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of the European Audiovisual Observatory

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European Court of Human Rights: Taranenko v. Russia

The European Court's judgment in the case of Taranenko v. Russia illustrates how Article 10, in conjunction with Article 11 (freedom of assembly and association), also protects collective action, expressive conduct and distribution of leaflets as a form of protected speech. The case concerns the detention and conviction of Ms Taranenko, a participant in a protest against the politics of President Putin in 2004. The protesters had occupied the reception area of the President's Administration building in Moscow and locked themselves in an office. They waved placards with "Putin, resign!" (« Путин , уйди !») and distributed leaflets with a printed address to the President that listed ten ways in which he had failed to uphold the Russian Constitution, and a call for his resignation. One of the protesters, Ms Taranenko, complained in Strasbourg about the way the Russian authorities have treated, detained, prosecuted and convicted her for participating in this protest action, claiming that her right to freedom of expression and her right of peaceful assembly had been violated.

The Court reiterated that "the right to freedom of assembly is a fundamental right in a democratic society and, like the right to freedom of expression, is one of the foundations of such a society. Thus, it should not be interpreted restrictively". The Court also emphasised that any measures interfering with freedom of assembly and expression "other than in cases of incitement to violence or rejection of democratic principles do a disservice to democracy and often even endanger it". The Court noted that the issues of freedom of expression and freedom of peaceful assembly are closely linked in the present case: "Indeed, the protection of personal opinions, secured by Article 10 of the Convention, is one of the objectives of freedom of peaceful assembly as enshrined in Article 11 of the Convention". The European Court underlined that the protest, although involving some disturbance of public order, had been largely non-violent and had not caused any bodily injuries. The participants in the protest action came to the President's Administration building to meet officials, hand over a petition criticising the President's policies, distribute leaflets and talk to journalists. The aim of the protesters in Moscow was indeed to obtain media-exposure, in which they effectively succeeded. The disturbance that followed was not part of their initial plan but a reaction to the guards' attempts to stop them from entering the building. In this context, the Court had to examine with particular scrutiny the prison sentence as a sanction imposed by the national authorities for non-violent conduct. The Court found in particular that while a sanction for Ms Taranenko's actions might have been warranted by the demands of public order, her detention pending trial of almost one year and the suspended prison sentence of three years imposed on her had to have had a deterring effect on protesters. The Court considered the pre-trial detention and the prison sentence as an "unusually severe sanction" having a chilling effect on Ms Taranenko and other persons taking part in protest actions. The Court referred to the "exceptional seriousness of the sanctions" as being disproportionate and therefore concluded that the interference had not been necessary in a democratic society for the purposes of Article 10. There had accordingly been a violation of Article 10 interpreted in the light of Article 11 of the Convention.

• Judgment by the European Court of Human Rights (First Section), case of Taranenko v. Russia, Appl. No. 19554/05 of 15 May 2014
http://merlin.obs.coe.int/redirect.php?id=17082 EN

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European Court of Human Rights: Perinçek v. Switzerland and Pentikäinen v. Finland

Two cases that have been previously reported in IRIS, Perinçek v. Switzerland (see IRIS 2014-2/1) and Pentikäinen v. Finland (see IRIS 2014-4/2), were referred to the Grand Chamber on 2 June 2014. The consequence of the referrals is that neither the judgment of 17 December 2013 in Perinçek v. Switzerland, nor the judgment of 4 February 2014 in Pentikäinen v. Finland have become final. In its application of Article 43 of the Convention the panel of the Grand Chamber was of the opinion that both cases raise serious questions affecting the interpretation or application of the Convention, or concern serious issues of general importance, in which the Grand Chamber of 17 judges is now to deliver a final judgment, most likely in 2015.

In Perinçek v. Switzerland, the Second section of the Court ruled by five votes to two, that Switzerland had violated the right to freedom of expression by convicting Doğu Perinçek, chairman of the Turkish Workers' Party, of publicly challenging the existence of genocide against the Armenian people. The Swiss Courts found Perinçek guilty of racial discrimination within the meaning of Article 261bis of the Swiss Criminal Code. According to the Swiss Courts, the Armenian genocide, like the Jewish genocide, was a proven historical fact, recognised by the Swiss Parliament, while Perinçek's motives in denying this historical fact were of a racist tendency and did not contribute to the historical debate. The Second section of the European

Court however clearly distinguished the discussions on the legal qualification of the atrocities perpetrated against the Armenian people in the first decades of the 20th century from those concerning the negation of the crimes of the Holocaust, committed by the Nazi-regime shortly before and during World War II. The Court took the view that Switzerland had failed to show how there was a social need in that country to punish an individual for racial discrimination on the basis of declarations challenging the legal characterisation as "genocide" of acts perpetrated on the territory of the former Ottoman Empire in 1915 and the following years. The Swiss Government requested the referral to the Grand Chamber in order to reconsider the approach and reasoning of the majority of the Second section, finding that there has been a violation of Article 10.

In Pentikäinen v. Finland the Fourth section of the European Court found that a Finnish press photographer's conviction for disobeying a police order while covering a demonstration did not breach his freedom of expression as guaranteed by Article 10 of the Convention. Pentikäinen had not been prevented from taking photos of the demonstration and no equipment or photos had been confiscated. His arrest was a consequence of his decision to ignore the police orders to leave the area, while there was also a separate secure area which had been reserved for the press. The Court considered that the fact that the applicant was a journalist did not give him a greater right to stay at the scene than the other people and that the conduct sanctioned by the criminal conviction was not his journalistic activity as such, but his refusal to comply with a police order at the very end of the demonstration, when the latter was judged by the police to have become a riot. The European Court concluded, by five votes to two, that the Finnish courts had struck a fair balance between the competing interests at stake. Pentikäinen requested a referral to the Grand Chamber. His claim was supported by the Finnish Union of Journalists, the International Federation of Journalists and the European Federation of Journalists, arguing that the Court's finding risked undermining press freedom and the rights of journalists covering issues of importance for society.

• Decision by the Panel of 2 June 2014 to refer the case of Perinçek v. Switzerland, Appl. No. 27510/08 of 17 December 2013, to the Grand Chamber NN

• Decision by the Panel of 2 June 2014 to refer the case of Pentikäinen v. Finland, Appl. No. 11882/10 of 4 February 2014, to the Grand Chamber. NN

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Committee of Ministers: Protection of whistleblowers

On 30 April 2014, the Council of Europe's Committee of Ministers (CM) adopted Recommendation CM/Rec(2014)7 to member states on the protection of whistleblowers. This follows previous engagement with the topic by other Council of Europe bodies, e.g., the Parliamentary Assembly's Resolution 1729(2010) and Recommendation 1916(2010), both entitled, "Protection of 'whistle-blowers'" (IRIS 2010-5:Extra) and case-law of the European Court of Human Rights (e.g. Heinisch v. Germany, no. 28274/08, ECHR 2011).

The starting premise of the Recommendation is that whistleblowers "can contribute to strengthening transparency and democratic accountability" (Preamble). Its central recommendation is that member states "have in place a normative, institutional and judicial framework" (hereafter, national framework) to protect whistleblowers. For the purposes of the Recommendation, a whistleblower is "any person who reports or discloses information on [acts and omissions that represent] a threat or harm to the public interest in the context of their work-based relationship, whether it be in public or private sector" (Appendix, para. (a)).

The Appendix to the Recommendation comprises "a series of principles to guide member states when reviewing their national laws or when introducing legislation and regulations or making amendments as may be necessary and appropriate in the context of their legal systems". The principles are grouped as follows: material scope; personal scope; normative framework; channels for reporting and disclosures; confidentiality; acting on reporting and disclosure; protection against retaliation; advice, awareness and assessment.

In terms of material scope, the national framework facilitating public-interest disclosures should include, "as appropriate, collective labour agreements" (para. 1). In terms of personal scope, the national framework "should cover all individuals working in either the public or private sectors, irrespective of the nature of their working relationship and whether they are paid or not" (para. 3). It should extend to after the cessation of the work-related relationship and "possibly" also to "the recruitment process or other pre-contractual negotiation stage" (para. 4). However, a "special scheme or rules, including modified rights and obligations, may apply to information relating to national security, defence, intelligence, public order or international relations of the State" (para. 5).

An important feature of the envisaged normative framework is that States should ensure the existence of an effective mechanism or mechanisms "for acting

on public interest reports and disclosures" (para. 9). The Recommendation calls for prompt and efficient follow-up to public-interest reporting and disclosures, i.e., investigation and, "where necessary", other action by "the employer and the appropriate public regulatory body, law enforcement agency or supervisory body" (para. 19). It also calls for whistleblowers to be kept informed of relevant follow-up action taken (para. 20).

There should be clear channels for public-interest reporting and disclosures: within an organisation "(including to persons designated to receive reports in confidence)"; to "relevant public regulatory bodies, law enforcement agencies and supervisory bodies", and to the public, e.g. to "a journalist or a member of parliament" (para. 14). Furthermore, employers should develop - in consultation with workers and their representatives - internal reporting procedures (paras. 15-17).

Whistleblowers are entitled to confidentiality ("subject to fair trial guarantees"") (para. 18) and to protection against "retaliation of any form, whether directly or indirectly, by their employer and by persons working for or acting on behalf of the employer" (para. 21).

The Recommendation concludes with a call for "[p]eriodic assessments of the effectiveness of the national framework [04046] by the national authorities" (para. 29).

• Recommendation CM/Rec(2014)7 of the Committee of Ministers to member states on the protection of whistleblowers, 30 April 2014
http://merlin.obs.coe.int/redirect.php?id=17127 EN FR

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Committee of Ministers: Declaration on protection of journalism and safety of journalists and other media actors

On 30 April 2014, the Council of Europe's Committee of Ministers (CM) adopted a Declaration on the protection of journalism and safety of journalists and other media actors. The Declaration's point of departure is the observation that:

"Journalists and other media actors in Europe are increasingly being harassed, intimidated, deprived of their liberty, physically attacked and even killed because of their investigative work, opinions or reporting. These abuses and crimes are often met with insufficient efforts by relevant State authorities to bring the perpetrators to justice, which leads to a culture of impunity" (para. 1).

The Declaration draws attention to the vulnerability of journalists and others performing public-watchdog functions through the media: they are often confronted with operational obstacles as well as threats to their safety and security. Crucially, it stresses that "Attacks against journalists and other media actors constitute particularly serious violations of human rights because they target not only individuals, but deprive others of their right to receive information, thus restricting public debate, which is at the very heart of pluralist democracy" (para. 5).

The Declaration then connects the dots between some of the most relevant emphases in the case-law of the European Court of Human Rights pertaining to the safety of journalists and other media actors. It refers to the expansive nature of the legal protection for journalistic activities (as governed by duties and responsibilities) under Article 10 of the European Convention on Human Rights (ECHR). It also refers to various positive obligations of States, e.g. to: create a favourable environment for inclusive public debate; protect individuals' right to freedom of expression "against the threat of attack, including from private individuals, by putting in place an effective system of protection" (para. 7), and eradicating impunity. It insists that: "All attacks on journalists and other media actors should be vigorously investigated in a timely fashion and the perpetrators prosecuted" (para. 8).

The Declaration recalls that States are required to tackle the sources of chilling effects on free expression and public debate, e.g.: judicial intimidation; arbitrary application of the law; restrictions on free access to information; lack of protection of journalists' sources, and the "surveillance of journalists and other media actors, and the tracking of their online activities [04046] without the necessary safeguards" (para. 10).

The action-oriented part of the Declaration (para. 11) returns to the point of departure of the Declaration: the need to effectively counter attacks and threats targeting journalists and other media actors. It draws attention to the "specific dangers" faced by female journalists. It urges member states to fulfil relevant positive obligations and to "contribute to the concerted international efforts to enhance the protection of journalists and other media actors", along the lines envisaged by the United Nations Plan of Action on the Safety of Journalists and the Issue of Impunity.

