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INTERNATIONAL

COUNCIL OF EUROPE

European Court of Human Rights: **Axel Springer AG v. Germany (No. 2)**

In a judgment of 10 July 2014, the European Court found that the publication by the daily newspaper *Bild* of suspicions concerning the former German Chancellor, Gerhard Schröder, was covered by journalistic freedom. In Strasbourg, the publisher of *Bild*, Axel Springer AG, had lodged a complaint arguing that the German courts had interfered with the right to freedom of expression and critical press reporting in a way that violated Article 10 of the Convention.

An article in *Bild* had repeated a series of suspicions and doubts on the part of Mr Thiele – the deputy president of the Liberal Democratic Party's (FDP) parliamentary group – with regard to Schröder's appointment as chairman of the supervisory board of the German-Russian consortium Konsortium Nordeuropäische Gaspipeline (NEGP). Thiele had insinuated that Mr Schröder had resigned from his political functions because he had been offered a lucrative post in the consortium headed by the Russian company Gazprom. In this regard, references were made to an agreement on construction of a pipeline that was signed in April 2005, in the presence of Mr Schröder and the Russian President Vladimir Putin. Having complained to the German courts, Mr Schröder obtained an order banning further publication of the passage, which reported Mr Thiele's comments and insinuations of corruption.

The European Court sharply disagrees with the reasoning and findings of the German courts. The Court refers to the relevant criteria it has taken into consideration in earlier cases (see *Von Hannover v. Germany (No. 2)* and *Axel Springer AG v. Germany (No. 1)*, (see IRIS 2012-3/1) when dealing with the conflicting rights of freedom of expression guaranteed by Article 10 and the right to protection of one's reputation under Article 8 of the Convention as part of the right to private life.

First the Court notes that the article in *Bild* did not recount details of Mr Schröder's private life with the aim of satisfying public curiosity, but related to Mr Schröder's conduct in the exercise of his term of office as Federal Chancellor and his controversial appointment to a German-Russian gas consortium shortly after he ceased to hold office as Chancellor. Furthermore, there were sufficient facts, which could justify suspicions with regard to Mr Schröder's conduct. Such suspicions amounted to the expression of a value

judgment, without concrete allegations of Schröder having committed criminal offences. The Court also observes that Mr Thiele's questions were not the only comments to be reproduced in the *Bild* article, but supplemented a series of statements made by different political figures from various political parties.

As well as this, the Court could not subscribe to the German court's opinion that the article in *Bild* should have also contained elements in favour of the former Chancellor. The former Chancellor had a duty to show a much greater degree of tolerance than a private citizen. In the political arena, freedom of expression is of the utmost importance and the press has a vital role as public "watchdog". The punishment of a journalist for assisting in the dissemination of statements made by another person would seriously hamper the contribution of the press to discussions of matters of public interest. The Court also considers that a newspaper cannot be required to systematically verify the merits of every comment made by one politician about another, when such comments are made in the context of a current political debate. As to the severity of the measure imposed, the Court notes that although only a civil-law ban on further publication of the impugned passage in the *Bild* article had been imposed, it nonetheless considers that this prohibition could have had a chilling effect on the newspaper's freedom of expression.

The Court concludes unanimously that *Bild* has not exceeded the limits of journalistic freedom in publishing the disputed passage. The German courts have not convincingly established the existence of any pressing social need for placing the protection of Mr Schröder's reputation above the newspaper's right to freedom of expression and the general interest in promoting this freedom where issues of public interest were concerned. There had therefore been a violation of Article 10 of the Convention.

• *Arrêt de la Cour européenne des droits de l'homme (cinquième section), affaire Axel Springer AG c. Allemagne (n°2), requête n°48311/10 du 10 juillet 2014* (Judgment by the European Court of Human Rights (Fifth Section), case of Axel Springer AG v. Germany (No. 2), Appl. No. 48311/10 of 10 July 2014)

<http://merlin.obs.coe.int/redirect.php?id=17202>

FR

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EUROPEAN UNION

Court of Justice of the European Union: **Papasavvas v O Fileleftheros**

On 11 September 2014, the Court of Justice of the European Union (CJEU) handed down a judgement in

case C-291/13, *Papasavvas*. The case concerned an action for damages brought against a Cypriot newspaper for harm caused by articles published on the paper's website that were of an allegedly defamatory nature. The district court of Nicosia submitted a series of five questions to the CJEU. The answers given were as follows:

(1) Should the laws of the Member States on defamation be regarded as restrictions on the provision of information services for the purposes of applying the E-Commerce Directive (Directive 2000/31)?

Article 3(2) of the E-Commerce Directive states that "Member States may not, for reasons falling within the coordinated field, restrict the freedom to provide information society services from another Member State." Given that the services at issue in the case at hand originate in Cyprus, Article 3(2) does not apply. Accordingly, the Court found, the Directive does not preclude the application of the Cypriot rules of civil liability for defamation.

(2) If so, do the safe harbour provisions of Articles 12, 13 and 14 of the E-Commerce Directive apply to civil liability for defamation?

The Court noted that Article 2(b) of the E-Commerce Directive defines the concept of "service provider" as "any natural or legal person providing an information society service". Therefore, according to the Court, the E-Commerce safe harbours are capable of applying to civil liability for defamation, as long as the conditions listed in those provisions are satisfied.

(3) Do the safe harbours create individual rights, which may be pleaded as defences in law in a civil action for defamation, or do they operate as an obstacle in law to the bringing of such actions?

The CJEU reminded the referring court that a directive cannot of itself impose obligations on an individual and cannot therefore be relied on as such against an individual. Instead, it is the Member States that are obliged to implement the safe harbour provisions in national law. If there is no transposition into national law, the national courts are nevertheless required to interpret the law, as far as possible, so as to achieve the result pursued by the directive.

As the Court noted, the safe harbour provisions do not concern the conditions in which remedies for civil liability may be exercised against service providers: this is a matter that, in the absence of any specific provision of EU law, is decided entirely by the national law of the Member States.

(4) Are online information services that are remunerated by means of commercial advertisements posted on the website included in the definition of an "information society service" and "service provider" in Article 2 of the E-Commerce Directive and Article 1(2) of Directive 98/34?

The Court first clarified the relationship between the two provisions by observing that Article 2(a) of the E-Commerce Directive defines the term "information society services" by making a reference to Article 1 of Directive 98/34. The latter refers to any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services.

It then observed that Recital 18 of the E-Commerce Directive expressly excludes conditioning the definition of "information society services" on remuneration that derives directly from the recipient of the service. Consequently, the CJEU concluded, the notion of an "information society service" must be interpreted as including online information services for which the service provider is financed, not by the end-user, but by the placement of ads on the website.

(5) May a newspaper publishing company that operates a website on which the online version of a newspaper drafted by staff or freelance journalists is posted, that company being, moreover, remunerated by income generated by commercial advertisements posted on that website, be regarded as providing "mere conduit" or "caching" or "hosting" services for the purposes of the safe harbour provisions of Articles 12, 13 and 14 of the E-Commerce Directive? Does the answer to that question depend on whether or not access to that website is free of charge?

In answering this question, the Court referred back to its previous judgements in *Google France* (C-236/08 to C-238/08) and *L'Oréal* (C-324/09), in which it emphasised that, in order to benefit from safe harbour protection, a service provider must play a neutral role, in the sense that its conduct is merely technical, automatic and passive and that it has no knowledge or control over the data it stores. As a result, the mere fact that a referencing service is subject to payment, that the provider sets the payment terms or that it provides general information to its clients cannot have the effect of depriving that provider of immunity from liability.

However, since a newspaper publishing company which posts an online version of a newspaper on its website has, in principle, knowledge about the information which it posts and exercises control over that information, it cannot be considered to be an "intermediary service provider" that benefits from the safe harbours of Articles 12 to 14 of the E-Commerce Directive, whether or not access to that website is free of charge.

• Judgment of the Court (Seventh Chamber) in Case C 291/13 *Sotiris Papasavvas v O Fileleftheros Dimosia Etairia Ltd*, CJEU 11 September 2014
<http://merlin.obs.coe.int/redirect.php?id=17243>

EN FR

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Court of Justice of the European Union: CJEU introduces concept of parody in EU Law: *Deckmyn v. Vandersteen*

A judgment of the Court of Justice of the European Union (CJEU), by way of a preliminary ruling delivered on 3 September 2014, once more deals with the conflicting interests of copyright protection and the right to freedom of expression and information (see Case-C-70/10 *Scarlet Extended v. SABAM* (see IRIS 2012-1/2), Case C-360/10 *SABAM v. Netlog NV* (see IRIS 2012-3/3) and Case C-314-12 *UPC Telekabel v. Constantin Film Verleih* (see IRIS 2014-5/2). In a case concerning the concept and application of the parody-exception in copyright law, the CJEU held that a “fair balance” must be obtained between the rights of the copyright holders and the right to freedom of expression, in this case of the parodist. The case concerns a political cartoon on a calendar with a message that was alleged discriminatory towards foreigners. The cartoon is a parody of the cover of one of the most famous comics strips in Belgium, *Spike and Suzy* (*Suske en Wiske, Bob et Bobette*) by Willy Vandersteen. The parodist is a member of the *Vlaams Belang* (Flemish Interest), a Flemish nationalistic party.

The judgment of the CJEU contains three elements. First the Court held that the (optional) parody exception under Article 5(3)(k) of the Information Society Directive 2001/29/EC must be interpreted as meaning that the concept of “parody” appearing in that provision is an autonomous concept of EU law. Second, the Court decided that the essential characteristics of parody are, first, to evoke an existing work, while being noticeably different from it, and secondly, to constitute an expression of humour or mockery. It is up to the national courts to determine whether a parody is sufficiently different from the original work and whether it is funny or mocking. These are the only essential characteristics, as, according to the CJEU’s judgment, the concept of “parody” is not subject to the conditions that the parody should display an original character of its own, other than that of displaying noticeable differences with respect to the original parodied work; that it could reasonably be attributed to a person other than the author of the original work itself; or that it should relate to the original work itself or mention the source of the parodied work.

Finally, the Court emphasised that in applying the parody-exception, national courts must strike a fair balance between the interests and rights of copyright holders and the freedom of expression of the user of a protected work who is relying on the exception for parody, within the meaning of Article 5(3)(k). It is indeed for the national courts to determine, on the facts, whether the application of the exception for parody on the assumption that the drawing at issue fulfils the essential requirements of parody, preserves that fair balance. In this regard the Court drew attention

to the principle of non-discrimination based on race, colour, and ethnic origin, as defined in Council Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin and confirmed by Article 21(1) of the Charter of Fundamental Rights of the European Union. In those circumstances, copyright holders, such as Vandersteen, have, in principle, a legitimate interest in ensuring that the work protected by copyright is not associated with such a message.

