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European Court of Human Rights: Case of Colombani *(Le Monde)* v. France

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In a judgment of 25 June 2002, the European Court of Human Rights found a violation by France of the right to freedom of expression. The case concerns the conviction of the publishing director and of a journalist of the newspaper, *Le Monde*. Both had been convicted by the Court of Appeal of Paris in 1997 for defamation of the King of Morocco, Hassan II.

In its issue of 3 November 1995, *Le Monde* published an article about a confidential version of a report by the Geopolitical Drugs Observatory (OGD) on drug production and trafficking in Morocco. The report had been compiled at the request of the Commission of the European Communities. The article, which was sub-headed, "A confidential report casts doubt on King Hassan II's entourage", called into question the resolve of the Moroccan authorities, and principally the King, in combatting the increase in drug-trafficking on Moroccan territory. At the request of the King of Morocco, criminal proceedings were brought against *Le Monde*. Mr. Colombani, the publishing director, and Mr. Incyan, the journalist who wrote the article, were convicted by the Paris Court of Appeal under section 36 of the Law of 29 July 1881 for insulting a foreign head of state. According to the Court, the journalist had failed to check the allegations and the article was considered to have been inspired by malicious intent.

The European Court, however, did not agree with these findings, emphasising in the first place that when contributing to a public debate on issues that raised legitimate concerns, the press had - in principle - to be able to rely on official reports without being required to carry out its own separate investigations. The Strasbourg Court also referred to other French case-law which was inclined to recognise that the offence under section 36 of the Law of 29 July 1881 infringed freedom of expression as guaranteed by Article 10 of the European Convention. Recent French jurisprudence itself appears to accept that this provision and its application were not necessary in a democratic society, particularly since heads of state or ordinary citizens who have been the target of insulting remarks or whose honour or reputation has been harmed, have an adequate criminal remedy in recourse to a prosecution for defamation. The special status for heads of states that derogated from the general law could not be reconciled with modern practice and political conceptions. In the Court's view, such a privilege went beyond what was necessary in a democratic society. The Court therefore found that, owing to the special nature of the protection afforded by the relevant provision of the Law on Freedom of the Press of 1881, the offence of insulting foreign heads of state was liable to infringe freedom of expression without meeting a "pressing social need". For these reasons, the Court held unanimously that there had been a violation of Article 10 of the Convention. ■

Judgment by the European Court of Human Rights (Second Section), Case of Colombani and Others v. France, Application no. 51279/99 of 25 June 2002, available at: http://www.echr.coe.int

FR

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European Court of Human Rights: Case of Wilson & the NUJ v. the United Kingdom

In a judgment of 2 July 2002, the European Court of Human Rights found a violation by the United Kingdom of the right to freedom of assembly and association (Article 11 of the European Convention). The case concerns the use of financial incentives to induce employees to relinquish the right to union representation for collective bargaining. The case is especially interesting for the media sector, as it was brought before the Court of Human Rights jointly by David Wilson, a journalist working for the Daily Mail and by the National Union of Journalists (NUJ). Other applications by members of the National Union of Rail, Maritime and Transport Workers were later joined to this initial application by Wilson and the NUJ.

The case goes back to 1989 when Associated Newspapers Limited gave notice of its intention to de-recognise the NUJ and to terminate all aspects of collective bargaining. It also signalled that personal contracts were to be introduced with a 4.5% pay increase for journalists who signed and accepted the de-recognition. Wilson applied to the domestic courts, contesting the legality of the requirement to sign the personal contract and lose union rights, or accept a lower pay rise. After the House of Lords held that the collective bargaining over employment terms and conditions was not a *sine qua non* of union membership, Wilson and the NUJ lodged applications in Strasbourg, alleging that the law of the United Kingdom, by allowing the employer to de-recognise trade unions, failed to uphold their right to protect their interests through trade union representation and their right to freedom of expression, contrary to Articles 11 and 10 (and also in conjunction with Article 14 of the Convention (non-discrimination)).

With regard to Article 11, the Court is of the opinion that the absence in UK law of an obligation on employers to enter into collective bargaining did not give rise, in itself, to a breach of Article 11 of the Convention. However, the Court took the view that allowing employers to use financial incentives to induce employees to relinquish important union rights constituted a violation of Article 11. The Court referred to the fact that this feature of domestic law has been criticised by the Social Charter's Committee of Independent Experts and the International Labour Organisation's Committee on Freedom of Association. According to the Court, it is the State's responsibility to ensure that trade union members were not prevented or restrained from using their union to represent them in attempts to regulate their relations with their employers. The Court concluded that the United Kingdom had failed in its positive obligation to secure the enjoyment of the rights guaranteed under Article 11 of the Convention.

As the Court considered that no separate issue arose under Article 10 of the Convention that had not already been dealt with in the context of Article 11, it held that it was not necessary to examine the complaint from the perspective of Article 10. The Court also found that it was unnecessary to consider the complaint raised under Article 14 of the Convention. ■

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Judgment by the European Court of Human Rights (Second Section), Case of Wilson & the National Union of Journalists (and Others) v. the United Kingdom, Application nos. 30668/96, 30671/96 and 30678/96 of 2 July 2002, available at: http://www.echr.coe.int

EN

European Court of Human Rights: Yagmurdereli v. Turkey and Seher Karatas v. Turkey

In two recent judgments, the European Court of Human Rights again found violations of the right to freedom of expression in Turkey.

The case of Esber Yagmurdereli concerns an application arising out of a sentence of ten months' imprisonment. The applicant, a lawyer, writer and doctor of philosophy, had given a speech at a meeting in 1991, in which he referred to Kurdistan as a part of the National Territory and to the terrorists acts carried out by the PKK as "a struggle for democracy and freedom". In 1994, he was convicted by the National Security Court for infringement of the anti-terrorist law: the content of his speech was considered to amount to separatist propaganda aimed at undermining the territorial integrity of the State and national unity.

The case of Seher Karatas concerns the conviction of the applicant, who was the publisher and editor of a fortnightly magazine, *Gençliğin Sesi* ("The Voice of Youth"). After the publication of an article, which urged young people to unite with the working-class and which criticised the actual political system as heading towards instability and crisis, Ms. Karatas was charged with inciting the people to hatred and hostility, contrary to Article 312 of the Turkish Criminal Code. The National Security Court found Karatas guilty of this offence and imposed a fine and a term of imprisonment of one year and eight months, with the prison sentence being converted into a fine.

In both cases, the European Court recognised the sensitivity of the security situation in south-east Turkey and referred to the need for the authorities to fight against terrorism and to be vigilant in repressing acts liable to increase violence. That is why the Court held that the interferences with the applicants' freedom of expression pursued legitimate aims of protecting national security and territorial integrity and preventing disorder and crime.

However, in both cases, the Court found that the applicants' comments had taken the form of a political speech, emphasising that the European Convention allowed very few restrictions on freedom of expression in the sphere of political speech or questions of general interest. The Court also noted that the Turkish authorities had not pointed to any passages containing a vindication of acts of terrorism, an incitement to hatred between citizens or a call for violence or bloody revenge. Accordingly, the Court concluded in both cases that the measures taken against the applicants could not be deemed to be necessary in a democratic society and held that there had been a violation of Article 10. The Court also found a violation of Article 6 para. 1, as both applicants, as civilians, had not had a fair trial owing to the presence of a military judge on the bench of the National Security Court. ■

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Judgment by the European Court of Human Rights (Second Section), Case of Yagmurdereli v. Turkey, Application no. 29590/96 of 4 June 2002
Judgment by the European Court of Human Rights (Second Section), Case of Seher Karatas v. Turkey, Application no. 33179/96 of 9 July 2002, both available at: http://www.echr.coe.int

FR

European Court of Human Rights: Four Friendly Settlements in Cases on Freedom of Expression (Turkey and Austria)

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After the finding by the European Court of Human Rights of several violations of freedom of expression in Turkey, it seems that the Turkish Government has now become aware of the fact that some restrictions and penalties can manifestly no longer be tolerated from the perspective of Article 10 of the Convention. Shortly after the adoption of a friendly settlement in the case of Altan v. Turkey on 14 May 2002 (see IRIS 2002–7: 2-3), the Court again took note of the agreements reached between the parties in three different cases against Turkey.

In each of these cases, the Turkish Government promised that steps would be taken in order to guarantee the right to freedom of expression and information, including the offer to pay an amount of damages to the applicants. 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 Criminal Code and under Article 8 para. 1 of the Prevention of Terrorism Act 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. The Government refer also to the individual measures set out in Interim Resolution adopted by the Committee of Ministers of the Council of Europe on 23 July 2001 (ResDH (2001) 106), which they will apply to the circumstances of cases such as the instant one". While this statement was made in the Özler case, the essence of the statements delivered by the Turkish Government in the other cases was the same.

All applicants had been found guilty some years ago of dissemination of propaganda against the indivisibility of the State (Prevention of Terrorism Act) or incitement to hatred and hostility arising from a distinction based on race or religion (Article 312 of the Criminal Code). Ali Erol (a journalist), Sürek (a lawyer and publisher) and Özler (a human rights activist) had criticised the policy of the Turkish authorities on the Kurdish Question in newspapers or in public speeches. Each of them had initiated an application against Turkey, complaining, *inter alia*, of a violation of Article 10 of the Convention.

