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INTERNATIONAL

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Court of Justice of the European Communities: Judgment on Compulsory Licensing

On 29 April 2004, the European Court of Justice in a preliminary ruling gave further guidance on the compulsory licensing of intellectual property rights under European competition law. The ruling is an answer to a referral made by the *Landgericht Frankfurt am Main* in Germany.

The three questions asked by the *Landgericht* in the main proceedings concerned the conditions under which a company in a dominant position should license its intellectual property to its competitors. The Court considered that in exceptional circumstances a dominant undertaking is obliged to license its intellectual property right.

First, the subject-matter protected by the right should constitute, upstream, an indispensable factor in the downstream supply of a product. The degree of user participation in the development of the subject-matter protected by the right, and the outlay, particularly in terms of cost, on the part of the users in purchasing an alternative product are relevant factors to consider when determining if it is indispensable. The potential licensee should also intend to produce new goods or services not offered by the owner of the right, and for which there is consumer demand. Third, the refusal should not be justified by objective considerations. And fourth, the refusal should be such as to reserve to the owner of the right the market for the supply of the product by eliminating all competition on that market.

At issue, in this case, is the licensing of formats for the provision of regional sales data of pharmaceutical products. Pharmaceutical wholesale companies offer their sales data to companies who create sales reports, which are then sold to pharmaceutical companies. The data provided by the wholesale companies is broken into geographical segments called "bricks", which are formatted in a predefined way.

IMS is the dominant company for the provision of these sales reports in Germany. Its data formats for the provision of sales data, the "1860 brick structure" and derived formats, have been created in cooperation with the pharmaceutical companies, and the free offering of its reports helped it become the normal industry standard. Pharmaceutical companies have become accustomed to the provision of sales reports according to this structure.

In 2000, the court in Frankfurt considered that IMS' data formats were protected by copyright, and by way of a provisional order forbade the use of the formats by its competitor, NDC. After IMS refused to license its formats to NDC, the latter submitted a complaint to the Commission, claiming that IMS' refusal to license constituted an abuse of its dominant position under Article 82 of the EC Treaty. The European Commission on 3 July 2001 by way

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of interim measures ordered IMS to license its 1860 brick structure (OJ 2002 L 59, p. 18). This decision was later suspended by the President of the Court of First Instance on 26 October 2001 (T-184/01), and the President of the European Court of Justice dismissed the appeal against the suspension (C-481/01). In 2003, the Commission withdrew its first order to license the structure, because there was no longer any urgency to impose interim measures (OJ 2003 L 268, p. 69). In the main proceedings at the origin of this preliminary ruling, IMS is pursuing its aim of prohibiting NDC from using its 1860 brick structure. ■

● Judgment of the European Court of Justice of 29 April 2004, case C-481/01, IMS Health GmbH & Co. OHG v NDC Health GmbH & Co. KG, available at: http://merlin.obs.coe.int/redirect.php?id=9089

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

Advocate General: German Inhibition of "Laserdrome" Justified

In her conclusions presented on March 18th, 2004 in the case C-36/02, OMEGA Spielhallen GmbH/Bonn, the Advocate General at the European Court of Justice (ECJ) Stix-Hackl (GA) fundamentally dealt with the restrictions to the freedom of services, determination of which results from the protection of human dignity stipulated by the Member States.

The plaintiff of the initial action is a company established under German law. The company operated a facility called "Laserdrome" in Bonn, Germany, set up as an extensive labyrinth. Using laser weapons, 'players' could shoot at sensor receivers permanently installed in the hall. Furthermore, a combat simulation was also possible, by firing at 'co-players', *ie* at the waistcoats worn by these that were equipped with sensors. In September 1994 the competent regulatory agency forbade the plaintiff to allow or tolerate at its business premises games having the objective of firing at human beings using laser beams or other technical equipment (e.g. infrared), i.e. the scope of which is so-called 'playful killing' of other people based on hits registration."

The view of the submitting court is that human dignity is a constitutional principle that could be infringed through the generation or reinforcement of the attitudes of game participants denying the fundamental value and right to respect of every person. Fundamental rights asserted by the plaintiff cannot affect this assessment of the national law.

According to the Advocate General, the case affects the freedom of services pursuant to paragraph 49 and 50 of the Treaty Establishing the European Community. The business relationship between the plaintiff and the UK-based provider of the equipment required for this 'game' is fundamentally determined by the franchise agreement. The resulting contractual obligations of the UK-based party went far beyond the delivery of goods and let this aspect of relationship move into the background.

Concerning the justification, she explicates initially that a case would be presented to the court for decision which must clarify which requirements are to be stipulated for the existence of compulsory grounds of general good as an unwritten ground of justification. In particular, it is necessary to examine closely the question of whether the rights of a Member State derived from the national constitutional law are in this context creditable when other Member States in comparable cases determine no impairment of fundamental values, which have been possibly developed for the appropriation of public order. Thus the question to be answered is whether a shared interpretation of law by all Member States shall be necessary to assume such general good. The Advocate General addresses the circumstance that protection of fundamental rights is ensured by the recognition of general legal principles particularly obtained from the common constitutional traditions of the Member States.

Accordingly, "regarding the presentation in conclusion that assuming the necessity of a common interpretation of law by all Member States with respect to an individually questionable decision based on fundamental rights, indicates at the same time on the level of Community Law the existence of a direct collision between fundamental freedoms (as in this case – the freedom of services) and the fundamental rights approved by Community law."

The existence of such a collision raises fundamental questions regarding the interplay of fundamental freedoms.

Consequently we are dealing with human dignity as a legal standard and its protection by Community Law. In this context the remark that the legal term of human dignity has been introduced into secondary legal instruments of the Community, such as in the stipulations of the television directive, gains importance.

The Advocate General quotes the jurisprudence of the European Court of Justice, according to which it is incumbent upon the Court of Justice "within the scope of its supervisory duty concerning the compatibility of the actions of the agencies with the general basic principles of Community Law, to ensure that human dignity and the fundamental right to individual integrity are respected". According to the opinion of the Advocate General it results from the aforesaid that the European Court of Justice acknowledges human dignity as a fundamental right, which means that it cannot be (solely) the interpretation benchmark or the basic (constitutional) value of the European legal system. She refuses a direct assimilation of the contents of this fundamental Community right with the guarantee of human dignity according to Article 1 of the German Basic Constitutional Law in the present case. Regarding the interpretation of justification based on the ground of "public order", it is questioned whether the decision of the authority in the matter in dispute is based upon a sufficiently serious breach (of public order). Therefore the Advocate General is of the opinion that considering the scope of the discretion that the European Court of Justice awards to the Member States, individual state evaluations are absolutely legitimate. It is not obligatory that the protection of the legal substance in all Member States be implemented through similar concrete measures and evaluations. The main point is the existence of a "fundamental compliance with values in National Law and in Community Law regarding the significance of human dignity".

In her conclusion, the Advocate General comes to the result that the sanction is justified because it also complies with the basic principle of proportionality. ■

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● Advocate General at the European Court of Justice (ECJ) Stix-Hackl (GA), Conclusions of 18 March 2004, Case C-36/02, OMEGA Spielhallen- und Automatenaufstellungs-GmbH v. Oberbürgermeisterin der Bundesstadt Bonn, available at: http://merlin.obs.coe.int/redirect.php?id=9118

DE-FR

Council of the European Union: Definitive Adoption of Intellectual Property Rights Enforcement Directive

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On 26 March 2004, the Council of the European Union definitively adopted the Directive on the enforcement of intellectual property rights. This Directive was proposed by the Commission on 30 January 2003 (see IRIS 2003-3: 8) and approved by the European Parliament on 9 March 2004 (see IRIS 2004-4: 5). The form of the Directive to which the Council has now agreed is equal to the version approved by the European Parliament. There is no need for a second reading by either the Parliament or the Council.

The objective of the Directive is to ensure a high, equivalent and homogeneous level of protection of intellectual and industrial property rights in the Internal Market. Therefore the Directive aims to create a level playing field for rightsholders in the EU to defend their intellectual property rights if they are infringed. By ensuring that all Member States adopt a similar set of civil measures, procedures and remedies, the Directive will enable rightsholders to proceed effectively against those engaged in counterfeiting and piracy.

Unlike the original Commission proposal, the adopted version of the Directive does not contain provisions on criminal sanctions. Because the Commission still believes that an effective fight against counterfeiting and piracy requires strong criminal sanctions, it will examine the possibility of proposing measures providing for criminal sanctions in the future.

The Directive will enter into force on the twentieth day following that of its publication in the Official Journal of the European Union, which will take place very shortly. Within two years from the date of its adoption, Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive. ■

- **"Intellectual property: Commission welcomes adoption of Directive against counterfeiting and piracy", Press Release of the European Commission of 26 April 2004, IP/04/540, available at:**
http://merlin.obs.coe.int/redirect.php?id=9073
- **Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights, available at:**
http://merlin.obs.coe.int/redirect.php?id=9076

DE-EN-FR

Council of the European Union: Current MEDIA Programmes Extended to 2006

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On 26 April 2004, the Council of the European Union approved the Commission's proposal to extend the existing Community programmes supporting the European audiovisual industry (MEDIA Plus and MEDIA Training) unchanged until the end of 2006 (see IRIS 2003-6: 5). As proposed by Parliament in its amendments at first reading, the budget for Media Training will be increased to EUR 59.4 million and the one for Media Plus to EUR 453.60 million, to take account not just of the extension of the duration of the programmes but also of enlargement.