It is now up to the Brussels Court of Appeal to apply the criteria put forward by the CJEU to determine whether the cartoon calendar at issue falls under the parody-exception as provided for in Article 22(1)(6) of the Belgian Copyright Act, also taking into consideration the right of freedom of (political) expression of the parodist and its limits from the perspective of “hate speech”.

• Judgment of the Court (Grand Chamber) in Case C-201/13 *Deckmyn and VZW Vrijheidsfonds v. Vandersteen a.o.*, 3 September 2014
<http://merlin.obs.coe.int/redirect.php?id=17232>

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FR	CS	DA	EL	ES	ET	FI	HR	HU	IT	LT		
LV	MT	NL	PL	PT	SK	SL	SV					

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Court of Justice of the European Union: EUR 150 million fine upheld for anti-competitive broadband pricing by Spanish Telecoms Giant

On 4 July 2014, the Court of Justice of the European Union (CJEU) delivered its opinion in Case C-295/12 (*Telefónica SA and Others v. European Commission*). In this case, the Court considered a request on appeal for the revocation of a fine imposed by the European Commission for anti-competitive pricing in Spanish broadband access markets.

The case arose following a complaint to the Commission concerning the pricing policies of Telefónica SA and its subsidiaries submitted on 11 July 2003. The Commission subsequently examined whether the margin between the wholesale prices, which Telefónica charged their competitors for the supply of broadband access in Spain, and the retail prices they charged to end users, was enough to allow competitors of Telefónica to compete with it (an anti-competitive practice known as ‘margin squeezing’).

On 4 July 2006, having found evidence of such ‘margin squeezing’, the Commission adopted a decision to impose a fine of EUR 151,875,000 on Telefónica SA for the abuse of a dominant position in the Spanish broadband market – the second largest fine to ever

be imposed for a breach of Article 102 of the Treaty on Functioning of the European Union (TFEU). On 1 October 2007, Telefónica SA brought an action for annulment of this decision, or, in the alternative, the revocation or reduction of the fine imposed. The General Court dismissed the action in full (Case T-336/07).

On 13 June 2012, Telefónica SA brought an appeal before the Court of Justice, seeking annulment of the General Court's ruling and revocation or reduction of the fine. Among other grounds, it was claimed that the General Court should have ascertained whether the Commission's ex post intervention was compatible with the objectives pursued by the Spanish Commission for the Telecommunications Markets through ex ante regulation. This claim was rejected as unfounded, as the CJEU found that 'the Commission's implementation of article 102 TFEU is not subject to any prior consideration of action taken by national authorities'.

Telefónica SA also submitted that the General Court failed to have regard to the principle of legal certainty by finding that the Commission was entitled to impose a fine on them for 'margin squeezing', due to a lack of clear and foreseeable precedents. However, the CJEU agreed with the General Court that the Commission's decision was reasonably foreseeable due to the anti-competitive effects of 'margin squeezing' practices and prior decisions of the Commission.

The size of fine imposed was also disputed as disproportionate, with the appellant drawing comparisons to other Commission decisions where fines were up to eleven times smaller, even though the relevant geographic markets were significantly larger. However, the CJEU held that the Commission's practice in previous decisions cannot itself serve as a legal framework for the imposition of fines in competition matters. Furthermore, they found that the size of fines does not depend exclusively on the size of the relevant geographic market, but also on other criteria characterising the infringement. On these grounds, the fine was upheld in its entirety.

• Judgment of the Court (Fifth Chamber) in Case C-295/12P Telefónica SA and Others v. European Commission, 10 July 2014

<http://merlin.obs.coe.int/redirect.php?id=17235> DE EN FR
CS DA EL ES ET FI HR HU IT LT LV
MT NL PL PT SK SL SV

• Judgment of the General Court (Eighth Chamber) in Case T-336/07 Telefónica SA and Others v. European Commission, 29 March 2012

<http://merlin.obs.coe.int/redirect.php?id=17238> DE EN FR
CS DA EL ES ET FI HR HU IT LT LV
MT NL PL PT SK SL SV

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European Commission: Summary of responses to Green Paper on 'fully converged audiovisual world' published

On 12 September 2014 the European Commission published its Feedback Paper on the public consultation responses it received following the release of its Green Paper on 'Preparing for a Fully Converged Audiovisual World: Growth, Creation and Values in 2013' (see IRIS 2013-6/5). The purpose of the Green Paper had been to initiate a public discussion on the implications of the rapidly transforming audiovisual landscape, and in particular media convergence (i.e. the progressive merger of traditional broadcast services and the internet).

The Commission opened its public consultation on the Green Paper in April 2013, and it ran until September 2013. Stakeholders were asked to submit responses to a series of 27 questions posed in the Green Paper. The Commission received a large amount of responses, with 236 submissions being received. A wide range of stakeholders made submissions, including individuals, consumer and citizen groups, broadcasters, advertising associations, network operators, film and television producers and distributors, sports associations, child protection associations, disability rights groups, publisher associations, digital and internet companies, public authorities, regulatory authorities, and academia.

While many of the submissions were made publicly available on the Commission's website (where stakeholders gave consent), the Commission has now published a 112-page Feedback Paper summarising the submissions received. The Commission has also helpfully published a much shorter 10-page Executive Summary, neatly summarising the main responses to the Green Paper questions.

As reported earlier in IRIS 2013-6/5, the questions posed in the Green Paper covered a wide range of issues, with some of the big issues being revision of current competition rules, whether the Audiovisual Media Services Directive's distinction between linear (broadcast) and non-linear (on-demand) services for regulatory purposes was still appropriate, whether there is scope for self and co-regulation with regard to changing advertising techniques, and revision of the 'country of origin' principle, among many others.

Many divergent interests are represented by the various stakeholders who made submissions, and the Commission notes on its website that there are 'no clear tendencies among respondents and views are indeed quite split on most areas touched in the Green Paper'. To take just one example, of the views submitted on revising the AVMS Directive, some respondents argued for liberalising linear services regulation, others argue for increasing regulation of non-linear ser-

vices, and others argued for maintenance of the status quo. It will now be up to the Commission to consider the responses received, and determine how best to respond to the changing media landscape and media convergence.

- European Commission, Summaries of the replies to the public consultation launched by the Green Paper "Preparing for a Fully Converged Audiovisual World: Growth, Creation and Values", 12 September 2014

<http://merlin.obs.coe.int/redirect.php?id=17250>

EN

- European Commission, Executive Summary of contributions to the public consultation - Green Paper: Preparing for a Fully Converged Audiovisual World, 12 September 2014

<http://merlin.obs.coe.int/redirect.php?id=17197>

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UNITED NATIONS

United Nations: New industry guidelines for online child protection

Two United Nations agencies, the International Telecommunication Union (ITU) and the United Nations Children's Fund (UNICEF), have jointly published new Guidelines for Industry on Child Online Protection. The original guidelines had been drawn up in 2009, following the establishment of the Child Online Protection (COP) Initiative by the ITU. But with the rapid advancements in technology and convergence in the intervening years, these UN agencies launched a consultation process in 2013 with civil society, industry and children, on updating the guidelines.

Following the consultation process, the new 42-page guidelines were published in September 2014. The general purpose of the guidelines is to ensure the safety of children when using information and communication technologies (ICT). In particular, the guidelines provide guidance to the ICT industry on protecting children's safety when children are using information and communication technologies.

The guidelines identify five important areas for industry to focus on: first, integrating child rights considerations into all appropriate corporate policies and management processes. Second, developing standard processes to handle child sexual abuse material. Third, creating a safer and age-appropriate online environment. Fourth, educating children, parents, and teachers about children's safety and their responsible use of ICTs. Fifth, promoting digital technology as a mode to further civic engagement.

Some of the specific guidance includes: ensuring an individual or team within a company has overall re-

sponsibility for child online protection within the company, the development of notice and takedown procedures, the use of technical measures to prevent underage access to inappropriate content, educate parents on their children's ICT activities, and avoiding over-blocking of developmentally appropriate content. The guidelines then set out sector-specific guidance for a number of different ICT industry sectors, including: mobile operators, internet service providers, content providers, online retailers, app developers, social media providers, public service broadcasters, and operating system developers.

- International Telecommunication Union (ITU) and United Nations Children's Fund (UNICEF), Guidelines for Industry on Child Online Protection, 2014 Edition, 5 September 2014

<http://merlin.obs.coe.int/redirect.php?id=17209>

EN

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2014 Joint Declaration by the four special international mandates for protecting freedom of expression

On 6 May 2014, at the UNESCO World Press Freedom Day Celebrations in Paris, 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 - adopted a Joint Declaration on Universality and the Right to Freedom of Expression. This was their 16th annual Joint Declaration, and was adopted with the assistance of the Centre for Law and Democracy and ARTICLE 19 (for former Joint Declarations, see IRIS 2011-8/2, IRIS 2010-5/1, IRIS 2009-9/101, IRIS 2009-2/101, IRIS 2008-4/1, IRIS 2007-2/101, IRIS 2006-3/2, IRIS 2005-2/1, and IRIS 2004-2/12).

The 2014 Joint Declaration is somewhat different from its predecessors, inasmuch as it focuses more on the philosophical underpinnings of freedom of expression than on technical/regulatory issues, although it also seeks to provide specific guidance on law reform.

The Joint Declaration highlights two inter-related aspects of universality for freedom of expression. The first is the positive obligation on States to ensure universal and equal enjoyment of this core right, while the second is the negative obligation on States to refrain from imposing undue restrictions on freedom of expression on the basis of a claimed need to protect their cultural, traditional or community values, or moral or religious beliefs.

In terms of the first issue, the Joint Declaration points to a number of measures States should take, including in support of public service and community broadcasting, media serving the voice and information needs of different individuals and groups in society, and access to the Internet. It also calls on States to address prejudices and harmful stereotypes that prevent certain groups from being able to enjoy their right to freedom of expression.

In terms of the second issue, the Joint Declaration makes it clear that States must modify or eliminate traditional or historical laws, regulations, customs and/or practices where these undermine respect for human rights, including the right to freedom of expression. While recognising that international law does grant States some flexibility to adapt restrictions on freedom of expression to respond to local contexts, the Declaration essentially rules out such adaptations in relation to political speech, given its importance to democracy and human rights. It also provides a list of types of restrictions which can never be justified, including to protect religion against criticism, to prohibit debate about issues of concern to minorities and, importantly, to prohibit speech which forms part of the identity or personal dignity of groups which have suffered from historical discrimination. This latter recommendation would, among other things, rule out laws which prohibit statements of gay pride, which all too many countries have moved to adopt in recent years.

