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INTERNATIONAL

Tenth Joint Declaration by the Four Special International Mandates for Protecting Freedom of Expression

This note reviews the Joint Declaration adopted on 3 February 2010 by the four special IGO mandates for protecting freedom of expression - the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media, the OAS Special Rapporteur on Freedom of Expression and the African Commission on Human and Peoples' Rights (ACHPR) Special Rapporteur on Freedom of Expression and Access to Information. It was adopted with the assistance of ARTICLE 19 and the Centre for Law and Democracy (for former Joint Declarations see IRIS 2009-9: Extra, IRIS 2009-2: Extra, IRIS 2008-4: 2, IRIS 2007-2: Extra, IRIS 2006-3: 3, IRIS 2005-2: 2 and IRIS 2004-2: 6).

The 2010 Joint Declaration looks forward to predict the ten main threats to or challenges facing realisation of the right to freedom of expression over the next decade. This has a standard-setting aspect, since it can be understood as identifying what would constitute a breach of freedom of expression. But it also has an important prioritisation function, pointing to key areas where attention needs to be focused.

The first challenge identified in the Joint Declaration is government control over the media. Specific aspects of this include control over public media, registration requirements for the print media and/or Internet, control over broadcast regulators, abuse of State advertising, ownership of the media by political leaders, politically motivated legal cases and the retention of antiquated legal rules which penalise criticism of government. The second challenge focuses on criminal defamation laws, a particularly problematical genre of antiquated legal rules.

The third challenge is violence against journalists, and the impunity that fuels it. Three particular aspects of this challenge are noted: a failure to allocate sufficient resources to preventing and investigating attacks; the lack of recognition that special measures are needed to redress this problem; and the absence of protection measures for journalists who have been displaced by attacks.

Although great strides have been made over the last decade in recognising the right to information, the fourth challenge recognises that much still remains to be done. Most States and a large majority of inter-governmental organisations (IGOs) have still not adopted right to information laws or policies, many

laws that have been passed fail to meet minimum international standards, and implementation efforts remain too weak in many countries.

The fifth challenge concerns equal enjoyment of freedom of expression. Discrimination in relation to the establishment of media outlets, abusive application of hate speech laws to silence disadvantaged groups and the failure of many media to adopt effective self-regulatory measures to redress past injustices are some of the key challenges here.

Commercial pressures on the media are, if not new, a growing threat to freedom of expression, as recognised in the sixth challenge listed in the Joint Declaration. Concentration of ownership, fracturing of the advertising market and other commercial pressures to cut local content and investigative journalism, and the risk that the 'digital dividend' will go mainly to powerful broadcasting and telecommunications interests at the expense of diversity are highlighted as particularly problematical issues.

Closely related is the seventh challenge - the lack of adequate support for public and community broadcasters. For the former, this takes the form of challenges to often already inadequate public support and the lack of a clear public service mandate. Licensing systems often fail to make appropriate provision for community broadcasting, frequently coupled with a failure to allocate sufficient frequencies or other resources for this broadcasting sector.

National security has historically been abused to unduly limit freedom of expression but, as recognised in the eight challenge, this has become a particular problem since the attacks of September 2001. This is exacerbated by the use of vague and overbroad terms and definitions, pressures on the media not to report on terrorism, for fear of giving it succour, and expanded use of surveillance.

Challenges nine and ten focus, respectively, on restrictions and access to the Internet. Firewalls, filters, registration requirements, blocking of websites and jurisdictional rules that lead to a lowest common denominator approach have undermined freedom on the Internet. At the same time, pricing structures, the failure to address the 'last mile' gap, and inadequate support for community-based ICT and other public access options have perpetuated the digital divide and left the poor and rural communities without or with limited access to the Internet.

• Tenth Anniversary Joint Declaration: Ten Key Challenges to Freedom of Expression in the Next Decade by the United Nations (UN) Special Rapporteur on Freedom of Opinion and Expression, the Organization for Security and Cooperation in Europe (OSCE) Representative on Freedom of the Media, the Organization of American States (OAS) Special Rapporteur on Freedom of Expression and the African Commission on Human and Peoples' Rights (ACHPR) Special Rapporteur on Freedom of Expression and Access to Information, 3 February 2010 <http://merlin.obs.coe.int/redirect.php?id=12382>

EN

Toby Mendel
Centre for Law and Democracy

COUNCIL OF EUROPE

European Court of Human Rights: *Flinkkilä a.o. and four other connected cases v. Finland*

The European Court of Human Rights in five judgments of 6 April 2010 came to the conclusion that Finland had violated the right of freedom of expression by giving too much protection to the right of private life under Article 8 of the Convention. In all five cases the Court was of the opinion that the criminal conviction of journalists and editors-in-chief and the order to pay damages for disclosing the identity of a public person's partner amounted to an unacceptable interference with the freedom of expression guaranteed by Article 10 of the European Convention of Human Rights.

All applicants in all five cases were journalists, editors-in-chief and publishing companies that were involved in the publishing in 1997 of a total of nine articles in a newspaper and in several magazines concerning A., the National Conciliator at the time, and B., his female partner. The articles focused primarily on the private and professional consequences for A. of an incident in 1996. This incident, including the revelation of B.'s identity, had earlier been reported upon in the Finnish print media and on television. During that incident A. and B. entered A.'s home late at night while A.'s wife was there and, as a result of an ensuing fight, B. was fined and A. was sentenced to a conditional term in prison. A few weeks later, a newspaper and several magazines revisited the incident and the court case, this time with more background information, interviews or comments. All articles mentioned B. by name and in addition gave other details about her, including her age, name of her workplace, her family relationships and her relationship with A., as well as her picture.

A. and B. requested that criminal investigations be conducted in respect of the journalists for having written about the incident and the surrounding circumstances. The journalists and media companies were ordered by the domestic courts to pay fines and damages for the invasion of B.'s private life. The Finnish courts found in particular that, since B. was not a public figure, the fact alone that she happened to be the girlfriend of a well-known person in society was not sufficient to justify revealing her identity to the public. In addition, the fact that her identity had been revealed previously in the media did not justify subsequent invasions of her private life. The courts further held that even the mere dissemination of information about a person's private life was sufficient to cause them damage or suffering. Therefore, the absence of intent to hurt B. on the part of the applicants was

irrelevant. The Finnish courts concluded that the journalists and the media had had no right to reveal facts relating to B.'s private life or to publish her picture as they did.

The journalists, editors-in-chief and media companies complained under Article 10 of the Convention about their convictions and the high amounts they had to pay in damages to B. Having examined in earlier case law the domestic Criminal Code provision in question, the European Court found its contents quite clear: the spreading of information, an insinuation or an image depicting the private life of another person, which was conducive to causing suffering, qualified as an invasion of privacy. In addition, even the exception stipulated in that provision - concerning persons in a public office or function, in professional life, in a political activity or in another comparable activity - was equally clearly worded. Even though there had been no precise definition of private life in the law, if the journalists or the media had had any doubts about the remit of that term, they should have either sought advice about its content or refrained from disclosing B.'s identity. In addition, the applicants were professional journalists and therefore could not claim not to have known the boundaries of the said provision, since the Finnish Guidelines for Journalists and the practice of the Council for Mass Media, albeit not binding, provided even stricter rules than the Criminal Code.

However, there had been no evidence, or indeed any allegation, of factual misrepresentation or bad faith on the part of the applicants. Nor had there been any suggestion that they had obtained information about B. by illicit means. While it had been clear that B. was not a public figure, she was involved in an incident together with a well-known public figure with whom she had been in a close relationship. Therefore, B. could have reasonably been seen as having entered the public domain. In addition, the disclosure of B.'s identity was of clear public interest in view of A.'s conduct and his ability to continue in his post as a high-level public servant. The incident was widely publicised in the media, including in a programme broadcast nationwide on prime-time television. Thus, the articles in question had not disclosed B.'s identity in this context for the first time. Moreover, even if the events were presented in a somewhat colourful manner to boost sales of the magazines, this was not in itself sufficient to justify a conviction for breach of privacy. Finally, in view of the heavy financial sanctions imposed on the applicants, the European Court noted that B. had already been paid a significant sum in damages by the television company for having exposed her private life to the general public. Similar damages had been ordered to be paid to her also in respect of other articles published in other magazines by the other applicants listed above, which all stemmed from the same facts. Accordingly, in view of the severe consequences for the applicants in relation to the circumstances of the cases, the European Court held that there had been a violation of Article 10 of the Convention in all five cases.

Under Article 41 of the Convention (just satisfaction), the Court held that Finland was to pay the applicants sums ranging between EUR 12,000 and EUR 39,000 for pecuniary damages, between EUR 2,000 and EUR 5,000 for non-pecuniary damages and between EUR 3,000 and EUR 5,000 in respect of costs and expenses.

• Judgment by the European Court of Human Rights (Fourth Section), case of *Fiinckilä a.o. v. Finland*, Application No. 25576/04 of 6 April 2010

<http://merlin.obs.coe.int/redirect.php?id=12420>

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• Judgment by the European Court of Human Rights (Fourth Section), case of *Jokitaipale a.o. v. Finland*, Application No. 43349/05 of 6 April 2010

<http://merlin.obs.coe.int/redirect.php?id=12421>

EN

• Judgment by the European Court of Human Rights (Fourth Section), case of *Iltalehiti and Karhuvaara v. Finland*, Application No. 6372/06 of 6 April 2010

<http://merlin.obs.coe.int/redirect.php?id=12422>

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• Judgment by the European Court of Human Rights (Fourth Section), case of *Soila v. Finland*, Application No. 6806/06 of 6 April 2010

<http://merlin.obs.coe.int/redirect.php?id=12423>

EN

• Judgment by the European Court of Human Rights (Fourth Section), case of *Tuomela a.o. v. Finland*, Application No. 25711/04 of 6 April 2010

<http://merlin.obs.coe.int/redirect.php?id=12424>

EN

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Parliamentary Assembly: Recommendation and Resolution on the Protection of “Whistle-Blowers”

On 29 April 2010 the Parliamentary Assembly of the Council of Europe (PACE) adopted Resolution 1729(2010) and Recommendation 1916(2010) both of which are entitled “Protection of ‘whistle-blowers’”.

The Resolution first of all recognises the importance of whistle-blowers. Their ability to stop wrongdoings and provide an opportunity for accountability and to bolster the fight against corruption and mismanagement is an asset in both the public and private sectors. Unfortunately, whistle-blowers are often discouraged by, inter alia, fear of reprisals.

The Assembly notes that most of the Member States of the Council of Europe do not provide comprehensive laws for the protection of whistle-blowers, though many do have rules covering certain aspects of whistle-blowing. The Resolution refers to the United Kingdom and the United States of America as examples of countries where legislation has been enacted with widely satisfactory results.

Adequate legislation is required to give whistle-blowers the security they need to give warning of malpractice without risking their livelihoods and those of their families. Relevant legislation should include a

safe alternative to silence and the avoidance of practices which entrap potential whistle-blowers with a false sense of security. The Assembly therefore invites all Member States to review their legislation concerning the protection of whistle-blowers, while keeping several guiding principles in mind.

Whistle-blowing legislation should first of all be comprehensive, with a wide definition given to protected disclosures. It should also cover a wide area of law and both the public and private sectors. Furthermore, it should focus on providing a safe alternative to silence. This can, inter alia, be achieved by giving appropriate incentives to government and corporate decision-makers to set in place internal whistle-blowing procedures with procedural safeguards.

The Assembly furthermore stresses that the cultural attitude towards whistle-blowing must be freed from its previous association with disloyalty or betrayal. Non-governmental organisations can greatly contribute to this change according to the Assembly. Finally the Assembly invites the Council of Europe, in order to set a good example, to put in place a strong internal whistle-blowing procedure.

In a subsequent Recommendation on the matter, the Assembly stresses the importance of whistle-blowing as a tool to increase accountability and strengthen the fight against corruption and mismanagement. It recommends that the Committee of Ministers draw up a set of guidelines for the protection of whistle-blowers, with respect to the guiding principles outlined above, and to consider drafting a framework convention. It further recommends that the Committee of Ministers invite Member States to examine their existing legislation for conformity with those guidelines.

• Resolution 1729 (2010) of the Parliamentary Assembly on the Protection of whistle-blowers, adopted on 29 April 2010

<http://merlin.obs.coe.int/redirect.php?id=13061>

EN FR

• Recommendation 1916 (2010) of the Parliamentary Assembly on the Protection of whistle-blowers, adopted on 29 April 2010

<http://merlin.obs.coe.int/redirect.php?id=13062>

EN FR

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EUROPEAN UNION

European Commission: Commission Authorises a EUR 12 Million Support Scheme for Dubbing and Subtitling Films in Catalan

The European Commission has approved a EUR 12 million Spanish scheme to support the dubbing and subtitling of films in Catalan. The scheme is in line

with EU rules that allow State subsidies for cultural objectives and, in the case in question, for the promotion of multilingualism and cultural diversity.

The scheme notified by the Spanish government aims to promote the use of the Catalan language, in particular in the film industry. Around 800 films released in Spain every year are dubbed in Spanish, while only 20-25 films are dubbed in Catalan. A further 10-15 are subtitled in Catalan. These figures are provided by the Spanish authorities.

They point out that Catalan is the main language of Catalonia, where it is understood by 95% of the population, spoken by 78% and read by 82%. A total of 62% also write it. But, as most inhabitants of Catalonia also understand Spanish, few commercial film distributors consider spending money on dubbing and/or subtitled films in Catalan when they have Spanish versions of the films.

The Commission examined the measure under Article 107(3) (d) of the Treaty, which allows aid for cultural objectives and in this case to promote cultural diversity and multilingualism.

The amount of aid is €12 million to be granted by the regional government of Catalonia until 31 December 2015.

The non-confidential version of the decision will be made available under the case number N33/10 in the State Aid Register on the DG Competition website once any confidentiality issues have been resolved. New publications of State aid decisions on the internet and in the Official Journal are listed in the State Aid Weekly e-News.

