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Dear readers,

in previous years, the fifth edition of IRIS has always contained a summary of the **status of signatures and ratifications of relevant European conventions and other international agreements**. We still consider this information to be extremely important and will continue to publish it, although from now on it will be available on the Internet. This will enable us not only to present the tables much more clearly, but also to provide links to the texts of the agreements and – if the organisations concerned offer such a service – updated lists of signatory states. This “new” service is accessible on our website:

http://www.obs.coe.int/oea_publ/iris/etat_signatures.html

This edition of IRIS also marks a change in terms of personnel, since our colleague Ms Kathrin Berger of the Institute of European Media Law (EMR) took on a new post in May. Ms Berger has written numerous IRIS articles (including one IRIS *plus*) since August 2004, as well as collating and editing many more articles from other correspondents. On behalf of the whole editorial team, we would like to thank Ms Berger for her excellent work and wish her good luck for the future. Ms Nicola Weissenborn will be our new contact at the EMR. ■

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the Department
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The objective of IRIS is to publish information on all legal and law related policy developments that are relevant to the European audiovisual sector. Despite our efforts to ensure the accuracy of the content of IRIS, the ultimate responsibility for the truthfulness of the facts on which we report is with the authors of the articles. Any opinions expressed in the articles are personal and should in no way be interpreted as to represent the views of any organizations participating in its editorial board.

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INTERNATIONAL

UNESCO / CBA

Guidelines for Broadcast Regulation

UNESCO and the Commonwealth Broadcasting Association (CBA) have frequently been requested to offer guidance where new regulatory organisations are set up. In answer to these requests, a handbook outlining regulatory guidelines has been jointly produced by the two international bodies. The main purpose of the handbook is to enlighten stakeholders on the means available to them to preserve and indeed strengthen public service broadcasting against the backdrop of a commercially viable industry.

The issues discussed in the handbook range from jurisdiction over cable and telecommunications as carriers of programmes to spectrum management and broadcasting-related intellectual property. The role of Government in the digital switchover is also

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● Guidelines for Broadcast Regulation, available at:
<http://merlin.obs.coe.int/redirect.php?id=10135>

EN

considered as are the dilemmas concerning regulation that the private and the public sector are faced with. Indeed, regulation of broadcasting in the interest of protecting citizens must be balanced against the need to ensure that fundamental freedoms are not violated. Also, the regulator's independence must be safeguarded while allowing the pursuit of public policy objectives. Finally, an equilibrium must be found between the potentially conflicting rights of the broadcaster, society and the individual.

One of the topics dealt with in the handbook is the licensing of community radio stations, which is of particular interest to UNESCO, as it has always encouraged the allocation of frequencies for radio stations which serve the needs of marginalized groups.

Policymakers, regulators and broadcast media practitioners can rely on this book as a useful reference, and can, in particular, draw ideas from a substantial section outlining national experiences regarding model regulatory objects. ■

COUNCIL OF EUROPE

European Court of Human Rights: Case of Özgür Radyo v. Turkey

In 1998 and 1999 the Istanbul radio station Özgür Radyo was given three warnings and its licence was twice suspended by *Radyo Televizyon Üst Kurulu* (Turkish broadcasting regulatory authority - RTÜK). The first suspension was for a period of 90 days, the second suspension period lasted 365 days. Some of Özgür Radyo's programmes had touched on various themes such as corruption, the methods used by the security forces to tackle terrorism and possible links between the State and the Mafia. The radio station was sanctioned by RTÜK because one programme was considered defamatory and other programmes had allegedly incited people to engage in violence, terrorism or ethnic discrimination and stirred up hatred or offended the independence, the national unity or the territorial integrity of the Turkish State. The radio station turned to the administrative courts for an order setting aside each of the penalties, but its applications were dismissed.

In its complaint to the European Court of Human Rights, Özgür Radyo argued primarily that the penalties that had been imposed by the RTÜK

entailed a violation of Article 10 of the European Convention (freedom of expression). There was no discussion as to the fact that the sanctions (both the warnings and the suspension of the licence) were prescribed by law (Art. 4 and 33 of the Turkish Broadcasting Act n° 3984 of 12 April 1991) and pursued a legitimate aim as listed in Article 10 para. 2 of the Convention. Thus, the decisive issue before the Court was whether the interference with the applicant's right to freedom of expression had been "necessary in a democratic society". In assessing the situation, the Court said it would have particular regard to the words that had been used in the programmes and to the context in which they were broadcast, including the background to the case and in particular the problems linked to the prevention of terrorism.

The Court emphasizes that the programmes covered very serious issues of general interest that had been widely debated in the media and that the dissemination of information on those themes was entirely consistent with the media's role as a "watchdog" in a democratic society. The Court also notes that the information concerned had already been made available to the public. Some of the programmes had only reproduced orally, without fur-

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ther comment, newspaper articles that had already been published and for which no one had been prosecuted. Moreover, Özgür Radyo had been diligent in explaining that it was citing newspaper articles and in identifying the sources. The Court also observes that although certain particularly acerbic parts of the programmes had made them to some degree hostile in tone, they had not encouraged the use of violence, armed resistance or insurrection and did not constitute hate speech. The Court

● **Judgment by the European Court of Human Rights (First Section), case of Özgür Radyo-Ses Radyo Televizyon Yayın Yapım Ve Tanıtım A.fi. t. Turkey, nrs. 64178/00, 64179/00, 64181/00, 64183/00, 64184/00, 30 March 2006, available at: <http://merlin.obs.coe.int/redirect.php?id=9237>**

FR

Parliamentary Assembly: Resolution to Combat Nazi Ideology

On 12 April 2006, the Parliamentary Assembly of the Council of Europe (PACE) adopted Resolution 1495 (2006) entitled "Combating the resurrection of Nazi ideology".

One of its central premises is that contemporary Europe "has been conceived as a total rejection of the Nazi ideas and principles, with the aim to exclude that such horrendous crimes as those committed by the Nazi regime in the name of 'racial superiority' may ever be repeated". It considers that the Council of Europe, "as the oldest European political organisation aimed at protecting and furthering democracy, human rights and the rule of law, has a special responsibility in preventing the resurgence of the Nazi ideology".

The Resolution states that the PACE is "extremely worried over some developments which indicate that the public awareness of the danger of the Nazi ideology and its rejection by society are weakening". It is concerned in particular by the desecration of memorials and graves of "soldiers of the anti-Hitler coalition"; "attempts to rehabili-

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● **Combating the resurrection of Nazi ideology, Resolution 1495 (2006) (Provisional edition), Parliamentary Assembly of the Council of Europe, 12 April 2006, available at:**

<http://merlin.obs.coe.int/redirect.php?id=10120>

EN-FR

Standing Committee on Transfrontier Television: Opinion on Freedom of Retransmission

At its 40th meeting, the Standing Committee on Transfrontier Television had to decide on a request concerning the interpretation to be given to Article 4 of the European Convention on Transfrontier Television (ECTT).

The question was whether freedom of retransmission under Article 4 ECTT allows cable distribu-

tion, strongly underlines that this is an essential factor to be taken into consideration. Finally the Court refers to the severity of the penalties that had been imposed on the applicant, especially in terms of the suspension of the licence, first for a period of 90 days and in a second decision for a period of one year. The latter being the maximum penalty prescribed in Art. 33 of the Turkish Broadcasting Act n° 3984. Taking into account all these elements of the case, the Strasbourg Court considers the penalties disproportionate to the aims pursued and, therefore, not "necessary in a democratic society". Consequently, the Court unanimously holds that there has been a violation of Article 10. ■

tate, justify and even glorify those who participated in the war on the Nazi side [...]" ; the use of Nazi symbols, and the denial or minimisation of the significance of crimes committed by the Nazi regime, in particular the Holocaust.

The PACE is also concerned by "political and social phenomena which, while making no direct reference to the Nazi regime, should be seen in the light of its ideology". These include: "the growing number of manifestations of racial, ethnic and religious intolerance in daily life, including, inter alia, desecration of Jewish cemeteries and attacks on religious sites"; "attempts to create, through the media, a negative perception of some ethnic or religious groups", and "growing support for political parties and movements with a xenophobic agenda".

The PACE calls for the increased coordination of efforts to combat the revitalisation of Nazi ideology, "xenophobia, intolerance and hatred based on racial and ethnic grounds, political and religious extremism and all forms of totalitarian action". It envisages a leading role for the Council of Europe in this respect. It welcomes relevant ongoing activities by various limbs of the Council of Europe, in particular by the European Commission against Racism and Intolerance (ECRI), but urges that the development of such activities should be rendered more inclusive of a wider range of societal actors. ■

tors to freely retransmit broadcast signals from a neighbouring country, that is also Party to the Convention, captured within the spill-over area, without providing evidence of compliance with relevant copyright and neighbouring rights laws.

Following intensive discussions, the Standing Committee concluded that freedom of retransmission as guaranteed by Article 4 ECTT does not constitute an absolute right. As an aspect of the more general right to freedom of expression and to hold

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opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers, it is subject to respect for the principles derived from Article 10 of the European Convention on Human Rights, in particular of its second paragraph. According to this provision, "The exercise [of the right to freedom of expression and to hold opinions and to receive and impart information] may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic

● **Opinion No. 10 (2006) on freedom of retransmission (Article 4), adopted by the Standing Committee on Transfrontier Television at its 40th meeting (10-11 April 2006), available at:**

<http://merlin.obs.coe.int/redirect.php?id=10156>

EN-FR

Steering Committee on the Media and New Communication Services: Working Paper on the Alignment of Defamation Laws with ECHR Case-law

On 15 March 2006, a working paper of the Steering Committee on the Media and New Communication Services (CDMC) on the alignment of the laws on defamation in Council of Europe Member States with the relevant case-law of the European Court of Human Rights (ECHR), including the issue of decriminalisation of defamation, was released. The paper was prepared by the Secretariat at the request of the CDMC following decisions of the Committee of Ministers of the Council of Europe and the 2005 European Ministerial Conference on Mass Media Policy.