The Commission has recently adopted a Communication in which it outlines the proposed features of the new generation of MEDIA programmes due to start in 2007 (see IRIS 2004-5: 4). A legislative proposal for the 2007 programmes will be put forward later this year. ■

- **Press release of the Council 8350/04 of 26 April 2004, available at:**
http://merlin.obs.coe.int/redirect.php?id=9097

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

European Commission: Communication to Clarify Interpretation of Advertising Provisions in Television Without Frontiers Directive

As announced in its Communication on the future of European regulatory audiovisual policy published last December (see IRIS 2004-1: 6), the European Commission has adopted an Interpretative Communication on certain aspects of the provisions on televised advertising in the "Television without Frontiers" Directive. The aim of the Communication is to clarify how the rules on advertising in the Directive apply to certain commercial practices and advertising techniques, which have emerged in recent years. This should help increase legal certainty for all parties concerned. The Communication only clarifies existing rules and does not create any new ones.

As pointed out by the Commission, "the Communication shows that new advertising techniques and new forms of advertising are compatible with the Directive, provided that their use respects the objectives of general interest pursued by the Directive" (namely the right of viewers to a clear separation between advertising and editorial content, their protection against excessive advertising and the respect of the integrity of audiovisual works).

The first part of the Communication analyses the meaning of the basic relevant rules of the Directive and how these apply to a number of commercial practices. For instance, the Commission clarifies how the provisions of Article 11 (insertion of advertising and teleshopping) apply to sports programmes; it specifies how mini-spots must be used to comply with the Directive; and looks at how the Directive applies to telepromotions. Clarifications are also given as regards surreptitious advertising and teleshopping.

The Communication then specifies how the provisions of the Directive apply to new advertising techniques, namely split screen, interactive advertising and virtual advertising.

Split screen advertising (i.e. the simultaneous or parallel transmission of editorial and advertising content) is considered to be compatible with the Directive, "provided it is readily recognisable and kept quite separate from other parts of the programme by acoustic or optical means", so as to avoid any confusion between the two for viewers. A spatial separation between editorial and advertising content is thus considered to comply with the rules of the Directive. Split screen advertising must also not prejudice the integrity of the programme and is fully covered by the provisions on the presentation, insertion, duration and content of advertising.

As regards interactive advertising, the Commission notes that, being a service supplied on individual demand, this is an information society service and is thus outside the scope of the Directive. However, interactive advertising is usually accessed by the viewer through an advertisement broadcast in the context of a linear programme. The Communication thus specifies

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that as long as the viewer has not entered the interactive environment, the context is one governed by the Television without Frontiers Directive. Therefore, the provisions of the Directive apply with regard to separation of advertising and editorial content, to advertising content and to the protection of human dignity and of minors. However, once the viewer, on a voluntary and informed basis has entered into the interactive environment, then the provisions of the Electronic Commerce Directive will apply.

Finally, the Commission also considers that virtual advertising complies with the Directive, provided it respects a number of conditions. ■

● **Commission interpretative communication on certain aspects of the provisions on televised advertising in the "Television without frontiers" Directive, published in OJ C102/2 of 28 April 2004, available at:**
http://merlin.obs.coe.int/redirect.php?id=9111

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

European Commission: Proposal for New Recommendation on Protection of Minors and Human Dignity

On 30 April 2004, the European Commission put forward a proposal for a new Recommendation of the European Parliament and of the Council on the protection of minors and human dignity and the right of reply in the European audiovisual and information services industry.

At the end of 2003, the Commission adopted its second evaluation report on the 1998 Council Recommendation on the protection of minors and human dignity in audiovisual and information services (see IRIS 2004-2: 6). The report came to a generally positive conclusion on the application of the 1998 Recommendation, but also identified areas where further action would be appropriate. The new Recommendation follows up on the report (and on the public consultation on the Television without Frontiers Directive – see IRIS 2004-1: 6) and is intended to complement the 1998 Recommendation (which remains valid), in particular in order to take account of the new challenges brought about by technological developments. Like its predecessor, the new Recommendation concerns the content of audiovisual and information services whatever their form of delivery (from broadcasting to Internet).

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The proposed Recommendation calls for:

- The promotion of media literacy and media education programmes so as to "enable minors to make responsible use of on-line audiovisual and information services". This should be achieved notably by improving the level of awareness among parents, educators and teachers of the potential of new services and of how they can be made safe for minors;
- Action by Member States, industries and all parties concerned to avoid and combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation in all media, with the aim of establishing an appropriate balance between the principles of protection of human dignity and free speech. The promotion of a diversified and realistic picture of the skills and potential of women and men in society is also encouraged;
- Co-operation and exchange of best practices between self- and co-regulatory bodies dealing with the rating or classification of audiovisual content. This could lead to a "bottom up" harmonisation of the systems used in the Member States. The development of a system of common descriptive symbols is encouraged, as this would help viewers assess the content of programmes;
- Consideration by Member States to introducing into their national laws and practices measures to ensure the right of reply across all media, "without prejudice to the possibility of adapting the manner in which it is exercised to take into account the particularities of each type of medium". Indicative guidelines are given on how the right could be implemented. ■

● **Proposal for a Recommendation of the European Parliament and of the Council on the protection of minors and human dignity and the right of reply in relation to the competitiveness of the European audiovisual and information services industry, Brussels 30 April 2004, COM (2004) 341 final, available at:**
http://merlin.obs.coe.int/redirect.php?id=9094

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

European Commission: Unfair Competition Complaints because of the Use of Licence Fees to Acquire Sports Rights and Fund Digital Television

Because of a complaint from the Private Broadcasting and Telecommunications Union (VPRT), dated April 2003, on 5th April 2004 the EC Commission (Competition DG) made a request for information from the Federal Republic of Germany. The complaint was directed against the financing of the public broadcasters, ARD and ZDF, in particular, for what were possibly anti-competitive practices in relation to the acquisition of football transmission rights. The complaint reproached ARD and ZDF for allegedly acquiring sports transmission rights without actually broadcasting the relevant sporting events later on. Moreover, the VPRT said the public broadcasters had taken over the sports-rights market, because, armed with public money, they had been able to bid far higher than the private broadcasters. As an example, the VPRT cited the acquisition of the transmission rights for the German Premier Football League matches, which, at EUR 70 million, had exceeded the financial capabilities of the private broadcasters by a long way. In the light of this scenario, both overcompensation and anti-competitive practices could have obtained. In a list of questions posed to the German authorities, the Commission has asked for a more detailed explanation of the facts.

In the context of a further complaint lodged early in May 2004, several cable network operators have had recourse to the Commission on account of the financing of the digitally-transmitted terrestrial television channel (DVB-T) in the Berlin-Potsdam region (see IRIS 2002–4: 6). The indictment has been brought that the Berlin-Brandenburg Media Authority (mabb) gave assistance for the use of the DVB-T network, thus distorting the competition situation. The applicants felt they had been put at a disadvantage as a result. A Commission decision on the setting up of a formal investigation has yet to be made. ■

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● **Information request no. CP 43/2003 by the European Commission to the Federal Republic of Germany of 5 April 2004**

DE

European Commission: 6 Member States Referred to Court of Justice over Electronic Communications Framework

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On 21 April 2004, the European Commission announced its decision to refer to the European Court of Justice the six Member States that had still not fully implemented the new regulatory framework for electronic communications into their national law (i.e. Belgium, Germany, Greece, France, Luxembourg and the Netherlands). The new framework was to be implemented by July 2003, but 8 Member States failed to meet this deadline and in October 2003 the Commission opened infringement proceedings against those States (see IRIS 2003-10: 5 and IRIS 2004-2: 4). Proceedings against two Member States, Spain (see IRIS 2004-1: 11) and Portugal (see IRIS 2004-6: 15), have since been closed as these States have now notified transposition measures. The Commission notes that it is also aware of the progress being made in certain Member States, namely France and the Netherlands, to finalise implementing measures and that it is ready to take these developments into account as soon as it receives formal notification of national laws. In the Netherlands, implementing legislation was adopted on 20 April 2004 (see IRIS 2004-6: 14), and Germany has also now adopted transposition measures (see IRIS 2004-6: 9). With this decision, the Commission wants to send a clear signal to all Member States that the sector can no longer afford any further delays in these fundamental reforms.