• "State aid: Commission authorises a €12 million support scheme for dubbing and subtitled films in Catalan", IP/10/356, 24 March 2010
<http://merlin.obs.coe.int/redirect.php?id=12391>

DE EN FR

Press release
European Commission

European Commission: Commission Requests Information from Spain on New Charge on Operators

In March 2010, the European Commission sent a letter of formal request for information to Spain under EU infringement procedures (Article 258 of the Treaty on the Functioning of the European Union) in relation to a new administrative charge imposed on national telecoms operators. The charge, which amounts to 0.9% of the yearly turnover of telecoms operators, was introduced through Spanish Law 8/2009 on the funding of the Spanish Radio and Television Corporation in order to offset the elimination of paid advertising on the Spanish public service broadcaster *Corporación*

de Radio y Televisión Española (RTVE) (see IRIS 2009-8: 11/16 and IRIS 2010-1/18). A limited number of operators were exempted from paying the charge on the basis of their geographical scope and the type of services they provide.

The Commission is concerned that the provisions of the new law could be incompatible with EU law, as the charge does not appear to be related to costs arising from regulatory supervision. It thus unduly burdens the companies in question, possibly limiting their investments in new networks and advanced services. According to the provisions of the Authorisation Directive (Directive 2002/20/EC) charges on telecoms operators may only be imposed in order to finance certain administrative and regulatory activities and should be transparent, objective and proportionate. In addition, interested parties should be consulted in the appropriate manner.

The Commission opened a formal State aid investigation into the new funding scheme in December 2009. The formal request for information is without prejudice to that investigation.

If the Spanish Government does not respond to the formal request or if the observations the Government presents are not satisfactory, the Commission may issue a "reasoned opinion" under EU infringement procedures, requesting that Spain amend the legislation in question to ensure compatibility with EU rules.

• "Telecoms: Commission requests information from Spain on new charge on operators; closes infringement case on universal service", IP/10/322, Brussels, 18th March 2010

<http://merlin.obs.coe.int/redirect.php?id=12392>

DE EN FR

ES

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European Commission: Spanish State Aids and EU Approval

The Spanish Ministry of Culture approved, on 19 October 2009, an Order Approving Economic Aids to Cinematographic and Audiovisual Companies.

Spain notified the European Commission of this Order on 29 October 2009. Before the consultation period ended, the Commission received a claim by "Filmmakers against the Order", a group of 205 directors, technicians and film critics.

The Commission, on 27 January 2010, finally approved the new System of Economic Aids to the Cinematographic and Audiovisual Activity in Spain, as it considered the Order to be compatible with the Treaty on the Functioning of the European Union. The system of economic aids is approved until 31 December

2015 on the basis of the commitment made by the Spanish Authorities to amend it, if this is required, by modifications introduced during that period of time to the applicable rules on national aids.

According to Spanish Authorities, the object of the above-mentioned system of economic aids for cinematographic and audiovisual activity is to encourage Spanish linguistic and cultural diversity in the European context, helping audiovisual directors, new creators and independent producers and distributors.

The legal basis of this system is formed by the following: Law 55/2007 of 28 December on Cinema, Royal Decree 2062/2008 of 12 December, which develops the aforementioned Law, and the Order by which rules for the application of Royal Decree 2062/2008 are made public.

The Authority responsible for providing the aid will be the Instituto de la Cinematografía y de las Artes Audiovisuales (Cinematographic and Audiovisual Arts Institute - ICAA), of the Ministry of Culture, which will have a global budget for this purpose of EUR 576 million.

Finally, this system includes the following types of economic aids:

- Selective aids for pre-production and production;
- Automatic aids for production;
- Selective aids for promotion and distribution;
- Other aids (for the participation of Spanish films in film festivals and for cultural projects).

The Commission concluded that the system notified represents a national aid according to Article 107.1 of the Treaty on the Functioning of the European Union.

The economic aid can be justified if the system is in accordance with the general legal criteria and the four compatibility-specific criteria related to cultural content, territorialisation, intensity of the economic aid and supplementary subsidies, stated in the Cinema Communication.

In Article 2.3.a., the Cinema Communication states that the Commission must verify that the scheme does not contain clauses that would be contrary to provisions of the EC Treaty (now called Treaty on the Functioning of the European Union) in fields other than State aid. In Article 2.3.b.1., the Cinema Communication states that the economic aid must be directed toward a cultural product. Each member state shall ensure that the content of productions which benefit from the economic aids can be classified as "cultural" in accordance with verifiable national criteria.

The Spanish Government is interested in encouraging the production and distribution of cinematographic works with cultural content, encouraging the cultural diversity of the works that are finally presented to

the public, and emphasising specifically the projection of the different Spanish languages. According to the Spanish Authorities, the main reason for supporting cinematographic diversity in Spain is the considerable share of American productions in the Spanish market (in 2008, the share of Spanish movies in Spanish market was 13.3%. On the other hand, the share of American movies in Spanish market was 71.5%).

The Spanish Authorities state that the number of viewers of European and South American movies decreases every year in Spain, compared to the number of viewers of American movies. Therefore, Spain considers that a way of encouraging viewers to watch quality films with high cultural interest in movie theatres would be through granting economic aids for their promotion and marketing.

On the basis of all the above-mentioned considerations, the Commission concluded that the economic aid system is compatible with the Common Market in accordance to what it is stated in Article 107.3.d. of the Treaty on the Functioning of the European Union and decided not to object to it.

• Decision of the European Commission, Subject: State aid No N 587/2009 - Spain - Spanish national film support scheme, C (2010)174 final, 27 January 2010

<http://merlin.obs.coe.int/redirect.php?id=12393>

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• Orden CUL/2834/2009, de 19 de octubre, por la que se dictan normas de aplicación del Real Decreto 2062/2008, de 12 de diciembre, por el que se desarrolla la Ley 55/2007, de 28 de diciembre, del Cine, en las materias de reconocimiento del coste de una película e inversión del productor, establecimiento de las bases reguladoras de las ayudas estatales y estructura del Registro Administrativo de Empresas Cinematográficas y Audiovisuales; Boletín Oficial del Estado nº257, de 24 de octubre de 2009 (Order 2834/2009, of 19 October, which sets out regulations for the application of the Royal Decree 2062/2008, of 12 December, that develops Law 55/2007, of 28 December, on Cinema, in the matters of recognition of film costs and producers' investment, establishing the regulatory basis of national aids and the structure of the Registry of Cinematographic and Audiovisual Companies; Spanish Gazette nº 257, 24 October 2009)

<http://merlin.obs.coe.int/redirect.php?id=12394>

ES

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NATIONAL

AM-Armenia

Amendments to Broadcast Legislation Passed

On 28 April 2009 the National Assembly of the Republic of Armenia (RA) passed a package of amendments and supplements to the national statutes "On Television and Radio", "Statute of the RA National Commission on Television and Radio", "Statute of the RA National Assembly", and "On State Duty".

The aim of these bills as stated in the Justification was to ensure the “independence of the bodies that regulate public and private media (National Commission of Television and Radio and Public Television and Radio Council)”. Numerous amendments and additions to the existing statutes were introduced, some related to the changes in the formation and activities of the National Commission of Television and Radio (see IRIS 2001-2: 4/9) and of the Council for Public Television and Radio, but many others made corrections and clarifications that were not necessarily connected with the stated aims of the bills. These are new criteria on which the NTRC is to base its choice in granting a broadcasting licence; new norms regarding sponsorship of television and radio programmes, as well as to ensure the transparency of broadcasters; a new procedure for the National Commission on Television and Radio (NTRC) to rebuke broadcasters before suspending their activities, etc.

The amendments to the broadcasting legislation provoked strong criticism from a number of journalists' associations and from the OSCE Representative on Freedom of the Media. In particular they pointed to substantial problems with the amendments. The selection process of the candidates for the NTRC has a basic flaw in that none of the tests to be taken by candidates and requirements subscribed to by them demand their integrity, their high moral standing, or the understanding of their mission.

The proposed scheme of financing public broadcasting and regulatory bodies in the sector provides for the majority in the parliament an opportunity to sanction or support them at will, thus rendering them dependent on such a majority. In this way, instead of following public duty, the “independent public broadcaster” and “independent regulator” will exercise self-censorship.

The amendments in a number of articles put public broadcasting under the control of the National Commission on Television and Radio. It makes the broadcaster dependent on two overseeing bodies - the Council and the Commission, appointed (elected) differently and, as a result, possibly issuing different or even conflicting orders.

• Comments on the Draft Law of the Republic of Armenia on Broadcasting commissioned by the Office of the Representative on Freedom of the Media of the Organization for Security and Co-operation in Europe (OSCE), 2009

<http://merlin.obs.coe.int/redirect.php?id=12373>

EN

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RAK issues warning to FTV

A very specific case recently prompted a reaction from the Communications Regulatory Agency (RAK) concerning the sensitive issue of judging broadcast programme content.

The political magazine “60 minutes” of the Federal Television (FTV), a public broadcaster, in its issue broadcast on 8 February 2010, borrowed from YouTube inserts from the movie “Der Untergang” (“Downfall”). The story is about Hitler and his closest associates in his Berlin bunker, shortly before Berlin’s final downfall.

The video clip was named “Vidimo se u Bileci” (“See you in Bileca”) and makes an allusion to an election debacle of the Party of Independent Social Democrats (SNSD), which is the ruling political party in Republika Srpska (RS), in Bileca, a small town located in south-east part of the RS bordering with Montenegro.

In this video clip the prime minister of RS and head of the SNSD was depicted as Hitler and his closest associates were acting as leading Nazis of that time. Such a role was clearly suggested by accompanying titles/captions.

The reactions of the RS were vehement. To compare leading politicians of the RS with Nazis was considered in bad taste, in particular if seen in the context of not so distant history - the Second World War - in which Serbs suffered badly at the hands of the Nazis.

The Communications Regulatory Agency stated in its warning that “With full respect for the freedom of editorial policy and independent journalism, as well as for satire as a specific form of expression, the Agency considers that broadcast of this form of contents within the informative programmes seriously endangers professional and ethical standards that should be implemented by public broadcasting services, as well as the function of the public broadcasting service itself.”

According to the RAK’s press release the Agency was surprised due to the silence of the Steering Board, the Editorial Council and the Management of RTV FBiH who are responsible for the creation of editorial policy and their failure to react.

• RAK (RAK’s warning)

<http://merlin.obs.coe.int/redirect.php?id=10734>

BS

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New Legislation on Collecting Societies in Belgium

It was nothing new for Belgium - the legislator and a number of users have felt for some time that some collecting societies were not operating in a transparent fashion and were abusing their dominant position. A number of bills have been tabled over the past ten years and more, aimed at reinforcing the supervision of collecting societies, but none has ever been adopted. The Act of 10 December 2009 was gazetted (published in the *Moniteur Belge*) on 23 December 2009, and came into force on 1 April 2010.

The new Act confirms that collecting societies are required to manage the rights recognised by copyright legislation if the rightsholder so requests and inasmuch as this is in compliance with the societies' object and articles of association. The management must be carried out fairly and without discrimination.

The new Act on the supervision of collecting societies imposes clear conditions on the managers of these societies. Henceforth the societies must keep detailed accounts in accordance with specific rules; this arrangement replaces the concise accounting schedule that had been in force. There is also provision for separate accounts, making it possible to distinguish clearly between the collecting society's own funds and the royalties received. The collecting societies will now have to redistribute the funds received within 24 months. Their internal organisation will have to combat all forms of conflicting interests (for example, a performer being a member of the distribution committee and being entitled to receive money).

Regarding financial movements for social, cultural or educational purposes, the new Act is aimed at clarifying the final destination of such funds. Thus in future the collecting societies will not be able to allocate more than 10% of the amount of the royalties received to social, cultural or educational projects, and will have to do so out of their own funds.

Lastly, supervision by the Ministry of the Economy will be reinforced. It has the power to fine any collecting society not fulfilling its statutory obligations. It may also report to the courts, which may intervene more rapidly and firmly using the specific provisions of the new Act.

This supervision is financed by the collecting societies, with the contribution from each society being calculated on the basis of a percentage of the royalties received (up to a maximum of 0.4%). An "organic" fund has been created for the supervision of collecting societies.

Each year, the supervision service must publish a report on its activities. This report will list for each category of work and exploitation method the enquiries and complaints made by debtors and beneficiaries, and the intervention initiated by the supervision service, together with their results. Justified complaints are to be published by the collecting societies.

The report must present a faithful picture of the collective management sector and report on the specific role and the financial situation of the collecting societies and on recent developments in the sector.

• *Loi du 10 décembre 2009 modifiant, en ce qui concerne le statut et le contrôle des sociétés de gestion des droits, la loi du 30 juin 1994 relative au droit d'auteur et aux droits voisins, Moniteur Belge 23 décembre 2009, p. 80461* (Act of 10 December 2009 amending the part of the Act of 30 June 1994 on copyright and neighbouring rights concerning the status and the supervision of collecting societies, gazetted (published in the *Moniteur Belge*) on 23 December 2009, p. 80461)

<http://merlin.obs.coe.int/redirect.php?id=12398>

FR

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Flemish Community: Public Broadcaster, Shocking Images and Product Placement

In two recent decisions, both chambers of the *Vlaamse Regulator voor de Media* (Flemish Regulator for the Media - monitoring and enforcement of media regulation) condemned the public broadcasting corporation VRT for breach of the Flemish media regulation.