The CM also pledges to "intensify its standard-setting and co-operation activities for the protection of journalism and the safety of journalists and other media actors as a priority and contribute expertise to other international organisations with regard to the particular competence of the Council of Europe". The current prioritisation of these themes in various parts of the Council of Europe is evident. Safety of journalists was the focus of the third Resolution adopted at the Council of Europe Conference of Ministers responsible for

Media and Information Society in Belgrade in November 2013 (IRIS 2014-2/3). In December 2013, the CM held a thematic debate on the topic, based on a discussion paper by the Secretary General (SG) of the Council of Europe. In the run-in to the CM debate, the Council of Europe's Steering Committee on Media and Information Society (CDMSI) also devoted attention to the theme. Following the CM debate, the SG drew up a set of proposals for follow-up.

After the adoption of the Declaration, a Round Table on Safety of Journalists ('From commitment to action') was organised by the Council of Europe in May 2014 and an expert committee on protection of journalism and safety of journalists (MSI-JO) is currently drafting a Recommendation with an identical focus to that of the Declaration. As such, the Recommendation, which will be submitted to the CM for adoption in 2015, will complement the Declaration.

The Russian Federation entered a reservation to the Declaration, "specifically denying its application to 'other media actors', as it considers this term to be unspecific and without any basis in binding international legal documents" (footnote 1 to the Declaration).

• Declaration of the Committee of Ministers on the protection of journalism and safety of journalists and other media actors, 30 April 2014
http://merlin.obs.coe.int/redirect.php?id=17129 EN FR

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EUROPEAN UNION

European Commission: A revised General Block Exemption Regulation

On 17 June 2014, the European Commission adopted a revised General Block Exemption Regulation (GBER). The original GBER (Council Regulation No 994/98 of 7 May 1998, amended by Council Regulation No 733/2013 of 22 July 2013), declared certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty, thereby exempting them from prior notification to the Commission. The revised GBER has considerably extended the scope of exemptions from prior notification of state aid granted to companies. According to Article 3 GBER, public aid schemes shall be considered compatible with the internal market and exempted from the notification requirement of Article 108(3) of the Treaty provided that such aid fulfils all the general conditions laid down in Chapter I GBER, as well as the specific conditions for the relevant category of aid laid down in Chapter III GBER.As a consequence of this, Member States will be able to grant more aid measures and higher amounts without having to notify them to the Commission for prior authorisation.

The key changes brought by the revised GBER are the following:

- Wider scope through increased thresholds: The exemption thresholds for many measures that were already covered by the existing GBER have been raised, allowing Member States to grant higher aid amounts without prior notification. For some categories of aid, the scope has also been increased through more flexible eligibility conditions, more favourable maximum aid intensities and higher aid amounts.

- Wider scope through additional categories of aid: The adoption of a revised Enabling Regulation allowed the Commission to exempt new categories, such as aid for local, broadband, research and energy infrastructures, innovation clusters, regional urban development funds, culture and heritage conservation, audio-visual works, sports and recreational infrastructures and aid to make good damage caused by certain natural disasters.

- Simplification: taking on board feedback from the public consultations and in accordance with the objectives of the Commission's State Aid Modernisation (SAM) initiative, the conditions that aid measures should meet to benefit from the exemption have been significantly clarified and simplified.

In the case of aid concerning audiovisual works (including cinematographic works), state aid measures had to be notified to the Commission, which had to assess first whether the aid scheme respected the "general legality" principle, i.e. whether or not the scheme contains clauses that would be contrary to the provisions of the EU Treaty in fields other than state aid (including its fiscal provisions). It then had to assess the compatibility of the support scheme with the provisions of the TFEU dealing with state aid. The Commission's assessment of state aid for audiovisual works is based on the rules indicated in the 2013 Cinema Communication (see IRIS 2014-1/7).

The revised GBER may have an impact in the way Member States notify state aid schemes concerning the audiovisual sector. Recital 73 GBER acknowledges the important role played by these works in shaping European identities as well as the audiovisual sector's particularities, and states that the criteria determined by the Commission in the Cinema Communication should be reflected in block exemption rules for aid schemes for audiovisual works. According to Article 4(1)(aa) GBER, the notification threshold for audiovisual works amounts to EUR 50 million per scheme per year. Article 54 GBER lists the specific conditions rules according to which an aid scheme for audiovisual works shall be exempted from the notification requirement of Article 108(3) of the Treaty. These specific conditions are based on the criteria exposed in the Cinema Communication. First of all, aid shall

support a cultural product, and each Member State shall establish effective processes to determine what is considered "cultural", such as selection of proposals by one or more persons entrusted with the selection or verification against a predetermined list of cultural criteria. The aid may be granted to the pre-production, production and distribution of audiovisual works.

The aid intensity for the production of audiovisual works shall not exceed 50 % of the eligible costs, but may be increased to 60 % of the eligible costs for cross-border productions funded by more than one Member State and involving producers from more than one Member State, and to to 100 % of the eligible costs for difficult audiovisual works and co-productions involving countries from the Development Assistance Committee (DAC) List of the OECD.

The aid intensity for pre-production shall not exceed 100 % of the eligible costs. If the resulting script or project is made into an audiovisual work such as a film, the pre-production costs shall be incorporated in the overall budget and taken into account when calculating the aid intensity. The aid intensity for distribution shall be the same as the aid intensity for production.

Aid shall not be reserved for specific production activities or individual parts of the production value chain. Aid for film studio infrastructures shall not be eligible. Also aid shall not be reserved exclusively for nationals and beneficiaries shall not be required to have the status of undertaking established under national commercial law.

Furthermore, Article 54 GBER also contains a list of eligible costs and includes rules concerning territorial spending obligations following the lines of the Cinema Communication.

The Regulation entered into force on 1 July 2014.

• Commission Regulation (EU) No 651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty Text with EEA relevance
http://merlin.obs.coe.int/redirect.php?id=19094 DE EN FR
CS DA EL ES ET FI HU IT LT LV MT
NL PL PT SK SL SV HR

Francisco Javier Cabrera Blázquez
European Audiovisual Observatory

NATIONAL

BE-Belgium

New criminal provisions for online solicitation for sexual purposes and cyberluring

On 10 April 2014 two new (complementary) acts were adopted in Belgium that amend the Criminal Code in order to protect minors against solicitation for sexual purposes through ICT (information and communication technologies) 'grooming', on the one hand, and 'cyberluring' ('cyberlokken'), on the other hand.

The first act introduces a new article 377quater in the Criminal Code, which criminalises the proposal, through information and communication technologies, of an adult to meet a child who has not reached the age of 16, for the purpose of committing any of the offences established in the sections 'Indecent assault and rape', 'Depravity of youth and prostitution' or 'Public indecency', against him or her, where this proposal has been followed by material acts leading to such a meeting. This act can be punished with a prison sentence between 1 to 5 years. Additionally, an increase of the penalty has been integrated in article 377quater of the Criminal Code when sexual abuse is preceded by online or offline grooming.

Adopting a clear and explicit legislative provision with regard to the solicitation of children for sexual purposes by means of ICT is in line with article 23 of the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse and article 6 of the EU Directive on combating the sexual abuse and sexual exploitation of children and child pornography.

The second act inserts a new section in the Criminal Code, titled 'Luring of minors on the internet with a view to committing a crime or a misdemeanour'. According to the new article 433bis/1 of the Criminal Code, adults that communicate by means of information and communication technologies with an apparent or probable minor to facilitate the commission of a crime or offence against that minor will be punished with a prison sentence between 3 months and 5 years, 1) if they have concealed or lied about their identity, age or capacity, 2) if they have emphasised the confidential nature of their conversations, 3) if they have offered or held up the prospect of a gift or other advantage, 4) if they have tricked the minor in any other way. This article has a broader scope of application than the new article 377quater. The preparatory works of the act on cyberluring indicate that the communication through ICT between the perpetrator and the minor should not necessarily result in a proposi-

tion or meeting in order to be able to apply the new article 433bis/1, and that for instance manipulating a child to send child pornography images (without intending to meet that child) could fall within the scope. Moreover, 'cyberluring' could also have other goals, aside from the commission of sexual offences, such as luring children to a sect. Finally, it was clarified that the four conditions mentioned in the article should not be considered cumulative.

• *Wet van 10 april 2014 betreffende de bescherming van minderjarigen tegen benadering met als oogmerk het plegen van strafbare feiten van seksuele aard* (Act of 10 April 2014 regarding the protection of minors against solicitation with the purpose of committing criminal offences of a sexual nature, Official Gazette 30 April 2014)
http://merlin.obs.coe.int/redirect.php?id=17123 FR NL

• *Wet van 10 april 2014 tot wijziging van het Strafwetboek teneinde kinderen te beschermen tegen cyberlokkers* (Act of 10 April 2014 amending the Criminal Code with a view to protect children against cyberlurers, Official Gazette 30 April 2014)
http://merlin.obs.coe.int/redirect.php?id=17125 FR NL

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Federal Supreme Court weighs minor's right to informational self-determination against media freedom and freedom of expression

In a ruling of 29 April 2014 (case no. VI ZR 137/13), the *Bundesgerichtshof* (Federal Supreme Court - BGH) granted an appeal filed by a magazine and dismissed a complaint lodged by the adopted child of a famous television presenter, who had sought an injunction against the publication of information about the parent/child relationship between them.

The plaintiff had been adopted by a famous TV presenter and his wife in 2000. Until 2009, details of the parent/child relationship between the adopted minor and the TV presenter, including the plaintiff's name and age and her parents' names, had been reported in various publications. In the 8 July 2011 edition of the magazine "Frau im Spiegel", the defendant had published a report entitled "Gefragt wie ein Popstar" ("Questioned like a pop star") concerning an appearance by the TV presenter at the Goethe University in Frankfurt am Main. In the article, the plaintiff's full name and age had been mentioned and, although the digits in her age had been mixed up, she had still been identifiable.

The *Landgericht Hamburg* (Hamburg District Court - LG) had ordered the defendant not to publicise the parent/child relationship between the plaintiff and the TV presenter (decision of 29 June 2012, case no. 324 O 201/12). The defendant's subsequent appeal to the Hanseatisches Oberlandesgericht (Hanseatic Appeal Court - OLG) had been rejected (decision of 18 December 2012, case no. 7 U 67/12).

The BGH upheld the defendant's appeal and dismissed the action brought by the TV presenter's adopted child. Unlike the LG and OLG, the BGH ruled that the plaintiff was not entitled to prevent the publication of details of her relationship to the TV presenter.

It was true that the plaintiff's general privacy rights, in particular her right to informational self-determination, had been infringed by the publication of her first name, age and relationship to the TV presenter in the defendant's magazine. However, this infringement was not unlawful since, in the weighing up process that was necessary because the right to privacy was a framework right, the defendant's right to freedom of expression and media freedom was outweighed by the plaintiff's right to privacy.

In the weighing up process, the fact that the plaintiff had been only 12 years old when the information had been published and had therefore merited special protection in view of her continuing development into an independent person had counted in her favour.

However, the decisive factor in the defendant's favour was the fact that the information concerning the plaintiff that had been published in the magazine had previously been widely reported and therefore had already shaped the public's view of the plaintiff. According to the LG's findings, to which the OLG referred in its decision, 11 press reports had been published in various high-circulation media accessible to a wide audience in 2000, 2001 and between 2006 and 2009. These articles about the TV presenter had mentioned the plaintiff's first name and age, as well as the parent/child relationship between the two of them.

Therefore, the plaintiff's name, age and relationship to the TV presenter had been known to a large number of people before the defendant had published this information. Since these people could themselves have passed this information on to third parties, the plaintiff had lost her anonymity before the disputed report had been published. In view of the short period of time between the most recent of these publications and the disputed report, the plaintiff had not yet regained her anonymity. Since the defendant's disputed report did not contain any new information, it did not constitute a separate infringement.

Contrary to the OLG's opinion, the publication of known information by the defendant did not become unlawful simply because there was no legitimate public interest and because the report about the TV presenter could have been published without revealing the plaintiff's first name and age.

It was true that the information about the plaintiff only added entertainment and descriptive value to the article about the TV presenter. However, even

entertaining articles were protected under the freedom of expression and it was fundamental to the freedom of expression and media freedom that media should be able to decide according to their own editorial criteria what they considered to be in or outside of the public interest. Freedom of expression was not only designed to protect the public interest. Rather, its primary purpose was to guarantee the self-determination of individual holders of fundamental rights by enabling them to express their personality in communications with others. This in itself lent added importance to the freedom of expression when weighed against the general right to privacy, whereas any public interest merely increased the importance of this fundamental right even further.