• Joint Declaration on Universality and the Right to Freedom of Expression by the United Nations (UN) Special Rapporteur on Freedom of Opinion and Expression, the Organization for Security and Co-operation 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, 6 May 2014
<http://merlin.obs.coe.int/redirect.php?id=17195>

EN FR

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NATIONAL

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Austrian Administrative Court submits questions to CJEU on legal classification of newspaper's online video page

In a decision of 26 June 2014 (case no. 2013/03/0012), the Österreichische Verwaltungsgerichtshof (Austrian Administrative Court – VwGH) submitted questions to the Court of Justice of the European Union (CJEU) concerning the interpretation of Directive 2010/13/EU (Audiovisual Media Services

Directive – AVMSD) as part of the “New Media Online” case (case C-347/14).

The national court procedure concerns the website of an Austrian daily newspaper, which contains its own video section under a subdomain. This section contains a total of more than 300 news videos that can be searched via a catalogue. Some of the videos are linked to written articles on the newspaper's general website, while others have no direct connection with written articles.

The website's operator had appealed against a decision of the Bundeskommunikationssenat (Federal Communication Board), which stated that the video section met all the criteria of an on-demand service for the purposes of Article 2(4) in connection with Article 2(3) of the Audiovisual Media Services Act (AMD-G) and, therefore, had to comply with the information obligation set out in Article 9 AMD-G. Although the VwGH considers that some of the previously mentioned criteria are being met, it doubts whether the principal purpose of the services concerned is to provide information, entertainment or educational programmes. It also questions whether the principal purpose of a video section can be classified separately to that of the newspaper's website as a whole.

According to the VwGH, the first of these questions particularly entails checking whether videos included in a video catalogue, most of which can also be downloaded in connection with news reports in an online newspaper, fall under the definition of a ‘programme’ as contained in Article 1(1)(b) of the AVMSD. This depends on how much importance is attached to the criterion of being ‘television-like’.

Regarding the second question, the VwGH acknowledges that, in recital 28 of the AVMSD, electronic versions of newspapers are expressly excluded from the scope of the Directive. Nevertheless, it considers that the AVMSD does not clearly explain whether, when classifying a service as an audiovisual media service in terms of its principal purpose, the full range of services provided should be considered together, or whether individual parts of the service may be examined separately. However, the objectives of the AVMSD suggest that individual parts should be classified as audiovisual media services if they meet all the relevant criteria themselves. Otherwise, a service provider would be able to remove certain services from the scope of the AVMSD by broadening its range of services.

Since there is no CJEU case law on either of these questions, the VwGH stopped the proceedings in order to ask the CJEU for a preliminary ruling.

• *Beschluss des VwGH vom 26. Juni 2014 (Aktenzeichen: 2013/03/0012)* (Decision of the Austrian Administrative Court of 26 June 2014 (case no. 2013/03/0012))
<http://merlin.obs.coe.int/redirect.php?id=17251>

DE

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Flemish Media Regulator fines broadcasters for infringements of commercial communication provisions

On 2 September 2014, the Flemish Media Regulator (*Vlaamse Regulator voor de Media*) published three decisions in which it found that two broadcasters had violated the provisions in the Flemish Media Decree that prescribe the conditions under which teleshopping, sponsoring, and advertorials may be broadcasted.

The first decision (2014/036) concerned a teleshopping programme, *Jim Request Live*, which was interrupted five times after less than 15 minutes. Article 82, § 1, 3° of the Flemish Media Decree, however, states that teleshopping programmes must last for at least 15 minutes before being interrupted. The broadcaster contested (not for the first time in a similar situation) the qualification of the particular programme, which invites viewers to send text messages, to post chat messages, and to request music videos, as a teleshopping programme. It argued that the chat space and text applications are mainly used to ensure interaction between the viewer and the editorial content. The regulator considered this argument but found that, notwithstanding the largely interactive character, the programme also contained a pure chat function. This chat function did not interact with the programme and consisted solely of the sale of screen space. Consequently, the regulator considered the programme to be a teleshopping programme and found that the broadcaster had violated article 82, § 1, 3°. In addition, the regulator also found that the same broadcaster had broadcast two advertorials, without them being made clearly recognisable and distinguishable from editorial content. Taking into account this violation of article 79 § 1 as well as the infringement on article 82, § 1, 3°, the regulator imposed a fine of EUR 2500.

The second decision (2014/034) involved the programme 'Circus live', broadcast by private broadcaster 2BE. This programme consists of a demonstration of various gambling games, which can be played through the website 'circus.be'. Throughout the programme the presenter urges viewers to participate in

the games and to register on the website. According to the regulator the qualification of 'teleshopping' is applicable to 'Circus live'. Given that there is no indication, visually nor acoustically, of the fact that teleshopping is offered during the full duration of the programme, the regulator found that articles 79, § 1, and 82, § 1, 1° of the Flemish Media Decree had been violated and issues a fine of EUR 5000.

The third decision (2014/037) concerned the same broadcaster, 2BE, who broadcast a sponsorship message concerning 'Flexium gel' after an episode of 'The Simpsons'. The regulator found that the message went beyond merely raising brand awareness, given the fact that the advantages of the product were being listed and emphasised by means of animated illustrations in order to convince viewers of the efficiency of the product. A violation of article 2, 41° of the Flemish Media Decree was established, but the regulator limited the consequences thereof to a warning.

• *VRM t. Medialaan, Beslissing 2014/036, 14 juillet 2014* (VRM v. Medialaan, Decision 2014/036, 14 July 2014)

<http://merlin.obs.coe.int/redirect.php?id=17199>

NL

• *VRM t. Medialaan, Beslissing 2014/034, 23 juin 2014* (VRM v. Medialaan, Decision 2014/034, 23 June 2014)

<http://merlin.obs.coe.int/redirect.php?id=17200>

NL

• *VRM t. Medialaan, Beslissing 2014/037, 14 juli 2014* (VRM v. Medialaan, Decision 2014/037, 14 July 2014)

<http://merlin.obs.coe.int/redirect.php?id=17201>

NL

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Flemish Media Regulator dismisses complaint against stand-up comedy programme

On 25 June 2014, the Chamber for impartiality and protection of minors of the Flemish Media Regulator (*Vlaamse Regulator voor de Media*) issued a decision (2014/035) following a complaint related to the programme 'Comedy Kings', in which part of the show 'Interesting Times' by stand-up comedian Alex Agnew was broadcast.

The complaint concerned alleged anti-Semitism and ridiculing of the Holocaust by the comedian, because he referred to the gassing of Jews in relation to a controversial type of fine that can be imposed on citizens, which is referred to by its acronym 'GAS'. The complainant argued that by broadcasting the programme, the broadcaster also carried responsibility for exceeding the boundaries of acceptable humour. During the hearing, the complainant also argued that this responsibility was even more significant because the broadcaster chose this specific fragment to advertise the broadcasting of the comedy show. However, in the first part of the decision, the regulator found that since there was no mention of these trailers in the original written complaint, this particular element was inadmissible.

With regard to the complaint directed against the broadcasting of part of the stand-up comedy show, the Chamber, in its elaborate assessment of potential violations of articles 38 (prohibition on incitement to hatred or violence) and 39 (non-discrimination obligation) of the Flemish Media Decree, took into account the longstanding jurisprudence of the European Court of Human Rights on the protection of expressions that “shock, offend and disturb”. In that context it emphasised that satire deserves special protection. The Chamber also considered the parliamentary proceedings of the Flemish Media Decree and the jurisprudence of the Belgian Constitutional Court, which interprets ‘incitement’ as requiring a conscious and intentional action. Whereas the disputed fragment could be considered offensive in particular to the Jewish Community, it did not contain an active incitement to hatred or acts of violence against Jews. Nor could the incorporation of the Holocaust in a joke be considered as violating article 39 or being discriminatory against Jews.

The Chamber also took into account the particular context of a stand-up comedy show. Exaggeration, provocation, and satire are inherent in this type of humour and especially with regard to sensitive, societal issues; humour can contribute to public debate. The protection of this type of expression should not be unlimited, but restrictions should only be possible for very weighty reasons. In addition, viewers are aware of the characteristics of the specific genre and Mr Agnew himself emphasised the necessity of using carefully nuanced expressions. The Chamber acknowledged that the type of humour that was used in casu could be considered crude, direct and unsubtle, but that the possibility cannot be excluded that it was the stand-up comedian’s intention to denounce certain societal tendencies related, for instance, to the increasing social control to which the issue of GAS-fines is connected. The last finding concerned the fact that not only Jews and the Holocaust were the subjects of satire in the programme in question, but that other sections of the population were also insulted.

In the end, the Chamber came to the conclusion that taking into account the context and all relevant considerations, it cannot be proven that Mr. Agnew had the intention of consciously and maliciously inciting hatred or violent behaviour towards Jewish people, or discriminating against them. The same conclusion was reached with regard to the broadcaster. Hence, the Chamber found no violation of articles 38 and 39 of the Flemish Media Decree and declared the complaint to be without merit.

• *J.M.D. t. SBS Belgium, Beslissing 2014/035, 25 juni 2014* (J.M.D. v. SBS Belgium, Decision 2014/035, 25 June 2014)
<http://merlin.obs.coe.int/redirect.php?id=17198>

NL

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Public service broadcaster BNT’s invitation to tender for audience data research deemed lawful

In a decision of 20 May 2014 (Решение № 30П-01-10/20.05.2014), the Competition Commission rejected a complaint by Mediaresearch Bulgaria EAD (“Mediaresearch”), which is part of the Nielsen Group, concerning the public invitation to tender issued by the BNT director-general for the supply of information on BNT’s audience share and the use of radio and print media.

Two rival companies essentially dominate market research in the Bulgarian media sector: the complainant, Mediaresearch, and GfK Audience Research Bulgaria (“GARB”).

Whereas one of the two largest commercial TV companies (Nova TV) and the public service broadcaster BNT have, until now, entrusted Mediaresearch with the task of determining their audience share, the other main private TV company (bTV) has used GARB. All market participants see the fact that there are two different “currencies” in the television market, providing very different and barely comparable data, as highly problematic.

