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INTERNATIONAL

COUNCIL OF EUROPE

European Court of Human Rights: Case of *Giniewski v. France*

In 1994, the newspaper *Le quotidien de Paris* published an article with the headline "The obscurity of error", concerning the encyclical "The splendour of truth" (*Veritatis Splendor*) issued by Pope John Paul II. The article was written by Paul Giniewski, a journalist, sociologist and historian and contained a critical analysis of the particular doctrine developed by the Catholic Church and its possible links with the origins of the Holocaust. A criminal complaint was lodged against the applicant, the newspaper and its publishing director, alleging that they had published racially defamatory statements against the Christian community. The defendants were found guilty of defamation at first instance but were acquitted on appeal. Ruling exclusively on the civil claim lodged by the *Alliance générale contre le racisme et pour le respect de l'identité française et chrétienne* (General Alliance against Racism and for Respect for the

French and Christian Identity – AGRIF), the Orléans Court of Appeal ruled that Giniewski was to pay damages to the AGRIF and that its decision was to be published at his expense in a national newspaper. The Orléans Court of Appeal considered the article defamatory toward a group of persons because of their religious beliefs. The applicant unsuccessfully contested the decision before the French Supreme Court.

In a judgment of 31 January 2006, the European Court of Human Rights holds that the article in question had contributed to a debate on the various possible reasons behind the extermination of Jews in Europe: a question of indisputable public interest in a democratic society. In such matters, restrictions on freedom of expression are to be strictly interpreted. Although the issue raised in the present case concerned a doctrine endorsed by the Catholic Church, therefore a religious matter, an analysis of the article in question showed that it did not contain attacks on religious beliefs as such, but a view which

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the applicant had wished to express as a journalist and historian. The Court considered it essential that a debate on the causes of acts of particular gravity, resulting in crimes against humanity, take place freely in a democratic society. The article in question had, moreover, not been "gratuitously offensive" or insulting and had not incited disrespect or hatred. Nor had it cast doubt in any way on clearly established historical facts.

From this perspective, the facts were different from those in *I.A. v. Turkey* regarding an offensive

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● **Judgment by the European Court of Human Rights (Second Section), case of *Giniewski v. France*, Application no. 64016/00 of 31 January 2006, available at: <http://merlin.obs.coe.int/redirect.php?id=9237>**

FR

● ***R. Garaudy v. France*, ECHR, 24 June 2003, nr. 65831/01, Decision on admissibility, available at: <http://merlin.obs.coe.int/redirect.php?id=9237>**

EN

Advisory Committee on the Framework Convention for the Protection of National Minorities: Media-specific Provisions in Opinion on Kosovo

The Advisory Committee on the Framework Convention for the Protection of National Minorities (FCNM) recently adopted an Opinion on the implementation of the FCNM in Kosovo.

In its Opinion, the Advisory Committee made a number of specific recommendations to the (international and local) authorities in Kosovo, including to: "Process rapidly the delayed application for radio and TV licenses, with a view to expanding the scope and diversity of broadcasting for and by minority communities, and take further steps to ensure that all communities have equal access to public service broadcasting" (para. 154).

The Opinion also contains a discussion of a number of media-related issues, such as: fair and responsible reporting by the broadcast media and the goal

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● **Opinion on the implementation of the Framework Convention for the Protection of National Minorities in Kosovo, Advisory Committee on the Framework Convention for the Protection of National Minorities, 25 November 2005 (rendered public on 2 March 2006), Doc. No. ACFC/OP/I(2005)004, available at: <http://merlin.obs.coe.int/redirect.php?id=10066>**

EN-FR

Media Division: Report on Public Service Media in the Information Society

In February 2006, a report entitled "Public service media in the information society", which had been prepared by Christian S. Nissen for the Council of Europe's Group of Specialists on Public Service Broadcasting in the Information Society, was made public.

The main objective of the report is to "describe some of the key developments and trends in the

attack on the Prophet of Islam (see IRIS 2005-10: 3) and those in *R. Garaudy v. France*. The Court considered that the reasons given by the French courts could not be regarded as sufficient to justify the interference with the applicant's right to freedom of expression. Specifically with regard to the order to publish a notice of the ruling in a national newspaper at the applicant's expense, the Court considers that while the publication of such a notice did not in principle appear to constitute an excessive restriction on freedom of expression, the fact that it mentioned the criminal offence of defamation undoubtedly had a deterrent effect. The sanction thus imposed appeared disproportionate with regard to the importance and interest of the debate in which the applicant had legitimately sought to take part. The Court therefore held that there has been a violation of Article 10 of the Convention. ■

of promoting tolerance ((para. 58); see further: IRIS Special – Political Debate and the Role of the Media, pp. 101-103); law and practice governing the use of minority languages in the media (paras. 65 and 66); "significant delays" in the "processing of applications for licenses to broadcast in areas that are currently underserved and applications for multi-ethnic stations" (para. 67); specific guarantees for the provision of minority-language programming in public service broadcasting (para 68) and current practice relating to the same (para. 69), as well as technical difficulties pertaining to the reception of public service broadcasting signals in certain areas densely populated by specific minority communities (para. 70).

The FCNM provides for a monitoring system based on periodic State reporting. The Opinion discussed *supra* does not fall squarely within the ordinary monitoring work of the Advisory Committee; rather, it was adopted pursuant to the Agreement between the Council of Europe and the United Nations Interim Administration Mission in Kosovo (UNMIK) on the Technical Arrangements Related to the Framework Convention for the Protection of National Minorities, concluded on 23 August 2004. ■

media, and to address the long list of challenging and often controversial issues confronting Public Service Broadcasting in coming years". It examines a wide range of topics, under the chapter titles: "*Les forces profondes*" in the new media landscape"; "Public service media: from a monopoly to a competitive market"; "Public service media: a pact with society"; "Objectives and obligations of public service media"; "The remit: public service media content and services"; "Organising the provision and distribution of public service media"; "Public service governance"

and "Financing public media".

In the "Summary and conclusions" section of the report, it is stated that: "[I]n line with the segmentation and individualisation of modern society in general, public media are moving from collective 'broadcasts' to providing content and services tailor-made for a society of individuals". The report therefore homes in on "a number of possible consequences of this development".

According to the report, "[T]he combination of broadcast mass media (traditional radio and television) and more personalised 'on demand' services" will facilitate efforts by the public service media (PSM) to resolve "the classic dilemma of assuring a high reach among listeners, viewers and other users

on the one hand and of ensuring that the overall PSM offering can differentiate itself from that of commercial providers on the other". The report also argues against the distribution of PSM functions and obligations among private media companies: "especially to guard against radical solutions where the publicly-owned corporation is abandoned in favour of a PSM 'trust'". As regards the issue of governance, the report highlights "the often disturbing differences between the spirit and letter of the laws governing broadcasting and the harsh realities of the daily life of PSM". It also weighs up "some of the pros and cons of the ever more restrictive and detailed regulation of the European Union authorities".

To conclude, many distinct issues are discussed in the report, as is shown by the selection of issues mentioned above. However, their interplay with one another is also emphasised throughout the report, thereby contributing to a coherent analytical whole. ■

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● "Public service media in the information society", Report prepared for the Council of Europe's Group of Specialists on Public Service Broadcasting in the Information Society (MC-S-PSB) by Christian S. Nissen, February 2006, Doc. No. H/Inf (2006) 3, available at:
<http://merlin.obs.coe.int/redirect.php?id=10082>

EN-FR

EUROPEAN UNION

European Commission: State Aid to Promote Fast Internet Access for Businesses Approved

The European Commission has approved, under the state aid rules, the "FibreSpeedWales" project. This project, funded by the Welsh Development Agency, aims to contribute to reducing the relatively slow development of broadband in Wales. This slow-paced development is due to the nation's geographical isolation, its mountainous terrain and its low population density; as a result, broadband prices for businesses can be several times higher than in other areas of the UK. The project targets business parks for which affordable broadband services are not available as they are located in remote areas and are therefore unattractive for commercial investment by broadband providers.

The Welsh authorities decided to support the construction of an open, carrier-neutral fibre-optic

network linking fourteen business parks. The network will remain in public ownership, but construction and management will be contracted out to a wholesale operator. This operator will then offer its services to telecommunications operators, who will provide high-speed business services to business users.

The project is permitted under EC state aid rules as a subsidy for the development of economic activities or economic areas under Article 87(3)(c) of the Treaty as there is no overall negative effect on competition. It pursues a clear cohesion objective and indeed will be co-financed by EU structural funds; it is in line with European priorities outlined in the eEurope 2005 action plan and the i2010 initiatives. To prevent undue distortion of competition, the wholesale operator will be selected by an open tender and a repayment mechanism will keep the amount of aid to a minimum. The selected wholesale provider will also be expected to contribute a substantial proportion of the project costs. ■

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● "State aid: Commission endorses aid to promote fast Internet access for business parks in Wales" Press Release of 23 February 2006, IP/06/214, available at:
<http://merlin.obs.coe.int/redirect.php?id=10063>

DE-EN-FR

European Commission: Investigation Closed after Changes to Philips CD-Recordable Disc Patent Licensing

In 2003, the Commission launched an investigation following a complaint by FIPCOM, the Federation of Interested Parties in fair Competition in the Optical Media sector. This group of European manufacturers of CD-Recordable discs complained that the terms and conditions of Philips' CD-R technology

licensing violated article 81 of the EC Treaty, the competition provision on restrictive business practices. The Commission has now decided to close the case, since, as a result of settlement negotiations, Philips has revised its licenses and FIPCOM has withdrawn its complaint.

