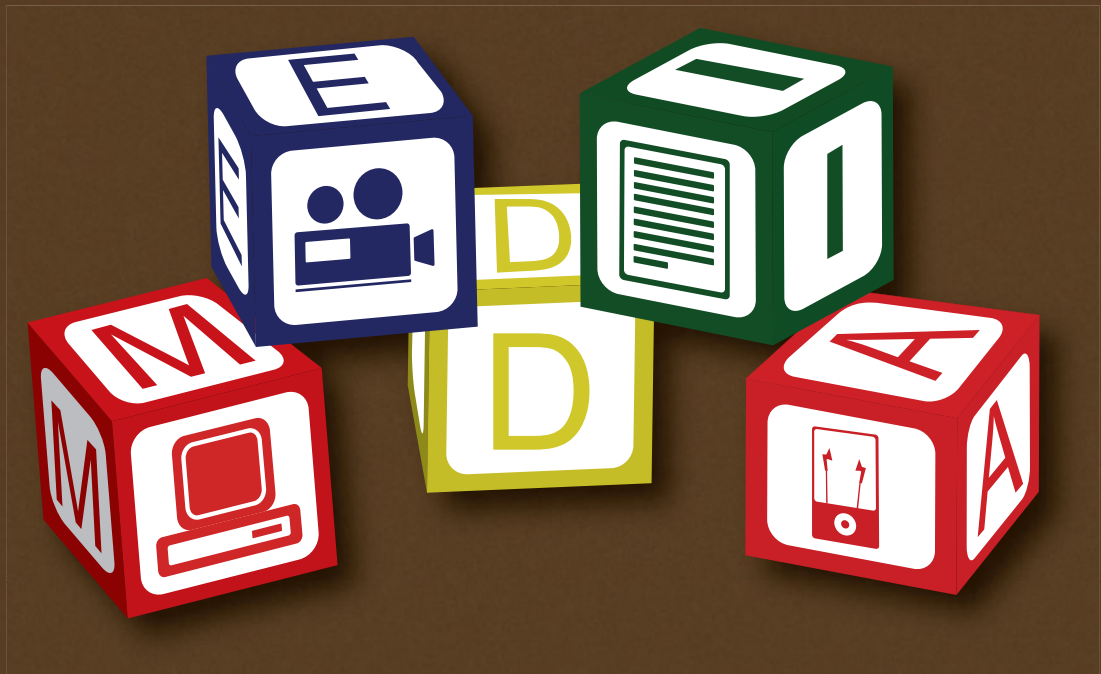
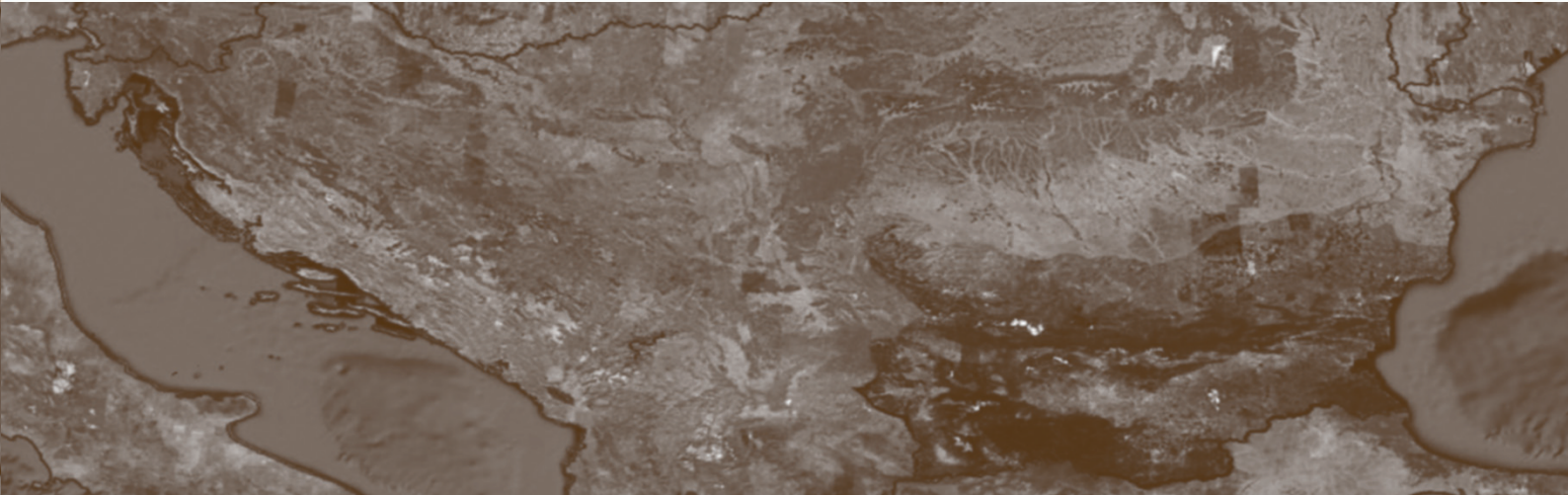


The Media in South-East Europe
A Comparative Media Law and Policy Study

**European Media Law and
Policy Framework**

Alexander Scheuer, Christian M. Bron, Shari Kind



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Office Bulgaria
P.O. Box 958
97, Knjaz Boris I Street
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Authors: Alexander Scheuer, Christian M. Bron, Shari Kind

Responsible: Beate Martin, FES Kosovo, Marc Meinardus, FES Bulgaria

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Conducted on behalf of the

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By the

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Preface

The benchmark applicable to numerous aspects of media law and policy at the national level is mainly set by the standards which can be derived from binding legal requirements and additional instruments issued at the Council of Europe as well as adopted by the European Union.

In this respect, the present analysis titled “European Media Law and Policy Framework” forms an integral component of the study “The Media in South-East Europe”. The Friedrich Ebert Foundation – Regional Project South-East Europe has commissioned the Institute of European Media Law to conduct this study which should not only explore the market and legal conditions of the media sector in the countries concerned, but also identify suitable remedies that could be suggested in order to help improve, and overcome possible shortcomings in, the situation actually encountered.

Therefore, the benchmark, against which the current legal and policy framework in the countries of South-East Europe had to be analysed and with regard for which proposals that might help remedy the identified deficits had to be developed, was initially established by the EMR and then made available to the national experts who drafted the country reports.

1 Council of Europe standards: Art. 10 ECHR as benchmark for the freedom of the media

In the following the Council of Europe standards, particular stemming from Art. 10 European Convention on Human Rights¹ (ECHR), are to be examined. This should serve as a benchmark for the freedom of the media in all European States that have ratified the Convention, not only EU Member States.

Art. 10 ECHR reads as follows:

- “1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or the rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.”

The European Court of Human Rights (ECtHR) has shaped, in its numerous decisions on the present subject matter, basic principles and requirements with regard to

Art. 10 ECHR, which widely influence today's European media landscape. The ECtHR refers in various decisions to different Conventions of the Council of Europe and Recommendations passed by the Committee of Ministers addressing the media. Therefore, reference is also made to the relevant Conventions and Recommendations in the following:

1.1 Legal Background to the Convention

According to its Statute² it is not a condition for membership in the Council of Europe that the respective state ratifies the ECHR, but that states respect the rule of law as well as human rights and fundamental freedoms. Still, all current Member States of the Council of Europe (47) are also Contracting States to the ECHR. However, ratification of the ECHR requires membership in the Council of Europe (Art. 59 (1) ECHR).

The ECHR is only binding for the Contracting States. It needs to be converted into national law to be valid; the way how the conversion of international treaties into the internal national law takes place can be specified by the states.

As mentioned, a fundamental characteristic is that just the (initial) Convention itself is binding for the states. Additional protocols are obligatory only for those states which have ratified them. Consequently, the range of protection concerning the particular guarantees in the Convention may differ in the respective states.³ Besides, Contracting States have the possibility of making reservations in respect of any particular provision in the Convention when signing it (Art. 57(1) ECHR).

According to Art. 1 ECHR,

“[T]he High Contracting Parties shall se-

¹ Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 as amended by its Protocol No. 14 (CETS No. 194) as from the date of its entry into force on 1 June 2010.

² Cf. Art. 3 et seq. Statute of the Council of Europe of 5 May 1949, available at: www.conventions.coe.int/

³ C. Grabenwarter, Europäische Menschenrechtskonvention, Munich 2009, § 2 rec. 4.

cure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.”

Thus, regardless of nationality, the legal protection of a person just depends on being affected by the sovereignty of a contracting state, whereas the latter can only be referred to the Court of Human Rights for violations of the ECHR as a Member State.

The European Union has not yet ratified the ECHR. However, Art. 6(2) of the Treaty on the European Union (TEU) (now) foresees the possibility for the EU to become a member of the ECHR by signing this international treaty. Additionally, Article 6(3) TEU declares that the fundamental rights as they are guaranteed by the ECHR are part of the Union Law as “general principles”. Correspondingly, Protocol No. 14 to the ECHR, which entered into force on 1 June 2010⁴, in its Art. 17, amended Art. 59 ECHR, which now states that “the European Union may accede to the Convention”. It could be expected that the EU will do so in the near future.

Besides, there is the question of the relationship between the range of the protection provided by the ECHR, on the one hand, and by the national constitutions, on the other hand. The Convention has the function to guarantee a “minimum standard” of protection. Therefore, the states are free to provide their citizens with more comprehensive, detailed and/or additional rights than the Convention itself does. However, the states must not fall short of the level of protection as afforded by the Convention (Art. 57 ECHR).

The Convention has “constitutional status” only in Austria. In all other states it ranks under the Constitution. However, it outranks simple-majority legislation, as for example in

some South-East European states like Croatia or Romania.⁵

After the drastic changes of the political systems in the Central European and Eastern European States, the ECHR as well as the jurisdiction of the ECtHR have a special significance as both can serve as a model for the construction of a new (legal) system with a European direction and standard in those countries.⁶

The examination by the ECtHR as to whether there is a violation of the Convention is carried out in three stages. Firstly, the Court inspects whether the scope of protection of an article of the Convention is affected. Secondly, it examines whether there is a measure that interferes with a legally protected position of a person. Thirdly, it assesses whether this restriction can be justified. According to Art. 10 ECHR, the interference shall be prescribed by law and pursue a legitimate aim, whereas the interference has to be proportionate to the significance and the value of the aim pursued.

1.2 *The scope of protection*

Art. 10 ECHR, first of all, according to para. 1 protects “the right to freedom of expression”. According to this fundamental right the ECtHR ruled in its “Handyside case” that the

“[f]reedom of expression constitutes one of the essential foundations of a democratic society, one of the basic conditions for its progress and for the development of every man.”⁷

However, Art. 10 ECHR has a much wider scope, because not only the “freedom of communication”, but the entire communication

⁴ Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending the control system of the Convention, Strasbourg, 13 May 2004.

⁵ See Art. 134 of the constitution of the Republic of Croatia, 21 December 1990 and Art. 20(2) of the constitution of Romania.

⁶ Cf. *Grabenwarter, op. cit.*, § 3, rec. 10.

⁷ *Handyside v. the U.K.*, judgment of 7 December 1976, Appl. 5493/72, § 49.

process is covered. This includes at least six sub-areas: the freedom of expression and of information, the freedom of the press and of broadcasting, and the freedom of art and of science.

As there are several forms of communication, it could be said that the freedom of expression is the basis of the protection of the freedom of communication. A reading of the jurisprudence of the ECtHR shows that it is difficult to distinguish between the respective rights, especially the freedom of expression and the freedom of the press. For example, journalists who make statements may be protected by the freedom of expression, as in the majority of the cases this right is concerned, or by the freedom of broadcasting.

Therefore, in some instances the protection of all covered rights under Art. 10 ECHR may merge and would have to be seen as complementing each other. In the following, different areas of the scope of protection applying to all the media are to be examined.

a) Value judgments and statements of fact

An opinion can be expressed by giving a value judgment and/or a statement of fact.

The ECtHR says that

“the existence of facts can be demonstrated whereas the truth of value judgments is not susceptible of proof.”⁸

It determines that a careful distinction needs to be made between value judgments and statements of fact, whereas the dividing line cannot be defined precisely.

In any case, value judgments have a descriptive element and include judgmental parts. In a democratic society they do not have to be proved – especially by journalists. Otherwise,

“it infringes freedom of opinion itself, which is a fundamental part of the right secured by Article 10 of the Convention.”⁹

However, it is necessary that they are adequately grounded on a sufficient factual basis that has to be proved itself; otherwise an interference could be proportionate.¹⁰

Journalists are principally obliged to verify factual statements. But even if their statements are defamatory of private individuals, they can be dispensed from this ordinary obligation. The exercise of freedom of expression carries with it “duties and responsibilities”, which also apply to the media even with respect to matters of serious public concern. They are considerable when the reputation of a named individual is attacked and thus the “rights of others” are interfered with. Therefore, special reasons are required before the media can be dispensed from their obligation to verify factual statements that are defamatory of private individuals. Whether such grounds exist, depends in particular on the nature and degree of the defamation in question and the extent to which the media can reasonably regard their sources as reliable with respect to the allegations.¹¹ Thus, it has to be decided based on a weighing of interests in the given case.

According to the ECtHR in the *Bladet Tromsø and Stensaas* judgment¹², the press should normally be entitled to rely on the contents of official reports and their correctness without having to undertake independent research. Otherwise, the vital public watchdog role of the press may be undermined.¹³ It has to be noted that the Court also decided that it is in principle not incompatible with Art. 10 ECHR to place on a defendant in libel

⁹ *Lingens v. Austria*, op. cit., § 46.

¹⁰ *Jerusalem v. Austria*, judgment of 27 February 2001, Appl. 26958/95, §§ 42 and 43.

¹¹ *Třnsbergs Blad AS and Haukom v. Norway*, judgment of 1 March 2007, Appl. 510/04, § 89.

¹² *Bladet Tromsø and Stensaas v. Norway*, judgment of 20 May 1999, Appl. 21980/93, § 68; see mutatis mutandis: *Colombani v. France*, judgment of 25 June 2002, Appl. 51279/99.

¹³ *Goodwin v. the U.K.*, judgment of 27 March 1996, Appl. 17488/90, § 39.

⁸ *Lingens v. Austria*, judgment of 8 July 1986, Appl. 9815/82, § 46.

proceedings the onus of proving to the civil standard the truth of defamatory statements.

Nevertheless, it is essential,

“in order to safeguard the countervailing interests in free expression and open debate, that a measure of procedural fairness and equality of arms is provided for.”¹⁴

There are also case configurations conceivable in which a proper value judgment has to be handled as a factual judgment. Where criminal accusations are concerned, a claim implying a negative value judgment includes a precise descriptive element and is therefore more likely to be of factual nature, and needs to be proved.¹⁵

Both value judgments and statements of fact are protected entirely and without limitations by Art. 10 ECHR.

Additionally, the case law of the ECtHR shows that, besides certain forms of expression and types of information, Article 10 also applies to information of a commercial nature.¹⁶

b) Critical statements

Criticism on state institutions or private persons are statements that are particularly suitable for affecting the legal sphere of other people or legal assets protected by the ECHR, such as the reputation or the authority and impartiality of the judiciary.

But the protection is not limited to positive or “harmless” criticism or inoffensive statements the particular receiver may want to receive. The Court often reiterates that

“it is applicable not only to information and ideas that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend,

shock or disturb; such are the demands of that pluralism, tolerance and broadmindedness without which there is no democratic society.”¹⁷

A speaker, however, is obliged to choose his words with caution. If he might have been able to voice his criticism and to contribute to a free public debate without having had recourse to a particular defamatory word which explicitly referred to a criminal offence a conviction based on this statement would not be a violation of Art. 10 ECHR.¹⁸

Criticism, especially conducted by journalists, is necessary in (and for) a democratic society in order to support political and social development. Therefore, freedom of expression gives the public the singular opportunity to receive information and thereafter to form their own opinions, so it is an integral attribute of a democratic society. A conviction of a journalist in relation to distributing information of public interest may well deter one from contributing to public discussion of issues affecting the life of the community and discourage one from making criticisms in future. It can amount to a kind of censorship and hinder the public opinion-forming process.¹⁹

Journalists can also refer to Art. 10 ECHR, even if they excoriate, exaggerate or provoke or if they make polemical statements. Nevertheless, the Court underlines that several rules are to be followed to assure a minimum level in the particular debate. Insults, denigrations, slander or gratuitous personal attacks could not enjoy general, unlimited protection under the Convention. Such statements cannot support a democracy and therefore must not be tolerated.

¹⁴ *Steel and Morris v. UK*, judgment of 15 February 2005, Appl. 68416/01, § 95.

¹⁵ Dommering, *Comments on Art. 10 ECHR*, in: Castendyk/Dommering/Scheuer, *European Media Law*, p. 55, para. 35.

¹⁶ *Markt intern Verlag GmbH and Klaus Beermann v. Germany*, judgment of 20 November 1989, Appl. 10572/83, § 26; *Casado Coca v. Spain*, judgment of 24 February 1994, Appl. 15450/89, § 37.

¹⁷ *Handyside v. the U.K.*, op. cit., § 49.

¹⁸ *Constantinescu v. Romania*, judgment of 27 June 2000, Appl. 28871/95, § 74 and § 75.

¹⁹ *Monnat v. Switzerland*, judgment of 21 September 2006, Appl. 73604/01, § 70.

c) Criticism of the judiciary

Concerning matters of public interest the ECtHR sees the functioning of the judiciary as such a relevant matter because of the fundamental role of the courts as guarantors of justice in a state based on the rule of law, whereas the protection of the authority and impartiality of the judiciary is a legitimate aim mentioned in Art. 10. The respect for the judiciary is also required by the Recommendation No. R (94) "on the independence, efficiency and role of judges".²⁰

Public confidence plays an essential role for the courts so that they have to be protected from distorting and unfounded criticism. Attention has to be paid to the special role of the media that allows even an aggressive or harsh tone. Consequently, published articles reporting about decisions of judges, the judges themselves or pending trials cannot be judicially attacked successfully in certain circumstances – especially, if there was detailed research and supporting opinions of experts etc. underlying the publications.²¹

Additionally,

"it is not for the Court, or for the national courts for that matter, to substitute their own views for those of the press as to what technique of reporting should be adopted by journalists."²²

So, the states are not entitled to restrict all forms of public discussion on matters pending before the courts²³, whereas the press has to pay attention to its "duties and responsibilities".

"It cannot be excluded that the public's becoming accustomed to the regular spec-

tacle of pseudo-trials in the news media might in the long run have nefarious consequences for the acceptance of the courts as the proper forum for the determination of a person's guilt or innocence on a criminal charge."²⁴

An article concerning legal proceedings pending, especially criminal proceedings, can also affect the rights of the defendant. It should be added that the defendant is entitled to enjoy the guarantee of a fair trial and the right to be presumed innocent of any criminal offence until proved guilty, a guarantee which is set out in Art. 6 ECHR. This fact has relevance for the balancing of competing interests.²⁵ Therefore, journalists have to refrain from statements that are likely to prejudice.

Furthermore the ECtHR deduces from the Appendix to the Recommendation Rec (2003) 13 "on the provision of information through the media in relation to criminal proceedings" that even the states are subject to positive obligations under Art. 8 to protect the privacy of convicted persons in such proceedings.²⁶

When examining whether the domestic authorities have solved this conflict of rights in conformity with the European law, the Court includes the principles of this Recommendation, saying that

"it rightly points out that the media have the right to inform the public in view of the public's right to receive information, and stresses the importance of media reporting on criminal proceedings in order to inform the public and ensure public scrutiny of the functioning of the criminal justice system. In addition, the Appendix to that Recommendation states that the public must be able to receive information

²⁰ *Amihalachioaie v. Moldova*, judgment of 20 April 2004, Appl. 60115/00, judge Pavlovski in a dissenting opinion.

²¹ *De Haes and Gijssels v. Belgium*, judgment of 24 February 1997, Appl. 19983/92.

²² *News Verlags GmbH & Co. KG v. Austria*, judgment of 11 January 2000, Appl. 31457/96, § 39.

²³ *Worm v. Austria*, judgment of 29 August 1997, Appl. 22714/93, § 50.

²⁴ *Sunday Times v. the U.K.*, op. cit., § 63.

²⁵ *Worm v. Austria*, op. cit., § 50 and 55; *Bladet Tromsø and Stensaas v. Norway*, op. cit., § 65.

²⁶ *Egeland and Hanseid v. Norway*, judgment of 16 April 2009, Appl. 34438/04, § 53.

about the activities of judicial authorities and police services through the media and that journalists must therefore be able to report freely on the functioning of the criminal justice system."²⁷

But it also refers to this Recommendation and its Appendix when it says that

"it is to be noted that the public nature of court proceedings does not function as a *carte blanche* relieving the media of their duty to show due care in communicating information received in the course of those proceedings"²⁸,

and that

"under the terms of Article 10 § 2, the exercise of the freedom of expression carries with it 'duties and responsibilities', which also apply to the press. In the present case this relates to protecting 'the reputation or rights of others' and 'maintaining the authority and impartiality of the judiciary'. These duties and responsibilities are particularly important in relation to the dissemination to the general public of photographs revealing personal and intimate information about an individual. The same applies when this is done in connection with criminal proceedings."²⁹

With regard to the principles of the Recommendation and Appendix, especially the positive obligations of the states, the Court has already affirmed a violation of Art. 8 ECHR concerning a publication that entailed prejudice against the applicant's honour and reputation and was therefore harmful to his moral and psychological integrity and his private life.³⁰

These considerations are also important for the question regarding under which cir-

cumstances the press may be excluded from a trial. Such an exclusion can be justified to protect the privacy of a child and other parties, which is protected by Art. 8 ECHR, and to avoid prejudicing the interests of justice.³¹

d) Criticism of politicians

The journalists' right of making statements may be restricted by the type of the person that is affected by it; however, generally not so, when it comes to reporting on public figures such as politicians. According to the Court³²,

"the limits of acceptable criticism are wider with regard to a politician acting in his public capacity than in relation to a private individual."

A politician is a public figure who voluntarily lays himself open to close scrutiny of his acting and word. Therefore he has to bargain for critical reactions of the public or the press and a higher degree of tolerance has to be displayed. A possible failure of a public figure, even in the private sphere, may, in certain circumstances, constitute a matter of legitimate public interest.³³

Even the publication of purely private information of public figures may be permitted, if there is a close connection with their function. The Court considers that

"it would be fatal for freedom of expression in the sphere of politics if public figures could censor the press and public debate in the name of their personality rights, alleging that their opinions on public matters are related to their person and therefore constitute private data which cannot be disclosed without consent."³⁴

²⁷ Dupuis and other v. France, judgment of 7 June 2007, Appl. 1914/02, § 42.

²⁸ Eerikäinen and others v. Finland, judgment of 10 February 2009, Appl. 3514/02, § 63; Flinkkilä and others v. Finland, judgment of 6 April 2010, Appl. 25576/04, § 77.

²⁹ Egeland and Hanseid v. Norway, *op. cit.*, § 59.

³⁰ A. v. Norway, judgment of 9 April 2009, Appl. 28070/06, §§ 73 - 75.

³¹ See B. and P. v. the U.K., judgment of 24 April 2001, Appl. 36337/97 and 35974/97.

³² Oberschlick v. Austria (no.2), *op. cit.*, § 29; Lopes Gomes da Silva v. Portugal, judgment of 28 September 2000, Appl. 37698/97, § 30.

³³ Třnsbergs Blad AS and Haukom v. Norway, *op. cit.*, § 87.

³⁴ Társaság a Szabadságjogokért v. Hungary, judgment of 14 April 2009, Appl. 37374/05, § 37.

But this does not mean that a politician is not entitled to have his person protected. In addition to Art. 10(1) ECHR protecting the right to freedom of expression as the basis of all media, Art. 8(1) ECHR declares a right to respect the private and family life, the home and the correspondence of a person. He/She enjoys this right even when he/she is acting in his public capacity, whereas both rights need to be counterbalanced in the case of conflicts.

There always has to be a fair balance between the personal interest of the politician and public interests, especially the interests of open discussion of political issues.

This topic has already been the subject of different judgments of the ECtHR. In the case *Dalban v. Romania*³⁵ the Court observed the application of a journalist who was convicted for criminal libel because of some articles that exposed a series of frauds allegedly committed by a senator and the chief executive. According to the ECtHR, this was an interference that could not be accepted as necessary in a democratic society. The information of the article was about a matter of public interest, namely the behaviour of the senator and the chief executive as a politician, thus a person of public interest, and did not concern their private life. With regard to the vital role of the press, and the fact that the allegations could not be proved as untrue, there was a clear breach of the journalist's right of freedom of expression.

A further question in this context is whether, and to what extent, journalists are allowed to report about persons who are associated with politicians, such as family members, partners in life or friends. Although they are not public figures, meaning that the principles mentioned above are basically not ap-

plicable, such reports can be justified by the right to freedom of expression of the journalists. This right has to be balanced against the protection of the private life of the persons affected, while special circumstances can lead to an outweighing of the former.

Therefore, the ECtHR found a violation of Art. 10 ECHR in the *Flinkkilä and others* case. Journalists were sentenced because of the publication of photos which showed a woman who was the partner of a politician. It said that

"[h]er status as an ordinary person enlarges the zone of interaction which may fall within the scope of private life."³⁶

Because she had already caught the attention of the public by her behaviour in the past, the Court found furthermore that

"[it] cannot but note that [she], notwithstanding her status as a private person, can reasonably be taken to have entered the public domain.(...) The disclosure of [her] identity in the reporting had a direct bearing on matters of public interest (...)." ³⁷

In conclusion, the conviction of the journalists was illegal, because they had acted in the public interest.

e) Criticism of the government

The examination of applications concerning "criticism of the government" is, according to the ECtHR, handled in a similar way to criticism of politicians.³⁸ The limits are also wider than with regard to a (purely) private person. The government occupies a dominant position, which makes it essential to exercise moderation, especially in resorting to criminal proceedings, where other measures are available.

³⁵ *Dalban v. Romania*, judgment of 28 September 1999, Appl. 28114/95.

³⁶ *Flinkkilä and others v. Finland*, judgment of 6 April 2010, Appl. 25576/04, § 82.

³⁷ *Flinkkilä and others v. Finland*, *op. cit.*, §§ 83 and 85.

³⁸ *Incal v. Turkey*, judgment of 9 June 1998, Appl. 22678/93, § 54.

Besides the division of power, the control by the public opinion is essential in a democratic system, while it remains open to the states as guarantors of public order to adopt measures to react, i.e. by law or other proportionate measures.

The Court's judgment in the case *Feldek v. Slovakia*³⁹ gives an example of the scope of protection of Art. 10 in this context. The applicant had criticised the then new Slovakian Government, especially the new political leaders. He referred to the fascist past of the new Minister for Culture and Education and cast doubts on the personal qualities of the minister as a member of the government in a democratic state. Although the applicant had used harsh words, the Court held that he could draw his statements upon Art. 10 of the Convention, because they were based on facts, and were made in good faith and in pursuit of a legitimate aim. Furthermore they were made in a very political context and were crucial for the development of Slovakia.