Referring to the commitments undertaken by the Turkish Government in each case and recognising that the friendly settlements are based on respect for human rights as defined by the European Convention, the Court has accordingly struck these cases out of the list.

Another friendly settlement was reached in the case of *Freiheitliche Landesgruppe Burgenland* v. Austria on 18 July 2002. In this case, the applicant (a periodical) had been convicted because of an insulting caricature under Section 115 of the Austrian Criminal Code. In order to reach a friendly settlement before the Court, the Austrian Government has promised to pay the applicant a sum of money as compensation in respect of any possible claims relating to the present application, including an amount for costs and expenses incurred both in the domestic proceedings and in the Convention proceedings. The applicant waives any further claims against Austria relating to the application concerned. Referring to the agreement reached between the parties and satisfied that the settlement is based on respect for human rights as defined by the Convention, the Court struck the case out of the list. ■

Judgment (Friendly settlement) by the European Court of Human Rights (First Section), case of Ali Erol v. Turkey, Application no. 35076/97 of 20 June 2002

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Judgment (Friendly settlement) by the European Court of Human Rights (Third Section), case of Özler v. Turkey, Application no. 25753/94 of 11 July 2002

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Judgment (Friendly settlement) by the European Court of Human Rights (Second Section), case of Sürek (n° 5) v. Turkey, Applications nos. 26976/95, 28305/95 and 28307/95 of 16 July 2002

FR

Judgment (Friendly settlement) by the European Court of Human Rights (First Section), case of Freiheitliche Landesgruppe Burgenland v. Austria, Application no. 34320/96 of 18 July 2002

EN

All judgments are available at the Court's website: http://www.echr.coe.int

Committee of Ministers: Increased Protection for Neighbouring Rights of Broadcasting Organisations

On 11 September, the Council of Europe's Committee of Ministers adopted Recommendation Rec(2002)7 to improve the protection of neighbouring rights of broadcasting organisations, primarily against piracy. Over the past decades, broadcasting organisations' programmes have increasingly been pirated as a result of technological developments.

The Recommendation therefore favours broadcasting organisations several exclusive rights to counteract this, including the retransmission right, the fixation right, the reproduction right, the making-available right, the distribution right and the right of communication to the public. In addition, it notes the importance of the exercise of such exclusive rights in relation to pre-broadcast programme-carrying signals. It also recommends that Member States provide adequate legal protection and legal remedies against the circumvention of effective technological measures and against the removal or alteration of electronic rights management information.

These protection measures build on previous treaties concerning neighbouring rights, i.e., the 1961 International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations (the Rome Convention) and the 1960 European Agreement on the Protection of Television Broadcasts. However, the Recommendation calls for wider protection and, in many respects, closely follows the wording of the 1996 WIPO Performances and Phonograms Treaty (WPPT). For example, the Recommendation advocates the extension of the exclusive rights granted to broadcasting organisations to include the making-available right and the distribution right, in line with the WPPT's provision of these rights for performers and phonogram producers. The same applies to the provisions relating to technological measures, rights-management information and the term of protection.

The fact that the Recommendation draws heavily upon the WPPT is explicitly stated in the Explanatory Memo-

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randum. The Explanatory Memorandum furthermore stresses that a specific WIPO treaty for broadcasting organisations is in preparation. Since the entry into force of such a treaty is expected to take some years, it is deemed necessary to provide interim protective measures for broadcasters.

France has asked for an interpretative statement to be appended to the minutes of the Committee of Ministers' meeting to take note of its view that the Recommendation should be regarded as the start of the debate relating to the preparation of a WIPO treaty for broadcasting organisations and to emphasise that the Recommendation must be focused on protection against piracy and not affect the rights of other rightsholders involved. ■

Council of Europe Recommendation Rec(2002)7 of the Committee of Ministers to member states on measures to enhance the protection of the neighbouring rights of broadcasting organisations (and Explanatory Memorandum), adopted by the Committee of Ministers on 11 September 2002 at the 807th meeting of the Ministers' Deputies);
Interpretative statement by France on the Council of Europe recommendation to enhance the protection of the neighbouring rights of broadcasting organisations (appended to the minutes of the 807th meeting of the Ministers' Deputies of 11 September 2002). All documents are available at:
http://www.humanrights.coe.int/media/
EN-FR

Standing Committee on Transfrontier Television: Statement on Human Dignity and the Fundamental Rights of Others

The Standing Committee on Transfrontier Television of the Council of Europe has issued a Statement which focuses on the need for television programmes to uphold human dignity and the fundamental rights of others. The Statement was drafted in response to the emergence – in an increasingly competitive market - of certain television formats and ideas which "can infringe upon human integrity and dignity and expose the participants in these programmes to a complete loss of their private life, as well as to gratuitous physical or psychological suffering".

The concerns and objectives of the Statement can readily be traced to the European Convention on Human Rights, the very ethos of which is about safeguarding human dignity and fundamental rights, and the European Convention on Transfrontier Television, Article 7 of which requires broadcasters, *inter alia*, to refrain from broadcasting programme items which are indecent or which contain pornographic material; which give undue prominence to violence or which are likely to incite racial hatred.

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The Statement is cognisant of the duties and responsibilities of regulatory authorities and broadcasters vis-à-vis programme formats that run the risk of adversely affecting human dignity. To this end, the Standing Committee urges regulatory authorities and broadcasters:

"- to co-operate and discuss among themselves on a regular basis on the question of television programmes which might contravene human integrity or dignity, with a view to seeking consensual co-regulatory or self-regulatory solutions - as far as possible - as regards such programmes;

- to avoid contractual arrangements between broadcasters and participants whereby the latter relinquish substantially their right to privacy, since this may represent an infringement of human dignity. Contractual arrangements should be designed to protect the most vulnerable parties, namely the participants who may be tempted to waive their rights in the pursuit of popularity and money." ■

Statement (2002)1 on Human Dignity and the Fundamental Rights of Others, Standing Committee on Transfrontier Television of the Council of Europe, 12-13 September 2002, available at: http://www.humanrights.coe.int/media/
EN

Group of Specialists on the Democratic and Social Implications of Digital Broadcasting: Draft Recommendation on Digital Broadcasting

The Council of Europe promotes the independence, pluralism and universal accessibility of public service broadcasting as a means to enhance the democratic and social values of its Member States. In light of the advantages and risks offered by the transition to digital terrestrial television, a draft Recommendation on the Democratic and Social Impact of Digital Broadcasting has been prepared by the Group of Specialists on the Democratic and Social Implications of Digital Broadcasting for consideration by the Committee of Ministers.

The draft Recommendation calls for a strategy to be drawn up for the transition to digital broadcasting in order to maximise its benefits and reduce its negative effects. Such a strategy must stimulate cooperation between the operators and optimise the availability of a wide variety of programmes/channels, eg. by awarding digital broadcasting licences to many different services, while encouraging local services in particular.

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Given that the changeover means that consumers must acquire new equipment and that media literacy is essential to minimising the risk of a "digital divide", Member States must collaborate closely with broadcasters, regulatory authorities and other public or private institutions to ensure that costs are kept to a minimum and that proper information on the media is made available to the public. For example, broadcasters should be encouraged to supply information for electronic programme guides (EPGs) and/or supply their own EPG in order to enable viewers to find their way through the many programmes, channels and services on offer in the digital environment.

The draft Recommendation stresses the importance of the availability of free-to-air services and cross-border access to television services, especially in view of the tendency on the part of broadcasters to limit access to, and/or request payment for, services by using digital encryption and conditional access techniques.

Public service broadcasters must play a central role in the transition to digital broadcasting in order to ensure that their principal objective of providing a wide variety of services to different types of viewers is attained. The Member States, for their part, must provide the broadcasters with sufficient financial, technical and other means. ■

Draft Recommendation on the democratic and social impact of digital broadcasting (Public version No. 1), Group of Specialists on the Democratic and Social Implications of Digital Broadcasting (MM-S-DB), Council of Europe, 7 June 2002, available at:
http://www.humanrights.coe.int/media/
EN-FR

EUROPEAN UNION

European Commission: Inconsistent Use of Public Lending Right

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A report by the European Commission of 12 September draws attention to the considerable differences still existing between EU Member States' provisions regarding the public lending right (PLR), despite the 1992 Council Directive on the Rental and Lending Right and Certain Related Rights. Member States have traditionally interpreted public lending activities in widely divergent ways.

The 1992 Rental and Lending Directive sets out to harmonise the implementation of the public lending right in order to ensure the proper functioning of the Internal Market (see IRIS 2000-2: 15). Article 1 grants rightholders an exclusive right to authorise or prohibit lending copyright works and other protected subject matter. However, Article 5 provides Member States with the opportunity to derogate significantly from this exclusive lending right. It allows them to replace the exclusive right by a remuneration right, under certain conditions, and to exempt certain establishments from paying the remuneration. Article 5 also leaves room to differentiate between different objects of lending (such as books or films) and to regulate the payment method in varying ways.