Since 2001, Philips has been offering European manufacturers a license agreement for its CD-R patents. Philips has now revised the conditions of the licensing agreement as follows:

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- Summary reports of independent experts regarding those Philips patents that are essential to produce CD-R discs will now be made available on the Philips website;
- Philips is now explicitly obliged to address technical problems associated with the management of

● "Competition: Commission closes investigation following changes to Philips CD-Recordable Disc Patent Licensing", press release of 9 February 2006, IP/06/139, available at:
<http://merlin.obs.coe.int/redirect.php?id=10071>

DE-EN-FR

European Commission: Further Steps towards Realization of European Digital Library

The European Commission is taking steps to realise its plans to create a European Digital Library (see IRIS 2005-10: 5). The digital library will offer access to Europe's cultural and scientific heritage and is part of the Commission's strategy to boost the digital economy, the so-called i2010 strategy (see IRIS 2005-7: 5). In order to increase digitisation of Europe's heritage, the European Commission will co-fund the creation of a Europe-wide network of digitisation centres. The TEL-infrastructure, the current gateway to the catalogue records of several national libraries in Europe, will be used as a basis for the European Digital Library.

By the end of 2006, all national libraries in the EU should fully collaborate with each other. In the following years, the archives and museums are to follow. The European Digital Library should comprise two million books, films, photographs, manuscripts, and other cultural works by 2008. This is expected to

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● "European Commission steps up efforts to put Europe's memory on the Web via a 'European Digital Library'", press release of 2 March 2006, IP/06/253, available at:
<http://merlin.obs.coe.int/redirect.php?id=10068>

DE-EN-ES-FR-IT-PL

European Commission: Safer Internet Day Stresses Children's Safety on the Internet

This year, Safer Internet Day was celebrated on 7 February. In 37 countries across the world, including 24 EU countries, around 100 organisations participated in this annual event to promote internet safety for children. Safer Internet Day is organised by Insafe, the EU network for internet safety awareness. The latter is in line with the European Union's ongoing efforts to make the internet safe for children (see IRIS 2005-9: 3).

Insafe organised a global "blogathon" or "blog-marathon". Organisations active in promoting internet safety and special guests made postings, and visitors, children, schools and parents were invited to comment. The blogathon aimed to raise awareness

the CD-R standard;

- The CD-R standard will be updated to clarify that discs which do not use Philips' Multi Speed patented technology but alternative high-speed recording technologies qualify as CD-R discs;
- The royalties per disc are retroactively reduced from USD 0.045 to USD 0.025 as from 1 October 2005.

The new Philips licensing conditions are expected to result in lower prices and more transparency for consumers of recordable CDs. ■

increase to at least six million items by 2010. Potentially every library, archive and museum will then be able to link its digital content to the European Digital Library.

The Commission has published the results of a major online consultation on the digital libraries initiative. The replies, from libraries, archives, museums, publishers, rightsholders and universities, show that all parties concerned welcome the initiative. However, the replies also show that cultural institutions and rightsholders differ on how to address copyright issues.

The Commission intends to present a proposal for a Recommendation by mid-2006 to address possible barriers to digitisation and online accessibility. Later this year, the Commission will also announce its plans for digital libraries based on scientific information. The Commission plans on addressing the issue of intellectual property rights management in the digital age in a Commission Communication on "Content Online" before the end of 2006.

Later this month, a High Level Group on the European Digital Library will meet to bring together major stakeholders from industry and cultural institutions to address public-private collaboration for digitisation and copyrights. ■

about the danger of posting personal information, the legal consequences of publishing copyright material and issues like false identity, hacking and security threats. Information Society and Media Commissioner, Viviane Reding, launched the blogathon focusing on treating each other with the same respect online as we do in the real world.

Results of a Eurobarometer survey on Safer Internet, run in December 2005, are to be published at the beginning of March. The Eurobarometer survey showed that although 50% of parents in the 25 Member States declare that their child has access to the internet, only 20% set rules regarding internet use. Most of the parents who do set rules deny their children access to certain websites (55%) and control time spent on the internet (53%). Less popular rules are not allowing children to meet in person someone they first contacted on the internet (35%) and not

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allowing downloads of music and films (19%).

Insafe is part of the Commission's Safer Internet Programme, which aims to hand parents and teachers the tools they need to ensure internet safety. The current 4-year programme, with a budget of EUR 45 million, is to combat illegal and harmful content, online as well as in other media. It explicitly addresses racism and e-mail spam. Other activities organised by Insafe this year include "I will teach

● "Safer Internet Day 2006: EU stresses commitment to safer use of the Internet",
press release of 7 February 2006, IP/06/126, available at:
<http://merlin.obs.coe.int/redirect.php?id=10074>

DE-EN-FR

European Parliament: Vote in Plenary on Services Directive

On 16 February 2006, the European Parliament by a large majority adopted a first reading legislative resolution on the proposal for a Directive on Services in the Internal Market presented by the Commission in January 2004. The proposed Directive sets out a legal framework to reduce barriers to cross-border provision of services within the European Union (see IRIS 2005-4: 3). In its resolution, Parliament excludes a long list of specific services, including audiovisual services, from the scope of the proposal and substantially rewrites the Commission's original proposal.

By excluding the audiovisual sector from the scope of the proposal, Parliament confirms an amendment that was adopted earlier in the lead parliamentary committee Internal Market and Consumer Protection (IMCO). Audiovisual services are now excluded "whatever their mode of production, distribution and transmission, including radio broadcasting and the cinema". Parliament also introduces a cultural safeguard clause stating that the future directive shall not affect measures taken at Community or national level to protect or promote cultural or linguistic diversity or media pluralism. Further-

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● European Parliament Legislative Resolution on the Proposal for a Directive of the European Parliament and of the Council on Services in the Internal Market, available at:

<http://merlin.obs.coe.int/redirect.php?id=10060>

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

European Parliament: Resolution on Human Rights and Democracy Clause in European Union Agreements

On 14 February 2006, the European Parliament adopted a Resolution on what is now commonly referred to as the human rights and democracy clause in EU agreements. This clause has evolved throughout the years and has appeared in different EU policy instruments.

you". This event allows children to teach adults about their activities on the internet and mobile phones.

Current projects and activities in the Safer Internet Programme include 21 hotlines for users to report illegal content, 23 nodes for raising awareness of safer use of the internet, a quality labelling scheme for websites, pilot projects in self-regulation to combat spam and to extend content ratings to online games, benchmarking of filtering software and the Safer Internet Forum. In 2005, the Forum concentrated on safety issues raised by the use of mobile phones by children. ■

more, Parliament deals with the uncertainty about the relation between this proposal and existing sectoral legislation. In its resolution, it states that in case of conflict between the proposed Directive and other sectoral Community rules, such as the Television Without Frontiers Directive, these other rules shall prevail.

Other major amendments adopted by Parliament include inter alia:

- the total exclusion of other sensitive services, such as services of general interest, health care, social services, temporary work agencies, gambling and professions and activities that are permanently or temporarily connected with the exercise of official authority in a Member State;
- the introduction of a social safeguard clause;
- replacing the country of origin principle by a pragmatic principle on "freedom to provide services" as the regulatory basis for cross-border service provision in the EU;
- the exclusion of so called "services of general economic interest" from major parts of the proposed Directive (i.a. the proposed principle on "freedom to provide services").

The European Commission announced it will present its amended proposal by 4 April 2006, in which it is expected to accept a lot of the amendments that were adopted by a large majority in the European Parliament. In accordance with the co-decision procedure, the modified proposal will then be put on the agenda of the Council. ■

It was first included in an international agreement in 1992 and its purpose, to uphold and encourage democratisation along with its underlying principles, was dubbed an "essential element" of the agreement. A model clause was subsequently drafted in 1995 and its first meaningful application can be found in the Cotonou Agreement (2000), a partnership agreement the European Union signed with a number of African, Caribbean and Pacific (ACP) countries.

Articles 9 and 96 of the Cotonou Agreement together embody the objectives and mechanism of the human rights and democracy clause. Through art. 9, the clause stresses that respect for fundamental human rights and democratic principles as laid down in the Universal Declaration of Human Rights (UDHR) underpin the internal and external policies of the parties and constitute an “essential element” of the agreement. In its Resolution, Parliament also makes a specific reference to the EU Charter of Fundamental Rights reflecting the fact that on the basis of universally recognised principles, in addition to international standards, each country also develops its own democratic culture. The clause is legally binding and it is paired with a mechanism, laid down in art. 96, which can lead to suspension of the agreement in cases of persistent and serious violations of its provisions. However, prior to such a decision, consultations must be held between parties.