The Competition Commission’s decision was hotly anticipated because of its market relevance. Indeed, by rejecting Mediaresearch’s complaint, it is now clear that BNT, which is legally obliged to use public tenders to acquire services, can only entrust GARB with this particular contract. The reason for this is that GARB is currently the only company in Bulgaria capable of supplying both the required audience data and the usage data for radio and print media, which was also included in the invitation to tender.

The complainant, Mediaresearch, essentially argued that the terms of the tendering procedure were discriminatory, since they required not only audience share data, but also other usage data, including, for example, data for the print media market, which it was unable to supply.

Responding to Mediaresearch’s complaint, BNT claimed that it needed this data because, on the one hand, it had launched a magazine in 2014 and, on the other, it was involved in joint projects with radio providers.

The Commission ruled that, in principle, it was within BNT’s discretion to decide which services should be included in an invitation to tender. Analysis of the current market and legal situation had shown that BNT’s explanation of the conditions of the tendering process

was reasonable. The Commission rejected the complaint as unfounded on the grounds that the invitation to tender was neither discriminatory nor inadmissible.

• РЕШЕНИЕ на Комисията за защита на конкуренцията № 898 от 10.07.2014 г. (Competition Commission decision no. 898 of 10 July 2014)

<http://merlin.obs.coe.int/redirect.php?id=17223>

BG

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Decision of the Supreme Court concerning personality protection

The TV broadcaster “FTV Prima” was unsuccessful in a long legal dispute about the publication of photos of a thirteen year old boy, one of the supporting actors in the so-called “Kuřimská” cases. On 25 June 2014, the Supreme Court upheld a judgment that has awarded the boy compensation of 100,000 CZK. The broadcaster “FTV Prima” referred in his objections to the right to news reporting, but the Supreme Court assumed that the real goal of the publication of the photos was denigration or defamation.

The so-called “Kuřimská” case is probably the most famous case of brutal treatment of children in the country. Two maltreated boys lived with their divorced mother. According to the judgment, the mother, the sister and their friends imprisoned the boys in cages, beat them and otherwise mistreated them at various locations from summer 2006 until May 2007. A court sentenced the boys’ mother to nine years in prison and their sister to ten years. Both have since been released. The background of this case has never been satisfactorily explained or revealed.

Later, the media published pictures of the boys. With regard to the publishing the photos, the family of the boys argued that there had been an unjustified interference with the children’s right to privacy. In 2012, measures to protect the privacy rights of the boys were unsuccessful. The Supreme Court ordered the reopening of the case and the Board of the Prague High Court ruled in favour of the boys. The Court held that the publication of the photos was not necessary and that the boys’ right to privacy outweighed the public’s interest in receiving information about this case.

The broadcaster, “FTV Prima”, appealed to the fact that the photos were published in accordance with the principles of the so-called news licence. In the opinion of “FTV Prima”, the public has a right to know about the dangers of various sects. Moreover, it is important to involve the public in the process of searching

for the perpetrators of a crime. The broadcaster also argued that the publication of the photos was not accompanied by any derogatory information. The advocate for the boys (both now young adults), however, argued that if juvenile offenders are protected against publication of their pictures under penal law, victims of a crime must also be protected.

In its final decision, the Supreme Court pointed out that a person’s image may not be used in news coverage, if it is contrary to the legitimate interests of that person. In the opinion of the Supreme Court, the photos were not only published with the goal of informing society but with the purposes of defaming and denigrating. The Court therefore found that the privilege of the principle of the so-called news licence could not be applied in the present case.

• *Usnesení Nejvyššího soudu č.j. 30 Cdo 252/2014 z 25.6.2014* (Decision of the Supreme Court, 30 Cdo 252/2014, 25 June 2014)

<http://merlin.obs.coe.int/redirect.php?id=17245>

CS

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DE-Germany

Constitutional Court rules on courtroom reporting restrictions

In a decision of 31 July 2014 (case no. 1 BvR 1858/14), the Bundesverfassungsgericht (Federal Constitutional Court – BVerfG) partially upheld an application for a temporary injunction against a procedural order restricting press reporting on a criminal procedure before the Landgericht Hamburg (Hamburg District Court – LG).

In the criminal procedure, which concerned a three-year old girl who had died from internal injuries, the LG Hamburg had issued several orders. Firstly, audio, photographic, and video recordings in the courtroom could only be made by a pool of two camera teams (one private and one public) and a small number of photographers, who would then make their images available to other journalists free of charge. Other than by this pool, no recordings were allowed in and around the courtroom. Secondly, the use of close-ups was restricted, and thirdly, the use of audio recording devices was prohibited.

The plaintiff, a publisher of several newspapers, appealed to the BVerfG against these orders, arguing that they represented a serious intrusion on the freedom of the press, as enshrined in Article 5(1)(2) of the Grundgesetz (Basic Law – GG).

The BVerfG ruled, firstly, that the freedom of the press had been infringed and that the orders were unjustified. It considered that, when exercising its discretion, the court had failed to take sufficient account of freedom of the press on the one hand and of the right to privacy of those involved, i.e. the defendants and witnesses, as well as the parties' right to a fair trial (Article 2(1) in conjunction with Article 20(3) GG), on the other.

The LG Hamburg will now, therefore, have to reconsider whether to issue a new order and how to balance the relevant interests in practical concordance.

Nevertheless, the BVerfG thought the ban on the use of audio recording devices, mobile phones, and laptops during the trial was legitimate. In this respect, the main element of the complaint about an infringement of the Constitution was therefore clearly unfounded and a temporary injunction was, as a result, out of the question.

• *Beschluss des BVerfG vom 31. Juli 2014 (Aktenzeichen: 1 BvR 1858/14)* (Decision of the Federal Constitutional Court of 31 July 2014 (case no. 1 BvR 1858/14))

<http://merlin.obs.coe.int/redirect.php?id=17224>

DE

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**Federal Administrative Court rules that
"Hasseröder Männercamp" did not breach
advertising rules**

In a ruling of 23 July 2014 (case no. 6 C 31.13), which has not yet been published, the Bundesverwaltungsgericht (Federal Administrative Court – BVerwG) decided that the depiction of a brand of beer before and after the live broadcast of a football match on the SAT.1 television channel did not constitute unlawful product placement for the purposes of Article 7(7)(3) of the Rundfunkstaatsvertrag (Inter-State Broadcasting Agreement – RStV).

During the broadcast of a football match, in which the use of product placement had been mentioned, the TV broadcaster SAT.1 had twice switched to the so-called "Hasseröder Männercamp". During conversations between the presenter and an expert, "Hasseröder" beer had been repeatedly mentioned. The brewery's logo had also been visible many times in the studio, on beer bottles and on other objects.

The first-instance Verwaltungsgericht Neustadt (Neustadt Administrative Court) had found the product placement admissible (decision of 31 October 2012, case no. 5 K 1128/11.NW). However, this ruling was overturned by the Oberverwaltungsgericht Rheinland-Pfalz (Rhineland-Palatinate Administrative

Court of Appeal – decision of 22 August 2013, case no. 2 A 10002/13.OVG, see IRIS 2013-10/14).

The BVerwG has, however, ruled that the depiction of a product is not excessive just because it serves a discernible advertising purpose. It only becomes excessive if the commercial element of a programme is more prominent than the editorial part.

In the present case, the BVerwG decided, the interviews with the football expert in the "Hasseröder Männercamp" had mainly concerned the football match being broadcast. The brewery's name had not been artificially depicted in the foreground and had not overshadowed the interviews in any way. The supposed qualities of the depicted product had not been discussed.

The BVerwG also stressed that it should be borne in mind that viewers of football programmes are always faced with a variety of commercially motivated messages, which means that a lower threshold could be applied to football programmes than for other programme formats.

For these reasons, the live broadcasts from the "Hasseröder Männercamp" were admissible under broadcasting law.

• *Urteil des BVerwG vom 23. Juli 2014 (Aktenzeichen: 6 C 31.13)* (Ruling of the Federal Administrative Court of 23 July 2014 (case no. 6 C 31.13))

<http://merlin.obs.coe.int/redirect.php?id=17225>

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**KJM presents broadcasting and telemedia
cases from first half of 2014**

On 18 August 2014, the Kommission für Jugendmedienschutz (Committee for Youth Protection in the Media – KJM) published a press release, in which it presented the cases it had examined during the first half of 2014 following alleged breaches of the Staatsvertrag über den Schutz der Menschenwürde und den Jugendschutz in Rundfunk und Telemedien (Inter-State Agreement on the Protection of Human Dignity and Minors in Broadcasting and Telemedia – JMStV).

In order to monitor the broadcasting sector, the KJM relies on the staff of the Land media authorities, which evaluate possible breaches of the JMStV in broadcast programmes and notifies them to the KJM.

Among 20 cases examined, the KJM particularly highlighted the following threats to the development of minors:

- For under-18s (11pm watershed): scenes contained in series or programmes depicting socially or ethically

disorientating attitudes to death and dying, as well as xenophobic, pro-National Socialist, anti-democratic, and aggressive radio content;

- For under-16s (10pm watershed): scenes with explicit sexual or violent content likely to harm the emotional development of minors;

- For under-12s (8pm watershed): programmes containing frightening scenes, threats or sexual connotations.

The KJM also complained about one advertisement that had infringed youth protection rules, two programme announcements that had breached Article 10(1) JMStV by ignoring watersheds and two breaches of Article 10(2) JMStV for failure to announce and adequately label age classifications. The KJM also asked for a ban on an interactive online TV programme that had depicted inhuman violence against other people.

In terms of Internet content, the KJM is supported in its tasks by jugendschutz.net as well as by the Land media authorities. When an infringement is found, the provider is firstly asked to remove the illegal content voluntarily. Cases are only submitted to the KJM for a decision if the content is not removed, or in particularly difficult circumstances.

In the nine telemedia cases that it examined in relation to the protection of minors, the following infringements were found and punished: Two services were deemed absolutely inadmissible on the basis of content likely to incite hatred or violent content, six were classified as relatively inadmissible due to pornographic content, and one was considered harmful to the development of minors because it depicted explicit sexual acts.

In 98 cases, the KJM requested that the telemedia service concerned be placed on the prohibited list, usually because of pornographic content, but in some cases due to extreme right wing or violent content.

In 126 cases, the KJM responded to applications from other bodies to place a wide range of different services on the prohibited list.

Depending on the type and seriousness of the infringements, the KJM filed official complaints, prohibited the services concerned and/or imposed fines.