On 19 January 2010, the *Kamer voor Onpartijdigheid en Bescherming van Minderjarigen* (Chamber for Impartiality and the Protection of Minors) rendered a decision regarding the transmission of a trailer around 8 p.m., just before the beginning of the family series 'Dieren in Nesten' (freely translated, 'Animals in Trouble'). This series follows the adventurous practices of some vets and, according to the plaintiff, both his children, who are five and seven years of age, are loyal viewers of it. The trailer in question displayed images of a murder by way of a gunshot to the forehead and of a transparent body bag which was unzipped, revealing the head of a deceased person, the face clearly injured. Article 42 of the new Flemish Media Decree prohibits linear television broadcasters from transmitting any programmes that could cause serious detriment to the physical, mental or moral development of minors, particularly programmes containing pornographic scenes or unnecessary violence (first indent). This provision also applies to announcements of programmes (fourth indent). The broadcaster can avoid violating this provision only where it is ensured, by selecting the time of the broadcast or by any technical measure, that minors in the area

covered by the service will not normally hear or see such broadcasts (second indent). The Chamber considered that displaying horrifying or shocking images can exert a negative influence on the physical, mental or moral development of minors and that the VRT should have been aware of the fact that it was not guaranteed, given that the transmission took place just before a family series, that children and young people would normally not see this trailer. Therefore, it concluded a breach of Article 42 of the Decree, but nevertheless decided in the end that there was no reason to impose a sanction, given that the transmission was said to be the result of a communication error and that the broadcaster made its excuses to the plaintiff and proceeded with taking measures to guarantee that, in future, spots that display images that could be harmful to minors will not be transmitted before, during or immediately after a family programme.

On 15 March 2010, the Regulator again found a breach by the public broadcaster VRT, this time of the regulation on product placement. On the Sunday morning information programme 'De Zevende Dag' (freely translated, 'The Seventh Day'), a report, which lasted two and a half minutes, was included on the presentation of the new sports collection of the famous lingerie label Marie-Jo. The product itself was mentioned and shown several times, while during the entire report various items from the collection were prominently displayed. The well-known Belgian tennis player Yanina Wickmayer, who is the 'face' of the new collection, used the interview to express her admiration for Marie-Jo. The *Algemene Kamer* (General Chamber) considered the combination of the visual elements and the auditory contributions to have a clear promotional value that could only be in favour of Marie-Jo. It judged Marie-Jo's cooperation with the programme to be a form of product placement, an allowable type of product placement (Article 99, 2° of the Media Decree), as Marie-Jo provided the VRT with a location in which to film and with various products. The first paragraph of Article 100 of the new Flemish Media Decree prohibits programmes that contain product placement from encouraging the viewer to purchase or lease goods or services, specifically by recommending these products or services (2°). In addition, the product or the service in question cannot benefit from undue prominence (3°). The Chamber judged that the label Marie-Jo had benefited from undue prominence, given the multiple display of the products in question, and that the interview with Yanina Wickmayer, during which she develops a purely promotional argumentation in favour of Marie-Jo, directly encourages the viewer to purchase those products. As a consequence, the Regulator decided to impose a fine amounting to EUR 5,000.

• ZAAK KURT LAMBRECHTS t. NV VLAAMSE RADIO- EN TELEVISIEOMROEP (dossier nr. 2009/0497) BESLISSING nr. 2010/006, 19 januari 2010 (Kurt Lambrechts vs. NV VRT, 19 January 2010 (No 2010/006))
<http://merlin.obs.coe.int/redirect.php?id=12374>

• ZAAK VAN VRM t. NV VLAAMSE RADIO- EN TELEVISIEOMROEP (dossier nr. 2010/0502) BESLISSING nr. 2010/015, 15 maart 2010 (VRM vs. NV VRT, 15 March 2010 (No 2010/015))
<http://merlin.obs.coe.int/redirect.php?id=12375>

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New Administrative Regime Concerning On-demand Media Services Established

With the latest amendments to the Radio and Television Act, published in State Gazette No 12 dated 12 February 2010, a new administrative regime was established concerning on-demand media services. Persons who intend to provide on-demand media services shall notify the Council for Electronic Media according to a model which shall include:

1. The identification data concerning the person providing on-demand media services: name (firm), seat and registered address as well as the unified identification code;
2. A short description and the basic parameters of the on-demand media services provided;
3. The territorial scope;
4. Telephone, fax, e-mail, address for correspondence and a contact person; and
5. The expected starting date for providing the on-demand media services.

Where the notification is not complete, the Council for Electronic Media shall, within seven days of its receipt, notify the person in writing to remedy the deficiencies.

The Council for Electronic Media shall enter the person on its register within a fourteen-day period of receiving the notification or of remedying the deficiencies.

Where a person has ceased to provide on-demand media services, he/she shall notify the Council for Electronic Media.

The person providing on-demand media services may petition the Council for Electronic Media in writing to issue a certificate for entry onto the register, for which he/she shall pay a single administrative tax. The Council for Electronic Media shall issue the certificate within seven days of submitting the petition.

• Закон за изменение и допълнение на Закона за радиото и телевизията (ДВ бр.12 от 12.02.2010463.) (Consolidated version of the Radio and Television Act)

<http://merlin.obs.coe.int/redirect.php?id=12417>

BG

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Tax Credit for Film Producers Has Been Postponed

On 27 January 2010 the President of the Parliamentary Commission and other members of the Bulgarian Parliament filed a proposal for Закон за филмовата индустрия (amendments to the Film Industry Act, see: IRIS 2004-1: Extra) as a measure to stimulate film production in Bulgaria.

According to the draft, every producer who is recorded on the register of film producers of the Изпълнителна агенция Национален филмов център (National Film Centre, an Executive Agency of the Ministry of Culture - NFC), can apply for a certificate for tax credit within 3 months after having finished their activity of film production in Bulgaria. The application shall be filed with the NFC, which shall take a decision within 30 days. The bill provides the Council of Ministers with power to set out in a special regulation the details about the proceedings and the substantial rules for the respective positive or negative statements of the NFC.

The main idea of the draft is - on the basis of the tax credit certificate - that the producer may be entitled to ask for a deduction from the sum due to be paid by him under the tax legislation up to the amount of the sum entered in the certificate. This opportunity could be used by the producers personally or they could transfer their right to somebody else against remuneration.

This form of State support is very new to Bulgaria. It is underlined that the rules do not impose any tax concession for the producers and will reduce the income to the State budget, but it will stimulate the financing of new film productions in Bulgaria.

The draft was broadly criticised by Bulgarian film workers and was determined as not complying with European standards by the Bulgarian Ministry of Finance and the Parliamentary Finance Commission.

Obviously the proposers of the bill are also not very convinced by the potential benefits of their ideas. On 17 February 2010 the bill was withdrawn and the discussion about State measures for supporting the film industry in Bulgaria was handed back to the Ministry of Culture and the NFC.

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Arrangements on Advertising and Sponsorship Relaxed

The Radio and Television Decree (*Ordonnance sur la Radio et la Télévision* - ORTV) has been amended, as of 1 April 2010, in order to bring its provisions into line with European rules. As a result of the transposition of Directive 2007/65/EC on Audiovisual Media Services ("AVMS Directive") into the national law of the member states of the European Union, those French, German and Italian television channels that can be picked up in Switzerland now have more opportunities with regard to advertising and sponsorship. The new agreement on Switzerland's participation in the MEDIA programme also provides that the foreign advertising slots broadcast in Switzerland are subject to the law of the broadcasting state. Thus the amendments made to the ORTV are aimed at relaxing somewhat the rules imposed on Swiss broadcasters and improving their economic conditions in the face of foreign competition.

The new provisions henceforth authorise the isolated broadcasting (separate from blocks) of advertisements between programmes and during coverage of sports events. There may be a commercial break every 30 minutes during cinema and television films (except serials, soaps and documentaries) and political news broadcasts and magazine programmes. During the broadcasting of events that include interruptions, advertising may also be broadcast during those interruptions, in addition to the slots already mentioned. In no circumstances, however, may broadcasts directed at children and broadcasts of religious services include commercial breaks. The duration of advertising may not exceed 15% of daily air time or 12 minutes per hour. Broadcasters not holding a concession, however, whose radio or television programmes cannot be picked up in other countries, are not subject to any restriction regarding commercial breaks or the duration of advertising (except for the ban on commercial breaks in broadcasts directed at children and broadcasts of religious services).

On the subject of sponsoring, the new Article 20 of the ORTV provides that the mention of the sponsor must not constitute direct incitement to enter into any binding agreement involving goods or services. This provision thus authorises certain declarations at the time of mentioning the sponsor that were not permitted under the former regulations (according to which the mention of the sponsor was not allowed to include any reference that might have constituted advertising). The ORTV now also provides that, contrary to the obligation to indicate product placement not only at the start but also (this point is new) after each

commercial break and at the end of the broadcast, a single declaration is sufficient where the value of the product placements, the material aids to production or the prizes do not exceed CHF 5,000. Furthermore, the obligation to indicate product placement does not apply to films not produced by the broadcaster itself, or commissioned from independent producers and financed less than 40% by the broadcaster (co-productions).

Relaxing the rules on advertising and sponsorship currently only applies to private-sector broadcasters, which means that the Swiss broadcasting company *Société Suisse de Radiodiffusion et Télévision* (SSR) remains subject to stricter rules. The Federal Council will pronounce on the possibility of relaxing the arrangements for SSR's programmes when it examines the amount of the television licence.

• *Ordonnance sur la radio et la télévision (ORTV) du 9 mars 2007 (Etat le 1er avril 2010)* (Decree on radio and television (ORTV) of 9 March 2007 (version as at 1 April 2010))

<http://merlin.obs.coe.int/redirect.php?id=12397>

DE FR IT

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BGH on Compensation for Use of a Video Film without Consent

In a judgment of 25 March 2010, the *Bundesgerichtshof* (Federal Court of Justice - BGH) allowed an appeal concerning a breach of copyright resulting from the use of a video film without authorisation.

In the proceedings at the centre of the appeal, the plaintiff had filmed the parachute jump of a well-known German politician in June 2007. The politician was killed, and the film was shown several times by one defendant, the operator of a news channel, on 29 June 2007, and made publicly available by another defendant, the operator of an internet portal. Both publications took place without the plaintiff's consent. The plaintiff considered this a breach of his copyright and demanded that the defendant provide information on the advertising revenue it had generated on 29 June 2007 so that he could use it as a basis for claiming compensation.

The BGH ruled in the plaintiff's favour, stating that the defendants had used the plaintiff's recordings without authorisation and were consequently obliged to pay him compensation. That consisted in handing over to him the profit made from the publication, which was based on the advertising revenue generated on the day concerned. It was, the court went on, unimportant that the advertisers had placed their advertising

before the video had been shot, and therefore with no reference to it. Rather, the decisive factor was that the clients had expected their advertising to be broadcast in a "news environment", irrespective of the actual news content. The selection of the news, according to the BGH, had had no effect on the connection between the breach of the plaintiff's rights and the advertising revenue based on that breach.

• *Pressemitteilung des BGH zum Urteil vom 25. März 2010 (Az. I ZR 122/08 und I ZR 130/08)* (FCJ press release on the judgment of 25 March 2010 (Cases I ZR 122/08 and I ZR 130/08))

<http://merlin.obs.coe.int/redirect.php?id=12402>

DE

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Ban on Reporting on Stasi Activity Confirmed

Germany's second public service television channel *Zweites Deutsches Fernsehen* (ZDF) may no longer broadcast, in the form that was the subject of the action, a remark by the Federal Commissioner for Stasi Documents that Gregor Gysi, the leader of the Die Linke party in the Bundestag, "knowingly and deliberately" reported to the Stasi on a critic of the GDR regime.

This was decided on 23 March 2010 by the *Hanseatisches Oberlandesgericht Hamburg* (Hanseatic Court of Appeal - OLG, which confirmed the judgment of the lower court. On 4 September 2009, the *Landgericht Hamburg* (Hamburg Regional Court) had established in response to the action brought by Gysi that the plaintiff's general personality rights had been infringed and prohibited the broadcasting of the report in issue. However, it did not forbid ZDF from ever broadcasting the Federal Commissioner's remark, stating that the channel had neither agreed with it - but, rather, compared it to the plaintiff's position on the issue and therefore tried to get to the bottom of the matter - nor could it be made liable as the disseminator of a public suspicion.

In its reasons for the judgment, the Regional Court only referred to the description in the news programme "heute-journal" of 22 May 2008, in which ZDF made it clear that the Federal Commissioner had only expressed an unproven suspicion and that the circumstances had not been clarified. However, the court went on, according to the principles established by the *Bundesgerichtshof* (Federal Court of Justice) a report on a suspicion was only permissible when there was a significant public interest in its dissemination, the circumstances had been carefully researched, there were sufficient indications that the suspicion was factually correct and that the case had been presented in a balanced way without it resulting in the person concerned being convicted in advance.

In the report, however, the court ruled that the facts that might militate against the truth of the Federal Commissioner's remark had only been mentioned in brief and incompletely. Finally, the report had accordingly been "insufficiently balanced and frank".

The Hanseatic Court of Appeal essentially agreed with this assessment. According to information from ZDF, it stressed that there was a considerable public interest in the question of whether Gysi had worked for the state security service at the time of the GDR, but the channel should have questioned him on the remarks and gone into his arguments in his defence in greater detail.

ZDF intends to examine the possibility of appealing against the decision, which is not yet final.

• *Urteil des LG Hamburg (Az. 324 O 836/08) vom 4. September 2009* (Judgment of the Hamburg Regional Court (Case 324 O 836/08) of 4 September 2009)

<http://merlin.obs.coe.int/redirect.php?id=12408>

DE

• *Pressemitteilung des ZDF zum Urteil des Hanseatischen OLG Hamburg vom 23. März 2010* (ZDF press release on the Hanseatic Court of Appeal's judgment of 23 March 2010)

<http://merlin.obs.coe.int/redirect.php?id=12409>

DE

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Arbitration Board Proposes Settlement between DTAG and VG Media

The arbitration board set up at the German Patent and Trade Mark Office under the *Gesetz über die Wahrnehmung von Urheberrechten* (Law on the Administration of Copyright) issued a settlement proposal on 22 February 2010 in a dispute between a cable network operator and rightsholders concerning fees for cable retransmission.