According to the Commission's assessment of the functioning of the public lending right across the EU, the public lending right is not being applied properly. Nearly all Member States have replaced the exclusive lending right by a remuneration right with respect to some lending institutions. Several countries have exempted certain libraries (Ireland, Italy, the Netherlands) from being subject to the public lending right, while others provide a broad exemption covering most lending institutions open to the public (Spain, Portugal). The Member States have also laid down different rules for specific objects of lending, eg. by applying the exclusive lending right to cinematographic items (Denmark, Finland, Sweden) and a remuneration right to books (Denmark, Sweden). Furthermore, some countries do not pay the rightholders concerned any remuneration (Belgium, France, Greece and Luxembourg), while others restrict payment to national authors or authors living in a specific territory (Sweden) or to books published in the national language (Denmark, Finland). The Commission has initiated an infringement procedure against Belgium for its failure (to date) to transpose certain provisions of the Directive into its national legislation.

However, despite the limited degree of harmonisation, it remains unclear what effects this actually has on the proper functioning of the Internal Market. The Commission recently received some information about the existence of certain obstacles that may be the result of the relatively low degree of harmonisation and it will continue to examine such considerations closely.

In conclusion, the report refers to future developments related to public lending rights in the digital environment. The emergence of new products and the use of new technologies (eg. online lending) are likely to affect the functioning of the Internal Market and lending activities. Such changes may require further action. ■

Council Directive 92/100/EEC of 19 November 1992 on rental right and lending right and on certain rights related to copyright in the field of intellectual property, OJ No L 346, 27 November 1992
Report from the Commission to the Council, the European Parliament and the Economic and Social Committee on the public lending right in the European Union, COM(2002) 502 final of 12 September 2002, available at:
http://europa.eu.int./eur-lex/en/com/rpt/2002/com2002_0502en01.pdf
DA-DE-EL-EN-ES-FI-FR-IT-NL-PT-SV

European Commission: Report on the Application of the Satellite and Cable Directive

Council Directive 93/83/EEC of 27 September 1993, on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission seeks to resolve the problems of protection for copyright holders arising from the differences in national copyright laws, in order to improve the free movement of television services. The Directive had to be implemented by Member States not later than 1 January 1995.

Following a study in 2000 and contacts with the parties affected by this Directive in 2001, the European Commission has published a report on the effects of the practical application of the Directive. The report analyses whether new guidelines are necessary for the future.

The report signals a trend on the part of programme producers to sell their programmes on condition that satellite transmissions are encrypted to prevent them from being received beyond national borders. This enables producers to resell the same programmes to individual broadcasting organisations in other Member States. However, this frequently results in a situation whereby viewers have no access to transmissions from other Member States since broadcasting organisations have refrained from purchasing the copyright on transmission in other Member States. This runs counter to a basic principle underlying the Directive, i.e., that a transfer of rights must apply to the entire EU territory. In practice, the transfer of rights is negotiated for each individual Member State. In order to reverse this trend, the Commission will conduct a study into ways of ensuring the freedom of television services.

Another development concerns Article 10 of the Directive which provides an alternative to the principle of negotiations between collecting societies and cable operators by allowing broadcasting organisations to conduct negotiations on cable retransmission rights with cable operators without the involvement of collecting societies. This alternative has been widely embraced by broadcasting organisations, but at the risk of weakening the position of the rightsholders who are not represented in negotiations. The Commission notes that the principle that the transfer of a right is subject to equitable remuneration (Article 11(a) of the Berne Convention) must be duly observed, but that the collective management of this right may severely res-

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trict the scope of the instruments provided for by the Directive.

In addition, the payment of retransmission rights to rightsholders has given rise to someserious disputes. The Directive provides the tool for mediation but the fact that the mediation process depends on the good faith of the parties and is not subject to any time limits has led to unsatisfactory situations.

These issues, combined with the general development of television services in the Information Society, mean that the Commission will initiate further studies to examine the necessity of adapting the mechanisms of dispute settlement and the role of collecting societies. Based on the results, it will consider whether the Directive needs revision. ■

Report from the European Commission on the Application of Council Directive 93/83/EEC on the Coordination of Certain Rules Concerning Copyright and Rights Related to Copyright Applicable to Satellite Broadcasting and Cable Retransmission, COM(2002) 430 final, 26 July 2002, available at:
http://europa.eu.int/eur-lex/en/com/rpt/en_rpt_number_2002_09.html

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

European Commission: Guidelines on Market Analysis and Assessment of Significant Market Power

Following the recent publication of its Draft Recommendation on relevant product and service markets, the European Commission has now also issued the Guidelines on market analysis and assessment of significant market power under the Community regulatory framework for electronic communications networks and services that were required under Article 15(2) of the Framework Directive (see IRIS 2002–3: 4 and 2002–1: 5). Market analysis and the assessment of the state of competition on national markets are the necessary preconditions for any intervention by National Regulatory Authorities (NRAs) with the goal of ensuring or restoring effective competition on, and the contestability of, European communication markets. In its Draft Recommendation on relevant product and service markets, the Commission has identified the markets that will be subject to supervision by NRAs. The purpose of the Guidelines is to set out the principles which the NRAs shall apply:

- when analysing the geographic dimension of markets, as identified in the Recommendation;
- when identifying, where necessary, national or sub-national product and service markets which are not listed in the Recommendation;
- when analysing the extent to which national markets are sufficiently competitive, and in particular:
- when identifying the existence of single or joint dominance (significant market power, SMP) on one particular market and
- when imposing proportionate *ex-ante* measures on undertakings with SMP (NRAs must impose at least one regulatory obligation once an undertaking has been designated as having SMP).

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NRAs shall take "utmost account" of the Recommendation and the Guidelines when performing their tasks (Article 15(3) of the Framework Directive).

The European Commission emphasises that the definition of markets and the identification of SMP follows the same methodology as under general competition law. One important difference, however, is the prospective character of market analysis under the new communications framework: unlike under general competition law, the starting point for the analysis is not necessarily an agreement, a concerted practice, concentrations or the abuse of dominance, but rather an anticipation of the future development of the market and the likely existence of effective competition, which is also the reason why the decisions of NRAs have to be reviewed on a regular basis. The prospective approach is also a consequence of the lack of evidence and records of past conduct, especially in newly emerging markets. Accordingly, the outcome of the analysis by NRAs can eventually differ from the outcome of general competition law procedures. Notably, National Competition Authorities (NCAs) may perform their own market analysis and impose adequate remedies, alongside the obligations imposed by NRAs. The European Commission explains this by the fact that *ex-ante* obligations imposed by NRAs on undertakings with SMP have the aim of fulfilling the specific objectives of the new communications framework, whereas competition law remedies would sanction anti-competitive behaviour.

After a general introduction, the Guidelines give criteria and describe the methods to be used by NRAs when defining national markets and identifying SMP. This includes reference to existing decisions of the European Court of Justice and existing Commission documents and practice. The Guidelines also discuss the possible actions which NRAs can undertake and what aspects have to be taken into account when doing so. Another section is dedicated to procedural questions, in particular NRAs' powers of investigation and the mutual coordination and cooperation between NRAs, NCAs and the European Commission. The Commission stresses the importance of those cooperation procedures. The final section tackles the procedures of public consultation and the publication of the proposed NRA decisions. ■

Commission guidelines on market analysis and the assesment of significant market power under the Community regulatory framework for electronic communications networks and services, 11 July 2002, OJ C 165/6
European Commission, Draft Working Document, Public consultation on a draft Commission Recommendation on relevant product and service markets within the electronic communications sector susceptible to ex ante regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communication networks and services, Brussels, 17 June 2002, available at:
http://europa.eu.int/information_society/topics/telecoms/news/documents/206_17_rec_public_consultation.pdf

EN

European Parliament: Accessibility of Public Websites and their Content

Following its consideration of the Communication of the European Commission, "eEurope 2002: Accessibility of Public Web Sites and their Content" (see IRIS 2001–9: 6), the Committee on Industry, External Trade, Research and Energy of the European Parliament has proposed a Motion for a Resolution.

The Motion welcomes the Commission's Communication and stresses once again the central objectives of the Communication, i.e., to counter the exclusion from society and from the burgeoning Information society (so-called "info-exclusion") of, in particular, disabled

and elderly people, and to promote their integration into both. The Motion acknowledges the impact of already-existing initiatives working towards these aims and sets 2003 (European Year of Disabled People) as a target date for full compliance by European Union Institutions and Member States with the "Web Content Accessibility Guidelines 1.0", elaborated by the Web Accessibility Initiative of the World Wide Web Consortium (W3C). These Guidelines are by no means perceived as a high-water mark in terms of standards. Rather, compliance therewith is seen as "a step forward" and the necessity of further developing or adopting improved versions of the Guidelines, as precipitated, *inter alia,* by evolving Internet technologies, is also underscored in the Motion.