The Commission has also sent reasoned opinions (the second stage in infringement proceedings) to 8 Member States for their failure to notify measures transposing the e-Privacy Directive (which is also an element of the new framework and which was to be implemented by 31 October 2003). Proceedings were initially opened against 9 Member States (see IRIS 2004-2: 4), but the proceedings against Sweden were closed after it notified its new spam legislation. The Member States concerned now have two months to comply with their obligations, failing which they could be referred to the European Court of Justice. ■

● **"Six Member States face Court action for failing to put in place new rules on electronic communications", Press Release of the European Commission IP/04/510 of 21 April 2004, available at: http://merlin.obs.coe.int/redirect.php?id=9115**

DE-EL-EN-FR-NL

European Commission: Santiago Agreement Potentially Incompatible with European Competition Law

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The European Commission has recently warned sixteen European collecting societies that their so-called Santiago Agreement is potentially in breach of European Union competition rules. The Santiago Agreement is a trial reciprocal agreement, concluded by nearly all the major European collecting societies representing authors in the area of music performing rights (lyrics writers and music composers). The agreement allows each of the participating societies to issue multi-territorial licenses of public performance rights to be used online. The aim is to grant online commercial users "one-stop shop" copyright licenses. These licenses include the music repertoires of all the societies and are valid in all their territories. In order to get a "one-stop shop" license, online users have to apply to the collecting society established in their own Member State.

The Santiago Agreement was notified to the Commission in April 2001. As clearly expressed in its Decision of 8 October 2002 concerning the IFPI Simulcasting case (see IRIS 2002-10: 5), the Commission fully acknowledges the need to ensure adequate copyright protection and enforcement in the digital environment. Besides, it strongly supports the "one-stop shop" copyright licensing for online use. But the Commission also considers that in order to achieve a genuine European single market, such crucial developments in online-related activities must be accompanied by increasing freedom of choice for consumers and commercial users throughout Europe as regards their service providers.

That is one of the main objections the Commission has to this Agreement. The structure put in place by the parties to the Santiago Agreement leads to an effective lock up of national territories. The Commission stresses that in order to safeguard the interests of rightsholders in the online world, it is not necessary to limit commercial users' choice to the monopolistic collecting society established in their own Member State. It considers that this territorial exclusivity is not justified by technical reasons and that it is irreconcilable with the world-wide reach of the Internet. The Commission believes that there should be competition between collecting societies. This should benefit companies that offer music on the Internet and consumers who listen to it. Competition is also necessary to achieve a genuine single market in the field of copyright management services.

The Commission invites the collecting societies to submit proposals to render the current arrangements compatible with European competition law. These will be examined carefully and with an open mind. The collecting societies have two-and-a-half months to reply to the Commission. They can also request a hearing. ■

● **"Commission opens proceedings into collective licensing of music copyrights for online use", Press Release of the European Commission of 3 May 2004, IP/04/586, available at: http://merlin.obs.coe.int/redirect.php?id=9079**

DE-EN-FR

European Parliament: Adoption of Report on Media Independence and Pluralism

On 22 April, the European Parliament adopted – at first reading – a report on the risks of violation, in the EU and especially in Italy, of freedom of expression and information (Article 11(2) of the Charter of Fundamental Rights). The mainstay of the report is a motion for an identically-titled European Parliament Resolution, which *inter alia* calls on the European Commission to present a proposal for a directive to safeguard media pluralism in Europe.

The motion stresses that media independence and pluralism are crucial for guaranteeing the right to freedom of expression and information. Relevant issues are subjected to a detailed examination, particularly from the angles of audiovisual policy; public service broadcasting and the commercial media. Due emphasis is laid on the individual and collective impact of arguments based on democracy, technological advances, and constitutional and competition law considerations.

Attention is drawn to specific problems pertaining in a number of EU Member States: France, Germany, Ireland,

the Netherlands, Poland, Spain, Sweden and the United Kingdom. The greatest scrutiny, however, is reserved for Italy, due to persistent concerns over high levels of concentration of ownership in the audiovisual market there, coupled with the prominence of political involvement in the same.

The proposed recommendations were distilled from concerns identified and explored in the body of the motion. For instance, it is stated that EU competence in policy and regulatory matters affecting the media, especially new technological features relating to digital television, should be used for furthering media pluralism and combating "horizontal and vertical media concentration in traditional as well as in new media markets".

Among the motion's calls for specific lines of action on the part of the European Commission are:

– the submission of a communication on the state of media pluralism in the EU as soon as possible (the envisaged scope of such a communication is broad, including a *compte rendu* of current measures and practice at the national and EU levels alike; explorations of possible and recommended courses of action, and the relevant mechanics of such action and any consultation procedures that would be involved);
– the submission of "a proposal for a directive to safeguard media pluralism in Europe in order to complete the regulatory framework […]".
– Another key recommendation is that "legislation should be adopted at European level to prohibit political figures or candidates from having major economic interests in the media […] legal instruments should be introduced to prevent any conflict of interest […]", and that the Commission should "submit proposals to ensure that members of government are not able to use their media interests for political purposes". The Commission is also called upon to devise an action plan on measures to promote pluralism in all EU sectors of activity. Twenty points are suggested for inclusion in such an action plan.

The substantive recommendations conclude with an invitation to the Italian Parliament to:

– speed up reforms of the national audiovisual sector in keeping with "the recommendations of the Italian constitutional court and the President of the Republic, taking due account of the incompatibility with Community law, as identified by these authorities in the Gasparri Bill" (see IRIS 2004-6: 12);
– resolve "the problem of a conflict of interest of the President of the Italian Council of Ministers who also directly controls the principal provider of private and, indirectly, public television, the main advertising franchise holder and many other activities connected with the audiovisual and media sector", and
– adopt "measures to ensure the independence of the public service broadcaster". ■

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● Report on the risks of violation, in the EU and especially in Italy, of freedom of expression and information (Article 11(2) of the Charter of Fundamental Rights) (2003/2237/(INI)), Committee on Citizens' Freedoms and Rights, Justice and Home Affairs (Rapporteur: Johanna L.A. Boogerd-Quaak), 5 April 2004, Doc. A5-0230/2004 (Final), available at:
http://merlin.obs.coe.int/redirect.php?id=9085

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

NATIONAL

AL – RTSH Faces an Identity Crisis

The Annual Report on the Activities of the Albanian Public Radio Television (RTSH) presented to the Parliament of the Republic of Albania in March 2004 by the Chief Managing Council of the RTSH, pointed out that RTSH remains in an identity crisis, even though five years have gone by since the law on the transformation of this institution into public property was passed.

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Albanian Parliament

The report stated that the origin of the problem lays *inter alia* in the incomplete implementation of the law on private and public radio and television channels in the Republic of Albania. So it will take more time to convert the RTSH into a public service broadcasting institution accurately reflecting and defending the public interest. The recent situation is characterized by three problems: political interference in the institution's activities, the institution's financial dependence on the state budget and the lack of structural reform. The report, which is presented to the Parliament at the beginning of each year, was discussed in March 2004. ■

● 2003 Annual Report of the Chief Council of the Albanian Public Radio Television presented to the Parliament, March 2004

SQ

AT – Broadband Initiative in Austria

Over the last few months various state agencies have published plans or introduced measures with a view to improving the way in which broadband Internet access is provided in Austria. 'Broadband' can be defined as constant Internet access with a physical downloading bandwidth of at least 384 kbit per second, the billing being unrelated to the amount of time the customer spends using it. At the present time, only 19 % of the population have this type of Internet connection. There is a consensus that Internet access should be improved, especially in rural areas. An investigation carried out by the regulatory authority, the *Rundfunk und Telekom Regulierungs-GmbH* (Broadcasting and Telecommunications Regulator - RTR-GmbH), showed that more than one million inhabitants live in locations that cannot be supplied with broadband Internet.

On 14 April 2004 the Federal Government adopted a 'Broadband Strategy'. It is designed to co-ordinate the tax incentives, the funding of the infrastructure expansion and the achievement of progress in the development of 'e-Government'. At the moment there are tax incentives for setting up a broadband connection, but these will cease to apply at the end of the year. In addition, the Federal Land of Lower Austria is investing EUR 14 million in order to bring broadband into the Land. According to the Federal Government's plans, the extension of the cable networks to accommodate the Internet is to be funded for areas that have hitherto not been penetrated. The recipients of the funding will be obliged to give customers equal treatment, and they will have to meet specific targets, tailored for their own regions. Currently, EUR 10 million is available to fund this expansion operation, having come from Federal budget resources. A further EUR 10 million is to come from the Länder and the EU. The funding will take the form of non-refunded subsidies paid out over a period of two years. It is intended that the operational implementation of the broadband-expansion initiative will begin in the summer

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of 2004. By 2007 the whole of Austria should have the benefit of this kind of fast Internet access.

On 7 May 2004 the Federal Economic Chamber, the state agency for trade and industry, held the 'Broadband Information Symposium'. It called for the co-ordination of the existing funding schemes and, at the same time, welcomed the initiative introduced by the Federal Ministry for Transport, Innovation and Technology, which has made it possible for private and commercial end-customers to be 'hooked up' into the broadband network, paying particular attention to small and medium-sized enterprises in structurally weak areas. Making the cost of a broadband connection tax-deductible was criticised as an ineffective means of funding access. ■

● Federal Ministry for Transport, Innovation and Technology Broadband Initiative, available at: http://merlin.obs.coe.int/redirect.php?id=9100

● Announcement by the Austrian Federal Economic Chamber on Broadband Information Symposium, which can be found at: http://merlin.obs.coe.int/redirect.php?id=9101

DE

BA – Rule on Media Concentration and Cross-Ownership

On the occasion of its regular session on 22 March 2004, the *Regulatorne agencije za komunikacije Bosne i Hercegovine* (Council of the Communications Regulatory Agency, RAK) adopted the Rule 21/2003 on Media Concentration and Cross-ownership.