The arbitration board is responsible for dealing with disputes between collecting societies and users of copyright-protected works and for disputes between broadcasters and cable network operators. Its task is to mediate between the parties with the aim of bringing about an amicable settlement.

In this particular case, Deutsche Telekom AG (DTAG) and the collecting society Verwertungsgesellschaft der Medienunternehmen (VG Media), which administers the rights of a number of private channels, were involved in a dispute concerning the rates charged by VG Media for the digital cable retransmission of broadcast signals via DSL networks (IPTV, DSL TV). The applicable rates are those listed by VG Media with respect to digital radio and television, which DTAG regarded as unreasonable because they are higher than the rates for analogue retransmission. It argued that IPTV technology led to more competition

between cable network operators, which already benefited the broadcasters. In addition, it said, the digitisation, preparation and encryption of the content offered meant that the cable network operators incurred higher costs. For its part, VG Media argued that the digitisation also resulted in higher quality and increased use. Furthermore, the cable network operators benefited from the possibility of combining programmes with additional content.

The arbitration board's settlement proposal essentially supports DTAG's position. It provides for a reduction in VG Media's digital rates from 2.01% or 1.72% (the latter rate applying when the cable network operator itself does not charge a feed-in fee) of the revenues generated from the retransmission to 1.1% or 1.0% (figures taking account of an overall contractual discount of 20%).

The settlement proposal brings the digital rates down to the level of the analogue rates and rejects VG Media's demand for a higher digital rate. The transition to digital technology, it is argued, is a normal adaptation of the method of transmission that is of no consequence in terms of copyright and is comparable for example to the (ongoing) transition from the record to the CD. Additional uses for the consumer that resulted in improved sales opportunities for DTAG did not constitute a more intensive use of rights but were based on services provided by DTAG itself. VG Media already benefited from higher DTAG revenues as a result of its revenue-based fee rates.

The proposal also caught the attention of observers because the arbitration board - without going into detail - classified IPTV as cable retransmission under section 20b of the *Urheberrechtsgesetz* (Copyright Act - UrhG), although opinions are divided on this.

It is possible that the proceedings will be continued before the *Oberlandesgericht München* (Munich Court of Appeal).

• *Einigungsvorschlag der Schiedsstelle vom 22. Februar 2010 (Az. Sch-Urh 07/08)* (Arbitration board's settlement proposal of 22 February 2010 (Case Sch-Urh 07/08))

DE

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New Version of the Inter-State Treaty on the Protection of Minors

The Prime Ministers of the German *Länder* agreed at their conference in Berlin on 25 March 2010 on a draft amendment to the *Jugendmedienschutzstaatsvertrag* (Inter-State Treaty on the Protection of Minors in the Media - JMStV).

The draft of the new treaty is based on the principle of regulated self-regulation or co-regulation. For example, it enables providers, *inter alia*, to rate their offerings according to the age groups (0, 6, 12, 16 and 18) mentioned in the *Jugendschutzgesetz* (Youth Protection Act - JuSchG) on the basis of their own assessment and/or confirmation or an assessment by the *Anerkannte Einrichtungen der Freiwilligen Selbstkontrolle* (Certified Organisations for Voluntary Self-Regulation - AEFSK), such as *Freiwillige Selbstkontrolle Fernsehen* (Voluntary Self-Regulation of Television - FSF) or *Freiwillige Selbstkontrolle Multimedia-Diensteanbieter* (Voluntary Self-Regulation of Multimedia Service Providers - FSM). Programmes likely to impair children's development should be identified as such by visual or acoustic means. The *Kommission für Jugendmedienschutz* (Commission for the Protection of Minors in Electronic Media - KJM) is also required to be able to provide binding confirmation of the AEFSK ratings in the case of offline media (such as DVDs).

In future, a service provider that provides indirect access to telemedia content - either acting as a "mere conduit" or as a "host" - so that this content does not fall entirely within its area of responsibility - must prevent content likely to impair children's development from being included or from remaining in the overall offering. Protective measures are considered to have been provided if an internet provider has submitted to the code of conduct prescribed by an AEFSK.

The draft of the JMStV has been forwarded to the *Land* parliaments for information and will probably be signed by the Prime Ministers on 10 June 2010.

After being passed by the *Land* parliaments, the 14th *Rundfunkänderungsstaatsvertrag* (Inter-State Agreement Amending Inter-State Broadcasting Agreements) on the protection of minors in the media is scheduled to enter into force on 1 January 2011.

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New Advertising Guidelines for Product Placements

The *Gesamtkonferenz der Landesmedienanstalten* (General Conference of Regional Media Authorities) has given practical form to the provisions of the 13th *Rundfunkänderungsstaatsvertrag* (Inter-State Agreement Amending Inter-State Broadcasting Agreements - RÄStV, see IRIS 2010-1/16) on product placements (PPs) in broadcasts by private television stations.

The guidelines, which will have to be adopted by the Regional Media Authorities, distinguish between paid

and unpaid PPs (production props), which are permitted in certain circumstances. Surreptitious advertising continues to be prohibited.

Paid PPs may only be included "for reasons predominantly linked to the storyline and action". Programmes and films must be appropriately identified with a logo at the start and at the end and after each advertising break. The placement of the product must not be advertorial in nature because that would be a feature of surreptitious advertising.

The requirement to identify programmes having product placement does not apply to unpaid aids and production props if they do not have any particular value. The guidelines also clarify the term "significant value": the borderline is 1% of the total production costs up to a maximum of EUR 1,000. If the production props have a higher value, the programmes containing them have to be identified accordingly.

For public broadcasters, the *Rundfunkänderungsstaatsvertrag* states that production props are the only form of PP allowed. Here, too, those with significant value must be identified.

• *Gemeinsame Richtlinien der Landesmedienanstalten für die Werbung, die Produktplatzierung, das Sponsoring und das Teleshopping im Fernsehen (WerbeRL / FERNEHEN)* (i. d. F. vom 23. Februar 2010) (Joint Guidelines of the Regional Media Authorities on Advertising, Product Placement and Television Teleshopping - WerbeRL / FERNEHEN (in the version of 23 February 2010))

<http://merlin.obs.coe.int/redirect.php?id=12344>

DE

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German Economy Ministry Introduces Proposals for Implementing Reform of Telecommunications Legislation

In a position paper of 19 March 2010, the *Bundesministerium für Wirtschaft und Technologie* (Federal Ministry for the Economy and Technology - BMWi) set out its proposals for transposing the new EU package of directives on electronic communication (see IRIS 2010-1/7) into national law.

The structure of the document is based on the two directives "Better Regulation" (2009/140/EC) and "Citizens' Rights" (2009/136/EC) amending the EU's legal framework for electronic communication.

It contains, *inter alia*, new rules for expanding the broadband networks in accordance with the rules on competition and for investing in the next generation networks (NGNs). In this connection the *Bundesnetzagentur* (Federal Network Agency - BNetzA) has been given the authority, as the regulatory body responsible, to specify competition- and investment-friendly

regulatory principles in accordance with Article 8(5) of the Framework Directive. In order to achieve greater planning certainty, regulatory cycles are to be extended and the BNetzA is to be authorised to issue administrative rules on its regulatory approaches. The paper also provides for the BNetzA to be able to order the joint use of land and any facilities installed thereon irrespective of the existence of market dominance. Co-operation of this nature is to be promoted through an obligation to provide information on existing and planned infrastructure facilities.

The position paper also contains proposals on the more flexible and more efficient organisation of the use of radio frequencies provided for in Articles 9ff. of the Framework Directive. The BMWi evidently wants to make use of Article 9a(1), according to which member states can enable holders of existing rights of use to have their compatibility with the new provisions examined in advance. Use is to be made of the possibility existing under Article 9(7) of laying down domestic rules, subject to penalties, to prevent spectrum hoarding.

The position paper also proposes rules for functional separation in accordance with the new Article 13a of the Access Directive and for the security and integrity of networks and services in accordance with Articles 13a and 13b of the Framework Directive.

In the area covered by the "Citizens' Rights" directive, the BNetzA is to be given the power to impose consumer protection requirements, such as a duty to provide information and an obligation to make a minimum service quality available and provide improved access for disabled end-users.

In order to improve international co-operation, the BMWi intends to involve the newly-created Body of European Regulators of Electronic Communications (BEREC) in the market regulations procedures and in proceedings to settle cross-border disputes. Finally, the paper suggests that information on legal remedies available against measures imposed by the BNetzA be collected on a systematic basis in future.

• *Eckpunktepapier des BMWi vom 19. März 2010* (BMW position paper of 19 March 2010)

<http://merlin.obs.coe.int/redirect.php?id=12407>

DE

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Rhineland-Palatinate Prime Minister Planning Application to Check Constitutionality of ZDF State Treaty

The Rhineland-Palatinate Prime Minister Kurt Beck is planning to file an application with the *Bundesverfassungsgericht* (Federal Constitutional Court - BVerfG)

to check the constitutionality of the *ZDF-Staatsvertrag* (ZDF State Treaty).

Beck announced his intention to file his application after the *Land* Prime Ministers' failure to agree on a reform of the ZDF State Treaty at their Berlin conference on 25 March 2010.

The background to this is the refusal in November 2009 by the ZDF Board, which is dominated by the German conservatives (CDU/CSU) to renew the contract of the former ZDF editor-in-chief Nikolaus Brenner. This led to a discussion on political influence in the ZDF's supervisory bodies and, in particular, on whether the composition of those bodies complies with the principle that public service broadcasting should be free from state influence.

In Beck's opinion, associations and institutions should be allowed to appoint their ZDF representatives without requiring the *Land* Prime Ministers' approval. However, those individuals should not hold a full-time or part-time office closely associated with the state. The proportion of state representatives among the delegates of the parties and the Federation should be reduced, cutting the size of the *ZDF-Fernsehrat* (Television Board) from 77 to 69 members.

The ZDF Television Board currently comprises one representative from each of the 16 *Länder*, three representatives of the Federation, twelve representatives of the political parties, two representatives of the Evangelical Church, two representatives of the Catholic Church, one representative of the Central Council of Jews and a further 41 representatives of social groups (including trades union, employers' associations and representatives of industry, nature protection organisations and the worlds of sports, arts and culture).

In addition, the membership of the *ZDF-Verwaltungsrat* (ZDF Administrative Board) should be increased so that there would no longer be a blocking minority. The Administrative Board currently has 14 members, five of them representatives of the *Länder* and one representing the Federation. The other eight are chosen by the Television Board and may not belong either to a government or any other legislative body.

• *ZDF-Staatsvertrag vom 31. August 1991, in der Fassung des Zwölften Staatsvertrags zur Änderung rundfunkrechtlicher Staatsverträge (Zwölfter Rundfunkänderungsstaatsvertrag) in Kraft seit 1. Juni 2009* (ZDF State Treaty of 31 August 1991, in the version of the 12th Inter-State Agreement Amending Inter-State Broadcasting Agreements, in force since 1 June 2009)

<http://merlin.obs.coe.int/redirect.php?id=12410>

DE

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New Version of GEMA's Membership Agreement concerning the Use of Musical Works for Advertising Purposes

On 12 March 2010, the *Gesellschaft für musikalische Aufführungs- und mechanische Vervielfältigungsrechte* (GEMA), the German collecting society for authors and music publishers, decided to adopt a new version of its membership agreement relating to the use of musical works for advertising purposes.

When music is used for advertising purposes, rights management is to be exercised separately by the member and GEMA. According to the amended version of section 1(k)(1) of the membership agreement the "right to allow third parties to use a musical work [...] for advertising purposes in an individual case or to prohibit such use" - that is to say, the "yes or no" decision on a use for advertising purposes - lies with the member.

According to section 1(k)(2), GEMA is assigned the rights mentioned in section 1(a)-(h) and (l) [transmission, copying, making available to the public] under a condition subsequent for advertising purposes. The condition subsequent accordingly occurs when the member makes use in an individual case of the possibility of prohibiting a specific use and informs GEMA of this in writing.

The reason for these changes is a judgment delivered on 10 June 2009 by the *Bundesgerichtshof* (Federal Court of Justice - BGH) in which it ruled that the current membership agreement - contrary to standard practice - did not properly authorise GEMA to manage the copyright holder's licensing rights with regard to the use of musical works for advertising purposes. It is hoped that the amendments will now ensure legal certainty and clarity in this area.

• *Änderung des GEMA-Berechtigungsvertrags* (Amendment to the GEMA membership agreement)

<http://merlin.obs.coe.int/redirect.php?id=12403>

DE

• *Urteil des BGH vom 10. Juni 2009 (A.: I ZR 226/06)* (BGH judgment of 10 June 2009 (case I ZR 226/06))

<http://merlin.obs.coe.int/redirect.php?id=12404>

DE

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FR-France

Discussion on the Maintenance of Daytime Advertising on France Télévisions Channels

On 8 January 2008, the French President Nicolas

Sarkozy announced his desire to abolish advertising on the public-sector television channels. A year later the Act on audiovisual communication and new-style public-service television was adopted, following on from the recommendations of the "Commission on the new-style public-service television" chaired by Mr Copé, introducing the gradual abolition of advertising on public-service channels between 8 p.m. and 6 a.m. (in force since 5 January 2009), pending its total abolition by the end of 2011 (end of analog television) (see IRIS 2009-4:10/14).

Things do not seem to be as static in reality as they are portrayed in the Act, however. Thus at the end of January the European Commission instigated infringement proceedings against France for its "telecom tax" of 0.9% of turnover that telecom operators were required by law to pay to compensate for the abolition of advertising on public-sector television (see IRIS 2009-9: 5/4).