The paper, which focuses on the media, provides information on the laws on defamation in Council of Europe Member States, examines the ECHR case-law and outlines other international standards concerning defamation. It also seeks to identify trends in developments concerning the regulation of defamation both in the domestic legal systems and international law.

The term defamation refers to oral or written statements that harm the reputation of others and/or are insulting or offensive. It is often also used in connection with the symbols of the state (e.g. flag or anthem). Article 10 of the European Convention on Human Rights consecrates the fundamental right to freedom of expression, but authorises its restriction *inter alia* for the protection of the reputation of others (a notion distinct from

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● **Steering Committee on the Media and New Communication Services (CDMC), Examination of the alignment of the laws on defamation with the relevant case-law of the European Court of Human Rights, including the issue of decriminalisation of defamation, CDMC(2005)007, Final version, Strasbourg, 15 March 2006. Available at:**

<http://merlin.obs.coe.int/redirect.php?id=10106>

EN-FR

society, (...) for the protection of the reputation or the rights of others, (...)."

The Standing Committee found that in the case in question, the exercise of freedom of retransmission can legitimately be subject to restrictions for the protection of the rights of others as are prescribed by law and necessary in a democratic society, in particular copyright and neighbouring rights of broadcast organisations.

Thus, freedom of retransmission as guaranteed by Article 4 ECTT does not exempt cable distributors retransmitting broadcast signals from a neighbouring country, that is also Party to the Convention, captured within the spill-over area, from compliance with relevant legislation on copyright and neighbouring rights of broadcast organisations. ■

preservation of public order, incitement to violence or hatred, racism and xenophobia).

State interference with freedom of expression can only be justified if it is necessary in a democratic society or, according to ECHR case-law, responds to a 'pressing social need'. When circumscribing the scope for state interference, the Court has paid particular attention to the interests of democracy and the need for public scrutiny and accountability of public figures, to the higher tolerance due to opinion, to the means of defence against accusations of defamation, and to the proportionality of criminal sanctions and civil damages.

The requirements of the ECHR case-law are met in law and/or in practice in many Council of Europe Member States. Indeed, respect for freedom of expression and the media is solidly entrenched in the culture of a number of Member States. But the situation is not the same throughout Europe, and there is no guarantee that legal provisions that have fallen into desuetude remain unused. The risk of criminal or disproportionate civil sanctions can have a chilling effect on desirable public debate and accountability.

In line with the trend that emerges from the ECHR case-law in respect of defamation and the media, the specialised bodies of international or regional organisations have increasingly called for a shift from dealing with defamation under criminal law to handling it under civil non-punitive legal provisions. This call would appear at present to be unanimous.

It might be added that, in Europe, the great differences in the legal treatment of defamation in a context of cross-border media and information services pose a real risk of jurisdiction shopping. This is a source of legal uncertainty.

The CDMC will pursue its work on this subject during its next meeting (to be held between 30 May and 2 June 2006). ■

EUROPEAN UNION

European Commission: Communication on “Digital Divide”

On 20 March 2006, the European Commission issued a Communication addressing the broadband gap which characterizes the European Union’s territory. The communication’s prime concern is to raise awareness among governments and institutions of the lack of adequate broadband services in the less developed areas of the Union. This “digital divide”, which the EU must according to the communication remedy urgently, reflects the gap between individuals, businesses and territories in terms of access and use of ICTs. The Communication stresses that access to high speed internet through broadband connections is paramount to the development of new services and goods and constitutes evidence of the promises of the “information society”.

In particular, such areas as telemedicine and eHealth, eGovernment, education and rural development would benefit from the revolutionary methods being brought about by high speed access to information through broadband connections. Purchase of medical supplies, prescriptions and electronic record keeping will become a reality; Public administrations will benefit from improved organisational performance; Real-time education and video-conferencing will mean life-long learning is a viable option and inter-institutional collaboration a daily exercise; Last but not least rural development will stand to gain as farms and businesses will be connected to national and international markets.

According to the Communication, the gap shows rural areas to lag behind urban areas. This concerns both access to broadband and connection speeds and can be attributed to the fact that low density of population and remoteness entail high costs. Leaving out the New Member States for which no precise data are yet available, 8 % of households located in rural areas as opposed to an average of 18 % in urban centres subscribe to broadband. However, there is optimism to be derived from the rapid pace of technological innovation which is gradually reducing deployment costs. Also, broadband services can be delivered by way of several combinations of communications network technologies (“platforms”) featuring either fixed or radio-based transmission infrastructure. Recent technological developments are offering even more options, for example, new wireless platforms that are particularly suited for rural areas are on the rise. In sum, there is no single technology or solution that will apply to all situations and a combined approach will often lead to the best

solution for each particular case. This will be the task of local authorities who will need to identify the best solutions in line with local needs and technological requirements. They will be assisted in their endeavours to draw up broadband strategies by the EU authorities. The Commission proposes six action lines to this end.

The first concerns the implementation by Member States of the EU regulatory framework for electronic communications. The rationale behind this is that broadband is developing most rapidly in liberalised markets. Enhancing competition is therefore the best way to stimulate the market to develop. This will be achieved by increasing open access and facilitating competition in rural areas. Also, given the importance of wireless solutions in rural areas, the EU Radio Spectrum Policy could lead to improved harmonisation and increase broadband connectivity. To this end, the Commission is working with Member States to harmonise the technical conditions of use in the EU for broadband wireless access applications. Secondly, public funding is considered as it could accelerate broadband deployment in the less profitable areas. Public intervention in the forms of loans and grants as well as fiscal incentives for subscribers are viable options. Thirdly, state aid and competition policy are mentioned. Because state aid can distort competition in the Single Market, when envisaging a project involving such aid, Member States should notify it to the Commission first. The Commission has in past already been asked to assess the impact of state aid in broadband projects and is set to disseminate its practice in this field more widely. Fourthly, the Structural Funds and the Rural Development Fund are cited. These Funds are designed to support regional and rural areas that are lagging behind, taking over where the market fails to produce the desired developments in broadband connectivity. Fifthly, demand aggregation and procurement is considered: fluctuations in demand inhibit commercial investment because of uncertain returns on investment. The aim here is for local authorities to register and assess the local demand in order to team up and consolidate aggregation across several communities. The Commission will assist this process by launching a web site meant to centralize information and encourage the exchange of best practices. Lastly, the promotion of modern public services is called for. This could prove to be an effective instrument to drive broadband demand and the Commission will take into account the impact of e-government services in disadvantaged regions when preparing its Action Plan for e-government this year.

Though these action lines concentrate solely on the geographical broadband digital divide, the latter is a feature of an ampler social and economic development issue pursued in the Commission’s i2010 initiative (see IRIS 2005-7: 5). ■

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● “Bridging the Broadband Gap”, Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions of 20 March 2006, available at:
<http://merlin.obs.coe.int/redirect.php?id=10153>

EN-FR-DE

European Commission: Broadcasting Regulators Encouraged to Reinforce Cross-border Cooperation under the Television without Frontiers Directive

On 24 March 2006, the European broadcasting regulators convened yet again as a follow-up to their first meeting almost exactly a year ago (see IRIS 2005-5: 5). This year's meeting brought together the broadcasting regulators' representatives of the 25 EU Member States and Croatia, Turkey, Norway and Liechtenstein. One of the prime concerns and discussions of the day revolved around combating hate speech while respecting the fundamental freedoms laid down in the European Union Charter of Fundamental Rights. Among the latter, freedom of expression and freedom of the media have an important role to play as cornerstones of a pluralistic democratic society. Though these freedoms must be scrupulously respected, clear forms of incitement to racial or religious hatred in the media must be banned. On-demand audiovisual media services, and technological developments such as digital and mobile tele-

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● "European Broadcasting regulators strengthen their cross-border cooperation under the Television without Frontiers Directive", Press Release IP/06/374, 24 March 2006, available at:
<http://merlin.obs.coe.int/redirect.php?id=10130>

DE-EN-FR

European Commission: French Cinema and Audiovisual Support Scheme Approved

The European Commission has approved, on the basis of the EC State aid rules, the core aspects of the support mechanisms for cinematographic and audiovisual works notified by France. These mechanisms pertain to all stages in the lifecycle of a work and can be grouped in the following categories: support for the production of theatrical short and feature films (including by way of tax credits); support for the distribution of films; support for cinema theatres; support for the production of television films; support for the video industry and specific financing

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● "State aid: The Commission approves the French cinema and audiovisual support mechanisms", Press Release IP/06/357, 22 March 2006, available at:
<http://merlin.obs.coe.int/redirect.php?id=10134>

EN-FR

European Commission: Inquiry into Financing of Portuguese Public Broadcaster Closed

On 22 March 2006, negotiations between the European Commission and the Portuguese authorities concerning the funding scheme of the Portuguese public service broadcaster were finalized. The Commission closed the investigation it had initiated towards the end of 2003 after receiving a number of commitments bent on improving both the transparency and the proportionality of the Portuguese financing system.

vision, are on the rise and present the audiovisual sector with new challenges.