An important attribute of a democratic society is a free political debate. There have to be very strong reasons to justify restrictions and states are given little scope for these. In other regards, there is a danger that respect for freedom of expression is affected in general in the state concerned.

There are also cases in which the Court considered that Art. 10 cannot take precedence over conflicting rights, such as the reputation of a politician. In 2008, the Court had to decide in a case⁴⁰ that dealt with a journalist who had alleged that a politician had been active in the secret police *securitate*.

In this case, there was no factual basis at all and additionally the statements were very

concrete, not "general and undetermined" and did not feature any irony or humour. Therefore, the ECtHR found that even the right of the press to provoke or exaggerate could not be exerted to justify such allegations, and that the bounds of acceptable criticism had been overstepped. In conclusion, a violation of Art. 10 ECHR was not established.

The same direction applied in the Court's judgment in the case *Petrov v. Bulgaria*⁴¹. In this case a journalist accused the applicant of (indirectly) participating in the assassination of a former chief prosecutor. The national courts did not convict the journalist because of his statement. The Court ruled that the acquittal of the journalist had not violated Art. 10 ECHR, because the applicant's own freedom of expression was not at stake. Furthermore, Art. 8 ECHR was not violated. In several cases concerning complaints brought under Art. 10 ECHR the Court ruled that a person's reputation is protected by Art. 8 ECHR as part of the right to respect for "private life". The protection of private life has to be balanced against the right to freedom of expression, enshrined in Art. 10. The Court ruled in this case that the national courts had balanced, in conformity with Convention standards, the applicant's interest in protecting his reputation against the paramount public interest in the respective matters.

f) "Hate speech" and violence

The Court concedes a wider margin of appreciation to the State authorities examining the need for interference, where such remarks constitute an incitement to violence against an individual or a public official or a sector of the population.⁴² It considers one of the principal characteristics of democracy to be

³⁹ *Feldek v. Slovakia*, judgment of 12 July 2001, Appl. 29032/95.

⁴⁰ *Petrina v. Romania*, judgment of 14 October 2008, Appl. 78060/01.

⁴¹ *Petrov v. Bulgaria*, judgment of 2 November 2010, Appl. 27103/04.

⁴² *Ceylan v. Turkey*, judgment of 8 July 1999, Appl. 23556/94, § 34; *Gerger v. Turkey*, judgment of 8 July 1999, Appl. 24919/94, § 48.

the possibility it offers of resolving a country's problems through dialogue, without having recourse to violence.⁴³ It is necessary in a democratic society to restrict such hate speech which constitutes incitement to violence, hostility or hatred, because violence as a means of political expression is the antithesis of democracy; irrespective of the ends to which it is directed, incitement to it will tend to undermine democracy and it is intrinsically inimical to the ECHR. Unlike the advocacy of opinions on the free marketplace of ideas, incitement to violence is the denial of a dialogue, the rejection of the testing of different thoughts and theories in favour of a clash of might and power. It should not fall within the ambit of Art. 10 ECHR, whereas a distinction between this and pure strong protest referring to a difficult political situation has to be made.⁴⁴ However, there could be the risk that media might become "a vehicle for the dissemination of hate speech and the promotion of violence".

These different approaches show that it is important to take the degree of aggressive tone of a statement and its circumstances into account, and whether an inhibition is necessary within the meaning of democracy that benefits from free circulation of information and opinions.

This is also shown by another example of the jurisdiction of the Court. The applicants of this case had shouted some slogans with a violent tone during a demonstration. Regarding the case as a whole the Strasbourg Court found that

"having regard to the fact that these are well-known, stereotyped leftist slogans and that they were shouted during law-

ful demonstrations – which limited their potential impact on "national security" and "public order" – they cannot be interpreted as a call for violence or an uprising. The Court stresses, however, that whilst this assessment should not be taken as an approval of the tone of these slogans, it must be recalled that Article 10 protects not only the substance of the ideas and information expressed, but also the form in which they are conveyed."⁴⁵

It also said that the applicants did not advocate violence, injury or harm to any person by these slogans and the applicants' conduct could not be considered to have had an impact on "national security" or "public order" by way of encouraging the use of violence or inciting others to armed resistance or rebellion. Consequently, there has been a violation of the applicant's right to freedom of expression.

When examining whether there has been a violation of Art. 10 ECHR, the ECtHR reverts to the definition of the term "hate speech" by the Appendix to the Recommendation No. R (97) 20.⁴⁶ "Hate speech" has to be understood as

"covering all forms of expression which spread, incite, promote or justify racial hatred, xenophobia, anti-Semitism or other forms of hatred based on intolerance, including: intolerance expressed by aggressive nationalism and ethnocentrism, discrimination and hostility against minorities, migrants and people of immigrant origin."

Besides its own case-law, the scrutiny by the Court involves the principles of this Recommendation and its Appendix, while the judges consider both of them as

"guidelines designed to underpin govern-

⁴³ United Communist Party of Turkey and Others v. Turkey, judgment of 30 January 1998, Appl. 19392/92, § 57.

⁴⁴ Karatas v. Turkey, judgment of 8 July 1999, Appl. 23168/94, dissenting opinion of the judges Wildhaber, Pastor Ridruejo, Costa and Baka.

⁴⁵ Gül and other v. Turkey, judgment of 8 June 2010, Appl. 4870/02, § 41.

⁴⁶ Recommendation No. R (97) 20 of the Committee of Ministers to Member States on "hate speech", adopted on 30 October 1997.

ments' efforts to combat all hate speech, for example the setting up of an effective legal framework consisting of appropriate civil, criminal and administrative law provisions for tackling the phenomenon. It proposes, among other measures, that community-service orders be added to the range of possible penal sanctions and that the possibilities under the civil law be enhanced, for example by awarding compensation to victims of hate speech, affording them the right of reply or ordering retraction. Governments should ensure that, within this legal framework, any interference by the public authorities with freedom of expression is narrowly circumscribed on the basis of objective criteria and subject to independent judicial control."⁴⁷

The position contrary to violence in the media of the Council of Europe is reflected in several further legal acts.

With regard to the fact that Art. 10 ECHR also protects opinions that shock or disturb, Recommendation No. R (97) 19⁴⁸ says that

"[h]owever, certain forms of gratuitous portrayal of violence may lawfully be restricted, taking into account the duties and responsibilities which the exercise of freedom of expression carries with it."

Thus it sets some guidelines for measures to restrict portrayals of violence in the media. Moreover the protection of women against violence shall be improved. According to the Appendix of the Recommendation Rec (2002) 5⁴⁹, the Member States should:

"17. encourage the media to promote a non-stereotyped image of women and men based on respect for the human per-

son and human dignity and to avoid programmes associating violence and sex; as far as possible, these criteria should also be taken into account in the field of the new information technologies;

18. encourage the media to participate in information campaigns to alert the general public to violence against women;
19. encourage the organisation of training to inform media professionals and alert them to the possible consequences of programmes that associate violence and sex;
20. encourage the elaboration of codes of conduct for media professionals, which would take into account the issue of violence against women and, in the terms of reference of media watchdog organisations, existing or to be established, encourage the inclusion of tasks dealing with issues concerning violence against women and sexism."

Concerning videogames the Committee of Ministers of the Council of Europe recommends in the Recommendation No. R (92) 19⁵⁰ that the governments of Member States:

"Review the scope of their legislation in the fields of racial discrimination and hatred, violence and the protection of young people, in order to ensure that it applies without restriction to the production and distribution of video games with a racist content;

Treat video games as mass media for the purposes of the application *inter alia* of Recommendation No. R (89) 7 concerning principles relating to the distribution of videogames having a violent, brutal or pornographic content, and of the Convention on Transfrontier Television (ETS 132)."

⁴⁷ *Gündüz v. Turkey*, judgment of 4 December 2003, Appl. 35071/97, § 22.

⁴⁸ Recommendation No. R (97) 19 of the Committee of Ministers to Member States on the portrayal of violence in the electronic media, adopted on 30 October 1997.

⁴⁹ Recommendation No. Rec (2002) 5 of the Committee of Ministers to Member States on the protection of women against violence, adopted on 30 April 2002.

⁵⁰ Recommendation No. R (92) 19 of the Committee of Ministers to Member States on video games with a racist content, adopted on 19 October 1992.

Additionally, with regard to the fact that the media can make a positive contribution to the fight against intolerance, Recommendation No. R (97) 21⁵¹ includes professional practices which are conducive to the promotion of a culture of tolerance.

g) Criticism by civil servants

In the following there is the question as to whether a civil servant could be deprived of their freedom of expression just because of their status.

The responsibility of a state under the Convention may arise for acts of all its organs, agents and servants. Thus, the obligations of a Contracting Party under the Convention can be violated by any person exercising an official function vested in them.⁵²

Therefore, a judge is not hindered from expressing his opinion among his responsibilities. Reactions to this as interference by a State authority in the form of acting by superiors can give rise to a breach of Art. 10 ECHR, unless it can be shown that it was in accordance with the aims laid out in its para. 2.

In 2008, the ECtHR decided⁵³ a case which concerned an informant, head of the Press Department of the Moldovan Prosecutor General's Office. The informant handed over two secret letters to a newspaper without consulting the heads of other departments of the Prosecutor General's Office and, therefore, was dismissed, as his behaviour was considered as a breach of the press department's internal regulations. It was revealed that the Deputy Speaker of Parliament had exercised undue pressure on the Public Prosecutor's Office.

The ECtHR ruled that pressure by Parliament put on the Public Prosecutor and, ac-

cordingly, the possible threat for independence of national justice are very important matters in a democratic society, the public has a legitimate interest to know about and that they are issues of public interest. These matters are so important in a democratic society that they outweigh the interest in maintaining public confidence in the Prosecutor General's Office. It emphasised that the special situation in Moldova supported this view in the given case. International non-governmental organisations had expressed concern about the breakdown of the separation of powers and the lack of judicial independence. Regarding the severe sanction in the form of a dismissal and the danger of a potential chilling effect on an open discussion of topics of public concern, the Court found that this interference could not be considered as "necessary in a democratic society".

h) Statements concerning religious beliefs

Another important issue addresses statements concerning religious beliefs. In its judgment *Kokkinakis v. Greece* the ECtHR pointed out that

"freedom of thought, conscience and religion, which is safeguarded under Article 9 of the Convention, is one of the foundations of a 'democratic society' within the meaning of the Convention. It is, in its religious dimension, one of the most vital elements that go to make up the identity of believers and their conception of life."⁵⁴

The protection of the religious feelings of other people can be a legitimate aim in the meaning of the ECHR. Freedom of thought and freedom of expression need to be counterbalanced in the case of conflicts.

In this context the ECtHR said that

"those who choose to exercise the free-

⁵¹ Recommendation No. R (97) 21 of the Committee of Ministers to Member States on the media and the promotion of a culture of tolerance, adopted on 30 October 1997.

⁵² *Wille v. Liechtenstein*, judgment of 28 October 1999, Appl. 28396/95, §§ 42 and 46.

⁵³ *Guja v. Moldova*, judgment of 12 February 2008, Appl. 14277/04.

⁵⁴ *Kokkinakis v. Greece*, judgment of 25 May 1993, Appl. 14307/88, § 31.

dom to manifest their religion, irrespective of whether they do so as members of a religious majority or a minority, cannot reasonably expect to be exempt from all criticism. They must tolerate and accept the denial by others of their religious beliefs and even the propagation by others of doctrines hostile to their faith.”⁵⁵

But a distinction has to be made between “provocative opinions” and abusive attacks on one’s religion⁵⁶, because

“whoever exercises the rights and freedoms enshrined in the first paragraph of Article 10 undertakes ‘duties and responsibilities’. Amongst them – in the context of religious opinions and beliefs – may legitimately be included an obligation to avoid as far as possible expressions that are gratuitously offensive to others and thus an infringement of their rights, and which therefore do not contribute to any form of public debate capable of furthering progress in human affairs.”⁵⁷

However, the manner in which religious feelings are at stake is a matter which may engage the responsibility of the State, notably its responsibility to ensure the peaceful enjoyment of the right.

Thus,

“it may be considered necessary in certain democratic societies to sanction or even prevent improper attacks on objects of religious veneration, provided always that any ‘formality’, ‘condition’, ‘restriction’ or ‘penalty’ imposed be proportionate to the legitimate aim pursued.”⁵⁸

The Court allows a wider margin of appreciation to the Contracting States when

regulating freedom of expression in relation to matters liable to offend intimate personal convictions within the sphere of morals or, especially, religion:

“This does not of course exclude final European supervision. Such supervision is all the more necessary given the breadth and open-endedness of the notion of blasphemy and the risks of arbitrary or excessive interferences with freedom of expression under the guise of action taken against allegedly blasphemous material. In this regard the scope of the offence of blasphemy and the safeguards inherent in the legislation are especially important. Moreover the fact that the present case involves prior restraint calls for special scrutiny by the Court.”⁵⁹

i) News reporting based on interviews

The press benefits from the need for free circulation of views and for open public debate. Any opinions and information that are expressed in this context are to be considered part of a debate on questions of public interest, meaning that there is little scope for restrictions under Art. 10. Therefore, a journalist is not hampered from asking captious or pointed questions or making such statements. He/She can only be convicted of defamation, if there are strong and sufficient reasons.

At the same time news reporting based on interviews is one of the most essential means of how the press can safeguard its elementary role as a “public watchdog”. As long as rights of other people are not outweighing, or as long as there are no other strong and sufficient reasons, a journalist must not be punished for assisting in the dissemination of statements made by another person, for example in an interview. Otherwise public

⁵⁵ *Otto-Preminger Institut v. Austria*, judgment of 20 September 1994, Appl. 13470/87, § 47.

⁵⁶ See *I.A. v. Turkey*, judgment of 13 September 2005, Appl. 42571/98.

⁵⁷ *Otto-Preminger Institut v. Austria*, op. cit., § 49.

⁵⁸ *Otto-Preminger Institut v. Austria*, op. cit., § 49.

⁵⁹ *Wingrove v. the U. K.*, op. cit., § 58; *Observer and Guardian v. the U.K.*, judgment of 26 November 1991, Appl. 13585/88, § 60.

discussion on topics of general interest would seriously be hampered.⁶⁰

It should be added that the Court also ruled⁶¹ that there is no general requirement for journalists to systematically and formally distance themselves from the content of a quotation that might insult or provoke others or damage their reputation. This is not reconcilable with the press role of distributing opinions and ideas.

According to the Court, the reputation of the affected person can be a legitimate aim and interference with the freedom of expression can be proportionate if there is an “objective link” between the impugned statement and the person suing in defamation as a requisite element:

“Mere personal conjecture or subjective perception of a statement as defamatory does not suffice to establish that the person was directly affected by the publication. There must be something in the circumstances of a particular case to make the ordinary reader feel that the statement reflected directly on the individual claimant or that he was targeted by the criticism.”⁶²

These principles also apply in the sphere of television and radio broadcasting.⁶³

j) Restrictions on journalistic publication and distribution

Freedom of expression does not prohibit in terms the imposition of prior restraints on publications. This is conveyed by words like “prevention” or “conditions” used by Art. 10(2) ECHR. According to that, an obligation to register a title of a newspaper is not a violation as such. It is a legitimate interference if it is prescribed by law and additionally neces-

sary in a democratic society. But there are also dangers of such a practice thinkable.⁶⁴

Therefore, it is questionable as to whether and to what extent States are allowed to restrain journalistic publication and distribution.

Because a careful scrutiny becomes important as far as the press is concerned, and news is a perishable commodity and delaying its publication, even for a short period, may well deprive it of all its value and interest⁶⁵, States must put forward strong and replicable reasons to the ECtHR for such measures to stand, whereby their margin of appreciation is limited as far as the freedom of press is at stake.⁶⁶

In the case *Ürper and others* four Turkish newspapers were suspended for periods ranging from 15 days to a month in respect of various news reports and articles. These restraints were not imposed on particular articles, but on the future publication of entire newspapers, whose content was unknown at the time of the national court’s decisions. Therefore, these applicants’ cases were distinguishable from the earlier case of *Observer and Guardian*⁶⁷. The ECtHR found that

“the preventive effect of the suspension orders entailed implicit sanctions on the applicants to dissuade them from publishing similar articles or news reports in the future, and hinder their professional activities. [...] Less draconian measures could have been envisaged, such as the confiscation of particular issues of the newspapers or restrictions on the publication of specific articles.”⁶⁸

It concluded that the national courts had overstepped their margin of appreciation and that they had

⁶⁰ *Jersild v. Denmark*, *op. cit.*, § 35.

⁶¹ *Thoma v. Luxembourg*, judgment of 29 March 2001, Appl. 38432/97, § 64.

⁶² *Dyuldin and Kislov v. Russia*, judgment of 31 July 2007, Appl. 25968/02, § 44.

⁶³ Cf. *Filatenk v. Russia*, judgment of 6 December 2007, Appl. 73219/01, § 45.

⁶⁴ *Observer and Guardian v. the U.K.*, *op. cit.*, § 60.

⁶⁵ *Observer and Guardian v. the U.K.*, *op. cit.*, § 60.

⁶⁶ *Editions Plon v. France*, judgment of 18 May 2004, Appl. 58148/00, § 44.

⁶⁷ See footnote 59.

⁶⁸ *Ürper and Others v. Turkey*, judgment of 20 October 2009, Appl. 14526/07, § 43; see, *mutatis mutandis*: *Demirel and Ateş v. Turkey*, judgment of 9 December 2008, Appl. 11976/03, § 28.

“unjustifiably restricted the essential role of the press as a public watchdog in a democratic society. The practice of banning the future publication of entire periodicals went beyond any notion of ‘necessary’ restraint in a democratic society and, instead, amounted to censorship.”⁶⁹

In conclusion, a violation of Art. 10 ECHR was given.

k) The protection of journalistic sources

The protection of journalistic sources is another important issue addressed by Art. 10 ECHR.

aa) Revealing the identity of an informant

An interference can be given by a disclosure order or the requirement to reveal the identity of the source. Such measures can be justified if there is a legitimate interest in the disclosure which clearly outweighs the public interest in the non-disclosure. The necessity of the disclosure is identified as responding to a pressing social need, while the Member States enjoy a certain margin of appreciation in assessing this need. In this context the ECtHR refers⁷⁰ to Recommendation Rec (2000) 7 “on the right of journalists not to disclose their sources of information”⁷¹, especially principle 3, stated therein. Furthermore, the Court makes use of the explanatory notes for the precise application of the Recommendation. As regards the term “sources”, the explanation reads as follows:

“Source:

17. Any person who provides information to a journalist shall be considered as his or her ‘source’. (...) Journalists may receive their information from all kinds of sources. Therefore, a wide interpretation of this

term is necessary. The actual provision of information to journalists can constitute an action on the side of the source, for example when a source calls or writes to a journalist or sends to him or her recorded information or pictures. Information shall also be regarded as being ‘provided’ when a source remains passive and consents to the journalist taking the information, such as the filming or recording of information with the consent of the source.”

Using these principles, the Court made the following assessments:

“Protection of journalistic sources is one of the basic conditions for press freedom. (...) Without such protection, sources may be deterred from assisting the press in informing the public on matters of public interest. As a result the vital public watchdog role of the press may be undermined and the ability of the press to provide accurate and reliable information may be adversely affected. Having regard for the importance of the protection of journalistic sources for press freedom in a democratic society and the potentially chilling effect an order of source disclosure has on the exercise of that freedom, such a measure cannot be compatible with Article 10 of the Convention unless it is justified by an overriding requirement in the public interest.”⁷²

“Far-reaching measures cannot but discourage persons who have true and accurate information relating to wrongdoing of the kind here at issue from coming forward and sharing their knowledge with the press in future cases.”⁷³

Hence, intensive measures for a certain time period can be proportional, but there has to be a grave sufficient interest in know-

⁶⁹ *Ürper and Others v. Turkey*, *op. cit.*, § 44.

⁷⁰ *Financial Times Ltd. and others v. the U.K.*, judgment of 15 December 2009, Appl. 821/03, § 36; *Voskuil v. the Netherlands*, judgment of 22 November 2007, Appl. 64752/01, § 43.

⁷¹ Recommendation Rec (2000) 7 of 8 March 2000 of the Committee of Ministers to Member States on the right of journalists not to disclose their sources of information.

⁷² *Goodwin v. the U.K.*, *op. cit.*, §§ 39 and 40; *Voskuil v. the Netherlands*, *op. cit.*, § 65.

⁷³ *Voskuil v. the Netherlands*, *op. cit.*, § 71.

ing the identity of the source, which overrides the interest in concealing it.

bb) Searches at a journalist's home and workplace

The ECtHR ruled in *Roemen and Schmit v Luxembourg* that searches carried out at a journalist's home and workplace to ascertain whether there had been a criminal offence, i.e. a breach of professional confidence, are very intensive measures. Such measures can only be legitimate if there are no alternative ways to obtain the information or, rather, there have to be very strong reasons to justify such searches.⁷⁴ The Court emphasised that there is a fundamental difference between this case and *Goodwin v UK*.⁷⁵ In the latter case, the journalist was just required to reveal the identity of his informant, whereas in the instant case searches were carried out at the first applicant's home and workplace, which formed a more drastic measure. This is because investigators who raid a journalist's workplace have access to all the documentation held by the journalist and thus they have very wide investigative powers. Such

"limitations on the confidentiality of journalistic sources call for the most careful scrutiny by the Court."⁷⁶

cc) Procedural guarantee

Interferences with the right of protection of sources must be attended with legal procedural safeguards. The ECtHR (again) refers to the above-mentioned Recommendation Rec (2000) 7 in the *Sanoma Uitgevers* case demanding that "any interference with the right to protection of such sources must be attended with legal procedural safeguards com-

mensurate with the importance of the principle at stake.(...) First and foremost among these safeguards is the guarantee of review by a judge or other independent and impartial decision-making body. (...) The requisite review should be carried out by a body separate from the executive and other interested parties, invested with the power to determine whether a requirement in the public interest overriding the principle of protection of journalistic sources exists prior to the handing over of such material and to prevent unnecessary access to information capable of disclosing the sources' identity if it does not.(...) The decision to be taken should be governed by clear criteria, including whether a less intrusive measure can suffice to serve the overriding public interests established."⁷⁷

This decision was entrusted to the public prosecutor. According to the Court, this person cannot be seen as impartial like an independent judge. Also, the involvement of the investigating judge in this case could not satisfy the ECtHR, because he only had a supporting role.

A law which does not provide regulations which meet these requirements has a deficient quality. Hence, an interference with the freedom of expression based on such a law is not prescribed by law, and thus it is a violation of Art. 10 ECHR.⁷⁸

l) Publishing of confidential documents

A further question is whether a journalist is entitled to receive and publish confidential documents. An interference, for example by a penalty imposed for such an action, can be justified by the legitimate aim of preventing

⁷⁴ *Roemen and Schmit v. Luxembourg*, judgment of 25 February 2003, Appl. 51772/99, § 56.

⁷⁵ *Goodwin v. the U.K.*, op. cit.

⁷⁶ *Roemen and Schmit v. Luxembourg*, op. cit., § 57.

⁷⁷ *Sanoma Uitgevers B.V. v. the Netherlands*, op. cit., §§ 88, 90 and 92.

⁷⁸ *Sanoma Uitgevers B.V. v. the Netherlands*, op. cit., §§ 93 ff.

the “disclosure of information received in confidence”, as mentioned in Art. 10(2) ECHR.

Furthermore, journalists exercising the freedom of expression undertake “duties and responsibilities”, the Court regularly emphasises. Hence, even with regard to the vital role of the press, journalists cannot be released from their duty to obey the ordinary criminal law.

However,

“press freedom assumes even greater importance in circumstances in which State activities and decisions escape democratic or judicial scrutiny on account of their confidential or secret nature”⁷⁹,

because the public rely on the press as their most important purveyor of information concerning these matters to monitor the actions of the government.

Therefore, the conviction of a journalist for disclosing information considered to be confidential or secret may have the effect of a censorship and discourage those working in the media from informing the public, that the press may no longer be able to play its vital role as “public watchdog”, and that the ability of the press to provide accurate and reliable information may be adversely affected.⁸⁰ Consequently, a fair balance between interest in the public’s being informed and the “duties and responsibilities” of the press could justify the publication of such documents.

In this context, the ECtHR reviews with great scrutiny whether the objective of protecting fiscal confidentiality, for example, constitutes a relevant and sufficient justification with regard to the interference with the right of freedom of expression.⁸¹

It declares that

“in essence, that Article leaves it for journalists to decide whether or not it is necessary

to reproduce such documents to ensure credibility and reiterates that it protects journalists’ right to divulge information on issues of general interest provided that they are acting in good faith and on an accurate factual basis and provide “reliable and precise” information in accordance with the ethics of journalism.”⁸²

Where this is given in connection with the specific case, the interest of the public in obtaining information is overweighing, even if the publication of some information is prohibited.

The same issue is dealt with by a case⁸³ in which a radio station was sanctioned for broadcasting a telephone conversation of a politician, which was unlawfully obtained. Since the journalists of the station were acting in good faith and the reputation of the politician was not tarnished, their being sanctioned was a violation of their right of freedom of expression.

With regard to all of these issues mentioned above one may refer to the Declaration by the Committee of Ministers on the protection and promotion of investigative journalism⁸⁴, which, for example, pursues the goal to protect and facilitate the work of the journalists by the requirement of ensuring the personal safety of media professionals and their access to information.

The ECtHR ruled in *Poyraz v Turkey* that the communication or publication of confidential material is not covered by Art. 10 ECHR.⁸⁵ Regarding the privileged position of public officers (in this case the chief inspector of the Ministry of Justice) benefiting from the access to the media, they must exercise their freedom of expression in a restrained manner

⁷⁹ Stoll v. Switzerland, judgment of 10 December 2007, Appl. 69698/01, § 110.

⁸⁰ Stoll v. Switzerland, op. cit., § 110 and 154.

⁸¹ Fressoz and Roire v. France, op. cit., §§ 52 and 53.

⁸² Fressoz and Roire v. France, op. cit., § 54.

⁸³ Radio Twist S.A. v. Slovakia, judgment of 19 December 2006, Appl. 62202/00.

⁸⁴ Declaration by the Committee of Ministers on the protection and promotion of investigative journalism, adopted on 26.09.2007.

⁸⁵ Poyraz v. Turkey, judgment of 7 December 2010, Appl. 15966/06.

(“faire montre de retenue”) to avoid an imbalance in relation to “ordinary citizens” who have limited access to the media.

Besides, there is the Recommendation No. R (96) 4⁸⁶ which provides to especially protect journalistic work also in situations of conflict and tension.

m) Politicians entitled by Art. 10 ECHR

Freedom of expression is not only a right that may conflict with the reputation of politicians, but also plays a vital role in political actions in general. For example, politicians can refer to this right with regard to their speeches.

