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INTERNATIONAL

EFTA

Surveillance Authority: Measures in Preparation for the Entry into Force of the New Regulatory Regime for Electronic Communications

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On 14 July 2004, the EFTA Surveillance Authority adopted Recommendation 194/04/COL on relevant product and service markets susceptible to *ex ante* regulation, Guidelines on market analysis and the assessment of significant market power (SMP), and Recommendation 193/04/COL on notifications, time limits and consultations provided for in Article 7 of the Framework Directive 2002/21/EC (see IRIS 2002-3: 4). These soft law measures mirror those already adopted by the European Commission (see IRIS 2002-9: 7, IRIS 2003-3: 7 and IRIS 2003-8: 6) taking into account specificities of the Agreement on the European Economic Area (EEA). The measures are addressed to the EEA EFTA States Iceland, Liechtenstein and Norway.

In order to ensure homogeneity throughout the EEA, the Authority has taken due account of the parallel Recommendations and Guidelines already issued by the European Commission when adopting its own soft law measures. The measures were adapted to the EEA context where necessary and aligned with the Authority's working procedures. Prior to adoption, the Authority consulted the general public and the national authorities in the EFTA States on the draft Recommendation on relevant markets.

The recommended list of relevant markets susceptible to *ex ante* regulation remains unchanged in comparison to Recommendation 2003/311/EC previously adopted by the Commission (see IRIS 2003-3: 7). The Guidelines on market analysis and SMP have been aligned with the competition provisions contained in the EEA Agreement. A noteworthy change occurred in the Recommendation on Article 7 Framework Directive procedural aspects: the national regulatory authorities of the EFTA states have to notify draft measures in the English language. This will enhance transparency and facilitate the peer-review mechanism built into the procedure.

On 23 June 2004, the Authority convened the first meeting of the EFTA Communications Committee assisting the EFTA Surveillance Authority in the discharge of its functions under the new regulatory regime. The EFTA Communications Committee's primary role is to deliver opinions on proposed measures put forward by the Authority, such as recommendations and guidelines and any negative decisions on proposed measures notified by national regulatory authorities in the EFTA States pursuant to Article 7 of the Framework Directive 2002/21/EC. The European Commission and representatives of the EU Member States are invited to participate as observers in the meetings of the Committee.

The adoption of parallel soft law measures and the establishment of a separate comitology committee are the consequence of the two-pillar system of surveillance established by the EEA Agreement, in which the EFTA Surveillance Authority has exclusive competence to scrutinize and, if necessary, veto draft measures notified by the national regulatory authorities in Iceland, Liechtenstein and Norway pursuant to Article 7 of the Framework Directive 2002/21/EC. The new regulatory regime for electronic communications will enter into force in the EEA on 1 November 2004. ■

● Recommendations and Guidelines in preparation for the entry into force of the new regulatory regime for electronic communications in the EEA, available at: http://merlin.obs.coe.int/redirect.php?id=9293

EN

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EUROPEAN UNION

Court of Justice of the European Communities: Ruling on the Bacardi Case

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On 13 July, the Court of Justice of the European Communities delivered its judgment in the two cases concerning the French law which bans indirect advertising of alcoholic beverages (*Loi Evin*).

The Court follows the Opinion of its Advocate General, dated 11 March 2004 (see IRIS 2004-4: 3 also for the content of the French provisions). Advocate General Tizzano decided in favour of the compatibility with Community law of the French legislation on tobacco and alcohol addiction ("the *Loi Evin*") and of the code of conduct drawn up by the *Conseil Supérieur de l'Audiovisuel* (the French audiovisual regulatory body – CSA).

The reasoning of the Court is similar to that of the Advocate General. First, the Court excludes the application, in the specific case, of the "Television without Frontiers" Directive. According to the Court, indirect television advertising for alcoholic beverages resulting from hoardings visible during the retransmission of sporting events does not constitute a separate announcement broadcast to promote goods or services within the meaning of the Directive.

As to the Treaty rules on the freedom to provide services (Art. 49 EC), the Court finds that the French television advertising rules constitute a restriction on the freedom to provide services: this is because, first, the owners of the advertising hoardings must refuse, as a preventive measure, any advertising for alcoholic beverages if the sporting event is likely to be retransmitted in France, and, second, because the rules hinder the provision of broadcasting services for television programmes. French broadcasters must refuse to retransmit all sporting events during the course of which hoardings bearing advertising for alcoholic beverages marketed in France are visible. Furthermore, the organisers of sporting events taking place outside France cannot sell the retransmission rights to French broadcasters where the broadcast of television programmes devoted to such events is likely to contain indirect television advertising for alcoholic beverages. Moreover, although it is true that it is technically possible to mask the images in order selectively to conceal the hoardings displaying advertising for alcoholic beverages, the use of such techniques involves substantial extra costs for the French broadcasters.

Finally, the Court considers whether the prohibition may be justified according to the derogations to freedom to provide services provided in the Treaty. The Court states that the French television advertising rules seek to protect public health (Art. 46 EC) and that they are appropriate to ensure that that objective is achieved. The rules restrict the situations in which advertising hoardings for alcoholic beverages can be seen on television and, as a result, are likely to restrict the broadcasting of such advertisements, thereby reducing the occasions on which television viewers might be encouraged to consume alcoholic beverages.

The Court, therefore, holds that the principle of the freedom to provide services laid down in the EC Treaty does not preclude a ban such as that imposed by the French rules on indirect television advertising for alcoholic beverages. ■

● **Case C-262/02 Commission of the European Communities v. French Republic and Case C-429/02 Bacardi France SAS v. Télévision Française 1 SA (TF1), Groupe Jean-Claude Darmon SA, Girosport SARL, available at:**
http://merlin.obs.coe.int/redirect.php?id=9295

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

European Commission: Proceedings Instigated Against Germany for Support of DVB-T in Berlin-Brandenburg

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In July 2004 the European Commission initiated state aid proceedings against the Federal Republic of Germany in accordance with Article 88 (2) of the EC Treaty with respect to the examination of the financing of DVB-T in Berlin-Brandenburg (see IRIS 2004-6: 5).

The complaint concerns the subsidies (the so-called *Ausgleichsgebühr*), paid to broadcasters by the *Medienanstalt Berlin-Brandenburg* (Berlin-Brandenburg media authority - *mabb*). These subsidies represent 30% of the transmission fee that private broadcasters have to pay to the operator of the DVB-T network (*T-Systems*). As part of a frequency allocation process, *T-Systems*, a subsidiary of *Deutsche Telekom*, was granted a DVB-T licence on condition that it expand the DVB-T network.

In the Commission's opinion, this arrangement has the potential to distort competition because of the direct advantages it gives to private broadcasters and its indirect support for *T-Systems*. The subsidies paid to private broadcasters mean that *T-Systems* is able to finance the DVB-T infrastructure from the transmission fee alone. In contrast to digital cable TV, for example, viewers are not required to pay for the service. According to the Commission, without the subsidies it would have been more difficult for *T-Systems* to set up its service; *T-Systems* had charged broadcasters a lower fee as an incentive to switch to DVB-T and should have funded the shortfall itself or by charging a subscription fee. The current financing arrangement meant that DVB-T was preferred to digital cable (DVB-C) and digital satellite (DVB-S) television because the latter had not received the corresponding subsidies. Since there was a degree of substitutability between DVB-T, DVB-C and DVB-S in both the upstream and downstream markets, they were competing with one another. There could also therefore be a distortion of competition at infrastructure level.

In the Commission's view, the switch from analogue to digital broadcasting must not involve any discriminatory measures by the Member States and must be completed in a technology-neutral way so that investment in other technological networks is not jeopardised. ■

● **Letter from the Commission to the Federal Republic of Germany, available at:**
http://merlin.obs.coe.int/redirect.php?id=9302

DE-EN

European Commission: Investigation of State Aid to the Swedish Digital Terrestrial Television Network

On 14 July 2004, The European Commission decided to initiate proceedings in accordance with Article 88(2) of the EEC Treaty against the Swedish State regarding state aid in connection with the establishment of digital terrestrial television ("DTT") in Sweden.

In 2000, the Swedish State gave the state owned entity Teracom permission to extend the DTT network to cover the entire country, and in 2003, the State decided that the DTT network should be extended to cover approximately 98-99% of the population. In 2002, the

Swedish Government was authorized to issue an interim credit warranty of SEK 2,000 million to the benefit of Teracom, and in 2003, the State granted Teracom a capital injection of SEK 500 million.

A significant part of Teracom's revenues are payments for transmission services from the public service broadcaster Sveriges Televison ("SVT"). SVT is primarily financed through compulsory license fees. Since 2002, SVT is required by the Swedish State to use DTT for digital transmissions. Thus, SVT must pay Teracom for both analogue and digital transmissions. In order to compensate SVT for the increased costs for analogue and digital transmissions, a "Distribution Account" - financed by parts of the compulsory license fees paid to SVT and by loans from the Swedish National Debt Office - was launched by the Swedish State in 2002.

In its decision to initiate an investigation, the Commission clarifies that state aid exists where there is an intervention by a Member State or through state funds, which a) gives the recipient an advantage, b) distorts or threatens to distort competition and c) such intervention may affect trade between Member States.