In the course of 2005, hate broadcasts of the foreign Al Manar station were suspended as European satellite systems ceased to transmit them. This was made possible thanks to close cooperation between European broadcasting services, and the European Commission encourages further cooperation. The regulators have therefore welcomed the Commission's proposal to launch a new EU Intranet Cooperation Forum to enhance joint efforts in fighting clear cases of incitement to hatred via broadcast and audiovisual media services.

The regulators also discussed the modernisation of the Television without Frontiers Directive and in particular noted it may prove an effective instrument to prohibit incitement to racial or religious hatred as the amendments introduced by the Commission target not only regular broadcasts but all audiovisual media services regardless of the technological platforms used to deliver and receive them.

Other issues, such as diverging national licensing systems for mobile broadcasting were discussed, as these different systems could hinder pan-European services and infrastructure. Aside from these licensing procedures, the lack of a common spectrum allocation was also brought up as it could be a hurdle in the establishment of cross-border mobile services. ■

mechanisms. In particular, the Commission was assured, as far as film production is concerned, that the criteria relating to the constraints on where the expenditures are to be incurred were fulfilled.

Despite the fact that the majority of these mechanisms qualify as State aid, the Commission has concluded that the criteria for the application of the cultural derogation principle, as laid down in Article 87.3(d) of the EC Treaty, are met. The 2001 Cinema Communication which focuses on State aid rules where cinematographic and audiovisual works are concerned, was also taken into consideration and was found to warrant the approval of the French support mechanisms. The Cinema Communication will expire in June 2007 and may be modified; the French authorities have committed to reviewing their mechanisms accordingly if necessary. ■

Though Commission officials recognize that public broadcasters must benefit from stable financing, their prime concern is also to ensure that no market distortions arise as a consequence of the national schemes in place. Indeed, a Communication was issued in 2001 laying down the principles to be observed by Member States for the application of state aid rules where the public broadcasting service is concerned.

The Portuguese authorities have agreed to financing RTP only to the extent necessary for it to fulfil its public service tasks. In addition to this minimum threshold funding, Portugal has committed

itself to avoid overcompensation and cross-subsidies which would unduly benefit RTP's commercial activities. In fact, measures will be taken to allow private and public broadcasters to compete on equal terms in commercial markets such as television advertising.

The Portuguese public broadcaster is not the only one under the Commission's scrutiny; when investigations into public broadcasters' financing schemes were opened towards the end of the year 2003, preliminary requests were issued to several Member States. They were all asked to review certain traits of

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● "State aid: Commission closes inquiry into financing of Portuguese public broadcaster following commitments", Press Release IP/06/349, 22 March 2006, available at:

<http://merlin.obs.coe.int/redirect.php?id=10136>

DE-EN-FR-PT

European Commission: Commitments on Sale of Football Rights Legally Binding

The European Commission has issued a decision that makes commitments from the UK Football Association Premier League concerning media rights legally binding. The commitments will remain in force until 30 June 2013, covering the next two rounds of bidding.

The Commission had raised concerns about the joint selling of rights by the Premier League, which might deprive media operators and British football fans of choice, and lead to higher prices and reduced innovation. However, the Commission also recognised that there are benefits to joint selling for football fans and media operators as well as for the clubs.

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● European Commission: "Commission makes commitments from FA Premier League legally binding", Press Release IP/06/356, 22 March 2006, available at: <http://merlin.obs.coe.int/redirect.php?id=10117>

DE-EN-FR

NATIONAL

CH – New Radio and Television Act Adopted

On 24 March 2006, the Swiss Parliament adopted a new Radio and Television Act, which will ensure that the *Schweizerische Rundspruchgesellschaft* (SRG) continues to provide a strong public broadcasting service in the future. The Act also relaxed certain restrictions on private broadcasters and strengthened support for local and regional private broadcasters from licence fee revenue (fee sharing).

The dual model originally proposed in the draft Radio and Television Act (with SRG on the one hand as a public service broadcaster funded through the licence fee, and private broadcasters in free competition on the other) was rejected following the parliamentary debates on the matter. Private broadcasters will continue to receive a share of licence fee revenue. The proportion they receive will even increase in the future: eligible private radio broadcasters will receive 4 % of radio licence revenue

their existing schemes. In April 2005, the Commission ended its probe into the French, Italian and Spanish public broadcasters following either amendments to the respective funding schemes, or commitments to introduce such amendments (see IRIS 2005-6: 5). Now that Portugal has joined the group of countries that have accepted the need to adopt the necessary amendments, the Commission can give its full attention to the remaining Member States whose public broadcasters are under investigation, namely, Germany, Ireland and the Netherlands. The procedure concerning Portugal is, however, not entirely finalized as the financial restructuring agreement signed in 2003 between the Portuguese authorities and RTP will be the object of a separate process. ■

The Premier League submitted proposals to the Commission which would ensure that no single broadcaster would be allowed to buy all of the packages of live match rights from 2007 onwards. After consultation, the Commission accepted these.

The agreed commitments provide for more rights, including television, mobile and internet rights, to be made available and ensure that the rights are sold in an open and competitive bidding process subject to scrutiny by an independent trustee. Live television rights will be sold in six packages which will be smaller and more balanced than previously; each will include 23 matches. No one buyer will be able to buy more than five of these packages. The commitments also enhance the scope for individual clubs to exploit rights that are not sold by the Premier League or used by the purchaser. Extracts of matches shown live on television will also be made available in real time on mobile phones. ■

(around CHF 16 million compared to CHF 7 million up to now) and private TV broadcasters 4 % of TV licence revenue (around CHF 28 million compared to CHF 6 million up to now). However, in future the number of Swiss TV broadcasters entitled to this income will be limited to 10 or 12 at the very most. Furthermore, the proportions due will no longer be redefined every year, but set over a period of several years, primarily in accordance with the size and economic potential of the area covered by the broadcaster.

Other private broadcasters which do not receive licence fee income must meet certain requirements if they wish to obtain a licence to broadcast their programmes terrestrially (mainly via FM frequencies at present, but in future via digital platforms as well). The number of such licences is to be limited to two television and two radio licences per media organization. It will soon also be possible to broadcast radio and television channels in Switzerland without a licence. However, providers of such programmes will

not receive any licence fee income nor will they be guaranteed terrestrial frequencies.

The SRG can further safeguard its dominant position in the Swiss broadcasting market. However, at the same time, the Act requires it, *inter alia*, to broadcast educational programmes and report any non-programme activities (eg online activities) which could interfere with the position and role of other media organizations.

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In the advertising field, the provisions on com-

• **Bundesgesetz über Radio und Fernsehen (Federal Radio and Television Act - RTVG) of 24 March 2006, available at:**

<http://merlin.obs.coe.int/redirect.php?id=10143> (DE)

<http://merlin.obs.coe.int/redirect.php?id=10144> (FR)

DE-FR

• **RTVG Revision, "Neues Radio- und Fernsehgesetz" (Revised Radio and Television Act - RTVG), available at:**

<http://merlin.obs.coe.int/redirect.php?id=10145> (DE)

<http://merlin.obs.coe.int/redirect.php?id=10146> (FR)

DE-EN-FR-IT

CH – Bill to Revise Copyright Legislation

The Swiss Federal Council has published the Bill that will revise part of Swiss national legislation on copyright and related rights. The purpose of the Bill is to enable Switzerland to ratify the "Internet treaties" of the World Intellectual Property Organisation (WIPO) – the copyright treaty (WCT) and the performances and phonograms treaty (WPPT). This means that the new provisions will transpose into Swiss national law the standards of protection required by these treaties (see IRIS 2005-8: 11).

The Bill provides for prohibiting the circumvention of technical means of protection such as electronic techniques for controlling access to Internet services or anti-copying techniques used on CDs and DVDs. The prohibition also extends to the production and marketing of software that makes it possible to circumvent such measures. An observatory will nevertheless be instructed to report any abuse of technical means of protection so that there is no prevention of uses allowed by law – private copying in particular.

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Suisse Romande,
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• **Message from the Federal Council on the Federal Decree on approval of two World Intellectual Property Organisation treaties and amendment of legislation on copyright, available at:**

<http://merlin.obs.coe.int/redirect.php?id=10122> (FR)

<http://merlin.obs.coe.int/redirect.php?id=10123> (DE)

FR-DE-IT

CH – Agreement between Switzerland and the European Union on the MEDIA Programme Comes into Force

The agreement between Switzerland and the European Union on Switzerland's participation in the MEDIA Plus and MEDIA Formation programmes came into force on 1 April 2006. The agreement was concluded on 26 October 2004 during the second round of bilateral negotiations on a number of issues, including

mercial breaks and alcohol advertising are relaxed for private broadcasters and brought into line with European standards. However, alcohol advertising remains prohibited on all SRG channels. The *Bundesrat* (Council of Ministers) will also issue decrees imposing further restrictions for the SRG (eg in relation to commercial breaks). The new Act also contains a provision on the protection of minors from certain forms of advertising and sponsorship.