Article 9 of the Cotonou Agreement underlines: “The Parties refer to their international obligations and commitments concerning respect for human rights [...] reaffirm that democratisation, development and the protection of fundamental freedoms and human rights are interrelated and mutually reinforcing. Democratic principles are universally reco-

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● **The European Parliament resolution on the Human Rights and democracy clause in European Union agreements of 14 February 2006, provisional edition, available at:**

<http://merlin.obs.coe.int/redirect.php?id=10094>

● **Communication from the Commission to the Council and the European Parliament - the European Union's role in promoting human rights and democratisation in third countries, available at:**

<http://merlin.obs.coe.int/redirect.php?id=10097>

● **The Partnership agreement between the members of the African, Caribbean and Pacific Group of States of the one part, and the European Community and its Member States, of the other part, signed in Cotonou on 23 June 2000, available at:**

<http://merlin.obs.coe.int/redirect.php?id=10100>

● **Council decision concluding consultations with the Republic of Guinea under Article 96 of the Cotonou Agreement, 14 April 2005, available at:**

<http://merlin.obs.coe.int/redirect.php?id=10103>

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

NATIONAL

AT - New Decision on Short Reporting

In 2004, pay-TV broadcaster Premiere acquired the exclusive rights to cover the T-Mobile Bundesliga. Austrian commercial broadcaster ATV+ subsequently purchased the secondary exploitation rights. The *Bundeskommunikationssenat* (Federal Communications Office - BKS) granted to *Österreichische Rundfunk* (ORF) the right to broadcast one short 90-second report on each match day (see IRIS 2005-1: 7). The *Verwaltungsgerichtshof* (Administrative Court) overturned this decision, since only allowing 90 seconds of coverage per match day was considered too restrictive (see IRIS 2006-3: 10).

gnised principles underpinning the organisation of the State to ensure the legitimacy of its authority, the legality of its actions reflected in its constitutional, legislative and regulatory system, and the existence of participatory mechanisms”. This also entails respect for free media as enshrined in Art. II-71 of the Charter of Fundamental Rights of the Union as incorporated in Part II of the Treaty establishing a Constitution for Europe (“The freedom and pluralism of the media shall be respected”) and Art.19 of the UDHR (“Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers”). The consultations opened under Art. 96 with ACP partner Guinea illustrate the EU's concern about freedom to receive and impart information as it seeks guarantees from Guinea that it will enable political parties to access state radio and television broadcasting and liberalise private electronic media.

In its resolution, Parliament calls for the clause to be extended to all new agreements between the European Union and third countries, both industrialised and developing, including sectoral agreements, trade and technical or financial aid.

Parliament also suggests a number of measures to make the clause even more effective. In particular, it wants to rid the clause of its “generic nature” which does not spell out detailed intervention procedures, but it also wishes to be involved in the decision-making process for initiating consultation or suspending an agreement. It has also declared it is no longer prepared to give its assent to new international agreements that do not contain a human rights and democracy clause.

The human rights and democracy clause has been introduced into over 50 agreements and applies to more than 120 countries. ■

On 3 February 2006, the BKS issued a revised judgment, obliging Premiere to make available to ORF the signals from all football matches in the T-Mobile Bundesliga. ORF was authorised to “produce appropriate short news-type reports”. The BKS went on to explain that, as a rule, ORF was only allowed to show goals, missed penalties, shots hitting the woodwork that decided the outcome of the match, shots that bounced down off the crossbar, serious fouls that led to the expulsion of a player, and crowd disturbances. Exceptionally, in matches that decide the championship or the fight to avoid relegation, short reports could also include decisive moments, such as missed goal chances, controversial offside

decisions that could decide the outcome, or deliberate handballs or fouls in the penalty area which the referee did not see.

Short reports may not be broadcast before the start of Premiere's football programme and no sooner than 30 minutes after the scheduled end of the match concerned. From now on, reports are limited to 90 seconds per match.

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● Decision of the *Bundeskommunikationssenat* (Federal Communications Office), 3 February 2006, 611.003/0006-BKS/2006

DE

AT – Licence Awarded for Terrestrial Multiplex Platform

In February 2006, the *Kommunikationsbehörde Austria* (Austrian communications authority) granted to *Österreichische Rundfunksender GmbH & Co KG* (ORS) the licence to operate a terrestrial multiplex platform valid until 1 August 2016 (see IRIS 2005-7: 8 for details of the invitation of tenders). The decision is not yet in force. The award of this licence represents a further step towards nationwide availability of digital terrestrial broadcasting.

The licensing decision sets out detailed conditions for the transmission of digital terrestrial television. ORS is required to increase its coverage in stages. It must carry both national TV channels and,

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● Decision of *KommAustria*, 23 February 2006, KOA 4.200/06-002, available at: <http://merlin.obs.coe.int/redirect.php?id=10086>

DE

BE – New Media Authority

On 10 February 2006, the new Flemish Regulator for the Media (FRM) was officially established. As an external autonomous agency, the FRM is responsible for licensing and supervising radio and television broadcasting organisations, cable networks and radio and television services in the Flemish Community. The FRM integrates the competences of the former *Vlaams Commissariaat voor de Media* (Flemish Media Authority), the former *Vlaamse Geschillenraad voor Radio en Televisie* (Flemish Council for Radio and Television Disputes) and the former *Vlaamse Kijk- en Luisterraad* (Flemish Listening and Viewing Council).

The new media authority has two separate and independent chambers, a general chamber and a chamber for impartiality and protection of children. Its members are appointed by decision of the Flemish government. The general chamber is composed of five members: two judges and three academic media experts, independent of any media enterprise or media institution. This chamber is responsible for the monitoring of most of the Flemish Broadcasting Act's provisions. It will allocate licenses to broad-

ORF must pay Premiere EUR 1,000 per minute broadcast.

Under its secondary exploitation rights, terrestrial TV broadcaster ATV+, which is available throughout Austria, may not report on T-Mobile Bundesliga matches before 10 pm. According to the BKS, these secondary exploitation rights could not be taken into account in the decision on ORF's right to short reporting. ATV+ therefore had to accept the fact that ORF was allowed to show the key moments of matches several hours before its own football programme. ■

to a limited extent, the regional channels produced by *Österreichische Rundfunk* (ORF). Private broadcaster ATV is also entitled to have its national terrestrial channel ATV+ transmitted via the ORS multiplex platform. The broadcast of radio and television channels must take priority over additional services (teletext, information services). If ORS itself offers an electronic programme guide, it must respect the order of channels set out in the licence. Channels must also be treated equally in terms of their layout and accessibility. Fees charged for the transmission of channels and additional services must be reasonable. ORS is also obliged to treat all applicants equally when calculating these fees.

The full partner of ORS is *Österreichische Rundfunksender GmbH*, 60% of whose ordinary share capital is owned by ORF and 40% by *Medicur Sendeanlagen GmbH*. ORF and *Medicur Sendeanlagen GmbH* are limited partners of ORS. ■

casting providers and networks, monitor and handle complaints regarding advertising, sponsoring and teleshopping rules and provide analysis of relevant markets. The latter entails reporting on relevant markets' competitiveness or identifying undertakings with significant market power and imposing specific regulatory obligations where necessary. The general chamber will also monitor concentrations in the audiovisual and print media and the implementation of the executive agreement between the Flemish government and the public broadcaster VRT (see IRIS 2001-9: 7).

The chamber for impartiality and protection of children is composed of nine members (judges, professional journalists and academics). It can decide on complaints which concern alleged infringements of provisions relating to editorial independence, impartiality, discrimination (art. 111bis), incitement to hatred on the grounds of race, gender, religion or nationality and the protection of minors on radio and television (Art. 96 § 1). In case of complaints regarding the protection of minors, the chamber welcomes four additional members, all experts in the field of child psychology, pedagogy or families' and

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children's interests. The broadcasting organisations, cable networks and radio and television services are obliged to hand over the documents and programmes requested by the FRM. All members of the FRM, as well as its staff, are under a strict obligation of confidentiality (art. 176octies). The Flemish broadcasters are no longer under a legal obligation to respect jour-

● **Decreet van 16 december 2005 houdende de oprichting van het publiekrechtelijk vormgegeven extern verzelfstandigd agentschap Vlaamse Regulator voor de Media en houdende wijziging van sommige bepalingen van de decreten betreffende de radio-omroep en de televisie, gecoördineerd op 4 maart 2005, Belgisch Staatsblad 30 december 2005** (Legislative decree of 16 December 2005 providing for the establishment of the Flemish Regulator for the Media and modifying the Broadcasting Act 2005, *Moniteur Belge*, 30 December 2005), available at: <http://merlin.obs.coe.int/redirect.php?id=10077>

● **More information about the Council for Journalism, available at:** <http://merlin.obs.coe.int/redirect.php?id=10078>

DE-EN-FR-NL

DE – Munich District Court Rules on Business Terms of Pay-TV Providers

In a ruling of 23 February 2006, the *Landgericht München I* (Munich District Court I) declared that certain clauses of a pay-TV provider's general terms of business were invalid and it therefore granted an injunction sought by the *Verbraucherzentrale Bundesverband* (Federation of German Consumer Organisations - *vzbv*).

