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Dear readers,

The winter break is over and we are looking forward to another year of providing you with legal information on new developments in the audiovisual sector.

Very soon you will be able to obtain either from us (Markus.Booms@obs.coe.int) or from one of our distribution partners the latest edition of *IRIS Special* on the theme of *Regulating Access to Digital Television - technical bottlenecks, vertically integrated markets and new forms of media concentration*. This will be published in early February. Last year's *IRIS plus Collection* on the theme *Going Horizontal* is already available.

In *IRIS plus* this year, we will be focusing on the following subjects: broadcasting and minority languages, sport and media, audiovisual archives, the role of private

international law in the audiovisual sector and the protection of broadcasters. Lots to look forward to!

We have also made a change to the *IRIS Newsletter*. At the last meeting of the IRIS editorial team, it was unanimously decided that the growing phenomenon of convergence should be taken into account. Therefore, the headings "Broadcasting", "Film", "New media/technologies" and "Related fields of law" will no longer be used. Instead, national developments will be reported in alphabetical order according to the country in which they take place.

Finally, I would like to mention our new legal database *IRIS Merlin*, which offers fast, free access to all articles that have ever been published in the *IRIS Newsletter*. Numerous articles written especially for the database will be added during the year. You can experience for yourself the fantastic opportunities for individual searches that the database offers by visiting: <http://merlin.obs.coe.int>

We hope that our range of *IRIS* products will help to make the coming months successful for you and wish you a happy and joyful new year! ■

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of the Legal Information  
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## INTERNATIONAL

### EPRA

#### European Platform of Regulatory Authorities: 18th Meeting

Susanne Nikoltchev  
European Audiovisual  
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Representatives of 43 regulatory authorities from 34 countries attended the 18th meeting of the EPRA, hosted by the Cyprus Radio-Television Authority.

• For more details on the 18th EPRA meeting, see  
<http://www.epra.org/content/english/press/2003nicosia.html>

EN-FR

The main theme was the implementation of EC legislation in the new EU Member States and candidate countries. The delegates particularly focused on the challenges facing national regulatory authorities regarding the implementation of the aims and principles of EU media policy.

Other topics of debate included aspects of advertising law that had been discussed at previous EPRA meetings. Information was provided concerning new advertising techniques and new models for the funding of advertising, as well as topical questions on the separation of editorial content and advertising, surreptitious advertising and product placement. ■

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

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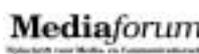
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## OSCE

### High Commissioner on National Minorities: International Guidelines on Use of Minority Languages in Broadcast Media

A set of international Guidelines on the Use of Minority Languages in the Broadcast Media was launched recently. Elaborated by a group of experts under the auspices of the OSCE High Commissioner on National Minorities, the Guidelines draw inspiration from, and indeed seek to crystallise, existing international standards (both legal and political) dealing specifically or even implicitly with the topic.

The Guidelines, which are accompanied by an Explanatory Note tracing each of the 17 constituent paragraphs to its origins in the relevant international standards, are divided into four sections: General Principles; Policy; Regulation and Promotion of Minority Languages.

The general principles enumerated are: freedom of expression; cultural and linguistic diversity; protection of identity, and equality and non-discrimination.

According to the second section of the Guidelines, States should develop policy to address the use of minority languages in the broadcast media. The elaboration and application of such State policy should include the "effective participation" of persons belonging to national minorities. It ought to be supportive of public service broadcasting to the extent that such broadcasting caters, *inter alia*, for the linguistic needs of national minorities. State policy in this area should also "facilitate the establishment and maintenance by persons belonging to national minorities of broadcast media in their own language" (para. 8), and independent regulatory bodies should have responsibility for its implementation.

Regulation (including licensing) "must be prescribed by law, based on objective and non-discriminatory criteria and shall not aim to restrict or have the effect of restricting broadcasting in minority languages" (para.

9). States may not prohibit the use of any language in the broadcast media and any measures promoting one or more language(s) should not have restrictive repercussions for the use of other languages, or otherwise adversely affect the rights of persons belonging to national minorities. Furthermore, again drawing on the language of Article 10 of the European Convention on Human Rights, regulation must pursue a legitimate aim and be proportionate to that aim. The proportionality of regulation should be assessed in light of a wide range of factors, including the existing political, social, religious, cultural and linguistic environment; the number, variety, geographical reach, character, function and languages of available broadcasting services, and the rights, needs, expressed desires and nature of the audience(s) affected.

The Guidelines stipulate that onerous translation requirements should not be imposed on minority-language broadcasting and that transfrontier broadcasting must not be restricted (on the basis of language). Moreover, the availability of foreign broadcasting in a minority language does not obviate the need for States to facilitate the domestic production of programmes in that language, "nor does it justify a reduction of the broadcast time in that language" (para. 13).

The fourth section of the Guidelines countenances a number of facilitative measures aimed at stimulating broadcasting in minority languages, both qualitatively and quantitatively. These include States providing access to broadcasting technology and infrastructure; creating financial assistance schemes; pursuing advantageous fiscal policies and maintaining particular licensing and administrative regimes; all with a view to achieving "effective equality" for broadcasters operating (to varying degrees) in minority languages. As elsewhere in the Guidelines, providing incentives for minority language broadcasting and teasing out various possibilities for its realisation, are approached distinctly from public service and private broadcasting perspectives. The importance of capacity-building (e.g. technical support for the distribution of productions in minority languages; education and training of personnel for minority-language broadcasting) is also emphasised.

A number of processes fed into the preparation of the Guidelines: a commissioned study of the regulation of minority language use in the broadcast media throughout the 55 OSCE Participating States (see *infra/supra*) and an analysis of relevant international standards. ■

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● Guidelines on the Use of Minority Languages in the Broadcast Media & Explanatory Note, Office of the OSCE High Commissioner on National Minorities, December 2003, available at: <http://www.osce.org/hcnm>

EN-RU

## CONCIL OF EUROPE

### European Court of Human Rights: Case of Karkin v. Turkey

The case of Karkin v. Turkey concerns the conviction of the secretary of a union who was sentenced by the National Security Court in 1997 to one year's imprisonment for making a speech inciting the people to hatred and hostility creating discrimination based on membership of a social class and race, a criminal conviction in application of Article 312 of the Turkish Criminal Code. Although the European Court of Human Rights clearly

takes into account the sensitivity of the security situation in south-east Turkey and the need for the authorities to be alert to acts capable of fuelling additional violence in the region, the Court did not agree that the conviction and punishment of Karkin was to be considered necessary in a democratic society. The Court was of the opinion that the applicant's speech was "political in nature" and was expressed during a peaceful gathering, far away from the conflict zone. As these circumstances significantly limited the potential impact of the comments on "national security", "public order" or "territorial integrity" and as the penalties imposed on the applicant were severe, the Court unanimously concluded that there was a violation of Article 10 of the European Convention on Human Rights. ■

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● Judgment by the European Court of Human Rights (Fourth Section), Case of Karkin v. Turkey, Application no. 43928/98 of 23 September 2003, available at: <http://www.echr.coe.int>

FR

### European Court of Human Rights: Case of Kizilyaprak v. Turkey

In the case of Kizilyaprak v. Turkey, the European Court of Human Rights is of the opinion that the

Turkish national authorities did not take sufficient account of the public's right to be informed from different perspectives on the situation in south-east Turkey. The conviction of Kizilyaprak concerned the

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● **Judgment by the European Court of Human Rights (First Section), Case of Kizilyaprak v. Turkey, Application no. 27528/95 of 2 October 2003, available at:**  
<http://www.echr.coe.int>

FR

## European Court of Human Rights: Friendly Settlements in Freedom of Expression Cases (Turkey)

In three cases involving Turkey concerning freedom of expression, an agreement was reached between the applicant's widower, Mr. Zarakolu, and the Turkish Government. All three cases concern the seizures of several books because of separatist propaganda. The Court, in its judgments of 2 October 2003, took notice of the friendly settlements, referring to the declaration from the Turkish Government in which it is recognised that the (former) Court's rulings against Turkey in cases involving prosecutions under the provisions of the Prevention of Terrorism Act relating to freedom of expression, and also the facts underlying the present cases, "show that

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● **Friendly Settlements in the cases Zarakolu (no. 1-3) v. Turkey (Third Section), Application nos. 37059/97, 37061/97 and 37062/97 of 2 October 2003, available at:**  
<http://www.echr.coe.int>

EN

## Parliamentary Assembly: Focus on Freedom of Expression for Minorities

On 29 September 2003, the Parliamentary Assembly of the Council of Europe (PACE) adopted Recommendation 1623 (2003), entitled "Rights of national minorities". The Recommendation, aside from explaining the latest state of play as regards the Framework Convention for the Protection of National Minorities and the European Charter for Regional or Minority Languages, and suggesting a number of ways in which the implementation of the Framework Convention could be enhanced, also focuses on a handful of thematic issues, including freedom of expression.

Para. 7 of the Recommendation reiterates the Assembly's earlier insistence (in Recommendation 1589 (2003), "Freedom of expression in the media in Europe" (see IRIS 2003-2: 2)) that "all European States should abolish restrictions on the establishment and functioning of private media broadcasting in minority languages" on the grounds that such restrictions fall foul of Article 10 of the European Convention on Human Rights.