The MP Christian Kert, who is also a director of France Télévisions, quickly followed by Jean-François Copé, chairman of the majority UMP group in the National Assembly, stated that they were opposed to the abolition of advertising before 8 p.m. on the France Télévisions channels, and were even planning to table a bill on the matter. If advertising were to be abolished totally, there would be a shortfall of about 400 million euros in the financing for the public-sector audiovisual group, if the telecom tax were to be discontinued. A number of MPs wonder whether the State is in a position to provide this financing. There is also some uncertainty hanging over the private-sector channels, inasmuch as the anticipated "opportunity effect" did not happen and inasmuch as the transfer of the volume of advertising from the public sector to the private sector does not seem to be sufficient. The President is not in favour of such a turnaround, however. "The law will be applied. It provides for a consultation in May 2011 on whether advertising should be maintained before 8 p.m. or not. That date will be kept. But the aim remains the total abolition of advertising", a presidential spokesperson stated. Indirectly, the possible maintenance of advertising before 8 p.m. could compromise the sale of the France Télévisions Publicité public corporation, which is currently adjourned indefinitely. A debate on the application of the Act of 5 March 2009 is on the agenda for the Senate on 10 May, and a bill "to ensure the safeguarding of public-service television", through the maintenance of daytime advertising on public-sector television, tabled by the Senate member Jack Ralite, is to be discussed on 20 May 2010.

• *Proposition de loi visant à assurer la sauvegarde du service public de la télévision, présentée par M. Jack Ralite et les membres du groupe CRC-SPG* (Bill to ensure the safeguarding of public-service television, tabled by Mr Jack Ralite and members of the CRC-SPG group)

<http://merlin.obs.coe.int/redirect.php?id=12399>

FR

Amélie Blocman
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Ways of Boosting French Fiction on Television

Inaugurating the international market for television programmes (MIPTV) on 12 April, the Minister for Culture and Communication Frédéric Mitterrand recalled his preoccupation with the difficult situation French fiction finds itself in, seriously affected as it is by the economic crisis. On the basis of the annual balance sheet of the national cinematographic centre (*Centre National Cinématographique* - CNC), highlighting a volume of French fiction on television that was 17.6% lower than in 2008, whereas all the other genres (documentaries, animation, live shows) had increased in 2009, the Minister has launched initiatives in two major areas, based on the proposals contained in a report by the Club Galilée. The Club was instructed in September 2009 to consider the issue, and has just delivered its conclusions. These are focused on the editorial aspect and the economic aspect. Concerning editorial issues, the report advocates the creation of an obligation of diversity, with a view to developing new formats, which would include adapting the current arrangements for aid governed by the CNC, particularly regarding filming languages and international distribution. The Minister announced his desire to see the role of authors strengthened, and advocated encouragement for writing and project development, and the setting up of a system of ongoing training, which was also proposed in the report. Philippe Chevalier has been given the task of assessing these proposals and their implementation. The other aspect involves the diversification of models and sources of financing the production of fiction. The Club Galilée's report stresses the importance of increasing resources for audiovisual creation in general, through the harmonisation of European and French rules on advertising and the institution of real equality of treatment of the Internet and television. The report also proposes withholding the programme industry support account tax (*Compte de Soutien à l'Industrie des Programmes* - COSIP) from the turnover of all IAPs and not just half of them, as at present. It is also considered desirable for the advertising turnover of audiovisual content hosts to be subject to the COSIP tax in the same way as those of the television channels, according to the report. In return, it advocates an extension of the use of the CNC's aid arrangements to the new formats for fiction, taking into account the new broadcasting networks, such as broadcasting in 3D, for example. It also expresses the wish that the companies in the sector, which are often under-capitalised, could have access to the arrangements for aid for SMBs, the research tax credit and perhaps even the Strategic Investment Fund (*Fonds d'Investissement Stratégique* - FIS). Both the Club Galilée and the Minister wish to develop an industrial policy by elevating audiovisual creation to the level of a "strategic area of activity" within the recovery plan. A steering committee will assess the

proposals put forward and their actual transposition. Frédéric Mitterrand has also announced the launch of the mission on "Television prospects in 2015", a working party that will be required to formulate scenarios for possible evolution and specific proposals. The mission will involve all the professionals in the sector.

• *Rapport de mission : « Crise et relance de la fiction française » du Club Galilée, remis le 9 avril 2010* (Mission report entitled "Crisis and recovery of French fiction" by the Club Galilée, delivered on 9 April 2010)

<http://merlin.obs.coe.int/redirect.php?id=12400>

FR

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CSA's Conditional Agreement to TF1's Purchase of TMC and NT1

On 23 March 2010, the Conseil Supérieur de l'Audiovisuel (audiovisual regulatory body - CSA) gave its agreement to TF1's purchase of the AB Group's free-to-air channels TMC and NT1, adding a number of new conditions, including some involving programmes, to those already laid down by the competition authority (*Autorité de la Concurrence*) in January 2010. The CSA noted that the plan observed the rules restricting the concentration of DTTV channels and has obtained substantial undertakings from TF1 guaranteeing the pluralism and diversity of the programme offer in the interests of viewers. As a result, the agreements that the CSA is to conclude with TF1 will include stipulations firstly laying down a framework for the synergies among the three channels, with it not being possible to promote NT1 and TMC's programmes on TF1. Repeat broadcasting of certain TF1 programmes will be limited to just one of the other two channels. TMC and NT1 have also undertaken to broadcast each year 365 and 456 hours respectively of programmes never previously shown. Programming will include a regular cultural broadcast on NT1 and transmission of live shows on both channels. Undertakings have also been given to foster French and European audiovisual creation. The peak viewing times during which NT1 will have to meet its broadcasting quotas have been restricted and brought into line with the other non-specialist free-to-air DTTV channels. The obligations concerning new production imposed on TF1 include a proportion to be shown on NT1 and on TMC. TF1 has also agreed to the early release from rights after the last broadcast, in order to improve the circulation of audiovisual works. The M6 group has announced that it has lodged an appeal for the cancellation of the CSA's decision with the Conseil d'Etat.

• *Achat de TMC et NT1 par TF1 : accord du CSA assorti d'engagements substantiels* (Purchase of TMC and NT1 by TF1 - CSA agreement including substantial undertakings)
<http://merlin.obs.coe.int/redirect.php?id=12401>

FR

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GB-United Kingdom

Complaints about Television Advertisement on Climate Change Rejected

The Advertising Standards Authority, the self-regulatory body to which regulation of advertising content is delegated by the UK communications regulator Ofcom, has not upheld 939 complaints about a government advertisement on the effects of climate change. It did not consider the question of whether the advertisement broke the rules prohibiting political advertising, as this is a matter for Ofcom itself, and did uphold in part complaints about associated newspaper advertisements.

The television advertisement for the Government's 'Act on Co2' campaign showed a young girl being read a bedtime story illustrating the effects of climate change and suggesting that whether there will be a happy ending is up to the viewer. Related newspaper advertisements illustrated the issue of climate change through popular nursery rhymes (e.g., 'Rub a dub dub, three men in a tub, a necessary course of action due to flash flooding caused by climate change'). Complaints were made on ten grounds, including that the television advertisement could be distressing for children, it was misleading because it presented human induced climate change as a fact, and that a claim that 'over 40% of the CO2 was coming from ordinary everyday things' was misleading. The Authority rejected all complaints about the television advertisement. The advertisement was not to be broadcast in or around programmes made specifically for children, so it was unlikely to cause harm or undue distress. Major international bodies were in agreement about the evidence for human induced climate change whereas no national or international bodies with climate science expertise disagreed, so it was reasonable to rely on this evidence. The claim about the sources of CO2 was qualified in the advertisement and based on official statistics and so was unlikely to mislead.

The Authority did uphold complaints that two of the press advertisements should have been phrased more tentatively in their predictions of extreme weather conditions.

• Advertising Standards Authority, 'ASA Adjudication on Department of Energy and Climate Change', 17 March 2010
<http://merlin.obs.coe.int/redirect.php?id=12377>

EN

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Regulator Requires Sky to Supply Sports Channels to Other Retailers at Regulated Wholesale Prices

The Office of Communications (Ofcom), the UK communications regulator, has now made its final decisions in its long-running investigation into the pay-TV market (see IRIS 2009-1: 13/22 and IRIS 2009-8: 14/21). It has made a number of far-reaching decisions.

The most important decision is that Sky must offer wholesale standard definition versions of Sky Sports 1 and 2 to other retailers, for example cable, terrestrial and IPTV, in order to secure fair and effective competition. The price for this 'wholesale must-offer' is set by Ofcom; Ofcom has set a price of GBP 10.63 for each of the channels, 23.4% below the current wholesale price to cable operators. The price for the bundle of both channels has been reduced by 10.5% to GBP 17.14. The price has been set on a 'retail-minus' basis, which takes the price at which Sky retails the channels to its own customers and subtracts a fixed margin to allow for efficient retailing costs. This approach is designed to minimise any negative impact on sports rights.

Secondly, Ofcom has approved Sky's request to offer pay-TV services on digital terrestrial TV. However, this has been made subject to conditions that Sky implements a wholesale deal under the supply obligation for the sports channels and that, if it decides to offer movie channels on digital terrestrial television, those channels must also be offered to other digital terrestrial television operators.

Ofcom also found that Sky is restricting the distribution of premium movies and that there is ineffective exploitation of subscription video-on-demand movie rights. However, Ofcom cannot deal with this fully using its own competition powers (which relate primarily to linear channels) and thus the regulator proposes to refer the issue under the Enterprise Act 2002 to the Competition Commission, the main UK competition authority.

Finally, Ofcom will require Sky to offer wholesale high-definition versions of Sky Sports 1 and 2; to help promote future innovation the regulator has not set wholesale prices for them but requires them to be offered on fair, reasonable and non-discriminatory terms.

Although this is the end of a lengthy and detailed inquiry, resulting in a decision of over 650 pages, it is not the end of the story, as Sky is vigorously opposed to the outcome (as are the major owners of sports rights) and intends to appeal against the decision to the Competition Appeal Tribunal and to challenge the process by which it was reached by judicial review. A general election is also imminent and the opposition Conservative Party is pledged to reducing the powers of Ofcom.

• Ofcom, 'Delivering consumer benefits in Pay TV', Press Release, 31 October 2010

<http://merlin.obs.coe.int/redirect.php?id=12381>

EN

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New Industry Co-Regulator

The Association for Television On-Demand (ATVOD) is now been formally "designated" as the co-regulator for UK Video on Demand (VOD) services. Formerly, it was an industry association. ATVOD has been restructured, "to ensure independence from the industry's commercial interests and to make sure that protection of the public is its top priority." It will have a board comprising five independent members and four industry members, from BSkyB, BT, Virgin Media and Five, to provide a "general industry perspective".

Regulation of these services is a requirement of the EU's Audiovisual Media Services Directive and covers all VOD services which are "TV-like", namely, services which make programmes available for members of the public to view at a time of their choice (i.e., the form and content is comparable to that of television programmes). Not, therefore, within ATVOD's jurisdiction would be electronic versions of newspapers; private websites and un-moderated user-generated material (hosted on, e.g., YouTube).

The legal basis for regulating such services is contained in the Audiovisual Media Services Regulations (2009), which entered into force on 19 December 2009. A VOD service subject to regulation is called an 'on-demand programme service' in the Regulations and defined in section 368A of the Communications Act 2003 (as amended) (see paragraph 2 of the Regulations). The statutory provisions affecting on-demand programme services are set out in new sections 368A-368R inclusive of the Communications Act 2003.

Advertising included in those services will be regulated by the Advertising Standards Authority.

Ofcom remains the overall regulator, meaning that Ofcom retains "back-stop powers to intervene if the new co-regulatory system does not work effectively"

and "the power to impose sanctions against service providers."

Examples of such services are BBC iPlayer, 4OD, ITV Player, SkyPlayer and Demand Five, available through Virgin Media, Sky and BT Vision and over the internet. However, content on BBC iPlayer will not be regulated by ATVOD, but will fall within the prevailing BBC content regulation arrangements, i.e., will continue to be regulated by the BBC Trust and Ofcom.

ATVOD must ensure that services conform to certain (i) programming standards (e.g., must not contain any incitement to hatred based on race, sex, religion or nationality; must not provide material which might seriously impair the physical, mental, or moral development of minors, unless it is made available in such a way that ensures that minors will not normally hear or see such content; and sponsored programmes and services must comply with applicable sponsorship requirements) and (ii) advertising standards (e.g., advertising must be readily recognisable and cannot contain any surreptitious advertising or use subliminal advertising techniques; advertising must not encourage behaviour that is prejudicial to the health or safety of people; and tobacco products, prescription-only medicines or medical treatments cannot be advertised).

Further obligations on VODs are also imposed in virtue of the 2010 Regulations: a requirement on all providers to notify the regulator within a specified period if they are providing a VOD service; a requirement for those providers to pay a notification fee (the level has not yet been announced); and a requirement for those providers to retain a recording of content for 42 days from the date it was last made available to users of the service. Failure to comply may lead to enforcement action, including fines and, ultimately, a criminal prosecution for providing an illegal service

• Ofcom, "Designation Pursuant to Section 368B of the Communications Act 2003 of Functions to the Association for Television On-Demand in Relation to the Regulation of On-Demand Programme Services"

<http://merlin.obs.coe.int/redirect.php?id=12378>

EN

• Ofcom, "Information for Providers of Video on Demand ('VOD') Services Regulation of VOD Services", 12 February 2010

<http://merlin.obs.coe.int/redirect.php?id=12379>

EN

• Ofcom, "Update on Regulation of TV-Like Video on Demand Services"

<http://merlin.obs.coe.int/redirect.php?id=12380>

EN

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Court Decision on the Czech Broadcasting Act

A Czech operator of an electronic services network applied for a broadcasting license. The Czech Broadcasting Council refused his petition with reference to Article 17 paragraph 4 of the Czech Broadcasting Act which states the following:

“Licences for radio or television broadcasting disseminated solely by digital transmitters or registrations to operate retransmissions disseminated only digitally [Section 2 paragraph 1, point g), Section 26 and subsequent] may not be awarded to entrepreneurs who provide electronic communications networks (hereafter only “electronic communications network entrepreneurs”) or to groups of electronic communications network entrepreneurs or persons who are financially or personally connected to such entrepreneurs”.