One of the imperatives is laid down in the sixth point of the Preamble which states that "broadcast programming plays a central role in democracy, and that it is crucial to provide a range of different independent information and programming to serve the whole population".

At this point, Bosnia and Herzegovina as a relatively small media market does not manifest an indication of possible imminent danger of media concentration. However, its state-level regulatory agency has made a pre-emptive move.

The Rule consists of six articles. Article 1, *inter alia,* gives definitions relevant for the purpose of the Rule: *e.g.* 'Ownership' in the media sector shall be relevant for this rule for the holder of more than 10 percent of the share capital of a broadcast or print media organisation. Art. 2 sets a rule for so-called multiple ownership, which states that one natural person or legal entity cannot own two or more radio or two or more TV stations that cover the same population range. Paragraph 2 of the article provides that only in exceptional cases, when required by technical regulation and/or compliance with international obligations in relation to protected and service zones, is the RAK allowed to issue a licence by which certain transmitters cover the same population from different locations and different frequencies.

Article 3 defines Cross-Media Ownership, and provides limitations on firstly, the ownership of shares regarding broadcasting and print media, and secondly, Radio-television cross-ownership. In brief, one natural person or legal entity is allowed to own only one broadcasting and one print media outlet, and one radio and one TV outlet for the ranges of population that the different media cover.

Article 5 deals with non-compliance with the Rule. In such cases the RAK may apply the enforcement measures at its disposal pursuant to article 46 of the Communications law of Bosnia and Herzegovina (see Official Gazette 33/02 and 31/03).

Article 6 defines entry into force of this Rule (it has entered in force as of 1 April 2004), stating also that after 18 months it may be reviewed and amended according to experience and changing circumstances.

The Rule faces some criticism in the context of the RAK's competence, as it is responsible only for the broadcasting and telecommunications sector, but not for print media. ■

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● Press release of 22 March 2004 available at: http://merlin.obs.coe.int/redirect.php?id=9092

EN

DE – Pornography on the Internet

The *Oberlandesgericht Düsseldorf* (higher regional court of Düsseldorf, OLG) annulled the decision of the *Landgericht Düsseldorf* (regional court of Düsseldorf) dated February 17 2004 regarding legal requirements to be fulfilled to comply with protection of minors against the distribution of simple pornography on the Internet.

The regional court of Düsseldorf decided in 2003 that it was sufficient to comply with requirements of on-line child protection by querying a personal ID number whose conclusiveness was verified by a computer program in connection with an offer subject to costs (see IRIS 2003-4: 12).

In contrast to this, the OLG judged that systems based solely on the verification of personal ID keys even in connection with an offer subject to costs are not appropriate instruments to ensure protection of minors in the area of the Internet age verification also. Rather, more precautions must be made for distribution of pornographic content on the Internet to regularly prevent minors from accessing such pornographic content, just as for broadcasting facilities that distribute such content. An 'efficient barrier' should be installed between the pornographic content and the minor to be protected. A corresponding provision has been drawn up by the administrative courts for the field of broadcasting (see IRIS 2002-10: 6 and IRIS 2002-3: 7).

The OLG sees this protection of minors' adjudication to be applicable to the Internet as well. The medium plays no role when it comes to the fact of distribution of pornography having criminal relevance. This barrier must be as efficient on the Internet as for pay-TV offers or video rentals. Age verification systems based solely on the specification of a personal ID number or credit card number thus do not represent an efficient barrier between the content of an Internet page and an under-age user. The case was remitted to another criminal division of the regional court of Düsseldorf to be heard again and decided. ■

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● Judgment of the Oberlandesgericht Düsseldorf of 17 February 2004, reference number III-5 Ss 143/03 – 50/03 I

DE

DE – Amendment to the Deutsche-Welle Act

On 24 March 2004, the Federal government accepted the bill on the amendment to the Deutsche Welle Act.

The aim of this Act is to give a modern task profile to the public broadcasting station Deutsche Welle (DW), broadcasting radio programmes abroad. The primary objective is to present Germany abroad in its entire diversity and encourage understanding of and exchange between cultures and nations. The Act forbids any content-related standards in order to reinforce autonomy and journalistic independence. The new bill introduces a self-regulation system to enable DW to transparently discharge its stipulated tasks. This involves the partici-

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pation of the Federal German Government, the Federal Parliament (Bundestag) and interested members of the public who are given the opportunity to express their suggestions regarding task scheduling. With the newly implemented assessment obligation, the broadcasting station will additionally keep verifying how the aims have been reached. For this purpose DW has been granted a "reliable financial planning foundation" for a period of four years. Furthermore, DW is explicitly enabled to discharge its tasks also through online offers in addition to radio and TV broadcasting. The station is additionally obliged to cooperate with other national and foreign public broadcasting stations. ■

● **Press release issued by Deutsche Welle, available at: http://merlin.obs.coe.int/redirect.php?id=9107**

DE

DE – Promoting the Act Prohibiting Unauthorised Photography

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The *Bundestag* (Federal Parliament) has further promoted the initiative of the *Bundesrat* (Federal Council) on the protection of privacy against unauthorised photography (see IRIS 2003-10:13 and IRIS 2004-3: 6). On 29 April the Federal Parliament adopted a corresponding act amending the penal code with the votes of all parliamentary factions. The modification of the previous bill stipulates that certain non-indictable cases of socially inappropriate behaviour shall be excluded from criminal liability. This includes in particular cases when the offender does not positively know that disclosure of pictures originally authorised can under certain circumstances be unauthorised. The Federal Council, the representative of the federal provinces, still has to consent to the proposed bill. ■

● **Resolution recommendation and report of the judicial panel of 28 April 2004, available at: http://merlin.obs.coe.int/redirect.php?id=9108**

DE

DE – New Telecommunications Act Adopted

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Following the consent of the *Bundestag* (Federal Parliament), the *Bundesrat* (Federal Council) also assented to the bill amending the German Telecommunications Act (TKG). With this amendment, the new European legal framework regulating electronic communications has been implemented into German law.

Through the stipulation of the principal objectives and the regulations of paragraph 2 the bill makes clear that the concerns of broadcasting stations are to be taken into account. The media legislation of federal provinces, which also includes the broadcasting act remain unaffected.

The competent Regulatory Authority for Telecommunication and Postal Services (RegTP) pursuant to the TKG is to advise, in particular beyond this general stipulation, the relevant provincial broadcasting institutions as well as to involve them in procedures whenever the concerns of broadcasting institutions are concerned regarding legal fee regulations thereunder.

Thus the RegTP provides for the instigation of procedures and ordering of fee regulation measures upon application by the competent provincial broadcasting institutions.

A further particular measure is dictated for the field of broadcasting by the fact that auction procedures do not apply to the frequency allocation procedure. In the area of trading of frequency rights RegTP provides for the necessary outline conditions and procedural stipulations for broadcasting only, acting in agreement with the competent provincial media institution pursuant to the corresponding provincial law regulating the supervision of the broadcasting stations holding the frequencies.

RegTP is obliged to revoke frequency assignments for analogue terrestrial television signals by 2010 and for analogue radio broadcasting signals (USW) by 2015 for the purpose of performing the digital switchover.

The obligations to take precautions for implementing legal measures for the control and supervision of telecommunications is limited to operators of public communications networks.

Accordingly, all non-public operators of telecommunications facilities are relieved from the obligation to keep communications data. Further limitations will follow under an appropriate decree on the control and supervision of telecommunications.

Most parts of the Act will come into effect on the day after its promulgation. ■

● **Press release of the German Federal Ministry of Economy and Labour of 14 May 2004, available at: http://merlin.obs.coe.int/redirect.php?id=9109**

DE

DE – Private Commercial Stations Turn to Brussels Regarding Regional Broadcasting Windows

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To ensure diversity of opinion, German television programme stations with full national coverage are obliged pursuant to article 25, section 4 of the *Rundfunkstaatsvertrag* (German Interstate Broadcasting Agreement, RStV) to broadcast so-called "window programmes" in conformity with provincial legal provisions. These time-limited programmes should be adapted in such a manner as to contain information directly related to the region concerned. Pursuant to article 25, section 2 of the RStV the broadcaster will be granted a bonus of 2% upon reaching legally-significant media concentration threshold values of 25/30% of the viewers, provided that they operate regional broadcasting windows. This new regulation introduced by the 7th amendment of the Interstate Broadcasting Agreement should create an incentive to maintain such regional broadcasting windows.

The broadcasters concerned regard provisions stipulated in the provincial media acts very critically, from the point of view of cost efficiency amongst other issues, as such provisions also oblige them to produce these regional programmes in the respective region. Regarding the reform of the Lower Saxony Media Act the Landstag (provincial assembly) spoke in support of a corresponding stipulation, which was integrated into article 15, section 3 of the Lower Saxony Media Act and came into force on 1 January 2004; a corresponding regulation should also been introduced in Schleswig-Hostein.