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● **"Rights of national minorities", Recommendation 1623 (2003), Parliamentary Assembly of the Council of Europe, 29 September 2003, available at:**  
<http://assembly.coe.int/Main.asp>

EN-FR

● **"Rights of national minorities", Report of the Committee on Legal Affairs and Human Rights (Rapporteur: Boriss Cilevics), Parliamentary Assembly of the Council of Europe, 9 July 2003, Doc. 9862, available at:**  
<http://assembly.coe.int/Main.asp>

EN-FR

● **"Filling the Frame", Conference to mark the 5th Anniversary of the entry into force of the Framework Convention for the Protection of National Minorities, Strasbourg, 30-31 October 2003, Special File, available at:**  
[http://www.coe.int/T/E/human\\_rights/minorities/](http://www.coe.int/T/E/human_rights/minorities/)

EN

propaganda and incitement to hatred based on ethnic and regional differences (Article 8 of the Prevention of Terrorism Act and Article 312 of the Criminal Code), the owner of the publishing house, Zeynel Abidin Kizilyaprak, was sentenced to six months imprisonment by the National Security Court in 1993. In a crucial consideration the Strasbourg Court is of the opinion that, although some passages in the book painted an extremely negative picture of the Turkish State and the army and reflected a very hostile tone, the content of the book did not constitute an incitement to violence, armed resistance or an uprising. Referring also to the severity of the conviction, the Court unanimously concluded that the Turkish authorities had violated Article 10 of the European Convention on Human Rights. ■

Turkish law and practice urgently need to be brought into line with the Convention's requirements under Article 10 of the Convention". In all three cases the Court took note of the agreement reached between the parties. The Court expresses its satisfaction that the settlement is based on respect for human rights as defined in the Convention and its Protocols. It is ordered that the cases be struck out of the list.

It is to be emphasised that recent modifications in Turkish law, as part of the 6<sup>th</sup> and 7<sup>th</sup> reform packages of July and August 2003 (see IRIS 2003-9: 15), are significant steps forward with a view to ensuring compliance with Article 10 of the European Convention on Human Rights. The abrogation of Article 8 of the Prevention of Terrorism Act and the amendments to Articles 159 and 312 of the Criminal Code are of particular relevance in this context. Also, a comprehensive reform of the Turkish Press Law is announced and will be discussed in Parliament in December 2003. ■

In Para. 11(iv), the Assembly calls on "the states parties to pay particular attention to the fair implementation of Article 9 of the framework convention (Freedom of expression) by abolishing undue restrictions imposed on private broadcasting and the publishing of written news in minority languages".

The Recommendation also touches on other themes of interest to persons belonging to national minorities: unrestricted language use "in areas where they live in substantial numbers"; parliamentary representation, and the full protection of "the most vulnerable Roma minorities". The Recommendation is the progeny of an identically-titled Report which was completed earlier in 2003 by the PACE Committee on Legal Affairs and Human Rights (Rapporteur: Boriss Cilevics). As far as freedom of expression for minorities is concerned, the Report (Doc. 9862) examines a number of country-specific cases, outlining relevant concerns identified, *inter alia*, by the Advisory Committee on the Framework Convention in the course of the State-reporting/monitoring procedures. The Framework Convention assigns responsibility for monitoring its implementation to the Committee of Ministers of the Council of Europe and states that the Committee of Ministers shall be assisted in this task by the Advisory Committee (Articles 24-26).

On a related note, the Advisory Committee recently organised a conference, "Filling the Frame", to mark the fifth anniversary of the entry into force of the Framework Convention. One of the three parallel workshops at the conference was devoted to the topic of "Persons belonging to national minorities and the media". The workshop treated issues such as the media representation of persons belonging to national minorities and the promotion of a spirit of tolerance and intercultural dialogue, as well as the access of persons belonging to national minorities to the media. ■

## EUROPEAN UNION

### Council of the European Union: Conclusions on the Transition from Analogue to Digital Broadcasting and on Digital Television and 3G Mobile Communications

At its meeting of 20 November 2003, the Council of the European Union adopted Conclusions on the transition from analogue to digital broadcasting and Conclusions on digital television and third generation mobile communications.

In its Conclusions on switchover to digital broadcasting, the Council welcomes the Communication recently published by the Commission on this subject (see IRIS 2003-10: 4). Recalling the findings and conclusions of the Communication, the Council calls on

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● 2543th Council Meeting (Transport, Telecommunications and Energy), Brussels, 20 November 2003, available at:  
<http://ue.eu.int/newsroom/related.asp?BID=87&GRP=6444&LANG=1>

DA-DE-EL-EN-ES-FI-FR-IT-NL-PT-SV

### Council of the European Union: Resolution on Deposit of Cinematographic Works

At its meeting of 24-25 November 2003, the Council of the European Union adopted a Resolution calling for the systematic deposit of cinematographic works in the European Union.

The Resolution refers to the Commission Communication on certain legal aspects relating to cinematographic and other audiovisual works (see IRIS 2001-9: 6), which examined the legal deposit of audiovisual works as a possible way of preserving and safeguarding Europe's audiovisual heritage. The Communication launched a stocktaking exercise of the current situation as regards the deposit of works in the Member States, candidate countries and EFTA countries, to be carried out prior to a possible Commission proposal in this field. The Council now notes that the Commission's stocktaking exercise indicates that at least two thirds of Member States have a system of compulsory deposit either for all cinematographic works or at least those that have received public support.

The Resolution invites Member States to put in place effective systems for the deposit and conservation of cinematographic works in their national archives (or other relevant institutions), where such systems do not yet exist. The deposit systems should cover national cinematographic works as far as practicable, or at least cinematographic works that have received public sup-

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● Council Resolution of 24 November 2003 on the deposit of cinematographic works in the European Union, Press release of the 2545th Council meeting (Education, Youth and Culture), Brussels, 24-25 November 2003, available at:  
<http://ue.eu.int/newsroom/related.asp?BID=92&GRP=6499&LANG=1>

DA-DE-EL-EN-ES-FI-FR-IT-NL-PT-SV

### European Commission: End of Monitoring of FIA/ Formula One Compliance with 2001 Settlement

The European Commission has announced that it will end its monitoring of the 2001 settlement between the Commission, the *Fédération Internationale de Sport Automobile* (FIA) and the Formula One Administration (FOA).

Member States to publish their intentions regarding a possible switchover, by December 2003, and to ensure that policy interventions are transparent, justified, proportionate, timely and non-discriminatory. It also welcomes the Commission's proposed action as set out in the Communication and invites it, within the limits of Community law and policy, to support Member States' initiatives to promote digital broadcasting.

In the second set of Conclusions, the Council welcomes the Commission's Communication on open platforms in digital television and third generation mobile communications (see IRIS 2003-8: 7). The Council invites Member States to ensure, where possible, that public services available electronically are accessible by different platforms, to carry out full implementation of the EU regulatory framework for electronic communications, and to support the Commission's efforts to move forward the standardisation programme. The Council welcomes the follow-up actions, which the Commission intends to take in this field as indicated in the Communication and also invites it to: give attention to platforms other than digital television and 3G; monitor developments in multi-platform delivery systems with the aim of encouraging interoperability of digital interactive services; and ensure that the standardisation programme covering electronic communications (provided for in the "Framework Directive") is carried out in a timely fashion. ■

port at national and/or Community level. They could be based on a legal or contractual obligation "or on other measures having the same effect in terms of preserving the cinematographic heritage". Member States should also provide for the possibility of using deposited works for educational, cultural and research purposes or for similar non-commercial uses (in compliance with copyright and related rights). Finally, Member States should co-operate and exchange good practice in this area.

The Commission is called upon to examine possible ways to further develop co-operation between Member States in this field, as regards for instance the exchange of information on the deposit and preservation of important European films. Furthermore, it is invited to continue the exchange of experiences and best practices from Member States in the context of the cinema experts group it has established and to report to the Council on the progress achieved.

The Resolution also refers to the Council of Europe Convention for the protection of the Audiovisual Heritage (see IRIS 2001-9: 3), which was opened for signature on 8 November 2001 and has been signed by 4 EU Member States (Austria, France, Greece and Portugal).

As regards future initiatives in this field, Commissioner Reding has recently announced that the Commission is currently working on a proposal for a recommendation concerning cinematographic heritage, which it plans to present in the first quarter of 2004.

At the same meeting, the Council also held an exchange of views on the future of audiovisual policies, on the basis of the Commission's mid-term evaluation of the MEDIA Plus and MEDIA Training programmes (2001-2005) and of a document presented by the Presidency. ■

This settlement was preceded by years of investigation by the Commission of the Formula One and four-wheel motor sports sector after notifications (of the FIA regulations and certain commercial agreements) by the parties themselves in 1994 and 1997 (see also IRIS 1998-4: 8).