• *Urteil des BGH vom 29. April 2014 (Az.: VI ZR 137/13)* (Bundesgerichtshof (Federal Supreme Court - BGH) decision of 29 April 2014 (case no. VI ZR 137/13))
http://merlin.obs.coe.int/redirect.php?id=17108 DE

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Federal Supreme Court rules that privacy breach compensation is not heritable

In a ruling of 29 April 2014 (case no. VI ZR 246/12), the Bundesgerichtshof (Federal Supreme Court - BGH) rejected an appeal by a plaintiff who, as the heir of a famous entertainer, had wanted to pursue a claim for financial compensation for an infringement of the late entertainer's right to privacy.

The entertainer had argued that articles published in the defendant's magazines had infringed his right to privacy and claimed financial compensation from the defendant. His complaint had been faxed to the court the day before he died, but had not been sent to the defendant until a few weeks later.

In its decision, the BGH confirmed the lower-instance rulings of the Landgericht Berlin (Berlin District Court) of 21 June 2011 (case no. 27 O 145/11) and the Kammergericht Berlin (Berlin Supreme Court) of 3 May 2012 (case no. 10 U 99/11) on the grounds that the claim for financial compensation for breach of privacy was not heritable.

However, this outcome was not based on the recognition that the intangible elements of the right to privacy were irreparably tied to the individual rightsholder and, as personal rights, were inalienable and indispensable, i.e. non-transferable and non-heritable. Indeed, the claim to financial compensation was not itself an element of the general right to privacy. Rather, the claim was not heritable because of its very nature and purpose.

The legislature had never previously examined the heritability of a claim to financial compensation. Neither had it stated indirectly that such a right could be inherited. In particular, the deletion and rescinding of Articles 847(1)(2) and 1300(2) of the old version of the Bürgerliches Gesetzbuch (Civil Code - BGB), which had governed the non-heritability of the right to non-material damages and "Kranzgeld" (compensation due for breach of a promise to marry) respectively, could not be interpreted as such an indirect statement.

The function of a claim to financial compensation proved decisively that it could not be inherited. The awarding of financial compensation to a victim of serious breaches of privacy was based primarily on the idea of making amends, which was the main purpose of the right to such compensation. Financial compensation could not be considered for breaches of privacy rights committed after a person's death because a deceased person could no longer be satisfied in this way. The same applied in the current situation, in which, although his privacy had been breached while he was still alive, the victim had died before the claim to financial compensation had been met. Here also, as in the case of postmortem breaches of privacy, amends could no longer be made. Generally speaking, there were (in principle) no grounds for extending a compensation claim beyond the victim's death.

The preventive effect sought through or resulting from the payment of financial compensation did not justify any other outcome, since it was not, on its own, a sufficient reason to award such compensation. The heritability of the right to damages and other intangible rights on the one hand, and the non-heritability of claims to financial compensation on the other, did not represent unjustified discrimination under Article 3(1) of the Grundgesetz (Basic Law - GG). Indeed, there were material grounds for such discrimination because the notion of making amends was more prominent in a claim for financial compensation than in a claim for damages and other claims for reimbursement for non-material losses.

The fact that the claim for financial compensation was faxed to the court while the deceased was still alive did not alter the fact that the purpose of the compensation, i.e. to make amends, could no longer be met after he had died.

Whether the right to financial compensation would have been heritable if the claim had been delivered to the defendant while the victim was still alive could remain an open question. In this case, the retroactive effect provided for in Article 167 of the Zivilprozessordnung (Code of Civil Procedure - ZPO) did not apply, i.e. the time at which the action was submitted to the defendant was not fictitiously moved forward to the time when it was submitted to the court. Article 167 ZPO only applied to cases in which the document was submitted in order to comply with a deadline, to have the period of limitations begin anew or to have it extended.

• *Urteil des BGH vom 29. April 2014 (Az.: VI ZR 246/12)* (Federal Supreme Court ruling of 29 April 2014 (case no. VI ZR 246/12))
http://merlin.obs.coe.int/redirect.php?id=17109 DE

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Regional Constitutional Courts find broadcasting charge acceptable

In a ruling of 13 May 2014, which has not yet been published in full, the *Verfassungsgerichtshof Rheinland-Pfalz* (Rhineland-Palatinate Constitutional Court) decided that the new regulations on the financing of public service broadcasting through the levying of broadcasting charges did not infringe the provisions of the Constitution (case no. VGH B 35/12; regarding the introduction of the new broadcasting charge in Germany, see IRIS 2012-2/14). A complaint lodged by the Montabaur-based road construction firm Volkmann und Rossbach, which has numerous branches both in Rhineland-Palatinate and elsewhere, was deemed inadmissible by the court insofar as it concerned details of the collection of the charge and of related data. These details should initially have been clarified by the administrative courts. It was also clear that alleged violations of the freedoms of occupation, trade and information, and of the right to informational self-determination could be ruled out immediately, since the broadcasting charge did not interfere with any of these areas.

The court considered the complaint to be admissible but unfounded insofar as the complainant disputed the Land's jurisdiction to legislate on the grounds that the broadcasting charge was actually a tax that the Länder did not have the authority to introduce. The broadcasting charge was not a tax, but a contribution, as defined under fiscal law, for which the Länder were responsible. The court also rejected the complainant's allegation that the equal treatment principle had been violated. The road construction firm had argued that businesses were categorised according to the number of sites and employees they had, rather than being treated individually, which led to unequal treatment in individual cases. In particular with mass phenomena, as they appeared specifically in fiscal law, the legislature was therefore both obliged and entitled to base its decisions on an overall assessment and to incorporate them into generalised regulations. If this resulted in hardship for some, it did not represent a violation of the general principle of equality. Although it was not currently necessary under constitutional law to take exceptional cases into consideration, the legislature was obliged to continuously monitor and observe developments in the law on the broadcasting charge and technical changes.

Finally, the broadcasting charges were proportionate. They were limited to a small percentage of staff and operational costs. The law on the financing of broadcasting also ensured that any budgetary surplus was taken into account when calculating future financial requirements and did not have a detrimental effect on those liable to pay the charge.

This interpretation of the law was confirmed two days later by the *Bayerische Verfassungsgerichtshof* (Bavarian Constitutional Court) (decision of 15 May 2014, case no. Vf. 8-VII-12 and Vf. 24-VII-12). In a case brought in particular by the Rossmann pharmacy chain, it was also argued that the broadcasting charge was a tax and that the aforementioned fundamental rights had been infringed. Rossmann claimed that it had to pay around EUR 280,000 for its 1,750 or so branches, whereas it would only have to pay EUR 39,000 if all its staff worked at the same location. The Bayerische Verfassungsgerichtshof replied that it was not contrary to the nature of a charge such as this that owners of properties in which there was no broadcast reception equipment should be obliged to pay. The proportionality principle did not mean that the legislature should exempt people from the obligation to pay the charge if they did not want to make use of the opportunity it gave them.

• *Presseerklärung des Verfassungsgerichtshofs Rheinland-Pfalz zum Urteil vom 13. Mai 2014, Aktenzeichen: VGH B 35/12* (Press release of the Rhineland-Palatinate Constitutional Court concerning the judgment of 13 May 2014 (VGH B 35/12))
http://merlin.obs.coe.int/redirect.php?id=17114 DE
• *Entscheidung des Bayerischen Verfassungsgerichtshofs vom 15. Mai 2014 (Aktenzeichen: Vf. 8-VII-12 Vf. 24-VII-12)* (Decision of the Bavarian Constitutional Court of 15 May 2014 (Vf. 8-VII-12 Vf. 24-VII-12))
http://merlin.obs.coe.int/redirect.php?id=17115 DE

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Karlsruhe Appeal Court rules on infringement of own image rights

On 14 May 2014, the Oberlandesgericht Karlsruhe (Karlsruhe Appeal Court - OLG) ruled, in a decision yet to be published in full, that the Bild newspaper, by publishing a photograph of a famous footballer in which a woman appeared by chance in the background, infringed the woman's own image rights under Article 22 of the Kunsturhebergesetz (Art Copyright Act - KUG) and, at the same time, breached her general right to privacy under Article 823(1) of the Bürgerliches Gesetzbuch (Civil Code - BGB).

The disputed photograph was published in 2012 in an article about a robbery committed against the footballer during his holiday. The text "Sonne, Strand,

Strauchdiebe. Gestern sahen wir ... Star A. in pikanter Frauen-Begleitung am Ballermann... Jetzt wurde er Opfer einer Straftat...” (“Sun, beach, thief. Yesterday we saw 04046 star A. with a tasty female companion on the Ballermann04046 Now he has become a victim of crime04046”) was printed under the headline “A. am Ballermann ausgeraubt” (“A. robbed on the Ballermann”). The image showed the famous footballer on a public beach. The plaintiff could be identified in the background on the right-hand edge of the picture, wearing a bikini and lying on a sunlounger. She had asked the Landgericht Karlsruhe (Karlsruhe District Court - LG) for an injunction preventing the re-publication of the photograph and for appropriate financial compensation. The LG rejected her claim on the grounds that images in which people appear only as an accessory alongside a landscape or other members of the public may be distributed and publicly displayed in accordance with Article 23(1)(2) KUG. The plaintiff appealed to the OLG Karlsruhe against this decision.

The OLG argued that, contrary to the LG’s assumption, the content of the image in this case was characterised by its location. The exception provided for in Article 23(1)(2) KUG did not apply because, otherwise, someone pictured with a famous person purely by chance would be treated less favourably than a famous person’s companion in an everyday situation that did not, in itself, justify the publication of a photograph of them. The OLG also thought that no exception to the requirement for consent under Article 22 KUG applied in this case. The fact that it was acceptable to publish an image of the footballer in the context of the report did not mean that the plaintiff could also be pictured. Since she had no connection whatsoever with the footballer, there was no public interest for her to be included in the picture. The photograph showed the plaintiff on holiday, a situation in which even the privacy of famous people was usually closely protected. The plaintiff could have been made unrecognisable if her face had been pixelated or her eyes blanked out. It was significant that the plaintiff, because she had been wearing a bathing costume, would have been exposed to more intensive scrutiny by millions of people than would otherwise have been the case. Readers could also have been led to speculate over whether she was the “tasty female companion” referred to in the article.

Following the plaintiff’s appeal, the OLG ordered the newspaper not to publish the image again. However, it did not consider that the infringement justified payment of financial compensation because it did not constitute a serious invasion of the victim’s privacy.

The OLG’s decision is open to appeal.

• *Pressemitteilung des OLG Karlsruhe vom 20. Mai 2014* (Karlsruhe Appeal Court press release of 20 May 2014)
http://merlin.obs.coe.int/redirect.php?id=17111 DE

Anastasia Orlova
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Koblenz Appeal Court accepts claim that intimate images should be deleted after relationship ends

In a decision of 20 May 2014, which is not yet final and has not been published in full, the Oberlandesgericht Koblenz (Koblenz Appeal Court - OLG) ruled that a partner’s consent to the storage of intimate photographs and film footage is limited to the duration of the relationship (case no. 3 U 1288/13).

During a relationship between the plaintiff and the defendant, who is a photographer, a large number of photographs of the plaintiff were taken with her consent. They included intimate pictures, some of which the plaintiff had taken herself and given to the defendant in digitised form.

After the relationship ended, the plaintiff demanded that the defendant should not be allowed to make the images accessible to third parties or the public. The defendant accepted this request. He was also ordered by the Landgericht Koblenz (Koblenz District Court - LG) to delete the electronic copies of intimate images of the plaintiff that were in his possession. The LG Koblenz refused the plaintiff’s additional request that the defendant be obliged to delete all images in which she appeared.

Both parties appealed against the first-instance decision.

The OLG Koblenz confirmed all elements of the LG’s decision. Firstly, it concluded that photographing and filming someone with their consent during a relationship did not constitute an illegal invasion of the person’s general privacy rights. However, where intimate images were concerned, the plaintiff’s privacy rights needed to be weighed against the defendant’s right of ownership. In principle, the plaintiff had consented to the creation and use of the images. However, if the images were intimate, this consent was valid only during the relationship. All intimate digital images should therefore be completely deleted after the end of the relationship.