Despite extensive exchange of information between the Swedish State and the Commission, the Commission is not convinced that the Swedish State has not provided state aid to DTT in Sweden. Specifically, the Commission expresses the following concerns:

- The loans from the National Debt Office and the payments from SVT to Teracom all constitute state funds, which appear to be used to compensate Teracom with higher amounts from SVT than SVT would have paid to Teracom under normal market conditions. The overpayment by SVT to Teracom may be an indirect state aid to Teracom.
- The issue of the credit warranty to the benefit of Teracom constitutes state intervention which gives Teracom an advantage on the market and it is not possible to rule out that the right to issue a credit warranty does not already include state aid.
- The granting by the State of the capital injection of SEK 500 million to Teracom, clearly constitutes transfer of state funds, and the Commission doubts that there is no state aid in the capital injection.

The Commission then concludes that substitutability exists between the use of the DTT and satellite and cable for distribution of digital television, and that the Swedish State's decision to support DTT exclusively, rather than all forms of digital transmissions is contrary to the Commission's Communication on the switchover from analogue to digital transmissions (COM (2003) 541 final) and has led to a distortion of competition. The Commission states that it can be assumed that trade between Member States will be affected.

On a separate note, the Commission questions if the Swedish State has complied with the "Transparency Directive" (Counsel Directive 80/723, as amended by Counsel Directive 2000/52/EEC).

Accordingly, the Commission has, based on Article 88(2) of the EEC Treaty, requested that the Swedish State submit its comments and information to the Commission. The Swedish State is reminded that, under Article 88(3) of the EEC Treaty, it must suspend all state aid to DTT. If the Commission finds that the state aid given by the Swedish State to DTT is illegal, Council Regulation 659/1999 requires that all state aid that has been paid must be recovered. ■

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● **Commission Note for the attention of the Members of the Commission. Monitoring the application of Community law - State Aid NN 35/2004 - Sweden - Introduction of digital terrestrial television C (2004) 2671 final, available at:**
http://merlin.obs.coe.int/redirect.php?id=9283 (EN)
http://merlin.obs.coe.int/redirect.php?id=9284 (SV)

EN-SV

European Commission: Communication on Interoperability of Digital Interactive Television Services

Interactive television merges traditional TV-watching with the interactivity of a personal computer. But only the more sophisticated set-top boxes with a so-called Application Programme Interface (API) can process interactive television. The API is a form of middleware and functions as a communication bridge (interface) between the set-top box operating system and the application. Different APIs can support different standards. Notably where proprietary API applications are in place, third providers of interactive applications must enter into negotiations with the controller of the proprietary API technology, and would have to know the technical specifications of that API before they can develop and deliver interactive services via this particular platform. This gateway function of the API has raised considerable concerns about the possible negative consequences of a lack of interoperability on market contestability, service portability and consumer choice, but also on the realisation of media policy goals such as the free flow of information, pluralism and cultural diversity.

This is why Article 18 (1) of the EC Framework Directive (see IRIS 2002-3: 4) calls upon Member States to encourage providers of digital interactive television services, as well as providers of digital television equipment, to use an open API. In so doing, the Framework Directive refrained for the time being from mandating a particular API standard. But according to Article 18 (3) of the Framework Directive, the European Commission is required to examine the effectiveness of this concept based on voluntary co-operation and whether interoperability and freedom of choice for users have been achieved. Where the European Commission's finding is that this is not the case, it is entitled to undertake action and even to make a specific API standard compulsory (Article 18 (3), 17 (3) and (4) of the Framework Directive).

For this purpose, the European Commission has invited market players and other interested parties to respond to a Staff Working Paper on the interoperability of digital interactive television services that was published earlier this year. A Commission Communication now summarises the results of the consultation process. Based on the contributions received from more than 51 entities, including manufacturers, network operators, broadcasters, API providers, consumer associations and others, the European Commission concluded that for the moment there was no clear case for mandating standards. One reason is the belated implementation of the new framework by the Member States and the resulting lack of experience in practice. Other reasons are the differing views presented of what interoperability actually means and whether it has been achieved. One group defended the view that interoperability has not been achieved yet, because interoperability in the sense of Article 18 of the Framework Directive should be best interpreted in the sense of open, non-proprietary standards (for example the Multi Media Home Platform – MHP standard). This view was put forward by e.g. free to air, and especially public broadcasters, which have an interest in free market access, unhampered by proprietary standards and incompatibilities. On the other hand, a second group

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interprets interoperability in the sense of availability of the same interactive services on different distribution platforms. Due to, for example, technical solutions that support the portability of interactive applications across different platforms, interoperability has, according to this group, been achieved. Consequently, interference by the European Commission is not necessary. The later opinion was represented by e.g. infrastructure operators. In infrastructure markets, control over a proprietary standard can mean a competitive advantage.

The Commission suggested a number of promotional measures (establishment of a working group, providing legal certainty regarding public subsidies for consumer equipment, extension of the list of standards published in the Official Journal, monitoring access to proprietary technologies). The Commission announced that it will review the issue again in the second half of 2005. ■

● **European Commission, Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions on interoperability of digital interactive television services, Brussels, 30 July 2004, COM (2004) 541 final, available at:**
http://merlin.obs.coe.int/redirect.php?id=9310

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

European Commission: France Asked to Lift Ban on Television Advertising for Publishing and the Cinema

In May 2002, the European Commission formally asked France to lift its ban on television advertising by the press, the distribution networks and the cinema and publishing sectors introduced by the Decree of 27 March 1992 (see IRIS 2002-6: 13). The Community authorities felt that these regulations, which France held were necessary to preserve the diversity of the press and culture and to protect small shops, restricted the free circulation of services within the Union. In a Decree of 7 October 2003, the French public authorities decided to authorise television advertising for the press, from 1 January 2004 onwards, and for the distribution networks, but in stages – from 1 January 2004 for local, cable and satellite channels and for Digital Terrestrial Television, and from 1 January 2007 for national analogue channels. The authorisation does not apply, however, to advertising special offers. The ban has also been lifted for publishing, but only in regard to cable and satellite channels. It has, however, been maintained for the cinema, so that French companies are not penalised in comparison to the wealthy American majors. The Commission still does not seem to be satisfied with these concessions – on 7 July it issued a "reasoned opinion" in which it called on France to lift the ban on television advertising for publishing and the cinema. Given the small audiences that cable and satellite channels attract in France (less than 10% of the national total), the change for the publishing sector was not such as to put an end to the infringement. The Commission believes that the current regulations "could have discriminatory effects on books and films from other Member States", and that "less restrictive measures would be possible to achieve the objective of protecting cultural diversity as put forward by the French authorities". The Minister for Culture and Communications, taking note of the request, nevertheless insisted on emphasising that the current regulations banning television advertising for the cinema and publishing on terrestrially broadcast networks was aimed firstly at maintaining a balance in order to better preserve the diversity of what was on offer to the public. They also protected European films for which exposure remained difficult as they did not have the means of paying for advertising campaigns on television. The Minister therefore hoped the procedure instigated by the Commission would "enable France to remember that its regulations contributed mainly to the essential preservation of what was on offer in Europe without distorting competition and that the Union's bodies would recognise that action in favour of cultural diversity was right".

If it did not receive a satisfactory reply within two months (ie by 7 September), the Commission could bring France before the Court of Justice. As this deadline approached, however, the French Government obtained an extension. The European Commission is calling on France to lift the ban on television advertising for publishing and the cinema by 4 October. ■

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● **"Commission calls on France to lift ban on television advertising for publishing and the cinema", press release dated 7 July 2004, available at:**
http://merlin.obs.coe.int/redirect.php?id=9320

DE-EN-FR

European Commission: Proposal for MEDIA 2007 Programme

As announced earlier this year (see IRIS 2004-5: 4), the European Commission has adopted its proposal for the MEDIA 2007 programme, which is intended to succeed the current EU programmes in support of the European audiovisual sector (MEDIA Plus and MEDIA Training – see IRIS 2004-6: 4). According to the Commission's proposal, MEDIA 2007 will be structured as a single programme, integrating the existing two programmes, and will cover the period 2007-2013 with a proposed total budget of EUR 1055 million. The proposal for the new programme follows the mid-term evaluation of the present programmes and extensive consultations with interested parties, which have confirmed the positive impact of Community action in this field and the need for such action to be continued. In line with the current programmes, MEDIA 2007 will continue to direct its actions to the pre- and post production phases, also taking account of the changes brought about by digitisation.

The proposed global objectives of the programme will be to: "(a) preserve and enhance European cultural diversity and its cinematographic and audiovisual heritage, guarantee its accessibility to European citizens and promote intercultural dialogue; (b) increase the circulation of European audiovisual works inside and outside the European Union; (c) strengthen the competitiveness of the European audiovisual sector in the framework of an open and competitive European market." In order to achieve these objectives MEDIA 2007 will target its actions towards supporting the acquisition and improvement of skills of professionals in the audiovisual field and the development of European audiovisual works (pre-production phase) and towards the transnational distribution and promotion of European works (post-production phase). Pilot projects will also be supported to ensure that the programme adapts to market developments. Among the priorities of the programme will be:

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strengthening the production structure of SMEs, of which the European audiovisual sector is mainly composed, including by facilitating access to finance for such actors; reducing the imbalances within the European audiovisual market between countries with a high production capacity and those with a low production capacity or a restricted linguistic area; and following and supporting market developments as regards digitisation (in this respect a number of actions will be directed to support both digitisation of European audiovisual works and digital exhibition – e.g. facilitating access to credit by cinema owners for investment in digital equipment).