With a view to achieving its own stated goals, as well as those of the Communication, the Motion encourages dialogue with representatives of disabled and elderly people; the "active exchange" of best practices; relevant instances of cooperation between EU Member States and the candidate countries, and the promotion of the principles of accessible design on all equipment used in relation to Internet access. The Motion also focuses on the (public) responsibilities of the EU Institutions and the Governments of Member States. Apart from raising awareness of the principles of web accessibility, EU and State bodies also ought to ensure that their own websites are of exemplary accessibility, by virtue of their design and the software which they employ. More creatively, compliance with accessibility guidelines could also be insisted upon in tenders for products or services. ■

Tarlach McGonagle
Institute for Information Law (IViR) University of Amsterdam

"Report on the Commission communication eEurope 2002: Accessibility of Public Web Sites and their Content" (COM(2001) 529 – C5-0074/2002 – 2002/2032(COS)) of 24 April 2002, Doc. No. A5-0147/2002, European Parliament Committee on Industry, External Trade, Research and Energy, Rapporteur: Bastiaan Belder, available at: http://www2.europarl.eu.int/omk/sipade2?PUBREF=-//EP//TEXT+REPORT+A5-2002-0147+0+DOC+SGML+V0//EN

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

"Web Content Accessibility Guidelines 1.0", World Wide Web Consortium (W3C) Recommendation 5 May 1999, available at: http://www.w3.org/TR/WCAG10/

EN

NATIONAL

BROADCASTING

DE – MTV "Freak Show" Endangering Minors

In two emergency rulings, the *Verwaltungsgericht München* (Munich Administrative Court - *VG München)* had to determine the degree to which the "Freak Show" programme broadcast by music channel MTV and based on the American programme "Jackass" constituted a danger to minors. The relevant supervisory body, the *Bayerische Landeszentrale für neue Medien* (Bavarian New Media Office – BLM), had banned the repeat showing of six programmes which had already been broadcast and were deemed to be obviously capable of seriously endangering minors. It had also restricted the showing of further episodes to the time period from 11 pm to 6 am. The decisions were declared immediately enforceable. MTV appealed and demanded that neither decision should take effect until a definitive court verdict was reached.

The *VG München* rejected the application concerning the time restriction, but granted the request relating to the broadcasting ban. It ruled that the programmes in question were indeed harmful but not "obviously capable of seriously endangering minors". In order to be deemed unlawful and prohibited under the terms of Article 3.1.3 of the *Rundfunkstaatsvertrag* (Inter-State Agreement on Broadcasting - *RStV*), they would have to be in the latter category. Since the programmes were likely, under Article 3.2.1 of the *RStV*, to endanger the physical, mental or emotional well-being of children or adolescents, the decision to restrict transmission times had been admissible. In the Court's opinion, the danger to minors lay essentially in the fact that injuring oneself and other people was portrayed as a humorous and harmless activity. Inflicting physical injuries was depicted as an end in itself and as a form of amusement. Since the "tricks" were played on people who could be easily identified, it was more likely that they would be imitated and that the value systems portrayed in the programme would also be copied. In Baden-Württemberg, one child had already injured himself seriously when imitating a scene from the "Freak Show" involving fire.

The *BLM* has appealed to the *Bayerische Verwaltungsgerichtshof* (Bavarian Administrative Court) against the decision to lift the broadcasting ban. ■

Carmen Palzer
Institute of European Media Law (EMR), Saarbrücken / Brussels

***VG München* (Munich Administrative Court), decision of 7 August 2002, case no. M 29 S 02.3205, and decision of 7 August 2002, case no. M 29 S 02.3258**

DE

ES – Competition Authorities to Assess Merger between Digital Satellite TV Platforms

The Spanish digital pay-TV market is currently dominated by two satellite platforms:
- *Canal Satélite Digital*, whose main shareholder is *Sogecable*, a company jointly controlled by *Canal Plus* (a subsidiary of *Vivendi Universal*) and *PRISA* (the main Spanish multimedia group). *Canal Satélite Digital* has 1.2 million subscribers. Moreover, *Sogecable* operates an analogue terrestrial pay-TV channel, which has approx. 800,000 subscribers.
- *Vía Digital*, whose main shareholder is the Spanish telecommunications incumbent, *Telefonica* (48%). *Vía Digital* has approx. 800,000 subscribers.

In May 2002, *Sogecable* and *Vía Digital* reached an agreement to merge. According to this agreement, the former would become integrated with the latter by means of the exchange of shares. Once the proposed operation would be carried out, the stakes of *Vía Digital*, *PRISA* and *Canal Plus* would be equal, although *PRISA* and *Canal Plus* would keep joint control of the company.

The new *Sogecable* would have more than 80% of the current pay-TV subscribers in Spain. Moreover, it would be backed by the two biggest multimedia groups in Spain, *PRISA* and *Telefonica*, which are very active in neighbouring markets, such as: free-to-air television; the acquisition of television rights for sports events and films; film and television programme production; radio broadcasting; press editing and the provision of telecommunications services. This proposed concentration could therefore strengthen the dominant position of *Sogecable* in the pay-TV market, and it could lead to a vertical integration that

could make entry into the market too difficult for new companies. However, the companies involved argue that the operation has to be assessed within the context of the crisis in the pay-TV sector in the European Union, which has led to the winding-up of several companies. Both *Vía Digital* and *Sogecable* were suffering heavy losses, and they claim that the merger is necessary for their survival.

This proposed merger will only become effective if the authorities consider that it complies with both competition law and sector-specific media ownership limits.

As regards competition law, the proposed merger has a Community dimension: according to Council Regulation (EEC) No. 4064/1989 of 21 December 1989 on the control of concentrations between undertakings (the EC Merger Regulation), the relevant authority would usually be the European Commission. However, the Spanish Government requested the European Commission, on the basis of Article 9.2 of the EC Merger Regulation, to refer the case to the Spanish competition authorities. In August 2002, the Commission reached the conclusion that, given the national scope of the markets affected by this operation, the Spanish competition authorities should now assess the transaction under national competition law.

In August 2002, notice of the case was then communicated to the Spanish Ministry of the Economy, which has asked for the advice of its *Servicio de Defensa de la Competencia* (Protection of Competition Unit) and of the *Comisión del Mercado de las Telecomunicaciones* (CMT, Telecommunications Market Commission, the independent electronic communications regulator). Both have highlighted in their respective reports that the merger could hinder competition in several relevant markets, such as those of premium films and sports rights, the provision of broadband audiovisual services, the provision of technical and administrative services for pay-TV or the production and commercialisation of theme-specific channels. The main concern expressed by those bodies is that the new platform could abuse its dominant position in relation to television rights sellers (such as football clubs), independent programmers, competing pay-TV platforms or end-users. Nevertheless, these authorities acknowledge that the economic situation of the pay-TV sector is currently very complicated.

The *Tribunal de Defensa de la Competencia* (TDC, Protection of Competition Court, an independent competition body) will now have to issue a non-binding opinion, and the Council of Ministers will adopt the final decision before the end of November, either authorising (in some cases subject to certain conditions which counterbalance possible restrictive effects) or prohibiting the operation.

This merger shall not only comply with the limits imposed by the Government in applying general competition law; the merging companies must also respect the specific limits on media ownership, such as those established by the 1988 Private Television Act (which regulates national and regional terrestrial television) or by the 1997 Act on the incorporation into Spanish law of EC Directive 95/47 (which deals with the provision of conditional access services for pay-TV and with the relationship between digital pay-TV platforms and independent broadcasters). ■

Alberto Pérez Gómez
Entidad Pública Empresarial RED.ES

"Commission refers the assessment of Vía Digital's merger with Sogecable to the Spanish Competition Authorities.", Press Release of the European Commission of 16 August 2002, IP/02/1216, available at:
http://europa.eu.int/rapid/start/cgi/guesten.ksh?p_action.gettxt=gt&doc=IP/02/1216|0|RAPID&lg=EN&display=

DE-EN-ES-FR

***Informe al Ministerio de Economía sobre la operación de concentración entre Vía Digital y Sogecable elaborado por la Comisión del Mercado de las Telecomunicaciones en respuesta a la solicitud formulada por el Ministro al amparo del art. 1.2.j) de la Ley 12/1997* (Report of the CMT to the Ministry of Economy on the proposed merger between Via Digital and Sogecable, not officially published)**
***Informe del Servicio de Defensa de la Competencia sobre el asunto N-280, Sogecable/Vía Digital* (Report of the Protection of Competition Unit on case N-280 *Sogecable/Vía Digital*), available at:**
http://www.mineco.es/dgpedc/new/n280infweb.PDF

ES

FR – The CSA Delivers its Report on the Definition of what Constitutes an "Audiovisual Work"