The OLG also held that photographs taken during parties, celebrations and holidays did not invade the plaintiff’s privacy, so the defendant was permitted to keep these images permanently. In contrast to the intimate photographs, the plaintiff’s general privacy rights did not outweigh the defendant’s right of ownership in these cases. The defendant could not therefore be required to delete these images.

• *Pressemitteilung des OLG Koblenz vom 21. Mai 2014* (Koblenz Appeal Court press release of 21 May 2014)
http://merlin.obs.coe.int/redirect.php?id=17112 DE

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IRIS
Legal Observations
of the European Audiovisual Observatory
OBSERVATOIRE EUROPÉEN DE L'AUDIOVISUEL
EUROPEAN AUDIOVISUAL OBSERVATORY
EUROPÄISCHE AUDIOVISUELLE INFORMATIONSSTELLE

Rhineland-Palatinate Administrative Appeal Court complains about SAT.1 inserts

In a ruling of 29 April 2014, the*Oberverwaltungsgericht Rheinland-Pfalz* (Rhineland-Palatinate Administrative Appeal Court - OVG) decided that an insert used to introduce a commercial break infringed rules on the separation of TV programmes and advertisements because it contained a programme announcement.

During a break between two early evening programmes, TV broadcaster SAT.1 had broadcast inserts that included the word "Werbung" (advertising). The inserts also contained programme announcements for a boxing match and the programme "The Voice of Germany". The *Landeszentrale für Medien und Kommunikation Rheinland-Pfalz* (Rhineland-Palatinate media and communication office - LMK) considered that this breached Article 7(3) of the *Rundfunkstaatsvertrag* (Inter-State Broadcasting Agreement - RStV) and ordered the broadcaster not to use the inserts again.

The OVG has now rejected the broadcaster's appeal and upheld the ruling of the first-instance administrative court.

The OVG held that, according to the relevant provisions of the RStV, advertisements should be clearly separated from other programme material by optical or acoustic means, depending on the medium. In the case of television advertising, this meant that the start of the advertisement should be indicated by optical means, usually including the word "Werbung". As a rule, this could not be linked to a programme announcement. According to the OVG, a programme announcement was an editorial item and therefore formed part of the programme, from which advertisements should be separated.

Since they contained programme announcements, the inserts therefore failed to meet the relevant requirements.

On account of the fundamental importance of the case, the OVG allowed an appeal to the *Bundesverwaltungsgericht* (Federal Administrative Court).

• *Urteil des OVG Rheinland-Pfalz vom 29. April 2014 (Az.: 2 A 10894/13.OVG)* (Decision of the Rhineland-Palatinate Administrative Appeal Court of 29 April 2014 (case no. 2 A 10894/13.OVG))
http://merlin.obs.coe.int/redirect.php?id=17113 DE

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vzbv complains about unlawful streaming service T&Cs

According to an inspection of 14 video and music streaming services by the Bundesverband der Verbraucherzentrale (Federation of German Consumer Organisations - vzbv), a total of 130 of the general terms and conditions used by the service providers were unlawful because they put consumers at an unreasonable disadvantage.

The vzbv has announced that it has so far cautioned 20 operators including Napster, Watchever, Spotify, Simfy and Amazon. As well as clauses restricting users' warranty rights or operators' liability, the vzbv questioned the operators' right to block or withdraw their services at any time and to unilaterally amend prices and contractual provisions.

There were also serious shortcomings as far as data protection was concerned. For example, many streaming services failed to meet their legal obligation to obtain consent for the use of customer data, which meant that they were often able to decide at their own discretion whether data on service use was collected without the customer's consent and whether data was passed to third parties for advertising purposes. This information was often passed to operators of social networks such as Facebook without users' knowledge.

Finally, the vzbv also reminded the providers that they needed to make their terms and conditions easier to read and understand. It particularly criticised the "sometimes unreasonable length" of the terms and conditions, since it was virtually impossible for the average consumer to fully understand a document that could be up to 19 pages long.

Cease and desist declarations have already been served to 16 of the 20 cautioned operators. The vzbv has not yet exercised its right to instigate court proceedings regarding this matter.

• *Bundesverband der Verbraucherzentrale - Überblick der Abmahnungen* (Federation of German Consumer Organisations - Overview of cautions)
http://merlin.obs.coe.int/redirect.php?id=17116 DE

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ZAK finds breach of reporting principles

On 13 May 2014, the German media authorities' *Kommission für Zulassung und Aufsicht* (Commission on

Licensing and Supervision - ZAK) ruled that reporting principles had been violated in the "Kabel eins" programme "Abenteuer Leben" on 20 March 2013.

The ZAK considered that the report had given the impression that a factory in Holland used horsemeat to produce a special type of Dutch sausage (known as "Frikandellen") because the "original recipe" included 5% horse meat. The report had also claimed that the factory was owned by a Dutch company. However, both statements had turned out to be false. The factory did not use horsemeat to produce "Frikandellen" and it was not a Dutch company, since its headquarters were in Germany.

The ZAK stated that, although the company's name had not been expressly mentioned, it had appeared on a lorry shown in the report.

For these reasons, the ZAK considered that the TV broadcaster "Kabel eins" had breached "recognised journalistic principles" in its reporting.

• *Pressemitteilung der ZAK vom 13. Mai 2014* (Commission on Licensing and Supervision press release of 13 May 2014)
http://merlin.obs.coe.int/redirect.php?id=17117 DE

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Election scrutiny board rejects Bundestag election protest after "Lindenstraße" forecast

At its meeting on 3 April 2014, the Wahlprüfungsausschuss (Election Scrutiny Board) of the German Bundestag (lower house of parliament) decided to recommend that the Bundestag reject as unfounded a protest against the validity of the 18th German Bundestag election of 22 September 2013.

On 22 November 2013, a citizen of the Bavarian town of Fürstenfeldbruck had faxed a protest against the validity of the Bundestag election of 22 September 2013. He had protested on the grounds that, in the 1,448th episode of the TV series "Lindenstraße", entitled "Leistungsträger", which was broadcast on the evening of the election, he had seen evidence of electoral fraud in so far as the election results shown in the episode had matched the initial election forecast that only just been published when the programme was shown. In the episode, the characters, one of whom was a candidate for a fictitious party, watched election forecasts for a fictitious Bundestag election on television. In the protester's opinion, it would have been technically impossible to insert and then broadcast an image of the forecast between 18.00, when the initial election forecast was broadcast, and 18.40, when the episode was shown.

The Election Scrutiny Board thought the protest was admissible but unfounded due to a lack of substantiated evidence. The protest contained nothing more than unproven conjecture and the mere suggestion of electoral irregularities, without offering any concrete factual evidence of an infringement of electoral law.

The election results broadcast in the programme were approximate figures based on election forecasts at the time when the episode had been produced. The ARD had previously announced on the series website that the initial forecast would be recorded and inserted in the episode so that the results filmed in advance could be adapted according to the situation on the evening of the election. Depending on the election result, any one of four different pre-produced episodes could be used. In this way, around two minutes of the episode were updated shortly before it was broadcast.

However, as the Election Scrutiny Board expressly pointed out in its recommendation, none of this meant that the election result had been fixed in advance. Contrary to the protester's opinion, therefore, since the election had not been manipulated, there was no reason to rerun the 18th German Bundestag election.

• *Beschlussempfehlung des Wahlprüfungsausschusses des 18. Deutschen Bundestages vom 03. April 2014 (Drucksache 18/1160, S. 149, Anlage 64, Az.: WP 200/13)* (Recommendation of the Election Scrutiny Board for the 18th German Bundestag election of 3 April 2014 (doc. 18/1160, p. 149, annex 64, case no.: WP 200/13))
http://merlin.obs.coe.int/redirect.php?id=17110 DE

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New cancellation right for downloaded software

As of 13 June 2014, German consumers are entitled to cancel purchases of software, music, videos and apps downloaded from the Internet. The change is designed to implement Consumer Rights Directive 2011/83/EU, which aims to create a common, reliable standard of consumer protection across Europe.

The amendment to the law on consumer cancellation rights itself does not contain any express regulation giving consumers the right to cancel purchases of intangible, digital content downloaded from the Internet. Rather, the introduction of such a right is demonstrated by the fact that such rights are restricted under the conditions laid down in the new Article 356(5) of the Bürgerliches Gesetzbuch (Civil Code - BGB), which transposes Article 16(m) of Directive 2011/83/EU into German law. Article 356(5) BGB defines the circumstances in which consumers' cancellation rights expire in relation to the remote purchase of digital, intangible content. It states that the decisive factor is whether the commercial seller has

obtained the consumer's prior consent to the immediate performance of the contract and his acknowledgement that he thereby loses his right of withdrawal.

Cancellation rights are fraught with considerable financial risks for sellers of Internet downloads because the purchaser can always keep a digital copy. In addition, films and e-books are usually only used once. Customers could therefore buy such digital content and then - exercising their cancellation rights - send it back to the seller having made full use of it.

There were previously no cancellation rights for purchasers of software, apps, videos, music and other digital content on the Internet if the product was provided in the form of a download or stream, i.e. if it was not supplied on a tangible medium such as a CD or DVD.

Sellers of Internet downloads should find out about these new legislative amendments as soon as possible. In principle, under the amended law on cancellation rights in relation to the sale of consumer goods, the previously valid cancellation deadlines, example terms of cancellation, rules on the cost of returning goods and a number of other specific aspects of cancellation rights changed as of 13 June 2014.

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FR-France

Canal Plus case against BeIN Sports for unfair competition dismissed

On 18 June the commercial court in Nanterre delivered a judgment that had been keenly awaited in the audiovisual sector. Canal Plus, editor of the eponymous premium channel and five derivative versions, including Canal + Sports which offers its subscribers exclusive live sports events, had brought proceedings for unfair competition against BeIN Sports, the Qatari subsidiary of Al Jazeera Network, which edits two sport channels launched in France in the summer of 2012. These channels had acquired a large number of audiovisual rights in respect of sport events, particularly top-level football competitions. BeIN Sports' commercial strategy had enabled it to progress from 500 000 subscribers in 2011 to more than 1.7 million in early 2014. Canal Plus, on the basis of Article 1382 of the French Civil Code, the common law text on tort, called on the court to declare that BeIN Sports had been guilty of unfair competition by adopting irrational economic behaviour, based on the sale of subscription to its channels at an abnormally low price (11 euros per month) in relation to its particularly substantial investments, resulting in disruption of the market; it was claiming almost 300 million euros in this respect. The court therefore considered whether Canal Plus had demonstrated that its competitor was at fault, that it had suffered prejudice as a result of the latter's behaviour, and that there was a causal link between the fault and the alleged prejudice suffered. The first point was the allegation of an abnormally low price. Canal Plus claimed that its competitor's unfair behaviour lay in the combination of very high prices for acquiring rights and a very low sale price which would not allow its offer to achieve profitability in anything less than ten years. The court noted, however, that the price charged by BeIN Sports was in line with market prices (quoting the offer of Canal+, Foot+, at 8 euros per month, and that of Orange Sport - which has since ceased - at 6 euros) and found that Canal Plus had not demonstrated that the prices charged by BeIN Sports for subscription to its channels were abnormally low in comparison with market prices. It went on to examine the issue of the purchase of audiovisual rights at abnormally high prices. Canal Plus held that the provisions of common law on unfair competition should make it possible to oppose the irruption on the market of operators with more financial backing than any other competitor might have. It felt that the structurally deficit economic model of its Qatari competitor inverted the competitive effect of its entry into the market by evicting other editors from the markets for the acquisition of rights. The court noted, however, that the inflation of prices for sport rights had begun well before BeIN Sports arrived on the market in June 2012 and that it had not affected the percentage of rights held by Canal Plus for the best matches in the premier league (70%) or for other headliner competitions. Similarly, contrary to the statements made by Canal Plus, the court found that BeIN Sports' entry into the market had not constituted an obstacle to competition since a number of stakeholders had entered bids in 2014 for the acquisition of TV rights (premier league and league of champions). Thus Canal Plus had not demonstrated that the Qatari channel's entry into the market had resulted in an increase in the cost of acquiring rights. In conclusion, the court recalled that the fact of a new arrival suffering losses during the initial stage of developing its offer on a market was not an abnormal situation, as long as it was part of an economic view at the end of which the operator was able to envisage achieving economic equilibrium. In the present case, it was not possible for Canal Plus to presume what its competitor's offer might be in one, three, five or ten years' time, given the extremely rapid and constant evolution of the audiovisual sector and world growth in the sport sector. The court also pointed out that the Vivendi group, of which Canal Plus was part, also had very substantial financial resources at its disposal and that the applicant party had not demonstrated that BeIN Sports' entry into the pay-TV market had had a disrupting influence. Canal Plus having failed to demonstrate the existence of unfair behaviour on

the part of its competitor which constituted fault, its claims on this point were rejected. To help provide transparency in this highly competitive market, the court ordered the parties to have the operative part of the judgment published, at their expense, in five national daily newspapers.