The operator filed a complaint with the Prague Municipal Court against the decision of the Broadcasting Council. The plaintiff alleged a conflict of the above provision with Community Law. The Municipal Court discontinued the procedure and proposed to the Czech Constitutional Court that it should cancel Article 17 paragraph 4 as not being in harmony with Community Law.

The Constitutional Court refused to cancel the provision of the Broadcasting Law and referred to the resolution of the Constitutional Court No. Pl. ÚS 19/04 of 21 February 2006 which states:

“Since 1 May 2004 every public authority is obliged to apply Community Law in preference to Czech law, if the Czech law is in conflict with Community law.”

The application of this principle in practice has the effect of an obligation to keep a national standard, which is inconsistent with a Community standard unapplied. This also applies to the administrative authority in regard to its conclusions.

The Prague Municipal Court then annulled the original decision of the Broadcasting Council. The Court stated that the consequence of an ex-ante regulation is the strictest penalty on stakeholders, i.e., the absolute prohibition of a business in a particular area only on the assumption that it could lead to distortion of competition. This would result in the use of excessive means to attain a given objective. The prohibition is applied outright without qualified examination which is contrary to the principle of proportionality.

The Court considered that it is a national measure which may constitute an obstacle to the exercise of

fundamental freedoms guaranteed by the EC Treaty which is not suitable for securing the attainment of the objective pursued and which goes beyond what is necessary to achieve the objective. Based on these considerations the Court concluded that the provisions of Article 17 paragraph 4 were contrary to Community Law and should not be applied.

The Ministry of Culture and the Ministry of Industry and Trade understood the difficulties of this provision with respect to its compatibility with Community Law and proposed the deletion of the provision in Article 17 paragraph 4 of the Broadcasting Act. The Government approved the proposals and forwarded those to Parliament for further consideration.

• No. 5 Ca 168/2007, 17/02/2010 (Decision of the Prague Municipal Court of 17 February 2010, No. 5 Ca 168/2007)

CS

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MT-Malta

Broadcasting Authority Consultation Document on the Eligibility Criteria for General Interest Objective Stations

On 23 March 2010, the Broadcasting Authority launched a consultation on the eligibility criteria for the classification of broadcasters that fulfil general interest objectives.

The Broadcasting Authority is playing a key role in the digital switch-over. Among its responsibilities the Authority has been charged with the selection process of the stations that will become General Interest Objective (GIO) Channels and will be carried on the digital multiplex platform to be operated by the public service broadcaster.

The purpose of the consultation document is to consult on the eligibility criteria that the Broadcasting Authority proposes to establish for the selection of broadcasters that are deemed to fulfil general interest objectives and whose content would be entitled to carriage on the proposed GIO network on a free-to-air basis.

The Broadcasting Authority has set out the mandatory criteria for holding a general interest objective broadcasting licence. These include, inter alia, quality programming throughout schedules; reduction of repeat programmes; quality technical infrastructure; promotion of education, culture, the arts and national identity in programming; news and current affairs programming; programming for children; programming that provides access to persons with a disability; and

broadcasting content prepared by independent producers. In addition, the Consultation Document is advocating the adoption of non-mandatory criteria which comprise a comprehensive and accurate information service in the interests of a democratic and pluralistic society; promoting a healthy lifestyle; and promoting environmental awareness and education.

A two-tier selection process for general interest objectives stations is proposed. The first stage is addressed to the public service broadcaster and existing licensed analogue free-to-air broadcasters. Stage two will then be opened for existing holders of a television broadcasting licence who do not broadcast on an analogue free-to-air frequency and applicants for a new television broadcasting licence who satisfy the requirements of the Broadcasting Act for a television licence.

Reactions to the proposals being made in this Consultation Document as well as to the provisions of the Draft Multiplex Licence which are attached to the consultation document have to be submitted to the Broadcasting Authority by Friday, 23 April 2010.

• Consultation Document on the Eligibility Criteria for the Classification of Broadcasters that fulfill General Interest Objectives
<http://merlin.obs.coe.int/redirect.php?id=12376>

EN

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Amsterdam Court of Appeal Adjudicates on Regulatory Clause which Prohibits Satellite Dishes on Vacation Homes

On 29 September 2009, the *Gerechtshof Amsterdam* (Amsterdam Court of Appeal) finalised its interlocutory judgment of 24 February 2009. The court found a regulatory clause prohibiting the placement of satellite dishes on vacation homes to be unfair and unreasonable under Dutch private law. The final judgment came after a separate hearing with the parties. In that hearing, the parties were given the opportunity to give their opinions on the question of whether in this case the internet could function as a satisfactory alternative to satellite dishes.

The case involved a dispute between a company that owns and rents out holiday cottages and a cooperative association of homeowners of which the company was a member. The association requires its members to sign articles of association, one clause of which prohibited all use of satellite dishes in a recreational park

where the members' houses are located. The company in question irregularly put up satellite dishes on the houses which were usually used by foreigners. For this, the association fined the company EUR 12,552.07.

The company, i.e., the appellant before the Amsterdam Court of Appeal, claimed that the application of the prohibition was unfair and unreasonable in the sense of Article 2:8 of the Dutch Civil Code, while also invoking Article 10 of the European Convention of Human Rights (ECHR).

In contrast to the court of first instance, the Amsterdam Court of Appeal opined in its interlocutory judgment that the company could rely on the protection offered by Article 10 ECHR. This protection weighs in on the evaluation of the interests involved in this case, which is based on Article 2:8 of the Dutch Civil Code. This statutory provision of Dutch private law contains an open norm demanding regulatory measures as issued by the association to be fair and reasonable.

According to the Amsterdam Court of Appeal, the interests of the association do not outweigh the interests of the company and the occupants of the houses. The right to receive information as protected by Article 10 ECHR was especially decisive. The court therefore referred explicitly to the judgment of the European Court of Human Rights in the case of *Khurshid Mustafa and Tarzibachi v. Sweden* (see IRIS 2009-4: 2/1).

The prohibition in the rules of the association stated that its main purpose was to maintain the harmony of the landscape in the recreational park. In this case, it was clear that the satellite dishes could hardly be seen while mounted. The further interest of the association in applying the prohibition in order to avoid future discussions with other members on the permissibility of satellite dishes was not significant enough, according to the court, to justify an interference with the right of the company and third parties occupying the houses to receive information.

The court set aside the claim of the association that sufficient alternatives to the use of satellite dishes to receive information that could be found on television through cable, radio, newspapers or the internet.

• LJN: BH6413, *Gerechtshof Amsterdam*, 104.004.334 (Interlocutory Judgment of the Amsterdam Court of Appeal, 24 February 2009, LJN: BH6413, 104.004.334)

NL

• LJN: BL6547, *Gerechtshof Amsterdam*, 104.004.334 (Judgment of the Amsterdam Court of Appeal, 29 September 2009, LJN: BL6547, 104.004.334)

NL

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OPTA Publishes Final Tariffs

The *Onafhankelijke Post en Telecommunicatie Autoriteit* (Independent Post and Telecommunications Authority - OPTA) has published its final rules and tariffs for Holland's two largest cable operators, UPC and Ziggo. Already on 22 December 2009, the European Commission stated that it had no comments on the draft version of the decision by OPTA (see IRIS 2010-2: 1/3). Now OPTA has published a slightly amended version of its decision.

Last year, Holland's four largest cable operators were labeled as having significant market power by OPTA. However, OPTA imposed a 'Wholesale Line Rental - Cable' obligation on only two of these: Ziggo and UPC. By obliging cable operators to sell their products to alternative providers at a fixed (low) rate, alternative providers will be able to resell them and so improve their digital offers, provide analogue transmission over the cable platform and sell packages (internet, telephony and television) to their customers.

The prices were set by the draft decision at EUR 8.84 for services purchased from UPC and at EUR 8.46 for services purchased from Ziggo per month per subscriber (before tax), while only the inflation rate could be taken into account when deciding upon price increases. In the final decision this rate is one cent lower. Another change has been made regarding the periods in which the two operators are obliged to make their networks available. Regarding making the networks available to third party sellers for subscribers that only require the analogue TV product from the cable companies, the original proposal suggested a term of 8 weeks, while, following complaints, this has been changed to 12 weeks. Also, with regard to cable customers who want to buy dual or triple play, an extension in terms has been made from 28 to 35 weeks. Newcomers in the market have to pay a fee of EUR 30,000 to the operator to launch their services.

In its decision OPTA did not regulate the responsibility for the payment of copyrighted content. This gap resulted in a complaint, made by newcomers Tele2 Nederland B.V. and Online Breedband B.V. against UPC and Ziggo. The request regarded the obligation of 'third party billing' by UPC and Ziggo, who were both hesitant. Tele2/Online wanted to have the possibility of reselling analogue-cable offers on behalf of UPC/Ziggo, which would give them the advantage of not having to make a contract with every single programme provider. However, this could be a form of copyright infringement, as it is forbidden to publish copyrighted content without the express consent of the author. One of the largest TV-providers, CLT, for example, has prohibited UPC and Ziggo from distributing wholesale TV-signals to other providers. OPTA has said that a judge has to decide upon the problem. Crit-

ics say that it could take years before there is final clarity on this topic.

Finally, both newcomers and UPC and Ziggo have made a complaint to the Dutch trade court *College van Beroep voor het Bedrijfsleven* (Court of appeal for Businesses - CBB) on the earlier published market analysis by the OPTA, upon which these regulations are based.

- Besluit inzake geschil Tele2/Online - Ziggo (Decision in the case of Tele2/Online - Ziggo)
<http://merlin.obs.coe.int/redirect.php?id=12383> NL
- Besluit inzake geschil Tele2/Online - UPC (Decision in the case of Tele2/Online - UPC)
<http://merlin.obs.coe.int/redirect.php?id=12384> NL
- Implementatiebesluit WLR-C (Ziggo) (Implementation Decision WLR-C (Ziggo))
<http://merlin.obs.coe.int/redirect.php?id=12385> NL
- Implementatiebesluit WLR-C (UPC) (Implementation Decision WLR-C (UPC))
<http://merlin.obs.coe.int/redirect.php?id=12386> NL
- Tariefbesluit WLR-C (UPC en Ziggo) (Tariff Decision WLR-C (UPC and Ziggo))
<http://merlin.obs.coe.int/redirect.php?id=12387> NL
- Openbare zienswijzen op de implementatiebesluiten WLR-C (Public views on the implementation Decision WLR-C)
<http://merlin.obs.coe.int/redirect.php?id=12388> NL
- Reactie Europese Commissie op de implementatiebesluiten WLR-C (UPC en Ziggo) (Reaction of the European Commission to the implementation decision WLR-C (UPC and Ziggo))
<http://merlin.obs.coe.int/redirect.php?id=12389> NL

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PL-Poland

Digital Terrestrial Television in Poland - New Developments

At the beginning of 2010 the Ministry of Infrastructure conducted public consultations on the Draft Act on launching digital terrestrial television (DVB-T), in which major industry stakeholders took part. After the results of the consultations had been published, the Draft was to be sent for intergovernmental consultations in March 2010.

The aim of the Draft Act is to facilitate the complex process of launching DVB-T by providing for a legal framework. The emphasis has been put on the first phase of this process, within which all present analogue terrestrial TV broadcasters would start digital terrestrial transmissions. The Draft Act establishes the date of the switch-off of analogue TV, the procedure of choosing the transmission networks' operator that would provide services for the DVB-T multiplex operator, the duties of the DVB-T multiplex operator,

the duties of TV broadcasters referring to an information campaign on the switchover to digital terrestrial television.

The Draft Act takes into account former developments in this field. On 30 September 2009 the Office of Electronic Communications issued a decision on frequency reservations for the five broadcasting companies (Telewizja Polska SA, Telewizja Polsat SA, TVN SA, Polskie Media SA and Telewizja Puls Sp. z o.o) granting them the right to co-use the frequencies in the first digital terrestrial multiplex (making them in fact together an operator of MUX 1). The aim was to reflect the current analogue terrestrial TV offer, having nation-wide or cross-regional character at the digital multiplex and to establish clear conditions when analogue frequencies might be freed. The time limit for co-using these frequencies has been established differently for public and commercial broadcasters: Telewizja Polska has gained the right to co-use the frequencies in MUX 1 until 31 July 2013 (the end of the transition period). It was agreed that after that date Telewizja Polska would broadcast its TV programme services on its own multiplex (MUX 3). The commercial broadcasters have been granted the right to co-use the frequencies of MUX 1 until 29 September 2024.

The above-mentioned decision was possible, because on 31 July 2009 the Chairman of the National Broadcasting Council signed a decision amending the licenses for terrestrial broadcasting of TV programmes; broadening the scope of existing analogue terrestrial TV licenses by providing for the possibility of broadcasting also on MUX 1 (on the new additional frequencies), while simulcasting by analogue means would be also possible for some time. The four commercial terrestrial TV programme services (nation-wide and cross-regional using no fewer than seven transmitting stations) are broadcast on the basis of amended licenses, while the three public TV programme services are broadcast directly under the provisions of the Broadcasting Act and do not require a licence.

The Draft Act announces that the switch-off of the analogue TV signal should take place until 31 July 2013. Broadcasters have been obliged in the Draft to cover by digital transmission 95% of the area indicated in the aforementioned frequency reservation decision. The Draft provides detailed obligations of the MUX 1 operator, the procedure of choosing a network provider in 3 different options. A special chapter of the Draft has been devoted to the information campaign on DVB-T. Broadcasters that obtained a frequency reservation for MUX 1 would be obliged to broadcast until 31 July 2013 information on the transition to the DVB-T standard within their own programme services. The Draft also provides technical requirements for TV-sets to be sold after 1 April 2010. Moreover, it provides numerous amendments to the Telecommunication Law of 16 July 2004. These changes establish new rules on the equal, non-discriminatory, clear and transparent rules on access

to multiplex, multiplex operator duties in this respect, the minimum requirements of agreement on the access to multiplex (between multiplex operator and broadcasters). The Draft also provides amendments to the Broadcasting Act of 29 December 1992 (referring to the licensing process).