The Commission objected to certain elements of the notified arrangements in 1999, stating that they con-

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sisted of unnecessary restrictions on promoters, circuit owners, vehicle manufacturers and drivers, as well as to certain provisions in commercial broadcasting agreements. The Commission and the two parties involved reached a settlement in 2001, whereby numerous remedies were agreed upon. Among other things, the FIA agreed to limit its role to that of a sports regulator (thus eliminating any commercial conflict of interest) and to

● "Commission ends monitoring of FIA/Formula One compliance with 2001 settlement", Press Release of the European Commission IP/03/1491 of 31 October 2003, available at: [http://europa.eu.int/rapid/start/cgi/guesten.ksh?p\\_action.gettxt=gt&doc=IP/03/1491|0|RAPID&lg=EN&display=](http://europa.eu.int/rapid/start/cgi/guesten.ksh?p_action.gettxt=gt&doc=IP/03/1491|0|RAPID&lg=EN&display=)

DE-EN-FR

## European Commission: Communication on the Future of European Regulatory Audiovisual Policy

On 15 December 2003 the European Commission adopted a Communication which sets out a roadmap for future EU regulatory action in the audiovisual sector. The Communication presents the results of the public consultation relating to the review of the "Television without Frontiers" Directive, launched at the beginning of 2003 (see IRIS 2003-2: 5), and on the basis of these results proposes a number of short and medium term initiatives.

The Commission has concluded that the current situation of the market does not require at present a revision of the Directive. However, it believes that in the medium term technological developments and changes in the structure of the audiovisual market might make changes to regulation for the different distribution channels for audiovisual content necessary. It thus envisages a possible thorough revision of the Directive at a later stage.

The present Communication proposes a two step approach. In the short term, the Commission will publish an interpretative Communication on the provisions of the Directive concerning advertising (first quarter of 2004). This will clarify in particular how these provisions apply with regard to new advertising techniques and should therefore bring greater legal certainty. As a result of the comments made by stakeholders during the consultation, the Commission will also put forward in the first quarter of 2004 a proposal for an update of the Recommendation on the protection of minors and human dignity.

In addition to these initiatives, a number of issues

● "The Future of European Regulatory Audiovisual Policy", Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions, COM (2003) 784 final, Brussels, 15 December 2003, available at: [http://europa.eu.int/eur-lex/en/com/cnc/2003/com2003\\_0784en01.pdf](http://europa.eu.int/eur-lex/en/com/cnc/2003/com2003_0784en01.pdf)

DA-DE-EL-EN-ES-FI-FR-IT-NL-PT-SV

## European Parliament: Call for Reduced VAT Rates for Recorded Music and Films

On 4 December 2003, the European Parliament adopted (under the consultation procedure) a legislative resolution on the proposal for a Council directive amending Directive 77/388/EEC as regards reduced rates of value added tax (VAT).

The proposal, presented by the Commission in July this year, aims to rationalise and simplify the rules rela-

guarantee access to motor sports to racing teams and circuit owners, without imposing any unnecessary restrictions and allowing for the establishment of new events. With regard to Formula One broadcasting rights, the FOA agreed to limit the duration of exclusive free-to-air broadcasting agreements to three years (five years in the case of host broadcasters). After the expiry of a contract, broadcasters will be invited to tender for the television rights. The FOA also removed from its standard form TV contract the provision whereby broadcasters were afforded a discount if they did not broadcast any other form of open wheeler racing.

After reaching the settlement, the Commission closely monitored compliance with the undertakings. The Commission now expresses the view that the remedies contained in the settlement have been effective in ending the unnecessary restrictions and ensuring a pro-competitive environment for motor sport activities in the European Union. ■

have been identified for which further reflection is needed. On some of these issues the Commission will seek the advice of independent experts through the establishment of focus groups (in 2004). These will concentrate on the subjects of regulation of audiovisual content, the level of detail in the regulation of advertising, and the right to information and right to short reporting. Furthermore, the Commission will launch, or has already launched, independent studies on the following topics: the impact of advertising regulation; the impact of measures concerning the promotion of the distribution and production of TV programmes; co-regulatory measures in the media sector; and the regulatory treatment of interactive television. The results of the focus groups and of the independent studies could lead to a proposal by the next European Commission to update the Directive.

Aside from focusing on the "Television without Frontiers" Directive, the Communication also analyses all the different Community policies which have an impact on the audiovisual sector, namely regarding competition, media pluralism, copyright, electronic communications networks and services and Information Society services, accessibility for people with disabilities to television, consumer protection, the law applicable to non-contractual obligations, trade policy and the promotion of cultural diversity in external relations.

As regards cinema, the Communication announces the adoption by the Commission in the first quarter of 2004 of a proposal for a Council Recommendation on cinematographic heritage (see article *supra*, IRIS 2004-1: 5) and of a proposal for an update of the Cinema Communication (see IRIS 2001-9: 6).

The Community's support programmes for the audiovisual sector (the MEDIA programmes) were also subject to a public consultation and review in 2003 (see IRIS 2003-6: 5). The Commission will propose a new generation of these programmes in a separate document, in the first quarter of 2004. ■

ting to reduced rates of VAT, so as to achieve greater uniformity in their application throughout the EU and ensure a more level playing field for all Member States. In order to simplify the system currently in place the Commission is, *inter alia*, proposing to add to Annex H of the Sixth VAT Directive, which contains the list of goods and services to which Member States may apply a reduced VAT rate, certain new categories of goods and services to which a number of Member States are already

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applying reduced rates under specific derogations. In parallel, it proposes to abolish the multitude of derogations, which currently permit Member States to apply reduced rates to goods and services outside Annex H.

Currently, the proposal does not provide for the inclusion in Annex H of sound and audiovisual media. The Commission notes that at present the standard VAT rate is applied in all Member States to all audiovisual media

● **European Parliament legislative resolution on the proposal for a Council directive amending Directive 77/388/EEC as regards reduced rates of value added tax, adopted on 4 December 2003, provisional text available at:**  
[http://www3.europarl.eu.int/omk/omnsapir.so/pv2?PRG=CALDOC&FILE=20031204&LANGUE=EN&TPV=PROV&LASTCHAP=26&SDOCTA=21&TXTLST=1&Type\\_Doc=FIRST&POS=1](http://www3.europarl.eu.int/omk/omnsapir.so/pv2?PRG=CALDOC&FILE=20031204&LANGUE=EN&TPV=PROV&LASTCHAP=26&SDOCTA=21&TXTLST=1&Type_Doc=FIRST&POS=1)  
**DA-DE-EL-EN-ES-FI-FR-IT-NL-PT-SV**

● **Proposal for a Council Directive amending Directive 77/388/EEC as regards reduced rates of value added tax, COM(2003) 397 final, 23 July 2003, available at:**  
[http://europa.eu.int/eur-lex/en/com/pdf/2003/com2003\\_0397en01.pdf](http://europa.eu.int/eur-lex/en/com/pdf/2003/com2003_0397en01.pdf)  
**DA-DE-EL-EN-ES-FI-FR-IT-NL-PT-SV**

## NATIONAL

### AT – Erotic Channel Guilty of Serious Breaches

In a decision of 5 November 2003, the *Kommunikationsbehörde Austria* (Austrian Communications Authority - *KommAustria*), ruled that *X-Gate Multimedia Broadcasting GmbH* had breached Article 32 paras. 2 and 3 of the *Privatfernsehgesetz* (Private Television Act - *PrTV-G*) through its operation of the satellite TV channel *TV6*. According to Art. 32 para. 2 *PrTV-G*, steps must be taken, either involving the time of broadcast or other measures, to ensure that minors cannot normally watch television programmes that may harm their physical, psychological or moral development. Under Art. 32 para. 3 *PrTV-G*, the unencrypted transmission of such programmes is only permitted if they are preceded by an acoustic warning or designated as such by a visual symbol throughout the broadcast.

*X-Gate Multimedia Broadcasting GmbH* holds a licence to operate a special interest channel, which broadcasts a combination of teleshopping programmes and erotic films. Whereas so-called soft erotica is transmitted before 11 pm, other erotic programmes are shown after that time, some of which could be classified as pornographic in other countries (including neighbouring Ger-

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● **Decision of *KommAustria* of 5 November 2003, case no. KOA 2.A 100/03-49, available at:**  
[http://www.rtr.at/web.nsf/deutsch/Rundfunk\\_Regulierung\\_Entscheidungen\\_Entscheidungen\\_KOA2100-03-49-XGateRechtsverletzung?OpenDocument](http://www.rtr.at/web.nsf/deutsch/Rundfunk_Regulierung_Entscheidungen_Entscheidungen_KOA2100-03-49-XGateRechtsverletzung?OpenDocument)

DE

### AT – Cross Promotion Ban Legitimate

According to a decision by the Austrian *Verfassungsgerichtshof* (Constitutional Court - *VfGH*), the ban on television advertising of radio stations operated by the public service broadcaster *Österreichische Rundfunk (ORF)* does not violate the broadcaster's freedom of expression.

In the decision contested by the *ORF*, the relevant

and the situation is thus relatively harmonised. Extending reduced rates to new sectors, such as these, would lead to a lack of harmonisation in VAT rates and represent a retrograde step for the internal market. The Commission also believes that lowering the VAT rate may not be sufficient to combat piracy (including Internet piracy) and illicit markets, even if the reduction were passed on in full to the consumer in the final price. In fact, it would be "more like a form of sectoral aid".