In its terms of business, the pay-TV company concerned, *Premiere*, had reserved the right "to supplement or expand, for the benefit of subscribers", its range of programmes, individual channels, their use and the composition of programme packages. The court considered this to be an invalid means of reserving the right to amend services. Firstly, such a phrase did not take sufficiently into account whether an amendment would be acceptable from the customer's point of view. Secondly, the concept of the "benefit" for customers was not adequately defined. Customers of the pay-TV company concerned opted for a specific package from a wide range

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● **Ruling of the *Landgericht München I* (12. Zivilkammer) (12th civil chamber of Munich District Court I), 23 February 2006, case no. 12 O 17192/05**

DE

DE – OLG Düsseldorf Rules on Cartel Procedure against SES Astra

Satellite operator *Eutelsat* lodged a complaint with the *Oberlandesgericht Düsseldorf* (Düsseldorf Court of Appeal - OLG) concerning a decision of the *Bundeskartellamt* (Federal Cartels Office) at the end of 2004. According to the decision, the acquisition of the company *Digital Playout Center* (DPC), owned by pay-TV provider *Premiere*, by satellite operator *SES Astra* (see IRIS 2005-2: 8), had been authorised. Now, in an interim decision of 22 February 2006, the 1. *Kartellsenat* (1st Cartels Court) of the OLG has invited the *Bundeskartellamt* to obtain from market partici-

nalistic ethics (see IRIS 2005-6: 8). This is from now on within the remit of the *Raad voor de Journalistiek* (Council for Journalism), a self-regulatory body overseeing journalistic ethics, both in print media and radio and television. ■

● **Besluit van de Vlaamse regering van 10 februari 2006 tot bepaling van de datum van inwerkingtreding van het decreet van 16 december 2005 houdende de oprichting van het publiekrechtelijk vormgegeven extern verzelfstandigd agentschap Vlaamse Regulator voor de Media en houdende wijziging van sommige bepalingen van de decreten betreffende de radio-omroep en de televisie, gecoördineerd op 4 maart 2005, Belgisch Staatsblad 7 maart 2006** (Decision of the Flemish Government of 10 February 2006 determining the date of coming into force of the Decree of 16 December 2005 on the establishment of the Flemish Regulator for the Media and modifying the Broadcasting Act 2005, 7 March 2006), available at: <http://merlin.obs.coe.int/redirect.php?id=10077>

DE-FR-NL

of channels and programme packages. Their right to continue receiving the services they had originally chosen was therefore particularly worthy of protection.

In addition, a clause under which prices could be increased annually if production costs rose was prohibited. The provision stated that such a price increase should be announced three months in advance and that customers would be entitled to cancel their subscription if prices rose by more than 5%. According to the court, this clause did not sufficiently meet the conditions of a price rise. Furthermore, customers with an interest in consistent pricing on the grounds that price was a factor in their choice of package would not be able to predict how much they would be charged.

In addition, clauses under which the provider reserved the right to change subscription fees if programme packages were amended or restructured, and rules preventing customers from cancelling their subscription because of a change to the pricing structure following an amendment of the service provided, were also deemed invalid.

According to the ruling, these clauses may no longer be used. The company is also forbidden from referring to them in existing contracts. ■

pants additional information that could be used as a basis for its final decision.

DPC, which now trades under the name of *Astra Playout Services* (APS), provides TV broadcasters and programme providers with technical services linked to broadcasting and digital services. In its decision, the *Kartellamt* had pointed out that the merger would seriously restrict competition in the satellite TV broadcasting market. However, it had based its decision to allow the takeover on the weighing up clause of Art. 36 GWB, because it thought the takeover would stimulate competition in the pay-TV sector. *Eutelsat* believes that this has not happened and fears restrictions of competition that have

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resulted from the takeover. It claims that the APS service is very closely linked to the Nagra Aladin encryption system used by Premiere and that the

• Interim decision of the 1. Kartellsenat (1st Cartels Court) of the *Oberlandesgericht Düsseldorf* (Düsseldorf Court of Appeal) of 22 February 2006

DE

DE – OLG Frankfurt Rules on Cinema Film Ban

In a ruling of 3 March 2006, the *Oberlandesgericht Frankfurt* (Frankfurt Court of Appeal) banned the screening of the cinema film with the German title “Rohtenburg” following an appeal for a temporary injunction. The film had been due to be premiered on 9 March 2006.

The film “Rohtenburg” (English title: “Butterfly – a Grimm Love Story”), which was described by its distributors as “a real-life horror film that could hardly be more intense and gets under your skin in the truest sense of the word”, tells the story of a psychology student who writes a thesis on a homosexual cannibal and researches his life and childhood in order to find out what caused him to carry out his deeds.

The plaintiff, who has repeatedly been called the “Cannibal of Rotenburg” in the media and at the time of the judgment was in prison awaiting trial on suspicion of murder, claimed that the film portrayed his life and actions in a sensational, distorted and accusatory way, constituting an illegal breach of his personality rights.

The *Oberlandesgericht*, taking into account the artistic freedom and freedom to film of the film production company and the plaintiff’s personality rights, decided that the depiction of a crime and of the psychological profile of the perpetrator in a horror film constituted a serious breach of personality rights.

The court ruled that, in this case, artistic freedom was less important than the plaintiff’s personality

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• Ruling of the *Oberlandesgericht Frankfurt* (Frankfurt Court of Appeal), 3 March 2006 (case no. 14 W 10/06), available at:
<http://merlin.obs.coe.int/redirect.php?id=10093>

DE

DE – Springer Appeals Against Ban

Axel Springer AG has appealed to the *Oberlandesgericht Düsseldorf* (Düsseldorf Court of Appeal - OLG) against the decision of the *Bundeskartellamt* (Federal Cartel Authority) to prohibit Springer’s takeover of ProSiebenSat.1 Media AG (see IRIS 2006-2: 9). According to the appellant, the purpose of the appeal is to obtain the necessary legal certainty for future acquisition procedures. In its opinion, the grounds set out by the *Bundeskartellamt* for its deci-

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• Press release of Axel Springer AG of 23 February 2006, available at:
<http://merlin.obs.coe.int/redirect.php?id=10089>

• Press release of the KDLM of 7 March 2006, available at:
<http://merlin.obs.coe.int/redirect.php?id=10090>

DE

DPC takeover has created an anti-competitive technical access monopoly in the digital pay-TV market. Premiere and SES Astra countered with the argument that APS was an open platform which was also accessible to other providers. A firm date for the court’s final decision has yet to be fixed. ■

rights, since the film did not create an independent fictional character. Instead, the plaintiff’s crime and life situation were portrayed in detail without any attempt to hide his identity. Any claim that the work was fictional was therefore unfounded. For example, the film was named after the town in which the plaintiff lived and carried out his crimes, with only a small phonetic difference. Furthermore, the film was expressly advertised as a “real-life horror film” inspired by true events.

The protection of the plaintiff’s personality rights was also deemed more important than the freedom of reporting by means of the press, broadcasts and films enshrined in Art. 5.1.1 of the Basic Law. It was true that anyone who broke the law should, in principle, also expect that the public’s right to information about his crime in a society that respected the principle of free communication should be met via the usual channels. However, this did not mean that he should be the subject of a film advertised as a “real-life horror film”. The film in question did not endeavour to present factual information or a balanced portrayal of events and the plaintiff’s personality, but was meant purely to provide entertainment as a horror film. Therefore, the personality rights breach could not be justified by the freedom of reporting by means of films enshrined in Art 5.1.2 GG.

The California-based film production company was therefore forbidden from copying, screening or advertising the film, or putting it into circulation in any other way.

If this injunction is breached, a fine of EUR 250,000 or a prison sentence of up to six months may be imposed. ■

sion, should they be confirmed by the *OLG*, would effectively prevent the company from growing in Germany through the acquisition of other companies.

Meanwhile, the *Medienrat* (Media Council) of the *Bayerische Landesmedienanstalt* (Bavarian Land media authority - BLM) has withdrawn its appeal against the decision of the *Kommission zur Ermittlung der Konzentration im Medienbereich* (Commission on Concentration in the Media - KEK). The BLM had wanted proceedings to continue. Now, however, at its meeting on 7 March 2006, the *Konferenz der Direktoren der Landesmedienanstalten* (Conference of Directors of the Land Media Authorities - KDLM) agreed that the BLM’s application was no longer relevant following the decision to abandon the takeover plans. ■

DE – Draft North German Media Agreement Criticised

In early February 2006, the *Länder* of Schleswig-Holstein and Hamburg agreed a draft inter-state agreement on media law in Hamburg and Schleswig-Holstein.

A key aspect of the agreement is the creation of a joint media authority for both *Länder*.

This idea was criticised by the *Hamburgische Anstalt für neue Medien* (Hamburg new media authority - HAM) and the *Unabhängige Landesanstalt für Rundfunk und neue Medien* (independent regional authority for broadcasting and new media - ULR) in a statement dated 6 March 2006.

The statement argued that the role of the joint media authority would essentially be limited to authorising and monitoring broadcast channels. This

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● Statement of 6 March 2006, available at:
<http://merlin.obs.coe.int/redirect.php?id=10087>

DE

DE – ZDF Joins ARD's Constitutional Court Appeal

In the so-called "licence fee dispute", *Zweites Deutsches Fernsehen* (ZDF) has now turned to the *Bundesverfassungsgericht* (Federal Constitutional Court) and, on 6 March 2006, joined the appeal that was submitted to the Court by the first German public TV channel, ARD, in October 2005 (case no. 1 BvR 2270/05; see IRIS 2005-10: 10). The deadline for appeals in this matter is 31 March 2006. The appeal concerns the adoption of the 8. *Rundfunkänderungsstaatsvertrag* (8th Amendment to the Inter-State Broadcasting Agreement), through which the Minister-Presidents of the *Länder* increased the broadcasting licence fee by a sum different from the figure proposed by the *Kommission zur Ermittlung des Finanzbedarfs der Rundfunkanstalten* (Committee for the Establishment of the Financial Needs of the Broad-

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● ZDF press release of 6 March 2006, available at:
<http://merlin.obs.coe.int/redirect.php?id=10088>

DE

DE – Cable Operator as Broadcaster

Arena Sportrechte und Marketing GmbH, a 100% subsidiary of the largest cable network operator in North Rhine-Westphalia (Unity Media), has been granted authorisation to operate a national TV channel, "Arena Bundesliga", by the *Landesanstalt für Medien Nordrhein-Westfalen* (North Rhine-Westphalia Media Authority - LFM). However, this decision remains subject to the approval of the *Kommission zur Ermittlung der Konzentration im Medienbereich* (Commission on Concentration in the Media - KEK). The KEK represents the relevant *Land* media authority in licensing procedures and ensures compliance with the provisions designed to safeguard plurality of opinion on television. In such procedures, the KEK deci-

would not be in keeping with a modern approach to new media regulation. Rather, the joint body should also be responsible for advising broadcasters and other content providers, promoting the dual broadcasting system and technical infrastructure, particularly for new broadcasting technologies, supporting media competence, media research and promoting film aid in both *Bundesländer*.