• *Pressemitteilung 07/2014 der KJM, 18. August 2014* (Committee for Youth Protection in the Media, press release 07/2014 of 18 August 2014)

<http://merlin.obs.coe.int/redirect.php?id=17226>

DE

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Google ordered to de-reference links to defamatory articles

On the basis of the decision delivered by the CJEU on 13 May 2014 (see IRIS 2014-6/3), the Paris courts, in an order delivered on 16 September under the urgent procedure, ordered the company Google France to delete links to articles that had been judged as being defamatory.

The applicant parties claimed that they had been victims of defamatory statements made on-line, for which the perpetrator had been found guilty in March 2014 by the criminal court. Having discovered that entering their surnames in the Google search engine produced a list of links containing the statements that had been the subject of the legal proceedings, they sent Google formal notice, but to no avail. They therefore had the company summoned under the urgent procedure so that the court would order it to delete the referenced links.

The judge began by referring to the document instigating the proceedings. Google argued that the summons was null on the basis of Article 53 of the 1881 Act, under which proceedings are null if the summons fails to state and qualify the incriminating act, indicate the text of the applicable legislation, contain the address for service in the town in which the court referred to sits, or if both the party summoned and the public prosecutor are not notified. The judge found that the applicant parties were not claiming that the fact that Google had made data of a personal nature available to its users, which had been judged to be defamatory, incurred liability in respect of defamation. Thus their application for Google to be ordered to delete the reference links attached to their names in its search engine, on the grounds that the links were to a site and a Facebook page containing statements judged to be defamatory, did not constitute defamation proceedings. The provisions of the Act of 29 July 1881 were, therefore, not applicable.

In its defence, Google also argued a lack of specific elements regarding the actual referencing of the links that the complainants wanted to be deleted. The court nevertheless found that the summons met the requirements of Article 56 of the Code of Civil Proceedings and made it possible to determine the object of the application (the de-referencing of links attached to the names of the applicants in the search engine), the arguments on which the application was based (a judgment having qualified the statements made in the linked documents as being defamatory and a formal notice having had no effect), and the legal means (the Act of 6 August 2004 transposing Directive 95/46

EC into national law, and the CJEU judgment delivered on 13 May 2014). The court also rejected Google France's defence that its activity was merely the supply of marketing services for purely advertising purposes and that it was not involved in any editorial or operational activity in respect of the Internet sites or of the search engine, as it is the company Google Inc. that is responsible for processing the data. It did, however, recall that the CJEU, in its judgment delivered on 13 May 2014, had considered that "the activities of the operator of the search engine and those of its establishment situated in the Member State concerned are inextricably linked".

Lastly, the court noted that the application was justified. It was indeed established that the statements the applicants wished to see withdrawn had been definitively judged to be defamatory by the criminal court, that they were reproduced in the Google search engine as being associated with the names of the applicants, with reference being made to a number of links. The application was lawfully formed in accordance with Article 809 of the Code of Civil Proceedings, which empowers a judge sitting under the urgent procedure to put a stop to a disturbance that was manifestly unlawful. The judge, therefore, ordered the company Google France, on pain of payment of 1000 euros per day of delay, to delete the disputed referenced links, without allowing the company's request to limit the injunction to the links provided by Google.fr.

• *TGI de Paris (ord. réf.)*, 16 septembre 2014 - MM. X. c. Google France (Regional court of Paris (urgent procedure), 16 September 2014 – Messrs X v. Google France)

FR

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Digital technology and fundamental rights – 50 proposals from the Conseil d'État

To what extent does the protection of fundamental rights need to be rethought in the face of the upheaval brought about by the digital era? In its annual study made public on 9 September 2014, the Conseil d'État – as the guardian of fundamental rights and freedoms – attempts to answer the question, drawing up a statement of the current situation and putting forward fifty proposals. The study addresses a number of topical issues (neutrality of the Internet, the right to be forgotten, data ownership, the use made of data and its incorporation in Big Data, etc). This article focuses on those issues concerning audiovisual communication and freedom of expression.

The Conseil d'État's study proposes confirming the principle of the neutrality of the Internet, particularly with regard to the fundamental guarantee of freedom

of expression, in positive law. It points out that the dominant position of certain content suppliers and the share of the volume represented by a small number of large sites broadcasting videos, currently constitute threats to the observance of this principle. The electronic communications operators are not the only stakeholders to play a decisive role; the Conseil d'État advocates creating a new legal category for 'platforms', separate from both the editors and the hosts provided for in Article 6 of the LCEN Act of 21 June 2004. Platforms offer services for classifying, sharing, and referencing goods and services put on-line by third parties. Although it is pointed out that the platforms cannot be subjected to the same obligation of neutrality as the operators of electronic communications, they should be subjected to an obligation of loyalty to their users, including the definition in clear, comprehensible, and non-discriminatory terms of the criteria for withdrawing illegal content. The platforms are involved in the debate on combating illegal content. Beyond their legal obligations, they are taking voluntary steps under their 'policies' on acceptable content and making tools to detect infringement of copyright available to rightsholders. This is a controversial role, regarded by some as constituting 'private policing'. The Conseil d'État nevertheless considers that it would not be realistic to deny private stakeholders the right to decide on the withdrawal of content by reserving this right for the courts and, therefore, advocates making provision for an obligation for hosts and platforms to prevent the reappearance of content previously withdrawn, for a specified period of time. According to the Conseil's study, this obligation would be imposed by an administrative authority.

The study also indicates the need to provide audiovisual regulations with instruments adapted to the digital environment. It is noted that the two theoretical foundations of audiovisual regulation, i.e. occupation of the public domain and the need to regulate linear broadcasts, cannot be transposed to audiovisual services that may be accessed via the Internet. On the other hand, the third theoretical foundation – constituted by the objectives of the constitutional importance of maintaining public order, respecting the liberty of other people, and preserving the diverse nature of socio-cultural movements of expression – is just as relevant to the Internet as to the conventional media for audiovisual communication. So as not to jeopardise the neutrality of the Internet, the study therefore proposes not requiring communications operators to differentiate between lawful content on the generalist Internet. On the other hand, such obligations could be envisaged for the distribution of specialist services. It would also be appropriate to revise the methods for checking media concentration in order to provide a better guarantee of diversity, given the multiplicity of information media. The final proposal is to develop mediation in order to settle disputes connected with the use of digital technologies.

The study does not fail to point out that many of the proposals put forward fall within the remit of the Eu-

European Union's institutions, either because they require existing EU law to be amended, or because the EU is the relevant level for action. In national terms, the Government has announced that a bill on digital technology is to be submitted to Parliament in 2015. Prior consultation, which has been placed in the hands of the National Digital Council (Conseil National du Numérique), will begin soon.

• *Etude annuelle 2014 du Conseil d'Etat - Le numérique et les droits fondamentaux* (2014 annual study by the Conseil d'Etat on digital technology and fundamental rights)

<http://merlin.obs.coe.int/redirect.php?id=17227>

FR

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HADOPI opinion on the exception for making private copies of television programmes

On 17 September 2014, the high authority for the broadcasting of works and the protection of rights on the Internet (Haute Autorité pour la Diffusion des Oeuvres et la Protection des Droits sur Internet – HADOPI) published an interesting opinion, further to a referral by two individuals on the exception for making a private copy of television programmes received via an Internet access provider (IAP) or by satellite. One of HADOPI's tasks is to ensure that the technical measures used to protect works do not hamper interoperability and the exercise of exceptions to copyright, such as making a private copy. The complainants argued that it was only possible to record digital-format programmes using the recorder incorporated in the hardware supplied by the IAP or in the satellite receiver and that use of the copies was restricted by technical protective measures, which prevented the interoperability of the recordings made. Thus changing provider, and sometimes even just replacing the receiver, could result in the loss of all recordings made previously.

In its opinion, HADOPI recalled that that the exception for making a private copy of television programmes, as provided for in Articles L. 122-5, L. 211-3, and L. 331-9 of the Intellectual Property Code (Code de la Propriété Intellectuelle – CPI), for which remuneration was paid to compensate for the prejudice suffered by the rightsholders, allowed viewers to make interoperable, storable digital copies for their own private use, including in the event of changing hardware or television services distributor. The intention of the legislator, by specifically protecting the digital copying of television programmes, was to ensure as far as possible the continuity of analogue and digital copies. Honouring this intention therefore meant not placing limits on the possibility of watching privately made copies on different media, as long as the copies continued to be protected against unauthorised use.

HADOPI therefore considered that the restrictions on the use of privately made copies of television programmes imposed at the request of the rightsholders were only legal if their purpose was to preserve the compatibility of making a private copy with the demands laid down by the three-stage test resulting from the Bern Convention, which were recalled in Articles L. 122-5 and L. 211-3 of the CPI, particularly where there was a serious risk of private copies infringing copyright and affecting the normal exploitation of the work. Such restrictions, implemented by means of technical protective measures, should theoretically be differentiated according to the risks at issue and according to the requests made by the rightsholders. Thus it was for the players in the television sector to apply these principles, by differentiating the protection applied where this was technically possible and did not represent a disproportionate constraint.

On the issue of the need to ensure a degree of interoperability and the possibility of storage for privately made copies, HADOPI felt that, at this stage in its investigation, there was no evidence that the levels of restriction being applied were necessary. Thus, it noted that certain systems for the sale of musical or cinematographic works by definitive downloading from the Internet offered interoperability and storage possibilities that were better than those offered by ADSL or satellite television. According to the opinion, it would appear to be possible to protect works while imposing fewer restrictions on the use of privately made copies.

In conclusion, HADOPI considers the limitations on the interoperability of privately made copies on hardware other than the appliance used to make the recording, and those preventing the storage of copies when changing provider, to be excessive and, therefore, invites ADSL and satellite television operators to offer viewers, within a reasonable timeframe, the possibility of making a private copy of television programmes for durable storage with sufficient interoperability for the private use of the person making the copy. It is nevertheless stressed that providing such a technical arrangement would not have to be free of charge if it required the use of additional means of copying (recorder or back-up copy). Nor would operators be expected to renew the pool of existing receivers. HADOPI also emphasises that it is essential that, in application of Article L. 331-10 of the CPI, precise information should be given regarding the possibilities for using the copies made with each appliance. It now remains to be seen whether the operators will adopt these recommendations.

• *Hadopi, Avis n°2014-1 relatif à l'exception de copie privée des programmes télévisés, 11 septembre 2014* (HADOPI, Opinion no. 2014-1 on the exception for making a private copy of television broadcasts, 11 September 2014)

<http://merlin.obs.coe.int/redirect.php?id=17228>

FR

Amélie Blocman
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Netflix arrives in France

Netflix, the American subscription video on demand (SVOD) giant, was launched in France on 15 September 2014. A few days earlier, the operator Bouygues Telecom announced that it had signed an agreement with the world leader in SVOD, giving not only its Bbox Sensation clients, but also the future clients of its Android box, direct access via their television set to the unlimited SVOD Netflix service. Without Bouygues, Netflix would not have been available via Internet boxes, which is the preferred mode of access in France to top-of-the-range telecom services.