“In a democracy, Parliament or such comparable bodies are the essential fora for political debate. Very weighty reasons must be advanced to justify interfering with the freedom of expression exercised therein.”⁸⁷

Nevertheless, it is possible that conflicting rights of others justify a restriction of their freedom of expression. In 1988, a politician reacted to an article in a local newspaper about him and his actions in the past by calling this work “Nazi-Journalism”. Thereupon, an injunction was issued against him prohibiting him from repeating the statement. The Court⁸⁸ ruled that there was no violation of Art. 10. Although it held that the article itself was defamatory, it had particular regard to the special stigma that are attached to activities inspired by national-socialist ideas. Besides, it took into consideration that, according to Austrian legislation, it is a criminal offence to perform such activities and that the applicant was only prohibited from repeating his statement or the making of similar statements. He had still been entitled to express his opinion in other words or ways. Such an

interference was therefore “necessary in a democratic society”.

aa) Election time

In the *Bowman* case⁸⁹, the politician *Bowman* was charged with an offence because he had distributed more than one million leaflets. The Court held that this measure was an interference with the freedom of expression of the politician, but that it did pursue the legitimate aim of protecting the rights of others, namely the candidates for election and the electorate.

It considered that this action was also necessary in a democratic society because free elections, particularly freedom of political debate – besides the freedom of expression – form the bedrock of any democratic system. These two rights determine each other.

The Court notes that

“freedom of expression is one of the 'conditions' necessary to 'ensure the free expression of the opinion of the people in the choice of the legislature.’”⁹⁰

For this reason, it is particularly important in the period preceding an election that opinions and information of all kinds are permitted to circulate freely. However, even at the time of elections, these two rights can conflict, meaning that certain restrictions, which usually would not be accepted as compatible with Art. 10, can be required. It can be concluded that the states are free within their margin of appreciation to rule the elections to guarantee free elections as a democratic state's need, but they are obliged to exactly analyse if there are other measures thinkable to reach this aim, and avoid total barriers, such as in the *Bowman* case.

bb) Restrictions on political activities

Another example of national measures restricting the actions of a politician are rules

⁸⁶ Recommendation No. R (96) 4 of the Committee of Ministers to Member States on the protection of journalists in situations of conflict and tension, adopted on 3 May 1996.

⁸⁷ *Jerusalem v. Austria*, *op. cit.*, § 40.

⁸⁸ *Andreas Wabl v. Austria*, judgment of 21 March 2000, Appl. 24773/94.

⁸⁹ *Bowman v. the UK*, judgment of 19 February 1998, Appl. 24839/94.

⁹⁰ *Mathieu-Mohin and Clerfayt v. Belgium*, judgment of 2 March 1987, Appl. 9267/81, § 54.

that restrict the participation of a substantial number of local government officers in certain kinds of political activities. In its judgment⁹¹, the Court held that this interference with Art. 10 can be justified by the legitimate aim of the protection of an effective democracy.

However, this aim cannot *eo ipso* suffice as a justification of interference with the rights guaranteed by Art. 10. Otherwise, both the interests served by democratic institutions such as local authorities and the need to make provision to secure their proper functioning – where this is considered necessary to safeguard those interests – would be overlooked.

“The Court recalls in this respect that democracy is a fundamental feature of the European public order. This is apparent from the Preamble to the Convention, which establishes a very clear connection between the Convention and democracy by stating that the maintenance and further realisation of human rights and fundamental freedoms are best ensured on the one hand by an effective political democracy and on the other by a common understanding and observance of human rights.”

There is also a bond of trust between elected council members and the local government officers. The former bank on the loyalty and support of the impartial officers. Besides, there is the expectation of the citizens that the council members they have voted for behave in accordance with their election pledges. Therefore, the rights of the council members and the electorate can be considered as legitimate aims within the meaning of Art. 10(2). The Court examined whether a pressing social need exists and whether the restrictions were proportionate to the pursued aim. In the present case, there had been

an abuse of power by certain local government officers which was, in the view of the ECtHR, a sufficient reason to establish a pressing social need.

In 1999, a similar case⁹² was decided. In Hungary, a law was enacted which prohibited members of the armed forces, the police and security services from joining any political party and from engaging in any political activity. The Court agreed that there was an interference with the right of freedom of expression, but found that having a politically neutral police force is a legitimate aim. According to the Court, the Hungarian state could also restrict the freedom of the police with regard to their margin of appreciation and their historical background.

The Court also stated that an absolute ban is not compatible with Art. 10 ECHR and that policemen are entitled to

“undertake some activities enabling them to articulate their political opinions and preferences.”

1.3 Interferences according to Art. 10 ECHR

a) State measures

According to Art. 10(2) ECHR, interferences are possible by state measures in the form of formalities, conditions, restrictions or penalties. States can interfere with the rights of Art. 10 ECHR if they enact a law which affects the legal sphere of the citizens. The same could apply to administrative action by state authorities as well as national court decisions, which confirm the legality of such action, based on national law.

b) Positive obligations

Recently, the ECtHR again dealt with the question as to whether Art. 10 ECHR creates positive obligations on Member States to take measures protecting the right to freedom of expression.

⁹¹ Ahmed and Others v. the UK, judgment of 2 September 1998, Appl. 22954/93, § 52.

⁹² Rekvény v. Hungary, judgment of 20 May 1999, Appl. 25390/94.

The case which the judges had to decide upon was about a journalist who was sentenced because of his critical stance on society. A short time later he was murdered by nationalist extremists. The national authorities did not take any safeguard measures although there were concrete indications of an attempt on the life of the journalist.

In this context, the Strasbourg Court stressed that “the states are required to create a favourable environment for participation in public debate by all the persons concerned, enabling them to express their opinions and ideas without fear.”⁹³

It drew the conclusion that this requirement leads to a “positive obligation” to protect the right to freedom of expression against attack, also by private individuals, whereas it also clarified that a potential failure can be vindicated by a “pressing social need”.

Consequently, states are not only obliged to refrain from interferences with the rights guaranteed by Art. 10 ECHR, but also to be active in protecting these ones subject to the limits referred to in paragraph 2 of Art. 10 ECHR.

c) “Third-party applicability”

There is the question as to whether an interference is only thinkable by means of a contracting state or also by private individuals.

It has not been conclusively clarified whether the rights of the Convention have a so-called “third-party applicability” (*Drittwirkung*), but in any event the Contracting States have positive obligations to ensure compliance with these rights, because, according to the Court,

“the genuine and effective exercise of freedom of expression under Article 10 may require positive measures of protec-

tion, even in the sphere of relations between individuals.”⁹⁴

Therefore, the states can be responsible for a breach of Article 10 even by a private person, if they do not attend to their duties. The subject of a decision by the ECtHR is the domestic court’s ruling, which judges the national litigation between private individuals. Thus, it can be assumed that there is not a direct but at least an indirect applicability of the Convention between private individuals. For example, the Court affirmed such an indirect applicability to relations between employer and employee.⁹⁵

In fulfilling their responsibilities the States especially have to ensure that the freedom of expression of journalists working in public broadcasting companies is respected, because “subject to the conditions set out in Article 10 § 2, journalists have a right to impart information. The protection of Article 10 extends to employed journalists and other media employees. An employed journalist can claim to be directly affected by a general rule or policy applied by his employer which restricts journalistic freedom. A sanction or other measure taken by an employer against an employed journalist can amount to an interference with freedom of expression.”⁹⁶

Therefore, interferences are possible, if there is a policy of restricting an open discussion or the expression of several opinions as, for example, they were considered to be disturbing or politically sensitive.⁹⁷

In this context, the Court had to decide a case⁹⁸ in which a journalist criticised the programming changes of a public State-owned broad-

⁹³ *Dink v. Turkey*, judgment of 14 September 2010, Appl. 2668/07, 6102/08, 30079/08, 7072/09 and 7124/09, § 137.

⁹⁴ *Özgür Gündem v. Turkey*, judgment of 16 March 2000, Appl. 23144/93, § 43.

⁹⁵ *Fuentes Bobo v. Spain*, judgment of 29 February 2000, Appl. 39293/98.

⁹⁶ *Manole and others v. Moldova*, op. cit., § 103; *Fuentes Bobo v. Spain*, op. cit. § 38.

⁹⁷ *Manole and others v. Moldova*, op. cit., § 106.

⁹⁸ *Wojtas-Kaletka v. Poland*, judgment of 16 July 2009, Appl. 20436/02.

casting company. Regarding their own finding that employees owe to their employer a duty of loyalty and discretion⁹⁹, the judges focused on the question of where the limits of loyalty of journalists working for such companies are.

The Court emphasised that

“where a State decides to create a public broadcasting system, the domestic law and practice must guarantee that the system provides a pluralistic audiovisual service. (...) Under the applicable legislation the public television company was charged with a special mission including, among other things, assisting the development of culture, with special emphasis on Polish intellectual and artistic achievements.”¹⁰⁰

Also as an employee of a public television company, a journalist has the task to impart information and ideas by his own. Therefore, the obligation of discretion and constraint cannot be said to apply with equal force to journalists. Criticising the programme has a cultural relevance and, thus, it is a matter of public interest, which a journalist has the right and the obligation to comment on. The obligation of loyalty must be weighed against this as well as against the public character of the broadcasting company when examining whether there is a pressing social need that can justify an interference as necessary in a democratic society.

In conclusion, within their margin of appreciation the States always are called upon to find a proportionate relation between the individual rights guaranteed by Art. 10 and its institutional aspects.

1.4 *Legality of interferences*

Although the measure in question could interfere with Art. 10 ECHR, it could be “pre-

scribed by law” and therefore be a legitimate restriction of Art. 10 ECHR. This is the case if the aim, which the measure claims to pursue, is legitimate according to Art. 10(2) ECHR and is “necessary in a democratic society”.

a) Prescription by law

Concerning the expression “prescribed by law” the ECtHR declares, firstly, that the impugned measure should have some basis in domestic law. The term “law” includes both “written law”, encompassing enactments of lower ranking statutes and regulatory measures taken by professional regulatory bodies under independent rule-making powers delegated to them by Parliament, and unwritten law. Furthermore “law” must be understood to include both statutory law and “judge-made law”.¹⁰¹ Besides,

“it also refers to the quality of law, which requires that legal norms should be accessible to the person concerned, their consequences foreseeable and their compatibility with the rule of law ensured.”¹⁰²

“Firstly the law must be adequately accessible: the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case. Secondly a norm cannot be regarded as a ‘law’ unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able – if need be with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. These consequences need not be foreseeable with absolute certainty: experience shows this to be unattain-

⁹⁹ Vogt v. Germany, judgment of 26 September 1995, Appl. 17851/91, § 53.

¹⁰⁰ Wojtas-Kaletka v. Poland, op. cit., § 47.

¹⁰¹ Sanoma Uitgevers B.V. v. the Netherlands, judgment of 14 September 2010, Appl. 38224/03, § 83.

¹⁰² See among others: Association Ekin v. France, judgment of 17 July 2001, Appl. 39288/98, § 44.

able. Again, whilst certainty is highly desirable, it may bring in its train excessive rigidity and the law must be able to keep pace with changing circumstances. Accordingly, many laws are inevitably couched in terms which, to a greater or lesser extent, are vague and whose interpretation and application are questions of practice.”¹⁰³

For example, the ECtHR found¹⁰⁴ that the terms “behaviour *contra bonos mores*” were so unprecise that it was not apparent to the applicants or anyone what to do or to refrain from doing in order to behave lawfully, meaning an interference by a public authority was not “prescribed by law”.

b) Legitimate aim and necessity in a democratic society

If the interference is “prescribed by law”, it must safeguard one of the legitimate aims listed in Art. 10(2) ECHR such as “the interests of national security”, “territorial integrity or public safety”, “the prevention of disorder or crime”, “the protection of health or morals”, “the protection of the reputation or the rights of others” or “the disclosure of information received in confidence”.

With regard to the question, whether the measure is “necessary in a democratic society”, the ECtHR noted that

“whilst the adjective 'necessary', within the meaning of Article 10 para. 2, is not synonymous with 'indispensable', the words 'absolutely necessary' and 'strictly necessary' and, in Article 15 para. 1, the phrase 'to the extent strictly required by the exigencies of the situation', neither has it the flexibility of such expressions as 'admissible', 'ordinary', 'useful', 'reason-

able' or desirable and that it implies the existence of a 'pressing social need'.”¹⁰⁵

It has to satisfy itself that the national authorities applied standards which were in conformity with the principles embodied in Art. 10, and it determines whether the interference is “proportionate to the legitimate aims pursued” and whether the reasons adduced by the national authorities to justify it are “relevant and sufficient”; in this, the background to the case submitted to it, particularly national problems, play a role.

“When examining, the Court is faced not with a choice between two conflicting principles, but with a principle of freedom of expression that is subject to a number of exceptions which must be narrowly interpreted.”¹⁰⁶

c) Margin of appreciation

When assessing whether the requirements are met, the national courts may refer to the so-called doctrine of the “margin of appreciation”. This means that the states are in a better position to estimate the particular local circumstances that have an influence on the (perceived) existence of a pressing social need, and, therefore, are to estimate based on the content of these requirements.

It is for the national authorities – the domestic legislator and the bodies, judicial amongst others – to make the initial assessment of the reality of the pressing social need. This margin is not unlimited:

“Article 10 para. 2 does not give the Contracting States an unlimited power of appreciation. The Court, which, [...] is responsible for ensuring the observance of those States’ engagements (Article 19), is empowered to give the final ruling on whether a “restriction” or “penalty” is

¹⁰³ Sunday Times v. UK, judgment of 26 April 1979, Appl. 6538/74, § 49.

¹⁰⁴ Hashman and Harrup v. the U.K., judgment of 25 November 1999, Appl. 25594/94.

¹⁰⁵ Handyside v. the U.K., op. cit., § 48.

¹⁰⁶ Sunday Times v. the U.K., op. cit., § 65.

reconcilable with freedom of expression as protected by Article 10. The domestic margin of appreciation thus goes hand in hand with European supervision. Such supervision concerns both the aim of the measure challenged and its “necessity”; it covers not only the basic legislation but also the decision applying it, even one given by an independent Court.”¹⁰⁷

In addition, when exercising its supervision, the ECtHR observes the case as a whole, including the content of a statement and the context in which it was made. It sees its task not in substituting the national assessment on its own. In fact, it reviews the decisions which the domestic courts delivered pursuant to their power of appreciation, and examines whether the interference is proportionate to the aim, and whether the reasons which shall justify it are “relevant and sufficient.”¹⁰⁸

d) Public debate

Especially, there is little scope for restrictions on political speech or on questions of public interest.¹⁰⁹ Besides political and social issues, the ECtHR has also accepted topics related to private corporations and their executives¹¹⁰, health and science¹¹¹, foreign countries¹¹², as those relating to the public interest.

The Court¹¹³ emphasises that the principles mentioned are of particular importance with regard to the press and carries out a careful scrutiny of measures which concern it. While the press must not overstep the bounds set, *inter alia*, for “the protection of the reputation of others”, its task is, nevertheless, to

impart – in a manner consistent with its obligations and responsibilities – information and ideas on political issues and on other matters of general interest.

For the examination of the legality of interferences in this area, this means that conflicting rights have to be particularly important to outweigh the freedoms of Art. 10, while there have to be exceptional circumstances to justify such interferences.

1.5 Freedom of information

Free public debate does not only depend on the protection of the expression of opinions but also on the possibility to receive information and ideas to build one’s own opinion. In this context the Committee of Ministers stressed¹¹⁴

“that media transparency is necessary to enable members of the public to form an opinion on the value which they should give to the information, ideas and opinions disseminated by the media.”

Thus it recommends in the Recommendation that the Member States shall guarantee or promote media transparency as well as to facilitate exchanges of information between Member States on this topic. The Appendix of this Recommendation provides several measures for the states to fulfil the mandate in both the broadcasting and press sector.

Therefore, Art. 10 ECHR protects the right to receive information, also including the collection of information besides very passive reception.¹¹⁵ The ECtHR often reiterates in its judgments that

“not only does the press have the task of imparting such information and ideas: the public also has the right to receive them. Were it

¹⁰⁷ *Handyside v. the U.K.*, op. cit., § 49.

¹⁰⁸ *Handyside v. the U.K.*, op. cit., § 50.

¹⁰⁹ *Wingrove v. the U.K.*, judgment of 25 November 1996, Appl. 17419/90, § 58.

¹¹⁰ See *Fressoz and Roire v. France*, judgment of 21 January 1999, Appl. 29183/95.

¹¹¹ See *Sunday Times v. UK*, op. cit.

¹¹² See *Colombani v. France*, op. cit.

¹¹³ *Sunday Times v. UK*, op. cit., § 65; *Lingens vs. Austria*, op. cit., §§ 41ff.; *Oberschlick v. Austria (no.2)*, judgment of 1 July 1997, Appl. 20834/92, § 29.

¹¹⁴ Recommendation No. R (94) 13 of the Committee of Ministers to Member States on measures to promote Media Transparency, adopted on 22 November 1994.

¹¹⁵ *Grabenwarter*, *ibid.*, § 23 rec. 6.

otherwise, the press would be unable to play its vital role of ‘public watchdog’.”¹¹⁶

It approved the “right of the public to be properly informed” and “the public’s right to be informed of a different perspective.”¹¹⁷

In Recommendation Rec(2007)2¹¹⁸ the Committee of Ministers recommends – especially by recalling Art. 10 ECHR (guaranteeing freedom of expression and freedom to receive and impart information and ideas without interference by a public authority and regardless of frontiers) – “measures promoting the structural pluralism of the media” by addressing ownership regulation, public service and other media contributing to pluralism as well as diversity and access regulation and interoperability. Furthermore, the Recommendation addresses “measures promoting content diversity” and describes the content of information to safeguard “media transparency”.

There is the question as to whether and to what extent Art. 10 is able to grant a right to receive information that is not generally accessible. In former judgments, the Court declared that

“article 10 does not confer on the individual a right of access to a register containing information on his personal position, nor does it embody an obligation on the Government to impart such information to the individual”¹¹⁹

and that

“[t]hat freedom cannot be construed as imposing on a State positive obligations to collect and disseminate information of its own motion.”¹²⁰

Therefore, the failure by the authorities to spread information could not be a violation of the right to receive information. These cases have to be distinguished from those hindering the public from receiving information from independent media that fulfils their task of a public watchdog, or from freely accessible information resources. In this context, the ECtHR ruled that

“Article 10 prohibits a Government from restricting a person from receiving information that others wish or may be willing to impart to him.”¹²¹

At a later time, the Court addressed the issue as to whether the public has a right to access public documents. In a case¹²² where a request for access to administrative documents was refused by the authorities, the judges explicitly accepted the applicability of Art. 10 and further held that this refusal is an interference with the right to receive information, which has to meet the requirements of Art. 10(2). Hence, this right is not an absolute one. The Court emphasises that, as the exercising of this right can violate the right of others, the security of the state or public health, the scope of the right to have access to the respective information is limited.¹²³

Moreover, the Court also declared in these cases that

“it is difficult to derive from the Convention a general right of access to administrative data and documents.”¹²⁴

Nevertheless, in 2009, the ECtHR continued its jurisdiction on this matter. In the respective case, a request to Hungary’s Constitutional Court to disclose a parliamentarian’s

¹¹⁶ *Sunday Times v. the U.K.*, op. cit., § 50, *Lingens vs. Austria*, op. cit., § 41., *Jersild v. Denmark*, op. cit., § 31.

¹¹⁷ *Sener v. Turkey*, judgment of 18 July 2000, Appl. 26680/95, § 45.

¹¹⁸ Recommendation Rec(2007)2 of the Committee of Ministers to Member States on media pluralism and diversity of media content, adopted by the Committee of Ministers on 31 January 2007.

¹¹⁹ *Leander v. Sweden*, judgment of 26 March 1987, Appl. 9248/81, § 74.

¹²⁰ *Guerra and others v. Italy*, judgment of 19 February 1998, Appl. 14967/89, § 53.

¹²¹ *Leander v. Sweden*, op. cit., § 74.

¹²² *Sdružení Jihočeské Matky v. Czech Republic*, judgment of 10 July 2006, Appl. 19101/03.

¹²³ *Sdružení Jihočeské Matky v. Czech Republic*, op. cit..

¹²⁴ *Loiseau v. France*, judgment of 28 September 2004, Appl. 46809/99.

complaint questioning the legality of new criminal legislation, was denied. The Court noted that with regard to the importance of the contribution to the discussion of public affairs, free access to information plays a vital role for an informed public debate on matters of public interest. Furthermore Art. 10 ECHR does not accept a law allowing arbitrary restrictions. If the states should create obstacles to the gathering of information it could result in a form of indirect censorship.¹²⁵

Regarding the “censorship-effect” of an information monopoly, the Court saw an interference with the exercise of the functions of a public watchdog by the press. Moreover, the State’s obligations in matters of freedom of the press include the elimination of barriers to the exercise of press functions where, in issues of public interest, such barriers exist solely because of an information monopoly held by the authorities. The same would apply to private organisations which the Court also categorised as a ‘public watchdog’. Since the requested information was ready and accessible, it considered that the State had an obligation not to impede the flow of information sought by the applicant. Thus, a violation of Art. 10 was affirmed.

Although the judges recalled that it was difficult to derive a general right of access to administrative documents, they also said that

“the Court has recently advanced towards a broader interpretation of the notion of freedom to receive information and thereby towards the recognition of a right of access to information.”¹²⁶

Therefore, one may draw the conclusion that the ECtHR obviously tends towards an acceptance of the right of access to public documents.

In this context, it has to be noted that Recommendation Rec (2002) 2¹²⁷ provides that “Member States should guarantee the right of everyone to have access, on request, to official documents held by public authorities.”

However, it also admits that limitations, if they are set down precisely in law, are necessary in a democratic society and are proportionate to the aim of protecting. As yet the Court has not referred to this Recommendation in its decisions.

The special significance of the right to receive information especially became clear in a case¹²⁸ which the Court had to decide in 2008. The Court classified the possibility of foreign residents to have access to information concerning matters of their country of origin to be so important that it outweighs even other constitutionally guaranteed rights, such as property rights. The judges found that

“that information included, for instance, political and social news that could be of particular interest to the applicants as immigrants from Iraq. Moreover, while such news might be the most important information protected by Article 10, the freedom to receive information does not extend only to reports of events of public concern, but covers in principle also cultural expressions as well as pure entertainment. The importance of the latter types of information should not be underestimated, especially for an immigrant family with three children, who may wish to maintain contact with the culture and language of their country of origin.”¹²⁹

Therefore, a landlord could not lawfully de-

¹²⁵ Társaság a Szabadságjogokért v. Hungary, judgment of 14 April 2009, Appl. 37374/05, § 27; see *mutatis mutandis* Kenedi v. Hungary, judgment of 26 May 2009, Appl. 31475/05.

¹²⁶ Társaság a Szabadságjogokért v. Hungary, *op. cit.*, § 35.

¹²⁷ Recommendation Rec (2002) 2 of the Committee of Ministers to Member States on access to official documents, adopted on 21 February 2002.

¹²⁸ Khurshid Mustafa und Tarzibachi v. Sweden, judgment of 16 December 2008, Appl. 23883/06.

¹²⁹ Khurshid Mustafa und Tarzibachi v. Sweden, *op. cit.*, § 44.

mand the dismantling of a satellite dish from his tenants.

1.6 The freedom of the press

The press contributes to the societal opinion-forming process by the special form of distribution of information in textform by its articles in newspapers and journals. The freedom of the press takes a special position because it corresponds to the right of the public to receive this information in the interest of free and open public debate. In this context the ECtHR frequently states that

“it is nevertheless incumbent on it to impart information and ideas of public interest. Not only does the press have the task of imparting such information and ideas: the public also has a right to receive them. Were it otherwise, the press would be unable to play its vital role of public watchdog.”¹³⁰

Concerning bounds set to the press, Art. 10(2) ECHR provides that the exercise of this freedom carries with it “duties and responsibilities”, which, however, apply to all forms of media. These “duties and responsibilities” are of concern if the reputation of private individuals is attacked and “rights of others” are undermined. Where there is the question of attacking the reputation of individuals and thus undermining their rights as guaranteed in Art. 8 ECHR regard must be had for the fair balance which has to be struck between the competing interests of the individual and of the community as a whole. In both contexts the State enjoys a certain margin of appreciation.¹³¹

Furthermore, the safeguard afforded by Art. 10 ECHR is subject to the provisions that the journalists are acting in good faith in order to provide

accurate and reliable information in accordance with the ethics of the profession of journalism.¹³²

The Court claims that journalists shall, besides further possible investigations, contact the person that is concerned by their articles and ask their opinion on the matter. Moreover, this person has a right to publish a reply¹³³, which also finds a basis in the Recommendation Rec (2004) 16.¹³⁴

The examination especially depends on the nature and degree of the defamation, the manner in which the impugned article was written and the extent to which an article can reasonably regard its sources as reliable with respect to the allegations in question.

Further factors that have to be considered when assessing the proportionality of sanctions or other measures are the nature and severity of the penalties.¹³⁵ These are capable of hampering journalistic work and of discouraging the participation of the media in debates over matters of legitimate public concern, the so-called “chilling effect”. In this context the ECtHR considered unpredictably large damages capable of having a chilling effect on the press and, therefore, requiring the most careful scrutiny.¹³⁶

1.7 Freedom of broadcasting

In contrast to the protection of freedom of broadcasting by national constitutions, Art. 10 ECHR primarily is a human right and not a so-called “*dienende Freiheit*”, the latter meaning that the primary task of this right is to ensure the diversity of opinion in the media.¹³⁷

¹³⁰ Observer and Guardian v. the U.K., judgment of 26 November 1991, Appl. 13585/88, § 59.

¹³¹ Pfeifer v. Austria, judgment of 15 November 2007, Appl. 12556/03, § 35; Von Hannover v. Germany, judgment of 24 June 2004, Appl. 59320/00, § 57.

¹³² Goodwin v. the U.K. op. cit., § 39; Fressoz and Roire v. France, judgment of 21 January 1999, Appl. 29183/95, § 54.

¹³³ Flux v. Moldova, judgment of 29 July 2008, Appl. 22824/04, § 29.

¹³⁴ Recommendation Rec(2004)16 of the Committee of Ministers to Member States on the right of reply in the new media environment, adopted on 15 December 2004.

¹³⁵ Skałka v. Poland, judgment of 27 May 2003, Appl. 43425/98, § 35 and 38.

¹³⁶ Independent News and Media and Independent Newspapers Ireland Limited v. Ireland, judgment of 16 September 2005, Appl. 55120/00, § 114.

¹³⁷ Fink/Cole/Keber, Europäisches und internationales Medienrecht, rec. 255.

Private broadcasters as well as public broadcasting corporations may refer to the freedom of broadcasting. This right includes radio, television and, at least to some extent, new (audiovisual) media (information and communication) services. The protected activities range from the organisation of broadcasters to the broadcasting and distribution of information as well as to its content.¹³⁸

In the Court's view, neither the fact that its activities are commercial nor the intrinsic nature of freedom of expression can deprive one of the protection of freedom of broadcasting. It applies to "everyone", whether natural or legal persons and it applies not only to the content of information but also to the means of transmission or reception, while the actual reception is involved.¹³⁹ Interferences concerning the means of receiving are also interferences with the right of imparting and receiving information and ideas. Thus, Art. 10 also protects the right to install antenna systems or satellite dishes.