If these tasks were entrusted to *Norddeutsche Rundfunk* (NDR), the balance of power of a dual broadcasting system would be jeopardised.

All in all, the proposal was considered unsuitable in the age of digitisation and media convergence. In particular, limiting the authority's role to the licensing of broadcasters was not a modern approach. The statement also criticised the plan to make many of the statutes and the budget of the media authority subject to approval, since this would represent excessive interference by the state. ■

casting Authorities - KEF). According to the ZDF Director General, this latest decision was triggered by the unwillingness of the Broadcasting Commission of the *Länder* to discuss ZDF's proposal for a new procedure for fixing the licence fee. As a result, a consensual, constructive solution would not be possible before the deadline for appeals expired. Furthermore, there were reasons to suggest that, during the appeal proceedings, the *Bundesverfassungsgericht* would consider not just the issue of the fixing of the licence fee, but also the basic functions and financing of public service broadcasting. For this reason, it was important that ZDF should be able to voice its opinions as a legitimate party in the proceedings. According to the Director-General, ZDF was taking this step not in order to have the decision on the licence fee changed, but in order to create legal clarity and certainty for all parties – *Länder* and broadcasters – in the future.

The press reported that, on 13 March 2006, *DeutschlandRadio* were also joined in the appeal to the Constitutional Court. ■

des whether a company obtains a controlling influence over public opinion as a result of the channels it operates, or a change to its ownership structure or both.

This case is unusual because it involves vertical integration. It is the first time an infrastructure operator has also sought to become a content provider. Arena purchased the pay-TV rights to broadcast Bundesliga matches from the German Football League (DFL) in December 2005. Another infrastructure operator, T-Online, a subsidiary of Deutsche Telekom AG, acquired the equivalent Internet rights.

At its meeting on 31 January 2006, the *Direktorenkonferenz der Landesmedienanstalten* (Conference of Directors of the *Land* Media Authorities - DLM) discussed the media law consequences of the sale of German Bundesliga broadcasting rights to

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cable network operators. It stressed that a broadcasting licence was required to transmit Bundesliga matches via telephone networks (DSL and mobile networks). The concept of broadcasting was made up of elements such as its widespread impact, influence on opinion and topicality; due to technical advances, the same now applied to transmissions via telephone networks. With regard to the rights acquired by

● Press release of the LFM of 10 March 2006, available at:
<http://merlin.obs.coe.int/redirect.php?id=10091>

● Press release of the DLM of 1 February 2006, available at:
<http://merlin.obs.coe.int/redirect.php?id=10092>

DE

FR – Court of Cassation Pronounces on Private Copying versus Technical Protective Devices

One week before the examination of the bill to transpose into French law the Directive no. 2001/29/EC of 22 May 2001 on copyright and neighbouring rights in the information society was to resume, the Court of Cassation joined the forum by delivering a notable decision on the use of technical protective devices in relation to private copying. A case involving “Mulholland Drive” had been brought before the Court (see IRIS 2004-7: 9 and IRIS 2005-6: 13), in which an individual, backed by a consumer association, complained that he was unable to make a video copy of the DVD of the film he had bought because technical anti-copying measures had been applied to the digital medium but had not been clearly indicated on the cover. The individual and the association claimed that such technical protective measures infringed the user’s right to make a private copy recognised by Articles L. 122-5 and L. 211-3 of the Intellectual Property Code. The Court of Appeal in Paris, having noted that private copying was merely an exception available to users and not a right recognised in absolute terms, upheld their claim last April, judging that the exception could not be limited if French law had no corresponding provision, and that in the absence of blameable misuse, proof of which had not been furnished, the making of one copy for private use was not such an infringement of the normal exploitation of the work in DVD form. The Court of Cassation overturned this judgment, on the basis of Articles L. 122-5 and L. 211-3, interpreted in the light

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● Court of Cassation (1st chamber, civil section), 28 February 2006, *Studio Canal, Universal Pictures Video France and SEV v. S. Perquin and UFC Que Choisir*; available at:
<http://merlin.obs.coe.int/redirect.php?id=8885>

FR

FR – Urgent Authorisation to Pre-view a Disputed Report

Article 809 of the New Code of Civil Procedure entitles a judge sitting in urgent matters, called an “emergency” judge, to take any precautionary or

T-Online, the DLM also pointed out that if Deutsche Telekom or one of its subsidiaries were to provide a service that required a licence, the latter’s 37% share in Deutsche Telekom would throw open the question of whether it was entitled to a licence.

Finally, in the DLM’s opinion, access to the respective platform should also be available to other operators, in case the network operators should link the Bundesliga service with other content and telecommunications services. The minimum requirements in this respect were the disclosure of the conditions and a clear separation of broadcasting and telecommunications activities, in order to guarantee access without discrimination.

of the provisions of Directive No. 2001/29/EC of 22 May 2001 and Article 9.2 of the Bern Convention. The Court began by recalling firstly that these texts uphold the “three-step test”, according to which the reproduction of works protected by copyright may be authorised, in certain special cases, on condition that it does not infringe the normal exploitation of the work and does not cause unjustified prejudice to the author’s legitimate rights. It then stated that the exception for private copying (which was not a right to make a private copy) could not stand in the way of the application to media on which a protected right was reproduced of technical protective devices intended to prevent copying where this would have the effect of causing prejudice to the normal exploitation of the work, which should be appreciated by taking into account the economic effect such a copy could have in the context of the digital environment. In the present case the Court of Cassation, unlike the court of appeal, held that, in view of “the economic importance the exploitation of a work in DVD form represents in amortising the cost of cinematographic production, the exception for private copying should cease to exist as it causes prejudice to the normal exploitation of the work”. The consequences of the decision were not slow in appearing – on 14 March, when the bill was examined in Parliament, Amendment 30, which would have made the making of a copy of a DVD legal, was withdrawn, whereas technical protective devices were legalised. It should now be for a panel of mediators to determine the number of private copies that may be made of any work. In conclusion, as “Maitre Eolas” posted in his famous blog (<http://maitre.eolas.free.fr/>), “the Court of Cassation has begun to apply the law even before its adoption!” on 21 March by the Assembly, before being examined by the Senate. ■

reparatory measures that may be necessary, particularly in order to prevent the imminent occurrence of damage. On the basis of this, a number of individuals applied to the judge sitting in urgent matters in Paris to request a pre-viewing of a report that was to be broadcast that evening and which they believed

would infringe their personal rights as to their character. The report at issue, concerning arms dealers, showed the police search of their home and the pharmacy they ran. A cameraman from the television channel had followed and filmed the police as they worked, despite the protestations of the persons concerned. The judge sitting in urgent matters that morning upheld their application, so the television channel lodged an appeal against the decision. The matter was therefore taken, on the afternoon the broadcast was to take place, before the 14th chamber of the court of appeal in Paris, which is competent to deal with urgent matters.

The Court began by recalling the fundamental principle according to which “the prior control over information may only be envisaged if the alleged infringement of personal rights as to character is not purely an eventuality and if the danger is sufficiently constituted and manifest as to constitute the beginnings of proof of an abuse of freedom of expression”. In the present case, the persons concerned were not subsequently prosecuted. What is more, their description of the circumstances of the search concurs with the trailer for the disputed broadcast in various media, namely “A pharmacist has been held for questioning on the illegal possession of war weapons. He is neither a robber nor a terrorist – he’s

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● Court of appeal in Paris (14th chamber, section B), 2 February 2006, France 2 v. Compain et al.

FR

FR – CSA Inflicts Heavy Penalty on Skyrock Radio

On 31 January 2006, the *Conseil supérieur de l’audiovisuel* (audiovisual regulatory body – CSA) fined Skyrock radio EUR 50,000 for broadcasting comments likely to cause offence to listeners under the age of 16. Under Article 15 of the Act, as amended, of 30 September 1986, the CSA has a duty to “ensure the protection of children and young people”, and it was on this basis that the CSA sent a recommendation to radio stations on 10 February 2004 prohibiting them from broadcasting programmes likely to cause offence to listeners under the age of 16 between 6 am and 10.30 pm. Skyrock broadcasts a phone-in programme which often gets out of control. On 17 December 2004, the CSA had already served notice on the station to observe its recommendation and to refrain from broadcasting inappropriate comments before 10.30 pm. Despite this formal notice, the CSA

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● CSA decision of 31 January 2006

FR

GB – Wide-Ranging Report into Media Literacy Published

According to Section 11 of the Communications Act 2003, “It shall be the duty of OFCOM to take such

a collector.” They were also concerned that the television channel claimed that journalists were not bound by the secrecy of investigation. On the basis of all this, the Court concluded that there were indeed elements of serious proof, and that the broadcast of the images at issue were such as to constitute imminent and definitive damage in respect of the applicants if the necessary steps were not taken to ensure that they could not be identified. It continued that refusing them the possibility of viewing the report before the broadcast although they provided proof of the seriousness and imminence of the damage they claimed they would suffer, and preferring to leave the journalists to ensure themselves the protection of the individual rights of the persons involved, would even be contrary to Article 6-1 of the European Convention on Human Rights.