For the private broadcasters Sat.1 and RTL this represents a violation of the freedom of establishment and services provided by the Treaty establishing the European Community and they have filed a complaint with the European Commission. The pending action brought against Germany by the Commission regarding the allocation of the third radio broadcasting chain in Rhineland-Palatinate (see IRIS 2003-8: 4) is quite comparable to this dispute.

The conference of directors of the provincial Media Establishments also decided on 3 May 2004 to specify the requirements regarding content and quality that regional window programmes must meet. This arises from a programme analysis carried out on behalf of DLM. At least 20-minute long reports covering regional events are therefore to be broadcast; further criteria are still to be discussed with the broadcasters. ■

● **Press release of the conference of directors of the provincial media establishments issued 3 May 2004, available at: http://merlin.obs.coe.int/redirect.php?id=9102**

FR

DE – ARD and ZDF Acquire Europe-wide Satellite Broadcasting Rights

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According to press releases from the parties involved, the public broadcasting stations ARD and ZDF have come to an agreement with the Swiss Infront agency on 17 May 2004 on the granting of TV and radio broadcasting rights for the FIFA World Cup 2006, at a price of nearly EUR 230 million plus VAT.

The agreement covers on the one hand the live broadcasting rights for 48 or 49 matches (a total of 64 World Cup matches will take place), which have been exclusively granted to the Germany-wide free TV stations ARD and ZDF. These rights cover all matches played by the German national team, the opening match, the quarter- and semi-final matches, the play-off match and the final match. Moreover ARD and ZDF have been granted a non-exclusive right to broadcast summaries on non-live broadcast matches. The rights granted also cover the non-exclusive right for radio broadcasting.

The agreement is not limited to certain forms of broadcasting; digital satellite broadcasting is also covered amongst others. This is of particular significance regarding the license disputes following the FIFA World Cup 2002 (see IRIS Plus 2004-6 as a supplement to this issue of IRIS).

The background of this dispute was the fact that non-coded satellite transmission can be received across Europe. The KirchGruppe selling those rights at the time had partially granted ARD and ZDF the rights to free-to-air TV programmes in Germany, whereas in other European countries the KirchGruppe granted broadcasting rights exclusively and undertook an obligation towards the licensees not to endanger the exclusive broadcasting through any possible Europe-wide non-coded reception.

In particular, the Spanish acquirer of the rights and pay-TV provider Via Digital fought against such non-coded satellite transmission. The contracting parties agreed to allow analogue satellite broadcasting by ARD and ZDF, thus enabling analogue reception by Spanish households. As a countermove, ARD and ZDF did not transmit over digital satellites. German viewers using solely digital satellite decoders who did not want to fall back on pay-TV offers were unable to receive any World Cup matches. ■

- **ARD Press release issued of 17 May 2004 available at: http://merlin.obs.coe.int/redirect.php?id=9103**
- **ZDF Press release issued of 18 May 2004 available at: http://merlin.obs.coe.int/redirect.php?id=9104**
- **Infront Press release of 17 May 2004 available at: http://merlin.obs.coe.int/redirect.php?id=9105**

DE

DE – ARD Increases its Contributions to Film Industry Funding

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In line with the announcement made in the run-up to the re-enactment of the Film Support Act (FFG) as amended, the revised version of which came into effect as early as 1 January 2004 (see IRIS 2004-1: 10 and IRIS 2003-5: 14), the directors of the Public Service Broadcasting Union of the Federal Republic of Germany (ARD) at a meeting on 31 March 2004 in Saarbrücken, decided to increase the funding paid to the German film industry. The directors gave their consent to the conclusion of the 8th Film and Television Convention with the Film Support Authority (FFA) in accordance with § 67, Paragraph 1, Section 1, FFG. The Convention stipulates that, by 2008, ARD will be giving support to cinema and television films in the form of resources and cash payments worth a total of EUR 5.5 million annually. The funding from the Broadcasting Union will subsidise specific film projects, not the film producers directly. A subsidy unrelated to any particular project, funded by licence fees, would not be permissible either from the standpoint of the Commission for Notification of Financial Requirements of public broadcasters (KEF), or from the standpoint of the broadcasting directors themselves. Therefore, in the view of the KEF, it is only possible to use income from fees to fund films if, at the same time, assistance is afforded in the fulfilment of the programming remit. ■

- **Press release from ARD on 31 March 2004**

DE

FR – CSA Wants Arrangements that better Reflect the Diversity of Origins and Cultures on Public Television

On 26 April the *Conseil supérieur de l'audiovisuel* (audiovisual regulatory authority– CSA) and the *Haut Conseil à l'intégration* (council for integration– HCI) organised a special day entitled "Pale screens?" devoted to considering the representation on television of the diversity of the origins and cultures that make up the national community. Dominique Baudis, Chairman of the CSA, took the opportunity to reaffirm his determination to act in favour of better representativeness of French diversity on television.

Mr Baudis said that, although the channels had reflected diversity better over the last few years, there was still some way to go before the gap between the reality of the diversity of French society and its representation on television was finally bridged. Moreover, although both the private channels and the public-sector channels are in principle required – in accordance with the provisions of their agreements and terms of reference – to reflect the diversity of the French population, their obligations in this respect are not the same on this point; more specifically, they differ in the drafting and in the terms used. Thus in 2001 the CSA negotiated with the private channels TF1, M6 and Canal+ an amendment of their agreements in order to introduce specific provisions with clear objectives. These channels are required to "promote the values of integration and solidarity that are those of the French Republic" and "take into account in the representation on the television screen the diversity of the origins and cultures of the French community". These provisions are extended to all the cable and satellite channels and future terrestrially-broadcast digital channels. However, the provisions for public-sector television are nowhere near as specific. Unlike the private channels, there is no specific obligation in respect of the diversity of origins and cultures of the people shown on television. Nevertheless, since the Decree of 24 February is intended to reinforce the terms of reference of France 2 and France 3 in this field, the two public-sector channels are required to ensure the promotion of the different cultures that form French society without discrimination of any kind. France 5, for its part, must ensure "exchanges between the various sectors of the population" and broadcast programmes concerning "the inclusion of foreigners", but there are no specific provisions concerning the representativeness of French diversity on television. The public-sector channels therefore still have to make an effort in this regard. Thus at its colloquy the CSA stated its desire to see the rules applicable to the public-sector channels brought into line with

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those of the private channels. A few days later, the CSA delivered its opinion on a bill amending the terms of reference of the national programme companies, more particularly in order to illustrate the consequences of the disappearance of the statutory monopoly of the company TéléDiffusion de France in terms of the regulations. In its opinion it pointed out that this change could provide an opportunity for including, in the national programme companies' terms of reference, provisions intended to provide a better reflection of the diversity of origins and cultures of contemporary French society in their programming. "Thus it would be desirable for broadcasts to ensure effective representation of the various components of the French community." It remains to be seen if the regulatory authorities will take note of this opin-

● **Opinion no. 2004-2 of 4 May 2004 on the draft decree amending the terms of reference of the national programme companies Radio France Internationale, Radio France, the French overseas network, France 2, France 3 and France 5, published in the *Journal Officiel* of 18 May 2004 (page 8813); available at the following address: http://merlin.obs.coe.int/redirect.php?id=8885**

FR

FR – Agreement between French Cinema and Canal+

Decree No. 2001-1332 of 28 December 2001 lays down the way in which editors of television services broadcast in analog mode by terrestrially-broadcast means, which are funded by payment received from users, are to contribute to the development of the production of cinematographic and audiovisual works. In the context of the relationship between Canal+ and the French cinema, there has been discussion for several months on the renewal of the partnership by adapting it to recent developments in the sector and to the strategic prospects of the channel. The aim was more particularly to confirm Canal+ as the essential partner of the entire sector and to encourage diversity of cinematographic creation. On 10 May all the professional cinema organisations (BLIC, BLOC and ARP) and the channel itself announced the signing of a fundamental agreement that guarantees both reinforced partnership between Canal+ and the cinema and an enriched cinema offer for subscribers to the encrypted channel. It should be borne in mind that the channel invested EUR 128 million in the French cinema last year, and pre-purchased 110 films out of the 180 produced.

According to this agreement, Canal+ – unlike other terrestrially-broadcast channels – may now offer its subscribers full-length films every evening throughout the week, including Friday evening (with no restriction based on the number of cinema tickets sold) and, for the first time, Saturday evening with the broadcasting of films for which no more than 1.2 million tickets were sold. Full-length films may now also be scheduled for showing on a Wednesday afternoon.

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To remedy the imperfections in the present diversity clause, it has been decided to include a more ambitious diversity undertaking. The channel will from now on devote 17% of its obligation to purchase cinematographic works originally made in the French language to the purchase of films costing no more than EUR 4 million. It will make sure it contributes to the financing of a wide variety of films and will maintain a balance in its involvement in all the budgetary segments of the market. It has been agreed that the cinema professionals and the channel will meet twice a year to assess to what extent the diversity objectives have been attained.

Canal+ will continue to devote at least 9% of its turnover to the purchase of works originally made in French as part of its obligation to devote 12% of its turnover to the purchase of European works (Article 5-1 of the Decree of 28 December 2001). Investment in the French and European cinema could even be as much as 12.5%, according to the new agreement. To make film production easier, Canal+ has also undertaken to devote 80% of its French obligations to the pre-purchase of films before the first day of shooting.