In conclusion, both the broadcaster and the broadcast recipient are protected by Art. 10 ECHR.

According to the Court,

"broadcasting is mentioned in the Convention precisely in relation to freedom of expression. Like the Commission, the Court considers that both broadcasting of programmes over the air and cable retransmission of such programmes are covered by the right enshrined in the first two sentences of Article 10 para. 1, without there being any need to make distinctions according to the content of the programmes."¹⁴⁰

It has to be noted that the action of persons who impart information or ideas in connection with broadcasting is protected by the freedom of expression. In this context interferences have to correspond to the requirements which this right imposes.

Art. 10 ECHR also imposes requirements on the national framework regulating the broadcasting system. The Court determined that the

"effective exercise of freedom of expression does not depend merely on the State's duty not to interfere, but may require it to take positive measures of protection, through its law or practice. The Court considers that, in the field of audiovisual broadcasting, the above principles place a duty on the State to ensure, first, that the public has access through television and radio to impartial and accurate information and a range of opinion and comment, reflecting *inter alia* the diversity of political outlook within the country and, secondly, that journalists and other professionals working in the audiovisual media are not prevented from imparting this information and comment. The choice of the means by which to achieve these aims must vary according to local conditions and, therefore, falls within the State's margin of appreciation."¹⁴¹

In its Art. 11, the "European Charter for Regional or Minority Languages"¹⁴² stipulates special requirements for the use of regional or minority languages in the media. This applies to public service broadcasters since, for example, such languages play a role to "the extent that radio and television carry out a public service mission", as well as to press organisa-

¹³⁸ Grabenwarter, *ibid.*, § 23, rec. 9.

¹³⁹ *Autronic AG v. Switzerland*, judgment of 22 May 1990, Appl. 12726/87, § 47.

¹⁴⁰ *Gropper Radio AG v. Switzerland*, judgment of 28 March 1990, Appl. 10890/84, § 55.

¹⁴¹ *Manole and others v. Moldova*, *op. cit.*, §§ 99-100.

¹⁴² European Charter for Regional or Minority Languages of 5 November 1992.

tions which, for example, should encourage and/or facilitate the publication of newspaper articles in the regional or minority languages on a regular basis.

Recommendation Rec (2003) 9¹⁴³ contains basic principles addressing the issue of digital broadcasting. Especially public service broadcasters should preserve their special social remit in the new digital environment. Nevertheless, Member States should assist public service broadcasters to be present on the different digital platforms (cable, satellite, terrestrial) with diverse quality programmes and services as well as giving them the possibility of having access to the necessary financial means to fulfil their remit.

a) Public service broadcasting

With regard to the public service broadcasting the ECtHR refers¹⁴⁴ to Recommendation Rec(2007)3 on “The remit of public service media in the information society” and to Recommendation No. R (96) 10¹⁴⁵ on “The Guarantee of the Independence of Public Service Broadcasting”, including its Appendix which provides *inter alia* that:

“Member States have the competence to define and assign a public service remit to one or more specific media organisations, in the public and/or private sector, maintaining the key elements underpinning the traditional public service remit, while adjusting it to new circumstances. This remit should be performed with the use of state-of-the-art technology appropriate for the purpose.”

¹⁴³ Recommendation Rec (2003) 9 of the Committee of Ministers to Member States on measures to promote the democratic and social contribution of digital broadcasting, adopted by the Committee of Ministers on 28 May 2003.

¹⁴⁴ *Wojtas-Kaleta v. Poland*, judgment of 16 July 2009, Appl. 20436/02, § 21; *Manole and others v. Moldova*, op. cit., § 102.

¹⁴⁵ Recommendation No. R (96) 10 of 11 September 1996 of the Committee of Ministers to Member States on the guarantee of the independence of Public Service Broadcasting.

The legal framework governing public service broadcasting organisations should clearly stipulate their editorial independence and institutional autonomy.

The legal framework governing public service broadcasting organisations should clearly stipulate that they shall ensure that news programmes fairly present facts and events and encourage the free formation of opinions.

The cases in which public service broadcasting organisations may be compelled to broadcast official messages, declarations or communications, or to report on the acts or decisions of public authorities, or to grant airtime to such authorities, should be confined to exceptional circumstances expressly laid down in laws or regulations.”

Hence, the Court determined that

“[w]hile the Court, and previously the Commission, have recognised that a public service broadcasting system is capable of contributing to the quality and balance of programmes, there is no obligation under Article 10 to put in place such a service, provided that some other means are used to the same end.

Where a State does decide to create a public broadcasting system, it follows from the principles outlined above that domestic law and practice must guarantee that the system provides a pluralistic service. Particularly where private stations are still too weak to offer a genuine alternative, and the public or State organisation is therefore the sole or the dominant broadcaster within a country or region, it is indispensable for the proper functioning of democracy that [broadcasting] transmits impartial, independent and balanced news, information and comment and in addition provides a forum for public discussion in which as broad a spectrum of

views and opinions as possible can be expressed.”¹⁴⁶

The Court also ruled that the guarantee of diversity of opinion does not require a public monopoly and refused to accept arguments to refuse a licence of the states:

“Of all the means of ensuring that these values are respected, a public monopoly is the one which imposes the greatest restrictions on the freedom of expression, namely the total impossibility of broadcasting otherwise than through a national station and, in some cases, to a very limited extent through a local cable station. The far-reaching character of such restrictions means that they can only be justified where they correspond to a pressing need. As a result of the technical progress made over the last decades, justification for these restrictions can no longer today be found in considerations relating to the number of frequencies and channels available.”¹⁴⁷

b) Licensing system

Art. 10(1) sent. 3 allows the Contracting States to require the licensing of broadcasting, television or cinema enterprises. However, the Court emphasises that the purpose of this last sentence and the scope of its application must be considered in the context of the Article as a whole and, in particular, in relation to the requirements of para. 2. This sentence clarifies

“that states are permitted to control by a licensing system the way in which broadcasting is organised in their territories, particularly in its technical aspects. It does not, however, provide that licensing measures shall not otherwise be subject to

the requirements of paragraph 2, for that would lead to a result contrary to the object and purpose of Article 10 taken as a whole.”¹⁴⁸

When examining, the Court weighs the legitimate need for the quality and balance of programmes in general against the freedom of expression of the applicant, namely his right to impart information and ideas and assesses whether the national measures are justifiable in principle and proportionate in respect of the case as a whole and the immediate and powerful effect of the media.

According to Recommendation No. R (99) ¹⁴⁹ “Member States should monitor the development of the new media with a view to taking any measures which might be necessary in order to preserve media pluralism (...).”

Regarding the exigence of safeguarding and promoting pluralism in the audio-visual media, the states as the ultimate guarantors of the principle of pluralism have to ground their decisions primarily on safeguarding this, especially with regard to broadcasting, because of their very wide reach and strong impact on the public.¹⁵⁰ Domestic authorities have to aim at preventing a one-sided range of programmes.¹⁵¹

The national courts are allowed to take special national circumstances into account. In its *Demuth* case the Court had regard to the decision of the Commission¹⁵², according to which

“the particular political circumstances in Switzerland (...) necessitate the application of sensitive political criteria such as

¹⁴⁶ Manole and others v. Moldova, op. cit., §§ 100 and 101.

¹⁴⁷ Informationsverein Lentia and others v. Austria, op. cit., § 39.

¹⁴⁸ Groppera Radio AG v. Switzerland, op. cit., § 61.

¹⁴⁹ Recommendation No. R (99) 1 of the Committee of Ministers to Member States on measures to promote media pluralism, adopted on 19 January 1999.

¹⁵⁰ Informationsverein Lentia and others v. Austria, op. cit., § 38.

¹⁵¹ Demuth v. Switzerland, judgment of 5 November 2002, Appl. 38743/97, § 43.

¹⁵² Verein Alternatives Lokalradio Bern and Verein Radio Dreyeckland Basel v. Switzerland, decision of the Commission of 16 October 1986, Appl. 10746/84.

cultural and linguistic pluralism, balance between lowland and mountain regions and a balanced federal policy”, and it accepted the validity of these considerations

“which are of considerable importance for a federal State. Such factors, encouraging in particular pluralism in broadcasting, may legitimately be taken into account when authorising radio and television broadcasts.”¹⁵³

Moreover, the States are not prohibited from making the granting or refusal of a licence conditional on other considerations, i.e. such matters as the nature and objectives of a proposed station, its potential audience at national, regional or local level, the rights and needs of a specific audience and the obligations deriving from international legal instruments.”¹⁵⁴

In this scope there is also a margin of appreciation,¹⁵⁵ but the Court has already pointed out that

“it cannot be argued that there are no equivalent less restrictive solutions; it is sufficient by way of example to cite the practice of certain countries which either issue licences subject to specified conditions of variable content or make provision for forms of private participation in the activities of the national corporation.”¹⁵⁶

Furthermore, it emphasised that it could not accept the argument that a national market was too small to sustain a sufficient number of stations to avoid regroupings and the constitution of “private monopolies”,

“because their assertions are contradicted by the experience of several European

States, of a comparable size to Austria, in which the coexistence of private and public stations, according to rules which vary from country to country and accompanied by measures preventing the development of private monopolies, shows the fears expressed to be groundless.”¹⁵⁷

In the context of the licensing procedure, the ECtHR also refers to Recommendation Rec (2000) 23¹⁵⁸ on the independence and functions of regulatory authorities for the broadcasting sector:

“The Court notes that the guidelines adopted by the Committee of Ministers of the Council of Europe in the broadcasting regulation domain call for open and transparent application of the regulations governing the licensing procedure and specifically recommend that ‘[a]ll decisions taken (...) by the regulatory authorities (...) be (...) duly reasoned [and] open to review by the competent jurisdictions.’”¹⁵⁹

As a result, the licensing criteria in the underlying process especially must provide sufficient guarantees against arbitrariness, so that a lack of reasons for a decision denying a broadcasting licence infringes the right to freedom of expression.

“A licensing procedure whereby the licensing authority gives no reasons for its decisions does not provide adequate protection against arbitrary interferences by a public authority with the fundamental right to freedom of expression.”¹⁶⁰

Finally, Recommendation Rec (2000) 23

¹⁵³ Demuth v. Switzerland, op. cit., § 44.

¹⁵⁴ Informationsverein Lentia and others v. Austria, judgment of 24 November 1993, Appl. 13914/88; 15041/89; 15717/89; 15779/89; 17207/90, § 32.

¹⁵⁵ Groppera Radio AG v. Switzerland, op. cit., § 72.

¹⁵⁶ Informationsverein Lentia and others v. Austria, op. cit. § 39.

¹⁵⁷ Informationsverein Lentia and others v. Austria, op. cit., § 42.

¹⁵⁸ Recommendation Rec (2000) 23 of 20 December 2000 of the Committee of Ministers to Member States on the independence and functions of regulatory authorities for the broadcasting sector.

¹⁵⁹ Glas Nadezhda EOOD and Anatoliy Elenkov v. Bulgaria, judgment of 11 October 2007, Appl. 14134/02, § 51.

¹⁶⁰ Glas Nadezhda EOOD and Anatoliy Elenkov v. Bulgaria, op. cit., §§ 50 and 51; Meltex Ltd. And Mesrop Movsesyan v. Armenia, judgment of 17 June 2008, Appl. 32283/04, § 83.

itself refers to the “European Convention on Transfrontier Television”, when providing that “another essential function of regulatory authorities should be monitoring compliance with the conditions laid down in law and in the licences granted to broadcasters. They should, in particular, ensure that broadcasters who fall within their jurisdiction respect the basic principles laid down in the European Convention on Transfrontier Television and, in particular, those defined in Article 7.”

The Court also (indirectly) applies the principles of the European Convention on Transfrontier Television using this instrument for

“a proper understanding and interpretation of the relevant rules.”¹⁶¹

This Convention obligates the parties to “ensure freedom of expression and information in accordance with Article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms and they shall guarantee freedom of reception and shall not restrict the retransmission on their territories of programme services which comply with the terms of this Convention.”

It also provides in its Art. 8 the right of reply and in its Art. 10a that the parties shall avoid that programme services endanger media pluralism.

The Convention on Transfrontier Television, and also an earlier instrument issued by the Committee of Ministers of the Council of Europe affecting national broadcasting systems, i.e. Recommendation No. R (91) 5¹⁶², claim the right to short reporting on major events with the aim of regulating the exercis-

ing of the public’s right to information. As a result any broadcaster is entitled to provide information on a major event by means of a short report, even if there are contractual (exclusivity) agreements between another broadcaster and the organiser of the event.

c) Political advertising

It is especially questionable as to whether a ban on broadcasting political advertising is compatible with Art. 10 ECHR.

Advertisements have not only a political character if they promote a political party. In 1994 the broadcasting of a commercial concerning animal welfare by the “*Verein gegen Tierfabriken – VGT*” (Association against industrial animal production) was refused. The Swiss Public Television founded this decision on the political character, while Swiss broadcasting law prohibits political advertisements on radio and television. The ECtHR agreed that the commercial could be regarded as “political”, so the ban could legally be founded on the national regulation because

“it reflected controversial opinions pertaining to modern society in general. (...) Indeed, it cannot be denied that in many European societies there was, and is, an ongoing general debate on the protection of animals and the manner in which they are reared.”¹⁶³

Additionally, the Court stated that

“powerful financial groups can obtain competitive advantages in the area of commercial advertising and may thereby exercise pressure on, and eventually curtail the freedom of the radio and television stations broadcasting the commercials. Such situations undermine the fundamental role of freedom of expression in a democratic society as enshrined in

¹⁶¹ *Autronic AG v. Switzerland*, op. cit., § 62.

¹⁶² Recommendation No. R (91) 5 of the Committee of Ministers to Member States on the right to short reporting on major events, where exclusive rights for their Television Broadcast have been acquired in a transfrontier context, adopted on 11 April 1991.

¹⁶³ *VgT Verein gegen Tierfabriken v. Switzerland*, judgment of 28 June 2001, Appl. 24699/94, § 70.

Article 10 of the Convention, in particular where it serves to impart information and ideas of general interest, which the public is moreover entitled to receive. Such an undertaking cannot be successfully accomplished unless it is grounded in the principle of pluralism of which the State is the ultimate guarantor. This observation is especially valid in relation to audio-visual media, whose programmes are often broadcast very widely.”¹⁶⁴

Hence, the Court ruled that a ban on political advertisements is not an infringement of Art. 10 ECHR *per se*, but there can be relevant and sufficient reasons to justify¹⁶⁵, for example, the need for securing the quality of political debate and pluralism or for securing the political independence of the television broadcasters, besides preventing financially powerful groups from dominating the political forum.¹⁶⁶

According to the Court a ban on religious advertisements can be more easily justified because of the immediate and powerful effect of the audio-visual media.¹⁶⁷

However, it has to be noted that the association participated in a topical debate in society and that there is little scope under Art. 10 for restrictions on political speech and on debates relating to questions of general interest, while the national margin of appreciation is reduced. The national authorities could not give sufficient reasons that could justify the refusal in the particular circumstances of the case, so the Court found a violation of the freedom of expression of the association.

Concerning the prohibition of advertisements of political parties and its compatibility with Art. 10 ECHR, the Court found that the

Contracting States have a wide margin of appreciation in striking a fair balance between freedom of expression of these parties and the need to place restrictions thereon in order to secure people’s independent decision in the election.¹⁶⁸ According to the ECtHR,

“a lack of consensus between the States making up the Convention community with regard to the regulation of the right to vote and the right to stand for election may justify according them a wide margin of appreciation in this area.”¹⁶⁹

The ECtHR also refers to Recommendation No. R (99) 15¹⁷⁰ “on measures concerning media coverage of election campaigns”, which provides that

“the possibility of buying advertising space should be available to all contending parties, and on equal conditions and rates of payment”,

as well as to Recommendation Rec(2007)15¹⁷¹, which entailed a revision of Recommendation No. R (99) 15, stating:

“In view of the different positions on this matter, Recommendation CM/Rec(2007)... does not take a stance on whether this practice should be accepted or not, and simply limits itself to saying that if paid advertising is allowed it should be subject to some minimum rules, in particular that equal treatment (in terms of access and rates) is given to all parties requesting airtime.”

Using these principles for the examination of whether such a ban is proportionate, the ECtHR determined in this case that

¹⁶⁴ VgT Verein gegen Tierfabriken v. Switzerland, op. cit., § 73.

¹⁶⁵ VgT Verein gegen Tierfabriken v. Switzerland, op. cit., § 75.

¹⁶⁶ TV Vest AS & Rogaland Pensjonistparti v. Norway, op. cit., § 70.

¹⁶⁷ Murphy v. Ireland, judgment of 10 July 2003, Appl. 44179/98.

¹⁶⁸ Mathieu-Mohin and Clerfayt v. Belgium, op. cit., §§ 52 and 54.

¹⁶⁹ TV Vest AS & Rogaland Pensjonistparti v. Norway, judgment of 11 December 2008, Appl. 21132/05, § 65.

¹⁷⁰ Recommendation No. R (99) 15 of 9 September 1999 of the Committee of Ministers to Member States on measures concerning media coverage of election campaigns.

¹⁷¹ Recommendation CM/Rec(2007)15 of 7 November 2007 of the Committee of Ministers to Member States on measures concerning media coverage of election campaigns.

“paid advertising on television became the only way for the Pensioners Party to put its message across to the public through that medium. By being denied this possibility under the law, the Pensioners Party was at a disadvantage compared with major parties which had obtained edited broadcasting coverage, and this could not be offset by the possibility available to it to use other, less potent, media.”¹⁷²

The required “equal treatment to all parties requesting airtime” was not granted to the party, thus there was a violation of Art. 10 ECHR.

1.8 Freedom of artistic expression

The freedom of artistic expression is not explicitly mentioned in Art. 10 ECHR. However, the ECtHR accepts its protection and argues that “admittedly, Article 10 does not specify that freedom of artistic expression, in issue here, comes within its ambit; but neither, on the other hand, does it distinguish between the various forms of expression. As those appearing before the Court all acknowledged, it includes freedom of artistic expression - notably within freedom to receive and impart information and ideas - which affords the opportunity to take part in the public exchange of cultural, political and social information and ideas of all kinds. Confirmation, if any were needed, that this interpretation is correct, is provided by the second sentence of paragraph 1 of Article 10, which refers to 'broadcasting, television or cinema enterprises', media whose activities extend to the field of art. Confirmation that the concept of freedom of expression is such as to include artistic expression is also to be found in Article 19 § 2 of the Interna-

tional Covenant on Civil and Political Rights, which specifically includes within the right of freedom of expression information and ideas 'in the form of art'.”¹⁷³

The protection is not limited to specific forms or content of art, films¹⁷⁴ and books¹⁷⁵, as they are protected just like paintings¹⁷⁶, for instance. Finally, art is just another way of communication, because an artist is also able to impart information and ideas by his work.

Besides the conveying of art itself, the scope of Art. 10 ECHR includes the so-called artists “*Wirkbereich*”. Therefore also an exhibitor of artistic works, an operator of a cinema or a proprietor and a managing director of a publishing house can refer to this freedom¹⁷⁷:

“Those who create, perform, distribute or exhibit works of art contribute to the exchange of ideas and opinions which is essential for a democratic society. Hence the obligation on the State not to encroach unduly on their freedom of expression.”¹⁷⁸

Interferences concerning the freedom of artistic expression are thinkable if artistic works are confiscated or if their publication and distribution is forbidden.

So in the *Wingrove* case¹⁷⁹ a film director was refused a distribution certificate because his film was considered as blasphemous. In another case a film was even seized.¹⁸⁰

These measures can also be legal. In this context, the Court determined that

“artists and those who promote their work are certainly not immune from the possibility of limitations as provided for

¹⁷² *TV Vest AS & Rogaland Pensjonistparti v. Norway*, op. cit., § 73.

¹⁷³ *Müller a.o. v. Switzerland*, judgment of 24 May 1988, Appl. 10737/84, § 27.

¹⁷⁴ See *Otto-Preminger Institut v. Austria*, op. cit.; *Wingrove v. the U.K.*, op. cit.

¹⁷⁵ *Editions Plon v. France*, op. cit.

¹⁷⁶ See *Müller a.o. v. Switzerland*, op. cit.

¹⁷⁷ See *Müller a.o. v. Switzerland*, op. cit.; *Otto Preminger Institut v. Austria*, op. cit.; *I. A. v. Turkey*, op. cit.

¹⁷⁸ *Müller a.o. v. Switzerland*, op. cit., § 33.

¹⁷⁹ *Wingrove v. the U.K.*, op. cit..

¹⁸⁰ *Otto-Preminger Institut v. Austria*, op. cit.

in paragraph 2 of Article 10 (art. 10-2). Whoever exercises his freedom of expression undertakes, in accordance with the express terms of that paragraph, 'duties and responsibilities'; their scope will depend on his situation and the means he uses.¹⁸¹

The most common legal interests that conflict with freedom of artistic expression are the protection of morals and the rights of others, both mentioned in Art. 10(2) as legitimate aims to pursue. As already indicated above, when assessing whether an interference was "proportionate to the legitimate aim pursued" and whether the reasons adduced to justify it are "relevant and sufficient", the domestic authorities enjoy a wider margin of appreciation than when assessing interferences with freedom of the press, for example.

The Court ruled that

"today, as at the time of the *Handyside* judgment, it is not possible to find in the legal and social orders of the Contracting States a uniform European conception of morals. The view taken of the requirements of morals varies from time to time and from place to place, especially in our era, characterised as it is by a far-reaching evolution of opinions on the subject. By reason of their direct and continuous contact with the vital forces of their countries, State authorities are in principle in a better position than the international judge to give an opinion on the exact content of these requirements as well as on the 'necessity' of a 'restriction' or 'penalty' intended to meet them."¹⁸²

Subject to those rulings the Court has rarely determined a violation of Art. 10 ECHR

so far. In the above-mentioned cases¹⁸³ it found that the national court could rightly assume the respective measures to be necessary in a democratic society in order to protect the rights of others. Although there is little scope for restrictions on political speech or on the debate of questions of public interest, the Court also emphasised that the states have a wider margin of appreciation with regard to the sphere of morals. Thus it accepted the national decision to give precedence to the rights of the persons affected by the film and to restrict freedom of expression.

1.9 Protection of the use of the internet, emails and telephone

The use of the medium of internet is also protected by the freedom of expression and information as far as there is an imparting and receiving of information. Art. 10 ECHR also protects the form in which information is conveyed.¹⁸⁴

Internet archives, for example, are very important tools of preserving and making available news and information. They constitute an important source for education or historical research, particularly as they are readily accessible to the public and are generally free. Therefore, they play an important role for the press that has a further task, beside the role as a public watchdog, to maintain and make available to the public archives containing news. Thus they enjoy protection by Art. 10. However, the Court emphasised that the margin of appreciation afforded to States in striking the balance between the competing rights is likely to be greater where news archives of past events, rather than news reporting of current affairs, are concerned. In

¹⁸¹ Müller a.o. v. Switzerland, op. cit., § 34, *Handyside v. the U.K.*, op. cit., § 49.

¹⁸² Müller a.o. v. Switzerland, op. cit., § 35.

¹⁸³ See footnotes 163 and 164.

¹⁸⁴ *Oberschlick v. Austria* No.1, judgment of 23 May 1991, Appl. 11662/85, § 57.

particular, the duty of the press to act in accordance with the principles of responsible journalism by ensuring the accuracy of historical, rather than perishable, information published is likely to be more stringent in the absence of any urgency in publishing the material.¹⁸⁵ But according to the case-law of the Court,

“telephone calls (from business) premises are *prima facie* covered by the notions of “private life” and “correspondence” for the purposes of Article 8 para 1¹⁸⁶. It follows logically that e-mails (sent from work) should be similarly protected under Article 8, as should information derived from the monitoring of personal internet usage.”¹⁸⁷

According to Recommendation CM/Rec (2007)16¹⁸⁸, the Member States shall take all necessary measures to promote the public service value of the internet by – *inter alia* – enhancing the protection of human rights, especially

the right to freedom of expression, information and communication on the Internet and via other ICTs promoted, *inter alia*, by ensuring access to them.

Furthermore Recommendation No. R (99) 5¹⁸⁹ of the Committee of Ministers to Member States for the protection of privacy on the internet (guidelines for the protection of individuals with regard to the collection and processing of personal data on information highways) is relevant to the use of the internet. It includes guidelines for the protec-

tion of individuals using this medium, where especially internet service providers are concerned. The guidelines concern the question as to how they shall design their systems and technologies to safeguard the user as far as possible. The “Convention on Cybercrime”¹⁹⁰ also pursues the objective of increasing the safety of the use of the internet. The contracting parties set several actions concerning the confidentiality, integrity and availability of computer data and systems, computer-related offences, offences related to child pornography as well as copyright and related rights as criminal. Besides, they laid down provisions with regard to the procedural law.

Additionally, there are the “Guidelines for the co-operation between law enforcement and internet service providers against cybercrime”¹⁹¹ besides Recommendation Rec (2001) 8. They recommend the states to encourage content descriptors or search tools and filtering profiles, for example, to increase the protection of cyber users.

Besides, there is a recommendation¹⁹³ concerning the use and control of internet filters with regard to freedom of expression and information.

Especially children shall be protected from the dangers of the use of the internet. Thus the Recommendation CM/Rec(2009)5¹⁹⁴ provides that the states shall ensure that there are safe and secure spaces for children on the

¹⁸⁵ Times Newspapers Ltd. (nos. 1 and 2) v. the U.K, judgment of 10 March 2009, 3002/03 and 23676/03, § 45.

¹⁸⁶ Halford v. the United Kingdom, judgment of 25 June 1997, Appl. 20605/92, § 44.

¹⁸⁷ Copland v. the U.K., judgment of 3 April 2007, Appl. 62617/00, § 41.

¹⁸⁸ Recommendation CM/Rec(2007)16 of the Committee of Ministers to Member States on measures to promote the public service value of the Internet, adopted on 7 November 2007.

¹⁸⁹ Recommendation No. R (99) 5 of the Committee of Ministers to Member States for the protection of privacy on the internet (guidelines for the protection of individuals with regard to the collection and processing of personal data on information highways), 23 February 1999.

¹⁹⁰ Convention on Cybercrime, 23. October 2001, available at www.conventions.coe.int/.

¹⁹¹ Guidelines for the co-operation between law enforcement and internet service providers against cybercrime, 2 April 2008.

¹⁹² Recommendation Rec (2001) 8 on self-regulation concerning cyber content (self-regulation and user protection against illegal or harmful content on new communications and information services adopted on 5 September 2001.

¹⁹³ Recommendation CM/Rec(2008)6 of the Committee of Ministers to Member States on measures to promote the respect for freedom of expression and information with regard to Internet filters, 26 March 2008.