The Court then took care to list the guarantees necessary for such an “intervention” – viewing would not infringe the freedom of expression if it took place in the presence of the judge, who would guarantee a balance of the various rights at issue, which were of equal value and deserved equivalent protection, and control would not cover the content of the broadcast but only the way in which the television channel ensured respect for the rights of the parties involved. The Court therefore ordered the television channel to communicate the recording for the purpose of viewing before the Court on the same day, in the presence of the parties and their counsel. ■

noted on five occasions between January and May 2005 comments by programme moderators and listeners made on the air describing certain sexual practices in a crude, detailed and banal way between 9 pm and 10.30 pm. The CSA held that these comments were likely to cause offence to listeners under the age of 16 and as such should not be broadcast earlier than 10.30 pm, and that the radio station had disregarded the official notice that had been served on it. The CSA therefore implemented its power of sanction under Article 42-1 of the amended Act of 30 September 1986. The CSA had the choice of suspending the programme at issue for a maximum of one month, reducing the duration of the agreement subject to a one-year limit, inflicting a fine, or cancelling the station’s agreement, and the CSA chose to inflict a fine which, according to the terms of Article 42-2 of the amended 1986 Act, should reflect the degree of seriousness of the fault committed. The CSA therefore decided to fine the radio station EUR 50,000. ■

steps, and to enter into such arrangements, as appear to them calculated (a) to bring about, or to encourage others to bring about, a better public understanding of the nature and characteristics of material published by means of the electronic media; (b) to

bring about, or to encourage others to bring about, a better public awareness and understanding of the processes by which such material is selected, or made available, for publication by such means;...”

To that end, the Media Literacy Unit published the “most comprehensive audit of media literacy ever undertaken in the UK” in February 2006.

A total of 3,244 UK-wide respondents were interviewed and the audit “focuses on the four main digital platforms, with analogue TV and radio included where relevant.”

The report identifies a number of “key themes” (i.e. not “conclusions”), for example:

- Age is a significant indicator of the extent and types of media literacy;

- Knowledge of industry funding and regulation across platforms varies. A significant majority of respondents (over 75%) know how the television industry is funded and that it is regulated. Over half of UK adults know how radio is funded and that it is regulated. Two in five internet users know how search engine websites are funded, although this drops to one quarter of UK adults as a whole.
- Levels of concern about content vary across platforms, with little concern about mobile phone content...[A] sizeable minority of internet users are not confident about blocking viruses or email scams;
- Many people, especially the elderly, say they prefer to learn media skills from family and friends, or by themselves rather than in formal groups.

This report is just the first in a series. Later media literacy reports will focus on children; minority ethnic groups; older people; people with a disability; and those living in the “devolved nations” (Scotland and Wales) and the English regions. ■

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● **Communications Act 2003, Section 11: Duty to promote media literacy, available at:**
<http://merlin.obs.coe.int/redirect.php?id=10055>

● **Ofcom Media Literacy Audit - Report on adult media literacy, available at:**
<http://merlin.obs.coe.int/redirect.php?id=10056>

● **Ofcom Media Literacy Bulletins, available at:**
<http://merlin.obs.coe.int/redirect.php?id=10057>

EN

GB – New Unit to Combat Film Piracy

A unit to combat film piracy has just been established as a joint venture between the Metropolitan Police and the Federation Against Copyright Theft (FACT).

The Film Piracy Unit has been established within the Police’s Economic and Specialist Crime Command

and “will investigate those individuals and organizations involved in the illegal activity in the area of film piracy” e.g., the manufacture and distribution of counterfeit film products. Where such individuals or organizations have profited from such activity, the confiscation powers in the Proceeds of Crime Act 2002 may be brought into play.

The Unit will also collate information on trends and activity in this area. However, the Unit will operate initially for a year. It aims to become “the ‘centre of excellence’ for the investigation of film piracy offences and, a source of advice, guidance and support to other police forces in respect of such investigations”. ■

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● **“Met joins forces with FACT to target film crime”, press release of 23 February 2006, available at:**
<http://merlin.obs.coe.int/redirect.php?id=10058>

● **“Metropolitan Police Film Piracy Unit”, press release of 23 February 2006, available at:**
<http://merlin.obs.coe.int/redirect.php?id=10059>

EN

HU – Draft Act on the Digital Switchover

The Government submitted a draft act “on the Rules of Digital Broadcast Transmission” to the Parliament. The proposal aims at creating the necessary legal preconditions for the introduction of digital broadcasting services in Hungary, with special regard to digital terrestrial television (DTT) services. The background of the proposed bill is provided by Act No. C. of 2003. on Electronic Communications.

The main provisions of the draft are as follows:

- The definition of the legal status of the multiplex service providers;
- A basic set of rules concerning interoperability of networks and devices used for the transmission or reception of digital services;

- The transposition of the provisions of the Access Directive related to conditional access systems;
- A basic set of rules concerning electronic programme guide services;
- Detailed provisions on questions of frequency allocation for the purposes of digital broadcasting services;
- 2012 as the date of analogue switch-off in Hungary.

In addition to these questions the bill also describes the basic institutions responsible for coordinating the process of digital transition in Hungary. In this respect the role of *Digitális Átállást Koordináló Bizottság* (the Commission Coordinating the Digital Switchover) has to be noted. It is planned as an intergovernmental body that also includes a representative of *Országos Rádió és Televízió Testület*

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(the National Radio and Television Commission - ORTT), the independent regulatory authority for the media. The main role of this coordinating body would be to elaborate and to execute the national strategy for digital switchover.

• **T/19081. számú törvényjavaslat a digitális műsorterjesztés szabályairól (Bill No. T/19081. on the Rules of Digital Broadcast Transmission), available at:**
<http://merlin.obs.coe.int/redirect.php?id=10079>

HU

IE – ISPs Ordered to Disclose Details of File-Sharers

The High Court on 24 January made an order requiring three ISPs to hand over to four record companies the names, addresses and telephone numbers of 49 alleged file-sharers. The first such order had been made by the Court in July 2005 (see IRIS 2005-10: 15). The file-sharers in the recent case were all alleged to have downloaded between 500 and 5,000 files, in breach of s.140 of the Copyright and Related Rights Act 2000 (see IRIS 2000-8: 13). The music companies intend to take infringement proceedings against the file-sharers. Mr. Justice Kelly described the activity as a modern form of thieving. He said it had been in operation “on a very substantial scale

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• **EMI Records (Ireland) Ltd, Sony BMG Entertainment (IRL) Ltd, Universal Music Ireland Ltd and Warner Music Ireland Ltd v Eircom Ltd, BT Communications Ireland Ltd and Irish Broadband Internet Services Ltd, High Court, Kelly J., 24 January 2006**

EN

KZ – New Rules of Entrepreneurial Activities Affect Mass Media

The Statute of the Republic of Kazakhstan “On entrepreneurial activities” was enacted on 31 January 2006 along with the Statute introducing a number of amendments to current legislation, including the Statute “On the Mass Media” of 23 July 1999.

The Statute “On entrepreneurial activities” establishes general principles of entrepreneurial business: rights, duties and liability of entrepreneurs, the competence and liability of governmental authorities, rules of the governmental support as well as of the supervision of business activities. The Act includes a number of provisions that are important for the mass media: first, it provides for the guarantees of information rights of entrepreneurs; second, it regulates procedures of the state supervision of entrepreneurs’ activities.

According to the Statute, the government shall provide entrepreneurs with information support. Article 5 of the Act provides for the publication (including dissemination via Internet) by governmental agencies of any bill or draft of a legal document that may potentially affect business activities; such agencies shall be obliged to set up web-sites *inter alia* for this purpose (Art. 23). The Statute pro-

According to the draft, Act No. I. of 1996 on Radio and Television Broadcasting (the Broadcasting Act) will stay untouched. As a result of this, licensing of the broadcasters would remain the responsibility of the ORTT, as also in the case of digital broadcasting.

The debates on the draft took place in February 2006 in the Parliament. The final vote is expected to be held at the following session. ■

over a lengthy period of time” and that the record companies had no other way of getting the information.

He acknowledged the rights to privacy and confidentiality but said that those rights had to be weighed against the wrongful activities perpetrated against the record companies. The ISPs did not oppose the making of the order but did seek, and were given, undertakings by the record companies that they would use the information only for the specific purposes for which it was given. The record companies accepted that the ISPs were innocent parties in the case and that, therefore, their reasonable costs, including the costs involved in extracting the required information, should be paid by the plaintiffs. Since the first High Court order of July 2005, the Irish Recorded Music Association (IRMA) has settled with a number of file-sharers for an average of EUR 2,500 and is suing a few others. ■

claims the right of entrepreneurs to obtain information and consulting services financed by the government, as well as to access information resources that are managed by governmental authorities (Art. 18).