At the end of 2001, when the "Popstars" programme was classified as an "audiovisual work" (see IRIS 2002–1: 8), the *Conseil supérieur de l'audiovisuel* (the audiovisual regulatory body - CSA) announced its decision to embark on a broader consideration, beyond this specific case, involving creators, producers and broadcasters, of the relevance of the present definition of what constitutes an "audiovisual work" (resulting from Article 4 of the Decree of 17 January 1990) in the light of new programme concepts, particularly reality television broadcasts (see IRIS 2001–2: 9). The report drawn up following the public consultation organised by the CSA last April in conjunction with the *Centre national de la cinématographie* (national cinematographic centre – CNC) reflects the varying opinions expressed by those concerned, as well as giving the CSA's analyses and proposals. The CSA emphasises that any amendment to the definition, whether it made it more or less restrictive, would necessarily incur a re-examination of the legal framework of the obligations involved in the production and broadcasting of works. This framework was in fact comprehensively reworked very recently for all the channels, including the future channels for terrestrially-broadcast digital television (see IRIS 2001–2: 8), and it is too soon to be able to evaluate these new provisions yet. Thus, although the audiovisual scene is preparing to embark on a new era in its history with the launch of terrestrially-broadcast digital television, the CSA feels that for the time being the maintenance of established rules and a clear framework for action for both producers and broadcasters shall ensure legal security for all those involved in the sector. The CSA is also anxious to respect the European schedule – while the European Commission is awaiting the results of the impact study on the effects of Articles 4 and 5 of the Television Without Frontiers Directive on the programme industries with a view to possible reconsideration, the CSA is unsure whether it would be appropriate for France to adopt a position on this in advance, as it has already adopted a more restrictive definition than that contained in the Directive. Lastly, taking into account the recurrent demand on the part of the various parties concerned to provide more transparent information more quickly on decisions regarding classification, the CSA has announced that it will gradually be putting on-line on its Internet site the list, updated each month, of new programmes broadcast by the national terrestrially-broadcast channels that it would have classified as "works" and the list, updated each month, of all the audiovisual works broadcast by the national terrestrially-broadcast channels indicating their European origin and/or the fact that their original language is French, to enable the various parties concerned to have at their disposal reliable information on the classification of all broadcasts. ■

Amélie Blocman
Légipresse

CSA press release no. 501 of 25 July 2002; available at the following address:
http://www.csa.fr/actualite/communiques/communiques_detail.php?id=9297

FR

FR – French Government's Reply to Community Authorities on Sectors not Allowed to Advertise on Television

Amélie Blocman
Légipresse

On 7 May the European Commission instructed France to repeal its decree of 27 March 1992 prohibiting advertising on television for a number of sectors of economic activity (literary publishing, the cinema, the press and large-scale distribution). Mr Aillagon, Minister of Culture and Communication, immediately announced that consultation would be embarked upon with the professionals concerned "in the near future" (see IRIS 2002–6: 13). Yet it was not until 25 September that the French Government replied to the Community authorities, giving its reasons for considering the contested regulations to be "in compliance with Community law, since they were in proportion to the objectives of general interest being pursued". The Government considers that, by prohibiting television advertising for large-scale distribution, the written press, publishing and the cinema, the purpose of the Decree of 27 March 1992 is to "maintain the diversity of the cultural offer and the pluralism of the media by contributing to the preservation of the equilibria of competition and advertising resources in the serious media". The Government is nevertheless aware that the appearance of new means of audiovisual communication is the reason for a number of professionals calling for a change in the regulations, particularly as some of them are expressing their concern regarding the continuation of the current provisions. Consequently, taking advantage of its reply to the Community authorities, the Government announced the launch, under the guidance of the *Direction du développement des médias* (Media Development Directorate – DDM) and with the support of the *Direction générale de la concurrence, de la consommation et de la répression des fraudes* (General Directorate for Competition, Consumer Affairs and the Repression of Fraud – DGCCRF), of a broad consultation of the professionals concerned, including more particularly the press, radio stations, advertisers, professionals in advertising and the cinema, publishing and the distribution sector as well as the independent administrative authorities concerned. ■

Reply by the French Government to the European Commission's instruction concerning regulations governing sectors not allowed to advertise on television, 25 September 2002
http://www.culture.gouv.fr/culture/actualites/index.htm

FR

FR – CSA Publishes its Balance Sheet for 2001 of Cable and Satellite Channels

Mathilde de Rocquigny
Légipresse

At its plenary meetings on 23 July and 10 September 2002, the *Conseil supérieur de l'audiovisuel* (the audiovisual regulatory body – CSA) examined the balance sheet of the authorised French-language services distributed by cable and satellite. Traditionally, this balance sheet is based on two complementary approaches – firstly the monitoring and observation of programmes by the CSA, and secondly a declaration scheme based on the undertaking given by each service to submit an annual report on the conditions for carrying out its obligations. The report must include all the figures for programmes and more particularly a statement of the audiovisual and cinematographic works broadcast.

The study carried out by the CSA indicates that the sector of authorised theme channels broadcast by cable and satellite is growing, albeit more slowly than in the past, carried mainly by a small number of major theme channels and a small number of new channels. This sector has seen growth in the order of 11% compared with the previous year, with a turnover amounting to EUR 848.7 million, more than half of which was generated by the four theme channels (cinema, sport, youth and fiction). As of 31 December 2001, the number of households subscribing to pay television on cable and satellite (excluding Canal + broadcast terrestrially) exceeded five million, corresponding to an increase of 11% compared with 2000.

The CSA noted that respect for the basic ethical principles (pluralism, protection of children and young persons) and for the rules concerning advertising and sponsorship were on the whole satisfactory in 2001. Respect for obligations concerning the broadcasting of audiovisual and cinematographic works remains a subject for – sometimes serious – concern, although the report does note an encouraging trend in the right direction. In examining the evolution of the disparities between the percentages required and those achieved, the CSA noted that the services took account of the warnings, formal notices to take action and notices concerning the instigation of sanctions procedures that it had sent to them. It nevertheless carried out sanctions procedures against eight services for failure to respect the quotas for broadcasting cinematographic and/or audiovisual works after first issuing formal notices. It also sent formal notices to a number of services, mainly concerning respect for these quotas, the communication of balance sheets and the right of undertakings to acquire broadcasting rights for cinematographic works.

Lastly, the CSA carried out the sanction procedures it had notified in November 2001. Eight of these procedures concerned a failure to respect obligations regarding quotas for European or French-language audiovisual works, and resulted in fines of between EUR 10 000 and 150 000. Ten sanction procedures concerned failure to respect obligations regarding quotas for European or French-language cinematographic works. The CSA called on most of the services concerned to decide on a period of seven consecutive days before the end of 2002 during which they would only broadcast European and/or French-language cinematographic works.

Lastly, concerning certain services, the CSA has fixed at EUR 25 000 the fine for failing to provide information on an annual basis for undertakings to acquire broadcasting rights for European and French-language cinematographic works. ■

CSA press release no. 502 of 12 September 2002
CSA newsletter no. 154 for August/September 2002

FR

GB – Minister Approves New BBC Digital Channel Subject to Strict Conditions

In September 2001, the British Culture Secretary approved three new BBC digital channels; however, she asked for a further proposal for a new youth channel to be revised and re-submitted because it did not have a distinctive character and similar services are offered by private broadcasters (see IRIS 2001–9: 10). The new youth channel, BBC3, has now been approved subject to stringent conditions. Ministerial consent is required for new services under the Agreement with the Secretary of State which defines the powers of the BBC. The channel will be funded by the licence fee rather than by advertising or subscription, which has led to serious fears of unfair competition by commercial broadcasters; it will have a

substantial annual programme budget of GBP 97 million.

The minister stated that she was satisfied that, under the new proposals and after hard negotiations with the BBC, the channel would be "genuinely distinctive, genuinely public service and genuinely innovative". Twelve conditions have been attached to the approval in order to ensure that this standard is met. These include "high general standards in all respects (and in particular in respect of content, quality and editorial integrity)". The new service is to deliver a mixed schedule of programmes embracing drama, entertainment, news, current affairs, education, music, the arts, science and coverage of international issues. Quality programming must not be at the expense of programmes for the same audience in the more widely-available BBC1 and BBC 2. More specific requirements include the following:

- 25% of output must be commissioned from the independent sector;
- 90% of time must be allocated to programmes made in the EEA, for first showing in the UK; such programmes will also represent 90% of programme expenditure;
- 80% of output must consist of programmes specially commissioned for BBC3 and genuinely new to television.

A review of the channel will be undertaken after two years, including an independent assessment of its impact on the broadcasting market, to satisfy the minister that the conditions and assurances made during the approval process are met. ■

Tony Prosser
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University of Bristol

"Tessa Jowell Gives Approval to BBC3", Department for Culture, Media and Sport, Press Release 175/02 of 17 September 2002, available at:
http://www.culture.gov.uk/creative/search.asp?Name=/pressreleases/creative/2002/dcms175

IT – Code of Conduct on Teleshopping

On 14 May 2002, the *Commissione per il riassetto del sistema radiotelevisivo* (Commission for the reform of the radio and television broadcasting sector), located at the *Ministero delle comunicazioni* (Ministry of Communications), published a Code of Conduct on Teleshopping drafted by broadcasters and their associations, together with representatives and experts from the Ministry, based on the premise that teleshopping relating to astrological services, gambling and games requires that there should be specific protection for consumers, in order to avoid the exploitation of superstition or fear as a justification for the purchase of goods or services that are advertised.