The preparations to launch MUX 1 faced some troubles, notably because of difficulties with the appropriate procedure of choosing the network operator; while commercial broadcasters have already agreed on one, the public broadcaster can do so only after completing a tender procedure as envisaged in the Public Procurement Law. In order to find a workable solution to this problem, broadcasters recently expressed a view that public and commercial broadcasters should be placed on separate multiplexes (MUX 1 and 3 for public broadcasters, MUX 2 for commercial ones). Broadcasters said they were considering proposing appropriate motions to the regulatory authorities.

A great number of households in Poland already have access to digital TV offers, through digital satellite and cable TV platforms, and the amount of households with access to such digital platforms is growing. Still, the digital switchover of terrestrial TV is considered important.

- Projekt ustawy o wdrożeniu naziemnej telewizji cyfrowej DVB-T (Draft Act on launching digital terrestrial television (DVB-T))
<http://merlin.obs.coe.int/redirect.php?id=12364> PL
- Rozpoczęcie cyfryzacji telewizji naziemnej w Polsce (Launching of digitisation of terrestrial television in Poland)
<http://merlin.obs.coe.int/redirect.php?id=12418> PL
- Plan wdrażania telewizji cyfrowej w Polsce (Plan to implement digital television in Poland)
<http://merlin.obs.coe.int/redirect.php?id=12366> PL
- Ogłoszenie Przewodniczącego KRRiT z dnia 3 lutego 2009 r. o możliwości uzyskania koncesji na rozpowszechnianie programu telewizyjnego (Announcement of the President of the National Broadcasting Council of 3 February 2009 on the possibility to obtain licence to television broadcast.)
<http://merlin.obs.coe.int/redirect.php?id=12367> PL

Małgorzata Pęk

National Broadcasting Council of Poland

RO-Romania

New Rules on Consumer Information Adopted by ANPC

Public Order No. 72/2010 issued by the Head of the *Autoritatea Națională pentru Protecția Consumatorilor* (National Consumer Protection Authority - ANPC) and published on 15 March 2010 in the *Monitorul Oficial al României* (Romanian Official Gazette) contains a number of measures aimed at improving consumer information. The new rules came into force 30 days after their publication.

The new provisions include a rule that administrators of websites on which goods are offered, online orders are taken and/or advertising is accepted for certain products and/or services - such as e-commerce articles, tourist services or airline tickets - are obliged to insert a direct link from their home page (first page) to the ANPC's website (www.anpc.gov.ro) together with the text *PROTECTIA CONSUMATORILOR - ANPC* (Consumer Protection - ANPC). The provision of telephone numbers (whether free or not) for contacting the consumer advice agencies is not a substitute for the obligation to provide the required link.

According to *Hotărârea de Guvern nr. 284/2009 privind organizarea și funcționarea Autorității Naționale pentru Protecția Consumatorilor* (Government Decision No. 284/2009 on the organisation and operation of the Consumer Protection Authority), the ANPC is a specialist central government body with legal personality (section 1(1)).

The Consumer Protection Authority co-ordinates and carries out the government's consumer protection strategy and policy, takes preventive action and combats practices that may have a harmful effect on the lives, health and economic interests of consumers (section 2(1)).

- Autoritatea Națională pentru Protecția Consumatorilor, 72/2010, Monitorul Oficial al României, 15 March 2010 (Public Order No. 72/2010 issued by the Head of the National Consumer Protection Authority (ANPC) and published on 15 March 2010 in the Romanian Official Gazette) RO

- ANPC modifica reglementarile privind informarea consumatorilor (ANPC press release of 15 March 2010) RO

<http://merlin.obs.coe.int/redirect.php?id=12426>

- Hotărârea de Guvern nr. 284/2009 privind organizarea și funcționarea Autorității Naționale pentru Protecția Consumatorilor (Government Decision No. 284/2009 on the organisation and operation of the Consumer Protection Authority) RO

<http://merlin.obs.coe.int/redirect.php?id=12412>

Mariana Stoican
Journalist, Bucharest

New Board of Administration for the National Cinematography Centre

As announced by the Ministry of Culture and National Patrimony on 23 March 2010 the Minister has appointed the seven members of the Board of Administration of the *Centrul Național al Cinematografiei* (National Cinematography Centre - CNC). The mandate of the new Board is for two years.

The members are: the general director of CNC, a representative of the Ministry of Culture and National Patrimony, a representative of the Union of Authors and Filmmakers of Romania, a representative of the Cineasts Union of Romania, a representative of the Union of Film Producers, a representative of the

Cineasts Association of Romania and a representative of the Association of Romanian Film Promotion.

The professional cinematography associations did not succeed in designating the requisite five members themselves and proposed a list of 19 persons to the Ministry of Culture and National Patrimony. The Minister then took the decision to appoint the five members of the CNC's Board of Administration representing the filmmakers' associations himself on the basis of the proposals he received.

Every year the CNC organises contests for subsidies for film projects (see IRIS 2010-2: 1). Filmmakers, especially directors of the new generation, criticise the way the members of the juries mark the projects at their own will without being obliged to give reasons for their decisions.

- Ministrul Culturii a numit Consiliul de Administrație al Centrului Național al Cinematografiei (The Minister of Culture appointed the Board of Administration of the Centrul Național al Cinematografiei)

<http://merlin.obs.coe.int/redirect.php?id=12368>

RO

Eugen Cojocariu
Radio Romania International

RS-Serbia

Changes in the Application of TV Advertising and Sponsorship Rules

The Council of the Serbian Broadcasting Agency (SBA) has, in late 2009, announced that, starting from 1 January 2010, it shall establish permanent monitoring of TV programmes in order to determine the breaches of the provisions of the 2005 Law on Advertising that refer to TV advertising and sponsoring and to apply this statute rigorously.

On 5 March 2010 the SBA published the results of its monitoring carried out in January and February 2010, finding that all monitored broadcasters breached the law more than once. As a result, it has filed a misdemeanour report with the competent Misdemeanour Court against all six TV stations that have national coverage licenses, requesting that they should be fined in line with the law.

Judging from the statement given by SBA Council Vice-chairperson the most common breaches of advertising regulations refer to the duration of advertising slots and a lack of observance of the proper duration of the period between such breaks, as well as the failure to audio-visually separate commercial breaks from other content and the failure to abide by the regulations pertaining to teleshopping programmes. The SBA announced that, this time, it shall treat all breaches it found as one misdemeanour on the part

of each respective broadcaster, so it filed one report against each of the six broadcasters. In future, however, each breach shall be followed by a report to the Misdemeanour Court, so that the broadcasters are encouraged to strictly apply the statutory rules.

It is worth mentioning that the SBA analysis did not include some highly disputed practices, such as product placement and so-called "chyrons" (also called "crawls" or "tickers" which in fact are advertising in a form of text and/or graphic that appear to move over the screen while some other content is being shown). This was omitted due to the fact that their legality under the current Law on Advertising was disputed and not quite clear, as the SBA explained. However, following a legal opinion the SBA requested and received from the Ministry of Trade and Services which found that the "chyrons" are indeed forbidden under the current legislation, the SBA recently announced it shall not tolerate such practices from 15 March 2010 onwards.

Last, but not least, in order for the national legislation to keep up with recent European legislative developments in this field, a working group of the Ministry of Trade and Services is preparing new legislation on advertising which is supposed to be more precise than the current law.

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SE-Sweden

Proposal for a New Swedish Radio and Television Act

On 18 March 2010 the Swedish government presented a bill for inter alia a new Radio- och TV-lagen (Radio and Television Act - RTL). The new RTL is intended to implement the Audiovisual Media Services Directive 2007/65/EC, which amended Directive 89/552/ECC. The new RTL is proposed to enter into force on 1 August 2010.

The bill includes among others the following:

Under the new RTL it will be easier for broadcasters to place sponsoring messages and advertisements during TV programmes. For instance, the general rule that advertisements should be placed between programmes has been abolished. However, placements must still be made with due consideration for the programmes' character and length, so that the integrity or rights of rightsholders are not violated; advertisements cannot not exceed an hourly limit of 12 minutes.

Furthermore, the new RTL includes regulation of new techniques for advertising. For example, virtual advertising and split screen advertisements will be allowed in certain circumstances.

The bill also introduces the specific regulation of product placement. As a general rule, product placement will be prohibited. But, product placement may be permitted in films, TV series, sports programmes and in light entertainment programmes, provided that the programme in question does not improperly favour commercial interests. If such programmes contain product placement, then viewers must be informed accordingly at the beginning and the end of the programme, as well as in connection with breaks in the programme. Product placement will, however, always be prohibited in programmes which are primarily directed towards children under 12 years of age. In addition, certain products, e.g., alcoholic beverages, tobacco products and pharmaceuticals sold on prescription will be forbidden for use in product placement.

A system for distribution of permits for digital radio is also introduced by the bill. In this way, the government intends to create opportunities for a market-driven development of digital radio broadcasts.

Besides the proposal for a new RTL, the bill also suggests amendments to the Swedish Act on the Protection of Artistic and Literary Works. This means increased possibilities for broadcasting companies established within the EEA to use otherwise protected broadcasts concerning events of major interest to the general public.

Finally, from the bill it also follows that the two current authorities in the field - *Granskningsnämnden för Radio och TV* (the Swedish Broadcasting Commission) and *Radio- och TV-verket* (the Swedish Radio and TV Authority) - will be merged to form a new joint Swedish Authority for Radio and TV.

At the moment of writing, the bill had not yet been passed by Parliament. However, seeing as the current Government holds the majority, it may be safely assumed that the new RTL will be adopted in accordance with the bill within the near future.

• Regeringens proposition 2009/10:115 - En ny radio och tv-lag (Government bill 2009/10:115 - A New Radio and TV Act)
<http://merlin.obs.coe.int/redirect.php?id=12390>

SI-Slovenia

Supporting the Environment for Film Productions

At the end of January 2010 the *Zakon o Slovenskem filmskem centru* (Act on Slovenian Film Centre), which might be the first step towards prosperity for the Slovenian film industry, was proposed. The public debate on this ended on 4 March 2010.

The film sector is one of the pillars of cultural diversity. Its strength lies in its ability to cross borders and travel around the globe at a reasonable cost. Film production is the financially most intensive segment of the film industry. The toughest part of the producers' job is fundraising and it takes a long time for producers to cover the costs of the investments and to receive the profits.

Producers have to find distributors to place their product on the market through broadcasters. In Slovenia the broadcasters' share varies between 40-60% of the total income on sales before taxes. The distributors take 15-40% from the rest. The remainder goes to the producer who has to pay royalties to authors, taxes and investors.

To stimulate the film production the *Filmski sklad Slovenije* (Slovenian Film Fund - FS) rewards producers with 10% of its income for 10,000 - 20,000 spectators, 15% for up to 30,000, 20% for up to 40,000, 25% for up to 50,000 and 30% above 50,000 spectators. But the producer has to invest the reward in his next production co-financed by FS. Since the Slovenian market is rather small the most viewed film had around 500,000 spectators in film theatres. The average box office for Slovenian films is about 10,000 spectators. There is a need to create a supportive environment for film production since the industry is limited to the internal market of the Slovenian-speaking population. Most important is a support for producers to enter the European market where there is still lack of Slovenian audiovisual content.

It is typical in Slovenia that producers are organised for projects. They engage companies and freelance workers to carry out the project. The weak point in such a model is the lack of production infrastructure, poor business and marketing strategies, long-term growth and development as well as poor education and vocational training.

Crucial for the audiovisual industry are independent producers who work in a competitive market. The State institutions should assure a stable source of finance and mechanisms that enhance business abilities and knowledge, open foreign markets, assuring

respective social status for human resources and supporting social dialogue in the sector.

The Draft Act introduces State aid in the form of a subsidy instead of investments so the revenue goes to the producer to strengthen his capital in order to be able to invest in future projects. The model stimulates producers to engage in the market and control the distribution of the product.

• Osnutek Zakona o Slovenskem filmskem centru (Draft Act on Slovenian Film Centre)

<http://merlin.obs.coe.int/redirect.php?id=12370>

SL

Denis Miklavcic

Union Conference of Freelance Workers in Culture and Media (SUKI)

Steps Toward Easing Freelancers' Life

In April 2009 the Slovenian *Ministrstvo za kulturo* (Ministry of Culture) set up a project group to solve the problems of the self-employed in the cultural sector. The group consists of representatives of the Ministry of Culture, *Ministrstvo za delo, družino in socialne zadeve* (Ministries of Finance, Labour, Family and Social Affairs), NGOs such as *Asociacija, Odprta zbornica, Artservis* and the *Sindikalna konferenca samostojnih ustvarjalcev na področju kulture in informiranja* (Union Conference of Freelance Workers in Culture and Media - SUKI).

The first achievement of the project group is the *Uredba o samozaposlenih na področju kulture* (Draft Decree on the self-employed in the cultural sector, prepared by the Ministry of Culture and revised by the project group who suggested some changes) that was proposed in January 2010. It sets up some special conditions for the first registration of a person after having completed the relevant education. The aim is to stimulate interest for special professions that are lacking in the cultural sector. The conditions on proper education/qualification are not checked again in case of a subsequent registration for the same profession.

Self-employed artists who have the right to a subsidy for social security contributions now have the possibility to calculate an average of their three-year income. In practice there was a problem to match these criteria on the annual income as it varies, especially in case of long-term projects, or awards that raise the artists' income unexpectedly.

Senior self-employed artists now do not have to prove their right to a subsidy for social security contributions if they are above 50 years old, and it is 6 years before the fulfilment of the minimum conditions for retirement.

The procedure of registration of self-employed persons and the decision on their right to a subsidy for

social security contributions are now merged. That means a considerably shorter procedural time, and helps save money for the self-employed who until now had to cover social protection contributions themselves during the procedure.