The proposal now has to be examined by Parliament and Council. The aim is for it to be adopted by the end of 2005. ■

● **Proposal for a Decision of the European Parliament and the Council Concerning the implementation of a programme of support for the European audiovisual sector (MEDIA 2007), Brussels, 14 July 2004, COM(2004) 470 final, available at:**
http://merlin.obs.coe.int/redirect.php?id=9307

DE-EN-FR

NATIONAL

AT – Major Reform of Broadcasting Acts Opens the Door for Nationwide Private Radio Stations

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The Federal Act amending the Private Radio Act, the Private Television Act, the KommAustria Act and the ORF Act and repealing the Television Signal Act was promulgated at the end of July, and most of its provisions entered into force on 1 August 2004. The new act heralds the most extensive modification in the broadcasting field since the reform of its legal framework in 2001.

The amendment places private broadcasting laws as a whole on a sounder commercial footing, *inter alia* by relaxing certain guarantees designed to ensure media diversity. The provisions on controls have been amended with a view to boosting efficiency.

For the first time ever, nationwide private radio stations are now possible. By combining licences it should also be possible to take advantage of synergies, exclusively on the basis of existing licences. Private radio stations will be able to transfer their existing licences to a company, then cancel them in return for a new licence covering the whole country. Only commercial corporations will be eligible as nationwide licence-holders. Other conditions also apply. For example, companies must meet certain capital criteria and their range must include at least 60 per cent of the Austrian population.

In principle, broadcasters are obliged to make sure their programme complies with their licence. In the past, several radio broadcasters lost their licence when it was found they had significantly changed their programming. Under the new act, broadcasters must wait at least two years after receiving their licence before modifying their programming and changes may only be made with the consent of the Austrian broadcasting regulator (KommAustria). However, such a request may only be refused if the modification is likely to have a major negative impact on competition, for the economic efficiency of radio broadcasters already operating in the area, or for the diversity of programmes available to listeners.

Before the new law was introduced, the *Bundeskommunikationssenat* (Federal Communications Office), the supervisory body for public radio, had no powers to monitor the ORF's programmes on a permanent basis. In the interests of more effective control, KommAustria is now obliged to carry out regular checks of all radio broadcasters at least monthly, to make sure they are complying with the restrictions on advertising. Broadcasters found to be violating such restrictions have a right of reply, following which, if there are still good grounds for suspecting that the ORF is in breach of the law, KommAustria must report the matter to the Federal Communications Office. In the event of a suspected violation by a private radio broadcaster, KommAustria pursues the matter itself.

In the past, complaints alleging that the ORF had violated the ORF Act could be lodged with the Federal Communications Office providing they were backed up with the signatures of 300 radio listeners. The only other condition that had to be met was that complainants had to be licence holders. Now, the signatures of only 120 radio listeners or people living under the same roof as them are needed in order to lodge a complaint.

The Television Signal Act (BGBl I 2000/50 as amended by BGBl I 2001/136) governing the promotion of television services for widescreen format (16:9) and high-definition television (HDTV) and those that use fully digitalised transmission technology has been repealed. The provisions of the Access Directive 2002/19/EC and the Universal Service Directive 2002/22/EC should shortly be incorporated into regulations issued by KommAustria. ■

● **Federal Act amending the Private Radio Act, the Private Television Act, the KommAustria Act and the ORF Act, and repealing the Television Signal Act, BGBl I 2004/97 of 30 July 2004, available at:**
http://merlin.obs.coe.int/redirect.php?id=9259

DE

AT – *KommAustria* to Monitor Advertising

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Following the amendment of Austrian broadcasting laws, *KommAustria* was entrusted with an important new responsibility at the beginning of August. It will monitor broadcasters' compliance with advertising regulations on a monthly basis and publish its findings "in an appropriate way". The results will be published on the website of *RTR GmbH*.

In August, *KommAustria* condemned breaches of advertising regulations by three commercial radio broadcasters, by *ATV+*, the only terrestrial TV operator providing programmes throughout Austria (see IRIS 2004-4: 6), and by *Österreichische Rundfunk (ORF)*. *KommAustria* gave the broadcasters two weeks to respond to the charges.

If, having examined their responses, *KommAustria* still believes the law might have been broken, it will instigate administrative court proceedings against the relevant employees of the broadcasting companies concerned. In the case of *ORF, KommAustria* must report its suspicions to the *Bundeskommunikationssenat* (Federal Communications Office), the second broadcasting regulator, which will then take official administrative proceedings against the *ORF* staff concerned. Appeals against the decisions of *KommAustria* or the *Bundeskommunikationssenat* can be taken firstly to the *Unabhängige Verwaltungssenat Wien* (Vienna Independent Administrative Court) and then to the *Verwaltungsgerichtshof* (Administrative Court) or *Verfassungsgerichtshof* (Constitutional Court). ■

● **Publication of results of advertising monitoring, available at:**
http://merlin.obs.coe.int/redirect.php?id=9312

DE

CS – Amendments to the Law on Broadcasting Adopted

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The Parliament of Serbia adopted the proposed amendments of the Government to the 2002 Law on Broadcasting of Serbia (see IRIS 2004-8: 6) at its session held on 23 August 2004. The amendments were accepted in an urgent procedure, justified by the need to undo the work of the Council of the Broadcasting Agency. The Law entered into force on 27 August 2004.

The Parliament did not accept any further amendments to the proposal, so the essence of the final version remained the same as in the draft (see IRIS 2004-8: 6). More specifically, changes are not material but rather concern procedural aspects. The current Council is dismissed and a completely new one shall be elected. Also, the list of authorised nominators has been changed so that, instead of the Government of Serbia, the Executive Council (i.e. the Government) of the Autonomous Province of Vojvodina and the National Assembly (i.e. the Parliament) of Serbia as well as the parliamentary Committee on Culture and Information are going to nominate candidates as Council members. Apart from that, another important amendment relates to the change of the required majority for appointing and removing the Council members (the original text provided for a simple majority of all MPs, i.e. 126 votes, the amendment proposes a simple majority of all MPs present, provided that there is a quorum, i.e. 64 votes).

The reactions to the amendments have been mostly favourable. The process of nomination of the new members of the Council is in progress, the deadline being 25 September 2004. None of the NGO's or the professional associations that were openly criticising the proposal of the amendments decided to withdraw from the nomination process. A statement of the OSCE stressed in early September 2004 the need for transparent elections of the new Council members, their genuine impartiality and knowledge. Therefore it seems that Serbia has a second chance to elect a fully credible Council of the Broadcasting Agency, and to finally implement the 2002 Law on Broadcasting. If that Law is be adopted, the broadcasting industry is expected to be much more attractive to foreign investors, especially those already present in the region. ■

CS – Directive on Privatization of Local Broadcasters

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On 20 August 2004 the Ministry of Culture and Information passed a Directive on the Privatization of Local Broadcasters. Its aim is to enable the existing local broadcasters, that are currently still under control of local authorities, to fulfill their obligation to privatize until June 2006, as provided in the 2002 Law on Broadcasting.

Nearly a hundred radio and TV stations providing regional coverage are currently in the hands of local governments. During the drafting of the 2002 Law on Broadcasting, it was decided that this kind of broadcasting companies should be abandoned in the broadcasting system of Serbia. A transitional period of four years after the Law on Broadcasting entered in force had been provided for these broadcasters to privatize (Article 96 Par. 9). The Law also explicitly authorized the competent Ministry to pass a Directive in which the detailed manner of privatization is to be determined (Article 126 Par. 2).

The Directive only regulates certain peculiarities related to the privatization of broadcasting companies, leaving the process of privatization to the general regime of the 2001 Law on Privatization of Serbia (Official Gazette of the Republic of Serbia No. 38/01, 18/03). Under these rules, the privatization of local broadcasters is to be conducted through the sale of their capital in a public tender or a public auction. The privatization procedure is to be launched in radio and television stations which have brought their operations and activities into conformity with the 2002 Law on Broadcasting. Regarding the relatively small size of most local broadcasting companies, it is highly unlikely that a sale by tender shall be organized for any of them. The rules stipulate that the privatization of local state-owned broadcasters is to be conducted in a way that enables uninterrupted production and broadcasting of local current affairs and educational programming. This continuity is to be secured by restricting the sale to purchasers that are entitled to hold a broadcasting license and by determining that the existing activities of the company are not to be changed before the expiry of the current license for radio and television broadcasting. The rules further constitute that a minimum of four hours per day of local current affairs and educational programming in the morning and evening prime time must be secured. ■

● **Directive on the Privatization of Local Broadcasters, Official Gazette of the Republic of Serbia No. 94/04**

CS

CZ – Law on Certain Information Society Services

The Czech Parliament has adopted Law no. 480/2004 on certain information society services, which entered into force on 7 September 2004.