According to Article 2 of the Code, teleshopping programmes shall not mislead consumers by any means such as omissions, exaggerations or ambiguities, and they must avoid violent scenes that may offend consumers' dignity, and must also avoid discrimination based on race, gender, religion or nationality. In particular, teleshopping must not generate unjustified fears or beliefs; make forecasts for the future that may threaten the viewers psychologically; include requests for money aimed at solving personal problems or show minors in indecent scenes or endangering their health.

Article 3 charges a Committee located at the Ministry of Communications with monitoring and sanctioning duties. It is composed of 12 members appointed by the Minister of Communications, six of whom represent national and local broadcasters; five, the public institutions (two, the Ministry of Communications; one, the Communications Authority; one, the local government and one, the parliamentary commission monitoring the public service broadcaster) and one representing consumers' associations. Should a violation of the Code occur, the Committee may adopt urgent provisions inviting the broadcaster to suspend the transmission of the teleshopping involved. In particularly serious cases, the Committee may order the broadcaster to publish the decision adopted. ■

Maja Cappello
Autorità per le Garanzie nelle Comunicazioni

***Codice di autoregolamentazione in materia di televendite e spot di televendita di beni e servizi di astrologia, di cartomanzia ed assimilabili, di servizi relativi ai pronostici concernenti il gioco del lotto, enalotto, superenalotto, totocalcio, totogol, totip, lotterie e giochi similari,* 14 May 2002, available at:**
http://www.comunicazioni.it/it/index.php?Mn1=12&Mn2=89
IT

RO – Recommendations to Ensure Plurality of Opinion

At its meeting on 12 September 2002, the supervisory body for electronic media in Romania, the *Consiliul Național al Audiovizualului* (National Audiovisual Council - *CNA*) adopted three recommendations applicable to both public service and private broadcasters designed to help them comply with the legal obligation to guarantee plurality of opinion.

According to these recommendations:

- in news bulletins, two-thirds of transmission time should be set aside for representatives of the government and parliamentary majority, and one-third for the opposition;
- in all matters of public interest or connected with public funding, the views of the opposition should be represented as well as the official government standpoint;
- more transmission time should be devoted to discussion-based programmes in order to provide greater plurality of opinion in relation to all matters of public interest.

In the CNA's view, meeting these recommendations would ensure compliance with the provisions of the new Audiovisual Act relating to plurality of opinion in Romania (Article 3 of Audiovisual Act no. 504 of 11 July 2002, see IRIS 2002–7: 14). ■

Mariana Stoican
Radio Romania International

RO – TV Ban for Tobacco and Alcohol Advertising

On 15 August 2002, the *Consiliul Național al Audiovizualului* (National Audiovisual Council – *CNA*) issued the following communiqué: "As the protector of the public interest and the sole regulatory authority for the electronic media, [the *CNA* has] noted that certain TV broadcasters are breaching the provisions of Act no. 504/2002 (Art. 20) by broadcasting cigarette advertisements. The Council has also noted that the transmission of some commercials for alcoholic beverages infringes Article 32 of the Audiovisual Act. Failure to comply with advertising regulations will be penalised with fines ranging between ROL 50 and 500 million". ■

Mariana Stoican
Radio Romania International

Communiqué of the *Consiliul Național al Audiovizualului* (National Audiovisual Council – CNA), 15 August 2002
RO

RO – CNA Withdraws Broadcasting Licence

Mariana Stoican
Radio Romania International

At its meeting on 12 September 2002, the supervisory body for electronic media in Romania, the *Consiliul Național al Audiovizualului* (National Audiovisual Council - *CNA*), took its most severe action yet against a television broadcaster. Following complaints about the content of the chat show "*Dan Diaconescu în direct*" ("Dan Diaconescu live"), broadcast on 31 July and 10 September 2002, the *CNA* withdrew the broadcasting licence of the private broadcaster OTV.

In the episode shown on 10 September, the presenter, who is also a director of OTV, interviewed the senator from the "*România Mare*" (PRM) political party, whose remarks triggered numerous letters of protest and complaints to the CNA. The Romanian President sent a communiqué to the CNA, describing the comments of the PRM politician on the OTV show as "racist, anti-Semitic and characterised by hatred and violence".

The CNA concluded that the programme content breached the provisions of Article 40 of Audiovisual Act no. 504 of 11 July 2002 (see IRIS 2002–7: 14). The Act prohibits the transmission of programmes that are in any way inflammatory on the grounds of race, religion, nationality, gender or sexual orientation (*"Este interzisă difuzarea de programe care conțin orice formă de incitare la ură pe considerente de rasă, religie, naționalitate, sex sau orientare sexuală."*). The CNA found that the programmes concerned constituted a serious breach of the public interest and, based on the provisions of Article 95.1 (b) of the Audiovisual Act, decided to withdraw OTV's broadcasting licence, held on the basis of licence no. S.Tv. 31/27.03.2001, issued to S.C. First Media Advertising, and authorisation ("*Autorizație*") no. 444.o/06.09.2001.

The CNA has informed the operators of Romanian cable TV networks of its decision, which came into force immediately. As a result, they have, as far as possible, removed the OTV channel from their cable packages.

OTV has appealed the decision to the *contencios administrativ* (Administrative Court) and applied for it to be revoked. On 18 September, having been asked to lift the immediate enforceability of the decision, the *Curtea de Apel* (Court of Appeal) decided that the CNA's decision should stand until a definitive court verdict was reached. In these interim proceedings, the Appeal Court's decision was based on procedural considerations, since the rules of procedure required OTV to apply directly to the CNA for the sanctions to be lifted before any court review could take place. OTV has now made such an application and the CNA is expected to announce its decision on 9 October. ■

Documentation on this case is available at: http://www.cna.ro/otv/sumar.html

RO

FILM

CH – European Union and Bern Open Negotiations on Switzerland Re-joining the MEDIA Programmes

Patrice Aubry
Lawyer (Geneva)

In 1991, Switzerland was the first country that was not a Member State of the European Union to join the EU's MEDIA programme, designed to promote the cinema. Following the rejection by the Swiss people of membership of the European Economic Area (EEA) in December 1992, Switzerland was excluded from the programme and as a result Swiss professionals in the cinema and audiovisual sector have not had access to the MEDIA programme since 1993.

In 1993, in order to mitigate the negative effects of this exclusion, the Swiss Federal Council introduced funding for compensatory measures. The funding, renewed each year, is administered by *Euroinfo Suisse* on behalf of the *Office fédéral de culture* (Swiss Ministry of Culture). In addition, since the beginning of 2000, Swiss professionals may once again, subject to special conditions, take part in the vocational and continuous training courses of the MEDIA programme.

When the European Union definitively adopted the final mandates for negotiations with Switzerland in Luxembourg on 17 June, Bern announced its intention to rapidly embark on discussions on those matters still pending, particularly Swiss participation in the MEDIA programmes. This was one of the topics not covered in the first round of bilateral negotiations between Switzerland and the European Union.

The first meetings of the Swiss and European delegations were held on 18 July 2002 in Brussels. These discussions covered the methods and conditions for Swiss participation in the MEDIA Plus and MEDIA Training programmes. The delegations also discussed the compatibility of Swiss television legislation with current European legislation; such compatibility is a prerequisite for all future participation by Switzerland in the MEDIA programmes.

By re-joining the MEDIA programmes to promote the cinema, Switzerland hopes to make Swiss/European joint productions easier, and to support training for professionals in the cinema sector and improve access to the European market for Swiss audiovisual productions. It would also promote the common cultural heritage the European cinema constitutes. The Swiss and European delegations agreed to meet in Bern in September 2002 for a second round of talks. ■

Press release from the *Office fédéral de la culture* (Swiss Ministry of Culture) dated 18 July 2002

FR-DE

FR – Further Referral to the *Conseil d'État* Concerning the Film *"Baise-moi"*

The film "*Baise-moi*" is still being talked about. The association "*Promouvoir*" will really have done everything in its power to get the Courts to cancel its authorisation and consequently to prevent the film being shown in cinemas. It will be recalled that on 30 June 2000, at the association's request, the *Conseil d'État* cancelled the authorisation prohibiting the film being shown to anyone under the age of 16 years that had been granted to the film previously, on the grounds that the Decree of 23 February 1990, in its wording in force at the time the certificate was issued, made no provision for a cinematographic work being prohibited from being shown to anyone under the age of 18 years in any other way than by putting the film on the list of pornographic films or those inciting violence (see IRIS 2000–7: 8). The case illustrated the legal vacuum that had previously existed on this point. On 12 July 2001, a Decree amended the Decree of 23 January 1990 by introducing the possibility of combining the certificate granted to a film with a ban on showing it to anyone under the age of 18 years without having the film included on the list of

pornographic films or those inciting violence (see IRIS 2001–8: 13). On 1 August 2001, the Minister for Culture and Communication issued the disputed film with a new authorisation in this category. The association "*Promouvoir*" did not give up and referred the matter again to the *Conseil d'État* to have this decision cancelled. In its decision of 14 June, the *Conseil d'État* rejected all the arguments put forward by the applicant. It confirmed that the Minister was able to issue the disputed authorisation without infringing the authority of the *res judicata* attached to the decision of 30 June 2000 cancelling the previous authorisation for the film. On the content of the case, the *Conseil d'État* felt that, although the film "*Baise-moi*" included scenes of considerable violence and scenes displaying non-simulated sex which justified banning it from being shown to anyone under the age of 18 years, the theme of the film and the conditions of its production did not make it a characteristically pornographic film or one that incited violence, which would have required its inclusion on the list of X–rated films. Thus the Minister for Culture and Communication had not committed an error of judgment and had not violated the principle of the dignity of the human person by granting the film an authorisation combined with a ban on showing the film to anyone under the age of 18 years.