The Statute regulates general rules of supervision activities in a very detailed way; at the same time it provides for the introduction of any specific procedure only in accordance with the statutes of the Republic of Kazakhstan (Art. 38). Article 37 prohibits supervisory authorities from adopting subordinate legislation changing or modifying rules of the supervision procedures. In the appendix to the Statute the supervisory functions are reallocated between the governmental agencies: the authorized body in the sphere of the mass media (the Committee of Information and Archives at the Ministry of Culture, Information and Sports) shall supervise the legality of the mass media activities; the authorized body in the sphere of justice (the Committee of Intellectual Property Rights at the Ministry of Justice) shall supervise the legality of the use of intellectual property rights as well as supervising the publication of texts of official acts.

According to the second Statute introducing amendments to the current legislation, an Article 4.1 (“Governmental supervision”) was integrated into the Statute “On the Mass Media”. The supervision is

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aimed at providing compliance of natural and legal persons with the mass media legislation (p.1 Art. 4.1). Point 3 of this Article stipulates that the governmental supervision shall be conducted by the authorized body in the sphere of the mass media and by local authorities in the form of inspections. There

● Statute of the Republic of Kazakhstan N 124 "O chastnom predprinimatelstve" ("On entrepreneurial activities"), published in *Kazakhstanskaya pravda* (official publication) on 7 February 2006, available at: <http://merlin.obs.coe.int/redirect.php?id=10048>

● Statute of the Republic of Kazakhstan N 125 "O vnesenii izmenenii i dopolnenii v nekotorye zakonodatelnye akty Respubliki Kazakhstan po voprosam preprinimatelstva" ("On amendments and addenda to several legislative acts of the Republic of Kazakhstan in the sphere of entrepreneurship") published in *Kazakhstanskaya pravda* (official publication) 14 February 2006, available at: <http://merlin.obs.coe.int/redirect.php?id=10049>

RU

LT – Licences for Digital Broadcasters Awarded

On 14 February 2006 the Radio and Television Commission of Lithuania (RTCL) summed up the results of the tender for digital terrestrial television broadcasting, announced in October 2005 (see IRIS 2006-1: 17).

The tender was invited following the "Model for the Implementation of Digital Terrestrial Television in Lithuania" (see IRIS Merlin 2005-1 Extra), which was approved by the Government on 25 November 2004. The Model envisages terms and stages of the implementation of digital terrestrial television. Following the Model, the implementation of the digital terrestrial television will be carried out in stages by four digital television (DVB-T) networks (see IRIS 2006-1: 17).

The tender for digital terrestrial television was a great success. Six television broadcasters and three rebroadcasters applied with the request to participate in the tender. They offered twelve original TV programmes as well as packages of rebroadcast programmes, which altogether amounted to over 100 programmes.

On 1 March 2006 digital terrestrial television licences to broadcast their own original programmes were granted to the following broadcasters: UAB "Baltijos TV" (2 programmes), UAB "Laisvas ir neprik-

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● Decisions of the RTCL on the results of the tender for digital terrestrial television broadcasting, dated 14 February and 1 March 2006, available at: <http://merlin.obs.coe.int/redirect.php?id=10080>

LT

LV – Draft Act on Political Advertising in Electronic Media

On 9 March 2006 the *Saeima* (Parliament of the Republic of Latvia) adopted in the second reading a draft law, prohibiting any political advertising in electronic media within 90 days before the elections to the *Saeima* and the European Parliament.

are three types of such procedures to be found in point 4 of Article 4.1. Planned inspections mean procedures that shall be planned beforehand and take place only within fixed periods of time. *Ad hoc* inspections shall be required by specific social-economic situations calling for an immediate reaction to the complaints of representatives of public. Finally, "patrol" inspections are aimed at control over compliance with the law of licensing documentation (e.g. broadcasting license, registration certificate of a mass media outlet). The duration of any inspection shall not exceed 15 days from the date when relevant order is served upon by the governmental agency to a mass medium (p. 5 Art. 4.1). ■

lausomas kanalas" (2 programmes), UAB "Tele-3" (2 programmes), UAB "K" (2 programmes), UAB "Spaudos televizija" (1 programme). Two positions were reserved for programmes of the Lithuanian National TV, the public broadcaster, which was granted the right to broadcast those programmes without a rival.

The licences to rebroadcast programmes were issued to UAB "Mikrovisata", MMDS operator (24 programmes) and UAB "Tele-3" (5 programmes).

The winners of the tender acquired the right to broadcast or rebroadcast television programmes in the territory of Lithuania using the transmission services of the Lithuanian Telecom and Lithuanian Radio and Television Centre, the transmission providers, who had previously won the tender for providing digital transmission services over four DTT networks.

As all the applicants chose MPEG-4 compression, it will enable the Lithuanian audience to view 40 digital television programmes. Transmission of these programmes in Vilnius, the capital of Lithuania are planned to start by the end of 2006. Five other big towns will be able to access digital TV by the end of 2007.

In accordance with the "Plan for the Implementation of Digital Terrestrial Television", at least one of the digital TV networks will have to cover no less than 95 per cent of the territory of Lithuania by the beginning of 2009. The gradual switch-over period from analogue to digital terrestrial television will start in 2012. Until then, both analogue and digital television will be operating in Lithuania. ■

Initially it was proposed that political advertising within 90 days before the elections should be prohibited in all the media. However, at the sitting of 9 March 2006 *Saeima* decided that the prohibition with respect to the printed media should be deleted from the draft. Thus, the prohibition would apply only to radio, television, and outdoor advertisements.

The draft law has been severely criticized by elec-

tronic media, including the Latvian Association of Broadcasters. The broadcasters claim that such a provision would involve their being discriminated *vis-à-vis* the printed media. Also, it would constitute an unjustified restriction of freedom of speech, as a certain part of population would not have access to information on candidates and political organisations. In addition, taking into account that the next elections of the *Saeima* will take place in October 2006, it is claimed that the prohibition will be introduced too late and without sufficient warning: some broadcasters have indicated that they have already concluded agreements on the broadcasting of political advertising before the elections. The broadcasters have publicly stated that if the prohibition comes into force, they intend to apply to the constitutional court.

One of the potential threats is the broad definition of "pre-election agitation" to which the prohibition applies. According to the draft, it includes "advertising of a certain political organisation, a union of political organisations, or an individual candidate in mass media, if it contains a direct or indirect invitation to vote for or against a certain political organisation, a union of political organisations, or an individual candidate".

If the definition were to be interpreted broadly, this might include even opinions and analytical

reports. However, a systematic interpretation of the law does not lead to such conclusions. Other sections of the law presuppose that the pre-election agitation is paid for: the law includes a requirement of non-discriminatory payment conditions, it also stipulates that after the elections all the broadcasters have to report the payments received to the National Broadcasting Council. Also, the law includes an interesting clause that the journalists of public broadcasting companies may not pursue agitation for or against candidates within 60 days before the elections (i.e., a period shorter than the 90 days prohibition). Moreover, the law specifically states that its provisions do not apply to statements of fact in news broadcasts and direct reporting. These features point to a narrow interpretation, namely, that the prohibition applies only to paid political advertising in its direct meaning. However, much will depend on the interpretation by the authorities, such as the National Broadcasting Council which supervises the compliance of broadcasters with the advertising rules (including political advertising). In its press release of 8 March 2006, the National Broadcasting Council expressed its objections to the law, claiming that the amendments would introduce an unjustified restriction on the freedom of speech, create financial problems for broadcasters, as well as contribute to an increase in the frequency of hidden political advertising.

The amendments still have to be adopted in the third reading. As the deadline for proposals to the third reading was 15 March 2006, the final reading might take place by the end of March. As the final possibility, even if the amendments are adopted, the President has the authority to send them back to *Saeima* for review. ■

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● Draft Amendments to the Law on Pre-Election Agitation before the Elections of *Saeima* and European Parliament, adopted in 2nd reading on 9 March 2006, available at:
<http://merlin.obs.coe.int/redirect.php?id=10081>

● Act on Pre-Election Agitation before the Elections of *Saeima* and European Parliament was adopted on 9. August 1995, in force as of 12 August 1995, published in *Latvijas Vēstnesis*, 11 August 1995, no. 120

LV

MK – Broadcasting Act Enters into Force

A new Law on Broadcasting Activity entered into force in the Republic of Macedonia on 29 November 2005. One of its purposes is to bring domestic law into line with the EU Television Without Frontiers Directive.

The Law is divided into 17 chapters and comprehensively regulates many different aspects of broadcasting. It begins by defining certain terms and dividing broadcasters into public, commercial and non-profit broadcasting companies. The highly detailed Chapter III is devoted to the protection of pluralism, diversity and transparency of the work of broadcasters. In order to control illegal media concentration, it requires broadcasters, for example, to inform the Broadcasting Council about any change to their ownership structure. The Law explains in detail the kinds of shareholdings that broadcasters may not own in other media companies (daily newspapers, other television broadcasters, as well as news agencies and advertising agencies).

Following provisions on the Broadcasting Council (Chapter IV), Chapter V describes the licensing procedure, licence fees and the possible revocation of licences. Chapter VI of the Law deals with programme standards in the broadest sense. Programmes must take into account factors such as freedom from discrimination, copyright and the protection of minors. Quotas for Macedonian programmes are laid down, as well as a list of major events which must be freely accessible to all.

The content, insertion and duration of advertising are regulated in detail in Chapter VII on advertising, teleshopping and sponsorship. Different regulations apply for public and commercial broadcasters.