The new law is designed to implement Directive 2000/31/EC of 8 May 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market.

In accordance with the Directive, the new law defines terms such as "information society services", "service provider", "established service provider", "recipient of the service", "consumer" and "commercial communication".

The law explains that service providers are not liable for the simple transmission or automatic, intermediate and temporary storage of third-party information which they have not selected or modified, whose transmission they have not initiated and whose recipients they have not selected. However, even providers who store illegal third-party content on their server may not be liable. Since their servers may regularly contain vast quantities of diverse, frequently changing content, such providers cannot and should not be expected to be aware of such content and check its legality. Only if they are knowingly storing specific illegal content can they, in principle, be expected to block access to and remove it.

Unsolicited e-mail advertising is regulated through the "opt-out principle". It is therefore illegal to send e-mail advertising if the recipient has asked not to receive it. E-mail advertising must be identifiable as such. It is left to the advertiser to decide how this should be achieved. There is no provision for standard labelling of such advertising.

Jan Fučík
Broadcasting Council
Prague

Sanctions (fines) for infringements of the law are imposed by the Data Protection Office and the responsible professional associations (established by law).

The new law also makes certain amendments to the e-commerce regulations set out in the Civil Code. Before a contract is concluded, companies are now obliged to declare a great deal of information explaining the technical steps involved in concluding the contract, the filing of the contract and the technical means for correcting errors. These and other obligations apply to companies that conclude contracts via teleservices or media services, particularly the Internet. ■

● ***Zákon č. 480/2004 Sb. o některých službách informační společnosti*** **(Law No. 480/2004 on certain information society services)**

CS

DE – *RTL* Withdraws Complaints to Constitutional Court

Alexander Scheuer
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RTL Television, the German subsidiary of the Luxembourg-based *RTL Group*, has withdrawn a complaint to the *Bundesverfassungsgericht* (Federal Constitutional Court) against a decision of the *Oberlandesgericht Celle* (Celle Appeal Court - *OLG*). The proceedings concerned the forfeiture of income earned from illegal advertising. In 1997, the *OLG* had ruled in the last instance that *RTL* could not take advantage of the more relaxed regulations governing series when calculating the maximum permissible number of commercial breaks (see IRIS 1997-7: 11).

The relevant media supervisory body, the *Niedersächsische Landesrundfunkausschuss* (Lower Saxony Broadcasting Commission), predecessor of the *Niedersächsische Landesmedienanstalt* (Lower Saxony Media Authority - *NLM*), had taken administrative court proceedings against the broadcaster. The proceedings brought by *RTL* with the *Oberverwaltungsgericht Niedersachsen* (Lower Saxony Administrative Appeal Court - *OVG*) were adjourned and referred to the European Court of Justice (ECJ) for a preliminary decision. In a ruling of 23 October 2003, the ECJ supported the interpretation of the supervisory body. The *OVG* then dismissed the complaint by *RTL Television*.

The appeal to the Constitutional Court concerned the forfeiture in accordance with the *Ordnungswidrigkeitengesetz* (Regulatory Offences Act - *OwiG*) of the resulting profits, which in this case amounted to more than EUR 10 million. The forfeiture had been deferred in 1998 because of the expected appeal to the Constitutional Court and the proceedings pending before the *OVG*.

In another dispute concerning the admissibility of advertising blockers (the so-called "TV fairy"), *RTL*, having considered the reasons for the *BGH's* ruling, has decided not to appeal to the Constitutional Court. The *BGH* (Federal Supreme Court) had largely upheld the appeal court's decision in its ruling of 24 June 2004 (see IRIS 2004-7: 7). According to press releases, *RTL* decided to take no further action in view of the fact that the disputed first generation products had since been withdrawn from the market. Nevertheless, it wishes to make sure that similar products are banned. Following the granting in early 2004 of an *RTL* appeal for a temporary injunction against the marketing and sale of such products, an oral hearing has been set for mid-October 2004. ■

● **Ruling of the *Bundesgerichtshof* (Federal Supreme Court) of 24 June 2004 (case no. I ZR 26/02), available at:**
http://merlin.obs.coe.int/redirect.php?id=8723

DE

DE – Munich Appeal Court on Internet Distribution of Harmful Media

Kathrin Berger
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In a ruling of 29 July 2004, the *OLG München* (Munich Appeal Court) clarified the requirements governing the distribution of media that carry the warning "unsuitable for young people" (case no. 29 U 2745/04).

The parties in the proceedings were two mail-order companies that rent out film DVDs via the Internet. The applicant complained that the distribution method used by the respondent failed to ensure that DVDs categorised as unsuitable for under-18s did not fall into the hands of children or young people. Individuals wishing to rent the films, after registering their personal data on the respondent's website, had to prove their identity in person at a post office branch. Once their identity and age had been verified, a form was sent from the post office to the respondent, who then sent out the relevant films. Under this system, no further age checks were carried out when the films were actually delivered.

According to Art. 12.3.2 of the *Jugendschutzgesetz* (Youth Protection Act - *JuSchG*), films categorised as unsuitable for young people may not be distributed by mail-order. However, under Art. 1.4 *JuSchG*, this does not apply if technical or other means are used to ensure that goods are not sent to children or young people. If appropriate precautions have been taken, such goods may therefore be distributed. The court stated, however, that these measures must not only exist in principle, but should be effective.

In its decision, the court began with a detailed interpretation of the term "distribution to children and young people". It decided that "distribution" entailed not only the actual sending of the goods, but also their arrival at the recipient. Under the post office ID system, this involved their being posted through the letter box or handed over by the postman. In the court's view, there was no guarantee under this system that a minor would not open the parcel. The e-mail informing the customer that the goods had been sent was also therefore insufficient. The only way of effectively ensuring that the goods were not opened by children or young people was to send them by recorded delivery so that only the customer in person could receive them.

Similar problems arise in relation to youth protection in broadcasting and telemedia. Under Art. 5.3.1 of the *Jugendmedienschutz-Staatsvertrag* (Inter-State Agreement on Youth Protection in the Media - *JMStV*), telemedia providers and broadcasters must ensure through technical or other means that content harmful to minors cannot be viewed by children and young people, or at least that access is heavily restricted. However, the *OLG München* did not draw a legal comparison between the two situations, since it thought that the criteria for restricted user groups (see IRIS 2003-10: 14 and IRIS 2004-6: 8) set out in Art. 4.2.2 *JMStV* did not necessarily apply to the mail-order distribution of videos and DVDs. ■

● ***OLG München*** **(Munich Appeal Court), ruling of 29 July 2004, case no. 29 U 2745/04**

DE

DE – Government Bill Amending *WDR* Act

On 9 July 2004, the *Landtag* (regional parliament) of North Rhine-Westphalia held a hearing on a Bill tabled by the *Landesregierung* (regional government) amending the *Gesetz für den Westdeutschen Rundfunk* (West German Broadcasting Act). The participants included representatives of regional broadcasting authorities, regulatory bodies, cable and satellite associations and academics.

Based on the complaints management system used by the British public broadcaster BBC, the Bill proposes the creation of an independent programming and complaints body, which would decide on viewers' complaints in agreement with the director general. *WDR* has rejected the idea of creating such a body as unnecessary and too cost-intensive.

Thorsten Ader
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As far as *WDR's* online services are concerned, the Bill follows the corresponding provisions of the *7. Rundfunkänderungs-Staatsvertrags* (7th Inter-State Broadcasting Agreement). These state that media services with programme-related content may be offered. Advertising and sponsorship in relation to online services are expressly prohibited.

Another aspect of the Bill which follows the *BBC's* example is the procedure for the definition by *WDR* of its own remit. Here again it transposes a provision of the *7. Rundfunkänderungs-Staatsvertrag*, which requires the regional broadcasting bodies that make up the *ARD*, as well as *ZDF* and *Deutschlandradio*, to define their own remit. According to the Bill, they should particularly include: details of programming structure; principles for the guarantee of journalistic and qualitative standards; general provisions on the quality and quantity of channels and programmes; information on the proposed emphases of the various channels; conceptual details of programme development and the strengthening of regional services; strategies to improve viewer relations and participation. In addition, the director general of each broadcaster should send to the *Rundfunkrat* (Broadcasting Council) an annual report on its fulfilment of this remit and, every two years, an implementation report. ■

● **Government Bill on the *WDR* Act, available at:**
http://merlin.obs.coe.int/redirect.php?id=9300

DE

DE – *KJM* Condemns *FSF* Evaluation of Cosmetic Surgery Broadcasts

For the first time since the co-regulatory system for the protection of youth in the media was established in Germany (see IRIS 2002-9: 15), the state regulator, the *Kommission für Jugendmedienschutz* (Commission for Protection of Youth in the Media - *KJM*), has overturned a decision of the co-regulatory body, *Freiwillige Selbstkontrolle Fernsehen (FSF)*. The *FSF* had examined various episodes of the *MTV* cosmetic surgery show "*I want a famous face*" before they were broadcast and approved them for daytime transmission. Under the provisions of the *Jugendmedienschutz-Staatsvertrag* (Inter-State Agreement on the protection of youth in the media - *JMStV*), the *KJM* may only overturn such approval if the *FSF* has exceeded its decision-making powers (Art. 20.3.1 *JMStV*). The *KJM* believes that this is the case, since it thinks the *FSF* failed, *inter alia*, to examine in accordance with the *JMStV* whether the programmes could harm the development of children or young people. The *KJM* said it would discuss with the *FSF* the criteria for assessing entertainment programmes based on cosmetic surgery.