Another new development is the fact that the whole area of technical transmission will no longer be regulated by the RTVG, but in the *Fernmeldegesetz* (Telecommunications Act - FMG). The RTVG will merely contain special provisions guaranteeing access to wireless terrestrial and cable transmission for licensed channels. Cable transmission capacity may also be permitted for additional national and foreign services, provided these contribute to the fulfilment of the broadcaster's constitutional law remit. ■

In addition, the new provisions give the performers, producers of phonograms and videograms and broadcasters the exclusive right to make works and other protected content available on the Internet through on-demand services. Rightsholders will thus be able to take to court Internet users who put music or films into circulation on peer-to-peer networks. On the other hand, the downloading of works for private purposes will remain authorised without restriction.

The Bill would introduce new restrictions on copyright that would bring Swiss legislation into line with the digital environment. Thus it is intended to extend the copyright exception to the advantage of libraries and other similar institutions so that they would be able to store their archives using digital technologies. Moreover, Internet service suppliers could not be held responsible for infringements of copyright committed by their clients. Also, a further copyright exception would make access to protected works easier for people with disabilities. The Bill also proposes making the reproduction rights of composers of musical works and performers and producers, when phonograms and videograms are used for broadcasting purposes, subject to compulsory collective management. Lastly, to avoid taxing users and consumers twice over, the reproduction of works accessible on demand through electronic pay services will be exempt from the remuneration receivable for reproduction for private use. ■

– in addition to the MEDIA programme – extension of the agreement on the free movement of persons to the European Union's new Member States, taxation on savings, and combating fraud in indirect taxation (see IRIS 2004-7:6). Switzerland will contribute CHF 7.9 million per year to the cost of the MEDIA programme. This amount also includes the subsidy allocated to the Switzerland MEDIA Desk and the funding for the recent compensatory measures that were set up to alleviate the negative results of Switzerland

being excluded from the MEDIA programme in 1992.

As a result, professionals in Switzerland's cinematographic and audiovisual industry may now participate fully in all forms of support included in the MEDIA programme. The support provided by the Community's funds will facilitate co-productions of films by Switzerland and other European countries. MEDIA will also make it possible not only to support access to the European market for Swiss audiovisual productions but will also facilitate the distribution of European films in Switzerland. The outcome of Switzerland's participation in the MEDIA programme should be a reinforcement of the diversity of the cinemato-

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• **Federal Decree of 17 December 2004 approving and implementing the bilateral agreement between Switzerland and the European Community on Switzerland's participation in the MEDIA Plus and MEDIA Formation programmes, available at:**
<http://merlin.obs.coe.int/redirect.php?id=10124> (FR)
<http://merlin.obs.coe.int/redirect.php?id=10125> (DE)

FR-DE-IT

CS – Preliminary Results of the Radio/TV Tender

The tender for issuing licences for terrestrial transmission of radio and TV programmes, announced by the Serbian Broadcasting Agency in January 2006 (see IRIS 2006-3: 11), closed on 27 March 2006. In accordance with the Broadcasting Act, the Broadcasting Agency has published the list of companies whose applications arrived timely and complete on 4 April 2006 (seven days after the tender was closed), as well as the list of disqualified applicants.

Concerning the five national TV networks, twelve applicants (as international companies there are CME, Fox, and Sigma TV from Cyprus) remain in the race for the five national TV networks.

Three companies applied for one TV network for the province Vojvodina, and nine companies applied for six TV networks for coverage of the metropolitan area of Belgrade.

There are nine applicants for five national radio networks, and forty applicants for fourteen radio networks in the metropolitan area of Belgrade. Nobody applied for the radio coverage of Vojvodina region.

Controversy has been caused by the disqualification of the application made by the local subsidiary of

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• **The full list of applicants as well as further information is available at:**
<http://merlin.obs.coe.int/redirect.php?id=10158>

SR

DE – BGH Rules on Ring Tone Advertising

On 6 April 2006, the *Bundesgerichtshof* (Federal Supreme Court - BGH) ruled on the admissibility under competition law of ring tone advertising in children's magazines.

The *Bundesverband der Verbraucherzentralen und Verbraucherverbände* (Federation of German Consumer Organisations) had complained that an advertisement for mobile phone ring tones in a children's magazine had only mentioned download costs per minute. The

graphic offer on the Swiss market. Moreover, Swiss professionals may now benefit under the same conditions as their European colleagues from easier access to the cinema schools supported by the MEDIA programme. Lastly, the Swiss cinematographic industry may also take part in film festivals organised within the European Union and thereby contribute to the promotion of European audiovisual production.

Switzerland's participation in the MEDIA programme was conditional on its legislation on television being "Euro-compatible". This implied that Switzerland undertook to transpose into its national legislation European demands in terms of minimum quotas for European audiovisual works (50 %) and independent productions (10 %) broadcast on television. As a result, a new Article 20c has been introduced for that purpose in the Federal Council's Order on Radio and Television (ORTV). This provision also came into force on 1 April 2006. ■

the RTL group, the RTL Belgrade GmbH whose parent company is RTL Central and Eastern Europe from Cologne, Germany. The Broadcasting Agency gave as reason for the disqualification of RTL the alleged breach of the 49 % threshold for foreign capital in the applying company. This consideration is based upon an interpretation of Article 41 Paragraph 3 of the Serbian Broadcasting Act prepared by the Minister of Culture. The reasoning of the Broadcasting Agency neglects the fact that there is an international treaty between Germany and Serbia guaranteeing national treatment of mutual investments. Thus the 49 % limitation would not be applicable in the case of RTL.

The Broadcasting Agency is still discussing (at the time of writing) to amend its decision and to let RTL take part in the licencing procedure.

As for the disqualified applicants, apart from RTL, three more TV applications were disqualified, either for not paying the deposit or for the fact that the companies were 100 % state owned or socially owned. Seven applications for radio coverage were disqualified for incomplete documentation, failure to pay the deposit or the fact of a 100 % ownership of the state.

The next step in the licensing procedure will be interviews with the authorised personnel of the applicants, which is scheduled for 10 April 2006 in Belgrade. The decision of the Broadcasting Agency has to be made until late June 2006. ■

Federation believed that young people were unable to estimate the length of the download and the resulting overall cost. Since this information did not appear in the advertisement, the Federation argued that it breached competition law.

The BGH agreed that the advertisement infringed competition law and confirmed the earlier decisions of the *Landgericht Hamburg* (Hamburg District Court) of 14 May 2002 and the *Hanseatische Oberlandesgericht Hamburg* (Hamburg Hanseatic Appeal Court) of 10 April 2003.

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According to Art. 4.2 of the *Gesetz gegen den unlauteren Wettbewerb* (Unfair Competition Act - UWG), an offence is committed if advertising is likely to take advantage of the lack of commercial experience of children or young people in particular, or the credulity, fear or predicament of consumers.

The BGH considered that these conditions had been fulfilled. The advertisement had been deliberately directed at young people, since more than 50 % of the readers of the magazine in question were children

• **Ruling of the Bundesgerichtshof (Federal Supreme Court - BGH), 6 April 2006 (I ZR 125/03), available at:**
<http://merlin.obs.coe.int/redirect.php?id=10141>

• **Ruling of the Landgericht Hamburg (Hamburg District Court) of 14 May 2002, case no. 312 O 845/01**

• **Ruling of the Hanseatische Oberlandesgericht Hamburg (Hamburg Hanseatic Appeal Court) of 10 April 2003, case no. 5 U 97/02**

DE

DE – Dispute on the Use of Premiere Decoders

According to press reports, on 7 April 2006 the *Landgericht Dortmund* (Dortmund District Court) rejected an application by Unity Media for a temporary injunction which would have given it the right to use the decoders of pay-TV provider Premiere.

The case was brought following the acquisition of broadcasting rights for the German football *Bundesliga* by pay-TV provider Arena, a subsidiary of Unity Media (see IRIS 2006-4: 11).

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DE – Federal Government Adopts Copyright Bill

On 22 March 2006, the Federal Government adopted the second wave of copyright law amendments enshrined in the Bill modernising copyright law. The Bill had been published for debate in January 2006 (see IRIS 2006-3: 11).

An amendment to Art. 53 of the *Urhebergesetz* (Copyright Act - UrhG) concerning copying for private and other "own" uses is designed to make it clear that the use of illegal file-swapping sites on the Internet is not covered by the exemption contained in Art. 53 *UrhG*. Under the Bill, the right to copy for private or "own" uses is no longer just restricted where the source is obviously illegal, but also when the source is made accessible to the public in an obviously illegal manner. This is meant to take into account the situation where a (non-copy-protected) copy made available on the Internet is not produced illegally, but is used illegally.

Under the new Art. 54 *UrhG*, copyright fees shall in future only be due in respect of devices that are used for large-scale copying. This amendment is designed to settle a dispute that has arisen from the

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• **Regierungsentwurf des Gesetzes zur Modernisierung des Urheberrechts (Government Bill modernising copyright law), available at:**
<http://merlin.obs.coe.int/redirect.php?id=10139>

• **Referententwurf des Gesetzes zur Verbesserung der Durchsetzung des geistigen Eigentums (Bill improving the enforcement of intellectual property rights) of 3 January 2006, available at:**
<http://merlin.obs.coe.int/redirect.php?id=10140>

DE

or teenagers.

A crucial factor in deciding whether the inexperience of children and teenagers was being exploited was the extent to which their inexperience influenced their response to the advertisement. Young people needed to be told clearly how much the product would cost since they were not yet able to correctly assess this aspect of an advertisement.

Where ring tones were concerned, these costs were not easy to understand. To compound the problem, the actual cost only became clear at a later date, when the bill was received.