At the same time, Paris Tech carried out a study entitled 'Après Netflix – Sensibilité des obligations de production de la télévision à la pénétration de la SVOD', which shows that the arrival of Netflix on the subscription video market changes the audiovisual sector in terms of competition. It also challenges the sector's regulatory framework. Analysing the impact of this change on the obligations to finance films and fiction works incumbent on French audiovisual groups, the study explores the consequences for the industrial organisation of the sector and concludes that the scheme of production obligations is rendered less relevant and loses its legitimacy. Thus to make better use of their rights (including via Netflix), the study recommends that television companies should more frequently own the programmes they finance; they would then be able to invest in efficient export and pool risk by concentrating and exploiting their catalogues.

Netflix has also signed agreements with the main companies for collecting and distributing French royalty fees. Thus an agreement with the Société des Auteurs, Compositeurs et Editeurs de Musique (SACEM), negotiated well before the launch, covers the remuneration of its members whose audiovisual works will be among those available on Netflix. This guarantees that the use of the works of writers of music, sketches, and dubbing/subtitling, and producers and editors represented by the SACEM, are legally covered before the service is launched in France, with the assurance of remuneration for all the rightsholders concerned. The SACEM has also signed an agreement authorising Netflix's exploitation of its catalogue of documentaries. This agreement applies to French and foreign catalogues represented by the SACEM in France, Belgium, and the Grand Duchy of Luxembourg.

Negotiations are also in hand between the professional organisation in the cinema sector and the CNC to review media chronology, which featured in the conclusions produced by the Lescure mission last May. Whereas the mission advocated shortening the period between the first screening of a film and its being available on SVOD from thirty-six to eighteen months, the CNC proposes twenty-four months, but only for

'virtuous' services, i.e. those meeting certain criteria (including the financing of European and French creation). This is one way for the cinema regulator to warn Netflix, which will have to comply with French regulations in order to be able to benefit from the same broadcasting windows if it should one day wish to reinforce its cinematographic offer. Although the Netflix offer focuses mainly on popular television series, the American company has nevertheless announced its intention to produce more French series, starting with 'Marseille', shooting for which is to start soon. For her part, Minister for Culture Fleur Pellerin said, "We must consider the arrival of foreign players as an opportunity for our production companies to develop".

• « Après Netflix - Sensibilité des obligations de production de la télévision à la pénétration de la SVOD », Paris Tech, septembre 2014 (Après Netflix – Sensibilité des obligations de production de la télévision à la pénétration de la SVOD', Paris Tech, September 2014)
<http://merlin.obs.coe.int/redirect.php?id=17252>

FR

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GB-United Kingdom

RT breaches impartiality rules over election coverage

Ofcom has determined that the news channel RT (formerly known as Russia Today) breached the rules relating to impartiality of election coverage. RT had broadcast a projected election outcome of the United Kingdom for the European Parliamentary elections once the polling stations had opened, in breach of the Ofcom Code.

RT is produced in Russia and is broadcast on satellite and digital terrestrial platforms in the UK. The licence for RT is held by the autonomous non-profit organisation TV Novosti. Under the Communication Act 2003, Ofcom has a statutory duty to set broadcasting standards, including section 320, which requires impartiality. This requirement is reflected generally in section five of the Ofcom Code and more specifically for election coverage at section six of the Code, reflecting the Representation of People Act 1983 (as amended).

Ofcom's Guidance to Section Six (Elections and Referendums) of the Code states that there is no obligation on broadcasters to provide any election coverage. However, if broadcasters choose to cover election campaigns then they must comply with the rules set out in section six of the Code.

Rule 6.4 of the Code states: "Discussion and analysis of election and referendum issues must finish when

the poll opens. (This refers to the opening of actual polling stations. This rule does not apply to any poll conducted entirely by post.)”

Rule 6.5 states: “Broadcasters may not publish the results of any opinion poll on polling day itself until the election or referendum poll closes. (For European Parliamentary elections, this applies until all polls throughout the European Union have closed.)” Under section six, the meaning of election includes European Parliamentary elections.

On the 22 May 2014, RT broadcast at 7.00am, just as the polling stations were opening in the UK, the following:

“The UK Independence Party takes a narrow lead in the final opinion polls ahead of the EU Parliamentary election, with Britain’s traditional political powers resorting to a smear campaign to battle their new opponent.”

At 7.10am during the same broadcast RT aired the following:

“Meanwhile today, UK citizens will be given the chance to have their say over who will represent them in the European Parliament. Opinion polls have outlined there’s likely to be a neck-and-neck race with the very latest giving the UK Independence Party a narrow lead. However, the traditional titans of British politics aren’t taking the battle lying down.”

This statement was made against a backdrop of a graphic depiction of an opinion poll expressed in percentages showing that the UK Independence Party (UKIP) - an anti-European party - was taking a lead in the polls.

TV Novosti realised that there had been an inadvertent breach of the Ofcom rules and immediately reported the error to Ofcom. Further, they ensured that future editions of the bulletin did not include the references made at 7am or 7.10am. TV Novosti also introduced procedures to ensure against a repetition of such a breach. Whilst stating that given the hour of the day a relatively small number of people would have seen the broadcast, TV Novosti did however recognise that the broadcast content at 7am and 7.10am was a breach of the code, and there was a risk it could influence voters yet to vote on their voting decision.

Ofcom determined that rule 6.4 clearly forbade discussion of election issues whilst the voting was in progress- 7am to 10pm in the UK. As such the 7am and 7.10am broadcasts were in breach of rule 6.4.

So far as depicting an opinion poll result, rule 6.5 reflects Regulation 30 of the European Parliamentary Election Regulations 2004 - namely forbidding publication “in whatever form and by whatever means” of opinion polls about European Parliamentary elections before the close of the polling in the Member State whose electors are the last to vote in those elections.

Whilst Ofcom recognised that TV Novosti had voluntarily declared the breach and also took remedial steps, there were nevertheless breaches of rules 6.4 and 6.5. The Ofcom determination does not state the sanction imposed by them.

• ‘RT’, Ofcom Broadcast Bulletin, Issue 261, 8 September 2014, pp 28-31
<http://merlin.obs.coe.int/redirect.php?id=17210>

EN

Julian Wilkins
Blue Pencil Set

Regulator decides that popular BBC programme included racially offensive material

Ofcom, the UK Communications Regulator, received two complaints about a racial reference in the very popular BBC programme ‘Top Gear’, a magazine series on motoring. The BBC is covered by the Ofcom Programme Code, rule 2.3 of which states that ‘[i]n applying generally accepted standards broadcasters must ensure that material which causes offence is justified by the context’. Such offensive material may include ‘discriminatory treatment or language’ (for example, on the grounds of race).

The episode of ‘Top Gear’ was filmed in Burma, and involved the presenters building a makeshift bridge over the River Kwai. When it was completed, Jeremy Clarkson, the main presenter, said ‘that is a proud moment 03 but 03 there is a slope on it’ and an Asian man was seen crossing the bridge. Clarkson then stated ‘we decide to ignore the slope and move onto the opening ceremony’. As well as its ordinary meaning of an irregularity, ‘slope’ is an offensive and pejorative term for a person of East Asian descent, which originated during the Vietnam War.

The BBC stated that the remarks had been prescribed and were intended as an inoffensive play on words and that the programme makers were unaware of its potential to cause offence. On realising that it could cause offence, the BBC had issued an apology.

Ofcom decided that that word ‘slope’ is a pejorative racial term, which has the potential to be offensive to Asian people specifically, as well as to viewers more generally. ‘Top Gear’ is an irreverent programme with outspoken humour and in the past had used national stereotypes for comic effect. The regular audience adjusts its expectations accordingly. However, this term was deliberately used to refer to the Asian person crossing the bridge; as it was scripted in advance, there had been an opportunity to research the word and its effect during filming and post-production. Ofcom noted that the BBC now accepted that the word was capable of causing offence and had apologised. There was insufficient context to justify the broadcast of the word and the BBC had not applied generally

accepted standards to protect members of the public from offensive material. It therefore found a breach of rule 2.3.

• 'Top Gear Burma Special', Ofcom Broadcast Bulletin, Issue 259, 28 July 2014, 8-10

<http://merlin.obs.coe.int/redirect.php?id=17208>

EN

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GR-Greece

Amendments to Act on public broadcaster

Two amendments to Act 4173/2013 directly affecting the status of the Greek public broadcaster NERIT, which was recently established after the shutdown of the former public broadcaster ERT (see IRIS 2013-6/24), were passed by parliament on 8 August 2014.

The first amendment concerns the formation of the Supervisory Council, the body that had been instituted to ensure independence from government and political parties, and having the essential task of promoting sound corporate governance in NERIT (see IRIS 2013-9/20).

According to the new provisions, the selection procedure begins with a call for tender issued by the President and CEO of NERIT. The list of candidates is then forwarded to the competent minister who suggests the names of seven members. The final decision is taken by a simple majority of a parliamentary body named the "President's Conference" (Δι'αρχική των Προέδρων), which consists of the chairman and vice-presidents of the parliament, the chairmen of its standing committees and the chairmen of the political parties.

The second amendment concerns the nomination of the CEO and the board members of NERIT, who are selected among candidates that have responded to a call issued by the President of the Supervisory Council (two months before the expiration of the term of the existing President and CEO). The members are appointed by the Supervisory Council upon suggestion of a three-member body consisting of members of ASEP – the independent authority dealing with the recruitment of public servants (Ανώτατο Συμβούλιο Επιλογής Προσωπικού), ESR – the independent authority regulating radio and television stations (Εθνικό Συμβούλιο Ραδιοτηλεόρασης), and the Legal Council of the State, a service that provides legal support to the central government.

During discussions in parliament, opposition parties raised questions about the new text and the indepen-

dence of public broadcasting, insofar as the government traditionally controls the parliamentary "President's Conference". Under the former text, both members of the Supervisory Council and those of the Board of NERIT were selected by a special selection committee comprised of private or public companies, or organisations with international experience in executive-staff selection.

On 12 September 2014, the Chairman of NERIT, Prof. Antonis Makridimitris, and Deputy CEO Rodolfos Moronis, suddenly resigned a few months after the President and CEO, George Prokopakis, was removed from his position (see IRIS 2014-7/24). To date, no official statement has been made on the Chairman's resignation, or on whether the amendments to the Act played any role in the resignation.