Quite separate from this case, the Government issued a Decree on 20 September amending the Decree of 15 May 1992 on access to cinemas for minors. The earlier version of the decree required a poster measuring at least 50 cm bearing only the words "Not for showing to minors under the age of 12, 16 or 18 years" to be displayed very conspicuously at ticket offices. The new decree makes no reference to a poster, merely requiring "the mention [of the restriction], made very conspicuously, on the support networks intended to provide the public with information about showings at the cinema". ■

Amélie Blocman
Légipresse

***Conseil d'État*, 14 June 2002, *"Promouvoir"* association**
FR

NEW MEDIA/TECHNOLOGIES

ES – Act on E-Commerce

In July 2002, the Spanish Parliament approved Act 34/2002 on Information Society Services and E-Commerce. By means of this new Act, which will come into force in October 2002, the Spanish authorities have incorporated EC Directive 2000/31 ("Directive on electronic commerce") into Spanish law.

This new Act applies to "information society services" ("IS services"), which the Annex to the Act defines as those provided for remuneration (even if they are free for the recipient), at a distance, electronically and at the individual request of the user. Services provided by voice telephony, fax, telex, mere exchanges of information via e-mail, television, radio broadcasting or TV teletext are not IS services.

The provision of IS services does not require prior authorisation from the Administration, save for authorisations already required by Telecommunications Law for some services such as data transmission.

Act 34/2002 basically applies to IS service providers or intermediaries established in Spain. Some provisions of the Act apply to providers established in an EU Member State when the recipient of the service is located in Spain and the service relates to certain specific matters (eg. intellectual property rights or the legality of commercial communications). When the provider is not established in the EU and its services are directed at the Spanish market, Act 34/2002 will be applicable in its entirety, unless this conflicts with an international treaty.

The main purpose of this Act is to generate confidence among all the different groups involved in the provision of IS Services. To achieve this aim, the Act obliges IS service providers to provide the recipients or users of their services with all of the data needed to permit their identification, such as name or company name, address, public registers in which they are registered, tax identification number, information about the cost of the products or services offered, etc. To comply with this duty to provide information, it is enough for the IS service providers to include this information clearly on their websites.

As regards IS services intermediaries (i.e., natural persons or legal entities providing services consisting of transmission, network access, data hosting, creation of temporary copies to facilitate transmission, or locating and linking to third-party content), they shall not be responsible for any loss or damage caused by IS service providers, on condition that the former limit their activity to intermediation, and that they are not aware of the illegality or damaging nature of the IS service in question. IS service intermediaries are specifically obliged to store data relating to electronic communications connections and traffic for a maximum period of 12 months. These data shall only be used for criminal investigations or to safeguard public security. The use of these data for other purposes shall be considered as a very serious infringement of this Act.

The new Act also addresses commercial communications, defined as the direct or indirect promotion of the goods and services or image of a company, organisation or persons carrying out a commercial, industrial or professional activity. Commercial communications must be clearly identifiable as such, as must also the person that performs them. When a commercial communication is sent via e-mail or similar electronic communication means, the word "*publicidad*" (advertising) has to appear at the beginning of the message. The Act expressly forbids sending these commercial communications unless they have been previously requested or expressly authorised by the recipient.

Other Chapters of Act 34/2002 deal with electronic contracts (the conditions applicable to these contracts, the moment and location of the conclusion of the contract, etc.), and with the applicable sanctions in case of breach of the provisions of this Act. Sanctions range from up to EUR 30,000 for minor infringements to up to EUR 600,000 for very serious infringements.

Finally, some Additional and Final Provisions of Act 34/2002 deal with matters relating to electronic communications, such as the assignment of domain names under the Country-Code top-Level Domain (ccTLD), ".es", or the amendment of the concept of "universal service obligations" of the Telecommunications Act, which will now include the provision of Internet services. ■

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***Ley 34/2002, de 11 de julio, de servicios de la sociedad de la información y de comercio electrónico* (Act 34/2002 on Information Society Services and on E-Commerce, 11 July 2002), available at:**
http://www.igsap.map.es/cia/dispo/l34-02.htm
ES

GB – Report on Controlling Children's Media Consumption

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The British Broadcasting Corporation (BBC), the Independent Television Commission (ITC) and the Broadcasting Standards Commission (BSC) have jointly published a report entitled "Striking a balance: the control of children's media consumption".

The Report was driven by the UK Government's White Paper on Communications, "A New Future for Communications" (see IRIS 2001–1: 8), which proposed an investigation into the various mechanisms for exercising control over children's media consumption. It was commissioned to draw together information and evidence on "attitudes, behaviour and feasibility in relation to mechanisms, primarily those designed to be used by parents and other adults […]".

The Report covers both television and the internet. Broadly speaking, parents feel that the former is under reasonably effective control, and that the regulatory guidelines (eg., the 9pm Watershed, mechanism for controlling children's television – broadcasters agree not to show programmes that are unsuitable for children before a certain time) are effective. The level of concern increases both in relation to the internet and the trend of proliferation of television channels and services.

For the future, what is wanted, according to the findings of the Report, are: "better information about programme content"; "improved awareness and understanding of the various technological aids available" and a solution to the "wrong balance between complexity and ease of set up" of technological mechanisms.

Finally, the Report highlights the view that whilst parental control mechanisms "have a valuable part to play in the control of children's media consumption", they need to be "easy to use and targeted in the right way", notably to emphasise "[…] the positive, empowering aspects" enabling users to "explore family-friendly offerings with confidence". ■

"Striking a balance: the control of children's media consumption", Pam Hanley (Ed.), the British Broadcasting Corporation, the Broadcasting Standards Commission and the Independent Television Commission, September 2002, available at:
http://www.itc.org.uk/latest_news/press_releases/release.asp?release_id=632
http://www.bsc.org.uk/publications.htm
"A New Future for Communications", Communications White Paper, Department of Trade and Industry/Department for Culture, Media and Sport, December 2000, available at:
http://www.communicationswhitepaper.gov.uk/

RELATED FIELDS OF LAW

CH – Review of Telecommunications Act Under Discussion

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medialex

The Swiss *Bundesrat* (Council of Ministers) has decided to open for discussion proposals for a partial revision of the *Fernmeldegesetz* (Telecommunications Act - *FMG*) and the *Fernmeldedienstverordnung* (Teleservices Decree - *FDV*). The discussion phase forms part of the legislative process in Switzerland.

Unbundling of the local loop is to be made compulsory by decree. The *Bundesrat* considers the legal basis set out in the *FMG* to be sufficient to regulate leased lines and all three types of unbundling by means of official decrees.

The proposal for a revised *FMG* sets out a number of firmer regulatory instruments. Under the present law, if a company holds a dominant market position, the *ComCom* (Swiss Federal Communications Commission) can only take action in certain markets subject to an application being lodged by a teleservice provider in connection with a standard bundling procedure. This process has proved to be slow, lengthy and ineffective at promoting fair competition. *ComCom* will therefore now be able, on a regular basis, to specify markets in which regulation would be justified. It will assess whether competition in these markets is fair or whether they are dominated by certain teleservice providers. Companies holding a dominant position must submit their standard offers to *ComCom* for approval. These offers form the basis of agreements between dominant companies and other providers in the field of access and bundling. The *Bundesrat* hopes that this new provision, which has proved successful in other European countries, will improve legal certainty and speed up the whole process.

Other amendments relate to the adaptation of Swiss telecommunications law to that of the European Union and greater consideration for data protection and consumer issues.

The discussion phase will last until 15 October 2002. ■

Proposal for a partial revision of the *Fernmeldegesetz* (Telecommunications Act - FMG)
Proposal for a partial revision of the *Fernmeldedienstverordnung* (Teleservices Decree - *FDV*).

DE-FR

CZ – Tobacco Advertising Ban

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Prague

Members of the Czech Parliament have tabled a Bill proposing a complete ban on tobacco advertising.