Lastly, as the partner of the cinematographic sector as a whole, Canal+ has renewed its aid for operation and distribution to promote the renovation of cinema theatres so that films are shown under better conditions.

On the other hand, it has not succeeded in persuading the professionals in the cinema sector to reduce the length of time before films can be shown on television, currently fixed for the unencrypted terrestrially-broadcast television channels at one year after their first cinema screening (Article 8 of the 2001 Decree).

The agreement will come into force on 1 January 2005, and will be valid for 5 years. ■

FR – Act on Confidence in the Digital Economy Adopted

Article 1 of the Act on confidence in the digital economy, adopted by the Senate at its second reading on 8 April and examined by the Joint Committee on 27 April, creates a separate legal scheme applicable to Internet (see IRIS 2004-3: 8). The text lays down a number of definitions that establish Internet's place in French law relating to audiovisual communication. More particularly, the Act creates the notion of "communication to the public by electronic means", which refers to the making of signs, signals, documents, images, sounds or messages of any kind that do not have the characteristic features of private correspondence available to the public or to categories of the public by means of electronic communication. This notion is divided into two sub-groups – "audiovisual communication", covering any communication to the public of a radio or television service, and "on-line communication to the public", covering any transmission of digital data that does not have the characteristic features of private correspondence in response to an individual request, by means of a process of electronic communication allowing the mutual exchange of information between the sender and the receiver. These definitions indicate that the overall provisions covering audiovisual communication no longer apply to Internet.

Article 2 IV (a) of the Act, in the terms of an amendment included by a member of the Senate prior to the second reading, also creates a specific scheme for the prescription of infringements by the on-line press. Both public and civil action would now be out of time "after three full months, starting on the date on which the message likely to give rise to an action ceases to be available to the public", whereas previously, by virtue of Article 65 of the Act of 29 July 1881 and case-law of the Court of Cassation, the time period for prescription started on the date of publication, whatever the medium of the disputed message. However, the three-month prescription period starting from the date of publication "shall remain applicable (…) if the content is the same on the computerised medium and on paper". This provision has been severely criticised, as it discriminates against the on-line press and indeed has the result of virtually removing any time limit on prescription for on-line press offences. This is because disputed content may still remain on-line through search engines, masks, archive sites, etc even if its editor has deleted it on its own initiative.

Furthermore, any person referred to or named on an Internet site will now have the possibility of obtaining the inclusion of a right to reply by contacting the person responsible for the publication or – in the case of editors

of non-professional sites – the host, for forwarding to the site's administrator within a period of three months starting on the date on which "the message justifying the application was made available to the public".

Lastly, concerning the responsibility of providers of technical Internet services, and in order to transpose the directive on e-commerce into national law as faithfully as possible, the bill as adopted by the Senate defines the host as the party ensuring storage of data at the request of the party for whom the service is intended. In Article 6, the text also provides that the host may incur civil and criminal liability as a result of the activities or the information stored at the request of a user of these services if the host was indeed aware of their unlawful nature or of facts and circumstances pointing to this or if, as soon as the host became aware of this, it did not take prompt action to withdraw the data or make it impossible to access. The service provider is deemed to be aware of the unlawful nature of content if it has been sent notification in accordance with procedure and in the form specified by law. This is not a new problem – it is at the heart of much of the thinking on reconciling the right to freedom of communication with the protection of other rights and freedoms of equal constitutional value. On two occasions – in 1996 and in 2000 – the Constitutional Court banned the arrangements drawn up for this, on the grounds of violation of Article 34 of the Constitution, which empowers the legislator to lay down the rules concerning the fundamental guarantees granted to citizens for the exercise of public freedoms. Again on 18 May, 60 members of the lower house and 60 members of the upper house sent the entire Act on confidence in the digital economy, and more particularly its Articles 1, 2 and 6, to the Constitutional Council for examination. ■

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● **The entire legislative dossier is available at the following address:**
http://merlin.obs.coe.int/redirect.php?id=9119

FR

GB – Regulator Publishes Review of Public Service Television Broadcasting

The UK communications regulator, Ofcom, has published the results of phase 1 of its review of public service television broadcasting. It is required to undertake such a review at least every five years under section 264 of the Communications Act 2003 (see IRIS 2003-8: 10), which also defines the overall public service remit of broadcasters. The review includes the BBC as well as the commercial public service broadcasters. In the first phase, Ofcom considered the current position of public service broadcasting, including how effective the main terrestrial channels are in providing it, and offered initial propositions on how it can be maintained and strengthened. Firm proposals will be produced in phase 2 later in 2004.

Ofcom found that a wide range of subjects was covered by broadcasters and that high-quality, accurate and unbiased news and information services were provided. However, more specialist programmes on subjects such as arts, current affairs and religion were pushed out of peak viewing hours, and spending on arts, children's, religious and education programmes had fallen. Channels relied instead on programmes with more obvious popular appeal.

The audience for the main terrestrial channels had fallen from 87% in 1998 to 76% in 2003, and from 63% to 57% in multichannel homes (except for those with digital terrestrial television, where the share stayed at around 85%). Viewing figures were lower for some audience groups, notably younger and non-white audiences. Some of the more serious and challenging programme types were those most affected by multichannel competition.

Despite the falls in viewing figures, a survey of viewers' attitudes found that they still valued wider social purposes in broadcasting, especially for news and information and for providing a wide range of programmes across the schedules; programmes dealing specifically with minority interests were less valued.

The review noted that increased competition is likely to reduce funds for meeting public service obligations and market failures will be reduced due to greater choice of programmes. However, public service broadcasting will still be required to provide information, reflect cultural identity, stimulate interest in arts, science and history and reflect the lives of different communities. It should be defined by its purpose and characteristics rather than by specific programme types, and regulation should break away from narrow obligations specifying particular types of programmes. Funding for public service broadcasting could be distributed in new ways, for example by allowing broadcasters or producers to bid for a share of it. Although the BBC should continue to deliver a wide range of activities, there should be an examination of new methods of funding for them, such as subscription, and a review of other BBC activities such as studio and production resources. All BBC programmes should reflect the broad purposes and character of public service broadcasting. Finally, after digital switchover, public intervention to secure public service broadcasting may not be justified on its present scale, either because of a reduction of market failures or because it will be impossible to achieve the purposes of public service broadcasting through television. ■

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● **Ofcom, "Ofcom Review of Public Service Television Broadcasting: Phase 1 – Is Television Special?", April 2004, available at:**
http://merlin.obs.coe.int/redirect.php?id=9068

IT – New Law on Broadcasting

On 3 May 2004, the Italian Parliament approved definitively the so-called Gasparri Law. The bill was proposed by the *Ministero delle comunicazioni* (Ministry for Communications) on 24 September 2002 to the *Camera dei deputati* (Chamber of Deputies of the Italian Parliament) (see IRIS 2002-10: 10) and after an almost two-year long discussion, during which temporary measures had to be adopted (see IRIS 2004-3: 11) in order to comply with a judgment of the Constitutional Court concerning the TV channels that were exceeding existing anti-concentration rules (see IRIS 2003-3: 13), the Law entered into force with its publication on 5 May in the Official Journal.

The aim of the new Act (Section I: Articles 1-13) is to set out the general principles of the broadcasting sector, as determined by the process of convergence between traditional broadcasting and other sectors such as telecommunications, publishing and Internet (the so-called integrated communications system). The principles concern the main aspects of freedom of expression, conceived both as a right to impart and to receive information, and pluralism of the media by prohibiting the achieving and maintenance of dominant positions. The Act introduces different authorisations for the different activities of network operators and content providers at national or local level and on different means of transmission (terrestrial, cable or satellite) under the obligation to apply equal conditions to any request for access. Informative broadcasting activity is considered as a service of general interest and underlies the obligations to represent facts truly, to ensure access to any political

party, to broadcast daily news programmes and the prohibition on manipulating information. Protection of minors is reinforced by the prohibition on employing minors less than 14 years old in advertising and sanctions are increased to a range of EUR 25,000-350,000. The *Autorità per le Garanzie nelle Comunicazioni* (Italian Communications Authority – AGCOM) is entrusted with the duty to ensure respect for fundamental rights.

Section II (Articles 14-15) concerns the protection of competition in the communications sector and introduces new rules on media concentration (see IRIS Special, "Television and Media Concentration - Regulatory Models on the National and the European Level", 2001, p. 47). The threshold of 20% of available programmes according to the frequency plan (see IRIS 1998-10: 12) is confirmed, but reference is made to the DTT frequency plan and consequently to a larger number of programmes. The threshold based on economic revenues (see IRIS 2000-7: 7) is lowered from 30% to 20%, while the terms of reference for the calculation no longer relate only to traditional broadcasting, but to the integrated communications system which includes daily and periodical press, yearbooks even on the Internet, radio and television broadcasting, cinema, outdoor advertising, communications initiatives and sponsorship. Cross-ownership limitations between television broadcasting and the press will be limited to an asymmetric rule allowing press operators to acquire shares in the broadcasting sector, while the reverse will be prohibited until 31 December 2010. Another limitation concerns operators collecting more than 40% of the revenues of the telecom market, who may not acquire more than 10% of the revenues of the whole integrated communications system.