¹⁹⁴ Recommendation CM/Rec(2009)5 of the Committee of Ministers to Member States on measures to protect children against harmful content and behaviour and to promote their active participation in the new information and communications environment, adopted on 8 July 2009.

Internet and develop the responsible use of labelling systems for online content, for example by creating a pan-European trustmark for labelling systems of online content.

In Recommendation CM/Rec(2007)11¹⁹⁵, the Committee of Ministers encourages the Member States to develop common standards and strategies to promote transparency and the provision of information, guidance and assistance to the individual users of technologies and services in the new information and communications environment. This takes place especially against the background of Art. 10 ECHR, guaranteeing the development of information and communication technologies and services for the benefit of each individual and the democratic culture of every society. The Recommendation also stipulates information on affordable access to ICT infrastructure that Member States should take into account.

2 Media law aspects of European Union law: The *acquis* and its extension to South-East Europe

Besides the benchmark which the Council of Europe and particularly the ECtHR set with respect to Art. 10 ECHR on the media law, the existing *acquis* of European Union (media) law, also as interpreted by the jurisprudence of the European Court of Justice (ECJ), additionally is of major relevance for the countries dealt with in the present study. It should be noted that Art. 10 ECHR becomes kind of “a part” of the *acquis* as Art. 11 of the Charter of Fundamental Rights of the European Union¹⁹⁶ (CFREU), read together with Art. 52(3) CFREU, has not only to be interpreted in

the light of Art. 10 ECHR, but shall have “the meaning and scope” of Art. 10 ECHR.

Art. 11 CFREU reads as follows:

“Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.

The freedom and pluralism of the media shall be respected.”

And Art. 52(3) CFREU reads:

“In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. (...)”

The *acquis* is relevant, first of all, for the EU Member States: Bulgaria and Romania. But it also bears relevance for the “candidate countries”: Croatia, the Former Yugoslav Republic of Macedonia (henceforth: FYROM or Macedonia) and Montenegro; as well as for the so-called “potential candidate countries”: Albania, Bosnia and Herzegovina, Serbia and Kosovo (all have been given the prospect of EU membership¹⁹⁷), and not least, for Moldova, which is a partner country within the European Neighbourhood Policy (ENP)¹⁹⁸ which, in its turn, forms another component of the EU’s external policy (also in the audiovisual sector). Before joining the EU, countries have to bring their national laws into line with the EU *acquis*, especially including – in

¹⁹⁵ CM/Rec(2007)11 of the Committee of Ministers to Member States on promoting freedom of expression and information on the new information and communications environment of 26 September 2007.

¹⁹⁶ Proclaimed by the European Parliament, the Council of Ministers and the European Commission on 7 December 2000, newly published in the adapted version in: [2010], OJ C 83, p. 389.

¹⁹⁷ The “pre-accession countries” have already made substantial efforts to meet European standards on media, and the process of reform is ongoing. Information on their progress towards meeting the membership requirements in the audiovisual field is available at: http://ec.europa.eu/enlargement/index_en.htm

¹⁹⁸ The “EU-Moldova Action Plan” lays out the strategic objectives based on commitments to shared values and effective implementation of political, economic and institutional reforms, available at: http://ec.europa.eu/world/enp/pdf/action_plans/moldova_enp_ap_final_en.pdf

the audiovisual field – the Audiovisual Media Services Directive (Directive 2010/13/EU¹⁹⁹, AVMSD). When they do so, they also become eligible for funding under the MEDIA 2007 programme²⁰⁰ (covering the period 2007-13). Promoting the alignment with European standards on media legislation and in particular the AVMSD is one of the initiatives of the European Commission's pre-accession strategy. Furthermore, the alignment of legislation and practices with European standards on media in accordance with fundamental democratic principles is an element of the so-called "Copenhagen criteria" (see *infra*), and is crucial for the promotion of cultural diversity.

This chapter aims at providing an overview of relevant legal provisions of the Treaty of the European Union (TEU), the Treaty on the Functioning of the European Union (TFEU), Secondary European Union legislation in the present field – especially the AVMSD, as well as relevant case-law of the Courts of the European Union.

2.1 *Obligations deriving from accession to the EU*

Besides the obligations for Member States deriving from European Union law, states that assume the status of "candidate" and "potential candidate" countries are already establishing regulations which are influenced

by EU law. The reason for this lies within the enlargement procedure: a country that wishes to join the EU submits an application for membership to the Council, which asks the European Commission to assess the applicant's ability to meet the conditions of membership. If the Commission delivers a positive opinion, and the Council unanimously agrees a negotiating mandate, negotiations are formally opened between the candidate country and all of the EU Member States.

The conditions for membership mainly follow from Arts. 6 and 49 TEU. Especially the so-called "Copenhagen criteria", which stipulate that

"[M]embership requires that the candidate country has achieved stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities, the existence of a functioning market economy as well as the capacity to cope with competitive pressure and market forces within the Union",

are essential for the (potential) candidate countries; hereunder, the protection of human rights, particularly freedom of expression, and the rule of law (including e.g. administrative capacity) feature prominently.²⁰¹ This latter element translates, according to the European Commission, into the requirement that

"the candidate country [...] ha[s] created the conditions for its integration by adapting its administrative structures. While it is important for EU legislation to be transposed into national legislation, it is even more impor-

¹⁹⁹ Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the co-ordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) (codified version), [2010] OJ L 95, p. 1.

²⁰⁰ Decision No 1718/2006/EC of the European Parliament and of the Council of 15 November 2006 concerning the implementation of a programme of support for the European audiovisual sector (MEDIA 2007), [2006] OJ L 327, p. 12. The MEDIA programme promotes (the) European film in its pre-production phase (training and development) as well as distribution and promotion. The current MEDIA 2007 programme will provide EUR 755 million to Europe's audiovisual industry for the period from 2007 to 2013. Another initiative is Europa Cinemas (<http://www.europa-cinemas.org/>) focusing on European films. Its objective is to provide operational and financial support to cinemas that commit to screening a significant number of European non-national films, to offering events and initiatives as well as promotional activities targeted at young audiences, and to screening digital European films.

²⁰¹ See also the European Council Declaration (Madrid Summit 1995): "The European Council also confirms the need to make sound preparations for enlargement on the basis of the criteria established in Copenhagen and in the context of the pre-accession strategy defined in Essen for the CCEE; this strategy will have to be intensified in order to create the conditions for the gradual, harmonious integration of those States, particularly through the development of the market economy, the adjustment of their administrative structures and the creation of a stable economic and monetary environment."

tant for the legislation to be implemented and enforced effectively through the appropriate administrative and judicial structures. This is a prerequisite of the mutual trust needed for EU membership.²⁰²

In particular, the Commission analyses whether the requirements have been met by the (potential) candidate countries and describes the “*status quo*” in their regular “progress reports”. In the case of negotiations being formally underway, i.e. the Council having unanimously decided – on the basis of a Commission opinion – in favour of the application, for present purposes the chapters referring to “Culture and audio-visual policy” (formerly Chapter 20, now: Chapter 10: “Information society and media”) are most relevant, since they cover the alignment with the *acquis* relevant for these sectors.²⁰³ The same importance applies to the establishment of legal provisions that safeguard the fundamental rights of the CFREU. With regard to the “media sector” especially the freedom of thought (Art. 10 CFREU) and the freedom of expression and information (Art. 11 CFREU) can be named.

The Council will decide to (provisionally) close a negotiating chapter, after the Commission is satisfied with the progress being made.²⁰⁴ Undertakings accepted by the acceding country thus become part of the relevant obligations that, finally, will become an integral component of the (draft) accession treaty and the accompanying act of accession.

2.2 Relevant legal framework

a) Primary European Union law

According to Art. 2 TEU, the EU is founded on various basic values and principles that are common to all the Member States in a society in which pluralism, among other things, prevails. In view of the role played by the press as well as public service and commercial broadcasting organisations in media pluralism and, thereby, in the freedom of expression, a role that is recognised in all Member States’ constitutions, Art. 2 TEU has an important function in terms of directing the application of the EU treaties and their provisions.

aa) Fundamental Freedoms

The Fundamental Freedoms as established by the TFEU are essential in primary EU Law. It is the free movement of goods, regulated in Arts. 34 *et seq.* TFEU, the free movement of persons (including workers as well as the freedom of establishment), regulated in Arts. 45 *et seq.* TFEU, the freedom to provide services, regulated in Arts. 56 *et seq.* TFEU, and the free movement of capital, regulated in Arts. 63 *et seq.* TFEU, that are of particular importance for the media sector, although the provisions on the “four freedoms” contain no specific reference to media or broadcasting services. In the following, a closer look at the freedom of establishment (as a part of the free movement of persons) and the freedom to provide services is to be taken.²⁰⁵

In general terms, the principle of freedom

²⁰² Cf. http://ec.europa.eu/enlargement/the-policy/conditions-for-enlargement/index_en.htm

²⁰³ This *acquis* includes the establishing of independent regulatory authorities and the securing of their independence in various regards, cf. Commission Staff Working Paper of 5 November 2008 accompanying the Commission Communication “Enlargement Strategy and Main Challenges 2008-2009” (COM(2008) 674), SEC(2008) 2694, available at: http://ec.europa.eu/enlargement/pdf/press_corner/key-documents/reports_nov_2008/croatia_progress_report_en.pdf, at p. 37.

²⁰⁴ See also Commission Staff Working Document on the External Dimension of Audiovisual Policy of 14 July 2009, SEC(2009) 1033, p. 15.

²⁰⁵ The relevance of the other “two freedoms” should, of course, not be underestimated: The free movement of goods could be applicable for “media carrier” like newspapers, magazines, books, DVDs; see, for instance, ECJ, Case 229/83, Leclerc, [1985] ECR I, para 20; Joined Cases 60 and 61/84, Cinéthèque, [1985] ECR 2605, paras. 10 *et seq.* The free movement of capital could be of relevance for media organisations, when it comes to transferring any amount of capital from one country to another or, for instance, when a broadcasting company established in a Member State wants to invest in a broadcasting company established or to be established in another Member State, see ECJ, Case C-148/91, Veronica, [1993] ECR I-487. Besides, the free movement of workers certainly also has a bearing for the media sector, as becomes apparent in the case of actors, cameramen, journalists etc.

of establishment enables an economic operator (whether a person or a company) to carry out an economic activity in a stable and continuous way in one or more Member States. The principle of the freedom to provide services enables an economic operator (providing services in one Member State) to offer services on a temporary basis in another Member State, without having to be established there. Member States must modify national laws that contain unjustified restrictions to the freedom of establishment, or to the freedom to provide services, and that are, therefore, incompatible with these principles.²⁰⁶ Arts. 45 and 56 *et seq.* TFEU thus require the elimination of all (direct and indirect) discrimination on grounds of nationality as well as any restriction which is liable to prohibit or further impede the activities of economic operators. Member States may only maintain such restrictions in specific circumstances where these are justified by reasons foreseen in Treaty provisions (such as public order in accordance with Arts. 52, 62 TFEU) or by overriding reasons of general interest²⁰⁷, for instance – in particular with view to the media sector – on grounds of cultural policy²⁰⁸, protection of consumers²⁰⁹ or of Art. 10 ECHR²¹⁰. Finally, the restrictions must also be proportionate.

²⁰⁶ Cf. ECJ, Case 33/74, Van Binsbergen, [1974] ECR 1299, paras. 7/9 *et seq.* See also a list of the various cases of the ECJ provided by the European Commission, Guide to the Case Law of the European Court of Justice on Articles 49 *et seq.* EC Treaty: Freedom to Provide Services, of 1 January 2001, available at: http://ec.europa.eu/internal_market/services/docs/infringements/art49_en.pdf; and Guide to the Case Law of the European Court of Justice on Articles 43 *et seq.* EC Treaty: Freedom of Establishment, of 1 January 2001, available at: http://ec.europa.eu/internal_market/services/docs/infringements/art43_en.pdf

²⁰⁷ Cf. ECJ, Joined Cases C-34/95, C-35/95 and C-36/95, De Agostini, [1997] ECR I-3843, para. 54; ECJ, Case C-352/85, Bond van Adverteerders, [1988] ECR 2085, paras. 33 *op cit.*

²⁰⁸ E.g. ECJ, Case 288/89, *Mediawet I*, [1991] ECR I-4007, paras. 22, 23.

²⁰⁹ E.g. ECJ, Case C-6/98, ARD, [1999] ECR I-7599, para. 50.

²¹⁰ E.g. ECJ, Case C-288/89, *Stichting Collectieve Antennevoorziening Gouda v. Commissariaat voor de Media*, [1991] ECR 4007, para. 23. See also the Communication from the Commission of 27 June 2001 on the application of the general principles of free movement of goods and services – Articles 28 and 49 EC – concerning the use of satellite dishes, COM (2001) 351 final, Part II., 2., p. 11.

(1) *The freedom to provide services*

The freedom to provide services was instrumental in liberalising the European broadcasting markets. However, it was the initial point of the ECJ, ruling that broadcasting is protected by the freedom to provide services, in its first major decision (*Sacchi*).²¹¹ Today it is firmly established that Arts. 56 *et seq.* TFEU (ex. Arts. 49 EC-Treaty) cover any form of electromagnetic transmission of information across frontiers, including terrestrial and direct satellite broadcasting and transmission via cable as well as Internet, multimedia and telecommunications services.²¹² The provisions on freedom to “provide” services also apply to the freedom to “receive” services, where the recipient of services crosses borders,²¹³ as well as to scenarios involving both the provider and recipient of services crossing borders and exchanging services in another Member State.²¹⁴ It is essential that the provisions on freedom to provide services do not apply to activities that take place only within a single Member State. The ECJ distinguishes several (non-discriminatory) measures that do also have a restrictive impact on the freedom to provide services, especially in the cases *Bacardi France* and *Commission v. France (Loi Evin)*: Here, the owners of advertising hoardings were subject to restrictions, since they had to refuse, as a preventive measure,

²¹¹ E.g. ECJ, Case 155/73, *Sacchi*, [1974] ECR 409, para. 6. Since then, the ECJ passed a large number of judgments in the field of audiovisual media, e.g. ECJ, Case 52/79, *Debauve*, [1980] ECR 833, para. 8; ECJ, Case 62/79, *Coditel*, [1980] ECR 881, paras. 14 *et seq.*; ECJ, Case C-260/89, *ERT*, [1991] ECR I-2925, paras 20-25; ECJ, Case C-353/89, *Commission v. Netherlands (Mediawet II)*, [1991] ECR I-4069, para 38; ECJ, Case C-211/91, *Commission v. Belgium*, [1992] ECR I-6757, para. 5; ECJ, Case C-23/93, *TV 10*, [1994] ECR I-4795, paras. 13 and 16; ECJ, Case C-429/02, *Baccardi France*, [2004] ECR I-6613.

²¹² Cf. K. Böttcher/O. Castendyk, Comments on Art. 49 EC, in: *Castendyk/Dommering/Scheuer*, European Media Law, Alphen a/d Rijn 2008, Art. 49 EC, *rec. 4.*

²¹³ ECJ, Joined Cases 286/82 and 26/83, *Luisi & Carbone*, [1984] ECR 377, paras. 10-16.

²¹⁴ ECJ Case 76/81, *Transporoute*, [1982] ECR 417, para. 14; Case C-55/98, *Vestergaard*, [1999] ECR I-7641, para. 18.

any advertising for alcoholic beverages if the sporting event was likely to be retransmitted in France²¹⁵, or, rather, the transmission of television programmes was restricted, since French broadcasters had to refuse all retransmission of sporting events in which hoardings bearing advertising for alcoholic beverages marketed in France might be visible.²¹⁶ However, these rules on television advertising have been justified as they relate to the protection of public health within the meaning of Art. 52(1) TFEU of the Treaty. Still, all kinds of restrictions on the freedom to provide services set by the States must be carefully assessed on a case-by-case basis, especially taking into account Art. 10 ECHR.

(2) *The freedom of establishment*

The freedom of establishment includes the right “to set up and manage” undertakings, in particular companies or firms. This characteristic is fulfilled, as distinct from the provisions of the free movement of capital, where the acquisition of a shareholding of a company in a Member State by an investor/a company

“[...] gives (...) definite influence over that company’s decisions and allows (...) to determine that company’s activities”²¹⁷.

The ECJ lays the main focus on the question as to how the influence on a company is exercised. This criterion seems to be a crucial tool for the distinction between the two freedoms. However, the distinction based on this criterion may not be evident in all cases.²¹⁸ Once affirmed, possible restrictions must be observed.

(3) *Particularly: Restrictive measures aimed at fostering media pluralism*

In the following a special look should be taken on possible constraints on media ownership in a Member State that can have a restrictive effect on companies wishing to establish themselves there. This is the case, for instance, where a broadcasting company is already established in a Member State and the levels of the candidates’ holdings and control in other Member States are counted towards the limits, or where an applicant for a broadcasting licence, who already operates a channel legally in another Member State, which is retransmitted in the state in which the licence is applied for, will, in that case, reach the concentration thresholds more rapidly; applicants without channels in other Member States will have an advantage. The question is then, whether the restriction on the freedom of establishment lies within the “general interest” and is proportional according to its legitimate purpose.²¹⁹ One should bear in mind that the fostering of “media pluralism” could be a restriction in the “general interest”, especially if measures are taken favouring operators which belong to groups representing and linked to the local community and contributing towards strengthening the regional economy.

The question as to whether national (state indicated) measures fostering media pluralism could justify restrictions of the fundamental freedoms is one of the most disputed legal issues in view of the role which the fundamental freedoms play in the field of European media law. This question becomes even more significant, if one supports the idea of “a right to access” of media companies/providers to foreign (national) media markets, following

²¹⁵ ECJ, Case C-429/02, Baccardi France, [2004] ECR I-6613, para. 35.

²¹⁶ ECJ, Case C-262/02, Commission v. France, [2004] ECR I-6569, para. 26.

²¹⁷ ECJ, Case C-284/06, Burda, [2008] ECR I-4571, para. 69.

²¹⁸ Cf. also Germelmann, *Konkurrenz von Grundfreiheiten und Missbrauch von Gemeinschaftsrecht – Zum Verhältnis von Kapitalverkehrs- und Niederlassungsfreiheit in der neueren Rechtsprechung*, EuZW 2008, p. 596 et seq.

²¹⁹ The so-called “Gebhard-Formula”; ECJ, Case C-55/94, Gebhard, [1995] ECR I-4165.

from the basic principle of freedom and pluralism of the media in the sense of Arts. 11(2) CFREU, 2 TEU (read together with Art. 10 ECHR).²²⁰ The ECJ has not yet set up a “general rule” in this regard. However, some “basic tendencies” could be drawn from the still leading judgments “*Commission v. Netherlands*”, “*Stichting Collectieve Antennevoorziening Gouda v. Commissariaat voor de Media*”, “*Vereniging Veronica Omroep Organisatie v. Commissariaat voor de Media*” and “*TV10 SA v. Commissariaat voor de Media*” dealing with single provisions of the – then in force – Dutch “*Mediawet*” (Dutch Law of 21 April 1987, governing the supply of radio and television programmes, radio and television licence fees and press subsidies). The ECJ, in general terms, stated that the *Mediawet* is “designed to establish a pluralistic and non-commercial broadcasting system and thus forms part of a cultural policy intended to safeguard, in the audio-visual sector, the freedom of expression of the various (in particular social, cultural, religious and philosophical) components existing in the Netherlands. [...] Those cultural-policy objectives are objectives relating to the public interest which a Member State may legitimately pursue by formulating the statutes of its own broadcasting organisations in an appropriate manner.”²²¹

In the case “*Vereniging Veronica Omroep Organisatie v. Commissariaat voor de Media*” the ECJ dealt with Art. 57(1) *Mediawet*. The provision states that “apart from producing

their programmes, the organisations which have obtained broadcasting time may not pursue any activities other than those provided for or authorised by the *Commissariaat voor de Media*” (the Dutch regulatory authority).

According to the ECJ, this provision contributes to the attainment of establishing a pluralistic and non-commercial broadcasting system:

“It seeks to prohibit national broadcasting organisations from engaging in activities which are alien to the tasks assigned to them by the Law or undermine the aims thereof, in the view of the *Commissariaat voor de Media*. Thus, in particular, it provides that the financial resources available to the national broadcasting organisations to enable them to ensure pluralism in the audio-visual sector must not be diverted from that purpose and used for purely commercial ends”.²²²

According to this, rules/regulations that prohibit broadcasting organisations established in a Member State from investing in a broadcasting organisation established or to be established in another Member State must at least ensure the pluralistic and non-commercial character of the audiovisual system (in the respective country). Otherwise, a violation of a fundamental freedom by such provisions can be assumed. It is essential to make rules, which prohibit national broadcasting organisations from setting up commercial radio and television companies abroad – for the purpose of providing services directed towards their State of establishment –, in order to ensure that such organisations cannot improperly evade the obligations deriving from the national legislation concerning the pluralistic and non-commercial content of programmes.

In the case “*Stichting Collectieve Anten-*

²²⁰ Cf. A. Rossnagel/W. Sosalla/T. Kleist, *Der Zugang zur digitalen Satellitenverbreitung, Gutachten im Auftrag der gemeinsamen Stelle ‘Digitaler Zugang’ der Landesmedienanstalten*, Visitas Verlag GmbH 2004, p. 78, 79.

²²¹ ECJ, Case C-288/89, *Stichting Collectieve Antennevoorziening Gouda v. Commissariaat voor de Media*, [1991] ECR I-4007, paras. 22, 23; Case C-353/89, *Commission v. Netherlands (Mediawet II)*, [1991] ECR I-4069, paras. 29, 30; Case C-148/91, *Vereniging Veronica Omroep Organisatie v. Commissariaat voor de Media*, [1993] ECR I-487, paras. 9, 10. Also affirmed in ECJ, Case C-23/93, *TV10 SA v. Commissariaat voor de Media*, [1994] ECR I-4795, paras. 18, 25.

²²² *Vereniging Veronica Omroep Organisatie v. Commissariaat voor de Media*, *ibid.*, para. 11.

nevoorziening Gouda v. Commissariaat voor de Media” the ECJ was confronted with Art. 66(1) para. b) *Mediawet*. The provision states that the operator of a cable network may “transmit programmes [...] which are broadcast by a foreign broadcasting body or a group of such bodies as broadcasting programmes, in accordance with the legislation in force in the broadcasting country. If such programmes contain advertisements, they may be transmitted, solely provided that the advertisements are produced by a separate legal person, that they are clearly identifiable as such and clearly separated from other parts and are not broadcast on Sundays, that the duration of such advertisements does not exceed 5% of the total air time utilised, that the broadcasting body fulfils the conditions laid down in Article 55(1) and that the entire revenue is used for the production of programmes. [...]”

This provision contains two “barriers”: First, operators of cable networks established in a Member State can only transmit radio or television programmes supplied by broadcasters established in other Member States if those broadcasters satisfy the conditions in their country. Second, if such programmes contain advertisements, they have to fulfil special conditions: especially, such programmes have to be produced by a separate company. The first “barrier” is of particular interest as it relates to the structure of broadcasting bodies established in other Member States. For the Dutch Government the restriction in the *Mediawet* is justified by “imperatives relating to cultural policy” as this policy is “to safeguard the freedom of expression of the various – in particular social, cultural, religious and philosophical – components of the Netherlands, in order that this freedom may be capable of being exercised in the press, on the radio or on television.” Although the ECJ recognised that a cultural policy understood in that sense

“may indeed constitute an overriding requirement relating to the general interest, which justifies a restriction on the freedom to provide services”, it ruled that

“conditions affecting the structure of foreign broadcasting bodies cannot [...] be regarded as being objectively necessary in order to safeguard the general interest in maintaining a national radio and television system which secures pluralism.”

The main reason for this ruling was that the Dutch broadcasting bodies did not have to fulfil all the same conditions (especially the obligation imposed on broadcasting organisations in other Member States not to permit a third party to make a profit), which the foreign broadcasting bodies had to observe. As long as restrictions do not apply to national and foreign persons in the same way, such restrictions cannot be justified by a cultural policy aiming to safeguard pluralism. Therefore, the national legislator has to formulate the same requirements for its own nationals and for foreign operators.

In the case *TV10 SA v. Commissariaat voor de Media*” the ECJ again was confronted with Art. 66 of the – then in force – *Mediawet*. However this time the question was essential, whether the provisions on the freedom to provide services are to be interpreted as precluding a Member State from treating a broadcasting body constituted under the law of another Member State and established in that State, as a domestic broadcaster if its activities are wholly or principally directed towards the territory of the first Member State (against the background that the broadcasting body was established in the other Member State in order to avoid the rules which would be applicable to it if it were established within the first Member State). The ECJ came to important findings: it decided that a radio and television organisation which establishes itself in another Member State in order to

provide services there which are intended for the first State's territory could be regarded as a domestic broadcaster. The treatment of a broadcasting body constituted under the law of another Member State as equal to a domestic broadcaster does not jeopardise the right to freedom of expression guaranteed by Art. 10 and Art. 14 of the ECHR as long as a national "media policy" (here: the Netherlands broadcasting policy in form of the *Mediawet*) upholds pluralism, which is – according to the ECJ –

"[...] intended to preserve the diversity of opinions, and hence freedom of expression, which is precisely what the European Convention on Human Rights is designed to protect."²²³

bb) Rules on Competition

The basic rules on competition are Art. 101 TFEU (prohibition on cartels), Art. 102 TFEU (prohibition on the abuse of a dominant position), Art. 106 TFEU (as a special competition rule concerning public undertakings and undertakings bestowed with special or exclusive rights), the Council Regulation 139/2004/EC²²⁴ (Merger Control Regulation, ECMR), and Arts. 107 ff. TFEU (State aid). The latter will be examined in an "extra-part" (*cf. infra cc*).

(1) Prohibition of cartels

Art. 101 TFEU aims to ensure that "companies play fair" by taking action against all business practices between two or more undertakings that restrict free competition in the internal market.²²⁵ To assess this, it – firstly – has to be clarified whether an agreement between

undertakings, which is capable of affecting trade between Member States, has an anti-competitive object, or an actual or potential anti-competitive effect. Secondly, it has to be determined whether a restrictive agreement also produces pro-competitive benefits that outweigh the restricting effects.²²⁶ In the media sector, the question as to whether a cartel should be prohibited or not plays an important role especially when it comes to collective or exclusive agreements on the selling or acquisition of sports rights²²⁷, or with regard to the collective management of the author's right to communicate and reproduce his works (online).

(2) Prohibition of the abuse of a dominant position

Art. 102 TFEU prohibits "any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it [...] in so far as it may affect trade between Member States". While Art. 101 TFEU aims at preventing the creation of new market power by means of agreements, decisions, concerted practices or concentrations, Art. 102 TFEU is directed towards the abuse of market power, where such power already exists.²²⁸ To determine whether an undertaking has abused its dominant position, one needs firstly to define the relevant product and geographic market(s)²²⁹, secondly to determine the dominance of the undertaking, and thirdly

²²³ ECJ, Case C-23/93, *TV10 SA v. Commissariaat voor de Media*, [1994] ECR I-4795, para. 25.

