Court could not admit the application on this strictly legal basis, which he found highly questionable. He pointed out that, within the limits of the powers he held by virtue of Article 809 of the Code of Civil Procedure which governs urgent matters, he was however in a position to prescribe any measure which could put a stop to the manifestly unlawful disturbance that circulation of the subject matter in question constituted. To this end he therefore ordered the posting on the Internet site in question of a communiqué expressing the applicant's objection.

This decision is a good illustration of the limits of any attempt to transpose existing texts to the exercise of a right to reply on the Internet. The bill on the information society presented at a Cabinet meeting under the previous Government and never debated in Parliament provided for the addition of an Article 43-10-1 to the Act of 30 September 1986 in order to regulate this. ■

Regional Court in Paris (order in an urgent matter), 5 June 2002, P. Hohenzollern v. S. Bern

FR

NL – Order for Closure of Website Containing Harmful Content

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On 25 April 2002, the President of the District Court of Amsterdam ordered XS4ALL (a Dutch Internet service provider) to take measures to deny access to a website which contained information that was harmful to the plaintiff, *Deutsche Bahn AG* (*DB*, a railway company), and furthermore, to provide the plaintiff with the names and addresses of the website-holders.

The offending sections of the website contained information given by a group of left-wing activists on how to disrupt and sabotage the German railroad network that is used by *DB*. Among other things, they described exactly how to fabricate a tool with which one can vandalise the overhead contact wires of the railroad network.

DB stated that this information was harmful to the company and that it suffered damage as a result. It urged the Court to order XS4ALL to block entry to the website and in addition, to order XS4ALL to provide *DB* with the names and addresses of the sites' users.

The President of the District Court ruled that the information was indeed harmful to *DB*: it emerged from the facts that, with help from the means described in the offending sections of the website, one is able to disrupt the railway traffic in Germany. The texts gave rise to a plausible threat that such damage would actually be caused. Now that the illegal character of the information has been determined, XS4ALL, as the service provider, is obliged to take action.

The surrendering of the names and addresses of all users, including the websites' visitors, would, in the President's view, be too drastic a measure, as simply consulting the website would not amount to an unlawful action as such. The claim of *DB* was therefore only allowed insofar as it regarded the website-holders. ■

***Rechtbank Amsterdam, 25 april 2002, LJN-nummer: AE 1935, Zaaknr: KG 02/790 OdC* (Decision of the District Court of Amsterdam of 25 April 2002), available at: http://www.rechtspraak.nl/uitspraak/frameset.asp?ui_id=33646**

NL

IRIS LEGAL OBSERVATIONS
OF THE EUROPEAN AUDIOVISUAL OBSERVATORY

RELATED FIELDS OF LAW

BA – Telecommunications Competence of Bosnia and Herzegovina Widens

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In late April the Communications Regulatory Agency (CRA), which was created in March 2001 as a single regulator for Bosnia and Herzegovina in the field of communications (see IRIS 2001–4: 4), and the NATO-led Stabilization Force (SFOR) signed the Normalization Agreement on Radio Spectrum Resource Coordination in Bosnia and Herzegovina. This agreement transferred the competencies for the allocation of frequencies from SFOR to CRA as the sole authority in charge of frequencies in Bosnia and Herzegovina. SFOR will continue to coordinate radio-frequency spectrum for its own requirements.

According to Paragraph 13, Annex 1A, Appendix B to Annex 1A, of the General Framework Agreement for Peace in Bosnia and Herzegovina (GFAP), commonly known as the Dayton Peace Agreement (DPA), NATO has had "the right to use all of the electro-magnetic spectrum for this purpose, free of cost …" This was part of the agreement on the military aspects of the peace settlement.

Seven years after the signing of the DPA, the political situation in the country has improved significantly, allowing for steps to be taken to reduce SFOR control of the radio spectrum in the country. In February 2000 SFOR firstly handed over some aspects of its responsibility for the control and management of commercial and frequency spectrum to the Telecommunications Regulatory Agency (the predecessor of the CRA). By signing the Normalization Agreement, SFOR has now extended the February 2000 agreement with CRA to comprise all bands and all uses of the radio spectrum. After the April 2002 agreement, military and police forces of the entities, Federation of BA and *Republika Srpska*, must deal with the CRA for the issuing of licenses for both military and civilian frequency or civilian radios. Even SFOR is obliged to approach the CRA for civilian radio purposes. ■

Press releases of SFOR, available on: http://www.nato.int/sfor/trans/trans.htm

EN

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