The Parliament is, however, now calling for a new category to be added to Annex H covering "the supply of music or films, whether recorded on compact discs or on similar audio or audiovisual formats, including for hire". It had already called for ending the current discrimination between cultural products as regards VAT (books, newspapers and periodicals are eligible for reduced rates – see IRIS 2003-9: 5-6).

It should also be noted that admission to cinemas and the reception of radio and television broadcasting services currently fall within the scope of Annex H. The Commission is not proposing to change this, although it intends to monitor closely any distortion of competition that may arise as a result of maintaining a reduced rate for broadcasting services, while not permitting it for services supplied by electronic means, and if necessary put forward appropriate proposals. ■

many) and should not therefore be broadcast. On 1 September 2003, *X-Gate* began broadcasting *TV6* digitally and unencrypted. The channel's content as such was not queried by the supervisory authority. Although it included a large amount of sexual content, *KommAustria* did not think it should be classified as pornography, the broadcasting of which is prohibited under Art. 32 para. 1 *PrTV-G*. However, it did complain about the fact that the channel, as a result of a technical fault, was on air from 6 am to 8 am and that programmes were not designated as potentially harmful to minors by means of an acoustic warning or a visual symbol on the screen throughout the broadcast. *KommAustria* therefore considered that the channel had seriously violated the law and instigated proceedings for the withdrawal of the broadcaster's licence in accordance with Art. 63 para. 1 *PrTV-G*. In the first stage of the proceedings, it asked *X-Gate Multimedia Broadcasting GmbH* to rectify the situation from a legal point of view within three days of the decision being issued. According to *KommAustria*, this measure was taken bearing in mind the fact that *TV6* could be received outside Austria. *X-Gate Multimedia Broadcasting GmbH* was also asked to read out various parts of the decision on the air at a specific time. If *X-Gate Multimedia Broadcasting GmbH* commits further offences, its licence may be withdrawn in accordance with Article 63 para. 3.2 *PrTV-G*. ■

supervisory body, the *Bundeskommunikationssenat* (Federal Communications Office), had found that the broadcaster had infringed Article 13(9) of the *Gesetz über den Österreichischen Rundfunk* (Austrian Broadcasting Act - *ORF-G*) by showing an advertisement on its TV channel *ORF1* for a competition being run by the *Ö3* radio station. A text showing the broadcast times and logo of the *Ö3* radio station had appeared, with the text read aloud by a voice over. The *ORF* argued that the ban

enshrined in Article 13(9) *ORF-G*, under which cross promotion is unlawful unless it refers to specific programme content, breached its freedom of expression and was discriminatory.

In the *VfGH's* view, the decision did not infringe the rights of the *ORF*. The Court ruled that the advertising restrictions, designed to protect private competitors, were reasonable in accordance with Article 10 of the ECHR. In view of the *ORF's* dominant position in the terrestrial TV and radio markets, an absolute ban was a reasonable means of limiting the resulting synergy effects. The fact that a certain amount of self-advertising was permitted insofar as individual programme content could legally be announced did not therefore mean that such restrictions were unreasonable. Although restricting when and how much self-advertising is allowed might be a more lenient measure, the structural advantage repre-

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● Decision of the *Verfassungsgerichtshof* (Constitutional Court), 8 October 2003, case no. B1540/02

DE

## AT – State Not Liable for Broadcasting Monopoly

On 7 October 2003, the Austrian *Verfassungsgerichtshof* (Constitutional Court - *VfGH*) rejected a claim under state liability law for compensation for misplaced investments in the establishment of a private television company.

Back in 1996, the plaintiff had wanted to operate private television in Austria as a partner of *RTS Radio- und Fernsehproduktions GmbH* (*RTS*). However, it had been denied a licence to manage and broadcast television channels because of the monopoly held at the time by the public service broadcaster *Österreichische Rundfunk (ORF)*. *RTS* had then established *ICS Broadcasting Ltd.* in London and obtained from the responsible British authority a Europe-wide satellite licence "to broadcast programmes for Austrians in Europe". The plan was to broadcast digitally from London a channel produced in Austria via the SES-ASTRA satellite system. The channel would be available directly via individual satellite dishes or via Austrian cable networks and shared receivers. To this end, contracts had already been negotiated with cable operators, investments had been made in order to raise capital and partnership agreements had been signed regarding shareholdings in *ICS*. On 12 September 1996, a ministerial Cable Broadcasting Bill, drawn up by the Constitutional Department of the *Bundeskanzleramt* (Federal Chancellery), was distributed to interested parties for evaluation. The Bill prohibited the retransmission of TV channels from abroad whose content was specifically aimed at the Austrian public and whose operators had established themselves abroad in order to circumvent Austrian legislation. It also banned the sale and marketing of technical devices designed to decode such channels. The draft never entered into force. However, the partners of *ICS* withdrew from the project. On account of its outstanding debts, the plaintiff was prevented from applying for a terrestrial analogue

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● Decision of the *Verfassungsgerichtshof* (Constitutional Court), 7 October 2003, case no. A11/01

DE

sent by the *ORF's* involvement in the radio and TV markets meant that a total ban was more appropriate. The *ORF's* argument that Article 13(9) *ORF-G* did not refer to a particular form of advertising, but more generally to "neutral content", was not convincing. The ban did not concern "pure content", but merely the promotion of *ORF* radio and TV channels by the respective other medium. The law defined self-advertising as measures designed to promote the provision of services. Neutral, informative references should not therefore be categorised as prohibited advertising *per se*.

The *VfGH* also ruled that the ban was not discriminatory. The *ORF's* argument that Article 11.2.1 of the *Privatfernsehgesetz* (Private Television Act - *PrTV-G*), banning so-called cross-ownership of national terrestrial television and radio, was unjustifiably discriminatory - a notion which was linked to certain threshold values in the non-national TV sector - was unconvincing. These provisions were meant to prevent close interconnections between media; however, the admissibility of "cross promotion" was not covered by these regulations. In addition, the continuing dominant market position of the *ORF* was a practical reason for differential treatment. Neither had the legislator discriminated against the *ORF* in an unobjective way, since foreign broadcasters that were able to practise cross promotion in the Austrian radio and TV markets without restriction under Austrian law and which enjoyed a similarly strong market position could apparently be ignored at the present time. ■

TV frequency in 2001 because it did not meet the legal requirements regarding financial suitability (see IRIS 2002-4:5, IRIS 2001-7:7). The plaintiff therefore sought compensation on both counts, claiming that Austria had breached EC law by allowing the broadcasting monopoly.

The *VfGH* decided that it was not competent to decide on the second claim for compensation. Such claims were the responsibility of the civil courts. However, this was not the case if the disputed action could be directly attributed to the legislature - as with the first claim for compensation for the withdrawal of partners following the publication of the Bill and the failure to establish a private TV market. However, in the Court's view, there were no grounds for such a claim. The claim for compensation under Community law had to be based, *inter alia*, on a sufficiently proven breach of applicable Community legislation. However, the Court did not believe that the *ORF's* monopoly of the TV market constituted a breach of applicable EC legislation. According to the ruling of the ECJ in the *ERT* case (C-260/89), the freedom to provide services was not incompatible with the existence of a TV monopoly on non-financial grounds in the public interest. However, a breach would be committed if such a monopoly led to discrimination against foreign TV programmes. The *VfGH* ruled that the *ORF's* objective of unbiased reporting fulfilled a public task that reflected the variety of opinions present in public life. In the Court's view, the broadcasting monopoly had not been organised in a discriminatory manner through the transposition into Austrian law of Articles 4.1, 4.2 and 5 of Directive 89/552/EEC ("Television without Frontiers").

The Court also decided that the plaintiff had no greater claim against the state under Art. 10 ECHR, which it had also cited, than under Art. 2.2 of the "Television without Frontiers" Directive, which contained the minimum regulations necessary to ensure the free transmission of TV channels. This rule did not affect the Member States' responsibility for regulating legal or official licences. ■

## BA – Model Law on Public Service Broadcasting

A team of experts assigned by the Office of the High Representative (OHR) and responsible for restructuring the public broadcasting system has published a draft for a new law on public service broadcasting, officially named Model Law on Public Service Broadcasting.

A reform of the existing legislation (see IRIS 2002-6: 7 regarding the Law of 23 May 2002) has been considered necessary as the number of households paying the subscription fee has fallen below 30 percent and the three public broadcasters – countrywide BH-TV1 and two entity-based broadcasters RTFBiH for the Federation of Bosnia and Herzegovina and RTRS for the *Republika Srpska* – are facing economic collapse.

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● Press Release of the Office of the High Representative of 10 October 2003, available at:  
[http://www.ohr.int/ohr-dept/presso/pressr/default.asp?content\\_id=30988](http://www.ohr.int/ohr-dept/presso/pressr/default.asp?content_id=30988)

EN

## CH – Communication on Amendment of Telecoms Act Published

At its meeting on 12 November 2003, the Swiss *Bundesrat* (Council of Ministers) established a solid legal basis for the “last-mile” unbundling that was imposed on the telecommunications sector in February 2003, submitting to Parliament a communication concerning the amendment of the *Fernmeldegesetz* (Telecommunications Act - *FMG*).