²²⁴ Council Regulation 139/2004/EC of 20 January 2004 on the Control of Concentrations between Undertakings, [2004] OJ L 24, p. 1.

²²⁵ *Cf. M. Elspaß/M. Kettner*, Comments on Art. 81 EC, in: *Cas-tendyk/Dommering/Scheuer*, *European Media Law*, Alphen a/d Rijn 2008, Art. 81 EC, rec. 1.

²²⁶ Commission, Notice 2004/C 101/08, Guidelines on the Application of Art. 81(3) EC, [2004] OJ C 101/97, para. 11.

²²⁷ Collective marketing (also an issue in the context of the prohibition on the abuse of a dominant position) of the right to broadcast certain sport events, for instance, has been in the focus of EC antitrust law on several occasions; see Commission, Decision 2003/778/EC, *UEFA Championsleague* (Case C.2/37.398), [2003] OJ L 291/25; Commission, Notice, *FA Premier League* (Cases C.2/38.173 and 38.463), [2003] OJ L 115, p. 3.

²²⁸ See D.G. Goyder, *EC Competition Law* (5th edn, Oxford University Press, 2009), pp. 324 et seq.

²²⁹ For market definitions in the media sector, see R. Capito, in: *EMR, Media Markets Definitions 2003 and 2005*.

to decide whether the undertaking is acting in an abusive manner and therefore affects trade between Member States. The field of collective administering of copyrights²³⁰ and the refusal to supply media content²³¹ are two of the most important fields of application for Art. 102 TFEU in the media sector.

(3) *Public undertakings and special rights granted to undertakings*

Art. 106 TFEU aims to prevent Member States from enacting or maintaining in force measures relating to public undertakings and undertakings to which Member States grant special or exclusive rights which derogate from other obligations under the Treaty, especially from the competition rules in Arts. 101 to 109 TFEU. According to the ECJ, Art. 106 TFEU must be interpreted as being intended to ensure that the Member States do not take advantage of their relations with those undertakings in order to evade the prohibitions laid down by other Treaty rules addressed directly to them, by obliging or encouraging those undertakings to engage in conduct which, if engaged in by the Member States, would be contrary to those rules.²³² However, the granting of a government broadcasting monopoly has been held not to form *per se* an infringement upon this provision.²³³ Member States are (only) obliged

not to adopt measures which lead to enterprises acting contrary to European Union law, even if they are State enterprises or enterprises which have been granted special or exclusive rights.²³⁴

(4) *Merger control*

The European Community Merger Regulation (ECMR) applies – in principle – to all concentrations with a Union-wide dimension (Art. 1(1) ECMR), which can be assumed, if the combined aggregate world-wide turnover of all the undertakings concerned is more than EUR 5 billion and the aggregate Union-wide turnover of each of at least two of the undertakings concerned is more than EUR 250 million, unless each of the undertakings concerned achieves more than two-thirds of its aggregate Union-wide turnover within one specific Member State (Art. 1(2) ECMR). Art. 1(3) ECMR sets out special thresholds catching concentrations which, even though they are below the thresholds of Art. 1(2) ECMR, show consequences in at least three Member States. It is the task of the Commission to delineate the relevant product and geographic market and to determine whether a concentration is compatible with the common market by conducting the so-called SIEC-test²³⁵ under Art. 2(3) ECMR.²³⁶

²³⁰ E.g. Commission, Decision 71/224/EEC, GEMA I (Case IV/26.760), [1971] OJ L 134/15; Decision 72/268/EEC, GEMA II (IV/26.760), [1972] OJ L 166/22 and Decision 82/204/EEC, GEMA III (IV/29.971), [1982] OJ L 94/12; see also ECJ, Case 7/82, GVL v. Commission, [1983] ECR 483; ECJ, Case 127/73, BRT v. SABAM, [1974] ECR 313; ECJ, Case 395/87, Tournier, [1989] ECR 2521.

²³¹ E.g. Commission, Decision 2003/778/EC, UEFA Championsleague (Case C.2/37.398), [2003] OJ L 291/25; Commission, Decision 2005/396/EC, Bundesliga (Case C.2/37.214), [2005] OJ L 134/46. The leading case on refusal to grant access to content is Magill, ECJ, Joined Cases C-241/91 and C-242/91, Magill, [1995] ECR I-743.

²³² ECJ, Case C-157/94, Commission v. Netherlands, [1997] ECR I-5699, para. 30.

²³³ The ECtHR ruled in 1993, that a ban on setting up commercial stations in Austria was in breach of Art. 10 ECHR (see above). This means that the legal obligations under Art. 10 ECHR for the Member States are more far-reaching than under Art. 106 TFEU.

²³⁴ Cf. ECJ, Case C-260/89, ERT, [1991] ECR I-2925, para. 12; Case C-41/90, Höfner and Elser, [1991] ECR I-1979, para 29; J.-D. Braun, Comments on Art. 86 EC, in: Castendyk/Dommering/Scheuer, European Media Law, Alphen a/d Rijn 2008, Art. 86 EC, paras. 8, 9.

²³⁵ Cf. the analysis of the meaning of the SIEC-test ("significant impediment of effective competition") N. Horner, Unilateral Effects and the EC Merger Regulation – How The Commission Had its Cake and Ate it Too, [2006] Hanse Law Review, p. 23 et seq.; S. Baxter/F. Dethmers, Unilateral Effects Under the European Merger Regulation: How Big is the Gap?, [2005] ECLR 380 et seq.; C.-D. Ehlermann/S. B. Völcker/G. A. Gutermuth, Unilateral Effects: The Enforcement Gap under the Old EC Merger Regulation, [2005] World Competition 28(2), p. 193 et seq.

²³⁶ The Commission has dealt with various mergers under the ECMR, e.g. Decision 2005/188/EC, Sony/BMG (Case COMP/M.3333), [2005] OJ L 63, p. 30; Decision 2007/595/EC, Universal/BMG Publishing (Case COMP/M.4404), [2007] OJ L 230, p. 12.

cc) Particularly: EU rules on State aid
The fundamental provision of European law governing the evaluation of public funding systems for broadcasting, cinema/film, press or (Internet-)broadband is Art. 107(1) TFEU. In principle, this provision prohibits aid granted to certain undertakings by a Member State or through State resources which distorts competition and affects trade between Member States. Art. 106(2) TFEU provides an exception in favour of undertakings entrusted with the operation of services of general economic interest.²³⁷ Art. 107(2) and (3) TFEU also provide a limited derogation from the rules of the Treaty. Of particular interest for the media sector are the exemptions to facilitate the development of certain economic activities or of certain economic areas within the meaning of Art. 107(3)(c) TFEU and for cultural State aid as defined in Art. 107(3)(d) TFEU.

Small amounts of State aid may be exempted from the above-mentioned rules, since they do not have a potential effect on competition and trade between Member States. The Commission Regulation on so-called *de minimis* aid²³⁸ provides that State aid measures shall be deemed not to meet all the criteria of Art. 107(1) TFEU, and shall be exempt from the notification requirement of Art. 108(3) TFEU, if they fulfil a number of conditions, namely (1) the ceiling for the aid covered by the *de minimis* rule is in general EUR 200,000 per undertaking over any three fiscal-year period (in the present time of financial and economic crisis, the Commission has considered it necessary to tem-

porarily increase the *de minimis* threshold to EUR 500,000 (cash grant) per undertaking²³⁹; the ceiling applies to the total of all public assistance considered to be *de minimis* aid. It will not affect the possibility of the recipient to obtain other State aid under schemes approved by the Commission; the regulation only applies to “transparent” forms of aid, which means aid for which it is possible to determine in advance the gross grant equivalent. The General Block Exemption Regulation²⁴⁰ identifies aid for general training measures, up to an aid intensity of 80%, as State aid that can be considered acceptable. Such training aid, not exceeding EUR 2 million per training project, is also exempted from individual notification.

(1) Financing public service broadcasting and effective supervision of the fulfilment of the public service broadcasting obligations

The far-reaching EU State aid rules are, so to speak, “specified” in further “European rules” that need to be taken into account²⁴¹:

The 1997 Amsterdam Protocol²⁴² stipu-

²³⁷ Art. 14 TFEU emphasises the importance of these services. Under this provision, the European Parliament and the Council can - without prejudice to the competence of Member States (see below) - in future, by means of regulations, establish principles and conditions, *particularly economic and financial conditions*, for the functioning of these services.

²³⁸ Commission Regulation (EC) N 1998/2006 of 15 December 2006 on the application of Articles 87 and 88 of the Treaty to *de minimis* aid, [2006] OJ L 379, p. 5.

²³⁹ Communication from the Commission - Temporary framework for State aid measures to support access to finance in the current financial and economic crisis (consolidated version of the Temporary Framework adopted on 17 December 2008, as amended on 25 February 2009), [2009] OJ C 83, p. 1.

²⁴⁰ Commission Regulation (EC) No 800/2008 of 6 August 2008, declaring certain categories of aid compatible with the common market in application of Articles 87 and 88 of the Treaty (General block exemption Regulation) (Text with EEA relevance), OJ [2008] L 214, p. 3.

²⁴¹ See C. Bron, “*Financing and supervision of public service broadcasting*”, IRIS plus 2010-4, pp. 7 ff, on current trends on the financing of public service broadcasting; M. Ridinger, “*The Public Service Remit and the New Media*”, IRIS plus 2009-6, pp. 7 ff.; and EMR et al., “*Public Service Media According to Constitutional Jurisprudence – The Human Rights and Constitutional Law Dimension of the Role, Remit and Independence*”, 2 July 2009, pp. 15 et seq. (available at: http://www.ebu.ch/en/legal/other/EMR_Study_PSM.php) with regard to current trends on the public service remit.

²⁴² Treaty of Amsterdam amending the Treaty of the European Union, the Treaties Establishing the European Communities and certain related acts – Protocols – Protocol on the Treaty Establishing the European Community – Protocol on the system of public broadcasting in the Member States of 1 May 1997, [1997] OJ C 340, 1997, p. 109 (now: Protocol No. 29, attached to the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed in Lisbon, 13 December 2007).

lates that the Member States can fund public service broadcasting insofar as such funding is granted to broadcasting organisations for the fulfilment of the public service remit and does not affect trading conditions and competition in the Union to an extent which would be contrary to the common interest.²⁴³

The European Commission confirmed, in line with the Amsterdam Protocol, its approach to the examination of public funding of audiovisual services (again) in its 2009 Broadcasting Communication²⁴⁴, stating that the Member States are “free to choose” the means of financing public service broadcasting.²⁴⁵ Funding schemes are divided into “single funding” and “mixed funding”. The “single funding” category comprises all systems in which public service broadcasting is financed only through public funds, in whatever form. “Mixed funding” (previously known as “dual funding”) systems comprise a wide range of schemes, where public service broadcasting is financed by a combination of State funds and revenues from commercial activities, such as the sale of advertising space or programmes and the provision of services against payment. In addition, Rec. 77 of the 2009 Broadcasting Communication states, with regard to the control of funding systems for public service broadcasting, that the Member States:

“[...] shall ensure regular and effective control of the use of public funding, to prevent

overcompensation and cross-subsidisation, and to scrutinise the level and the use of ‘public service reserves’. It is within the competence of Member States to choose the most appropriate and effective control mechanisms in their national broadcasting systems, also taking into account the need to ensure coherence with the mechanisms in place for the supervision of the fulfilment of the public service remit.”

Here, the Commission mentions the crucial aspect of the dual control over the use of public funding. There are two types of control: financial control over how funds are used and content-related control aimed at guaranteeing the fulfilment of the public service remit. Still, both forms of control should be viewed together, since the evaluation of the proper use of funds and that of the fulfilment of the public service remit are linked together. In its judgment of 26 June 2008 in the *SIC v. Commission* case²⁴⁶ regarding measures by the Portuguese Republic for the public service broadcaster RTP in order to finance the public service remit, the Court refers to the statements of the Amsterdam Protocol and to the Resolution of the Council and of the Member States of 25 January 1999 concerning broadcasting.

On the questions of whether the remit is fulfilled by public service broadcasting and whether compliance with financial requirements is secured, the Court distinguishes two manners of such an examination:

Firstly, it is necessary to check whether the quality standards are met, since these requirements, especially at the national level, are the key feature of services of general economic interest in the broadcasting sector. There is, the Court says, no reason for State funding to be

²⁴³ Incidentally, these provisions correspond with the Resolution of the Council and of the representatives of the governments of the Member States, meeting within the Council, on 25 January 1999 concerning public service broadcasting, [1999] OJ C 30, p. 1, Rec. 2.

²⁴⁴ Communication from the Commission of 2 July 2009 on the application of State aid rules to public service broadcasting (Text with EEA relevance), [2009] OJ C 257, p. 1. The 2009 Broadcasting Communication replaces the Communication from the Commission on the application of State aid rules to public service broadcasting of 15 November 2001, [2001] OJ C 320, p. 5.

²⁴⁵ 2009 Broadcasting Communication, *ibid.*, Rec. 58. However, this is on condition that the Commission has verified, under Art. 106(2) TFEU, that the State funding does not affect competition in the common market in a disproportionate manner (rec. 59).

²⁴⁶ CFI, Case T-442/03, *SIC – Sociedade Independente de Comunicação, SA v Commission of the European Communities*, [2008] ECR, p. II-1161.

continued if the public service broadcasters do not adhere to any particular quality standards and thus operate on the market like any other providers, such as the commercial broadcasters. This is a remit to be attributed to supervisory authorities/bodies at national level (only).

A different question, according to the Court, is whether the services commissioned have actually been provided in the way determined in advance and whether the costs corresponding to these services have not been exceeded. Here, the Commission is able to carry out checks: it can, for example, consult audits by external auditors if they contain information “relevant to the assessment of the costs for the purposes of its assessment of whether the aid is proportional within the context of Art. 86(2) ECT”. Only then is it possible to conduct a systematic examination of the cost-performance ratio with respect to the remit.

The Commission recognises that it is within the competence of the Member State to choose the mechanism to ensure effective supervision of the fulfilment of the public service broadcasting obligations. Especially, the establishment of an independent (regulatory) body in the audiovisual sector is deemed the preferred way to carry out the supervising functions assigned to it in an effective manner. Consequently, the Commission recommends that public service broadcasters be monitored by a body *independent* from the broadcaster. This body should have *appropriate powers and resources* to carry out a regular supervision and impose possible remedies. The independent body must monitor the actions of the public service broadcaster in order to ensure that national definitions of public service broadcasting remits are underpinned by independent, robust and enforceable mechanisms to *monitor* and render entrusted broadcasters *accountable* for the fulfilment of the associated obligations and for the level of public funding (and regulatory assets) assigned to this purpose.

With regard to supervision of the fulfilment of the public service obligations, para. 54 of the Broadcasting Communication states:

“[...] Such supervision would only seem effective if carried out by a body effectively independent from the management of the public service broadcaster, which has the powers and the necessary capacity and resources to carry out supervision regularly, and which leads to the imposition of appropriate remedies in so far it is necessary to ensure respect of the public service obligations.”

For financial control mechanisms to be effective, however, the Communication deems it necessary that these be “carried out by an external body independent from the public service broadcaster at regular intervals, preferably on a yearly basis” (para. 78 of the Broadcasting Communication).

(2) Aid Schemes for Cinema/Film

National cinema aid schemes often fall under Art. 107(1) TFEU.²⁴⁷ The question is then *inter alia*²⁴⁸, whether Art. 107(3)(d) TFEU is applicable or not. The Cinema Communication²⁴⁹

²⁴⁷ See also C. Bron/P. Matzneller, *Governance of Film Aid in South-East Europe*, in: IRIS *plus* 2011-2, p. 7 et seq., on the “whole picture” of the European framework concerning direct film funding.

²⁴⁸ Another problem lies within national film aid provisions that make the State aid conditional to the realisation of certain filmmaking activities in a single Member State (so-called “territorialisation clauses”). Conflicts could occur especially with the freedom to provide services and the freedom of establishment; cf. M. D. Cole, Klein, aber fein: *Luxemburgs* Filmförderung im Herzen Europas, p. 407, 422, in: *Europäisches und nationales Medienrecht im Dialog*, Festschrift aus Anlass des 20-jährigen Bestehens des Instituts für Europäisches Medienrecht e.V. (EMR), Band 40, Baden-Baden 2010.

²⁴⁹ Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions of 26 September 2001 on certain legal aspects relating to cinematographic and other audiovisual works, COM (2001) 534 final, [2002] OJ C 43, p. 6. The Commission decided to continue to apply the criteria until such time as new rules on State aid to cinematographic and other audiovisual works come into effect, or, at the latest, until 31 December 2012, see Communication from the Commission of 7 February 2009 concerning the State aid assessment criteria of the Commission communication on certain legal aspects relating to cinematographic and other audiovisual works (Cinema Communication), [2009] OJ 31, p. 1.

of the Commission provides for special rules on the assessing of funding provided for cinematographic and other audiovisual works under Art. 107(3)(d) TFEU. The Communication requires, besides the basic EU principles of prohibiting discrimination on the grounds of nationality, that freedom of establishment, free movement of goods and freedom to provide services have been respected (Arts. 18, 34, 36, 45, 49, 54 and 56 TFEU), and, in addition, that the following four criteria²⁵⁰ are met:

“The aid is directed to a cultural product. Each Member State must ensure that the content of the aided production is cultural according to verifiable national criteria (in compliance with the application of the subsidiarity principle).

The producer must be free to spend at least 20% of the film budget in other Member States without suffering any reduction in the aid provided for under the scheme. In other words, the Commission accepted as an eligibility criterion territorialisation in terms of expenditure of up to 80% of the production budget of an aided film or TV work.

Aid intensity must in principle be limited to 50% of the production budget with a view to stimulating normal commercial initiatives inherent in a market economy and avoiding a bidding contest between Member States. Difficult and low budget films are excluded from this limit. The Commission considers that, under the subsidiarity principle, it is up to each Member State to establish a definition of difficult and low budget film according to national parameters.

Aid supplements for specific filmmaking activities (e.g. post-production) are not al-

lowed in order to ensure that the aid has a neutral incentive effect and consequently that the protection/attraction of those specific activities in/to the Member State granting the aid is avoided.”

The first criterion shows that the Commission accepts – with reference to the subsidiarity principle – the primary cultural competence of the Member States to define a “cultural product”. The Commission, in principle, (only) assesses the existence of a test that safeguards the cultural content of the aided film; meaning the cultural product. To fulfil the “cultural criteria” it could be enough to appraise “the professional capacity and reputation (creative and technical) of the promoters and creative collaborators, as well as the contribution to be made by the project to the expression,²⁵¹ to consider the eligibility of the aided project which evaluates the cultural value of a certain State, or the significance of artistic/creative input of the qualifying film productions”²⁵², or if the aid scheme does not provide for automatic aid, but an “aid committee” decides on the admissibility and on the exact amount of the aid based on (mainly) cultural criteria.²⁵³ Besides, it should be mentioned that neither pornographic movies nor commercials fulfil the criteria of a “cultural product”.

With regard to the third criterion, the Commission is willing to accept aid intensities of the Member States higher than 50% in cases of limited geographic extension of certain languages and cultures, given the limited circulation of those cultural products within the European Union and world markets. Such projects must especially not be “difficult” and/or “low budget” films.

²⁵⁰ They were established in the decision of 3 June 1998 on the French automatic aid scheme to film production, N 3/98, and are listed in the Communication from the Commission of 26 September 2001, COM (2001) 534 final, *ibid.*, p. 7.

²⁵¹ State aid No NN 49/97 and N 357/99, Ireland “Section 35/481” tax-based film investment incentive, para. 3.11.

²⁵² State aid No N 237/2000, Ireland, Extension of aid schemes to film and TV production, p. 6.

²⁵³ Staatliche Beihilfe Nr. N 513/2003 (ex CP 40/2001), Österreich, Förderung von Fernsehproduktionen in Österreich – bundesweite Regelung “Fernsehfilmförderung”, para. 17.

The Cinema Communication refers to the production of films, but has also been applied (by way of analogy) to the development of film projects, including the writing of screenplays²⁵⁴ and the promotion and distribution of films.²⁵⁵ According to the diverse applications, it could be said that the public support of cinemas is in a good part being shaped by decisions of the Commission.

With regard to the digitisation of European cinemas²⁵⁶, the Commission has prepared a Communication on Opportunities and Challenges for European Cinema in the Digital Era, based on consultations from all stakeholders on digital cinema.²⁵⁷ Besides, the Commission announced a new strategy aiming to help European cinemas to go digital and to encourage more of them to screen European-made films.²⁵⁸ In its strategy, the Commission sets out options for financial support, including State aid and backing from the European Regional Development Fund and the EU MEDIA programme.

(3) Aid Schemes for the Press

In the absence of specific EU guidelines for dealing with State aid to the press sector, the Commission (mostly) assesses measures directly under Art. 107(3)(c) TFEU.

In 2008, for instance, the Commission authorised subsidies granted by Finland to news-

papers and the corresponding electronic media published in national minority languages, such as Sámi and Romany, and in Swedish, as well as for the production of Swedish-language news services under the terms of Art. 107(3)(c) TFEU. The targeted beneficiaries are small circulation newspapers (with a maximum average circulation of up to 15,000 copies) and the subsidies cannot exceed 40% of the operating costs of the newspapers. The overall budget of the measure is EUR 500,000 per year. In view of the Commission, the scheme contributes to media pluralism and to the protection of minority languages in Finland, while having a limited negative impact on competition and trade between Member States.²⁵⁹

In 2010, the Commission approved a (modified) Swedish aid scheme in favour of newspapers. The aid includes a maximum aid level of EUR 4.8 million for metropolitan newspapers over a period of five years, starting from 2011. Extra aid can only be granted to cover up to 40% of the additional costs deriving from the specific situation in the metropolitan newspaper markets (e.g. extra editorial costs and Sunday publishing). Support ceilings were fixed at max 40% of total operating costs for high and medium frequency newspapers and at max 75% for low-frequency newspapers. The beneficiaries of the aid do have reporting obligations to enable the granting authority to verify the use of the aid and, in its form, to establish annual accounts to be submitted to the Commission.²⁶⁰

(4) Aid Schemes to the Development of Broadcasting Technologies/ Broadband Internet

The introduction of "digital video broadcast-

²⁵⁴ E.g. Commission, Staatliche Beihilfe N 181/2004, 16 June 2004, Förderung von Film- und Fernsehproduktionen in Baden-Württemberg: Medien- und Filmgesellschaft Baden-Württemberg mbH, paras. 13 et. seq.

²⁵⁵ E.g. Commission, Ayuda de Estado n N 368/05, 30 September 2005, Ayudas a la promoción de obras audiovisuales por Andalucía, para. 2.3.

²⁵⁶ See F.J. Cabrera Blázquez, "Public Aid for Digital Cinema", IRIS plus 2010-2, pp. 7 et seq., on current trends on the funding of the digitisation of cinemas.

²⁵⁷ Communication from the Commission of 24 September 2010 to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions On opportunities and challenges for European cinema in the Digital era, COM(2010) 487 final.

²⁵⁸ Cf. press release from the Commission of 24 September 2010, IP/10/1168.

²⁵⁹ Commission, State aid N 537/2007, 20 May 2008, Finland – Aid to the press.

²⁶⁰ Commission, State aid E 4/2008, 20 July 2010, Sweden – Publishing of newspapers.

ing over a terrestrial network" (DVB-T) as well as broadband internet have also raised State aid issues in a number of Member States. Especially Art. 107(3)(c) TFEU has played an important role concerning State aid for private broadcasters to induce them to switch from analogue to digital terrestrial television²⁶¹, or in cases dealing with the public funding of broadband Internet connectivity.²⁶²

In its Communication of 17 September 2003 on the transition from analogue to digital broadcasting, the Commission presented two main conditions for State intervention in the switchover process from analogue to digital: First, the intervention from public authorities to facilitate and supervise the process could be justified insofar as general interests are at stake; that is, how far there are potential benefits and/or problems for the society as a whole, rather than just for certain groups or individuals. Second, in the case of market failure, meaning that the market powers themselves are not able to fulfil the collective welfare.²⁶³ In its Communication of 24 May 2005, the Commission presented the main obstacles to a rapid switchover (e.g. the absence of political decisions such as a fixed date for the national analogue switch-off or political decisions not to set switch-off dates, and the lack of a common European approach) and factors

for a successful change (e.g. an effective strategy to inform consumers about programme availability on digital platforms and the equipment needed to receive such programmes).²⁶⁴

In the field of Internet high-speed connectivity, the Commission sets one of its future targets on the guarantee of universal high-speed and ultra-fast broadband coverage.²⁶⁵ Therefore, the Commission has adopted a Communication outlining a common framework within which EU and national policies should be developed to meet the Europe 2020 targets.²⁶⁶ These policies should, in particular, lower the costs of broadband deployment in the entire EU territory, ensuring proper planning and co-ordination and reducing administrative burdens. For instance, the competent authorities should ensure that public and private civil engineering works systematically, provide for broadband networks and in-building wiring, clearing of rights of way and mapping of available passive infrastructure suitable for cabling.

In 2009, the Commission published guidelines for the application of State aid rules in relation to rapid deployment of broadband networks.²⁶⁷ The guidelines especially specify how State measures could be compatible with Art. 107(3)(c) TFEU. In this regard, the Commission assesses its balancing test and its application to aid for broadband network deployment. The Commission also states in its

²⁶¹ E.g. CFI, Case T-8/06, *FAB v Commission*, [2009] not yet published in the OJ; Case T-21/06, *Germany v Commission*, [2009] not yet published in the OJ; Case T-24/06, *MABB v Commission*, [2009] not yet published in the OJ; Case T-2/08, *LfM v Commission*, [2009] not yet published in the OJ; Commission, State Aid C 52/2005, 24 January 2007, Italy – Digital Decoders. The Commission has recently opened two investigations on Spanish National Transition Plan for digitisation and extension of terrestrial television network, see IP/10/1195.

²⁶² E.g. Commission, State Aid N 622/2003, 16 March 2005, Austria – Digitalisierungsfonds; State Aid N 382/2004, 3 May 2005, France – Mise en place d'une infrastructure haut débit sur le territoire de la région Limousin (DORSAL); State Aid N 263/2005, 20 October 2005, Austria – Breitband Kärnten.

²⁶³ Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions of 17 September 2003 on the transition from analogue to digital broadcasting (from digital 'switchover' to analogue 'switch-off'), COM(2003) 541 final., pp. 9 *et seq.*

²⁶⁴ Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions of 24 May 2005 on accelerating the transition from analogue to digital broadcasting, COM(2005) 204 final, pp. 4 *et seq.*

²⁶⁵ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions of 19 May 2010 "A Digital Agenda for Europe", COM(2010) 245 final, p. 19.

²⁶⁶ Communication from the Commission of 26 August 2010 to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – A Digital Agenda for Europe, COM(2010) 245 final/2.

