CUATRECASAS, GONÇALVES PEREIRA

NEWSLETTER | INTELLECTUAL PROPERTY, MEDIA AND IT

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I HIGHLIGHT

Protection of the art of cinema and of cinematographic and audiovisual activities

Law No. 55/2012 of 6 September was adopted, subject to reservation by some of the organisations that are part of this sector's value chain, with a view to the resolution of the crisis experienced by the cinema and audiovisual sector in Portugal.

Law No. 55/2012 reviews the legal framework of the funding of the cinematographic and audiovisual sector, setting out that the same shall be made through the imposition of fees and by establishing direct investment obligations. This notwithstanding, the regulation of a set o fundamental questions – the knowledge of which seems essential to achieve the full scope of this new legal framework – was delayed to a later stage.

According to information provided by the Government, the said regulation is now complete with the approval of the Decree-Law by the Council of Ministers on 18 July.

The television operators and pay-tv service operators have made a number of criticisms relating to Law No. 55/2012, many of which associated with its financing obligations.

One of the doubts raised by Law No. 55/2012 arises from the wording of article 27 thereof, which repeals Law No. 42/2004 of 18 August, with the exception of its articles 23 to 26, as well as articles 63 to 82 of Decree-Law No. 227/2006 of 15 November (which created *Fundo de Investimento para o Cinema e Audiovisual, "FICA"*). From this seems to follow not only the maintenance of *FICA* but also of the obligation to contribute thereto. This solution does not seem logic in light of the new financing model established.

Notice should be taken of how funding amounts are allocated: a relatively small share of the support is earmarked for audiovisual compared to the one allocated to cinema. The lack of a more fair distribution is a sign that television production continues to be treated as the "poor relation" of this sector.

It can also be said that Law No. 55/2012 perpetuates State – centralised decisions and funding of cinema without really trying to promote its progressive independence from the State.

Doubts also arise concerning the suitability of and need for this new Law. It should be reminded that the implementation of the scheme of support of the cinema and audiovisual activity previously in force - Law No. 24/2004 and Decree-Law No. 277/2006 – depended on the action of the State, with which multiannual investment contracts have been signed. However, in accordance with information provided, the cinematographic projects in respect of which funding was applied for, and which were approved, did not crowd out the available funds.

II LEGISLATION

Law No. 42/2013. *D.R.* (Portuguese official gazette) No. 126, Series I of 2013-07-13

Amending for the eighth time Law No. 5/2004 of 10 February (*Lei das Comunicações Electrónicas*), amending the rules of the selective communication barring relating to value added services based on message sending and audiotext services.

Law No. 47/2013. *D.R.* (Portuguese official gazette) No. 131, Series I of 2013-07-10

Amending for the second time Decree-Law No. 123/2009 of 21 May, which laid down the legal framework of the construction, access and installation of electronic communication networks and infrastructures .

Parliament Resolution No. 129/2013. *D.R.* (Portuguese official gazette) No. 154, Series I of 2013-08-12

Advocating territorial spending arising from State support of cinema and audiovisual production.

Decree-Law No. 124/2013 of 30 August. *D.R.* (Portuguese official gazette) No. 167, Series I of 2013-08-30

Setting out the rules of implementation of Law No. 55/2012 of 6 September, with regard to development support measures and the protection of cinema and audiovisual, to investment obligations and to the registration of cinema and audiovisual works and companies.

III CASE LAW

Judgment of the Court of Justice (Third Chamber) of 30 May 2013 (reference for a preliminary ruling from *Tribunal do Trabalho de Viseu*) — Worten — Equipamentos para o Lar, SA/*Autoridade para as Condições de Trabalho (ACT*)

Article 2(a) of 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, must be interpreted as meaning that the concept of «personal data», within the meaning of this provision, covers a record of working time, such as the one at issue in the main proceedings, containing the indication, in relation to each worker, of the times when working hours begin and end as well as the corresponding breaks and intervals.