Under the proposed Bill, it will be possible to force telecom service providers with a dominant market position to offer transparent, non-discriminatory access to their services and equipment at cost price. By way of examples, the Bill mentions unbundling of the local loop, also known as “last-mile” unbundling (completely unbundled, shared access to the local loop), *Bitstream Access* and the opening up of leased lines, which the *Bundesrat* introduced by means of a decree that entered into force on 1 April 2003. However, in order to create a solid legal basis for such an extensive opening up of the market, it was decided to incorporate unbundling into the current revision of the *FMG*. In doing so, the *Bundesrat* has also met a request from the specialist parliamentary committees concerned.

Under the new legislation, service providers with a dominant market position may only restrict the contractual freedom of customers if bundling is necessary for technical or economic reasons, to guarantee operational security or to ensure a certain quality of service.

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● Communication on the amendment of the *Fernmeldegesetz* (Telecommunications Act), available at:

[http://www.bakom.ch/imperia/md/content/deutsch/medieninformationen/fmg\\_rev\\_botschaft\\_d.pdf](http://www.bakom.ch/imperia/md/content/deutsch/medieninformationen/fmg_rev_botschaft_d.pdf) (DE)

[http://www.bakom.ch/imperia/md/content/francais/medieninformationen/fmg\\_rev\\_botschaft\\_f.pdf](http://www.bakom.ch/imperia/md/content/francais/medieninformationen/fmg_rev_botschaft_f.pdf) (FR)

● Draft *Fernmeldegesetz* (Telecommunications Act), available at:

[http://www.bakom.ch/imperia/md/content/deutsch/medieninformationen/fmg\\_rev\\_entwurf\\_d.pdf](http://www.bakom.ch/imperia/md/content/deutsch/medieninformationen/fmg_rev_entwurf_d.pdf) (DE)

[http://www.bakom.ch/imperia/md/content/francais/medieninformationen/fmg\\_rev\\_entwurf\\_f.pdf](http://www.bakom.ch/imperia/md/content/francais/medieninformationen/fmg_rev_entwurf_f.pdf) (FR)

DE-FR

## CZ – Live Transmission of a Court Hearing

By its decision of 30 October 2003, the High Court of Prague restricted the possibility of broadcasting a court hearing live. The decision was taken on the occasion of an appeal by five persons accused for the preparation of murdering a journalist who published several articles on a corruption case affecting the ministerial level.

To solve the problem, the draft prescribes that broadcasting fees will be included in the phone bills, bearing in mind that the number of phone bills paid is very high, close to 95 percent.

Furthermore, the draft lays down rules concerning the organisational structure of public service broadcasting, which are subject of criticism because of the strengthened state influence. So the Board of Governors of all three public broadcasters should be appointed by the respective parliament instead of by civil sector NGOs as is prescribed by the present broadcasting law. Also, according to the new model law, the competent Communications Regulatory Agency (CRA) would have an expanded supervisory role, as it may name and appoint the management bodies of public broadcasters and also has the power to dismiss them from their positions. The option of internally organising their structures by the public service broadcasting stations themselves would be narrowed as the draft prescribes new organisational schemes, systematisation of workplaces, qualifications, job descriptions, salaries and even the sale of existing buildings and other premises.

The draft entered the parliamentary procedure on 15 December 2003. ■

Under these rules, for example, *Swisscom Fixnet* and its subsidiary *Bluewin* would have to make ADSL Internet access available to preselection customers of other service providers.

Telecom services are being discussed as part of the second round of bilateral negotiations begun in 2002. In this context, the European Commission insists that the whole *acquis communautaire* should be adopted and opposes any deviations in Swiss law. Many of the proposed amendments to the *FMG* are therefore in line with the new European legal framework for telecommunications, which entered into force in the Member States on 25 July 2003. As well as the aforementioned “last-mile” unbundling, this concerns the large-scale abolition of the need for telecom service providers to be licensed, for example. Under the amended Act, access to the telecoms market will no longer depend on state approval. Telecom service providers will only be required to advise the *Bundesamt für Kommunikation* (Federal Communications Office - *BAKOM*) of their plans. However, licences will still be needed for providers of the universal service and for use of the broadcasting frequency spectrum. Incidentally, all telecom service providers will still be monitored by the *BAKOM*.

Part of the Bill deals with the protection of consumers and personal data. In particular, an arbitration board is to be created in order to settle disputes between customers and providers of telecom or value added services simply and quickly. The *BAKOM* may leave it to the telecoms industry to create such a body and preliminary steps in this direction are already being taken. Furthermore, the *Bundesgesetz gegen den unlauteren Wettbewerb* (Federal Competition Act - *UWG*) is to be amended, with the addition of a ban on unsolicited mass advertising (“spamming”).

Further amendments to the *FMG* concern procedural provisions relating to public invitations for tender and supervision, as well as heavier administrative penalties for violations of laws, licences and decrees that are in force. ■

In the Czech Republic, live coverage or recordings by the media in courtrooms are allowed in principle. The coverage must be expressly permitted by the competent judicial authorities. Such reporting should be authorised only where it does not involve a serious risk of undue influence on victims, witnesses, parties to criminal proceedings or the judges.

In the relevant case, a TV-studio was set up in the court building, from where lawyers and experts could comment on the proceedings. Inside the courtroom three cameras were installed and the fourth was placed in the entrance hall. Czech TV planned to invite guests into the studio to comment on the circumstances of the case and the personality of the defendants.

The main accused approved the live reporting, but did not approve the commentary on the procedure. At the very beginning of the hearing, the magistrate of the Court ruled that the live transmission should be allowed. However the solicitors of two other defendants did not approve the live transmission of the trial and asked that

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● *Usesení vrchního soudu v Praze (Decision of the High Court of Prague)*, 30 October 2003  
CS

## DE – Constitutional Court Rules on Right of Reply to Editorial Comments

By its decision of 17 September 2003 not to rule on a case, the *Bundesverfassungsgericht* (Constitutional Court - *BVerfG*) ended a legal dispute dating back to 1998 concerning the right of reply to editorial comments published in the press.

The dispute concerned a report in the *Badische Zeitung*, which dealt with the problems faced by a football club set up by Turkish citizens in obtaining access to suitable sports facilities in a particular municipality. A section headed "*Tagesspiegel*", which was indisputably classified as an editorial column, contained comments on this situation, to which the right of reply was requested. The newspaper refused the request, referring

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● *Bundesverfassungsgericht (Constitutional Court) decision of 17 September 2003*, 1 BvR 825/99

DE

## DE – Film Support Act Adopted

On 13 November 2003, the *Bundestag* (lower house of parliament) passed the amended *Filmförderungsgesetz* (Film Support Act - *FFG*) in time for it to enter into force, as planned, on 1 January 2004 (for more details on the Bill, see IRIS 2003-5:14).

However, first it was necessary to eliminate certain differences that had emerged immediately prior to the second and third readings in the *Bundestag* between private and public-service broadcasters concerning the future composition of the Awards Committee of the *Filmförderungsanstalt* (Film Support Institute - *FFA*). According to the final recommendation of the *Bundestagsschuss für Kultur und Medien* (Parliamentary Committee for Culture and Media) of 10 November 2003, both public service broadcasters *ARD* and *ZDF* would have occupied two seats each on the Awards Committee, while only one place was allocated to private broadcasters. Because of this allocation of seats, the *Verband Privater Rundfunk und Telekommunikation* (Private Broadcasting and Telecommunications Union - *VPRT*) announced the withdrawal of its original promise to double its voluntary payments to the *FFA* to EUR 22.4

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● Final recommendation and report of the Committee for Culture and Media on the Federal Government Bill, publication no. 15/1958 of 10 November 2003

● *Viertes Gesetz zur Änderung des Filmförderungsgesetzes vom 22. Dezember 2003* (Fourth Law amending the Film Support Act of 22 December 2003), BGBl Nr. 2003/64 vom 24. Dezember 2003 (OJL No 2003/64 of 24 December 2003)  
<http://217.160.60.235/BGBl/bgbl1f/bgbl103s2771.pdf>

DE

the question of broadcasting should be decided by the whole court and not by a magistrate only. The President of the Court pronounced the Court's decision that the right to a fair trial was – in this case – more important than the public's right to information. In the context of criminal proceedings, particularly those involving juries or lay judges, judicial authorities and police services should refrain from publicly providing information that involves a risk of substantial prejudice to the fairness of the proceedings. Respect for the principle of the presumption of innocence is an integral part of the right to a fair trial. Accordingly, opinions and information relating to ongoing criminal proceedings should only be communicated or disseminated through the media where this does not prejudice the presumption of innocence of the suspect or accused. Where the defendants are able to show that the provision of information is highly likely to result, or has resulted, in a breach of the right to a fair trial, they have an effective legal remedy.

The trial continued without live transmission. At the end, Czech TV was allowed to broadcast live only the public pronouncement of the judgment. ■

to the protection provided in Article 5.1.1 of the *Grundgesetz* (Basic Law). The district court to which the case had been referred in the first instance upheld the complaint. The *Oberlandesgericht Karlsruhe* (Karlsruhe District Appeal Court) also did not consider the relevant passages of the editorial to be the expression of opinion and dismissed the defendant's appeal on 16 April 1999.