Carmen Palzer
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In the case itself, the *KJM* found that the laws on youth protection in the media had been breached not only in the various episodes of the *MTV* show, but also in an episode of "*Big Brother*" (broadcast on *RTL2*, *Premiere* and *Tele 5*). All the programmes dealt with cosmetic surgery. In the programme "*I want a famous face*", young adults agree to undergo cosmetic surgery to make them look more like their particular idol. In the "*Big Brother*" episode, a cosmetic surgeon had given the occupants of the house advice on cosmetic surgery. The *KJM* thought that all the programmes were likely to harm the development of children or young people. It therefore laid down broadcast time restrictions on any future repeats of these programmes. The episodes containing references to the health risks of cosmetic surgery may only now be broadcast after 10 pm, since young people aged 16 and over should be able to analyse them critically and with a degree of self-awareness. The other episodes may not be shown before 11 pm. The *KJM's* verdicts were based on its decision of 20 July 2004, under which TV programmes that focus on the theme of cosmetic surgery for entertainment purposes may not, in principle, be broadcast before 11 pm. ■

● ***KJM* press releases, available at:**
http://merlin.obs.coe.int/redirect.php?id=9298
http://merlin.obs.coe.int/redirect.php?id=9299

DE

DE – Guidelines for TV Competitions

The *Gemeinsame Stelle Programm, Werbung und Medienkompetenz* (Joint Authority for programming, advertising and media) of the *Direktorenkonferenz der Landesmedienanstalten* (Conference of *Land* Media Authority Directors - *DLM*) has approved a set of guidelines for TV competitions.

The guidelines, proposed by the *Landesanstalt für Kommunikation Baden-Württemberg* (Baden-Württemberg Communications Office - *LFK*) and the *Bayerische Landeszentrale für neue Medien* (Bavarian New Media Office - *BLM*), are meant to facilitate common, practicable regulation of TV competitions.

The document recommends that TV broadcasters draw up their own internal rules for presenters of such programmes. These guidelines should state, *inter alia*, that the cost of entering a competition and viewers' chances of success should be clearly explained. The phone call should cost no more than the price of sending a postcard. The presenter should also refer to the terms and conditions of entry, which should also be published on the Internet and Teletext.

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According to the guidelines, the correct answer should be broadcast shortly after the end of the competition and there should be no misleading comments about the level of difficulty or logic of the question. Viewers may be encouraged to participate, although not excessively, and should certainly not be encouraged to phone in repeatedly.

The working document may now serve as a basis for interpretation of the general programming principles set out in Art. 3 of the *Rundfunkstaatsvertrag* (Inter-State Broadcasting Agreement - *RStV*) and the provisions on advertising and teleshopping contained in Art. 7.1 *RStV*. It will therefore be important in proceedings relating to programming complaints, for example. ■

● **Guidelines for TV competitions, available at:**
http://merlin.obs.coe.int/redirect.php?id=8709

DE

IRIS LEGAL OBSERVATIONS
OF THE EUROPEAN AUDIOVISUAL OBSERVATORY

FI – Higher Television Licence Fees in Finland as of 1 January 2005

Marina Österlund-Karinkanta
Finnish Broadcasting Company YLE, EU and Media Unit

The Council of State decree of 23 June 2004 (*Valtioneuvoston asetus televisiomaksuista*) increases the amount ot the television licence fee paid by households as of 1 January 2005. In Finland the television licence fee is called the television fee.

The new television licence fee is EUR 193,95 for twelve months, EUR 97,60 for six months and EUR 49,35 for three months. This is an increase of 3.9% on the previous fee.

The increase is part of an ongoing reform process, the first step of which consisted in the changes in the Act on the State Television and Radio Fund as of 1 July 2002, whereby the operating licence fee paid by the commercial television companies was cut by 50% and digital television operations were freed from the obligation to pay an operating licence fee during the ongoing licence period (i.e. until 31 August 2010, see IRIS 2002-7: 10). The second step was the increase of the television licence fees by 13% as of 1 January 2004.

The third step has now been taken through the introduction of annual television licence fee increases as of 1 January 2005. The increase of 3.9% is based on the average increase of the consumer price index in 2003 (1/3), on revised preliminary data about the average increase of the index of wage and salary earnings in 2003 (2/3) and an additional 1% which will be included in the increase as long as both analogue and digital transmissions are carried out (i.e. the simulcast period). ■

● **Council of State Decree No. 610/2004 of 23 June 2004, available at: http://merlin.obs.coe.int/redirect.php?id=9285**

FI-SV

FR – Exception for Artistic Purposes – Another Exception to the Right of Personal Portrayal?

Amélie Blocman
Légipresse

On 2 June 2004 the press chamber of the Regional Court of Paris delivered a judgment that has attracted particular attention, concerning the right of personal portrayal, by supporting the freedom to communicate ideas that are specially expressed in an artist's work.

A photographer had published a book, co-produced in conjunction with a philosopher/sociologist, of unidentified faces photographed in the Paris metro. One of the people photographed complained that he had discovered quite by chance that he was included in the book and had also been used in a film. He claimed that the publication, without his consent, of a photograph taken surreptitiously and reproduced for purely commercial purposes in two different media (book and film) violated his right of personal portrayal. In its judgment, the Court began by recalling a principle referred to on many occasions according to which "while every individual has an exclusive right in respect of his/her personal portrayal enabling him/her to object to an image being made or reproduced without his/her consent, this right is not absolute and yields more particularly to the right to information, a fundamental right protected by Article 10 of the European Convention on Human Rights, which authorises the publication of images of people involved in an event, subject to respect for personal human dignity". However, the Court – for the first time to our knowledge – went further by saying that "the same should apply where an individual's exercise of his/her right of personal portrayal would have the effect of arbitrarily hampering the freedom to receive or communicate ideas that are specially expressed in an artist's work".

Following the exception for information purposes, the Court seems to be using Article 10 of the European Convention on Human Rights to sanction an exception for artistic purposes to every person's right of personal portrayal on the basis of "the originality of the process used by the author". It should be noted in passing that this concept is very close to the concepts of literary and artistic ownership and could, in terms of the right of personal portrayal, be difficult to handle because of the risk of arbitrariness; it could even result in exclusion of application of the right of personal portrayal for any publication of photographs of people as it is easy for them to be protected under copyright. In the present case, the Court felt that the aim sought by the photographer (ie to place his art at the service of sociological observation) could not have been achieved if he had worked openly. If he did "steal" these images, the Court felt it was not particularly for a commercial or mercenary purpose but with a view to providing special sociological and artistic evidence on human behaviour, backed by the analysis of a sociologist/philosopher. The Court noted more particularly that the photograph representing the applicant did not show him in a degrading situation and that the impression given by the photograph did not make him look ridiculous. It concluded that by taking and using the disputed image in such circumstances, neither the photographer nor the producer of the film had made wrongful use of their freedom of expression. ■

● **Regional Court of Paris (17th civil chamber), 2 June 2004, M. Bensalah v. L. Delahaye Magnum, Editions Phaidon Presse Limited and MK2 S.A.**

FR

FR – Plagiarism in an Advertisement

In March 2004 the Regional Court of Paris ordered the telephone operator SFR and the advertising agency Publicis to pay the film company Gaumont EUR 300 000 for parasitic conduct as it had run a large-scale advertising campaign that deliberately used elements that were evocative of the film (see IRIS 2004-5: 7). One month later, the two companies appealed against the judgment, as did Luc Besson, whose application to the Courts on the grounds of piracy infringing his moral right as co-author of the film had been dismissed by the Court.

On 8 September, the Court of Appeal in Paris delivered a much-remarked decision. The advertiser's parasitic activities were confirmed, but the amount of the relevant compensation was substantially increased. What is more, the Court of Appeal, unlike the Court in the initial proceedings, acknowledged that the central character of the film, Leeloo, had been plagiarised, and ordered the advertiser and the agency to pay a record amount of damages to Luc Besson and Gaumont for this.

In examining the film director's application, the Court of Appeal laid down the principle according to which "it is possible for a fictional character, on condition that it constitutes an original work, to be protected and its reproduction without its originator's authorisation, particularly if it is immediately identifiable, to constitute copyright infringement". In the present case, the Court found that Leeloo, the heroine of "The Fifth Element", constituted in herself, by the combination of her characteristic and constant elements throughout the film (costume/hair colour), an original work, and has acquired the status of a truly mythical character. Thus the character selected to illustrate the disputed advertising campaign, who wears a red wig and an outfit that imitates that of the heroine and is played by the same

actress as in the film, creates an immediate visual identification between the two characters, giving rise to confusion in the public's mind. The advertiser and the advertising agency cannot justify this and are bound to agree that there is identification with the character in the film, reinforced moreover by the use of scenographic elements (sets) that correspond exactly to that of the cult sequence from the film. The Court held that if the character of Leeloo had been reproduced in the advertisement without authorisation, this constituted copyright infringement. In view of the broad coverage of the disputed advertising campaign (more than 2 000 TV spots in one month, 18 000 posters, inserts in more than 150 newspapers and magazines, etc), the advertiser and the agency were ordered by the Court to pay, jointly and severally, EUR 750 000 to the production company in compensation for their infringement of its pecuniary rights, and EUR 1 million to Luc Besson in respect of infringement of his moral right as the film's director.