• *Tribunal de commerce de Nanterre (1re ch.), 18 juin 2014 - Canal Plus c/ beIN Sport France* (Commercial court of Nanterre (1st chamber), 18 June 2014 - Canal Plus v. BeIN Sports France)
http://merlin.obs.coe.int/redirect.php?id=17131 FR

Amélie Blocman
Légipresse

Rights for excerpts from Football World Cup: last-minute agreement between TF1 and BeIN Sports

An agreement between TF1 and BeIN Sports, joint holders of the rights to broadcast the 2014 World Cup in France, was reached just two days before the start of the competition, enabling other television channels to acquire match excerpts. TF1, a private channel broadcasting unencrypted, had acquired full broadcasting rights for 130 million euros, and the Qatari sport channel BeIN Sports bought the rights from it for all the matches. BeIN Sports was thus offering live broadcasting of all 64 matches in the competition, showing 36 of them in exclusivity. TF1 for its part will be broadcasting 28, including those in which the French national team plays. The last-minute agreement reached by the joint holders of the rights thus enables those other channels wishing to broadcast longer excerpts than provided for in information law (i.e. free of charge for news broadcasts and limited by the audiovisual regulatory authority (Conseil Supérieur de l'Audiovisuel - CSA) to 90 seconds per hour of air time) to pay for images within a certain period of time. Under the agreement, the channels can pay to use a maximum of two minutes of images from any one match in the competition or a maximum of three minutes from a number of matches in any one news broadcast, within 24 hours of the end of the match in question. The excerpts, the charge for which is in the order of EUR 5000 to 6000 per minute, are intended for use in newscasts and by news channels, but not by magazine programmes devoted to the competition or for special reports. It should be recalled that the opening match, the semi-finals and the final of the football World Cup are all on the list of "events of major importance" defined in Decree No. 2004-1392 of 22 December 2004 on the broadcasting of events of major importance (see IRIS 2005-2/24). Accordingly, a freeview television service cannot be prevented from broadcasting them; such a broadcast must show the entire event and be sent out live. TF1 will therefore be broadcasting the matches.

On 20 June, the Chairman of the CSA for his part reaffirmed the need for sport and its major events to remain accessible for freeview television. Furthermore, he felt it was necessary for the CSA to be able to intervene "directly or indirectly in negotiations for rights concerning sports". He also said that the list of events of major importance provided for in the Decree "would be extended to women's competitions".

Amélie Blocman
Légipresse

On-demand audiovisual media services: public consultation on revision of regulations

The process of revising the Decree on On-Demand Audiovisual Media Services of 12 March 2010 (see IRIS 2011-1/26) continues. Following on from the audiovisual regulatory authority (Conseil Supérieur de l'Audiovisuel - CSA) submitting a report to the Government in November 2013 in which it made a number of proposals for amending the text (see IRIS 2014-2/20), the Minister for Culture and Communication embarked on a public consultation at the beginning of June with a view to obtaining comments from the stakeholders concerned. The aim is to determine what the follow-up should be to the recommendations made by the CSA. Firstly, the three recommendations requiring amendment of the Act of 30 September 1986 on freedom of communication are presented. These involve introducing the pooling of the principle of contributing to the production of on-demand audiovisual media services (on-demand AVMS) other than for catch-up TV edited by a single group or, alternatively, introducing a scheme for providing a number of different versions of the same on-demand AVMS. The third proposal involving an amendment to the legislation concerns the introduction of the principle of pooling the contributions of catch-up TV services to cinematographic production with those of the television services on which they are based, since Articles 28 and 33-1 of the Act of 30 September 1986 do not currently provide for this except for audiovisual production. The stakeholders are therefore being asked whether they are in favour of implementing all or part of these amendments to the legislation and, if so, whether they wish to make any changes. The same question is then asked in the consultation in respect of the six proposals made by the CSA regarding amendment of the decree on on-demand AVMS. It should be recalled that in its report the CSA proposed the adoption of the same threshold of 20 works for triggering the financial obligations and obligations of exposure of the decree on on-demand AVMS; "substantially raising" the current financial threshold of turnover of 10 million euros for triggering the obligation to contribute to the development of audiovisual and cinematographic production; the expansion of the

scope of the expenditure taken into account for the contribution to the development of production so that this would also include expenditure on digitisation and combating piracy; the abandonment of the obligation of exposure of European works and works made originally in the French language "at any time" in favour of an appreciation on an annual basis applied to both catch-up TV and video on demand; a relaxation of the obligations of exposure of certain themed services in exchange for obligations to invest in other forms of support for the French or European creative industry. Stakeholders are also being invited to make specific recommendations where the proposals call for additional details. Thirdly, the Ministry seems to have Netflix clearly in its line of fire when it asks whether "the projects for the launch in France of new on-demand AVMS established on the territory of other member States of the European Union and hence not subject to the French regulations" would result in the parties concerned changing their replies to the consultation the CSA held last year. Lastly, the stakeholders are being invited to say whether they wish to make any other comments or requests for changes to the regulations, for example with regard to the contribution rate, quotas for the exposure of works, or the arrangements governing advertising. Replies are to be sent to the Ministry of Culture and Communication no later than 15 September 2014.

• *Consultation publique sur l'adaptation du décret relatif aux services de médias audiovisuels à la demande, Ministère de la Culture et de la Communication, 24 juin 2014* (Public consultation on adapting the Decree on on-demand audiovisual media services, Ministry of Culture and Communication, 24 June 2014)
http://merlin.obs.coe.int/redirect.php?id=17119 FR

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Légipresse

Public consultation on funding for audiovisual production by the television channels

On 9 June 2014, the Minister for Culture and Communication launched a public consultation in order to ascertain the views of the stakeholders concerned by the change to the scheme of contribution to the production of audiovisual works applicable to editors of television services. The Act of 15 November 2013 on the independence of the public audiovisual sector altered the criteria for independent audiovisual production, henceforth authorising broadcasters to share in a coproduction on condition that they participate substantially in the financing of the work (Art. 7-1 of the Act of 30 September 1986 as amended). The level of the substantial funding of a work and the extent of the secondary rights and commercialisation mandates in the broadcasters' hands have to be set out in an implementing decree. In his report analysing the balance between broadcasters' investment in the production of works and the level and extent of the operating rights they hold in return, submitted to the Ministry of Culture and Communication in December 2013, Laurent Vallet set out a series of proposals for bringing relations between broadcasters and producers up to date. To encourage broadcasters to contribute to funding fiction works at a high level, Minister for Culture Aurélie Filippetti wanted the substantial level of funding of works entitling the channels to hold shares in a coproduction to be set at 70%. This consultation means that a revised consolidated version of the "production" decree of 2 July 2010 and the "cable-satellite" decree of 27 April 2010, incorporating the proposals contained in Mr Vallet's report approved by the Minister, is being submitted to the stakeholders concerned. The Ministry points out, nevertheless, that the purpose of this consultation on the provisions contained in the regulations is not to deal with all the issues concerning relations between producers and broadcasters, but rather to set up a new coherent framework within which both professional negotiations and the agreements concluded with the audiovisual regulatory authority (Conseil Supérieur de l'Audiovisuel - CSA) would be fully covered, thereby usefully supplementing the Act and its implementing decrees. To achieve this, the Minister is suggesting to producers and broadcasters that an expert should be entrusted with the task of mediation, particularly on those provisions not covered by the implementing decrees. This refers in particular to the scope of broadcasting rights, particularly for long-running serials, the valuation of rights, the implementation of first and final refusal, and the reorganisation of the right to revenue for works which are not coproduced. Respondents do not have much time in which to reply; their observations must be sent to the Ministry of Culture no later than 30 June 2014.

• *Consultation publique sur la modification du régime de contribution à la production d'œuvres audiovisuelles applicable aux éditeurs de services de télévision, Ministère de la Culture et de la Communication, 9 juin 2014* (Public consultation on changing the scheme of contributing to the production of audiovisual works applicable to editors of television services, Ministry of Culture and Communication, 9 June 2014)
http://merlin.obs.coe.int/redirect.php?id=17120 FR

Amélie Blocman
Légipresse

A year in the life of the Cinema Mediator

The Cinema Mediator - a function currently being carried out by Jeanne Seyvet - has published her report on the activities of 2013. The Cinema Mediator intervenes in the event of disputes regarding the circulation of films in cinema theatres, mainly between theatre operators and distributors. The parties meet with a view to seeking prior conciliation, in compliance with the rules on competition (Articles L. 213.1 to L. 213.8 of the Code on the Cinema and Animated

Images and Decree No. 83-86 of 9 February 1983 as amended). The Mediator has powers of injunction. "Upstream" intervention nevertheless constitutes a significant part of her activity and contributes actively to the prevention and settlement of disputes within the profession. This latest report of activities notes that 84 requests for mediation were lodged in the course of 2013, 8% fewer than in 2012, and that a solution was found in 75% of cases. 65% of the requests were for a conciliation meeting to be organised between one or more operators and one or more distributors with a view to settling a dispute regarding the placement of one or more films. Three requests involved competition, three involved operating conditions, and 23 involved digital contributions (within the Mediator's remit since the adoption of Act No. 2010-1149 of 30 September 2010 on the digital equipment of cinema theatres). The content of the agreement reached may vary, covering the film requested, the cinema theatre requested, one or more future films, the establishment of previously inexistent relations, or the resumption of interrupted commercial relations. The agreement may also cover operating conditions, the amount of digital contributions, or the terms of a contract. The treatment of a number of specific situations provided an opportunity, after concertation with the profession, to respond to the issue of access conditions for films beyond the first weeks of exploitation, in the form of a recommendation which was made public. The Cinema Mediator is also informed of all the decisions of the cinema committees in each département (Commissions Départementales d'Aménagement Cinématographique - CDAC) authorising the creation and extension of multiscreen cinema establishments with more than 300 seats. Among the 36 files investigated in this respect between January and December 2013, 27 were finally authorised; 18 of these concerned the creation or extension of establishments with eight or more screens (compared with 13 the previous year). The Mediator's intervention was concentrated on cases where new projects did not appear likely to ensure the diversity of forms of operation and hence the diversity of the offer of films. Lastly, the Cinema Mediator is responsible for examining the implementation of the programming undertakings of the owners and operators concerned. Undertakings to limit multicasting, essential for ensuring the diversity of cinematographic circulation, constituted the focal point of negotiation efforts in 2013. The Mediator regretted that the scheme was a fragile one, since the elements needed to draw up an annual report of undertakings were lacking and it had not been possible to examine them at this stage for 2013. Nevertheless, it is recalled that the Code of the Cinema and Animated Images provides that administrative sanctions may be pronounced by the national cinematographic centre (Centre National du Cinéma and de l'Image Animée - CNC) against anyone neglecting their obligations in this respect. In conclusion, the Mediator invites operators to take a more determined stand in undertakings of collective interest for the sector, for example with regard to the conditions of access and exposure of fragile films, or to the preservation of the diversity of forms of exploitation in competitive areas.