Under press law and audiovisual media law, which takes into account the relevant regional press regulations, the right of reply only applies to statements of fact. However, expressions of opinion, which regularly appear in newspaper or broadcast editorials in relation to recent events, for example, are not subject to the right of reply. As in the present case, making the necessary distinction is particularly difficult when an editorial makes reference to or includes facts.

The *BVerfG's* decision corresponds with the previous court rulings and is based on the lack of probability that an appeal would be successful. ■

million from 2004. In the end, the public service broadcasters relinquished one of their seats on the Awards Committee shortly before the *Bundestag* voted on the *FFG*. According to Minister for Culture Weiss, the rise in funding levels and improvements to the film support system make the new Act a more effective instrument for the support of the German film industry. In addition, the new *FFG* would ensure that all groups involved in the industry, such as authors, directors, producers, distributors and cinema operators, were supported.

Meanwhile, however, the *Hauptverband Deutscher Filmtheater* (Union of German Cinemas - *HDF*) heavily criticised the amended Act and announced that it would ask the Constitutional Court or another court to examine its provisions. It accused the legislature of failing to dispel the legal and content-related reservations expressed by the cinemas about the new *FFG* in the parliamentary procedure. The *HDF's* criticism was essentially directed at the rise in the statutory video and cinema tax which, in contrast to the voluntary payments made by private broadcasters, is a legal requirement. The Minister for Culture rejected the *HDF's* complaints as unfounded. She said that the tax, only half of which was paid by cinema operators (the other half being paid by the distributors), was offset by a similar level of direct support as well as other general assistance given to the film industry. Besides, the increase of approximately EUR 3.6 million translated into a rise of only around EUR 400 per cinema per year. The new *FFG* contained some important advantages for cinema owners. For example, support for sales of German films and film production would be significantly increased, with indirect benefits for cinemas. ■

## DE – Structural Paper on the Distinction Between Media Services and Broadcasting

At its meeting on 6 November 2003, the *Direktorenkonferenz der Landesmedienanstalten* (Conference of Regional Media Authority Directors - DLM) adopted a structural paper on the distinction between broadcasting and media services.

This distinction is relevant under German youth media protection law to the permissibility of the transmission of pornography (see IRIS 2003-10:6). According to the recently published paper, the categorisation of a service as broadcasting does not depend on the electronic means of its transmission. Rather, the determining factor is the relevance of the content to the formation of opinion and its impact on those who receive it. Rele-

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● DLM's Third Structural Paper on the Distinction Between Media Services and Broadcasting, 6 November 2003, available at:  
[http://www.alm.de/aktuelles/presse/Strukturpapier\\_Abgrenzung\\_RF\\_MD.pdf](http://www.alm.de/aktuelles/presse/Strukturpapier_Abgrenzung_RF_MD.pdf)

● DLM press release of 6 November 2003, available at:  
<http://www.alm.de/aktuelles/presse/p061103.htm>

DE

## ES – New Telecommunications Act Adopted

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On 3 November 2003, a new Telecommunications Act was adopted to replace Act 11/1998 on Telecommunications (see IRIS 2003-6: 12 and IRIS 1998-6: 9). The main

● Ley 32/2003, de 3 de noviembre, General de Telecomunicaciones (Act 32/2003 on Telecommunications of 3 November 2003), BOE (Official Journal) n. 264 of 4 November 2003, available at: [http://noticias.juridicas.com/base\\_datos/Admin/I32-2003.html](http://noticias.juridicas.com/base_datos/Admin/I32-2003.html)

ES

## FI – Act on the Exercise of Freedom of Expression in Mass Media

On 13 June 2003 the *Laki sananvapauden käyttämistä joukkoviestinnässä* (Act on the Exercise of Freedom of Expression in Mass Media) was ratified. The Act repeals the *Painovapauslaki* (Freedom of the Press Act, 1/1919) and the *Radiovastuulaki* (Broadcasting Liability Act, 219/1971). The Act entered into force on 1 January 2004.

The new Act brings the press, broadcasting and on-line media within the same framework with respect to responsibility and the exercise of freedom of expression, thus implementing technology-neutrality.

The new Act contains more detailed provisions on the exercise, in the media, of the freedom of expression enshrined in the Constitution (731/1999). The Constitution states that everyone has the right to freedom of expression. Freedom of expression entails the right to express, disseminate and receive information, opinions and other communications without prevention by anyone. The main principle in the application of the Act on the Exercise of Freedom of Expression is that interference with the activities of the media shall be legitimate only in so far as it is unavoidable, taking due note of the importance of the freedom of expression in a democracy subject to the rule of law.

According to the new Act a responsible editor shall be designated for a periodical, a network publication and a programme. A network publication means a set of net-

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Company YLE,  
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● Act No. 460/2003 of 13 June 2003, available at:  
<http://www.finlex.fi/english/laws/index.php>

FI-SV-EN

vance to the formation of opinion is measured according to the impact, topicality and suggestiveness of a service. However, broadcasting cannot be conclusively defined according to these three elements, since it is not an abstract, fixed quantity, but a type characterised by its distinguishing features. Therefore, it can only be described according to its outward appearance, since the concept of broadcasting must be defined as a type, according to its distinguishing features. On the basis of these considerations, the structural paper sets out criteria and recommendations on the distinction between broadcasting and media services.

In accordance with these criteria, *T-Online's* "Vision on TV" project was categorised as a media service. This system enables customers to download films onto their computers. Two different variants are planned: a single download in the form of *real-video-on-demand* or a download via a special hard disk recorder, onto which films are downloaded when the network is not operating to full capacity. However, the application by *Erotic Media GmbH* for its "Erotic Media" service to be classified as a media service was turned down. The plan had been to offer two digital channels via the digital platform of pay-TV broadcaster *Premiere*, showing erotic and pornographic films at regular intervals. The DLM classified this service as *near-video-on-demand*; it could only be defined as a media service if films could be individually ordered and paid for. ■

goal of this new Act is to implement into Spanish Law the new EC Electronic Communications Framework, which was approved in April 2002 (see IRIS 2002-3: 4). ■

work messages, arranged into a coherent whole comparable to a periodical, from material produced or processed by the publisher, and intended to be issued regularly. Thus there is no obligation to name a responsible editor for portals and chat groups and only the Penal Code applies to these. All programmes and network publications shall be recorded and retained for at least 21 days.

The most important change that directly affects the audiovisual sector is that the right to reply now also applies to network publications and broadcast programmes that are broadcast on a repeated basis (previously the right to reply did not apply to radio and television programmes and there were no rules concerning network publications). A private individual, who has a justifiable reason for considering a message offensive, has the right to have a reply published in the same publication or programme. The procedure for handling demands for reply or correction has become more bureaucratic.

The grounds for the imposition of a fine for editorial misconduct is that the responsible editor intentionally or negligently fails in an essential manner in his or her duty to manage and supervise editorial work.

A court can give an order to release the information required for the identification of the sender of a network message and to cease the distribution of a network message. A court may also order that a notice of the judgement concerning a violation of honour and privacy must be published free of charge and reasonably extensively in the media in question. ■

## FR – Broadcasting Programmes Not to Be Shown to People Under the Age of 18 or to Children Below Certain Age

On 13 October, the Court of Appeal in Versailles delivered a decision on application of Article 22724 of the Criminal Code. Under this article, the fact of either making, carrying or broadcasting by any means and on any support a message of a violent or pornographic nature or such as to seriously infringe human dignity, or commercialising such a message, is punishable by a three year prison sentence and a fine of 75 000 euros if the message is likely to be seen or noticed by a minor.

In this instance, a case was brought against a teacher of French for having shown to a class in the fourth year of secondary school [*i.e.* pupils usually aged 15 to 16] the films "Dobermann" and "Trainspotting", which [in France] are not to be shown to anyone under the age of 16, and the film "Léon", which [in France] is not to be shown to anyone under the age of 12. A similar case, but involving other films, was also brought against another teacher.

The Court of Appeal, upholding the decision delivered

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● Court of Appeal in Versailles, 7th chamber, 13 October 2003, case of AAPE de Viroflay, Alicia Delamarre v. D.B. and N.G.T

FR

by the regional criminal court in Versailles on 8 March 2002, considered that showing a film that was not to be shown to anyone under the ages of 12, 16 or even 18 to young people below the required age did not in itself constitute an infringement under Article 22724. This required establishment of the fact that violent, pornographic messages or messages seriously infringing human dignity had been shown to young people below the required age. This is an interesting decision in that it states that showing a message of this type to young people does not necessarily constitute an infringement under Article 22724 of the Criminal Code.

Indeed as the decision states, if this were not so the broadcasting of any scene presenting violent or pornographic aspects or seriously infringing human dignity, the purpose of which was to inform, explain, remind, commemorate or warn, such as films and documentaries about Second World War concentration camps, could give rise to prosecution on these grounds.