• Άρθρο Έβδομο Νόμου 4279/2014 (ΦΕΚ Α' 158/8.8.2014) (Article 7 of Act 4279/2014, Gazette A 158, 8 August 2014)

<http://merlin.obs.coe.int/redirect.php?id=17242>

EL

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IT-Italy

AGCOM adopts new regulation on transfer of ownership and enforcement of concentration limits in the media sector

On 17 July 2014, the *Autorità per le garanzie nelle comunicazioni* (Italian media regulation authority - AGCOM) adopted a new regulation concerning the notification of transfers of ownership, mergers, and agreements in the broadcasting sector, as well as the enforcement of the concentration limits set out in the Consolidated Law on Audiovisual and Radio Media Services (CLARMS). The regulation, which consists of six chapters, replaces and repeals an earlier regulation attached to AGCOM Decision no. 646/06/CONS.

The regulation first deals with the notification requirement for transfers of ownership of undertakings engaging in radio and television broadcasting. The notion of "transfer of ownership" includes every act, regardless of its form, leading to the acquisition of control or dominant influence on an undertaking. As per section 3(1) of the regulation, AGCOM must be notified of transfers of ownership within fifteen days of their execution. Failure to do so may result in a fine.

The regulation also requires notification of concentrations and agreements involving undertakings operating in the Integrated Communication System (ICS). The ICS is a statutory "relevant market" defined by the CLARMS as including, *inter alia*, the press, publishing, television and radio broadcasting, cinema, and

outdoor advertising. Concentrations and agreements meeting the criteria set out in section 4 of the regulation are subject to an ex ante notification requirement. Operations that fail to meet those criteria must be notified within fifteen days of their consummation. If operations involving undertakings operating in the ICS also entail a transfer of ownership, only one notification is required. Concentrations and agreements between undertakings belonging to the same corporate group are expressly exempted from notification under section 4(11) of the regulation. As in the case of ownership transfers, failure to notify a concentration or agreement may result in a fine.

The regulation devotes an entire chapter to the detection and removal of dominant positions and situations harmful to media pluralism. AGCOM initiates that procedure either ex officio or upon a request by any interested party and must complete it within 180 days. First, AGCOM defines the relevant market and submits its findings to a public consultation. Second, AGCOM determines whether dominant positions or situations harmful to media pluralism exist in that market and, if so, what steps must be taken to eliminate them. Also that decision is subject to a public consultation open to all stakeholders.

The following chapter of the regulation concerns the enforcement of the concentration limits set out in the CLARMS. If AGCOM deems that an undertaking active in the ICS has exceeded those limits, it notifies that undertaking of the opening of an investigation. The undertaking concerned, as well as all other interested parties, may submit observations and request a hearing with the case-handler. The latter may request the disclosure of relevant documents and information as well as on-the-spot inspections of the business premises of the undertaking concerned. Failure to disclose such information or the provision of incorrect data may result in a fine. The investigation must be closed within 120 days. AGCOM adopts a draft decision setting out, if need be, the appropriate remedies to enforce the concentration limits and submits it to a public consultation for thirty days, after which it adopts the final decision and publishes it in AGCOM's website.

• *Delibera n. 368/14/CONS, Regolamento recante la disciplina dei procedimenti in materia di autorizzazione ai trasferimenti di proprietà, delle società radiotelevisive e dei procedimenti di cui all'articolo 43 del decreto legislativo 31 luglio 2005, n. 177* (Decision no. 368/14/CONS of 17 July 2014, Regulation on the procedure for the authorization of ownership transfers in the broadcasting sector and on the procedures under Section 45 of Legislative Decree 31 July 2005, no. 177)

<http://merlin.obs.coe.int/redirect.php?id=17206>

IT

• *Allegato A. alla Delibera n. 368/14/CONS* (Annex A to Decision no. 368/14/CONS)

IT

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Cable companies broadcast programmes without copyright holder authorisation

On 27 August 2014, the Amsterdam District Court handed down its judgment in a case brought by LIRA (a collective rights management organisation for authors) against three cable companies for violation of copyright. LIRA had claimed that the cable companies UPC, Zeelandnet, and Ziggo showed content to their subscribers, which infringed the copyright of authors represented by LIRA. In October 2012, the cable companies stopped paying LIRA for the offering of the content to their subscribers.

In the district court, the cable companies argued that the authors lacked the authority to transfer their copyrights to LIRA and that, therefore, LIRA lacked the authority to represent the authors before the court. The cable companies based their argument on Article 45d of the Dutch Copyright Act (DCA), which provides for the presumption of transfer of copyrights from authors of audiovisual works to film producers. The cable companies thus reasoned that the authors lacked the power to dispose of their copyrights because they were transferred a priori to the film producers.

The court ruled that Article 45d DCA did not prevent the transfer of copyrights by the authors to LIRA. The presumption of transfer of copyrights from the author to the film producer occurs when the film producer deems the audio-visual work ready for showing. Therefore, the transfer of copyrights of the authors' current and future audio-visual works to LIRA was legally valid and, on that basis, LIRA can claim the missed payments on behalf of the authors.

Second, the cable companies were of the opinion that the transfer of copyrights of future works did not meet the requirement following from Article 3:84 (2) of the Dutch Civil Code (DCC). According to Article 3:84 (2), DCC copyright has to be sufficiently defined to be eligible for transfer.

The judge ruled that the contract for the transfer of copyrights from the authors to LIRA sufficiently defined the material scope of the copyrights. Therefore the requirement of Article 3:84 (2) DCC was met, thus making the copyrights eligible for transfer.

Furthermore the cable companies disputed that the contracts, used to transfer the copyrights of the authors to LIRA, included the right of first publication of the content. The judge, after reviewing the contract, concluded that it did include the transfer of the right of first publication of the content.

Lastly, the judge ruled in favour of LIRA and stated that the cable companies infringed the copyrights

vested in LIRA by offering the content to their subscribers without obtaining the required consent of the right holders. The cable companies were ordered to cease and desist distributing the disputed content and are facing a penalty for non-compliance.

• *Rechtbank Amsterdam, 27 augustus 2014, ECLI:NL:RBAMS:2014:5397* (Decision of the Amsterdam District Court, 27 August 2014, ECLI:NL:RBAMS:2014:5397)
<http://merlin.obs.coe.int/redirect.php?id=17211>

NL

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PT-Portugal

New rules for public service broadcaster programming

On 9 July 2014, the Portuguese Parliament approved Act no. 40/2014 which introduces, for the second time, changes to the Television and On-Demand Audiovisual Services Act - Law no. 27/2007 (see IRIS 2011-4/30 and IRIS 2011-6/25). These modifications alter the programme-content obligations of the public service broadcaster RTP 1 (Rádio e Televisão Portuguesa). Under the new provisions, the law requires the broadcaster to include programmes that enhance the following areas: education, health, science, research, the arts, innovation, entrepreneurship, interculturalism, the promotion of gender equality, economic issues, social action, the dissemination of humanitarian causes, nonprofessional sport and school sports, religious beliefs, the production of independent creative works, the Portuguese cinema, the environment, consumer protection, and audiovisual experimentation (Article 52).

Before the approval of this act, these content requirements were only part of the programming assigned to the second public service channel broadcast nationwide, RTP 2. The new law states that RTP 2 has an obligation to ensure programming characterised by a strong cultural and educational component, open to civil society (Article 54).

The act entered into force on 10 July 2014 and took effect on 1 July 2014.

• *Lei n.º 40/2014 de 9 de julho, procede à segunda alteração à Lei n.º 27/2007, de 30 de julho (Lei da Televisão e dos Serviços Audiovisuais a Pedido), modificando o conteúdo dos programas que integram a concessão do serviço público de televisão. Publicada no Diário da República n.º 130, 1.ª Série, de 09-07-2014* (Act no. 40/2014 of 9 July – alters the Television and On Demand Audiovisual Services Act (no. 27/2007) by modifying the content of programs that integrate public service broadcasting. Published in the official news bulletin “Diário da República”, no. 130, 1st series, dated 9 July 2014)

<http://merlin.obs.coe.int/redirect.php?id=17241>

PT

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RO-Romania

Modifications of the Audiovisual Act

The Audiovisual Act No. 504/2002 with further modifications and completions (Legea Audiovizualului nr. 504/2002 cu modificările și completările ulterioare) was modified by two different draft laws, which have been adopted by the Romanian Parliament (see IRIS 2010-1/36, IRIS 2011-4/31, IRIS 2011-7/37, IRIS 2013-3/26, IRIS 2013-6/27, IRIS 2014-1/37, IRIS 2014-2/31 and IRIS 2014-7/29).

Act No. 95/2014 on the modification of Article 86 of the Audiovisual Act No. 504/2002 (Legea nr. 95/2014 pentru modificarea art. 86 din Legea audiovizualului nr. 504/2002) was published in the Official Journal of Romania (No. 500, Part I) on 4 July 2014.

The modified Article 86 transposes the Audiovisual Media Service Directive 2010/13/EU into the legal system of Romania and ensures the free access of broadcasters to events of high public interest. According to the newly revised Article 86 (1), any broadcaster under the jurisdiction of Romania or another EU member state has the right to free access on a fair, reasonable, and non-discriminatory basis to events of high interest to the public, which are exclusively transmitted by a broadcaster under Romanian jurisdiction. In compliance with Article 85, which includes provisions about short reports and short extracts, any broadcaster may create short news items about these events. For broadcasters under the jurisdiction of the same EU member state as the broadcaster that has obtained exclusive rights to the event, Article 86 (2) stipulates that the access intended for the production of short news items has to be provided to the respective broadcaster.

Act No. 103/2014 on the completion of the Audiovisual Act No. 504/2002 (Legea 103/2014 pentru completarea Legii audiovizualului nr. 504/2002), was published in the Official Journal of Romania (No. 518, Part I) on 11 July 2014. It entered into force 90 days after its publication in the Official Journal.

The Act includes provisions on the protection of persons with hearing impairments. A revised Article 42.1 was introduced, according to which the hearing impaired have the right of access to audiovisual media services, depending on the technological possibilities (Article 42.1(1)). According to Art. 42.1(2) a), and in order to ensure the above-mentioned right, TV programmes with national coverage must translate programmes on news, analysis, and debate on actual political and/or economic subjects, into sign language and by synchronous subtitles for at least 30 minutes per day. According to Article 42.1(2) b), programmes of major importance as a whole, or as a summary thereof, must be translated into sign language and by synchronous subtitles. According to Article 42.1(2) c) and d), the TV stations have to give a verbal and visual cue that the above-mentioned programmes are suitable for the hearing impaired. According to Article 42.1(3), television stations with local coverage have the same obligations, but they can opt between translation into sign language or the use of synchronous subtitles for the above-mentioned types of programmes. Therefore, they are not obliged to use both techniques simultaneously to protect those with hearing disabilities.