• *Médiateur du cinéma, rapport d'activité 2013, avril 2014* (Cinema Mediator, Report of Activities in 2013, April 2014)
http://merlin.obs.coe.int/redirect.php?id=17121 FR

Amélie Blocman
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GB-United Kingdom

English High Court sets out circumstances where abusive words are not necessarily defamatory

In a defamation action in the Queen's Bench Division of the English High Court presided over by Mr Justice Dingemans, it was determined in a judgment given on 9 April 2014 that the broadcaster, Channel 5, and the production company, Endemol UK Limited, were not liable for vile and abusive words used by one contestant against another in the reality television show Big Brother. Although the words were vile and abusive, they were not deemed to be defamatory of the recipient of the verbal attack.

During the broadcast on the 25th June 2012, one contestant, Mr McIntyre, was abusive towards another contestant, Ms Uppal, using a rap song to question her sexual conduct, cleanliness and ethnic background. The verbal abuse was clearly stated in anger and the producers of the show on air via "Big Brother Voice" warned Mr McIntyre about his conduct. He recognised that he had acted inappropriately and said that he had spoken in anger. However, another incident occurred between Mr McIntyre and Ms Uppal, and the producers again admonished Mr McIntyre and warned him that he might be ejected from the show. Upon viewing a playback of the footage Mr McIntyre appeared genuinely contrite and appalled by his actions towards Ms Uppal.

Ms Uppal issued defamation, breach of contract, and negligence claims against the broadcaster and production company; the defamation claim was also taken against Mr McIntyre. In respect of the defamation claim, Mr Justice Dingemans applied the principles arising from the case Jeynes v. News Magazine Limited, which include: consideration of the words in their full context and taking account of any "bane and antidote"; avoiding over-elaborate analysis of the words; taking into account that the reasonable reader, or in this case viewer, is neither naive nor unduly suspicious.

Further, he applied the principle laid down by Sir Thomas Bingham, Master of the Rolls, in the Court

of Appeal case Skuse v. Granada Television Limited where he said: "A statement should be taken to be defamatory if it would tend to lower the plaintiff in the estimation of right-thinking members of society generally or would be likely to affect a person adversely in the estimation of reasonable people generally".

In this case, although the words were abusive, it was the court's view that no one would take a lesser view of Ms Uppal as a result of them; it was more likely that the viewing public would form a negative view of Mr McIntyre given his conduct towards Ms Uppal.

Further, one had to take account of the "bane and antidote" including the rebuke of Mr McIntyre and threat of his expulsion from the Big Brother production, as well as his own contrition.

Looking at all the events, it was not likely that a reasonable person would take an adverse view of Ms Uppal's reputation, and as such, the words whilst abusive were not defamatory given the overall context and circumstances.

• Deana Uppal v. Endemol UK Limited (1) Channel 5 Broadcasting Limited (2) Conor McIntyre(3) [2014]EWHC 1063(QB)
http://merlin.obs.coe.int/redirect.php?id=17102 EN

Julian Wilkins
Blue Pencil Set

Sports TV channel fined GBP 120,000 by Ofcom

The broadcasting regulator Ofcom imposed a GBP 120,000 fine on ESPN on 2 June 2014, after the sports TV channel failed to meet its targets for providing audio description on its programmes.

The channel was meant to provide the service for visually impaired viewers. It includes describing such things as body language, expressions and movements.

However, in 2012 it only managed to provide this on 2.3% of programmes instead of the 5% it had agreed to under Condition 9(1) of its licence. It had also missed the target in 2011, as reported in Ofcom's Broadcast Bulletin of 5 August 2013, leading the regulator to conclude that the breach of Rule 8 (now Rule 9) of the Code was "both serious and repeated".

As a result, the watchdog said that people with visual impairments have been excluded from access to ESPN's programmes.

Ofcom said ESPN had argued that television sports commentary does give visually impaired people some level of description by its nature. But the regulator said: "Television commentary of live sport presumes the viewer can see the action. It is unlike radio commentary in this respect, and is not provided with the needs of the visually impaired in mind."

ESPN, which was bought by BT in July 2013 and which had a licence to some English premier league and FA Cup matches between 2009 and 2013, said that live sport was not generally suitable for audio description on television.

The regulator noted that the channel had been co-operative during the investigation and had taken some steps to rectify the situation including commissioning audio description for a series of sports documentaries.

However, Ofcom ruled that the breach was so serious that it warranted the imposition of a statutory sanction under its sanctions procedures. As such, it decided ESPN should pay a fine of GBP 120,000 and broadcast a statement of the regulator's findings.

• Sanction 93 (13): Decision by Ofcom to be imposed on ESPN (Europe, Middle East Africa Ltd)
http://merlin.obs.coe.int/redirect.php?id=17104 EN
• Ofcom Broadcast Bulletin 255, Notice of sanction, pp 6-7, 2 June 2014
http://merlin.obs.coe.int/redirect.php?id=17083 EN

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Regulator issues new guidance on commercial references in programming and product placement

Ofcom, the UK communications regulator, has issued new guidance on commercial references and programming on 2 June 2014. This supplements existing provisions in the Ofcom Broadcasting Code (section 9) which aim to secure editorial independence in programming, to ensure that there is a distinction between editorial content and advertising, to prevent surreptitious advertising, to protect consumers and to prevent unsuitable sponsorship.

The new guidance advises that a programme about a product or service, such as a holiday destination or a high-street retailer, is likely to test the distinction between advertising and editorial material if it is funded by the organisation whose specific interests are featured. Although the product placement rules permit paid for references to products, services and trade marks in programmes, they do not allow commercial entities to fund programmes about their specific interests. Broadcasters are required to maintain a distinction between advertising and programming and must think carefully as to whether commercial and

contractual arrangements that engage product placement rules blur the boundaries between advertising and programming.

Programmes that are about the creation or transformation of people, places or things, such as makeover or cookery shows, should avoid the impression that success is dependent on the use of a placed product. If such shows focus on the positive attributes of placed products, they are likely to conflict with the provisions of the Broadcasting Code. Broadcasters must consider very carefully whether references to placed products, services or trademarks in makeover or cookery programmes primarily serve an editorial or promotional purpose.

Placed products that do not carry discernable branding, such as clothing or furniture, may only be identified during editorial material if the identification is integrated into the programme's narrative. Broadcasters should exercise particular caution when identifying generic and unbranded product placement within programmes. Where a reference cannot be included editorially, they should consider identifying generic and unbranded products during end credits.

Overall, it is a primary tenet of the regulatory framework that editorial content must remain distinct from advertising.

• Ofcom, 'Guidance on Section Nine of the Broadcasting Code', Ofcom Broadcast Bulletin 255, 2 June 2014, p. 8-12
http://merlin.obs.coe.int/redirect.php?id=17083 EN

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GR-Greece

Judicial review over public television's shutdown dismissed

In its decision (1901/2014), which was published on 23 May 2014, the Assembly of the Council of State - Supreme Administrative Court of Greece (the Συμβούλιο της 3253003713723013613043653713613023) ruled that a co-ministerial decision ordering the shutdown of the national public broadcaster (ERT SA) in June 2013 (see IRIS 2013-6/24) was lawful.

By a narrow majority (15 in favour and 10 against), the Court held that Article 15 of the Constitution does not necessitate the establishment of a public broadcasting entity and that the legislator is entitled, taking into account the financial capacity of the State, to choose whether it is necessary and possible to establish a public broadcasting entity based on the effective implementation of constitutional dispositions. The opinion of the court was influenced by a number of factors: firstly, that a new law providing for the establishment of a new public broadcasting body was published shortly after the shutdown (see IRIS 2013-9/20); secondly, a transitional institution of public broadcasting began to operate soon after the shutdown and; thirdly, during this time, the operation of private broadcasters continued without problems.

The dissenting judges argued that the legislator could not abolish the institution of public broadcasting indefinitely and added that the co-ministerial decision violated the principle of continuous operation of the public service, which is even more pronounced in this case, due to the fact that the private broadcasting stations were operating illegally under a special status of tolerance (see IRIS 2011-1/34).

The Court stated that the abolition of ERT did not violate Article 10 of the ECHR and was in compliance with the Charter of Fundamental Rights of the European Union and the Treaty on the Functioning of European Union (Protocol 29 on the system of public broadcasting in the member states) due to the fact that a co-ministerial decision has been adopted in order to set up a new body of public broadcasting.

Finally, the Court unanimously held that both the law on collective dismissals (Law 1387/1983) and the European Directive 75/129/EEC relating to collective dismissals, does not cover workers employed by public bodies exercising public power.

Meanwhile, shortly after the initiation of the formal operation of the new public broadcaster, Nerit, in April 2014, the President and CEO, Mr. George Prokopakis was removed from his position. As announced by the Supervisory Board of Nerit, the former manager did not implement the law concerning the strategic and operational plan (see IRIS 2013-9/20), while many actions on new television productions and recruitment of staff created problems of legitimacy. The Supervisory Board appointed a new President and Chief Executive Professor of Management Science at the University of Athens, Antonis Makridimitris, whose term will expire in early October 2014.

• *Α300΄377306361303367 1901/2014* της Ολομελείας του Συμβουλίου της Επικρατείας της *23.5.2014* (Ruling of the Supreme Administrative Court of 23 May 2014) EL

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IE-Ireland

Draft television access rules launched

On 26 May 2014, the Broadcasting Authority of Ire-

land (BAI) launched a public consultation on Draft Revised Access Rules for Irish television broadcasters. The draft Rules will update the current Access Rules in place since 2005 and last reviewed in 2012 (IRIS 2012-7/28). The Rules determine the levels of subtitling (including captioning), sign language and audio description that broadcasters will be required to provide; they apply to certain broadcasters within the State but do not apply to broadcast services commonly received in Ireland but licensed in other jurisdictions.

Section 41(3)(c) of the Broadcasting Act 2009 provides that the BAI shall prepare and revise rules that require broadcasters to take steps to promote the understanding and enjoyment of programmes for persons who are deaf, have a hearing impairment or are blind or partially sighted or a combination of these. Section 43(3) of the Act further provides for the rules to specify a percentage of programmes broadcast that must be accessible.

Under the draft Rules a range of percentage targets are set for each broadcast service (television station) that they must provide for the period 2014-2018 and different targets are set for each broadcaster. The target range is increased annually for each applicable broadcast service on an incremental basis over the five year-period.

Subtitling (on-screen text that represents what is said on screen) targets are set for the first time for the three additional RTÉ - national public service broadcaster - television services established in 2011, namely RTÉjr, RTÉ Plus 1 and RTÉ News Now. The draft Rules do not prioritise any programme genres, types or time-blocks. However, broadcasters must consult at least annually with user groups as to their viewing preferences.

Targets for Irish Sign Language and Audio Description (commentary that provides a verbal description of what is happening on screen) are currently only applicable to RTÉ One and RTÉ Two. The draft Rules propose extending the range of services on which Irish Sign Language must be provided. Specifically, it requires RTÉjr - a children's channel - to begin providing some Irish Sign Language. This requirement is in response to calls from access user groups who have highlighted their desire that children who are Deaf or Hard of Hearing would be able to access the children's television service and that their parents or guardians would be facilitated in watching this service with their children.

The draft Rules propose further reviews in 2016 and 2018. This is in line with the requirements under section 43(6) of the Broadcasting Act 2009. The closing date for receipt of public submissions on the draft Rules is 23 July 2014.

• Broadcasting Authority of Ireland (BAI), Access Rules Review Public Consultation, (May 2014)
http://merlin.obs.coe.int/redirect.php?id=17100 EN

• Broadcasting Authority of Ireland (BAI), Press Release - Changes Proposed to Rules on Television Subtitling, Sign Language & Audio Description, (26 May 2014)
http://merlin.obs.coe.int/redirect.php?id=17101 EN

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Review of designated free-to-air sporting events

The Minister for Communications, Energy and Natural Resources announced on 16 June 2014 that he intends to review the current list of sports and other events designated for coverage on free-to-air television. Submissions are invited from members of the public and interested parties on the current list of events and the possible designation of additional events.

Section 162 of the Broadcasting Act 2009 provides that the Minister may, by order, designate events of major importance to society, coverage of which can be provided by free-to-air broadcasters in the public interest. Under the Act the Minister may also determine whether coverage should be available on a live, deferred or both live and deferred basis. The events currently designated are all sporting events (IRIS 2011-7/26) and the list is unchanged since 2003:

On a live basis

- The Summer Olympics.