Moreover, the Court recalled that "instigated on the basis of Article 1382 of the Civil Code, proceedings for parasitic conduct could not be brought at the same time as proceedings for copyright infringement unless the applicant invoked and supplied proof of separate facts or the separate existence of copyright infringement". The Court held that the advertising company and the advertising agency, in addition to their copyright infringement, had also deliberately placed themselves in the wake of the film "The Fifth Element", constantly seeking to forge a link between the product being advertised and the cinematographic work. The Court upheld the allegation of parasitic conduct, and re-evaluated the compensation at EUR 1 million – more than three times the amount ordered by the Court in the original proceedings. ■

Amélie Blocman
Légipresse

● **Court of Appeal of Paris (4th chamber, A section), 8 September 2004 – Publicis Conseil and Luc Besson v. the companies Gaumont and SFR**

FR

FR – CSA Calls on Courts for Immediate Stop to Broadcasting by Unapproved Foreign Satellite Channel

Aware that the CSA (*Conseil supérieur de l'audiovisuel* – audiovisual regulatory body) has no control over the Lebanese channel Al Manar, broadcast in France by Eutelsat, which offers a serial likely to be considered anti-Semitic (see IRIS 2004-4: 10), the public authorities have reworded the references to audiovisual services in Article 42-10 of the Act of 30 September 1986 (see IRIS 2004-8: 8). Thus under Article 82 of the Act on electronic communications and audiovisual communication services of 9 July 2004, the CSA's Chairman may appeal to the Courts "to put a stop to a satellite operator broadcasting a television service falling within France's competence where the programmes infringe at least one of the principles referred to in Articles 1, 3(1) or 15" of the Act (respect for human dignity, upholding public order, protection of minors, etc). This new provision is intended to enable the national authorities, and more particularly the CSA, to prevent such infringements occurring in the case – not previously covered by the corresponding legislation – of a television service broadcast in France using satellite capacity falling within the competence of France that does not hold any approval or authorisation from the national authorities.

On the basis of its new prerogatives, the CSA therefore applied to the *Conseil d'État* to have it put an immediate stop to Al Manar's broadcasting, on the grounds that some of its programmes infringed at least one of the principles referred to in Articles 1, 3(1) and 15 of the Act of 30 September 1986. In an order handed down on 20 August, the *Conseil d'État* noted that the Eutelsat satellite constituted "satellite capacity falling within the competence of France" within the meaning of Article 43-4 of the Act of 30 September 1986. The company's broadcasting of Al Manar's programmes therefore led to the channel being considered as a "television service falling within the competence of France", and such broadcasting could therefore, where appropriate, give rise to application to Eutelsat of the provisions of Article 42(10). However, the Presiding Judge of the Disputes Section of the *Conseil d'État* noted that the disputed channel had requested the conclusion of an agreement with the CSA on the eve of the hearing. If this request were met, Al Manar's situation in respect of Articles 1, 3(1) and 15 of the Act of 30 September 1986 would be regularised, and this point had to be taken into account in the Court's deliberations. The *Conseil d'État* decided it was appropriate to distinguish between the various scenarios that could follow the request. Thus it was only if full approval application were not presented to the CSA by 1 October or if the application were rejected that Eutelsat would be given two months to stop broadcasting the disputed television services on its satellites. ■

Amélie Blocman
Légipresse

● **Conseil d'État (order in an urgent matter), 20 August 2004, CSA**

FR

GB – Dealing in Mod Chips Illegal

The English High Court recently handed down the first judgment relating to the circumvention of copyright protection. The case invoked the 2003 copyright law transposing the EC Copyright Directive (2001/29/EC) into UK law (see IRIS 2004-1: 13). The case was brought by Sony Computer Entertainment Europe against 6 defendants.

At issue was the legality of people dealing in modified Sony PlayStation2 chips. Buyers were enabled to play computer games imported from other regions (e.g., USA and/or Asia) on hardware encoded for Europe (which utilises the PAL standard). The chips (known as "Messiah 2 mod chips") also allowed buyers to play pirated software. In addition, the case dealt with the publication of information explaining how to install the chips in PlayStation 2 consoles.

The judge found that, under the Copyright and Related Rights Regulations 2003, the "sale, advertising, use, or possession" of the chips was illegal. The Court granted an injunction. It also ordered an interim costs payment. ■

David Goldberg
deeJgee Research/Consultancy

● **Sony Computer Entertainment Inc & Others v Gaynor David Ball & Others, High Court Action No HC-03-C04467 (19 July 2004), available at: http://merlin.obs.coe.int/redirect.php?id=9281**

● **The Copyright and Related Rights Regulations (2003), available at: http://merlin.obs.coe.int/redirect.php?id=9282**

HU – Tender on Providing Third Generation Mobile Communications Services

According to Article 69 Section 1 of Act C of 2003 on Electronic Communications (EHT), the right to use radio frequencies depends on the decision of the National Communications Authority *Nemzeti Hírközlési Hatóság (NHH)*. As constituted in the EHT, the bidding process for licences concerning the third generation of mobile telecommunications (UMTS) is also one of the compe-

tencies of the NHH. UMTS will improve the quality of conventional mobile phone calls. Furthermore it will significantly increase the data transmission rate and thereby make Internet-based multimedia services available with mobile phones too.

It is the task of the NHH to establish procedural and other conditions for the tender concerning UMTS, e.g. providing equal professional support to the bidders. Accordingly, the NHH announced a public procurement procedure on 23 April 2004, aiming at the selection of an advisor to make preparations for the invitation to tender and provide professional support for the implementation of 3G services (UMTS) in Hungary.

On 31 August 2004, the NHH announced the tender concerning the right to utilise radio frequency bands available for the provision of third generation mobile communication services.

According to the NHH tender, four technically equivalent frequency blocks can be obtained for the provision of UMTS for a period of fifteen years. Based upon the requirements of the call for tenders, the NHH shall issue the relevant licenses in 2004, and the services shall be introduced into the market in January 2006.

In order to make the launch of UMTS possible, the Hungarian state decided to share the risk with the investors. Namely, according to the bidding, to keep the interests of the investors in mind, the winners of the frequency bands may pay the licence fee by instalments, in proportion to their revenues. ■

Gabriella Cseh
Attorney at Law

IE – First SMP Designation under New Regulatory Framework

Directive 2002/21/EC on a common regulatory framework for electronic communications networks and services (see IRIS 2002-3: 4) was transposed into Irish law by Statutory Instrument (S.I.) No. 307 of 2003. On 27 April 2004, ComReg (The Commission for Communications Regulation) made its first SMP (significant market power) designation in accordance with Regulation 27(4) of the Framework Regulations. It designated RTÉ Transmission Network Ltd (RTNL), the transmission operating arm of RTÉ, the national public service broadcaster, as having significant market power (SMP) in two wholesale markets. The two markets are those for radio and television broadcasting transmission services on national analogue terrestrial networks. The decision followed an extensive market review process using a wide range of criteria, including market share, countervailing buying power and barriers to entry. ComReg also conducted a prospective analysis of the relevant markets and then engaged in a national consultation. The Decision was notified to and accepted by the European Commission on 2 March 2004. ComReg is now required to impose appropriate *ex ante* regulatory obligations. It intends to consult on the matter and then notify the European Commission. ■

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- **Market Analysis - Wholesale Broadcasting Transmission Services, Decision No.D6/04, Document No.04/47, available at: http://merlin.obs.coe.int/redirect.php?id=9287**
- **S.I. No. 307 of 2003: EC (Electronic Communications Networks and Services)(Framework) Regulations 2003, available at: http://merlin.obs.coe.int/redirect.php?id=9288**

IE – Broadcasting Funding Scheme Launched

The Broadcasting (Funding) Act 2003 (see IRIS 2004-2: 13) provided that five per cent of the net income from television licence fees would be set aside to be used for funding certain television and radio programmes. The Act required the Broadcasting Commission of Ireland (BCI) to prepare a scheme(s) for such funding. The draft scheme was launched by the BCI on 23 August 2004. In accordance with the Act (s.2), the scheme will apply to new programmes on Irish culture, heritage and experience and new programmes to improve adult literacy. It will support such programmes in the Irish language as well as those in English. The fund will also be used to support the development of an archive of programme material produced in the State. The Act (s.2(2)) stipulates that the scheme may only fund programmes carried on a free television service which provides near universal coverage in the State or on a cable or MMD system (MMD is the multipoint microwave distribution system used in less populated areas of the country) as part of a community content contract. The objectives of the scheme, as set out in the Act (s.3), include developing and increasing the availability of high-quality cultural and heritage programmes and developing local and community broadcasting. The BCI in launching the scheme said that the funding provides an important opportunity for the production and broadcast of programming which, through financial constraint, might not otherwise be made. The draft scheme is available for public consultation until 27 September. ■