This ruling should also be significant for ring tone advertising in the electronic media, such as television, where the actual costs should be made clear – at least where advertising is deliberately directed at children or teenagers. ■

Premiere AG, which had owned the rights until the current season, had cancelled an existing agreement with Unity Media, which had enabled viewers to receive programmes broadcast by Unity using Premiere decoders. In order to broadcast *Bundesliga* matches, Arena must therefore develop its own decoder or reach a new agreement with Premiere concerning the use of the existing decoders. Otherwise, Premiere could also prevent the reception of other Unity programmes via its own set-top boxes. ■

current wording, which states that fees must be paid for any device obviously designed for copying. The size of the copyright fee payable for the device will, according to the new Art. 54a *UrhG*, in future depend on the extent to which it is actually used for copying. However, the existence of technical protection measures for content will also be taken into account, reducing the amount due. According to the Government's wishes, the fees due will no longer be fixed by the legislator but by the parties concerned.

Another amendment concerns the possibility for authors to conclude contracts on presently unknown uses (Art. 31a of the Bill).

The Bill is not expected to come into force before the end of 2006.

In January 2006, at the same time as the Bill modernising copyright law, a Bill improving the enforcement of intellectual property rights was tabled, although this has not been adopted yet. The Bill is meant to transpose the European Enforcement Directive (Directive 2004/48/EC of 29 April 2004 on the enforcement of intellectual property rights). As well as detailed regulations on compensation, the Bill gives authors a right to information about the origin and distribution methods of illegally copied material. In order to obtain this information, the injured party would be able, through a court order, to demand communications data within the meaning of the *Telekommunikationsgesetz* (Telecommunications Act). ■

FR – Television Advertising for Books Validated by the *Conseil d'État*

In a decision adopted on 13 March, the *Conseil d'État* rejected the appeal brought by the television channel Télé Monte-Carlo and its advertising agency claiming, on the grounds of the principle of equality, cancellation of paragraph I of Article 1 of the decree of 7 October 2003 amending Article 8 of the decree of 27 March 1992. These provisions prohibit advertising for books except on television services that are exclusively distributed by cable or broadcast by satellite. In the present case, the television channel broadcasts its programmes partly unencrypted in analog mode in south-west France and partly by subscription by cable and satellite throughout France. The *Conseil d'État*

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● *Conseil d'État* (5th and 4th sub-sections combined), 13 March 2006, the companies TMC and Pathé Régie, available at:
<http://merlin.obs.coe.int/redirect.php?id=8885>

FR

FR – CSA Recommendation on the “Aerial Service” to Be Offered by Digital Cable Networks

Following the breakdown of negotiations between the *Conseil Supérieur de l'Audiovisuel* (French audiovisual regulatory authority – CSA) and cable operators offering digital transmission on the reasonably-priced delivery of free terrestrially broadcast digital television channels (the “aerial service”) in buildings with cable, the CSA has now issued a recommendation on the subject. The purpose of Article 34-1 of the Act of 30 September 1986 (as amended) is to ensure that homes in blocks of flats that are no longer connected to an aerial but to a cable distribution network are able to receive the terrestrially broadcast television channels for which no payment is charged that are normally received in the area, without being obliged to subscribe to a package of pay channels. The CSA's attention had been drawn to the conditions and time taken for implementing this “extended aerial service” and to the rates being

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● CSA Recommendation on the “aerial service” to be provided by digital cable networks, published in the *Journal Officiel* on 31 March 2006, available at:
<http://merlin.obs.coe.int/redirect.php?id=10147>

FR

FR – CSA Authorises Changes of Category for Radio Stations without Procedure for Calling for Applications

On 4 April, the *Conseil Supérieur de l'Audiovisuel* (French audiovisual regulatory authority – CSA) announced its decision on 141 applications from radio stations wishing to change holder and category without going through the procedure for calling for applications. In 1989 the CSA decided on five categories of radio station (A: services provided by associations; B: independent local, regional and themed services; C: local services broadcasting the programme of a

held that the difference in treatment that the clauses at issue made to the benefit of television services distributed exclusively by cable or broadcast by satellite was justified by the general interest that existed in providing these services with new resources as their economies were fragile, while at the same time avoiding massive transfers of advertising budgets away from the press to television and the concentration of advertising messages by the major publishing houses on television. Télé Monte-Carlo was in fact not in the position of a service exclusively distributed by cable and broadcast by satellite since its programmes were also broadcast terrestrially in analog mode. Furthermore, since the economic sectors of both book publishing and distribution were also in different situations, the regulatory authority was not required to lay down the same rules for broadcasting advertising messages on television for the two sectors. The *Conseil d'État* therefore found that the provisions at issue were not contrary to the principle of equality. ■

charged by certain cable operators for renting an adaptor. Article 34-1 in fact states that the amount charged must cover only “the cost of installation, maintenance, and replacement of the network”. This means that if the rate being charged for the aerial service plus the unencrypted terrestrially broadcast digital television channels is more than was being charged previously for the aerial service without these channels, the cable operators will have to provide the CSA with justification for the increase. On the matter of the adaptor, the CSA proposes three options:

- mere re-transmission of the terrestrially broadcast signals of free digital television channels;
- distribution of the free channels using the unencrypted DVB-C standard, which would involve marketing bi-standard adaptors at the same price as an adaptor for terrestrially broadcast digital television;
- making an adaptor available against a deposit or at a purchase price corresponding to the mere cost of purchasing and set-up.

The cable operators have three months from the date of publication of the Recommendation to comply with the CSA's requirements. ■

nationwide themed network in addition to a local interest programme; D: nationwide themed services; E: nationwide general-interest services) in order to give some shape to the radio scene and ensure its diversity. Since 2004, paragraphs 2 and 3 of Article 42-3 of the Act of 30 September 1986 (as amended) have made it possible for the CSA to authorise changes of holder and, if appropriate, changes in category without having to go through the procedure for calling for applications. Legislation sets limits on this, however, to prevent the radio scene becoming destabilised. Specifically, the CSA may not grant

approval until it has checked that the anticipated operation is compatible with “the preservation of equilibrium in terms of advertising, particularly at the local level” and that the criteria laid down in Article 29 of the Act of 30 September 1986 (ensuring the plurality of currents of socio-cultural expression, the diversification of operators, the need to avoid abuse of a dominant position and practices hampering the free exercise of competition, etc) are satisfied. Moreover, changes in holder and category without going through the procedure of calling for applications are not open to services provided by associations that fulfil a mission of local social communication (category A), or to independent local, regional and themed

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● **CSA Communiqué No. 591 of 7 April 2006, available at:**
<http://merlin.obs.coe.int/redirect.php?id=10148>

FR

GB – “Da Vinci Code” Not an Infringing Copy of “The Holy Blood and The Holy Grail”

In 1982, a book described as a historical conjecture, “The Holy Blood and The Holy Grail” (HBHG), was published. It suggests that Jesus and Mary Magdalene had children, and that Mary Magdalene fled to a Judaic Community in the South of France after Christ’s demise. Their putative offspring continued the bloodline from the Tribe of Benjamin to the Merovingian dynasty and from there to Godfroi de Bouillon. Two of the three authors of HBHG contended before the courts that in writing the novel “The Da Vinci Code” (DVC), Dan Brown had produced an infringing copy of their original work for which his publisher, The Random House Group Ltd, is responsible.

The Claimants argue that although there is no copyright in facts or ideas, the architecture or structure or way in which they are presented can be protected. By section 16(3) of the Copyright, Designs and Patents Act of 1988, reproducing a copyright work is an infringement if the work or “a substantial part of it” has been copied. In order to support their claim of non-textual copying, the authors of HBHG had identified features in their work which, according to them, make up the Central Theme appropriated by DVC. However, referring to existing case law,

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● **High Court of Justice, Chancery Division, Baigent & Leigh v Random House, 7 April 2006, available at:**

<http://merlin.obs.coe.int/redirect.php?id=10149>

EN

GB – Government Confirms Plans for the Future Role of the BBC

The UK Government has now published its delayed White Paper on the future of the BBC. In general, it repeats the proposals made in the earlier Green Paper (see IRIS 2005-4: 11). This will form the basis for the new Royal Charter for the Corporation,

services (category B). Having obtained information on the position of all the players concerned in the radio scene, and on the basis of the criteria recalled above, the CSA has authorised 93 of the 107 applications it received concerning the full take-up of nationwide networked programmes (change from category C to D: nationwide themed services), in particular to ensure that listeners will still be able to receive programmes produced locally. On the other hand, the CSA accepted only 7 of the 34 applications it received for commencing local operation (change from category D to C: local services broadcasting the programme of a nationwide themed network in addition to a local interest programme). These decisions follow on from the authorisations issued by the CSA in November 2005 in respect of applications to change holder without changing category. ■

the High Court judge dismissed the Claimants’ action.

It is first recalled that, in assessing whether there has been copying, the differences between the two copyright works are not relevant. Also, while the copied features must be a substantial part of the Copyright work relied upon they need not form a substantial part of the Defendant’s work. The Claimants had initially put forward a Central Theme broken down into 19 points which were at a later stage reduced to 15 points. These points, they argued, were to be found in both the HBHG and DVC and served the purpose of proving that a substantial portion of HBHG had been introduced in Dan Brown’s work.