The decision lists the conditions necessary for applying this article, *i.e.* the fulfilment of two conditions: firstly that the material was shown to young people below the required age regardless of their age, and secondly that the message shown may be categorised as violent or pornographic or such as to seriously infringe human dignity. Deciding otherwise would render the regulations on different minimum ages pointless. If every showing of this kind, whatever the reason for it, could be automatically prohibited, the only criterion would be whether the viewer was under or over the age of 18, regardless in each case of the message being shown and prohibitions based on the age of the viewer. Moreover, the administrative classification of a film because of certain aspects of its content may not prejudice the categorisation of such aspects by the courts, otherwise any showing of a scene of this kind intended more particularly for information purposes would be covered by this legislation. ■

## FR – Licence Fee - Senate Adopts Communications Budget

In the course of the public examination of Article 20 of the draft Budget for 2004 covering the audiovisual licence fee, the Senate adopted the budget for communication during the night of 28-29 November. At the request of the Minister for Culture and Communications, Jean-Jacques Aillagon, the Senators carried out a new distribution of audiovisual credits taking into account the additional revenue expected from licence fees.

Following the rejection by the Members of Parliament on the National Assembly's Finance Committee of the original proposal to combat evasion of payment of the fee by cross-checking the records of pay television operators against taxpayers' records (see IRIS 2003-10: 7), the Senators adopted a new Government amendment.

This amendment extends the obligation of declaration

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● Draft Budget for 2004, available at:  
<http://www.assemblee-nat.fr/12/budget/plf2004/discussion.asp>

FR

currently only applicable to television sets to decoders used for receiving pay television. This would cover all digital television systems (digital cable, satellite and the future terrestrially broadcast digital television) and Canal+; analog cable does not require a decoder. Thus the declaration scheme is extended to any undertaking that provides the public with systems for conditional access to one or more television services. This provision also applies in the case of rental, at the time of entering into the contract and each time the contract is renewed.

The Government is counting on an increase of EUR 8 million, including all taxes, in the yield from the audiovisual licence fee. This new measure will yield less than cross-checking records, since growth should be 2.65% rather than 3%. The Minister for Communications has also indicated that he has proposed setting up a working party in the New Year to redefine the means of establishing and collecting the licence fee. ■

## FR – Bill for Transposing the Directive of 22 May 2001 on Copyright and Related Rights in the Information Society

On 12 November the Minister for Culture, Jean-Jacques Aillagon, presented the Bill for transposing the Directive of 22 May 2001 on copyright and related rights

in the information society (see IRIS 2001-5: 3).

The text introduces two new exceptions to copyright under French law. Firstly, in accordance with Article 5(1) of the Directive, the Bill institutes an exception to the reproduction right in respect of certain ephemeral technical acts of reproduction, particularly those related

to transmissions using the Internet, such as certain categories of mask copies on the servers of access providers and certain technical copies. Secondly, the text also institutes an exception for the benefit of people with a disability in order to allow greater access for people with serious psychiatric, auditory, visual or motor deficiency; suitable formats may be produced and made available to them. On the other hand, there is no provision for exceptions for teaching purposes as called for by the education authorities.

In accordance with the Directive, the Bill also institutes penal sanctions to be applied in cases of circumventing the technical means of protecting a work, or circumventing information on the scheme of rights applicable to a work or a service protected by a related right.

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● Bill on copyright and related rights in the information society, available at:  
<http://www.culture.gouv.fr/culture/actualites/communiq/aillagon/PLdroitdauteur.pdf>

FR

## GB – Government Implements Copyright Directive

The UK Government has (somewhat belatedly) implemented the Directive of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (see IRIS 2001-5: 3 and IRIS 2003-8: 6). Implementation has taken place through the Copyright and Related Rights Regulations 2003, which amend the Copyright, Designs and Patents Act 1988. The Regulations came into effect on 31 October 2003.

The Regulations are long and complex; the main effects are as follows. They redefine the meaning of "broadcast" (to which copyright protection applies) in section 6 of the Act, bringing within it cable programmes sent for simultaneous reception by members of the public or at a time determined by the person making the transmission for presentation to the public, and by stating that, subject to some exceptions, internet transmissions are not broadcasts for the purposes of the Act.

Secondly, the Regulations redefine in section 20 of the Act the exclusive right granted to the copyright owner to control broadcasting of a work or including it in a cable service to provide more clearly that the owner has the right to control any communication to the public by electronic transmission, including by a broadcast and also by making available works to the public in such a

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● The Copyright and Related Rights Regulations 2003, Statutory Instrument 2003 No 2498, available at: <http://www.hmso.gov.uk/si/si2003/20032498.htm>

GB

## GB – Government Review of Film Co-production

The UK Government has announced a review of international film co-production treaties (see IRIS 1995-2: 8 and IRIS 1998-6: 11). The aim is "to ensure they are

In terms of legal protection, the Bill creates a "college of mediators" responsible for settling disputes between rightsholders and consumers, in order to ensure respect for the private copy exception. Apart from its conciliation role, provision is made that, in the event of conciliation failing, the college could issue injunctions prescribing the appropriate measures to give effect to the benefit of the exceptions. These decisions would be made public and could be appealed before the Court of Appeal in Paris.

The text also lays down the conditions for the exercise of copyright by civil servants, extending to them the rule that benefits employees who hold copyright in respect of the works they create as part of their professional activity, except in the case of collective works.

However, if the work is used in carrying out a non-commercial public service mission, the administration has the benefit of the statutory transfer of pecuniary rights.

Lastly, the Bill lays down the statutory registration requirement for copyright purposes of Internet pages with the national library (*Bibliothèque nationale de France*) and the national audiovisual institute (*Institut national de l'audiovisuel*), and authorises the bodies responsible for such registration to copy on-line content using a selective method allowing the gradual constitution of a collective memory representative of the evolution of public on-line communication.

The text will be debated in Parliament in the New Year. ■

way that members of the public may access them from a place and at a time individually chosen by them. A new exclusive right is given to performers to control the making available to the public in this way of their performances.

Thirdly, the Regulations amend the Act to comply with the Directive's regime of compulsory and permitted areas for exceptions to copyright; for example, relating to temporary copies, testing of computer programmes, and criticism, review and news reporting. An important change introduced by them is that the fair dealing exception to copyright infringement is abolished for commercial research.

Fourthly, the Regulations amend criminal liability, most notably creating a new criminal offence where a person makes infringing copies of a work and wilfully communicates them to the public; liability is also created for the making available of illicit recordings of performances which wilfully infringes a performer's making available right. In both cases the communication must be on a scale that is prejudicial to the rights owner or done in the course of a business. These new offences are of particular importance in relation to the unauthorised downloading of music and films from the Internet.

The Regulations also make new provision against the circumvention of technical protection measures to protect against copying, including creating a new criminal offence of manufacturing or dealing in a device designed to circumvent such measures, or of offering a service to facilitate circumvention. ■

bringing real cultural and economic benefits to the UK" e.g., film-industry related jobs and use of film making facilities.

The review will analyse existing treaties and advise whether there should be new ones.

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deeJgee  
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The terms of reference for the review are:

- To review and make recommendations for the redefinition of the current legislative definition of a "British film", geared to the twin issues of cultural expression and industry economics;
- To propose a clear policy framework for the UK's international co-production activity;
- To evaluate fully the cultural and economic benefits of all the UK's existing international co-production treaties, including the European Convention on Cinematic Co-Production, and to make recommendations, based on that analysis and the policy framework defined in objective 2 above, as to the

● "Estelle Morris Announces Major Review Of Film Co-Production", Press Release 124/03, Department of Culture Media and Sport, 4 November 2003, available at: [http://www.culture.gov.uk/global/press\\_notices/archive\\_2003/dcms124\\_03.htm](http://www.culture.gov.uk/global/press_notices/archive_2003/dcms124_03.htm)

● New Guidelines on Film Co-Production, October 2003, available at: <http://www.culture.gov.uk/NR/rdonlyres/ewg4oy2x2ygb5br3knfmrnl12hu4q5bwxswszw4iy5op7g7aqtiques3yjmmjrl2xpi7x33v52ora4ezl243st57ac/CoproductionGuidelinesOct2003.pdf>

GB

## GR – Procedure for Granting Licences for Terrestrially Broadcast Television

A new procedure for granting broadcasting licences (the first failed because of lack of economic elements in the applications) for analog terrestrially broadcast television is currently in hand (see IRIS 2003-8: 11). Calls for tenders were published by the national council for radio and television (CNRT), the independent authority responsible for supervising radio and television, in October and November, for 6 national licences, 51 regional licences and 57 local licences.

Although there is little doubt concerning the five private national channels (*Mega, Antenna, Alpha, Star and Alter*) that operate respecting the present regulations and have a solid infrastructure, the outcome is more uncertain when it comes to selecting one of the ten can-

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● The calls for tenders are available at: [www.minpress.gr/epopteia/prokirixeis.html](http://www.minpress.gr/epopteia/prokirixeis.html)

EL

## IE – Tax Relief for Investment in Film Industry to Continue

*Bord Scannán na hÉireann*/The Irish Film Board ("the Board") has warmly welcomed the decision of the Minister for Finance to continue tax relief for investment in the Irish film industry until the end of 2008 and his plan to increase the upper limit on investment to EUR 15 million per film from 2005.