Articles 6(1)(b) and (c) and 7(c) and (e) of Directive 95/46 are to be interpreted as not precluding national legislation, such as that at issue in the main proceedings, which requires an employer to make the record of working time available to the national authority responsible for monitoring working conditions, to allow immediate consultation of the same, provided that this obligation is necessary for the performance by that authority of its task of monitoring the application of the legislation relating to working conditions, in particular with regard to working time.

Judgment of the Court of Justice (Fourth Chamber) of 27 June 2013 (reference for a preliminary ruling from the Bundesgerichtshof — Germany) — Verwertungsgesellschaft Wort (VG Wort)/Kyocera, previously Kyocera Mita Deutschland GmbH, Epson Deutschland GmbH, Xerox GmbH, Canon Deutschland GmbH and Fujitsu Technology Solutions GmbH, Hewlett-Packard GmbH /Verwertungsgesellschaft Wort (VG Wort)

The acts of use of works and other protected material are not affected by 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, with regard to the period from 22 June, the date on which that directive came into force, to 22 December 2002, the deadline for the transposition thereof into national law.

In the context of an exception or limitation provided for by article 5(2) or (3) of Directive 2001/29, an act by which a rightholder may have authorised the reproduction of his protected work or other protected material has no bearing on the fair compensation owed, whether it is provided for on an compulsory or an optional basis, under the relevant provision of that directive.

The possibility of applying technological measures under article 6 of Directive 2001/29 cannot render inapplicable the condition relating to fair compensation provided for by article 5(2) of this directive.

The concept of «reproduction […] effected by the use of any kind of photographic technique or by some other process having similar effects », within the meaning of article 5(2)(a) of Directive 2001/29, must be interpreted as including reproductions effected using a printer or a personal computer, where the two are linked together.

In that case, Member States may put in place a system in which fair compensation is paid by the persons in possession of a device forming part of that chain, which contributes to that process in a non-autonomous manner, insofar as those persons have the possibility of passing on the cost of the levy to their customers, nevertheless, the whole amount of fair compensation owed as recompense for the harm suffered by the rightholders at the end of that single process must not be substantially different from the amount fixed for a reproduction obtained by means of a single device.

Judgment of the Court of Justice (Third Chamber) of 18 July 2013 — Union des Associations Européennes de Football (UEFA)/ European Commission, Kingdom of Belgium and United Kingdom of Great Britain and Northern Ireland

Appeal of the judgment of the General Court (Seventh Chamber) of 17 February 2011, UEFA/Commission dismissing an action for annulment of Commission Decision 2007/730/EC of 16 October 2007, declaring compatible with Community law measures taken by the United Kingdom pursuant to article 3A(1) of Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities.

Judgment of the Court of Justice (Eight Chamber) of 18 July 2013 (reference for a preliminary ruling from Tribunale Amministrativo Regionale per il Lazio — Itália) — Vodafone Omnitel NV, Fastweb SpA, Wind Telecomunicazioni SpA, Telecom Italia SpA, Sky Italia srl /Autorità per le Garanzie nelle Comunicazioni, Presidenza del Consiglio dei Ministri, Commissione di Garanzia dell'Attuazione della Legge sullo Sciopero nei Servizi Pubblici Essenziali and Ministero dell'Economia e delle Finanze

Article 12 of 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 (the "Authorisation Directive"), must be interpreted as meaning that it does not preclude legislation of a Member State, such as that at issue in the main proceedings, pursuant to which undertakings providing electronic communications services or networks are liable to pay a charge, intended to cover all the costs incurred by the national regulatory authority not financed by the State, the amount of which is determined according to the income received by those undertakings, provided that that charge is exclusively intended to cover the costs relating to the activities mentioned in number 1(a) of such article, that the totality of the income obtained in respect of that charge does not exceed the total costs relating to those activities and that that charge is imposed upon individual undertakings in an objective, transparent and proportionate manner, which is for the national court to ascertain.