- The All-Ireland Senior Football and Hurling Finals.

- Ireland's qualifying games in the European Football Championship and World Cup.

- Opening games, semi-finals and final of the European Football Championship Finals and the FIFA World Cup Finals Tournament.

- The Irish Grand National and the Irish Derby (Horseracing).

- The Nations Cup at the Dublin Horse Show.

On a deferred basis

- Ireland's games in the Six Nations Rugby Football Championship.

The Minister is required, under section 173 of the Act, to undertake a review of the list of designated events every three years. The current review follows a controversial deal between the Gaelic Athletic Association (GAA) - Ireland's largest sporting and cultural organisation (which deals with Gaelic sports) - and Sky Sports for exclusive coverage of a number of games in the All-Ireland Senior Football and Hurling Championships. The deal that was announced in April 2014

runs for a three-year period and provides for the first time that high profile GAA games will not be available free-to-air in Ireland.

The closing date for receipt of submissions is 1 August 2014. To designate an event, the Minister must have regard to a number of criteria, in particular the extent to which the event has a special general resonance for the people of Ireland, and the extent to which the event has a generally recognised distinct cultural importance for the people of Ireland.

• Department of Communications, Energy and Natural Resources - Press Release, Minister Rabbitte announces review of TV coverage of Designated Sporting and Other Events, 16 June 2014
http://merlin.obs.coe.int/redirect.php?id=17098 EN

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LU-Luxembourg

ALIA rejects plans for new radio station

On 27 February 2014, the Autorité luxembourgeoise indépendante de l'audiovisuel (Independent Audiovisual Authority of Luxembourg - ALIA), which was established in August 2013 (see IRIS 2013-10/32), issued its first major substantive decision in a case concerning a radio service. ALIA rejected the application of the Luxembourg radio service provider S.à.r.l. (Société de Radiodiffusion Luxembourgeoise) concerning several modifications of the cahier des charges (terms of reference) attached to the licence for its radio programme "DNR". In its decision, ALIA evaluated the Luxembourg media market by commenting on pluralism and diversity of media.

The applicant company wished to use the frequency it had held so far for its service "DNR" for a new radio service that would target the French-speaking population in Luxembourg, especially the Belgian and French cross-border commuters. To this effect, a change of the programme schedule was foreseen that would have resulted in broadcasts predominantly in the French language (compared to Luxembourgish as it was for "DNR"). Additionally, the name of the service was to be changed to "RTL 2", as the previous almost 100% ownership by the applicant company would in future be shared in a joint venture with the company S.A. CLT-UFA, which already offers a programme entitled "RTL Radio Lëtzbuerg". For this purpose not only the composition of the shareholders but also the governing bodies of the service provider were to be changed as indicated to ALIA.

ALIA considered that the suggested changes to the existing licence would decisively impact the current market situation as it has resulted from the allocation of frequencies in 1992 and subsequent amendments to the frequency assignments. More importantly, ALIA declared the modifications to be incompatible with the fundamental principles as stipulated in the Loi du 27 juillet 1991 sur les medias électroniques (the Act on Electronic Media, as last amended in August 2013 and rectified in November 2013). In this respect, ALIA referred to the objective of media pluralism as set out in Art. 2(2) of the Act on Electronic Media. It found that the strong position of the two future shareholders of the applicant, namely S.A. Saint-Paul Luxembourg on the Luxembourg press and S.A. CLT-UFA on the radio market would be further enhanced. Each of them already reaches almost 40 percent of the population with their most popular title or programme. This dominant position would be significantly increased, if CLT-UFA for instance, controlled three of the four main radio services in Luxembourg (RTL Radio Lëtzbuerg, Eldoradio and RTL 2) and there would be potential for cross-media cooperation between the two companies.

The refusal was also motivated by the fact that the frequencies granted to DNR were reserved for Luxembourgish radio services directed at a resident public. The Act on Electronic Media generally differentiates between services directed at a local public and those at an international audience. The new service RTL 2 would mainly be targeted at French and Belgian workers regularly travelling to Luxembourg and would therefore, according to ALIA, constitute a programme for the Greater Region and not only for residents. In addition, ALIA noted that the new programme schedule would devote less time to broadcasting information and current affairs programmes. The amount of information programmes had been an important determining factor in the granting of the initial licence in 1992.

Finally, ALIA discussed the change in language from Luxembourgish to French envisaged by the applicant. The use of the Luxembourgish language was a key element for the granting of the original licence. Throughout subsequent amendments of the licence, the language requirement had always been maintained. The applicant proposed to broadcast programmes in the Luxembourgish language between midnight and 6 o'clock in the morning. However, ALIA considered that this would not satisfy the language requirement for a generalist radio service broadcast in Luxembourgish. ALIA stressed that it did not per se oppose the creation of a radio service transmitting its programmes entirely in French and acknowledged a significant change in the composition of the audience in Luxembourg listening to radio with a much larger number of French commuters. Such a new service would however need to be granted based on a call for tender to allow competitors to apply, as well.

By refusing all four modifications (change of ownership, governing bodies, programme content, name), ALIA clarified that the substitution of one radio service for another with a fundamentally new concept cannot

take place in the form of an application for modifications to the terms of reference, but instead requires a competitive process involving all stakeholders. Even the commitments the applicant offered e.g. concerning the discontinuation of the use of some frequencies, were regarded as irrelevant by ALIA in this instance.

The applicant refrained from contesting the decision by an action for annulment before the Tribunal administratif (Administrative Tribunal), so the decision of ALIA became final in June. Also, as the applicant had announced previously, the service "DNR" has in the meantime been terminated and the frequencies used so far are mute.

• *Décision n° 4/2014 du 27 février 2014 du Conseil d'administration de l'Autorité luxembourgeoise indépendante de l'audiovisuel concernant une demande présentée par la s.à.r.l. Société de Radiodiffusion Luxembourgeoise* (Decision of 27 February 2014 of the Administrative Council of the Independent Audiovisual Authority of Luxembourg concerning a request presented by the Société de Radiodiffusion Luxembourgeoise)
http://merlin.obs.coe.int/redirect.php?id=17130 FR

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LV-Latvia

Amendments to Electronic Media Law adopted

On 24 April 2014, the Saeima (the Latvian Parliament) has adopted amendments to the Electronic Media Law.

The amendments clarify the criteria for the status of national electronic mass media, modify the conditions on which a broadcasting permit may be revoked, extend the period for storing the records of broadcasts and provide for other minor changes.

The amendments introduce a rule that an electronic mass medium will be considered as national, if it reaches at least 60% of inhabitants of Latvia or if it reaches the largest portion of the territory of Latvia. Previously only the territorial criterion was included, thus there were difficulties in deciding how to define national status for radio broadcasters. In addition, a special criterion for television remains: in order to be considered national, a channel must reach at least 99% of the territory.

The amendments also modify the conditions on which the National Electronic Media Council (the Council) may revoke a broadcasting permit or a retransmission permit. The conditions in essence remain the same (repeated breach of the law, breach of the conditions of the permit), but are supplemented with the criterion of substantiality, meaning that the breach must be substantial. In order to assess the substantiality, the Council must take into account the danger to the public, the consequences of the breach, the options to prevent a repetition of the breach and the impact of the breach on the general activities of the relevant mass medium.

The amendments extend the period for which the electronic mass media must store the records of their programmes. The law provides that all electronic mass media must fully record their programmes. Previously they had a duty to store these records for one calendar month. Now, the storage period is extended to three months. The amendments also clarify that the Council itself is entitled to perform the recording of programmes, not only to request them from the broadcasters.

The amendments came into force on 28 May 2014.

• *Likums "Grozījumi Elektronisko plašsaziņas līdzekļu likumā", "Latvijas Vēstnesis", 92 (5152), 14.05.2014* (Amendments to the Electronic Media Law, "Latvijas Vēstnesis", 92 (5152), 14 May 2014)
http://merlin.obs.coe.int/redirect.php?id=17086 LV

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RO-Romania

Modification of the Audiovisual Law

The Senate (upper Chamber of the Romanian Parliament) on 3 June 2014 approved the Draft Law on the modification of Art. 86 of the Legea Audiovizualului nr. 504/2002 cu modificările şi completările ulterioare (Audiovisual Law no. 504/2002 with further modifications and completions). The decision of the Senate is final. The Draft Law has been approved by the lower Chamber (the Chamber of Deputies) on 11 February 2014 (see IRIS 2010-1/36, IRIS 2011-4/31, IRIS 2011-7/37, IRIS 2013-3/26, IRIS 2013-6/27, IRIS 2014-1/37 and IRIS 2014-2/31).

According to the Draft Law, the modification of Art. 86 is meant to precisely transpose the Audiovisual Media Service Directive 2010/13/EU into the Romanian legal system and to ensure free access of broadcasters to events of high public interest.

The new version of Art. 86 (1) of the Audiovisual Law stipulates that any broadcaster under the jurisdiction of Romania or another EU member state has access on a fair, reasonable and non-discriminatory basis to events of high interest to the public transmitted exclusively by a broadcaster under Romanian jurisdiction,

with a view to making short news items, in compliance with Art. 85, which sets detailed requirements for the use of short reports.

The new version of Art. 86 (2) states that for the broadcasters under the jurisdiction of the same EU member state as the broadcaster that has obtained exclusive rights to the event, the access intended for the production of short news items has to be provided to the respective broadcaster.

• *Lege pentru modificarea art. 86 din Legea Audiovizualului nr. 504/2002 - forma adoptată de Camera Deputaților* (Act on the modification of Art. 86 of the Audiovisual Law no. 504/2002 - form adopted by the Chamber of Deputies)
http://merlin.obs.coe.int/redirect.php?id=17087 RO

• *Expunerea de motive la inițiativa legislativă* (Explanatory Memorandum to the legislative initiative)
http://merlin.obs.coe.int/redirect.php?id=17088 RO

Eugen Cojocariu
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New modification of the Public Audiovisual Services Law

The*Legea nr. 71/2014 pentru modificarea şi completarea Legii nr. 41/1994 privind organizarea şi funcţionarea Societăţii Române de Radiodifuziune şi Societăţii Române de Televiziune* (Law no. 71/2014 with regard to the modification and completion of Law no. 41/1994 on the organization and operation of the Romanian Radio Broadcasting Corporation and of the Romanian Television Corporation) was published in the Official Journal of Romania, no. 398, of 29 May 2014, Part I. The Law is meant to help the financing of the production and broadcasting of programmes abroad by the Societatea Română de Radiodifuziune şi Societatea Română de Televiziune, (public audiovisual broadcasters from Romania - SRR and TVR), including through private legal persons set up by SRR or TVR or in which the above mentioned companies are associates/shareholders (see IRIS 2013-5/37, IRIS 2013-10/36, IRIS 2014-1/38 and IRIS 2014-4/25).

The Law had been approved by the Chamber of Deputies (lower Chamber) and by the Senate (upper Chamber) in September and October 2013, but it had been sent back to the Parliament in October 2013 by the President of Romania. After a second approval of the Draft Law, with slight modifications, by the Romanian Chamber of Deputies in December 2013 and by the Senators in February 2014, the President in March 2014 sent to the Constitutional Court of Romania asserting the unconstitutionality of the Draft Law. The President considered that the provisions of the Law breach Art. 1 (5) of the Romanian Constitution, they are inaccurately formulated and do not observe the criteria of clarity, precision and predictability. Because he did not succeed with the complaint, the President promulgated the Law on 26 May 2014.

According to the new legal provisions, the financing of the production and broadcasting of programmes abroad, including through private legal persons set up by SRR or TVR or in which the SRR and TVR are associates/shareholders, as well as for the development of these activities, is done through state budget allocated funds, run through the budgets of the two institutions (Art. 42 (1)). A new paragraph, was introduced after Art. 43 (1), providing for the extension/development of the activity of the public audiovisual providers outside Romania; SRR and TVR can set up, with the advisory opinion of the Culture and Mass-Media Standing Committees of the Romanian Parliament, that private legal persons, with or without profit, can become associates in such entities or can acquire shares of an existing company.