Section III (Article 16) delegates to the Government the task of adopting a code that will gather and consolidate all existing provisions in the communications sector: the code will be adopted by a *decreto legislativo* (legislative decree) and will have the same force as an ordinary law, with the possibility of being able to directly amend existing legislation.

Section IV (Articles17-21) reserves general public service broadcasting to a public concessionaire (*Radiotelevisione italiana*, RAI) acting on the basis of national and regional contracts signed by the Minister for Communications on behalf of the Government and renewed every three years. Public service broadcasting has to be ensured on the whole national territory and will have to devote an adequate number of transmission hours to educational, informative and cultural programmes according to a 3-year definition laid down by AGCOM. Specific provisions concern access to party political broadcasts, the promotion of the Italian language and culture abroad, the protection of minority languages in Italy and RAI's audiovisual archive. AGCOM and the Ministry for Communications will jointly issue guidelines for the renewal of the service contracts. AGCOM is additionally charged with checking that the income deriving from the public service fee is used only for carrying out public service programming in accordance with the Communication from the European Commission on the application of state aid rules to public service broadcasting of 15 November 2001 (see IRIS 2001-10: 4). An official auditor appointed by RAI and approved by AGCOM will supervise the yearly budget. In case of non-compliance with the public service obligations, RAI may be fined up to 3% of the revenues. All three RAI channels will be privatised, and the process will start in July 2004, but no stakeholders may hold more than 1% of the shares and a quota of the stocks will be reserved to people who have duly paid the public service fee in the previous year.

Section V (Articles 22-29) concerns the switchover to digital terrestrial transmissions up to the switch-off on 31 December 2006. Two stages are envisaged for the coverage of DTT: 50% of the population by 1 January 2004 and 70% of the population by 1 January 2005. During this transition period, RAI will have to transmit on two multiplexes using both analogue and digital technology. In the meantime, existing analogue broadcasters transmitting on Hertzian frequencies will be allowed to continue their transmissions, provided that AGCOM, by 30 May 2004, has given a positive evaluation on the existing degree of pluralism in the digital environment according to three criteria: coverage of at least 50% of the population, presence of decoders at accessible costs and effective offer of programmes different from those broadcast on analogue networks. Should the analysis have a negative outcome, AGCOM may take the measures envisaged by Law no. 249/97 in the case of dominant positions on the market, such as orders to separate the undertakings or combined assets, or pecuniary sanctions. In order to accelerate the switchover process, the rental or the purchase of DTT set-top boxes will be encouraged by means of economic incentives to households. The national budget set up a fund for the promotion of purchases or rentals of decoders for cable and terrestrial digital television (C-DVB and T-DVB) providing for a contribution of EUR 150 per consumer (see IRIS 2004-3: 11).

On 27 May AGCOM found that all three conditions foreseen by the abovementioned Act are satisfied and gave green light to the maintenance of the exceeding channels on analogue frequencies until the definitive switch off in 2006, but outlined, among other things, that the overcoming of technological bottlenecks cannot be considered as sufficient, alone, to ensure pluralism in Italy due to the high degree of economic concentration on the Italian television market. ■

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● **Law of 3 May 2004, no. 112, *"Norme di principio in materia di assetto del sistema radiotelevisivo e della RAI Spa nonché delega al Governo per l'emanazione del testo unico della radiotelevisione"* (Principles relating to the organisation of the broadcasting sector and of RAI, as well as delegation of powers to the Government to issue the broadcasting code), published in the Official Journal of 5 May 2004, n. 82, s.o. no. 104, available at: http://merlin.obs.coe.int/redirect.php?id=9082**

IT

LU – Amendment of the Act on Copyright, Neighbouring Rights and Databases

By means of an Act of 18 April 2004, the Grand Duchy of Luxembourg has now transposed into its national law European Directive 2001/29/EC of the Parliament and the Council on the harmonisation of certain aspects of copyright and neighbouring rights in the information society (see IRIS 2001-5: 3). This transposition takes the form of a text amending the Act of 18 April 2001 on copyright, neighbouring rights and databases (referred to as "the Act"). Apart from the transposition of the provisions of the Directive, the new Act also amends the scheme for reserved royalties.

The new text introduces changes that affect the audiovisual sector in that, firstly, audiovisual works are protected in the Grand Duchy of Luxembourg under the copyright scheme (Article 20 of the Act) and, secondly, broadcasting bodies are protected under the neighbouring rights scheme (Section 4 of the Act).

In addition to the list of rights recognised by the Act (reproduction and communication), the right of distribution is now included (Article 3, paragraph 5 of the Act), although it is considered that this right was already included in the right of reproduction. This right, which covers the original of the work and its copies, only ceases if ownership of the subject protected by copyright (ie the original or copies of the original) changes hands within the European Union.

The Act of 18 April 2004 has also modified the scheme of exceptions laid down in the 2001 Act. Apart from differences in wording, three new exceptions have been added to those of the 2001 Act. These are set out in Articles 10(12), 10(13) and 10(14); they cover the use of a work for public security purposes, the use of short excerpts from public lectures or similar works for information purposes, and public communication of works by means of special terminals in certain public institutions (schools, museums, libraries, archives, etc).

In accordance with the Directive, the new Act provides that the exception for private copying is only possible where the copyright holders receive fair compensation (Article 10(4)). This compensation will not be satisfied by setting up a system for levying a lump sum on the sale price of recording media. Parallel to this exclusion from a lump-sum scheme, the new Act aims at the contractual fixing of rates for using the works or services covered by copyright or a neighbouring right (Article 66, paragraph 2(a)).

Alongside this modification of the conventional copyright scheme, the new Act has modified the scheme of neighbouring rights enjoyed more particularly by broadcasting bodies.

The only notable change in this article concerns the right allowed to broadcasting bodies to authorise the making of recordings of their programmes available to the public (Article 53).

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● Act of 18 April 2004, published in the *Mémorial A*, 2004, no. 61, pp. 942 et seq., available at the following address: http://merlin.obs.coe.int/redirect.php?id=9114

FR

Lastly, the new Act has adapted the wording of the exceptions concerning neighbouring rights and provides that the exceptions to copyright should apply for the remainder (Article 46, second paragraph).

The new Act adds a new section to the 2001 Act aimed at ensuring legal protection for technical measures created with a view to preventing access to protected works (part 7A). According to Article 71B, these technical measures include all technical procedures, arrangements or components intended to prevent or limit the carrying out, in respect of protected works or services, of acts not authorised by the holder of the corresponding copyright, neighbouring right or *sui generis* right (rights recognised for the producer of a database). Anyone circumventing these measures may be held liable in both civil and criminal terms. The technical measures may not under any circumstances hinder exercise of the right of lawful access to the protected work or service.

The new Act also contains provisions concerning the information that must be given in respect of the existing rights scheme (Article 71F of the Act). This information must make it possible to identify the protected work, service or database and the originator or any other holder of the protected right. Anyone deleting this information incurs civil and criminal penalties.

Advantage has been taken of the transposition of Directive 2001/29/CE into national law to extend the definition of reserved royalties to include all original works of art.

Furthermore, the new Article 71A of the Act also enshrines the principle of reciprocity for those persons who are not citizens of a European Union country. From now on, these persons will have the benefit of reserved royalties as long as the legislation of the State of which the originator is a citizen affords protection within its territory to reserved royalties for originators who are citizens of European Union countries. ■

NL – Revised Telecommunications Act

On 20 April 2004, the *Eerste Kamer* (the Dutch Senate) adopted an Act to implement the EC Electronic Communications Framework (see IRIS 2002-3: 4) into Dutch law (Act of 22 April 2004). The adoption of this Act introduces a number of modifications to the existing *Telecommunicatiewet* (Telecommunications Act), which entered into force in December 1998.

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● *Telecommunicatiewet* (Telecommunications Act), consolidated version, available at: http://merlin.obs.coe.int/redirect.php?id=9083

● *Wet van 22 april 2004 tot wijziging van de Telecommunicatiewet en enkele andere wetten in verband met de implementatie van een nieuw Europees geharmoniseerd regelgevingskader voor elektronische communicatienetwerken en -diensten en de nieuwe dienstenrichtlijn van de Commissie van de Europese Gemeenschappen* (Act of 22 April 2004 amending the Telecommunications Act and other legislation due to the implementation of a new European harmonised regulatory framework for electronic communication networks and services and the new Services Directive of the Commission of the European Communities), available at: http://merlin.obs.coe.int/redirect.php?id=9084

NL

Major changes include improved consumer protection (including anti-spam regulation) and a more flexible approach to the application of competition law. Furthermore, there is now a single regulatory framework that applies to all kinds of electronic communications networks. This means that the *Telecommunicatiewet* no longer contains specific rules for cable television networks. All provisions relating to must-carry obligations for cable television networks are now included in the *Mediawet* (Media Act – modification of Articles 82i and 82k *Mediawet*).