Judgment of the Court of Justice (Second Chamber) of 18 June 2013 (reference for a preliminary ruling from *Tribunale Amministrativo Regionale per il Lazio* — Italy) — Sky Italia Srl/Autorità per le Garanzie nelle Comunicazioni

Article 4(1) of Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010, on the coordination 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), the principle of equal treatment and article 56 TFEU must be interpreted as not precluding, in principle, a national rule, such as that at issue in the main proceedings, which lays down shorter hourly television advertising limits for pay-TV broadcasters than those set for free-to-air broadcasters, provided that the principle of proportionality is observed, which is a matter for the referring court to assess.

IV RESOLUTIONS, RECOMMENDATIONS, OPINIONS, OTHERS

European Parliament Resolution of 10 May 2012, on the patenting of essential biological processes. OJEU C 261 E/31 of 2013-09-10

This Resolution recognises, in particular, that patents promote the dissemination of valuable information and are an important tool for the transfer of technology.

European Parliament Resolution of 22 May 2012, on a strategy for strengthening the rights of vulnerable consumers. OJEU C264 E/11 of 2013-09-13

The goal of this Resolution is to define and implement a strategy for strengthening the rights of vulnerable consumers, assessing the current legislative framework and identifying specially problematic sectors.

Opinion of the European Economic and Social Committee on the Commission's Communication to the European Parliament, the Council, the European Economic and Social Committee and the Regions, towards a comprehensive European framework for online gambling. OJEU C271/09 of 2013-09-19

This Opinion is adopted by the EESC at the request of the EC, its main points being, in particular: (i) the criticism addressed to the Commission for not considering the combat against illegal gambling, which represents the main threat against consumers protection, as a priority; (ii) the need to consider the quality and the possible loss of jobs in the offline gambling sector in favour of the online gambling sector; (iii) the acknowledgement that gambling contribute to increase the tax income of Member States; (iv) the fact that the EESC is deeply concerned with the serious risks that gambling represents for public health; (v) that each Member state must establish national regulatory authorities, with clear competences and must ensure cooperation with the relevant competent authorities of other Member States; and (vi) the fact that no specific EU regulation for the online gambling sector is currently feasible.

Opinion of the European Economic and Social Committee on the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – Protecting businesses against misleading marketing practices and ensuring effective enforcement – Review of Directive 2006/114/EC concerning misleading and comparative advertising. OJEU C271/61 of 2013-09-19

This Opinion is adopted by the EESC, which advances, among others, the following conclusions and recommendations: (i) The EESC agrees with the Commission that stricter regulation is required to effectively ban and enforce exemplary and dissuasive sanctions against, certain aggressive directory company sales practices; (ii) the EESC believes that the best way to achieve coherent and consistent rules prohibiting misleading marketing practices would be a joint review of Directive 2006/114/EC and 2005/29/EC, to address simultaneously B2B and B2C, preserving the specificities of each

within a common framework for which reason it urges the Commission to start action in the short term; and (iii) the EESC urges the Commission to develop and enforce complementary measures to improve information and dissemination, cooperation between administrative authorities, public-private platforms and stakeholder representative organisations, and the improvement of rapid reaction mechanisms in order to put a stop to these practices and ensure damage compensation, namely through the immediate creation of a European judicial system for group action, already announced.

Opinion of the European Economic and Social Committee on the Proposal for a directive of the European Parliament and of the Council concerning measures to ensure a high common level of network and information security across the Union. OJEU C271/133 of 2013-09-19

This Opinion is adopted by the EESC, which advances, among others, the following conclusions and recommendations: (i) harmonisation and management of NIS at European level is essential to the completion of the Digital Single Market and the smooth functioning of the Internal Market as a whole; (ii) the Committee emphasises its disappointment with the lack of progress made by many Member States to implement effective NIS at national level and deplores the increased risks that this failure creates for citizens, as well as the negative impact it is having on the completion of the digital single market; all Member States should take action on their outstanding NIS obligations without further delay ; (iii) the Committee considers it necessary to create an EU-level authority for NIS, analogous to the central authority in the aviation industry (EASA) (3), to ensure the establishment of standards and to monitor enforcement of policies of NIS across the EU; and (iv) the Committee directs the Commission's attention to the many previous opinions of the EESC, that have discussed the topic of network and information security and which commended on the need for a secure information society and protection of critical infrastructures.