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- **"Draft Broadcasting (Funding) Scheme Launched", Press Release of 23 August 2004, available at: http://merlin.obs.coe.int/redirect.php?id=9289**
- **Broadcasting (Funding) Scheme, Public Consultation Document, available at: http://merlin.obs.coe.int/redirect.php?id=9290**
- **Broadcasting (Funding) Act 2003 available at: http://merlin.obs.coe.int/redirect.php?id=9291**

IE – New Satellite and Cable Content Contracts

The Broadcasting Commission of Ireland (BCI) announced on 8 September that, subject to the satisfactory conclusion of negotiations, it will enter into contracts with a Scottish company, Setanta, for the provision of a television service in accordance with sections 36 (satellite content contracts) and 41 (cable/MMD content contracts – MMD is the multipoint microwave distribution system used in less populated areas of the country) of the Broadcasting Act 2001. The service will be a 24 hours a day sports' service covering Scottish and Irish soccer, rugby, Gaelic sports, and minority sports. Distribution will be via the NTL and Chorus platforms (NTL and Chorus are the main cable and MMD operators), as well as by subscription on the Sky digital satellite platform. These will be the first contracts under the new television licensing policy, pursuant to the Broadcasting Act 2001 (see IRIS 2001-4: 9). ■

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- **BCI Press Release of 8 September 2004, available at: http://merlin.obs.coe.int/redirect.php?id=9292**

IE – Developments in Film Censorship

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On 3 September 2004, the Office of the Irish Film Censor (see IRIS 2004-3: 10) published the results of a survey of the views of parents regarding film classification.

The main concerns of parents in regard to the content of the films, videos and DVDs that their children watched were – in descending order of concern: drug taking, violence, racial references, underage drinking of alcohol, sexual activity/dialogue, anti-social behaviour, swearing and strong language, horror and scary scenes, nudity, drinking of alcohol, and cigarette smoking.

The survey also found that while parents were generally satisfied with the Film Censor's classifications, a significant percentage of parents said that the PG classification (under which it is recommended that a child be accompanied by an adult) and the 12PG and 15PG classifications (under which children under those ages must be accompanied by an adult) were too strict. In light of this the Film Censor said he is considering relaxing certain classifications and introducing a new 16 classification that would prohibit anyone under that age from viewing the relevant film. This would bridge the gap between the current 15PG and 18 classifications.

Last year the Office of the Film Censor certified 213 feature films and 6,504 videos and DVDs. No feature films were banned, and just 16 videos were banned.

The Film Censor also announced the launch of his Office's first website <http://www.ifco.ie>, which gives information on newly-released films and the reasons for the relevant certifications. Up to now, the Film Censor has only rarely given the reasons for his decisions, as he is not obliged by law to do so. The full results of the survey will soon be available on the website.

In a separate development, the Minister for Justice has announced that he intends to introduce legislation to give the Office of the Film Censor a "new orientation" and possibly a new name, to reflect its advisory and information-giving role. The Office of the Film Censor is under the authority of the Minister for Justice. ■

● **"Children viewing drug use main concern of parents" available on the Irish Times, 4 September 2004**

LU – Act on Freedom of Expression in the Media

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On 8 June 2004 the Grand Duchy of Luxembourg adopted new legislation on the press, repealing the Act of 20 July 1869 on the press and other means of publication, an Act that many commentators considered outdated. The Act of 20 December 1979 on the recognition and protection of the professional title of journalists has also been replaced.

By emphasising the guarantee of freedom of expression, the new legislation is closer to the spirit of Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

The new legislation reinforces the rights of journalists as regards both freedom of expression (Articles 6 to 9) and their relations with their editors (Articles 4 and 5).

More specifically, the new Act upholds journalists' rights to seek out information and to decide on communicating such information to the public. It also upholds the principle of the protection of journalists' sources, although there is provision for waiving the rule laid down.

The new text also reiterates that a journalist's work is protected by copyright.

Alongside these rights, a series of obligations is imposed on journalists and other collaborators working in the media (Articles 10 to 20). These obligations cover the journalist's and/or collaborator's duty to be accurate and truthful in the facts communicated. In addition, the journalist and/or collaborator must ensure that their work does not infringe the presumption of innocence or the entitlement to personal privacy, honour and reputation. Nor should their work include the communication of elements that make it possible to identify minors.

The system of criminal and civil responsibilities is also laid down in the new Act in respect of any deliberate fault committed through the media (Articles 21 and 22).

The Act now lays down the procedure to be followed in exercising the rights of reply (Articles 36 to 50) and of subsequent information (Articles 51 to 59). These two rights enable a person who has been cited either by name or implicitly (right of reply) or who has been accused wrongfully (right of subsequent information) to claim the inclusion, free of charge, of a reply or information correcting the false information given originally.

The new Act reorganises the scheme of statutory deposit and gives details of the indications that every publication, whether issued on a regular basis or otherwise, must contain to allow identification of the author or editor (Articles 62 to 69).

Lastly, the new text amends a number of the provisions of the Criminal Code, more specifically those concerning libel and slander (definition of what constitutes cases of libel and slander in the media), insurrection and rebellion, and infringements involving indecency (Articles 77 to 83). ■

● **Act of 8 June 2004 on freedom of expression in the media, available at: http://merlin.obs.coe.int/redirect.php?id=9286**

FR

LV – Concept on the Introduction of DVB-T

On 16 September 2004 the National Broadcasting Council of Latvia (the Council) adopted a decision to approve the Concept of the introduction of digital terrestrial television (DVB-T) in Latvia. The Concept had been drafted by a working group including the representatives of major broadcasters of Latvia, as well as government officials and NGOs.

The Concept outlines three phases of the introduction of DVB-T in Latvia, taking into account that terrestrial television is the major provider of national television broadcasting in Latvia. In the first phase, the programs in DVB-T standard shall be distributed in parallel with the analogue programs. Also, the necessary legislation shall be drafted and the need for developing new programs shall be evaluated. In a second phase, the licensing of program packages to be broadcast in DVB-T standard shall begin. The licenses shall be issued through competitions organized by the Council. In the third stage, the program packagers shall choose the distributors of the packages. The distributors shall be licensed by the Public Utilities Commission. The broadcasters may distribute their programs either with the assistance of program packagers, with the assistance of distributors, or by themselves – becoming packager and/or distributor. The Concept provides a special role for the only public service television broadcaster of Latvia – "Latvian Tele-

vision" (LTV): the necessary technical resources are granted to LTV at first, and the technical expenses of the introduction of broadcasting in DVB-T format shall be covered by the state budget. The commercial broadcasters shall cover their expenses themselves. The analogue broadcasting switch-off is envisaged differently for public service broadcasters and for commercial ones: the commercial broadcasters may switch off their analogue programs at any time, LTV, however, may be switched off only when 100% coverage of the specific region has been achieved.

The drafting of the Concept was the initiative of the Council itself, as none of the previous concepts drafted by governmental institutions outlined the development of program packaging and audiovisual content. The Concept does not have binding legal force, but it could be taken into account when deciding at governmental level on the further development of digital television. The Concept will be submitted to the Ministry of Transport and Communications in order to be included in the broader concept prepared by the Ministry. The broader concept drafted by the Ministry shall cover both the issues of program packaging and program distribution, as well as the technical means of the introduction of DVB-T. ■

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NL – Dutch Implementation of Directive 2001/29/EC

The Dutch Act implementing Directive 2001/29/EC on copyright and related rights in the information society (see IRIS 2001-5: 3) finally received royal sanction on 6 July 2004, and entered into force on 1 September 2004. This act was adopted more than eighteen months after the deadline of 22 December 2002 set by the Directive for implementation into national legislation. The length of the Dutch implementation process can be explained not only by the fact that two national elections took place during that period, but also by the complexity of the task that confronted the legislator. The implementation of the provisions of the Directive on the limitations on copyright and on the legal protection of technological measures posed particular difficulties. The Act introduces at least three new limitations on copyright: a parody exception, an exemption allowing libraries, archives or other non-commercial institutions to make reproductions for conservation purposes, and an exemption for the benefit of disabled persons. A number of existing limitations have been reformulated to adapt them to the digital environment and to comply with the strict wording of the Directive. Finally, the act implements the provisions of the Directive with respect to the legal protection of technological measures and rights management information. It is now unlawful in the Netherlands to circumvent any effective technological measure or to manufacture, import, distribute, sell or advertise a device the main purpose of which is to circumvent a technological measure in respect of a work. The government has the power to lay down by statutory instrument the rules according to which a rightsowner may be compelled to provide certain categories of users with the means to exercise the limitations listed in the relevant article of the Act. This latter obligation of the rights owner does not apply to the circumvention of technological measures for private copying purposes. ■

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● ***Wet van 6 juli 2004 tot aanpassing van de Auteurswet 1912, de Wet op de naburige rechten en de Databankenwet ter uitvoering van richtlijn nr. 2001/29/EG van het Europees Parlement en de Raad van de Europese Unie van 22 mei 2001 betreffende de harmonisatie van bepaalde aspecten van het auteursrecht en de naburige rechten in de informatiemaatschappij (PbEG L 167) (Uitvoering richtlijn auteursrecht en naburige rechten in de informatiemaatschappij)* (Act of 6 July 2004 implementing Directive 2001/29/EC), *Staatsblad* (Official Gazette) *2004, No. 336*, available at:
http://merlin.obs.coe.int/redirect.php?id=9294**

NL

NO – Proposed Amendments to the Norwegian Media Ownership Act

The purpose of the Norwegian Media Ownership Act of 1997 is to promote freedom of expression, genuine opportunities to express one's opinions and a comprehensive range of media. The Act applies to enterprises publishing newspapers or engaging in broadcasting, and to enterprises, which, as owners, have influence over such enterprises. The competent supervisory authority pursuant to the Act is the Media Ownership Authority. This independent body carries out continuous supervision of market conditions and ownership in the newspaper and broadcasting sectors. If necessary it intervenes in situations of acquisition of ownership interests within the said sectors, in order to avoid accumulation in the hands of any one entity of "significant ownership positions" in the national, regional or local markets. Such intervention may entail prohibiting the acquisition, ordering the divestment of ownership interests or allowing the acquisition on certain conditions.