²⁶⁷ Communication from the Commission of 30 September 2009 on Community Guidelines for the application of State aid rules in relation to rapid deployment of broadband networks, [2009] OJ C 235, p. 7.

guidelines that businesses should support efforts to speed up the renewal and extension of broadband networks in order to close supply gaps, particularly in rural areas.

dd) The “Culture-clause”

Art. 167 TFEU highlights the “cultural aspect” of the Union. The object and purpose of the norm are both to clarify and to limit the cultural competence of the Union: Art. 167(1) TFEU states that “the Union shall contribute to the flowering of the cultures of the Member States, while respecting their national and regional diversity and at the same time bringing the common cultural heritage to the fore”. Art 167 (4) TFEU requires the Union to take cultural aspects into account in its action under other provisions of that Treaty, in particular in order to respect and to promote the diversity of its cultures. The meaning of cultural aspects in this regard is limited to the cultural fields mentioned in Art. 167(2) TFEU, where European Union action is extended to artistic and literary creation, including the audiovisual sector (indent 4). The EU’s supplementing actions do not only cover print media like books, but also encompass media which disseminate cultural contents by auditory and visual means.²⁶⁸ Furthermore, Art. 167(2) TFEU authorises the Union to support the production and dispersion of broadcasting as well as Internet programmes, as far as their cultural components are at stake.²⁶⁹

Art. 167 AEUV also plays a role for the EU in order to encourage its Member States to cooperate in conserving and safeguarding cultural heritage of European significance, including cinema. With regard to the latter, the Recommendation to Member States on film heritage²⁷⁰

calls for Europe’s film heritage to be methodically collected, catalogued, preserved and restored so that it can be passed on to future generations. EU countries were asked to inform the Commission every two years of what they have done in this regard. The second implementation report has been published recently.²⁷¹

Finally, the Convention on the Protection and Promotion of the Diversity of Cultural Expressions²⁷² should be mentioned. This UNESCO treaty was jointly negotiated by the European Commission and by the European Council. Its main objective is to take into account cultural diversity when developing other policies (*cf.* the objectives listed in Art. 1). The preamble emphasises “the need to incorporate culture as a strategic element in national and international development policies, as well as in international development co-operation, taking into account also the United Nations Millennium Declaration (2000) with its special emphasis on poverty eradication” and “the importance of culture for social cohesion in general, and in particular its potential for the enhancement of the status and role of women in society”. Media including broadcasting (*cf.* Art. 6(2)(h), film (*cf.* Art. 14) as well as the “new media” is covered by the Convention. Art. 20 of the UNESCO Convention defines the relationship with other international treaties (like the WTO agreements) and specifies the linkage between these treaties in the case of overlap of rights and obligations. This Article also specifies the interpretation of the Convention in relation to other international treaties. The Convention was ratified by the European Union (former European Community) on 18 De-

²⁶⁸ Cf. Council Decision 508/2000/EC, Culture 2000, [2000] OJ L 63/1.

²⁶⁹ Cf. S. Schmahl, Comments on Art. 151 EC, in: *Castendyck/Dommering/Scheuer*, European Media Law, Alphen a/d Rijn 2008, Art. 151 EC, p. 259.

²⁷⁰ Recommendation of the European Parliament and of the Council of 16 November 2005 on film heritage and the competitiveness of related industrial activities, OJ L 323, p. 57.

²⁷¹ Commission staff working document of 2 July 2010 on the challenges for European film heritage from the analogue and the digital era (Second implementation report of the Film Heritage Recommendation), SEC 2010 (853), available at: http://ec.europa.eu/avpolicy/docs/reg/cinema/report_2/2010_853.pdf

²⁷² UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions of 20 October 2005, available at: <http://unesdoc.unesco.org/images/0014/001429/142919e.pdf>

ember 2006. All examined countries are part of the Convention, except for Kosovo.

The binding character of the UNESCO Convention for the EU (as well as for the EU-Member States) is, firstly, of relevance for external trade relations with other Members that have ratified the Convention. This applies especially for external actions of the EU under Arts. 205-207 TFEU. With a view to the so-called Doha-round the EU has – in the light of the UNESCO Convention – pressed its point on “non-liberalising” the audiovisual sector. Secondly, the Convention becomes also a “binding force” for the EU for measures to be taken on an EU level (respectively for its Members on a national level). The (binding) measures stipulated in the Convention (e.g. Art. 7, which includes measures to promote cultural expressions) deepen on the one hand the understanding of cultural diversity. The explicitly named measures in the Convention concretise on the other hand the provision of Art. 167(4) TFEU, which says that “the Union shall take cultural aspects into account in its action under other provisions of the Treaties, in particular in order to respect and to promote the diversity of its cultures”. This kind of a more “abstract principle” is shaped *in concreto* by the UNESCO Convention as all named State measures of the Convention are in principle legitimised and could not, in general, be tackled by the Commission.²⁷³

ee) EU competencies to harmonise (the) different sectors of “media law”

(1) General remarks

The Treaty on the Functioning of the EU does not contain an explicit competence to regulate press, broadcasting and/or other media

services. An exception is Art. 118 TFEU that allows the EU legislator

“to establish measures for the creation of European intellectual property rights to provide uniform protection of intellectual property rights throughout the Union and for the setting up of centralised Union-wide authorisation, co-ordination and supervision arrangements.”

The competence for harmonisation measures areas named in the former is mostly based on Arts. 114 and 115 TFEU. These provisions allow the adoption of “measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market”.

With regard to the freedom to provide services (and the freedom of establishment) there exists a *lex specialis* for the harmonisation on the basis of a directive, namely Art. 53(1) TFEU (read together with Art. 62 TFEU): the AVMSD, which will be dealt with at a later stage (see *infra* at b)), is the prominent example in the field of “Audiovisual Media Law”. Related areas find their basis in Art. 114 (and Art. 115) TFEU instead.

(2) eCommunications

As far as the transmission of (audiovisual) media is concerned, electronic communications regulation (in an auxiliary as well as an enabling function) comes into play.²⁷⁴ The allo-

²⁷³ Cf. V. Wiedemann, Ein Kyoto-Protokoll für die Kultur – Die UNESCO-Konvention zur kulturellen Vielfalt, in ARD Jahrbuch 2007, p. 23 (p. 26).

²⁷⁴ See Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive), as amended by Directive 2009/140/EC of 25 November 2009, OJ L 108, p. 33; Directive 2002/19/EC of the European Parliament and of the Council of 7 March 2002 on access to, and interconnection of, electronic communications networks and associated facilities (Access Directive), as amended by Directive 2009/140/EC of 25 November 2009, OJ L 337, p. 37; Directive 2002/20/EC of the European Parliament and of the Council of 7 March 2002 on the authorisation of electronic communications networks and services (Authorisation Directive), as amended by Directive 2009/140/EC of 25 November 2009, OJ L 337, p. 37; Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users’ rights relating to electronic communications networks and services (Universal Service Directive), as amended by Directive 2009/136/EC of 25 November 2009, OJ L 337, p. 12.

²⁷³ Cf. V. Wiedemann, Ein Kyoto-Protokoll für die Kultur – Die UNESCO-Konvention zur kulturellen Vielfalt, in ARD Jahrbuch 2007, p. 23 (p. 26).

cation and assignment of radio spectrum to electronic media services (particularly radio and TV) is primarily to be determined by the needs of these services, provided that the latter contribute to promoting media pluralism – one of the goals which regulatory authorities in the electronic communications sector have to take into account in their regulatory activities (see Recital 5, last sentence; and Art. 8(1) of Directive 2002/21/EC, as amended). On the other hand, also the discussion about whether regulatory convergence should follow technological and market convergence²⁷⁵ leads to the question as to how both sectors are regulated today and which are the differences between the two approaches applied.²⁷⁶

Electronic communication is part of the so called “Information Society/New Media” policy, which has set the tone for a knowledge economy based on information technology in a liberalised market. The Transparency Directive on information society services²⁷⁷ was the first Directive in this field, aiming to extend the notification procedures for technical standards to information society services. The Conditional Access Directive²⁷⁸, the e-Commerce Directive²⁷⁹ and the Electronic Money Directive²⁸⁰

have expanded the process of harmonising the information society policy up to now.

(3) Consumer and data protection

Media law is also linked with the issue of consumer protection. Consumer protection laws are in principle designed to ensure fair competition and the free flow of truthful information in the marketplace. With regard to media law, especially the AVMSD wants to ensure transparent information by giving a concept of “audiovisual commercial communication” in Art. 1(h) AVMSD, designed to cover all types of advertising.²⁸¹ Besides this, a number of other directives target the issue of consumer protection.²⁸²

Data protection is another important sector in the field of media law. The protection of personal data has been an area of considerable legislative activity both at the European and at the Member State level in the years before and after the adoption of the European Data Protection Directive 95/46/EC.²⁸³ The Directive is aimed at the protection of the fundamental rights and freedoms of natural persons, and in particular their right to privacy with respect to the processing of personal data, as well as the free flow of personal data between the Member States (Art.

²⁷⁵ There are proposals to merge regulatory bodies of these sectors into one, as has already been done in the UK (Ofcom) and a few other Member States (e.g. Italy, Finland). However, it is yet to be discussed on which criteria a decision on this issue shall be based.

²⁷⁶ See also S. Schweda, “The Telecoms Review: New Impetus for Audiovisual Media?”, IRIS plus 2009-10, pp. 7 ff., which analyses the impact of the revision of the regulatory framework for electronic communications networks and services on television broadcasting and other audiovisual media.

²⁷⁷ Directive 98/48/EC of the European Parliament and of the Council of 20 July 1998 amending Directive 98/34/EC, laying down a procedure for the provision of information in the field of technical standards and regulations, [1998] OJ L 217, p. 18 (as amended).

²⁷⁸ Directive 98/84/EC of the European Parliament and of the Council of 20 November 1998 on the legal protection of services based on, or consisting of, conditional access, [1998] OJ L 320, p. 54.

²⁷⁹ Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (‘Directive on electronic commerce’), [2000] OJ L 178, p. 1.

²⁸⁰ Directive 2009/110/EC of the European Parliament and of the Council of 16 September 2009 on the taking up, pursuit and prudential supervision of the business of electronic money institutions amending Directives 2005/60/EC and 2006/48/EC and repealing Directive 2000/46/EC, [2009] OJ L 267, p. 7.

²⁸¹ Cf. R. Chavannes/O. Castendyk, Comments on Art. 1(h) AVMSD, in: *Castendyk/Dommering/Scheuer*, European Media Law, Alphen a/d Rijn 2008, Art. 1 AVMSD, pp. 837 ff.

²⁸² With regard to Arts. 114 and 115 TFEU, the following Directives are to be mentioned: Directive 2009/22/EC of the European Parliament and of the Council of 23 April 2009 on injunctions for the protection of consumers’ interests (codified version), [2009] OJ L 110, p. 30; Regulation (EC) No. 1924/2006 of the European Parliament and of the Council of 20 December 2006 on nutrition and health claims made on foods, as last amended by Commission Regulation (EU) No. 116/2010 of 9 February 2010, [2010] OJ L 37, p. 16; Directive 2006/114/EC of the European Parliament and of the Council of 12 December 2006 concerning misleading and comparative advertising (codified version), [2006] OJ L 149, p. 22; Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer practices, [2005] OJ L 149, p. 22; Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the Protection of Consumers in Respect of Distance Contracts, [1997] OJ L 144, p. 19.

²⁸³ Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, [1995] OJ L 281, p. 31.

1). The Directive especially includes an exemption in Art. 9 for the processing of personal data within the objective(s) of freedom of expression. The provision states that

“Member States shall provide for exemptions or derogations [...] for the processing of personal data carried out solely for journalistic purposes or the purpose of artistic or literary expression only if they are necessary to reconcile the right to privacy with the rules governing freedom of expression.”

As Rec. 17 (read together with Rec. 37) of the Directive 95/46/EC states, in particular the processing of sound and image data in the audiovisual field is affected by Art. 9 of the Directive to safeguard the fundamental rights of individuals, while taking into account the freedom of information and notably the right to receive and impart information, as guaranteed in particular in Art. 10 ECHR.

The provisions of Directive 2002/58/EC as amended²⁸⁴ specify and complement Directive 95/46/EC in the area of data protection by (additionally) covering legal persons; and Directive 2006/24/EC²⁸⁵ addresses the obligations of the providers of publicly available electronic communications services or of public communications networks with respect to the retention of certain data.

(4) Intellectual property rights

The European Union has adopted a number of horizontal directives on copyright and intellectu-

al property law based on Art. 114 TFEU (sometimes together with Arts. 53, 62 TFEU).²⁸⁶ One that applies particularly to broadcasting (TV and radio) is the Cable and Satellite Directive from the early 1990s.²⁸⁷ Its main goal was to facilitate the clearance of rights for satellite broadcasting and cable retransmission.²⁸⁸ The (Copyright) Directive 2001/29/EC²⁸⁹ (also known as the Information Society Directive or the InfoSoc Directive) is a directive enacted to implement the WIPO Copyright Treaty²⁹⁰, in order to address the rights of reproduction, communication to the public, distribution, and legal protection of anti-copying and rights management systems. It ensures that films, music and other copyright protected material enjoy adequate protection in the single market. However, copyright and media law went along different historical paths.²⁹¹

²⁸⁶ Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs (codified version), [2009] OJ L 111, p. 16; Directive 2006/116/EC of the European Parliament and of the Council of 12 December 2006 on the term of protection of copyright and certain related rights (codified version), [2006] OJ 2006 L 372, p. 12; Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property (codified version), [2006] L 376, p. 28; Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights, [2004] OJ L 195, p. 16; Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases, [1996] L 77, p. 20.

²⁸⁷ Council Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission, [1993] OJ L 248, p. 15.

²⁸⁸ P. B. Hugenholtz, “SatCab Revisited: The Past, Present and Future of the Satellite and Cable Directive”, IRIS plus 2009-8, pp. 7 ff.

²⁸⁹ Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, [2001] L 167, p. 10.

²⁹⁰ World Intellectual Property Organisation Copyright Treaty (WCT), adopted in Geneva on 20 December 1996; see N. Helberger, Copyright Treaty Enters into Force, IRIS 2002-1:2/1.

²⁹¹ The Commission stated in its review report of 2002 that the goals of the Cable and Satellite Directive have only been partially achieved and that the envisaged future of a pan-European satellite broadcasting market has not materialised. Contractual licensing practices reinforced by the application of signal encryption techniques have allowed broadcasters and right holders to continue segmenting markets along national and regional and linguistic borderlines. Report from the European Commission of 26 July 2002 on the Application of Council Directive 93/83/EEC on the Co-ordination of Certain Rules Concerning Copyright and Rights Related to Copyright Applicable to Satellite Broadcasting and Cable Retransmission, COM(2002) 430 final.

²⁸⁴ Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications), amended by Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks, [2006] OJ L 105, p. 54 and by Directive 2009/136/EC of 25 November 2009, OJ L 337, p. 12.

²⁸⁵ Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks, *ibid.*

The increasing complexity of electronic communications patterns (now) call for an integrated approach of media law and copyright in the future.

b) Secondary European Union law: particularly the Audiovisual Media Services Directive

aa) General remarks on the content/scope and the guiding principles

The Audiovisual Media Services Directive²⁹² (AVMSD) covers all audiovisual media services (Art. 1(1) lit. a) AVMSD): traditional television (linear services) and video-on-demand (non-linear services).²⁹³

All audiovisual media services have to respect the basic tier of obligations in the following areas: identification of media service providers (Art. 5 AVMSD), prohibition of incitement to hatred (Art. 6 AVMSD), accessibility for people with disabilities (Art. 7 AVMSD), transmission of cinematographic works (Art. 8 AVMSD), qualitative requirements for commercial communications (Art. 9 AVMSD), sponsoring (Art. 10 AVMSD) and product placement (Art. 11 AVMSD). Furthermore, the Directive holds special rules only for television broadcasting, such as television advertising and teleshopping (Arts. 19-26 AVMSD), protection of minors (Art. 27 AVMSD) or the right of reply (Art. 28 AVMSD); and for on-demand services in Art. 12 AVMSD (protection of minors in on-demand services) and in Art. 13 AVMSD for the production and distribution of European works. The Directive also provides a general framework for the latter

applicable to linear audiovisual media services in its Arts. 16 and 17 AVMSD, including cinema and TV films.

The authorities in each Member State must ensure that all (providers of) audiovisual media services originating there comply with their own national rules, particularly those giving effect to the Directive (Art. 2 AVMSD – “country-of-origin principle”). This means content has to be checked once, rather than in multiple countries. If any Member State adopts national rules that are stricter than the Directive (as they are principally free to do), these can, in principle, only be applied to providers in that jurisdiction.

Member States may not restrict retransmissions on their territory of audiovisual media services from other Member States for reasons which fall within the fields co-ordinated by this Directive (Art. 3(1) AVMSD). Exceptions to this principle, such as the transmission of unsuitable content, are listed in Art. 3(2)-(6) AVMSD. Any restrictions must first be approved by the Commission and are only allowed under exceptional circumstances.

Besides, Member States are free to pass more detailed or stricter rules in the fields co-ordinated by the Directive to media service providers under their jurisdiction as long as such rules are in compliance with the general principles of European Union law (Art. 4 AVMSD).²⁹⁴

Finally, it should be noted that Art. 30 AVMSD (read together with Rec. 95) aims at securing the correct application of the Directive as the independent regulators in the Member States must co-operate closely both

²⁹² Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the co-ordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) (codified version), [2010] OJ L 95, p. 1.

²⁹³ See the various contributions in EAO (ed.), IRIS Special 2009: “Ready, Set...Go? – The Audiovisual Media Service Directive”, on information on how national solutions take into account the various interests covered by the AVMSD.

²⁹⁴ According to the Commission, an example in this regard is the promotion of a policy in favour of a specific language: “Member States are able to lay down more detailed or stricter rules on the basis of language criteria, as long as these rules are in conformity with European Union law and in particular are not applicable to the retransmission of broadcasts originating in other Member States” (cf. http://ec.europa.eu/avpolicy/reg/tvwf/provisions/strict-er/index_en.htm).

among themselves and with the Commission. This applies especially to issues of jurisdiction. Although the ECJ has not yet had the opportunity to hold on issues relating to (the independence of) regulatory bodies responsible for applying legal provisions in the audiovisual sector, one should take into consideration, for present purposes, the judgment of the Court in the *Centro Europa 7* case.²⁹⁵ The ECJ stated that Art. 56 TFEU (and Art. 9(1) of the Framework Directive, Art. 5(1), the second subparagraph of Art. 5(2) and Art. 7(3) of the Authorisation Directive and Art. 4 of the Competition Directive) must be interpreted as precluding, in television broadcasting matters, national legislation the application of which makes it impossible for an operator holding rights to broadcast to pursue this service – in the absence of broadcasting radio frequencies granted to him on the basis of objective, transparent, non-discriminatory and proportionate criteria.²⁹⁶ Given that the ECJ based its decision *inter alia* on the freedom to provide services, the effectuating of which the AVMSD also aims at, this judgment may serve also to more closely define the effectiveness that the work of “independent regulatory bodies”, in the sense of Art. 30 AVMSD, has to provide for.

On 10 December 2009, the Romanian National Audiovisual Council signed a Memorandum of Understanding on mutual cooperation and exchange of information together with the Czech Council for Radio and TV Broadcasting, the Hungarian National Radio and TV Commission, the Polish National Broadcasting Council, the Serbian Republic Broadcasting Agency and the Slovak Council for Broadcasting and Retransmission. Each signatory shall prepare a brief summary of the

relevant legislation in the respective country for the regulation of the content of, and advertising in, TV and radio broadcasts with a view to improving the mutual understanding, in the spirit of Rec. 95 of the Preamble and of Art. 30 AVMSD.²⁹⁷

bb) General requirements regarding the implementation of the AVMSD

Art. 36 AVMSD stipulates that the Directive is addressed to the Member States. This entails the obligations stemming from Art. 288(3) TFEU, saying that a Directive is binding “as to the result to be achieved”, “but shall leave to the national authorities the choice of form and methods”. However, the scope left to the Member States may not be used to enact national legislation circumventing the spirit of the Directive or watering down the arrangements made in it in what regards the desired outcome: as set out in Art. 4(3) TEU, Member States “shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union”. Both aspects have been highlighted also by Recital 94 of the AVMSD.

The Directive itself requires Member States, among others, to ensure compliance by media service providers with the relevant provisions: Art. 2 AVMSD, establishing the home-state-control principle, in its para. 1, states that a Member State has to

“ensure that all audiovisual media services transmitted by media service providers under its jurisdiction comply with the rules of the system of law applicable to audiovisual media services intended for the public in that Member State”;

²⁹⁵ ECJ, Case C-380/05, *Centro Europa 7 Srl ./. Ministero delle Comunicazioni e Autorità per le garanzie nelle comunicazioni*, [2008] ECR I-349.

²⁹⁶ *Ibid.*, para. 120.

²⁹⁷ Cf. J. Fučík, *Czech Republic – MoU between Regulatory Bodies*, IRIS 2010-2:1/8, available at: <http://merlin.obs.coe.int/iris/2010/2/article8.en.html>

and, additionally, Art. 4(6) AVMSD sets a focus on the obligation of the Member States to ensure, “within the framework of their legislation” and by appropriate means, that media service providers effectively comply with the provisions of the Directive.

The AVMSD deliberately does not prescribe by which means it must be secured that there is compliance.

This first obligation that Member States (like Bulgaria and Romania) had to fulfil relates to the “transposition” of the provisions of the Directive into their national legal order. Member States were obliged to transpose the provisions of the Directive by 19 December 2009. Transposition may not require the enacting of legislation that is specific in the sense that it covers *per se* the provisions of the Directive. Also, transposition may not in all circumstances, or as regards every single rule provided for by the Directive, necessitate the adoption of new legislation or the amending of the existing one, if and to the extent that the aims pursued by the Directive can be achieved by existing national rules. Nevertheless, the rights and duties that stem from a provision of the Directive must be implemented in a clear manner so that every person concerned can take due note of his/her entitlements and obligations, respectively.

Co-regulation, as referred to in Art. 4(7) and Rec. 44 AVMSD, may be used as a means to transpose the provisions of the Directive as well. In this case, for instance, the Member State’s legislation intended for serving transposition purposes may lay down general principles, on the one hand, and provide for procedures and instruments to incorporate self-regulatory regimes into the legal framework, on the other.

In order to ensure effective compliance, Member States are, secondly, under an obligation to provide for correct implementation or application. This entails monitoring of

the media service providers’ actual pursuit of their activities as falling under the scope of the Directive. The Member State will enjoy some leeway in respect of how this is secured (“appropriate means”). In particular, as long as such systems prove effective, a random-based monitoring of television broadcasts or of the provision of on-demand audiovisual media services may be sufficient. In general, the same would apply to a monitoring system based on complaints by the viewers and/or competitors, for instance.

All Member State authorities are obliged to ensure that a Directive is properly implemented in national law, entailing the legislator, the administration and the jurisdictional branch. However, particularly in respect of broadcasting, there is a long-standing tradition in almost all Member States to have specialised media authorities in place which are responsible, as the case may be, for licensing and monitoring the providers of (television) broadcasting or other (audiovisual) media services. In this respect, the Commission in the past has put some emphasis on a sufficient level of staffing and funding of regulatory authorities in the media field.²⁹⁸

As regards sanctioning, by referring to “appropriate means”, the actual text of the Directive foremost reflects on the discussion held among the EC institutions when the Directive was revised for the first time (by Directive 97/36/EC), on the necessity to prescribe in more detail what kind of measures should be used in order to avoid or, where necessary, to prevent future infringements of the provisions

²⁹⁸ “Furthermore, the Commission notes that Member States have devoted adequate resources to apply national legislation implementing the Directive effectively. Independent regulatory authorities have been established and budgets for technical resources as well as staff have been considerably increased where they were insufficient.” Fourth Report from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions on the application of Directive 89/552/EEC “Television without Frontiers”, COM (2002) 778 final, point 2.

of the Directive, as implemented in national law.²⁹⁹ Where an EU directive does not specifically provide any penalty for an infringement or refers for that purpose to national laws, regulations and administrative provisions, the Member States have to take all measures necessary to guarantee the application and effectiveness of EU law. For that purpose, while the choice of penalties remains within their discretion, they must ensure in particular that infringements of European Union law are penalised under conditions, both procedural and substantive, which are *analogous* to those applicable to infringements of national law of a similar nature and importance and which, in any event, make the penalty *effective, proportionate and deterrent*.³⁰⁰ With regard to labour law for instance, the Court has held that where a Member State chooses to penalise the breach of the prohibition on discrimination by the award of compensation, that compensation must in any event be adequate in relation to the damage sustained and have a deterrent effect.³⁰¹ Thus, the Member States are in principle free in respect of the choice of the particular sanction.³⁰² In this context they can choose penal, administrative and other sanctions according to criminal and civil law, or a combination of them.

Where recourse to co-regulation is made, it follows from the AVMSD, but also from primary European Union law, that the Member State

remains responsible for the achievement of the results of the Directive. Therefore, independent regulatory bodies must be vested with instruments to oversee the actual performance of the self-regulatory component of the co-regulatory system, and be able to intervene where necessary. This is to be derived particularly from Art. 4(7) AVMSD: the regime has to provide for effective enforcement. One could argue that this requirement has to be regarded as being redundant, as the obligation to secure effective compliance as such is already stipulated in Art. 4(6) AVMSD, and can also be derived from primary EU law. Still, Art. 4(7) AVMSD could have an effect beyond Art. 4(6) AVMSD insofar as it requires the regime *itself* to provide for effective enforcement. This leads to the question of whether modifications of the already existing co-regulatory regimes in some Member States would be required. As the study on co-regulation measures in the media sector³⁰³ has shown, co-regulatory regimes 'often' provide for a sanctioning system³⁰⁴, in other words, not all of the investigated regimes do. Other parameters for effectiveness will include in particular: *incentives* for participation; *transparency*; safeguarding of *process objectives*; *openness* to all relevant stakeholders; *broad acceptance* by stakeholders and society (necessitating complaint mechanisms and awareness campaigns); *effective means of enforcement* of the co-regulatory rules; as well as a regular *evaluation* of the system together with 'patience'. Also a 'legal back-stop' is necessary; this is referred to by Rec. 44 as a Member State's possibility to intervene, should the objectives of the co-regulatory regime not be met.³⁰⁵

²⁹⁹ Cf. A. Scheuer/T. Ader, Comments on Art. 3 TWFD, in: *Castendyk/Dommering/Scheuer*, European Media Law, Alphen a/d Rijn 2008, paras 6 et seq., 54 et seq.

³⁰⁰ ECJ, Case 68/88, Commission v. Greece, [1989] ECR 2965, para. 23 et seq.; Case C-7/90, Paul Vandevenne, [1991] ECR I-4371, para. 11; Case C-382/92, Commission v. United Kingdom, [1994] ECR I-2435, para. 55; Case C-383/92, Commission v. United Kingdom, [1994] ECR I-2479, para. 40; Commission, COM (2001) 330 final, pp. 1 et seq.; Hans-Bredow-Institut/Institut für Europäisches Medienrecht, Study on Co-Regulation Measures in the Media Sector, 2006, pp. 160 et seq.; available at: http://ec.europa.eu/avpolicy/docs/library/studies/coregul/coregul-final-report_en.pdf

³⁰¹ ECJ, Case 14/83, von Colson and Kamann, [1984] ECR, 1891, para. 23 et seq.