Opinion of the European Economic and Social Committee on the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: The Digital Agenda for Europe – Driving European growth digitally. OJEU C271/127 of 2013-09-19

In this Opinion, noteworthy are, for instance, the following conclusions and recommendations: (i) the Committee welcomes the Communication on the review of the Digital Agenda by the Commission to focus on priority actions, so urgently needed for economic growth and jobs; (ii) the EESC agrees with the Commission on the statement that the high level of unemployment is a tragedy, and that Europe must mobilise all available resources to create jobs and return to sustainable growth; (iii) despite economic recession, the digital economy is growing quickly and creating jobs; (iv) Europe needs the Digital Agenda strategy to speed-up recovery and deliver sustainable, inclusive growth, especially in the most economically challenged regions of the EU; (v)

broadband is the essential enabling infrastructure for the Digital Agenda; (vi) the Commission communication outlines a very ambitious set of proposals to address barriers to Europe's digital transformation and the EESC looks forward in due course to reviewing the specific communications from the Commission on each of the major initiative proposed; only then will it be possible to comment fully on the particular measures, their likely impacts and possible issues; (vii) Considering time and resource constraints, the EESC believes that a refocusing of the Digital Agenda strategy should prioritise certain following actions for growth; (viii) because the rollout of EU-wide high-speed broadband is so important, the Committee calls on the Commission to recommend a range of funding instruments to support accelerated investment in broadband infrastructures, especially where normal market returns are insufficient to attract private funds; and (ix) the EESC would like the Commission to advise how access to high-speed broadband can be recognised as a universal right of all citizens, regardless of location.

Commission Recommendation of 11 September 2013 on consistent non-discrimination obligations and costing methodologies to promote competition and enhance the broadband investment environment. OJEU L251/13 of 2013-09-21

The aim of this recommendation is to improve regulatory conditions needed to promote effective competition, enhance the single market for electronic communications networks and services and foster investment in the next generation access (NGA) networks.

Corrigendum to Directive 2009/140/CE of the European Parliament and of the Council of 25 November 2009, amending Directive 2002/21/EC on a common regulatory framework for electronic communications, Directive 2002/19/EC on access to and interconnection of electronic communications networks and associated facilities and Directive 2002/20/EC on the authorisation of electronic communications. OJEU L 241 of 2013-09-10

Corrigendum to Directive 2009/136/EC of the European Parliament and of the Council of 25 November 2009, amending Directive 2002/22/EC on universal service and users' rights relating to electronic communications network and services, Directive 2002/58/EC concerning the processing of personal data and the protection of privacy in the electronic communications sector and Regulation (EC) No. 2006/2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws. OJEU L 241 of 2013-09-10

Public clarification from the National Data Protection Commission to local government candidates

In its public clarification issued on 2013-08-21, the NDPC warns that local government candidates need to comply with the legal provisions on data protection in carrying out their politics marketing actions.

Agreement between the *INPI* and the Canadian office relating to PPH

The *INPI* (National Industrial Property Institute) and *CIPO* (Canadian Intellectual Property Office) signed a memorandum of understanding concerning the Patent Prosecution Highway (PPH) on 2013-09-23, in the margin of the Assemblies of the Member State of the WIPO that took place in Geneva.

The Memorandum of Understanding signed by the chairman of the *INPI* and by the chairman of the WIPO took effect on 2013-10-07.

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