According to the revised version of Art. 90 (1) g), breaches of the provisions of Art. 42.1 will be considered as criminal offences.

• (Act No. 95/2014 on the modification of Art. 86 of the Audiovisual Act No. 504/2002, Official Journal of Romania (No. 500, Part I) on 4 July 2014) RO

• *Legea 103/2014 pentru completarea Legii audiovizualului nr. 504/2002* (Act No. 103/2014 on the completion of the Audiovisual Act No. 504/2002, Official Journal of Romania (No. 518, Part I) on 11 July 2014) CS

<http://merlin.obs.coe.int/redirect.php?id=17216>

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Three out of five multiplexes awarded

Following the digital television auction, three out of five multiplexes allocated to Romania were awarded to the state-owned National Broadcasting Company S.A. - RADIOCOM (Societatea Națională de Radiocomunicații S.A. - RADIOCOM) for a total licence fee of EUR 1,020,002. The company RADIOCOM won one multiplex under the obligation to air free broadcasting and two other multiplexes in the UHF band sector (see IRIS 2010-3/34, IRIS 2010-7/32, IRIS 2010-9/35, IRIS 2011-4/33, IRIS 2013-6/30, IRIS 2014-4/26 and IRIS 2014-5/29). The National Authority for the Management and the Regulation of Communication Affairs ANCOM (Autoritatea Națională pentru Administrare și Reglementare în Comunicații) granted RADIOCOM the licences for the use of the radio spectrum and for the

purpose of operating the three digital national television multiplexes. The licences cover a ten-year period and enter into force on 17 June 2015.

In relation to the first multiplex in UHF (MUX 1), RADIOCOM will have an obligation to broadcast the public and private TV stations that are currently broadcast in the analogue terrestrial system, under transparent, competitive, and non-discriminatory conditions. As the only multiplex with such coverage obligations, this multiplex will have to ensure coverage for 90% of the population and of 80% of the territory by 31 December 2016.

For the other multiplexes that RADIOCOM won, the state-owned company will have the obligation to establish the operation of at least 36 emission stations for each of the networks corresponding with these multiplexes by 1 May 2017 (one installed in each allocation area).

According to the 2006 Geneva Agreement signed by Romania and the Strategy approved by the Government, the digital switchover in Romania will be completed by 17 June 2015. On 17 June 2015, all analogue terrestrial broadcasting will be switched off and replaced by the digital terrestrial broadcasting of TV programmes and related multimedia services.

ANCOM auctioned five multiplexes in the DVB-T2 standard, four in UHF and one in VHF. In accordance with the provisions of the audiovisual Law, the first multiplex in UHF (MUX 1) will be used to broadcast the public and private television stations free to air, that are currently broadcast in the analogue terrestrial system under transparent, competitive and non-discriminatory conditions. There were two qualified bidders, the private owned operator RCS&RDS S.A. and RADIOCOM.

According to RADIOCOM, the provider will broadcast the programmes of the public television TVR as well as programmes of other content producers through the three digital multiplexes, accounting for a total of approximately 40 channels in SD format. The multiplexes also allow for the broadcasting of HD programmes. RADIOCOM will also be able to provide related services, such as subtitles, EPG (Electronic Programme Guide), Video on Demand (VoD) and data transmission (e.g. weather bulletins).

• *Licitația de televiziune digitală s-a finalizat* (Press release of ANCOM "The Digital Television Auction Ended", June 2014) RO

<http://merlin.obs.coe.int/redirect.php?id=17217>

• *RADIOCOM și-a adjudecat trei multiplexuri din cele cinci scoase la licitație de către ANCOM – comunicat, 10 iunie 2014* (Press release of ANCOM, "RADIOCOM has won three out of five multiplexes auctioned by ANCOM" from 10 June 2014) RO

<http://merlin.obs.coe.int/redirect.php?id=17218>

Eugen Cojocariu
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RS-Serbia

New media legislation adopted in Serbia

On 2 August 2014, three new media acts, namely the Act on Public Information and Media, the Act on Electronic Media, and the Act on Public Service Media were adopted by the National Assembly of the Republic of Serbia and published in the Official Gazette No. 83/2014. The adoption of these acts was one of the main goals set in the Media Strategy, which the Government adopted in September 2011 and follows the stakeholder consultations and public debates that were held in 2013. Superseding a more than a decade old legislation, the new acts are introducing significant changes to the legal framework, which are relevant for the operation of media in Serbia.

Some of the major novelties introduced by the Act on Public Information and Media, which is the general media act, include the mandatory privatization of remaining publicly owned media until 1 July 2015. For the first time in Serbia, the law defines the common interest in the field of media, allowing the co-financing of media projects, which are of common interest, as a permissible form of state aid. A transparent and non-discriminatory procedure for the award of such an aid is prescribed in detail. Finally, the Act aims to improve the transparency of media ownership by introducing a Media Register. At the same time, for the purpose of consolidating the fragmented market, the media concentration regime is liberalised to some extent.

The Act on Electronic Media supercedes the 2002 Act on Broadcasting. For the purpose of a full harmonization with the Audiovisual Media Services Directive 2010/13/EU, its provisions include prohibitions on incitement to hatred, as well as those on accessibility for people with disabilities to audiovisual media services, and on protection of minors. The same applies to the rules on audiovisual commercial communications. Split screen advertising or virtual advertising is regulated along the lines of the interpretative Communication of the EU Commission of 2004 on certain aspects of the provisions on televised advertising in the Directive "Television without frontiers". The Act changes the name of the former Broadcasting Agency to the Regulatory Authority for Electronic Media and broadens its competences to include conceptions of market analysis, the regulation of on-demand services, and logical channel numbering. Besides the issuing of reprimands and warnings and the revoking of licenses, the Regulatory Authority for Electronic Media now has the power to temporarily prohibit the transmission of certain types of content in cases of serious violations of the law.

The Act on Public Service Media is harmonised with the Communication of the EU Commission on the ap-

plication of state aid rules to public service broadcasting. It recognises a national public service broadcaster (RTS), and a provincial one in the Province of Vojvodina (RTV), provides a precise definition of the public service remit, and entrusts it to both RTS and RTV. The law allows the dual funding of RTS and RTV by the combination of public service broadcasting fees and revenues from commercial activities. However, the collection of public service broadcasting fees is been deferred until 2016. Until then, RTS and RTV will be financed directly from the state budget.

- Закон о јавном информисању и медијима (Act on Public Information and Media, 2 August 2014)
<http://merlin.obs.coe.int/redirect.php?id=17247> SR
- Закон о електронским медијима (Act on Electronic Media, 2 August 2014)
<http://merlin.obs.coe.int/redirect.php?id=17248> SR
- Закон о јавним медијским сервисима (Act on Public Service Media, 2 August 2014)
<http://merlin.obs.coe.int/redirect.php?id=17249> SR

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Pro Plus abused its dominant position in the television advertising market

On 24 April 2013, the Agency for Protection of Competition (AVK) issued a decision, which found that the local company Pro Plus has abused its dominant position in the television advertising market on the territory of the Republic of Slovenia (and in the internal market). Since 1 January 2003, Pro Plus, which owns two commercial TV channels (Pop TV and Kanal A), required exclusivity from the advertisers (100% market share of advertising) or offered more favourable conditions for the loyalty of the advertisers discouraging them to advertise on other competitive TV channels, which restricted the access to the market and consequently reduced the growth of the market.

Pro Plus unsuccessfully challenged the decision before the Supreme Court, which confirmed the decision of the AVK in December 2013. The Supreme Court also dismissed the appeal against the decision on the fine of EUR 105,000.00 for the obstruction of the investigation.

On 21 July 2014, the Agency for Protection of Competition concluded the administrative procedure and issued a decision on a financial fine in the amount of EUR 4,994,491.00. In the setting of the fine, the Agency has taken into account the severity and the duration of the infringement of the prohibition of the abuse of a dominant position by Pro Plus, which lasted

a total of 10 years and 3 months (i.e. from 1 January 2003). Taking into account the type of violation (misdemeanour), the impact on the market, and the geographic scope of the infringement, the Agency considered such an abuse of a dominant position as a very serious offence. Considering the severity of the violation, the Agency took into account the nature of the breach/violation, the economic power of the undertaking, the geographic scope of the infringement, the impact on the market, and the time dimension of the infringement.

The Agency also determined that there had been a violation of Article 102 of the Treaty on the Functioning of the European Union (TFEU), because such an abuse of a dominant position has an effect on trade between the EU Member States.

In the setting of the fine, the Agency has taken into account the fact that the legal entity Pro Plus did not cease to abuse its dominant position until the end of the administrative procedure, which began on 10 August 2011. The Agency also took into consideration the fact that Pro Plus has not yet been sanctioned for a violation of the competition law.

The proceedings against Pro Plus are the result of complaints by the competing broadcasters TV3 and RTVS. On 29 February 2012, the commercial TV channel TV3 left the Slovenian market and as a consequence, the operator of the second DTT multiplex (Norkring) lost the last TV channel, which was broadcast via its multiplex network. The other Slovenian stations are hosted by the public network (multiplex A), which is managed by the public service broadcaster, RTV Slovenia. Norkring dismantled the DTT network and left the Slovenian market in spring 2012.

• *Javna agencija Republike Slovenije za varstvo konkurence, 24/04/2013* (Decision of the Agency for Protection of Competition (AVK), 24 April 2013)

<http://merlin.obs.coe.int/redirect.php?id=17219>

SL

• *Vrhovno sodišče, Sodba G 7/2013* (Ruling G 7/2013 of the Supreme Court on the appeal regarding the abuse of a dominant position, 3 December 2013)

SL

• *Vrhovno sodišče, Sodba G 7/2012* (Ruling G 10/2012 of the Supreme Court on the appeal regarding the obstruction of the investigation, 26 November 2013)

SL

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Agenda

Fiscal incentive schemes and their impact on film and audiovisual production

20 October 2014 Organiser: European Audiovisual Observatory Venue: Brussels

http://www.obs.coe.int/fr/events/2014/-/asset_publisher/AnjvtE6dsf2b/content/event-fiscal-incentives-conference

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