³⁰² *Ibid.*, para. 14.

³⁰³ Hans-Bredow-Institut/Institut für Europäisches Medienrecht (EMR), op.cit.

³⁰⁴ T. Kleist/A. Scheuer, "Neue Regelungen für audiovisuelle Mediendienste – Vorschriften zu Werbung und Jugendschutz und ihre Anwendung in den Mitgliedstaaten", [2006] MMR 206.

³⁰⁵ A. Scheuer/T. Ader, Comments on Art. 3 AVMSD, in: *Castendyk/Dommering/Scheuer*, European Media Law, op. cit., p. 863.

2.3 Transposition of the EU *acquis*, particularly the AVMS Directive

It is well known that, before joining the EU, countries have to bring their national laws into line with the EU *acquis*, including – in the audiovisual field – the AVMSD. When they do so, they become also eligible for funding under the MEDIA 2007 programme (covering the period 2007-2013). The candidate countries Croatia, Macedonia and Montenegro (with concrete negotiations regarding the latter two countries still to start) as well as the potential candidate countries Albania, Bosnia and Herzegovina, Kosovo and Serbia have already made substantial efforts to meet European standards on media, and the process of reform is ongoing. Information on their progress towards meeting the membership requirements in the audiovisual field is provided in the EU's annual progress reports or 'opinions' for the candidate and potential candidate countries.³⁰⁶ The main points of discussion are represented in the following. Besides the studies already undertaken, the reports provide for an additional insight into the perception of the status quo of media freedom and the related legal framework in the countries researched in the present study. For those countries that are already Member States of the EU, i.e. Bulgaria and Romania, some recent information is given instead. In the case of Moldova, which cooperates with the EU in the context of the European Neighbourhood Policy (ENP), the available information has proven sufficiently interesting to also form a starting point in the present context.

³⁰⁶ See Communication from the Commission to the European Parliament and the Council of 14 October 2009, Enlargement Strategy and Main Challenges 2009-2010, COM (2009) 533, available at: http://ec.europa.eu/enlargement/pdf/key_documents/2009/strategy_paper_2009_en.pdf; and the single progress reports of the countries, available at: http://ec.europa.eu/enlargement/press_corner/key-documents/reports_oct_2009_en.htm.

a) Albania

Albania applied for EU membership in April 2009. Council Decision 2008/210/EC³⁰⁷ requires Albania to "[a]lign Albanian legislation with the European Convention on Transfrontier Television and the Television without Frontiers Directive" and to "strengthen the administrative capacity of the National Council on Radio and Television and adopt the strategy for development of the radio and television sector and an updated national analogue and digital frequency plan for radio and television". The Council also calls on Albania to "ensure that electronic communications legislation is in line with the *acquis* and is enforced, and take measures to achieve a competitive market for electronic communications networks and services".

In the Commission's progress report 2009 on Albania, it notices little progress in the area of electronic communications and information technologies. The Regulatory Authority for Postal and Electronic Communications (AKEP) harmonised all existing licences with the authorisation scheme of the 2008 Law on Electronic Communications in December 2008. However, regulations to be implemented for the law on electronic communications are still pending adoption. Internal conflicts within the AKEPs Governing Council have hindered its decision-making process, bringing regulatory development to a standstill.

The Commission attested Albania "progress in the area of information society services". Amendments to the Criminal Code and the Criminal Procedure Code were adopted, following the requirements of the Convention on Cybercrime, as well as the Law on Electronic Commerce and the Electronic Signature

³⁰⁷ Council Decision of 18 February 2008 on the principles, priorities and conditions contained in the European Partnership with Albania and repealing Decision 2006/54/EC, [2008] OJ L 80, p. 1.

Law. However, there has been no progress as regards legislation on conditional access.

The audiovisual policy progress was, in the view of the Commission, “very limited”. The National Council for Radio and Television (NCRT) finalised the draft strategy for the switchover from analogue to digital broadcasting as well as the draft Broadcasting Law. The implementation of the Action Plan on media reform (already) agreed with the European Commission and the Council of Europe needs to be stepped up. Measures are also required to ensure sustainable funding for the public service broadcaster as the collection of licence fees remains low.³⁰⁸

The Commission detects in its Analytical report 2010 that the main legislative acts in the field of audiovisual policies of Albania (e.g. the Law on public and private radio and television in the Republic of Albania, the Law on digital broadcasting, etc.) are only partly aligned with European standards on media regulation - particularly, they are not aligned with the AVMSD and fail to ensure some of the main standards, such as guaranteeing the independence of the National Council for Radio and Television (the broadcasting regulatory authority) and of the public service broadcaster. Besides, there is a need to ensure freedom of expression and a better media climate by decriminalising defamation and libel.³⁰⁹ Finally, in its opinion the Commission points out that Albania needs to “strengthen media freedom and its independence”, and “address the prevalence of political influences” in the media.³¹⁰

b) Bosnia and Herzegovina

The Commission attested Bosnia and Herzegovina little progress in the area of informa-

tion society and media. Although the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions³¹¹ and rules on conditions for the provision and distribution of audiovisual media services and radio and TV programmes has been adopted, the Commission stated that

“(…) a deterioration of media freedoms in Bosnia and Herzegovina has been observed during the reporting period. Since January, the Free Media Helpline of the Bosnia and Herzegovina’s Union of Journalists has registered 16 verbal assaults and direct physical attacks, death threats and other violations of journalists’ rights. This represents an increase of 20% compared to 2008. The country is ranked in 115th place on the list of Reporters without Borders evaluating press freedom in 173 countries. There has been little cooperation between local media organisations responsible for media freedoms. In April the RTRS — the Republika Srpska public broadcaster — and the Republika Srpska daily newspaper Glas Srpski walked out of the association Journalists of Bosnia and Herzegovina, announcing the establishment of a separate, Republika Srpska only, association of journalists.”³¹²

Furthermore, efforts are necessary to implement the legal framework in the area of public broadcasting, to carry out the reform of this sector and to ensure the functional independence of the Communications Regulatory Authority.

The Commission notices in its progress report of 2010 that the public broadcasting system “Board of Governors” failed to adopt the statutes of the PBS corporation due to

³⁰⁸ SEC(2009) 1337, Albania 2009 Progress Report, pp. 40 *et seq.*

³⁰⁹ SEC(2010) 1335, Albania, Analytical report, p. 67.

³¹⁰ Commission Opinion on Albania’s application for membership of the European Union, COM(2010) 680, p. 12.

³¹¹ <http://unesdoc.unesco.org/images/0014/001429/142919e.pdf>

³¹² SEC(2009) 1338, Bosnia and Herzegovina 2009 Progress Report, pp. 52 *et seq.*

disagreements over ownership of equipment and revenue-sharing. Since its statutes have not been adopted, the PBS corporation could not be registered, which delayed the reform of the public broadcasting sector. The Entities' laws on public broadcasting services are not aligned with the State-level law.³¹³

c) Bulgaria

In Bulgaria, the government recently undertook some urgent measures in order to implement the AVMSD in Bulgarian law. The Council of Ministers had approached all key stakeholders (e.g. the Council for Electronic Media, the Bulgarian National Television, the Bulgarian National Radio, the Television Producers Association, the Bulgarian Radio and Television Operators Association, etc.) to offer their opinions on the draft legislative acts that needed to be prepared for the transposition of the Directive.³¹⁴

d) Croatia

Croatia joined the MEDIA 2007 programme in April 2008 following the ratification of the UNESCO Convention and the alignment of Croatian legislation with the *acquis*. In the light of these achievements the Council of Ministers (provisionally) closed Chapter 10 on information society and media on 18 December 2008. Council Decision 2008/119/EC³¹⁵ has made it a priority to complete

“(...) the alignment with the *acquis* concerning electronic communications, commerce, signatures and media, information security and the Television without Frontiers Directive” [as well as] “the planned

review of audiovisual media legislation on the basis of public consultation, ensure regulatory independence and guard against undue political interference.”

The Commission stated that “(...) freedom of expression, including freedom and pluralism of the media, is provided for in Croatian law and is generally respected. However, threats against journalists working on cases of corruption and organised crime have been increasing. Editors and journalists continue to report undue political pressure.”³¹⁶

The Commission attested Croatia in general “good progress (...) in the field of *information society and media*”:

“A good level of alignment has been reached. Efforts need to continue to strengthen the capacity of the national regulators to implement correctly the legal framework, as well as to sustain liberalisation of the electronic communications market.”³¹⁷

The “good progress” in the field of electronic communications and information technologies lies especially in the “necessary implementing legislation” and adoption of the Electronic Communications Act. Liberalisation of the sector has continued to progress significantly, in particular in the broadband market. However, the Commission sees a risk to the current EU strategy promoting Europe’s digital economy by a governmental initiative in the form of a “crisis tax” on mobile services.³¹⁸

The Commission attested Croatia (only) “some progress” (...) in the area of information society services and electronic commerce as well as in the field of audiovisual policy:

³¹³ SEC(2010) 1331, Bosnia and Herzegovina 2010 Progress Report, p. 51.

³¹⁴ Cf. R. Nikolova, Bulgaria – Progress on the Implementation of the AVMS Directive, IRIS 2010-1:10, available at: <http://merlin.obs.coe.int/iris/2010/1/article10.en.html>

³¹⁵ Council Decision 2008/119/EC of 12 February 2008 on the principles, priorities and conditions contained in the Accession Partnership with Croatia and repealing Decision 2006/145/EC, [2008] OJ L 42, p. 51.

³¹⁶ See Communication from the Commission to the European Parliament and the Council of 14 October 2009, Enlargement Strategy and Main Challenges 2009-2010, COM (2009) 533, p. 36.

³¹⁷ *Ibid.*, p. 39.

³¹⁸ SEC(2009) 1333, Croatia 2009 Progress Report, p. 37f.

In the area of information society services and electronic commerce

“further amendments to the Electronic Commerce Act have been adopted, aimed at completing legal alignment in this field and an e-Government Strategy for the period 2009–2012 has been adopted”, and with regard to audiovisual policy “preparations for the introduction of digital television are under way. The Croatian Audiovisual Centre has been established and it has joined European Film Promotion. However, some interference in the media landscape by mainly economic and partly political interest groups has continued. Also, anti-competitive State aid to the national broadcaster has continued.”³¹⁹ “Good progress” in the field of audiovisual policy was also diagnosed in the 2010 progress report by the Commission. But interference in the media landscape by economic and political interest groups persists in Croatia. Also anti-competitive State aid to the national broadcaster has continued.³²⁰

e) Kosovo

Council Decision 2008/213/EC³²¹ makes it a top priority to ensure

“(…) the independence of the regulatory bodies in Kosovo” and “stable and sustainable funding of the Public Service Broadcaster RTK (Radio and Television of Kosovo), the Independent Media Commission and the media fund.”

The 2009 report states some progress in the area of electronic communications:

“The Telecommunications Regulatory

Agency has obtained spectrum-monitoring equipment, enabling it to identify illegal activity in northern Kosovo and in the areas bordering neighbouring countries. Mobile telephony market penetration is at 60%; internet penetration is 5.4%. A third fixed telephony licence was issued in January 2009 but has not yet become operational. Two mobile virtual network operators have been licensed; one is already active in the market. The implementation of the sector policy adopted in 2007 is suffering delays.”³²²

Information society services need, according to the Commission, to be further developed.

With regard to the progress made in the field of audiovisual policy and media, the Commission stated:

“The laws that cover the media industry – the Law on the Independent Media Commission and the Law on the Public Broadcaster – are up for amendment. Re-licensing of broadcasters has begun: at the end of August [2009], a first batch of 12 long-term licences was approved for existing broadcasters. The Independent Media Commission is now assessing applications for new frequencies. Cable operators in the north are not licensed by the Commission. The Commission’s independence, in particular as regards its staff and resources, needs to be guaranteed in the context of possible legislative amendments. The appointment of the Commission’s council member by the Assembly and the RTK board is yet to be completed.”³²³

The Commission attested that, even though the regulation for broadcasters regarding the protection of children and minors

³¹⁹ *Ibid.*, p. 38.

³²⁰ SEC(2010) 1326, Croatia 2010 Progress Report, p. 35.

³²¹ Council Decision of 18 February 2008 on the principles, priorities and conditions contained in the European Partnership with Serbia including Kosovo as defined by United Nations Security Council Resolution 1244 of 10 June 1999 and repealing Decision 2006/56/EC, [2008] OJ L 80, p. 46.

³²² SEC(2009) 1340, Kosovo under UNSCR 1244/99 2009 Progress Report, p. 41.

³²³ *Ibid.*, pp. 41 *et seq.*

from harmful programme content entered into force, no mechanisms to implement and enforce it have been provided for. Also no progress on the switchover from analogue to digital broadcasting can be reported. The Commission allocates problems in financing public broadcasting as the contract by which the licence fee was collected via energy bills expired in November 2009. The Public Service Broadcasting Law envisages annual tenders to purchase audiovisual works from independent producers, which should account for 20% of the programmes produced by RTK. This has not been fully implemented. Further problems are the lack of an independent minority channel with Kosovo-wide coverage, the full implementation of the Law on Access to Information (which hampers the work of journalists) and the weak enforcement capacity of the Press Council (a self-regulatory body which depends on donations for its finances).³²⁴

The 2010 report comes to the overall conclusion that “limited progress has been made in the area of information society and media”. Regarding audiovisual policy and the media, the current draft, which addresses the Independent Media Commission (IMC), fails to preserve the Council’s independence in line with European standards on media regulation. In addition, the independence of the public service broadcaster RTK and its financial sustainability are not fully ensured.³²⁵ Furthermore, there are inconsistencies between the “Law on Defamation and Insults” and the “Criminal Code”:

“According to European standards defamation should not be a criminal offence. Kosovo does not apply the penal provisions on defamation, but since they remain on the statute book, legal uncertainty per-

sists. This will be resolved in the process of revising Kosovo’s criminal code.”³²⁶

f) Macedonia

Council Decision 2008/212/EC³²⁷ identifies the following (short-term) priorities for Macedonia:

- “- Reinforce the independence and administrative capacity of the regulatory authorities for electronic communications and media.
- Ensure a stable and sustainable source of funding for the public service broadcaster and the Broadcasting Council.”

On the 2009 developments, the Commission attested Macedonia “good progress in the area of electronic communications and information technologies”. Specifically concession contracts with operators with significant market power were terminated in accordance with the Law on Electronic Communications, Parliament adopted the national strategy on the next generation of broadband internet and the Agency for Electronic Communications (AEC) made important developments in its activities.³²⁸

The Commission attested Macedonia also “progress in the area of information society services, where a good level of alignment has already been achieved”.

With a view to the progress made on audiovisual policy, the Commission stated that “(...) the administrative capacity of the Broadcasting Council has improved, but is still not adequate to monitor the market effectively. The system for collecting the broadcasting fee has not been established yet. The sustainability and financial

³²⁴ *Ibid.*, p. 42.

³²⁵ SEC(2010) 1329, Kosovo 2010 Progress Report, p. 46 *et seq.*

³²⁶ *Ibid.*, p. 48.

³²⁷ Council Decision 2008/212/EC of 18 February 2008 on the principles, priorities and conditions contained in the Accession Partnership with the former Yugoslav Republic of Macedonia and repealing Decision 2006/57/EC, [2008] OJ L 80, p. 32.

³²⁸ SEC(2009) 1335, Macedonia 2009 Progress Report, p. 41.

independence of the public broadcaster is therefore not ensured. The legal provisions opening up the possibility of initiating bankruptcy proceedings against the public service broadcaster are still in force. The Broadcasting Council and the public service broadcaster continue to be subject to political interference, partly because of their dependence on finance from the State budget. This dependence also undermines the authority of the Broadcasting Council *vis-à-vis* broadcasters. Public expenditure on State advertising is a significant source of revenue for some broadcasters, but is not sufficiently transparent and therefore has the potential to undermine editorial independence. The Broadcasting Law, including the provisions relating to concentration of ownership of the media, has not been fully implemented. It is not yet aligned with the Audiovisual Media Services Directive. (...)”³²⁹

With regard to audiovisual policy, in the 2010 progress report the Commission stated that the legislation on media ownership and concentration is not fully enforced. Especially, sustainable funding of the public service broadcaster and the Broadcasting Council is not secured and the media legislation is not in line with the AVMSD.³³⁰

g) Moldova

The Commission stated in its country report of 2004 in the context of the European Neighbourhood Policy, that Moldova

“has an active and independent media”.³³¹

However, recent legislation and drafts (the 2003 amendments to the Law on Access to Information and a recent draft law on the

restructuring of the public broadcaster) had, according to the Commission, raised concern notably on the independence of journalists: problems with registration for two local radios, a statement by the chairman of Teleradio Moldova about the reported imposition by the Board of guarantors of the programme “the hour of the government” and his subsequent dismissal, and high fines imposed on local newspapers and opposition leaders for slander.³³² In a more general way, the EU’s Country Strategy Paper refers to concerns raised by the joint CoE and OSCE election observation mission in particular over the issue of the freedom of media and administrative pressures on opposition candidates.³³³ In its Action Plan the Commission calls for Moldova to approximate relevant audiovisual legislation in full compliance with European standards (with a view to possible future participation in the MEDIA programme if prerequisites are fulfilled).³³⁴

More recently, in its report on the ENP implementation progress in 2009³³⁵, the Commission Services’ staff document in its sector-specific part mainly expands on achievements in the area of regulating electronic communications. However, in relation to the report’s part on the situation of political reform, more specifically within the chapter on human rights and fundamental freedoms, important remarks are being made:

“As regards freedom of expression and media pluralism, the situation worsened significantly in the first half of 2009 through, notably, severe restrictions of

³²⁹ *Ibid.*, p. 42.

³³⁰ SEC(2010) 1332, Macedonia 2010 Progress Report, p. 41.

³³¹ Commission staff working paper of 12 May 2004, European Neighbourhood Policy, Country report – Moldova, SEC (2004) 567, p. 8.

³³² *Ibid.*, p. 9.

³³³ Country Strategy Paper 2007-2013, p. 6, available at: http://ec.europa.eu/world/enp/pdf/country/enpi_csp_moldova_en.pdf

³³⁴ EU/Moldova, Action Plan, para. 77, available at: http://ec.europa.eu/world/enp/pdf/action_plans/moldova_enp_ap_final_en.pdf

³³⁵ Dated 12 May 2010, available at: http://ec.europa.eu/world/enp/pdf/progress2010/sec10_523_en.pdf

the right of access to information and the use of administrative means such as tax investigations, as well as restrictions on freedom of media and free reporting in the context of the elections. New laws on state secret and on transparency in the public decision-making process entered into force in 2009, as did modifications to the Criminal Code that only partly reflected Council of Europe's recommendations on the decriminalisation of slander and libel. In the later part of the year a number of measures were taken, aiming to reverse the situation. In November 2009, the Audiovisual Code was amended – without consultation of the Council of Europe – to simplify the appointment procedure for the members of the Audiovisual Coordination Council and the Supervisory Council for Radio and Television. At the same time, in the last quarter of 2009, a private radio station was experiencing severe difficulties in having its licence renewed, and an opposition TV channel was required at very short notice to move out from its Government-owned premises.”

h) Montenegro

Council Decision 2007/49/EC³³⁶ calls on Montenegro to

“ensure implementation of the law on access to public information and continue the transformation of Radio and Television of Montenegro into a public service broadcaster and provide appropriate means for it.” Montenegro should also “guarantee the operational independence of the broadcasting authority.”

The Commission attested Montenegro in its report “some progress (...) on electronic

communications and information technologies”. While narrowband is still predominant for connecting to the internet, for instance in January 2009 the broadband penetration rate was 5.5% and alternative operators held around 20% of this important growth market.

With regard to information society services, further developments have been made, for instance a new Ministry for the Information Society was established on 3 January 2009 (which became the Ministry for Economic Policy and the Information Society), responsible for information and communication technology initiatives in all government bodies. The Conditional Access Directive has not yet been transposed and human resources at the Ministry for Economic Policy and the Information Society are still weak.

In the area of audiovisual policy and the media a Law on Public Service Broadcasting was adopted in December 2008, which abolished the steering committee of Radio Television Montenegro (RTCG) and transferred its powers to the RTCG Council. However, the Commission stated that

“(...) the political independence of the public service broadcaster has to be ensured. Licence fees for radio and television were abolished. RTCG is now financed from the State budget. It receives 1.2% of the annual budget. This provides the public broadcaster with stable financial resources. The responsibilities of the Agency for Electronic Communications and of the Broadcasting Agency under the Law on Electronic Communications regarding frequency licensing remain unclear. A disagreement between the two agencies regarding their competences contributed to delays in allocating a frequency to a private TV station.”³³⁷

³³⁶ Council Decision of 22 January 2007 on the principles, priorities and conditions contained in the European Partnership with Montenegro, [2007] OJ L 20, p. 16.

³³⁷ SEC(2009) 1336, Montenegro 2009 Progress Report, pp. 43 *et seq.*

With the adoption of the Law on electronic media in 2010, the Commission attested Montenegro an overall alignment with the AVMSD. But increased efforts are necessary as regards the protection of minors in the media.³³⁸

i) Romania

Romania transposed the provisions of the AVMSD as the first EU Member State into its domestic law through the *Ordonanța de Urgență Nr. 181/2008 pentru modificarea și completarea Legii audiovizualului Nr. 504/2002* (Emergency Government Decree amending and completing Audiovisual Act no. 504/2002), which entered into force on 3 December 2008.³³⁹

j) Serbia

Council Decision 2008/213/EC³⁴⁰ calls on Serbia to “start approximation to the *acquis* on the audiovisual sector and improve transparency and accountability, particularly of the Republican Broadcasting Agency” and also to “sign and ratify the European Convention on Transfrontier Television”.

On Serbia, the Commission remarked in its 2009 progress report that – although progress has been made in the areas of the information society and electronic communications –

“(…) the digital divide in electronic access and digital inclusion needs to be addressed and a broadband strategy needs to be finalised. IT capacity needs to be strength-

ened, especially at local level, with a view to e-government. Administrative capacity for implementation of the legislation in this area is insufficient.”³⁴¹

Furthermore, the Commission attested that

“(…) the fixed telephony sector is not yet liberalised in practice and there is still a lack of competition on this market (…).”³⁴²

The Commission reported progress in the area of audiovisual policy. Serbia ratified the European Convention on Transfrontier Television and the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions. Since 2008 the Broadcasting Agency has published all of its decisions on the internet and awarded until 2009 a total of 467 licences for broadcasting radio and TV programmes. A problem that is still unsolved is the privatisation of the broadcasting media in Serbia. This process is still blocked by certain provisions of the Law on Local Self-Government and the Law on the Capital City.³⁴³

Also in the 2010 progress report, the Commission stated that in the audiovisual sector media legislation needs to be aligned with the *acquis*, and a number of provisions of the law on public information continue to raise concerns; especially as some provisions of the law include excessive fines for the violation of professional standards as well as for non-registration of media outlets.³⁴⁴

³³⁸ SEC(2010) 1334, Montenegro 2010 Analytical Report, p. 69.

³³⁹ See results/consequences of the transposition by M. Stoican, Romania – Emergency Decree Amends Audiovisual Act, IRIS 2009-2:29, available at: <http://merlin.obs.coe.int/iris/2009/2/article29.en.html>; M. Stoican, Romania – Emergency Decree Defines European Works, IRIS 2009-3:30, available at: <http://merlin.obs.coe.int/iris/2009/3/article30.en.html>

³⁴⁰ Council Decision of 18 February 2008 on the principles, priorities and conditions contained in the European Partnership with Serbia including Kosovo as defined by United Nations Security Council Resolution 1244 of 10 June 1999 and repealing Decision 2006/56/EC, [2008] OJ L 80, p. 46.

³⁴⁰ Council Decision of 18 February 2008 on the principles, priorities and conditions contained in the European Partnership with Serbia including Kosovo as defined by United Nations Security Council Resolution 1244 of 10 June 1999 and repealing Decision 2006/56/EC, [2008] OJ L 80, p. 46.

³⁴¹ SEC(2009) 1339, Serbia 2009 Progress Report, p. 48.

³⁴² *Ibid.*

³⁴³ *Ibid.*, p. 49.

³⁴⁴ SEC(2010) 1330, Serbia 2010 Progress Report, p. 47.

About the authors

Alexander Scheuer, Attorney at law, General Manager, Member of the Executive Board of the Institute of European Media Law (EMR), Saarbrücken/Brussels (2000 to date). Mr Scheuer is a member of the Advisory Committee and of the IRIS Editorial Board, both at the European Audiovisual Observatory, Strasbourg. Since 2003 he has been a member of the Scientific Advisory Board (*Kuratorium*) of the Voluntary Self-Regulation of Private Televisions in Germany (*Freiwillige Selbstkontrolle Fernsehen*, FSF), Berlin. Editor and author of the Commentary "European Media Law", Castendyk/Dommering/ Scheuer, Alphen a/d Rijn 2008; co-author of the Commentary on the TEU- and TFEU- Treaties, Lenz/Borchardt (eds.), Köln, Basel, Genf, München, Wien (1999, 2003, 2006, 2010; chapters on free movement of workers, freedom of establishment). Scheuer has been responsible for several major studies in the area of media and telecommunications law, commissioned – at European level – e.g. by the European Commission (co-regulation; media market definitions), the Committee of the Regions and the Council of Europe, as well as – at the national level – by different media authorities in Germany, Austria and Switzerland. He has published widely on European media, telecommunications, protection of minors and copyright law. Scheuer has given numerous speeches at international and national conferences and acted as a speaker and panel chairperson/moderator among others in several media expert seminars organised by the respective EU Council presidencies.

Christian M. Bron, LL.M. Eur. (project coordinator). Mr Bron graduated in law from the Rheinische-Friedrich-Wilhelms-Universität Bonn in 2005, finished his practical legal education (*Referendariat*, intern clerkship) at the

Higher Regional Court of Dusseldorf in 2008 and obtained a post-graduate Masters diploma from the Europa-Institut at the University of Saarland in 2009. He had been working as scientific researcher at the Institute of European Media Law (EMR) in Saarbrücken from 2009 to the beginning of 2011; currently, after having finished his PhD thesis, he is practising as a lawyer (solicitor) in Switzerland.

Shari Kind, Ref. iur. (Assistant researcher). Mrs Kind obtained her graduate diploma in law studies from the University of Saarland and is currently undergoing her practical legal education (*Referendariat*, intern clerkship) at the Higher Regional Court of Frankfurt/Main. Her contribution to the study, more specifically to the Council of Europe's legal framework for the media as reflected in the "European benchmark", was elaborated during her 4 months' traineeship at the EMR in summer/autumn 2010.

For more information on the EMR please see: <http://www.emr-sb.de>