The technical aspects of broadcasting are regulated in the chapter on the transmission of programmes via public communication networks (Chapter VIII) and the chapter on the public operator for transmission of radio and television signals (X). Chapter XIII covers access to information and makes provision for the right to short reporting. Other

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chapters contain provisions on public broadcasting (IX), the financing of broadcasting (XI), the right to

● Law on Broadcasting Activity, available at:
<http://merlin.obs.coe.int/redirect.php?id=10084>

EN

NL – Dutch Court Upholds Creative Commons License

On 9 March 2006, the District Court of Amsterdam, judging in summary proceedings, rendered a decision involving the validity of a Creative Commons (CC) license, a first in the Netherlands. Local media celebrity, Adam Curry, had published photos of his family on a website (www.flickr.com) under a Creative Commons Attribution-Noncommercial-Sharealike license. The photos also carried the notice 'This photo is public'. The Dutch weekly 'Weekend', a gossip magazine, had reproduced four photos in a coverage of the celebrity's children without seeking his prior consent.

Curry sued 'Weekend' for copyright and privacy infringement. Regarding the copyright claim, 'Weekend' argued that it was misled by the notice 'this photo is public', and that the link to the CC license was not obvious. Audax, the magazine's publisher, alleged that it was informed of the existence of the CC license only much later by its legal counsel. Thus, 'Weekend' had assumed in good faith that authorization from Curry was not necessary. Moreover, the defendants argued, Curry had not incurred any damages by the publication of the photos in the magazine, since these were freely available to the public on "flickr".

The Court rejected the magazine's defense, and held as follows:

"All four photos that were taken from www.flickr.com were made by Curry and posted by

reply (XII) and the protection of sources of information (XIV). The final chapters deal with supervision of the enforcement of the law (XV), penalty provisions (XVI) and transitional provisions (XVII). ■

him on that website. In principle, Curry owns the copyright in the four photos, and the photos, having been posted on that website, are subject to the [Creative Commons] License. Therefore Audax should observe the conditions which control the use by third parties of the photos as stated in the License. The Court understands that Audax was misled by the notice 'This photo is public' (and therefore failed to take note of the conditions set out in the License). However, a professional party such as Audax can be expected to conduct thorough and precise research before publishing photos in 'Weekend' originating from the internet. If it had carried out such an investigation, Audax would have clicked on the symbol accompanying the notice 'some rights reserved' and found the (short version of) the License. In case of doubt as to the applicability and the contents of the License, it should have requested authorization for publication from the copyright holder of the photos (Curry). Audax has failed to perform such a thorough investigation, and has assumed too easily that publication of the photos was allowed. Audax has not observed the conditions stated in the License [...]. The claim [...] will therefore be accepted; defendants will be enjoined from publishing all photos that [Curry] has posted on www.flickr.com, unless this occurs in accordance with the conditions of the License".

The Dutch Court's decision is especially noteworthy because it confirms that the conditions of a Creative Commons license automatically apply to the content licensed under it, and bind users of such content even without their express agreement to, or knowledge of, the conditions set out in the license. ■

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● LJN: AV4204, *Rechtbank Amsterdam, 334492 / KG 06-176 SR* (decision of the the District Court of Amsterdam of 9 March 2006), available at:
<http://merlin.obs.coe.int/redirect.php?id=10067>

NL

NL – Proposal for a Revision of the Public Broadcasting System by 2008

In June 2005, the Dutch Cabinet announced its point of view regarding the future of the Dutch public broadcasting system, in a provisional draft entitled "*Met het oog op morgen*" ("Focusing on Tomorrow"). The Cabinet wishes to drastically revise the public broadcasting system by 2008 (see IRIS 2005-5: 17 and IRIS 2005-9: 17). The ambitions expressed in the provisional draft have now been converted into a law proposal put forward by the Secretary of State for Education, Culture and Science. In February, the proposal was approved by the coun-

cil of ministers. It has since been submitted to the *Raad van State* (Council of State) for an opinion. If all goes according to plan, the law proposal and the opinion of the *Raad van State* will be presented to the Dutch Parliament this spring.

The proposed changes for the public broadcasting system have caused commotion in the broadcasting sector. According to the Cabinet, the public broadcasting organisations should focus on three typically public functions: the news (including sports); opinion and social debate; and culture, education and other information. The entertainment function will be limited to meaningful entertainment (i.e. entertainment with well-defined purposes). The programming

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should be clearer and tailored to viewers' needs.

In the new structure, The Board of Directors will be responsible for the broadcasting organisations for performing in accordance with the three functions, and will oversee the allocation of funds and broadcasting time to each. The news must continue to be presented objectively and represent different points of view, also, public service broadcasting should equally be a forum for different opinions emanating from civil society. The broadcasting organisations

● *"Ministerraad stemt in met wetsvoorstel publieke omroep 2008"*, Council of Ministers press release of 10 February 2006, available at: <http://merlin.obs.coe.int/redirect.php?id=10051>

● *"Met het oog op morgen"* (Focusing on tomorrow), provisional draft of 24 June 2005, available at: <http://merlin.obs.coe.int/redirect.php?id=10052>

NL

RO – New Audiovisual Content Code

At the beginning of March 2005, the *Consiliul Național al Audiovizualului* (the Romanian regulatory body for electronic media - CNA) adopted a new, partly amended code (*Codul de reglementare al Consiliului Național al Audiovizualului*) summarising all the important legal provisions on audiovisual content.

The code was drawn up following consultations with broadcasters' representatives and the public. With a view to Romania's accession to the EU, it is designed to bring the country's legislation into line with existing EU regulations. The 160 articles of the code are divided into chapters regulating the protection of minors, the protection of human dignity and personal image rights, the right to reply and correction, the safeguarding of correct information and pluralism, responsibilities with regard to culture, game shows, and conditions for advertising, sponsorship and teleshopping. In particular, the code's

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● *Codul de reglementare a conținutului audiovizual*, available at: <http://merlin.obs.coe.int/redirect.php?id=10085>

RO

RU – New Advertising Statute

On 22 February 2006 the State Duma (parliament) of the Russian Federation adopted the Federal Statute "On Advertising". It replaces the statute of the same name of 1995 (see IRIS 1995-9: 9).

The new statute has six chapters and 40 articles.

Under advertising the statute understands the distribution of information in any form with the help of any media, which is intended for an indeterminate group of persons and is directed at forming or supporting interest in the objects of advertising and facilitating market advancement of such objects. As

will receive a fixed amount of money for opinion-making programs, and receive a guarantee that the programs will be broadcast.

The Cabinet wishes to adapt the tasks and structure of the public broadcasting organisations to recent digital developments. Radio, television, internet and mobile telephony should merge and interact to attract younger viewers. In order to protect the youngest viewers, there will no longer be commercial breaks during children's programs' broadcasting time. According to the Cabinet, as of 2008, the organisations should be able to engage in commercial activities. This way, they will be challenged to become creative entrepreneurs which, it is hoped, will lead to improved quality programming. ■

provisions on the protection of minors have been substantially amended. In future, broadcasters will not be allowed to broadcast interviews with children under 14, nor their statements or reports on dramatic family events, apart from statements provided to a court. This measure is designed to prevent journalists from interviewing child victims. Children under 14 may only participate in a broadcast programme with the written consent of a parent or legal guardian.

Meanwhile, television programmes that were previously meant only for viewers aged 16 or over will in future be classified as suitable for those aged 15 or over. Under another provision, programmes that depict methods of suicide, describe details of criminal acts or focus on exorcism, occultism or paranormal phenomena may not be broadcast between 6 am and 10 pm. Images filmed using a hidden camera must not cause annoyance or harm to the persons concerned, nor put them in degrading or risky situations.

The new code is expected to enter into force in March 2005, when it is due to be published in the Romanian Official Gazette. ■

before the statute does not regulate political advertising.

The statute introduces the notion of "sponsor's advertising", or advertising distributed on condition of mentioning the sponsor. There are fewer restrictions for such advertising than for general advertising.

With regard to advertising on television, it sets the new limits for its amount: 15 percent per hour (at present – 20 percent), effective 1 January 2008, and 15 percent per day (at present also 20 percent), effective 1 July 2006. These limits include teleshopping, but exclude announcements made by the broadcaster in connection with its own programmes.

Advertising and tele-shopping shall not use subliminal techniques. The statute refrains from regulating product placement and virtual advertising. There are no restrictions on advertising and tele-shopping to feature persons regularly presenting news and current affairs programmes. No restrictions exist for frequency of advertising either in news and current affairs programmes, or in children's programmes, when their duration is less than fifteen minutes.

The statute does not prohibit an advertiser from exercising any editorial influence over the content of programmes (Russia is not a party to the European Convention on Transfrontier Television).

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● **Federalnyi Zakon "O reklame" (Federal Statute "On Advertising")** was officially published on 15 March 2006 in *Rossiyskaya gazeta*, available at: <http://merlin.obs.coe.int/redirect.php?id=10050>

RU

The statute prohibits advertising of alcoholic beverages and tobacco products in broadcasting, but allows advertising of beers and beer products on TV from 10 p.m. till 7 a.m., and on radio from midnight till 9 a.m. local time. Advertising for medicines and medical treatment which are only available on medical prescription shall not be allowed in broadcasting. Advertising of lotteries, gambling and casinos in broadcasting is allowed in broadcasting from 10 p.m. till 7 a.m. only.

The statute contains detailed restrictions regarding advertising in children's programmes, as well as advertising of financial services, weapons, medicines, food supplements, etc.

The statute excludes paid TV with the use of decoding devices from restrictions that exist in regard to advertising of the above goods in regular TV. ■

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AGENDA

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