Preparations for the latest amendment to the Act on the Regulation of Advertising have already caused disputes with the tobacco industry lobby. According to EC Directive 98/43/EC of 6 July 1998 on the approximation of the laws, regulations and administrative provisions of the Member States relating to the advertising and sponsorship of tobacco products, tobacco advertising should have been banned completely back in 2000. However, in its ruling of 5 October 2000, the European Court of Justice (ECJ) declared that Directive 98/43/EC should be annulled. The main provisions of the tobacco advertising directive included the obligation for Member States to impose a general ban on tobacco advertising, sponsorship and free promotional distributions by July 2001. The ECJ's decision strengthened the tobacco lobby's position in the Czech Republic and the original Bill was therefore withdrawn and a new proposal put forward, allowing a limited amount of tobacco advertising. According to the revised Czech Act on the Regulation of Advertising (see IRIS 2002-4: 11), advertising for tobacco and other tobacco products is permitted under certain conditions. Tobacco advertising may not be aimed at or portray minors; only persons who are or who appear to be aged 25 or over may be depicted; tobacco advertisements may not appear in print media aimed at minors, nor on billboards measuring over 10 square metres located near (within 300 m of) schools or playgrounds. Advertising may not depict people smoking, nor people holding cigarettes or other tobacco products in their hands. Every tobacco advertisement must carry a health warning that covers 10% of the advertising area. Tobacco advertising is totally prohibited on radio and television.

According to the latest draft mentioned above, advertising aimed at tobacco traders and promotions for tobacco products at sales outlets are exempt from the ban on tobacco advertising. Non-tobacco products which, subject to a licence, for example, are sold bearing the trademark or name of a tobacco manufacturer, may be advertised. However, free promotional distributions of tobacco products are banned. These restricted forms of advertising are also subject to current legal provisions. In future, the health warning will have to cover 20% of the advertising area. The Czech Government approved this proposal on 5 August 2002 and it must now be adopted by Parliament. According to the Bill, the new Act will not enter into force until 1 July 2004. ■

Proposal for an amendment to the Act on the Regulation of Advertising, available at:
http://www.psp.cz/sqw/text/tiskt.sqw?O=4&CT=8&CT1=0

CS

DE – Monopolies Commission Advocates Cross-Network Regulatory Body

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In mid-July 2002, the independent *Monopolkommission* (Monopolies Commission) submitted to the *Bundeswirtschaftsministerium* (Federal Ministry of the Economy) its 14th major report, entitled "*Netzwettbewerb durch Regulierung*" (network competition through regulation). One particular chapter deals with network access arrangements and proposes practical measures for future regulation of this area. A particularly significant recommendation is that a cross-sectoral regulatory authority be created for railways, energy, telecommunications and postal services in order to counteract effectively the demands made on the regulatory bodies by those subject to regulation.

The Federal Government, however, does not think such a body is needed at present. Instead, it would rather strengthen the supervisory powers of the *Bundeskartellamt* (Federal Cartels Office) as part of the model for negotiated network access. ■

Press release of the *Monopolkommission* (Monopolies Commission), 14.7.2002, available on the Internet at:
http://www.monopolkommission.de/haupt_14/presse_h14.pdf
Press release of the *Bundeswirtschaftsministerium* (Federal Ministry of the Economy), 8 July 2002, available at:
http://www.bmwi.de/homepage/Presseforum/Pressemitteilungen/2002/2708prm1.jsp

DE

DE – Federal Cartels Office Approves Broadband Cable Network Co-operation Model

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On 22 July, the *Bundeskartellamt* (Federal Cartels Office) announced that, from a competition point of view, there was no reason to prevent co-operation between *Deutsche Telekom AG (DTAG)* and housing companies in connection with the development of the level 4 cable network (connecting the boundary of the individual house to a connection point inside the house). According to the co-operation model, *Kabel Deutschland GmbH (KDG)*, a subsidiary of *DTAG*, will take responsibility for upgrading the cable networks on behalf of housing companies. Although the housing industry will continue to provide cable households with signals transmitted via the cable network from property boundaries to the cable connection points of individual homes, *KDG* will be able to offer broadband Internet services and additional digital TV services and games via the updated network. By means of such co-operation, the level 3 (network between the cable head-end and a connection point at the boundary of the individual house) and level 4 cable networks, which are strictly separate entities, are converging. Most of level 3 is still owned by *DTAG*, although many different operators own a share of the level 4 network. ■

Press release of the *Bundeskartellamt* (Federal Cartels Office), 22 July 2002, available at:
http://www.bundeskartellamt.de/22_07_2002.html

DE

DE – Youth Protection Act and Inter-State Agreement on Youth Protection in the Media Adopted

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Youth protection reforms in Germany (see IRIS 2002–6: 13) are progressing. On 21 June 2002, the *Bundesrat* (upper house of parliament) followed the *Bundestag* (lower house) in approving the new *Jugendschutzgesetz* (Youth Protection Act). The Act will enter into force together with the *Staatsvertrag über den Schutz der Menschenwürde und den Jugendschutz in Rundfunk und Telemedien – Jugendmedienschutz-Staatsvertrag* (Inter-State Agreement on the protection of human dignity and minors in broadcasting and telemedia - *JMStV*), for which the *Länder* are responsible.

One of the aims of these reforms is to create a co-regulation system to guarantee the protection of minors. Self-regulatory bodies and State authorities should work together to protect minors in the media. Whether they are successful will depend in particular on co-operation between the groups involved, since the first draft, which was published in May 2002, was fiercely contested. The most controversial aspect was the relationship between self-regulation, which was previously organised privately, and State supervision, in the new co-regulation system, together with the make-up of the *Kommission für den Jugendmedienschutz* (Commission for Protection of Youth in the Media - *KJM*), which was to be set up at *Land* level. In particular, the regional media authorities, which currently monitor compliance with youth protection provisions in the private TV sector, held conflicting views to the self-regulatory bodies (which were supported by their umbrella organisations) which, independent of the State, supervise the protection of minors in the television sector (*Freiwillige Selbstkontrolle Fernsehen – FSF*) and in other telemedia (*Freiwillige Selbstkontrolle Multimedia – FSM*). Whereas the regional media authorities argued that the co-regulatory bodies should have total control, the self-regulatory bodies thought that the provisions set out in the Inter-State Agreement, particularly the demands of the regional media authorities, were excessive. Under the compromise that has now been reached, the co-regulatory bodies have a certain degree of freedom to make their decisions. The State authorities can only ensure that the boundaries of that freedom are not crossed. On the other hand, the obligation for co-regulatory bodies (previously the self-regulatory authorities) to be licensed was maintained. Furthermore, the position of the *KJM* is now stronger than in the original draft, boosted at the expense of the co-regulatory bodies.

Even now, the final version of the Inter-State Agreement is not without its controversies. Whilst it appears acceptable to the regional media authorities and the *FSF*, representatives of associations of media and Internet service providers have claimed that the Agreement is worded ambiguously. They fear that the current version makes provision for heavy penalties to be imposed on hosting and access providers as well as traditional telemedia providers who fail to take measures to block access to content that might harm the development of minors. Moreover, the *FSM* has announced that it will not apply for a licence and will therefore not become part of the co-regulatory framework. Whether it will stick to this position, and how the system will work in such circumstances, only time will tell. ■

***Jugendschutzgesetz* (Youth Protection Act - JuSchG), 23 July 2002, Federal Gazette I 2002, p.2730**
***Staatsvertrag über den Schutz der Menschenwürde und den Jugendschutz in Rundfunk und Telemedien – Jugendmedienschutz-Staatsvertrag* (Inter-State Agreement on the protection of human dignity and minors in broadcasting and telemedia - JMStV), 9 August 2002**

DE

US – News Organizations Protest at Hague Court's Supboena

Anna Abrigo
Media Center
New York Law School

A retired Washington Post journalist, John Randal, refused to give evidence to the UN International Criminal Tribunal for the former Yugoslavia in the trial of Radoslav Brdjanin, a Bosnian Serb charged with genocide in Bosnia. Supported by media organizations such as CNN, the BBC, the Associated Press and the New York Times, the Washington Post challenged plans by the Tribunal to subpoena Randal. He was the first journalist to refuse to give evidence to the United Nations Court. This was the first time that news organizations have intervened in hearings.

International Criminal Tribunal for the former Yugoslavia, in Trial Chamber II, Prosecutor v. Radoslav Brdjanin and Momir Talic, Decision on Motion to Set Aside Confidential Subpoena to Give Evidence, available at:
http://www.un.org/icty/brdjanin/trialc/decision-e/t020612.htm
EN

The Washington Post has submitted a brief to the Court in the Hague on behalf of 34 international organizations to protect journalists reporting from war zones from subpoenas, arguing that journalists have limited privilege and should be allowed to protect their sources.

In their brief, the media organizations urged the Tribunal "to recognize a qualified privilege for journalists not to be compelled to testify about their news gathering before this Court unless certain conditions are met—namely that the information is absolutely essential to this case and that it cannot be obtained by any other means".

The organizations are appealing a three-member panel lower court decision which stated that Randal had no grounds on which to refuse to testify and that his case did not involve freedom of the press. Further, the ruling stated that the reporter had insufficient grounds to refuse to testify against Brdjanin, because he was not in any danger and Randal had already revealed his source.

The Washington Post attorneys' leave to appeal has been granted and the parties are awaiting oral arguments on this issue.

The journalism community is split on this issue, as a BBC journalist recently testified at the war tribunals in the trial of former Yogoslav President Slobodan Milosevic. ■

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