The judge rejected the notion of a Central Theme in HBHG asserting he could not find one, but rather a collection of factual events presented in a chronological order which is in itself too general to justify protection against copying. He also pointed to the confusion in putting forward the Central Theme, as the Claimants had several times amended it and seemed unable to properly formulate it. This was, he believed, mainly due to the fact that such a Central Theme had to be artificially created to serve as a platform for litigation. In reaching the final decision to dismiss the Claimants’ action, the judge reminded the parties that Copyright protects the skill and labour employed by an author to produce a work, it does not protect against the borrowing of an idea contained in a work. However, in deciding each case, “the line to be drawn is to enable a fair balance to be struck between protecting the rights of the author and allowing literary development”. ■

to run from the beginning of 2007 until the end of 2016; a draft Charter and Framework Agreement with the minister are published alongside the White Paper. For the first time, the Charter will refer explicitly to the scope of judicial review for enforcing its provisions and those of the Agreement.

The White Paper sets out six new public purposes for the BBC: sustaining citizenship and civil society;

promoting education and learning; stimulating creativity and cultural excellence (including film); reflecting the UK's nations, regions and communities; bringing the UK to the world and the world to the UK; and building digital Britain. Five characteristics for the BBC's content are also set out: high quality, challenging, original, innovative and engaging.

The major reform is the replacement of the BBC's Board of Governors (much criticised for combining regulation and promotion of the Corporation) with two new bodies: the BBC Trust and the Executive Board. The Trust will be responsible for representing the interests of licence fee payers and will oversee the activities of the Executive Board, which will be responsible for the management of the Corporation. BBC services will be run on the basis of a service

licence issued by the Trust to the Executive which will set out how the service contributes to achieving the Trust's priorities and will include indicators which the Trust will use to judge performance.

Funding of the BBC will continue to be by licence fee, although a review will be undertaken during the Charter period of the case for the fee to be distributed more widely beyond the BBC.

A new market framework will be established to prevent unfair competition by the BBC in its provision of commercial services. This will include a duty for the Trust to have regard to competition issues, an overhauled fair trading regime, and a new system of *ex ante* codes drawn up by the Trust in consultation with Ofcom (the regulator for private broadcasting) in areas which raise potential competition concerns. There will also be a new complaints regime in relation to competition issues. In the case of new services, Ofcom will undertake a market impact assessment before the Trust decides whether to approve a service; the latter will also itself conduct a public value assessment to establish whether the new service will be in the interests of licence fee payers. ■

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● Department for Culture, Media and Sport, "A Public Service for All: the BBC in the Digital Age", March 2006, available at:
<http://merlin.obs.coe.int/redirect.php?id=10112>

● The draft Charter and Framework Agreement are available at:
<http://merlin.obs.coe.int/redirect.php?id=10113>

EN

GR – New Electronic Telecommunications Law

On 17 January 2006, the Greek Parliament adopted a new law (L. 3431/2006) incorporating the EU electronic communications legal framework. This new Law provides for the formation of a new Consultative Body, the Commission of Communication Policies, and clearly defines the tasks and responsibilities of the telecommunications authorities according to their specific remit: the Ministry of Transport and Communications shall be responsible for national policy in its sector, shall define the content of the Universal Service and shall set the procedures for the selection of the Universal Service provider; the NRA (National Commission of Telecommunications and Posts) shall observe and review the application of the Law and the

established national policy and shall grant licences where necessary. The providers shall be allowed to render relevant services after a special notification to the NRA whereas, when the use of scarce resources is needed, a General Licence must first be granted by the NRA. Regarding competition restrictions, the new Law sets restrictions only in a case where a provider has a dominant position in any of the defined markets (and not a Significant Market Position).

One of the most noteworthy provisions of the new Law is the application of the precautionary principle which translates in the implementation of significant restrictions with regard to the installation of stations and poles (300 meters away from sensitive areas such as schools, hospitals etc...). After the publication of this Law in the Greek Official Gazette, the Commission announced the termination of all (four) relevant procedures against Greece initiated from April 2004 (see IRIS 2006-3: 8). ■

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● Law 3431/2006, available at:
<http://merlin.obs.coe.int/redirect.php?id=10129>

EL

GR – Draft Law on Private Radio and Television

On 11 April 2006, a draft law on the concentration and licensing of media enterprises was presented by the government and could be voted on by Parliament before the end of May. The new text aims to abolish the existing restrictions on ownership of media companies, as well as to reorganize the licensing rules for radio and television stations.

A new concept that dominates the rules concerning audiovisual enterprises ownership is the concentration of control in the media market; for the assessment of such a concentration one must take account of the provisions of the existing law on competition and the provisions of the new law, that

determine the rate of infiltration in the market, on the basis of which possession of a dominant position is presumed. The supervision of these rules will be the task of the Competition Authority and not of the actual regulator of audiovisual matters (National Council of Radio and Television).

The current audiovisual landscape is characterized by the existence of a great number of television stations that can hardly satisfy legal obligations, especially with regard to programme content. In view of clarifying this situation, the new text abolishes the category of local televisions (leaving the regional and national stations intact) and introduces greater severity in the licensing procedure: it, for example, prescribes a minimum of employed per-

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sons, an obligation to pay an annual fee for the use of frequencies, an assessment of the current and

• **Ministerial proposal for a draft law on the concentration and licensing of media enterprises (announced on 22 December 2005) and the input in the discussion from interested parties, available at:**

<http://merlin.obs.coe.int/redirect.php?id=10114>

EL

HR – New Concession Fees

Pursuant to Art. 64 para. 5 of the Electronic Media Act, the Council for Electronic Media adopted new Rules on amounts and methods of payment of concession fees for the performing of radio and/or television broadcasting activities and on the amounts and methods of payment of tender documentation and tender fees.

Based on the new Rules, which came into effect as of 21 March 2006, the amount of the annual concession fees have been increased by 30 % for the local radio and television broadcasters and by 50 % for the national radio and television broadcasters. The novelty of the present rules consists in the stipulation based on which the radio and television broadcasters with a registered office in the areas of the special state concern shall only pay 70 % of the concession fee. The concession fees are determined based on the size of the population in the area in which a radio or television programme is broadcast.

The fees shall be paid in four equal instalments in

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• **Rules on the amounts and methods of payment of the concession fee for the performing of radio and/or television broadcasting and on the amounts and methods of payment of tender documentation fee and tender fee, Official Gazette No. 28/06, available at:**

<http://merlin.obs.coe.int/redirect.php?id=9153>

HR

LT – Draft Law on Information Society Services

The Committee of the Lithuanian Parliament for the Development of the Information Society prepared a Draft Law on Information Society Services. It serves to implement Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on Electronic Commerce).

The draft law indicates that it regulates the provision and other activities of providers of information society services.

It defines the main concepts such as e-commerce, services of the information society, commercial information, etc. The services of the information society are defined as services provided usually for remuneration by electronic means upon the individual request of the receiver of the services of the information society.

In accordance with Article 3 of the draft law the regulation on the provision of information society services and other activities of the providers shall be based on the principles of technological neutrality,

future economic situation of the company etc...

There is also a reference to the obligation on national broadcasters to switch off analogue broadcasting after a transitional period (though no definite periods of time are established), during which they have to diffuse content both via an analogue and a digital platform. ■

favour of the state budget of the Republic of Croatia. For the purpose of security of the payment of the concession fee the broadcaster shall, at execution of the concession agreement, provide the Council for Electronic Media with a blank bond. In case of failure on part of the broadcaster to make a timely payment of the concession fee, the Council for Electronic Media shall remind in writing the broadcaster of his obligation to make the payment, and determine a new deadline. If the broadcaster fails to make the payment of the concession fee within such new term, the Council for Electronic Media may withdraw the concession for radio and television broadcasting either on a temporary or a permanent basis.

The Rules also provide that in the procedure of granting a concession for the performing of activities of radio and television broadcasting, a fee shall be paid in an amount equal to the percentage of the annual concession fee, namely 5 % with the application for the providing of tender documents and 10 % for the submitting of tender to take part in the tender procedure.

So far concession fees were paid based on the Rules from 2003 regarding the fee for the provision of telecommunication services and performing of other telecommunication activities and on methods of payment. The amounts of those fees were determined in 1996 and simply adopted by the rules of 2003. ■

functional equivalence, freedom of the treaties, development of self-regulation, legal protection of personal data, consumer rights protection, protection of intellectual property, objectivity, legal certainty, etc.

It is indicated that the provider may be a natural or legal person, including the branch or representative office of a foreign company and that these services may be provided without concession of the public administration, unless other laws provide otherwise.

Furthermore, the draft law contains, *inter alia*, specific provisions concerning the conclusion of contracts by electronic means, moment and place of dispatch and receipt of the offer and the acceptance.

Chapter 5 defines the liability of the providers of the services of the information society. According to Article 12 of the draft law the providers are not liable for the provided information, if they do not make any changes in it.

Chapter 8 designates the supervisory bodies of the services of the information society and sets out their rights and duties. In accordance with Article 18, the Government of the Republic of Lithuania forms the policy and strategy of the provision of the services of

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the information society. The Communications Regulatory Authority regulates the provision of the services. Articles 19 and 20 define the functions and rights of the Communications Regulatory Authority, which are essential for the effective implementation and control

• Draft Law on Information Society Services, available at:
<http://merlin.obs.coe.int/redirect.php?id=10110>

LT

LT – Self-Regulatory Institution Founded

In March 2005, a self-regulatory institution, named *Lietuvos Reklamos biuras* (Lithuanian Advertising Bureau) was founded in Lithuania on the initiative of advertising agencies, media and advertisers. It started its activities in April 2006. The Lithuanian Advertising Bureau is responsible for the administration of the self-regulatory system and the application of the National Code of Advertising Practice, which is based on the Code of Advertising Practice of the International Chamber of Commerce.