The revised Telecommunications Act entered into force on 19 May 2004. ■

PL – Amendment of Broadcasting Law Passed

The bill amending the Broadcasting Act, aimed at the transposition of European Community legal standards into national law (see IRIS 2003-10: 9), was finally been adopted by the Parliament on 2 April 2004.

The draft bill sent to Parliament on 7 November 2003 by the Government, has been amended by the *Sejm* (lower chamber of the Parliament) and the *Senat* (upper chamber of the Parliament). The changes made to the governmental proposal are of minor importance and the main objective of the bill – harmonisation with EC law – is kept intact.

The amendment contains *inter alia* specific criteria to identify the jurisdiction over broadcasters in compliance with the "Television without Frontiers" directive. It also contains provisions referring to European quotas, and includes a detailed definition of "European programmes". The obligation to allocate most of the broadcasting time to European programmes has been adopted in a normative formula that will facilitate its effective observance. The notion of European programmes was incorporated into a concept of the quota of audiovisual works of independent producers. The deadline by which it will be obligatory to give preference to most recent productions within this quota has been changed and now it is 5 instead of 3 years. The amending law proposes changes that will allow foreign entities from the European Economic Area to enjoy full capital liberalization as from 1 May 2004. The law also proposes that from that date the share of foreign capital in Polish broadcasting companies would be raised to 49% for other foreign entities (outside

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the EEA). The law also includes provisions on the protection of minors, advertising and teleshopping, as well as provisions concerning the interruption of feature films and films made for television. This amended rule obliges the registering authority to impose upon cable network operators a ban on retransmiting programme services which seriously and gravely infringe the provisions on protection of minors and public order contained in Article 22 (1) or (2) and/or Article 22a of the Directive. To implement the newest developments of the EC state aid law, the amendments embrace provisions aimed at achieving compliance with the *acquis communitaire* referring to compensation for services provided in the general interest (see IRIS 2003–10: 4), including the definition of the public service remit and provisions aimed at guaranteeing the principle of proportionality. ■

- **Law of 2 April 2004 on the amendment of the Law on Broadcasting, available at: http://merlin.obs.coe.int/redirect.php?id=9093**

PL

PT – Implementation of Electronic Communications Package

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Portugal has adopted legislation implementing the new European rules on electronic communications (see IRIS 2002-3: 4, IRIS 2003-10: 5 and IRIS 2004-2: 4). Law nº5/2004, of 10 February – Electronic Communications Law (Regicom) – has transposed Directives 2002/19/EC (Access Directive), 2002/20/EC (Authorisation Directive), 2002/21/EC (Framework Directive), 2002/22/EC (Universal Service Directive), and also Commission Directive 2002/77/EC. By way of an announcement from the Ministry for the Economy – published in *Diário da República*, nº 71 (III *Série*), of 24 March – competences to update and make available information regarding the provisions of the said Law were assigned to the National Communications Authority (ANACOM). A declaration of rectification was further made available via publication in *Diário da República*, nº85 (I *Série*-A), of 10 April. ■

- ***Lei n.o 5/2004 de 10 de Fevereiro Lei das Comunicações Electrónicas* (Act 5/2004, of 10 February – Electronic Communications Law (Regicom)), available at: http://merlin.obs.coe.int/redirect.php?id=9069**
- ***Ministério da Economia, Autoridade Nacional de Comunicações, Aviso de 9 de Março 2004, publicado no D.R. n.º 71 (III Série), de 24 de Março* (Announcement of the Ministry for the Economy of 9 March 2004), available at: http://merlin.obs.coe.int/redirect.php?id=9070**
- ***Declaração de Rectificação n.o 32-A/2004* (Rectification declaration 32-A/2004), available at: http://merlin.obs.coe.int/redirect.php?id=9071**

PT

RO – Controversy over the "Big Brother" Show

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The launch of this year's season of the reality show "Big Brother" by the private station Prima TV led to intervention by the *Consiliul National al Audiovizualului* (National Audio-Visual Regulatory Agency, CNA) after some sex scenes had been broadcast.

In March 2004 the CNA fined Prima TV twice (CNA resolutions of 16 and 26 March respectively). The first fine amounted to ROL 200 million and the second to ROL 500 million (exchange rate: 1 Euro equals ROL 40,700). These penalties originated from the broadcasting of sexual scenes at inappropriate times and without any explicit warnings in the prescribed form. These are the highest fines ever imposed by the CNA. After the second fine originating from live broadcasting of sexual acts taking place in the house, Prima TV announced that they would not pay the imposed fine of ROL 500 million and would challenge the decision.

The broadcasting of a sexual act yet again during the programme on 12 April made the CNA members impose the most severe sanctions ever against a broadcaster in Rumania during their session on 15 April. CNA ordered an interruption of the programme for 10 minutes. This interruption was supposed to be carried out by Prima TV on the evening of 16 April during the prime time between 7 and 7.10 pm. The sanction imposed an obligation on Prima TV to show the relevant CNA decision on screen during this ten-minute period. The wording of the CNA decision (*Decizia de sancţionare nr. 75 din 15 aprilie 2004*) CNA indicates that Prima TV had infringed the provisions of paragraph 39, section 1 of the *Legea audiovizualului* (Audio-Visual Act No. 504/2002) by again broadcasting pornographic content. Pursuant to this provision broadcasting of programmes that might harm physical, mental and moral development of minors (*"este interzisă difuzarea de programe care pot afecta grav dezvoltarea fizică, mentală sau morală a minorilor, în special programele care conţin pornografie sau violenţa nejustificată..."*) is prohibited. Furthermore, paragraph 19, letter f) of CNA decision No. 57/2003 on the protection of minors (*Decizia CNA nr. 57/2003 privint protecţia minorilor în cadrul serviciilor de programe*) had been violated on similar grounds. Based on *Legea 402 din 7 octombrie 2003 privind modificarea şi completarea Legii audiovizualului nr. 5004/2002* (Act 402 of 7 October 2003 amending and completing the Audio-Visual Act No. 504/2002) CNA felt fully entitled to punish Prima TV with an interruption of the programme on the grounds that the TV broadcasting station repeatedly broke the law. CNA members believed that by broadcasting the denounced scenes Prima TV "has repeatedly and severely harmed public interests, transgressed the rules of public morals and disregarded cultural and artistic values". In the beginning, Prima TV refused to comply with the CNA decision. This decision was "abusive, unjustified and tendentious"; it constituted "an infraction of the right to freedom of expression". However, on 20 April the CNA decision was made public in the manner ordered. ■

- **Press release issued by the CNA on March 27th, 2004, *Potrivit art.90 din Legea audiovizualului nr.504/2002, postul Prima TV a fost amendat cu suma de 500.000.000 de lei pentru scenele difuzate in cadrul emisiunii "Big Brother"*, available at: http://merlin.obs.coe.int/redirect.php?id=9106**

RO

SI – Criticism of the Agreement between the Regulating Authorities and the TV Broadcasters

The agreement on the protection of minors concluded between the regulating authorities, the *Svet za Radiodifuzijo* (Broadcasting Council – SRDF), and the biggest TV broadcasters minors is subject to criticisms.

The criticisms focus in particular on the alleged lack of compatibility of the agreement with Art. 84 paragraphs 1 and 3 of the *Zakon o Medijih* (Media Law – see IRIS 2004-5: 15). These regulations deal with the protection of children and adolescents against harmful broadcasting content. The broadcasting of violent and erotic content – scenes of extreme forms of pornography is generally

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forbidden – is limited to the period between 00:00 and 05:00 and must be specifically labelled during broadcasting. Furthermore, the broadcast must be preceded by a warning that the programmes are unsuitable for children under the age of 15. The agreement has also been criticized because it determines only the content that cannot be seen by children under 15 without the supervision of adults and must be identified as such. The timeframe in which violent and erotic content may be broadcast is not specified in the agreement. In addition to this criticism of the contents, it is also objected that the designation of the warning notices is incomplete and inconsistent. ■

● **Media Law available at: http://merlin.obs.coe.int/redirect.php?id=9110**

SL

SK – Insertion of Advertisements during a Hockey Game Does Not Constitute a Violation of Broadcasting Law

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The Slovak state-owned television channel, STV, did not violate broadcasting law when it transmitted short advertisements during ice hockey games at times other than in the breaks stipulated by the rules (occurring at one-third and two-third intervals), according to the decision given by the *Rada Pre Vysielanie A Retransmisiu* (Broadcasting Council) in its meeting on 19 November 2003.

During the transmission of the 2003 ice hockey world championship in Finland, the television channel had interrupted the games as they were being played, by inserting short advertisements. The Broadcasting Council is of the view that this practice does not violate either Slovak law or Article 11, Paragraph 2 of the Television Without Frontiers Directive: The legitimacy of the advertising slots apparently represented a deviation from the official rules of the International Ice Hockey Federation (IIHF). Furthermore, the advertisements, which lasted roughly forty seconds, were not inserted during the actual competition, but during breaks necessitated by injury, for example, or while players were taking their positions to bully off, i.e. before what are termed *bullies*. ■

● **Press release from the EPRA (European Platform of Regulatory Authorities), available at: http://merlin.obs.coe.int/redirect.php?id=9072**

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