The Board is a statutory body whose remit is "to assist and encourage the making of films, and the development of a film industry in the State, having regard to the

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● "Budget 2004 Announcement-Section 481 retained to 2008", Press release from *Bord Scannán na hÉireann*/The Irish Film Board, 3 December 2003, available at: [http://www.filmboard.ie/stop\\_press.php?press=138](http://www.filmboard.ie/stop_press.php?press=138)

● Taxes Consolidation Act 1997, available at: <http://www.gov.ie/bills28/acts/1997/a3997a.pdf>

retention or revision of those existing treaties in order to obtain the maximum cultural and economic benefits for the UK;

- To make recommendations for new international treaties aimed at fostering intra-industry co-operation across the value chain, in the light of objective 2 above;
- To review the current operation of the system whereby films are certified as British, examining in particular the efficiency and relevance of current practice, and to make firm recommendations about the future operation and location of and appropriate resources for this function, with reference to objective 2 above.

As a first step, the guidelines clarifying the criteria for international co-productions – defined as "films made by two or more countries" – have been updated. A successful applicant gains "British Certification", enabling the producer to apply for film tax relief (see IRIS 2002-5: 13 and IRIS 2001-5: 13).

The new guidance is substantially the same as the existing one. However, it aims at increased transparency (explaining on what basis the Department for Culture Media and Sport grants a British Certificate) and prescribes that an application needs to be received not later than four weeks before principal photography commences, as well as tightening the rules requiring auditor's reports. ■

didates for the sixth place, due to the requirements and the difficult situation of most of the enterprises involved. At the regional and local levels, where a large number of undertakings operate at present, often disregarding the basic statutory provisions, it will be a rather delicate matter for the CNRT to make a choice.

In order for the CNRT to complete the procedure, which, according to the best estimates, will take at least five months in the case of the national licences, the CNRT will have to refute a rather widespread belief in the Greek political milieu, that a pre-election phase prior to legislative elections next spring is not the time best suited to granting broadcasting licences. At any event, granting licences under Act 2328 voted in 1995 will firstly allow the CNRT to gain a clear view of the situation of the audiovisual scene in Greece and have the Act applied effectively, and will also enable the Greek authorities to sort out frequencies with an eye to the organisation of the Olympic Games next August. ■

need for the expression of national culture through the medium of film-making". It deals with funding for the Irish film industry.

Tax relief for investment in the film industry was introduced in 1987 in attempt to encourage co-productions with film industries abroad and to nurture an indigenous film industry. It has continued since then, in amended and extended forms (see IRIS 2001-2: 10, IRIS 2000-2: 8 and IRIS 1999-8: 12). However, some uncertainty had arisen recently as the present provisions were due to last until December 2004, and the Minister had not indicated if he intended to continue them beyond that date. As a result, it proved difficult to finalise a number of proposed projects.

The provisions of the tax relief are contained in Section 481 of the Taxes Consolidation Act 1997, as amended. ■

## NL – List of Important Events Adopted

The Dutch State Secretary for Education, Culture and Science has adopted a list of events that are of major importance for Dutch society. The legal basis for the list is Article 72 of the *Mediawet* (Media Act), the Act that transposes the "Television without Frontiers" Directive (Directive 89/552/EEC, amended by Directive 97/36/EC) into Dutch law. Article 72 transposes Article 3a of the Directive. The list of designated events is now incorporated in the *Mediabesluit* (Media Decree), which implements the Media Act. The purpose of the list is to

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● *Besluit van 12 november 2003 tot wijziging van het Mediabesluit (vaststelling van een nationale evenementenlijst en nadere regels inzake deze lijst, alsmede enige technische wijzigingen)* (Decree of 12 November 2003 amending the Media Decree (drawing up a national list of events and further rules governing the list, as well as certain technical modifications)), *Staatsblad (Official Gazette) 2003 486*, available at: <http://overheid-op.sdu.nl/cgi-bin/showdoc/pos=0/session=anonymous@3A5950200984/query=2/action=pdf/STB8193.pdf>

NL

## RU – Constitutional Court Amends Election Law

On 30 October 2003, the Constitutional Court of the Russian Federation declared unconstitutional one part of the law that restricts media coverage of election campaigns. The ruling cancels an umbrella clause in the 2002 Federal Statute "On the Basic Guarantees of Voting Rights and the Right to Participate in a Referendum of Citizens of the Russian Federation", which defined campaigning so broadly that any reporting on a candidate

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● *Resolution of the Constitutional Court of the Russian Federation of 30 October 2003 N 15-P on the matter of constitutionality of certain provisions of the Federal Statute "On the Basic Guarantees of the Voting Rights and the Right to Participate in a Referendum of Citizens of the Russian Federation"* regarding an inquiry by a group of deputies of the State Duma and complaints from citizens S.A.Buntman, K.A.Katanyan and K.S.Rozhkov. Published in *Rossiyskaya gazeta* official daily, 31 October 2003, available at: <http://www.rg.ru/2003/10/31/sud-doc.html>

RU

## SK – Public Service Slovak Television Gets more Control over its Own Business

On 23 September 2003, the Slovak Parliament passed Act No. 418/2003 Z.z. amending the *Zákon SNR č.254/1991 Zb. o Slovenskej televízií v znení neskorších predpisov* (Act No. 254/1991 on Slovak Television). As referred to previously (see IRIS 2003-9: 12) an essential legal change regarding the business activities of *Slovenská Televízia* (Slovak public service television - STV) had been expected either as a part of completely new legislation governing public service radio and television or as an amendment of the current Act on Slovak Television; the latter alternative was the one chosen in the end.

The new legislation entitles the STV to pursue a number of business affairs as of 1 January 2004 without prior approval of the Ministry of Finance. Among others, STV

ensure that the designated events will be available to the public on free to air television (and not just on pay television). The adopted list is only slightly different from the list that was first proposed in 2000 (see IRIS 2000-5: 11).

The list consists of mainly sporting events and a few cultural events. It is divided into three categories. The first category (a) consists of events that must be broadcast live and in full on free to air television. This applies to all important football matches (World and European Championships, Champions League and UEFA Cup when Dutch teams are involved, national League Cup final and semi-finals), skating events (World and European Championships and the *Elfstedentocht*, a traditional long-distance race), tennis (parts of *Roland Garros* and Wimbledon) and two cultural events, the Eurovision Songfestival and the *Prinsengrachtconcert*. The second category (b) consists of events that must be broadcast live, but only in part, on free to air television. This applies to the Olympic Games, cycling (the *Tour de France*, the World Championships and a Dutch contest, the *Amstelgoldrace*) and the *TT Assen*, a motorcycle event. Each event has its own minimum length of broadcast. The third category (c) consists of events that must be broadcast on free to air television but only in part and on a deferred basis. This applies to matches of the National Football League, the Paralympics, athletics, hockey, volleyball and tennis. It also applies for *Pinkpop*, a music festival. Here each event has its own minimum length of broadcast. ■

could be construed as a violation of the law if it was potentially capable of swaying voters. Previously, any detail characterizing a candidate within the pre-election period (of about 3 months prior to the voting day) could be seen as helping or hurting a politician's image; and to guarantee voters' rights it could be disseminated in the mass media only as part of the allocated free time and space or paid for out of the election fund.

In particular, the Constitutional Court struck from the statute the seventh sub-clause ("zh") of Article 42, clause 2, which defined as pre-election campaigning "any action, inducing or trying to induce voters to vote for candidates, lists of candidates or against them". This is "incompatible with judicial equality, limits the freedom of public information and the rights of citizens to receive information necessary for the formation of their free opinion as to whom they wish to vote for", the court wrote. ■

shall be allowed to join a company dealing with the electronic measurement of the audience (and market) share as well as to manage the sale of transmission time without any mediating body. A restriction is that STV must not incorporate State property as its share in establishing the trading company and cannot be involved in business companies as the co-owner with unlimited liability. The amending rule contains an important provision regarding a duty that must be observed in relation to business activities. The Slovak television's entrepreneurial activity is bound to the tasks of Slovak television as set by the general rules and to the principle that Slovak television has to maintain its property more effectively by these activities. Furthermore, the entrepreneurial activity may not endanger the quality of its activities (§ 4a, section 3, 4 of the Act on Slovak Television).

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The last Parliamentary reading of a completely new Act on Slovak Radio and Act on Slovak Television intro-

• **Zákon z 23. septembra 2003, ktorým sa mení a dopĺňa zákon Slovenskej národnej rady č. 254/1991 Zb. o Slovenskej televízii v znení neskorších predpisov, in Zbierka zákonov (Official Journal) č. 418/2003 Section 180, p.3129, available at: <http://www.zbierka.sk/>**

SK

duced by the Government was scheduled for December 2004. Disputes have arisen concerning firstly, the splitting of the competencies among the Director General, the Board of STV (duty to oversee the fulfilment of the public service remit) and the Supervisory Board of STV (financial control), and, secondly, the obligation of STV to allocate 20% of its revenues (generated from concession fees) to independent producers in order to support original Slovak audiovisual production. STV's Managing Director has already announced that the new Act could damage the programme structure of STV for the year 2004. ■

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