The Ministry of Culture and Church Affairs has recently proposed rather extensive amendments to the Act. The proposal was adopted by the Government this summer and currently awaits hearing in the Norwegian Parliament. A summary of the proposed amendments is given below.

It is proposed to remove the legal basis for intervention on the local level, while on the regional and national levels the authority to intervene is upheld. However, the abovementioned criterion for intervention ("significant ownership position") will be replaced with exact statutory ownership limits.

On the regional level, the Ministry proposes a statutory ownership limit at 60 percent of the regional newspaper supply. Within the broadcasting sector, there shall be no separate limits on the regional but only on the national level.

On the national level, the Ministry proposes to establish a statutory ownership limit at 40 percent within each of the three markets of daily press, radio and television. If this 40 percent limit is exceeded within any one of the said markets, intervention shall be the main rule. The existing regulation limiting cross-ownership between large corporations in the daily press market is upheld, and it is proposed that this be extended to apply also to the broadcasting markets (radio and television).

In addition, on the national level, the Ministry proposes a separate regulation of multimedia concentration. The ownership limits applying to multimedia corporations shall vary depending on how many markets the actor is involved in. For ownership within two markets, the limits shall be 20 percent for one and 30 percent for the other market the actor is involved in. For ownership

Thomas Rieber-Mohn
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within three markets, the limits shall be 20 percent for each of the markets the actor is involved in.

It is further proposed to extend the scope of the Act – hence also the supervisory tasks of the Media Ownership Authority – to electronic media. However, for the present, no separate ownership limits shall apply in this respect and no authority is granted to intervene in relation to acquisition of electronic media.

Finally, it is proposed to grant the supervisory body authority to intervene in relation to co-operative agreements that leave a party with an influence over the editorial product equivalent to a full acquisition.

The Ministry also considered proposing a regulation of vertical integration within the media sector, but decided not to propose this. ■

● ***Ot.prp. nr. 81 (2003-2004) Om lov om endringar i lov 13. juni 1997 nr. 53 om tilsyn med erverv i dagspresse og kringkasting*** **(Bill on amendments to the Media Ownership Act) available at:**
http://merlin.obs.coe.int/redirect.php?id=9303

NO

● ***Lov om tilsyn med erverv i dagspresse og kringkasting*** **(Act of 13 June 1997 relating to supervision of the acquisition of newspaper and broadcasting enterprises (the Media Ownership Act)), available at:**
http://merlin.obs.coe.int/redirect.php?id=9304 (NO)
http://merlin.obs.coe.int/redirect.php?id=9305 (EN)

EN-NO

NO – Proposed Amendments to Article 100 of the Norwegian Constitution (Freedom of Expression)

Article 100 of the Norwegian Constitution of 1814 enshrines the principle of freedom of expression.

In 1999, the Commission on Freedom of Expression presented its final report. The report includes a broad discussion of freedom of speech and a proposal regarding several amendments to Article 100. Based on this report, the Norwegian Government earlier this year released a Green Paper (*Stortingsmelding*), in which it presents its own proposal for amendments to Article 100. In some aspects, the Government proposal coincides with that of the Commission, in other aspects it differs. The Green Paper also includes proposals for amendments to freedom of speech legislation on the non-constitutional level.

The Government's proposal has been criticized by several commentators. This criticism has been directed partly towards the amendment process itself, allegedly undermining the public debate around this important question, partly towards the content of the proposal. Despite this, there seems to be a sufficient majority within the Parliament in favour of the Government proposal. Parliament is due to deal with the matter on 30 September this year. A summary of the contents of the Government proposal is given below.

The Government proposes to abolish the existing statutory ban on political commercials on TV. Such commercials shall, however, still be subject to statutory limitations.

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On the other hand, the Government does not propose to include commercial expression under the constitutional protection of freedom of expression. This has been criticized, both because the protection of freedom of expression under the European Convention on Human Rights goes further, and because such a delimitation of the scope of Article 100 will result in considerable practical challenges (namely drawing the line between commercial and non-commercial expressions).

The Green Paper supports a strengthening of the protection of employees' freedom of expression, including rules protecting "whistle blowing" etc. However, for the present, no concrete proposals are offered in this regard.

The Government further proposes a strengthened constitutional protection against being held liable for defamatory expressions. This is not expressly stated in the proposed wording of Article 100, but a revision of the criminal defamation law is announced in the Green Paper. When it comes to racist expressions, on the other hand, the Government supports a limitation of the freedom of expression. It is argued in the Green Paper that the proposed new Article 100 should give room for a strengthening of the criminal law protection against racist and hateful expression.

The Green Paper states that the Government is willing to abolish prior censorship of films meant for adult audiences (but not of films meant for child audiences). However, the proposed wording of Article 100 does not prohibit prior censorship, except when it comes to written expression. Apart from written expression, prior censorship shall be consistent with the Constitution, provided that "weighty grounds render such censorship necessary, weighed against the rationales behind freedom of expression".

The Government further proposes to include in Article 100 that the authorities have a constitutional obligation to enhance the opportunities of individuals and groups to express themselves.

The Green Paper further states that the proposed Article 100 will open up the possibility for a statutory adoption of the principle of editorial independence. The Government also proposes that the administrative law principle of public access to government acts and information be included in the Constitution. ■

● ***St.meld. nr. 26 (2003-2004) Om endring av Grunnloven § 100*** **(Green Paper on amendments to article 100 of the Norwegian Constitution), available at:**
http://merlin.obs.coe.int/redirect.php?id=9306

NO

RO – New Advertising, Sponsorship and Teleshopping Rules

The Romanian regulatory body for electronic media, the *Consiliul Național al Audiovizualului* (*CNA*), has amended the regulations on advertising, sponsorship and teleshopping (*CNA* decision no. 123/2003, published in the Romanian Official Gazette no. 479 of 4 July 2003) by decision no. 254 of 5 July 2004 (*Decizia CNA privind publicitatea, sponsorizarea și teleshoppingul*). The aim of the changes is to uphold the principles of free competition, the protection of life, health, consumer interests and the environment, and to bring Romanian legislation into line with EC law.

Advertising for food, for example, should no longer encourage over-eating. Claims may only be made about the effect of certain vitamins or the positive impact of products on health if they are based on solid scientific evidence. Furthermore, advertising spots must not refer to any healing or preventive qualities of foodstuffs. Advertising for food may only depict products with various types of fruit and vegetables if the latter constitute at least 4% of the advertised product.

In order to counter the negative effects of alcohol consumption, mainly by minors but also in general, the new regulations ban all types of TV advertising for spirits between 6 am and 10 pm. Similar rules apply to radio advertising. All advertising spots for alcoholic drinks in

the electronic media must conclude with the message "*consumul de alcool dăunează grav sănătăţii*" (alcohol consumption seriously damages health).

Apart from advertising breaks, the only time that products and individual services may be shown or offered for sale is during teleshopping programmes. Exceptions apply to products and services from the cultural or educational field and cars in certain special programmes.

Regarding advertising for medicines, doctors, dentists and pharmacists are not allowed to recommend particular drugs. Advertising for natural remedies must be accompanied by the warning "*produs neatestat medical*" ("this product has not been medically approved").

The new *CNA* decision also includes provisions on political advertising and advertising for certain professions. Political advertising is only permitted during election campaigns, for example. Advertising for notaries, lawyers, bailiffs (*executori judecătoreşti)* or other legal experts (*experţi judiciari*) is banned. Active members of lawyers' associations (*membri activi ai barourilor de avocaţi)* must not mention on radio or TV any cases which are still pending.

According to Articles 90 and 91 of the Romanian Audiovisual Act (*Legea audiovizualului Nr. 504/2002, cu modificările şi completările ulterioare)*, breaches of the new *CNA* provisions may be punished by considerable fines. ■

Mariana Stoican
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● ***Decizia CNA privind publicitatea, sponsorizarea şi teleshoppingul Nr. 254 din 5 iulie 2004*** **(Decision No. 254 of 5 July 2004 concerning regulations on advertising, sponsorship and teleshopping),** ***Monitorul Oficial al României, Partea I, Nr. 668/26.VII.2004***

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