The project group is now focused on mid-term aims that should be achieved by the end of the year. There are open questions about the costs of being self-employed, calculating the yearly income, the right to sick leave, the payment of kindergarten costs, and some other matters.

The long term aims concern dealing with the legal status of self-employed artists/persons in the cultural sector that is now in the grey area between civil, labour and business legislation.

In Slovenia there are about 8,738 persons working in the film, audiovisual and art sector, 2,800 of those are freelance. So there are a considerable number of workers in the sector who are affected by the Decree.

• Uredba o samozaposlenih na področju kulture (Draft Decree on self-employed in the cultural sector)

<http://merlin.obs.coe.int/redirect.php?id=12369>

SL

Denis Miklavcic

Union Conference of Freelance Workers in Culture and Media (SUKI)

SK-Slovakia

Amendment of the Act on Broadcasting and Retransmission

On 15 December 2009 the latest amendment (No. 498/2009 Coll.) of the Act No. 308/2000 Coll. on Broadcasting and Retransmission (hereinafter referred to as “the Act”) came into effect. This amendment transposes the Directive 2007/65/EC (hereinafter referred to as “the Directive”) into the Slovak legal system.

Several important changes have been brought about by this transposition. The scope of regulation of the Act has become broader according to the Directive criteria. The present legal regulation is based on technological neutrality and covers audiovisual media services regardless of the technology used for transmission which includes the Internet.

According to the amended Act, the Council for Broadcasting and Retransmission (hereinafter referred to as “the Council”) regulates television broadcasting (including broadcasting exclusively through the internet) and on-demand audiovisual media services independently from the technology used. Since the Directive

does not concern radio broadcasting this area has remained unchanged. This means that a radio service transmitted wholly through the internet is not “broadcasting” according to the Act and therefore not covered.

The amendment has introduced the definition of new terms, especially the on-demand audiovisual media service (hereinafter referred to as “on-demand service”). An on-demand service is defined in section 3(b) as a “service of primarily economic character for viewing of programmes at the moment chosen by the user and at his individual request provided through electronic communications on the basis of a catalogue of programmes selected by the service provider the principal purpose of which is the provision of programmes in order to inform, entertain or educate the general public; the provision of audio recordings is not an on-demand audiovisual media service”.

In line with the Directive, providers of television broadcasting exclusively through the internet and providers of on-demand services do not need a license. For the purposes of an effective monitoring of these services a mere notification is required. The mentioned providers have to communicate to the Council the obligatory information not later than on the day of the commencement of broadcasting. The information serves not only for the purposes of regulation but also for determining whether the provider is subject to the jurisdiction of the Slovak Republic. The Council informs the provider in case his services are not governed by the Act.

The duties of broadcasters have been extended to on-demand service providers. The former obligation to enter a contract with an organization for collective rights management has been deleted since it concerns a relation governed exclusively by private law and thus does not need to be regulated. The period of time for which the broadcaster has to archive the recordings has been extended to 45 days.

The general ban on pornography does not apply to on-demand services. Therefore, a new specific prohibition against showing child pornography and pornography containing pathological sexual practices has been adopted. Moreover, with respect to the absence of a general ban on pornography a new requirement has been introduced according to which the on-demand service which might seriously impair the physical, mental or moral development of minors is only made available in such a way that ensures that minors will not normally hear or see such on-demand service.

In compliance with the Directive the term “media commercial communication” is established which includes advertising, teleshopping, sponsorship, product placement, television channels exclusively devoted to advertising and teleshopping as well as television channels exclusively devoted to self-promotion. Every duty regarding the media commercial communication applies to its every component. Some of the restrictions which were applicable to only one part of

it (e.g. surreptitious advertising) are now extended to the entire media commercial communication.

With respect to the Directive some rules regarding television advertising of specific content have been altered. A significant change involves the advertising of alcoholic beverages. The new provision (section 33 of the Act) allows advertising of beer throughout the day, wine only between 8 p.m. and 6 a.m. and other alcoholic beverages between 10 p.m. and 6 a.m. This provision together with the regulation of political and religious advertising is not applicable to broadcasters of television services exclusively through the Internet. A novelty is also that advertising may be separated from other types of broadcast also through a split-screen technique (in addition to the audiovisual means of separation).

The amendment introduces the concept of product placement defined as "audio, visual or audiovisual information on a product, service or trademark that is featured within a programme, in return for payment or for similar consideration". Product placement is only allowed under the conditions defined in the Act. There is an explicit prohibition of product placement in programmes intended for minors under 12 years of age. However, these restrictions only apply to programmes created after 19 December 2009.

According to the amended Act the providers of retransmission do not have to notify the Council of the changes in the composition of television programmes and radio services in 15 days but only once a year until January 31 with respect to the previous year. However, the provider of retransmission has to report the actual status on request of the Council.

• Zákon č. 498/2009 Z. z., ktorým sa mení a dopĺňa zákon č. 308/2000 Z. z. o vysielaní a retransmisii a o zmene zákona č. 195/2000 Z. z. o telekomunikáciách v znení neskorších predpisov a o zmene a doplnení niektorých zákonov (Amendment No. 498/2009 Coll. of the Act No. 308/2000 Coll. on Broadcasting and Retransmission of 15 December 2009)

<http://merlin.obs.coe.int/redirect.php?id=12425>

SK

• Zákon č. 308 zo 14. septembra 2000 o vysielaní a retransmisii a o zmene zákona č. 195/2000 Z. z. o telekomunikáciách (Consolidated version of the Act No. 308/2000 Coll. on Broadcasting and Retransmission)

<http://merlin.obs.coe.int/redirect.php?id=12396>

SK

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Concept of Media Education

On 16 December 2009 the Government adopted the "Concept of Media Education in the Slovak Republic in the Context of Lifelong Learning" (hereinafter referred to as "Concept"). This Concept has been elaborated according to the Government Programme.

The requirement to create conditions for the realisation of media education results from various EU

documents that underline the importance of information technology. According to Council Directive 89/552/EEC (transposed into Slovak law by Act No. 498/2009 Coll., see IRIS 2009-9: 18) the member states are obliged to submit to the European Commission a report on the state of media literacy every three years.

To elaborate on the concept the Ministry of Culture created a working group in February 2009 members of which were also representatives of schools, churches, NGOs and other professionals. The Concept examines the present state of education in this area and defines the objectives, strategy and conditions for an effective system of media education in the context of lifelong learning. One of the main goals of media education is to teach every age group a responsible attitude towards media content, educate the public to use new communication technologies and protect minors against illegal and inappropriate content.

At present there is no link between the activities in media literacy and the formal and informal education. The Concept therefore suggests the creation of a Centre for Media Education from 1 January 2011 that shall be incorporated into the structures of the Ministry of Culture. The Centre is going to co-ordinate activities in the field of media education, carry out research, make suggestions on different projects within the system and co-operate with other relevant subjects.

The Concept points out, in line with the Resolution of the European Parliament 2008/2129(INI), that media literacy should provide information about the issues of copyright, respect for intellectual property and ensure the security of data and protection of privacy. A literate user of media should be provided with information about risks regarding the protection of personal data and the danger of spreading violence over the Internet.

The system of media education should be divided into four basic levels according to age groups: media education for children of pre-school age, children at primary school, high-school children and adults. The first three levels should be oriented on forming a critical and selective approach towards media content and create basic knowledge from the field of media and communication technologies. Media education of adults should try to update the acquired knowledge. Lifelong learning can provide individuals with the necessary competence to re-enter professional circles.

Pursuant to the Concept, the precondition for achieving the goals of media education is the creation of a system with sufficient personal, material and technical resources. According to the experience of other European countries where media literacy has an established tradition, the system of media education is based on several pillars. These are mainly:

- the incorporation of media education into school curricula,

- a system of evaluation of media literacy,
- the existence of a stable public institution which coordinates these issues,
- the participation of media in these activities and programmes,
- motivation and assistance programmes focused on media made by individuals,
- the existence of research.

A fundamental precondition for the functioning of the media education system is the designation of a co-ordination authority and the division of competence among the individual participating subjects. A strong position should be given to non-governmental entities.

In the area of public service, the competence is going to be divided between the Ministry of Education and the Ministry of Culture. The Ministry of Education should regulate and be responsible for the formal education, accreditation of university programmes and the preparation of teachers. The Ministry of Culture will establish a Centre which will submit reports on the present state of media education every three years.

Other subjects that shall have responsibility in this area include universities (research), regulatory bodies (with focus on the protection of minors), the Audiovisual Fund (financial support), public media (support, promotion) and also non-governmental organisations.

The Concept states that the conditions necessary to attain the aforementioned goals are already present in the Slovak Republic.

- *Koncepcia mediálnej výchovy v Slovenskej republike v kontexte celoživotného vzdelávania (Concept of Media Education in the Slovak Republic in the Context of Lifelong Learning, December 2009)*
<http://merlin.obs.coe.int/redirect.php?id=12371>

SK

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TR-Turkey

Media Report of the Human Rights Investigation Commission

The Grand National Assembly of Turkey, Human Rights Investigation Commission, issued a report concerning its investigations into the allegation that some news reports by Turkish Media are likely to infringe upon the presumption of innocence. In the report entitled "Report on the Investigation of Alleged Violations

Committed by Turkish Media Related to the Presumption of Innocence" the Commission criticised the current appearance of the Turkish Media as well as its way of reporting news.

According to the report which begins with an analysis and evaluation chapter, the media's efforts to be the first power rather than the fourth power became a concern which is commonly declared by Turkish society. As result of those efforts, some problems have occurred such as fabricated news, violation of the right to respect for private life and the infringement of the presumption of innocence. The report explains the concepts of the liberty of the press, freedom of opinion and expression and presumption of innocence in respect of the articles of the Constitution of the Republic of Turkey, Turkish Supreme Court decisions and judgments of the European Court of Human Rights, and sums up the Commission's concerns as well as its suggestions for a solution to the identified problems. The Commission's main determinations and suggestions are the following:

- The freedom of the press is essential but it is not unlimited. It is necessary to balance it with personal rights. Therefore, while reporting news the media has to consider personal rights and especially the presumption of innocence which is protected under the Constitution and the Turkish Penal Code.
- Media and public relations departments have to be established in the courts to constitute a healthy communications mechanism between judicial authorities and media organisations.
- The articles of the relevant legal regulations which prevent the members of the judicial authorities from sharing information with the media have to be revoked.
- Media organisations should consider establishing "Judicial News Editorship" to avoid mistakes while reporting news regarding judicial issues.
- Educational programmes covering basic legal issues should be organised for the justice correspondents. Likewise, judges and prosecutors have to be educated about media and public relations during their internship period.
- Ethical principles regarding judicial news should be determined in co-operation with media organisations and the Ministry of Justice.
- The structure of the Radio and Television Supreme Council (RTÜK) should be revised to functionalize its control and organisational duty. It should be a joint control mechanism where media members, governmental authorities, political parties, NGOs and members of the public are represented.
- Legal regulations regarding Internet media have to be made immediately and it is necessary to remember that all the ethical rules related to traditional media are also valid for the Internet media.



OBSERVATOIRE EUROPÉEN DE L'AUDIOVISUEL
EUROPEAN AUDIOVISUAL OBSERVATORY
EUROPÄISCHE AUDIOVISUELLE INFORMATIONSTELLE

IRIS

Legal Observations
of the European Audiovisual Observatory

In preparing the report, the Commission asked the opinion of a group of media members and academics. The representatives of leading media organisations such as NTV, CNN Türk, Cumhuriyet and Zaman newspapers attended the consultation meeting as well as members of the Press Council, RTÜK, RATEM (Radio and Television Broadcasters' Collecting Society), Association of TV Broadcasters, Gazi University, Selçuk University and Istanbul Bilgi University.

• *MEDYADA YER ALAN BAZI HABERLERİN, MAŞUMİYET KARİNESİNİ İHLAL ETTİĞİ İDDİALARININ ARAŞTIRILMASI İLE İLGİLİ İNCELEME RAPORU* (Report on the Investigation of Alleged Violations Committed by Turkish Media Related to the Presumption of Innocence, published on 10 March 2010)

<http://merlin.obs.coe.int/redirect.php?id=12419>

TR

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OBSERVATOIRE EUROPÉEN DE L'AUDIOVISUEL
EUROPEAN AUDIOVISUAL OBSERVATORY
EUROPÄISCHE AUDIOVISUELLE INFORMATIONSTELLE

IRIS

Legal Observations
of the European Audiovisual Observatory

Agenda

Digital Cinema Tango! Getting the right rhythm for the digitisation of European cinemas

European Audiovisual Observatory's Afternoon in Cannes
Sunday 16 May 2010, 3pm – 4.30pm
Salle Buñuel (5th floor - Palais des Festivals)

Free entry to anyone with a Cannes Film Market
accreditation.
Registration required: cannes@coe.int

Book List

Droit des médias
Broché: 180 pages
Dalloz-Sirey (12 mai 2010)
Collection : DZ.PARA.UNIV.DZ

ISBN 978-2247087891
<http://www.dalloz.fr/>

Paal, Boris P.
Medienvielfalt und Wettbewerbsrecht
2010, Mohr Siebeck
ISBN 978-3161502460
[http://www.mohr.de/rechtswissenschaft/neue-buecher/buch/medienvielfalt-und-wettbewerbsrecht.html?tx_commerce_pi1\[catUid\]=0&cHash=e9a48409b6](http://www.mohr.de/rechtswissenschaft/neue-buecher/buch/medienvielfalt-und-wettbewerbsrecht.html?tx_commerce_pi1[catUid]=0&cHash=e9a48409b6)

Crown, Gilles
Advertising Law and Regulation: Media Law
2010, Tottel Publishing
ISBN 978-1845924515
<http://www.tottelpublishing.com/817/Bloomsbury-Professional-Advertising-Law-and-Regulation-2nd-Edition.html>

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