• *Legea nr. 71/2014 pentru modificarea şi completarea Legii nr. 41/1994 privind organizarea şi funcţionarea Societăţii Române de Radiodifuziune şi Societăţii Române de Televiziune* (Law no. 71/2014 with regard to the modification and completion of Law no. 41/1994 on the organization and operation of the Romanian Radio Broadcasting Corporation and of the Romanian Television Corporation, Official Journal, no. 398, of 29 May 2014, Part I)
http://merlin.obs.coe.int/redirect.php?id=17089 RO

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Intended laws for hearing and speech impaired people

The Chamber of Deputies (lower Chamber of the Romanian Parliament) on 3 June 2014 rejected two Draft Laws on the use of sign language. The upper Chamber, the Senate, had rejected the Draft Laws on 6 November 2013. However, two other Draft Laws on the same subject are currently under debate (see IRIS 2012-8/34 and IRIS 2014-2/31).

The initiators warned that there are more than 25,000 hearing impaired persons in Romania. The first Draft Law (Pl-x nr. 493/2013), backed by 6 Liberal MPs, intended to decide on the use of Romanian sign language or of sign language through an authorised official interpreter. According to Art. 16 of the Draft Law, the access to public interest information has to be assured for hearing impaired people, especially on matters related to their rights. The access has to be at the required level, including a nationwide mass-media, at least on TVR1 and Radio România Actualităţi, the first domestic channels of the Romanian audiovisual broadcasters. Art. 22 stipulated that besides the already existing special programmes using Romanian sign language or sign language through an authorised official interpreter, the national public television, TVR, has to use at least on its first channel, TVR1, subtitles or to use interpreters authorised in the following cases: for public interest information, if the show is not followed by news bulletins; when

airing documentaries, by subtitling, even if the dialogues are in Romanian. The second Draft Law (Pl-x nr. 494/2013), backed by 7 Liberal and Social-Democrat MPs, intended to regulate the Statute of the sign language interpreter.

At the same time, an identical Draft law (PL-x nr. 112/2014) was initiated by 12 Liberal, Social-Democrat, Liberal-Democrat and Conservative MPs. The new Draft Law was tacitly adopted by the Senate on 3 March 2014 due to exceeding the constitutional limit of 45 days for adopting a law. The Draft Law is now on the table of the Chamber of Deputies. The Standing Committees have sent their reports upon the Draft Law.

On the other hand, 19 MPs from the Conservative Party initiated a Draft Law (Pl-x nr. 217/2014) on the technical and social assistance to hearing and speech impaired persons. According to Art. 16, 80% of the cultural, political and general interest programmes aired by the public television, Televiziunea Română (TVR), must have written subtitles. The Draft Law was rejected by the Romanian Senate on 15 April 2014. The Draft Law is now on the table of the Chamber of Deputies. The Standing Committees have sent their reports upon the Draft Law.

• *Propunere legislativă privind folosirea limbajului semnelor româneşti sau a limbajului mimico-gestual oficial prin interpret autorizat* (Draft Law on the use of Romanian sign language or of sign language through an authorized official interpreter)
http://merlin.obs.coe.int/redirect.php?id=17090 RO

• *Propunere legislativă privind Statutul interpretului în limbaj mimico-gestual - forma iniţiatorului* (The Draft Law on the Statute of the sign language interpreter - form of the initiator)
http://merlin.obs.coe.int/redirect.php?id=17091 RO

• *Propunere legislativă privind acordarea de asistenţă tehnică şi socială persoanelor cu deficienţe de auz şi vorbire - forma iniţiatorului* (Draft Law on the technical and social assistance to hearing and speech impaired persons - form of the initiator)
http://merlin.obs.coe.int/redirect.php?id=17092 RO

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Modification of the Cinematography Emergency Decree rejected

The Chamber of Deputies (lower Chamber of the Romanian Parliament) on 3 June 2014 rejected the Draft Law on the modification of the Ordonanţa Guvernului nr. 39/2005 privind cinematografia (Government Emergency Decree no. 39/2005 with regard to the cinematography). The decision of the Chamber of Deputies is final. The Draft Law had been rejected by the upper Chamber, the Senate, on 6 November 2013 (see IRIS 2003-2/23).

According to the rejected Draft Law, the public television, Societatea Română de televiziune - TVR, would have paid only 4% of its advertising revenues to the Cinematography Fund (instead of the 19% TVR is paying now). The initiators of the Draft Law intended to repeal Art. 17 of the Emergency Decree no. 39/2005, because they claimed that it discriminated against the public broadcaster, who is obliged to pay to the Cinematography Fund 4% of the above mentioned revenues [Art. 13 b)] along with the private televisions, but, at the same time, according to Art. 17 is obliged, to pay another 15% of its own ads revenues to the Cinematography Fund.

In addition, TVR can choose to directly finance the film production with up to 50% of the sum due to the Cinematography Fund, upon request of the film producers and after the notification of the Centrul Naţional al Cinematografiei (National Cinematography Center, CNC).

The Draft Law intended to ease the extremely negative financial balance of public television. In 2013, the ads revenues of Romanian Television were of 22,553,214 lei, the Romanian currency (EUR ˜5,125,730). The total revenues of TVR were in 2013 of 543,982,979 lei (EUR ˜123,632,500).

• *Propunere legislativă pentru modificarea Ordonanţei Guvernului nr. 39/2005 privind cinematografia - forma iniţiatorului* (Draft Law on the modification of the Government Emergency Decree no. 39/2005 with regard to the cinematography - form of the initiator)
http://merlin.obs.coe.int/redirect.php?id=17093 RO

• *Expunerea de motive la iniţiativa legislativă* (Explanatory Memorandum to the legislative initiative)
http://merlin.obs.coe.int/redirect.php?id=17094 RO

Eugen Cojocariu
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TR-Turkey

Constitutional Court declares that YouTube ban is unconstitutional

On 29 May 2014 the Turkish Constitutional Court decided the ban imposed by the regulatory authority of telecommunications *Telekomünikasyon İletişim Başkanlığı* (Presidency of Telecommunication and Communication - TIB), on blocking access to YouTube is a violation of freedom of expression.

The YouTube ban was imposed by a TIB's decision of 27 March 2014 in response to the posting of a two-part voice recording that purported to disclose a top-secret discussion by high-ranking State Officials about a strike inside Turkey's southern neighbor, Syria. While reasoning its decision, TIB stated that this ban is an injunction for protection (koruma tedbiri) so as to prevent the disclosure of state secrets of which were disseminated through some 15 URL links on YouTube. Following TIB's decision, the Union of

Turkish Bars initiated proceedings before the Ankara Criminal Court (herein after "ACC") to lift the injunction order. On 9 April 2014 ACC rendered its decision holding that the restriction on accessing the indicated 15 URL links must be enforced. It however found that the ongoing ban for accessing the full YouTube webpage is disproportionate and thus, must be lifted instantly. Despite this judgment, the TIB did not execute the judgment by relying on the fact that the 15 URL addresses can still be accessed from abroad, even if they are no longer accessible in Turkey. On 2 May 2014 Ankara Administrative Court further granted a stay of execution on the matter. YouTube, nevertheless, remained blocked.

Against this background, the applicants, YouTube LLC Corporation Service Company and users of YouTube, lodged individual complaints before the Constitutional Court (CC). On the procedural limb, the CC held that the decision of the ACC was definitive and that there was no effective remedy applicable to the applicants' case on the basis of non-implementation of the stay of execution granted by Ankara Administrative Court. It thus declared the case admissible and examined it on the merits.

In their submissions, the applicants, relying on the corresponding articles on freedom of expression in the Turkish Constitution as well as the case law of the European Court of Human Rights (ECtHR), asserted that the ban had no legal basis. They also claimed that the ban not only constituted an interference with the right of access to information but also the right to disseminate it.

Similar to its reasoning in its decision on a Twitter ban (see IRIS 2014-6/35) in April 2014, underlining the requirement of having a court decision for fully blocking internet access, the CC decided that the TIB acted ultra vires while issuing the ban decision and the decision thus had no legal basis. Furthermore, the CC stated that internet had become an important medium for freedom of expression and that it could not be blocked in a democratic society. It therefore found a violation of freedom of expression. Following the CC judgment, the ban on YouTube was lifted accordingly.

• *T.C.Anayasa Mahkemesi, Başvuru Numarası: 2014/4705, Karar Tarihi: 29/5/2014* (Decision of the Constitutional Court, case number 2014/4705, 29 May 2014)
http://merlin.obs.coe.int/redirect.php?id=17107 TR

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US-United States

Planned reform of net neutrality by the Federal Communications Commission

On 15 May 2014 the Federal Communications Commission (FCC) launched a rulemaking seeking comment on proposals for prohibiting Internet providers from blocking or degrading consumers' Internet access in light of a recent Federal Court ruling that struck down the FCC's Open Internet Order of 2010 (see also IRIS 2010-1/41 and IRIS 2012-1/43). The FCC preliminarily rejected reclassifying broadband service under Title II of the Communications Act pursuant to the authority granted to it by the Court. Instead, it proposed to refine its anti-blocking rules and prohibit only commercially unreasonable practices.

The FCC proposed adopting the text of the anti-blocking rule it had adopted in the Open Internet Order, which requires broadband providers to "furnish04046 access to their subscribers generally" while establishing "a lower limit on the forms that broadband providers' arrangements with edge providers can take." It also clarified that it will allow individualized bargaining and scrutinise these practices under a commercially reasonable rule.

While the FCC affirmed that it does not intend to impose per se common carriage requirements on broadband providers, it concluded that an enforceable legal standard for broadband provider practices is necessary to preserve Internet openness. To achieve this, it intends to prohibit only commercially unreasonable practices, as defined by a totality of the circumstances standard. The FCC also proposed several safe harbors to its commercial reasonableness rule, including not applying the rule to mobile broadband providers and applying it separately from its no-blocking rule.

FCC Chairman Wheeler explained that the proposed rules follow the Court's blueprint for how the FCC can ensure that there is "only one Internet" and clarified that it does not allow paid prioritization that would entail a fast-lane and slow-lane, as some of the critics have suggested. He explained that under his approach, "anything that is anti-competitive or anti-consumer is competitively unreasonable, and therefore can and should be blocked." The proposal was universally rejected by Republicans, who oppose any net neutrality regulation. However, it was also received with scepticism by some Democrats, who expressed concern that the plan could allow carriers to strike deals with companies like Netflix for faster delivery of their content by later FCC leadership. There was also opposition across party lines to treating broadband as a utility.

• Federal Communications Commission document, Protecting and promoting open internet notice of proposed rulemaking, 15 May 2014
http://merlin.obs.coe.int/redirect.php?id=17096 EN

• Statement of Chairman Tom Wheeler Re: Protecting and Promoting the Open Internet, GN Docket No. 14-28.
http://merlin.obs.coe.int/redirect.php?id=17097 EN

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AT&T to merge with DirecTV

The telecommunication company, AT&T, announced on 18 May 2014 that it has agreed to acquire DirecTV for USD 67 billion. The deal, which includes USD 48.5 billion in stock and cash and USD 18.5 billion in assumed debt, is expected to close after approval by DirecTV shareholders, which is expected to come within approximately one year. The combined entity would boast 25 million subscribers and be the second largest provider of cable television in the United States, behind only a combined Comcast-Time Warner Cable. It remains unclear whether DirecTV will maintain its own branding entirely going forward, but the company notes it will continue to operate out of its current headquarters in El Segundo, California.

The merger is expected to face close scrutiny by numerous federal agencies, particularly since the combined subscriber base of a merged Comcast-Time Warner and merged AT&T and DirecTV would comprise more than half of the market for pay television. The Federal Communications Commission (FCC), which can take steps to block the deal, is expected to review the merger to determine whether it will harm the video programming or wireless markets. AT&T appeared to preemptively tamp down potential concern that the merger would harm the average consumer, boasting that the deal will allow it to "expand and enhance broadband to 15 million customer locations, primarily in rural areas" and offer a "stronger competitive alternative to cable, with a better customer experience and enhanced innovation." It also expressed a "continued commitment for three years after closing to the FCC's Open Internet protections established in 2010, irrespective of whether the FCC re-establishes such protections."

• Merger announcement, A&T newsroom, 18 May 2014
http://merlin.obs.coe.int/redirect.php?id=17095 EN

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Agenda

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