The establishment of such a self-regulatory institution is foreseen in Article 39.13 of the Law on the Provision of Information to the Public. The main aim of this self-regulatory institution is to ensure a relevant and effective system of self-regulation, enabling the advertising industry (advertisers who pay for advertising, advertising agencies responsible for the form and content of advertisements and media which disseminate them) to regulate its social responsibilities by itself. The self-regulation system shall also employ respective fair trade principles, promote actively the highest ethical standards in commercial communications and safeguard consumers' interests. Self-regulation in advertising has to be understood as the response of the advertising industry to the challenge of dealing with issues affecting commercial communications by co-operation rather than by detailed legislation.

The self-regulatory institution of advertisers is planning to operate in the following fields: taking care of advertising ethics, analysing advertising ethics, drafting legislative documents which are related to the communication marketing business, preparing proposals for the improvement of the communications business environment, arranging seminars, conferences and other forms of training in the field of the communication marketing business, publishing documentations on information, advertising, researches and methodology.

The Advertising Bureau is composed of the General Assembly of Members, Board and Arbitration Commission.

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NL – Secretary of State Unveils Plans to Support Dutch Independent Films

On 31 March 2006, Dutch Secretary of State for Education, Culture and Science Medy van der Laan

of the Law.

The Law will provide possibilities for developing services based on modern technologies and e-business. It is also expected that this Law will fill the gaps related to the legal framework of the services of the information society.

The Parliament of the Republic of Lithuania is planning to adopt the draft law on 12 April 2006. It shall come into force on 1 May 2006. ■

The Statutes of the Lithuanian Advertising Bureau indicate that members of the advertising self-regulation institution may be persons who run a business in any branch of media, advertising or marketing. Furthermore, any advertising supplier ranking high in the advertising market or an organization, whose main aim is to protect consumer rights may become member of the institution.

The General Assembly of Members deals with questions relating to the admission of new members, their elimination from the Association, the amount of the entrance fee for candidates to the Association, the annual payments for the members of the Association and other issues.

The Board is composed of 5 members. It forms the general policy of the advertising self-regulatory institution and coordinates its implementation. Its task is also to discuss issues on property, accumulation of funds and spending.

The Arbitration Commission is the only management body of the Association which can take decisions on various advertising complaints received by the Advertising Bureau Association. Those decisions are mandatory for the members of the Association.

The General Assembly of Members designates the Arbitration Commission from the members of the Association or other persons. It comprises 9 members (one representative each from advertising providers, TV, press, the consumer rights protection board, the Competition Council, the Child's Rights Protection Office as well as the Office of the Equal Opportunities Ombudsman and a psychologist).

The Arbitration Commission enacts written and reasoned decisions, which determine if a former or present form of advertising activity is not in conflict with the Ethics Code of Advertising, adopted and published by the Association. The Arbitration Commission adopts the decisions either after receiving written complaints or sometimes at its own discretion. Any legal or natural person (with the exception of the members of the Arbitration Commission) as well as Governmental or administrative institutions may submit such applications to the Arbitration Commission. ■

sent the *Tweede Kamer* (House of Representatives) a letter announcing the proposed budget for Dutch films. The letter expresses the Cabinet's desire to make a strong gesture towards supporting Dutch independent films. To make these films interesting

for an international audience, the Cabinet is prepared to invest an extra EUR 7.5 million in the artistic development of Dutch film makers as per 2007. With this increase, the total budget for Dutch film adds up to EUR 40 million a year.

Thus far, the Cabinet is pleased with the results of the Dutch policy on film. Overall, there has been a renewed interest in Dutch films, and films of general public interest are significantly on the rise. The policy will therefore be continued. However, the Cabinet is of the opinion that an impetus is needed to encourage the artistic ambitions of Dutch film.

The Cabinet will therefore invest EUR 6 million in the production of artistic films. *Het Nederlands Fonds voor de Film* (the Dutch film fund) will allocate part of the film budget to deploying a more adventurous policy based on film makers' personal choices for a few years. It is hoped that this will give talented film makers an improved opportunity to create cinematographic works. In addition, the Dutch film fund will receive a budget of EUR 400,000 to encourage inter-

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● **"Kabinet zet in op eigenzinnige film"** ("Cabinet supports independent films"), Council of Ministers, press release of 31 March 2006, available at: <http://merlin.obs.coe.int/redirect.php?id=10115>

● **"Filmeleid"** ("Film Policy"), letter from Secretary of State for Education, Culture and Science Medy van der Laan to the Tweede Kamer (House of Representatives), 31 March 2006, available at: <http://merlin.obs.coe.int/redirect.php?id=10116>

NL

PL – Constitutional Tribunal Examines the Act on Cinematography

On 27 March 2006 the Commissioner for Civil Rights Protection – guarding human and civil freedoms and rights specified in the Constitution and other legal acts – appealed to the Constitutional Tribunal with the petition to state that article 19 paragraph 9 of the Act on cinematography of 30 June 2005 is not consistent with the Constitution.

The Act on cinematography of 30 June 2005 came into force on 19 August 2005. However, provisions on charges, being an important part of the cinematographic production support system (Article 19) came into force on 1 January 2006 (see IRIS 2006-1: 18).

The Act on cinematography established in Article 19 an indirect support system, aimed at strengthening the domestic cinematographic film market, but it also provided additional rules for public service broadcasters concerning direct support. This Act introduces charges (1.5 % of revenues from certain

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● **Constitutional Tribunal, Application of the Commissioner for Civil Rights Protection of 27 March 2006, case K 12/06**

PL

PL – Amendment to Copyright and Related Rights Act Adopted

On 8 April 2006, an Act amending the Copyright and Related Rights Act of 4 February 1994 (with later

national promotion and cooperation. A budget of EUR 1.5 million is granted to stimulate the availability of artistic films to a larger public.

In the presented scheme, the film producer is considered to be crucial to the development of Dutch film talent. That is why the producer should, according to the Cabinet, have greater responsibility and should become the key figure in the realization of films. To this end, the traditionally exerted influence and interference by the Dutch film fund and the public broadcasting organisations will be reduced.

There will be stricter rules to qualify for financial support. However, to encourage a greater variety of films, the financial aid will no longer be limited to a maximum per film. The Cabinet also plans to simplify access to financial grants in order to avoid bureaucratic procedures. The cooperation between the Dutch film fund, the public broadcasting organisations and the film sector will therefore need to be reformed.

The tax arrangement for film has recently been improved based on suggestions made by the film sector (see IRIS 2006-2: 17). In future, the complicated system of the tax arrangement will be replaced by other means to attract film investors. A new film institute is also being considered and should boost the sector by offering education as well as research and by supporting national as well as international promotion. ■

types of activity) made by entrepreneurs whose business activity is connected with using films; i.e. broadcasters, digital platform operators, cable television operators, cinema owners, distributors selling or renting film copies in tangible form. These fees have to be paid to the Polish Institute of Film Art, which is a State legal person dealing with many tasks referring to the support of Polish film art.

The Article 19 paragraph 9 referred to states that payments described in the paragraphs 1 to 7 are subject to the application *mutatis mutandis* of the provisions of part III ("Tax obligations") of the Act of 29 August 1997 on Tax Law (*Ordynacja podatkowa*). But in the case of the film funding charges, the competences of the fiscal administration are given to the Director of the Polish Institute of Film Art, and the competences of the appeal body are given to the Minister of Culture.

The Commissioner for Civil Rights Protection did not question the purpose or socio-economic usefulness of the fees described in Article 19 paragraph 1 – 7. But he claimed that it infringed the principle of correct and rational legislation referring to activities of fiscal administration and the collection of a new tax. ■

amendments) has been given to the President for signature.

This Act is aimed at achieving full implementation of the Directive 2001/84/EC of the European Parliament and of the Council on the resale right for

the benefit of the author of an original work of art (so-called *droit de suite*) into the Polish legal system

In the course of the legislative procedure the *Sejm* - the lower chamber of the Polish Parliament - had adopted the Act on 23 March 2006. The Senate - the upper chamber of the Parliament - had proposed in its resolution of 30 March 2006 only one amendment to the draft Act. It referred to the definition of the 'professional resale' term. On 7 April 2006 this amendment had been rejected by the *Sejm*.

The amending Act provides that the authors of the original works of sculpture or photographic art or the author's heirs are entitled to receive a remuneration based on the sale price obtained for resale conducted on a professional basis of the work, subsequent to the first transfer of the work by the author.

The amount of this remuneration varies according to the amount of the resale price. It constitutes 5 % for the portion of the sale price up to EUR 50,000, 3 % for the portion of the sale price from EUR 50,000 to EUR 200,000. Further percentage limits of this

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● *Ustawa z dnia 23 marca 2006 r. o zmianie ustawy o prawie autorskim i prawach pokrewnych (Act of 23 March 2006 amending the Copyright and Related Rights Act of 4 February 1994), available at:*
<http://merlin.obs.coe.int/redirect.php?id=10111>

remuneration include 1 %, 0.5 % and 0.25 % for the portion of the sale price.

However, the maximum amount of this remuneration may not be higher than EUR 12,500.

Original works of art are defined as works made by the artist himself or copies considered to be original works of art - meaning copies which have been made in limited numbers by the artist himself or under his authority, which have been numbered, signed or otherwise duly authorized by the artist.

Although there is no such provision within the Directive 2001/84/EC the national legislator chose to keep in the national legal system the *droit de suite* also for authors of literary and musical manuscripts and for their heirs. They are entitled to receive 5 % of the resale price. The percentage in this case is not set in relation to the resale price. Also no maximum amount of such remuneration is provided.

It should be noted that *droit de suite* already existed in the Polish legal framework, but its legal construction needed to be more adjusted to the requirements of the *acquis communautaire*.

The Act will enter into force after 14 days after the day of its publication. ■

RO – Misleading Advertising Spots Withdrawn

Five advertising spots in which private banks advertised bank loans and lease finance were banned by the *Consiliul Național al Audiovizualului* (Romanian regulatory body for the electronic media - CNA) at the beginning of April 2006. The CNA took this step on the grounds that the actual annual interest and the total cost for the consumer were not expressly indicated in the spots. One advertisement mentioned "small monthly instalments of EUR 11", while in the right hand corner of the screen the actual credit value of EUR 16 per month was written in tiny, virtually illegible letters. Similarly, in an advertisement for lease finance, an interest rate of 7 % was indicated, but no reference was made to the additional charges that were due.

Before the ban was imposed, the CNA members discussed the issue of consumer credit with repre-

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● *Codul de Practică în Publicitate, available at:*
<http://merlin.obs.coe.int/redirect.php?id=10159>

RO

sentatives of the *Consiliul Român pentru Publicitate* (Romanian Advertising Council - RAC) and experts from the *Banca Națională Română* (Romanian National Bank).

In the opinion of the RAC, the advertising spots infringed Art. 32 of the *Codul de Practică în Publicitate (Code of Advertising Practice)*, which states that "advertisements promoting financial transactions, particularly investment services or investment in movables and immovables, must provide clear, comprehensive information in order not to mislead members of the public with no experience in this area. The public should be able to make a choice on the basis of their own knowledge of the subject". The provisions of this article also apply to advertising for bank services and insurance products.

According to the BNR, any advertisement for consumer credit should indicate the actual annual interest rate (*Dobânda Anuală Efectivă - DAE*) in a clear, understandable way. *DAE* represents the total cost of credit for the consumer and not just the interest charged by the bank. ■

RO – CNA and ARCA Sign Protocol

At the end of March 2006, the *Consiliul Național al Audiovizualului* (Romanian regulatory body for electronic media - CNA) and the *Asociația Română de Comunicații Audiovizuale* (Romanian audiovisual communications association - ARCA) signed a protocol designed to ensure closer compliance with Council of Europe Recommendation (2000) 23 (see IRIS 2001-1: 2). The Recommendation states that,

before imposing sanctions, regulatory authorities in the audiovisual sector should give broadcasters the opportunity to be heard.

In the protocol, the CNA agrees to inform the broadcaster concerned about the existence of a complaint about a breach of a law or CNA regulation. It will also give the precise date on which the complaint is due to be investigated. The CNA must provide this information at least 24 hours before the discussion is due to take place. The broadcaster will

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thus be able to express its own views before the matter is assessed by the regulatory authority, either

● **Protocol CNA-ARCA aplicabil în relație cu procedura de sancționare a radio-difuzorilor din 21 martie 2006, available at:**
<http://merlin.obs.coe.int/redirect.php?id=10142>

RO

RU – New Rules for Fighting Terrorism

On 26 February 2006 the State Duma adopted, the legislation that on 6 March 2006 President Vladimir Putin of the Russian Federation signed into law the Federal Statute “On Counteraction to Terrorism”. Most of its provisions have come into legal force after official publication. The Statute derogated most of the provisions of the Statute “On Fight against Terrorism” (of 25 July 1998) to be abolished completely on 1 January 2007.

The Statute provides for the principles of counteraction to terrorism, organizational and legal measures aiming at prevention and fighting against terrorism, and minimization or elimination of the aftermath of terrorist activities. It also stipulates legal rules of conduct of antiterrorist operations including the formation and competence of operational matters, admissible limitations of the rights and freedoms inside the territory of zone of counterterrorist operation, rules of use of the Armed Forces. The Statute includes a few provisions that affect the mass media.

The new law expands the boundaries of the notion of “terrorist activities”: it shall *inter alia* include propaganda of ideas of terrorism, dissemination of information calling for performance of terrorist activities as well as proving or justifying the necessity of such performance (Article 3.2). However, the law does not introduce liability for these kinds of activities.

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● **The Federal Statute of 6 March 2006, #35-FZ, “O protivodeistvii terrorizmu” (“On Counteraction Terrorism”), published (in Russian) in “Rossiiskaya gazeta” daily (official publisher) on 10 March 2006, extracts available at:**
<http://merlin.obs.coe.int/redirect.php?id=10109>

RU

UA – Sweep Changes in Broadcasting Statute

On 1 March 2006, the new wording of the Statute of Ukraine “On TV and Radio Broadcasting” of 21 December 1993, (see IRIS 1995-2: 8), adopted by the Supreme Rada of Ukraine (the parliament) on 12 January 2006, was enacted after its official publication.

The new Statute provides for major changes at two national state-run broadcasting companies – the National TV Company of Ukraine (NTCU) and the National Radio Company of Ukraine (NRCU). According to the Statute, the Supreme Rada of Ukraine shall form Public Councils for both NTCU and NRCU. Each will consist of 17 members: 9 persons recommended by parliamentary factions, 4 persons recommended by the President of Ukraine and the other 4 recommended by national broadcasting associations. The Public Councils will be involved in the process of appointment and dismissal of the heads of the NTCU and the NRCU. The pro-

cedure of appointment shall be rather complicated: the Public Council selects a candidate and makes a submission to the Supreme Rada of Ukraine. The parliament then approves the candidate and makes submission to the President of Ukraine for a final appointment.

Unlike previous law the Statute shall not include a general definition of a counterterrorist operation zone, however in case of start of such an operation the head of operational matters shall be obliged to define a zone of operation (name concrete objects to be included in the territory of such a zone if there are any) and immediately publish this information (Article 11.2, Article 13.2). Inside the zone the following limitations of information rights may be introduced: control over any forms of conveyance of information including communication via telecommunication networks; temporary suspension of provision of telecommunication services, e.g. mobile telephone communications (Article 11.3).

As distinct from the 1998 Act, the Statute does not include any limitations upon broadcasting by the mass media on the activities of professionals involved in life-saving operations. Neither included were any provisions authorizing the head of operational matters to define the rules of access and conduct of journalists in the counter-terrorist operation zone. The said legal norms were excluded from the original draft law after the first reading in the Duma. Deputies argued that this decision was justified as deriving from the controversial character of the issue in question. From now on the mass media activities in the situation of terrorist crisis shall be referred to the general provisions of the Statute on Mass Media and the self regulation rules (first of all, provisions of the Antiterrorist Convention adopted on 8 April 2003 by the Mass Media Industrial Committee).

The only provision that shall directly affect the mass media authorizes the head of counterterrorist operation to appoint a member of operational matters to be responsible for contact with the mass media and the public (Article 13.2.5). ■

cedure of appointment shall be rather complicated: the Public Council selects a candidate and makes a submission to the Supreme Rada of Ukraine. The parliament then approves the candidate and makes submission to the President of Ukraine for a final appointment.

Currently it is the President who appoints the heads of the NTCU and the NRCU by his own decision. The new amendments are considered a step forward to European public service broadcasting standards. At the same time a lot will result from new internal charters of the NTCU and the NRCU. According to the Statute “On TV and Radio Broadcasting” these charters shall be adopted by separate parliamentary statutes.

The Statute established a number of new content quotas to be followed by all broadcasters of Ukraine. Broadcasters shall reserve not less than 80 % of the broadcasting time for European programs, with not less than 50 % of the broadcasting time for Ukrainian programs. Not less than 50 % of weekly broadcasting

time of music and songs on every radio from 7:00h to 23:00h shall be secured for the music of the Ukrainian authors and performers. Judging from the current stage of implementation of the new Statute this obligation is being ignored by radio companies.

An obligation on every broadcaster to adopt within one year an editorial charter is another novelty of the Statute. The editorial charters shall define professional rules of conducts for journalists; moreover the Statute contains a general list of provisions that shall be written in the charters: for example provisions on how to report elections, on how to deal with information about private life, etc. The general structure of an editorial charter was copied from the BBC Producers' Code. Editorial charters shall be adopted by the management or owner of a TV or a radio company. It is not provided that journalists shall have any influence on the text of such a charter. At the same time

journalists will have 50 % representation in the Editorial Councils that shall be also formed at every TV and radio company. Such councils shall be responsible for settling editorial disputes. The other half of an Editorial Council shall be formed by the management or owner of the TV or radio company.

At the same time many provisions of the Statute are rather questionable. The President of Ukraine immediately after signing the Statute into law ordered the start of work on amendments. Without reasons the Supreme Rada removed from the bill at the very last moment provisions to limit foreign investments in TV and radio companies.

The introduction of the license guarantee is another point for criticism. A license guarantee is a payment in the amount of up to 10% of the license fee to be fixed every time by the National Council of Ukraine on TV and Radio, the main regulator in broadcasting, every applicant for the frequency shall pay such a guarantee in advance of the frequency competition. The license guarantee goes towards the state budget; it shall not be returned to those who lost competition. ■

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• **Zakon Ukrainy "Pro telebachennya i radiomovlennya" (The Statute of Ukraine "On TV and Radio Broadcasting")**, available at:
<http://merlin.obs.coe.int/redirect.php?id=10108>

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