

ECtHR: *Vladimir Kharitonov v. Russia, OOO Flavus and Others v. Russia, Bulgakov v. Russia and Engels v. Russia*

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In four judgments of 23 June 2020, the European Court of Human Rights (ECtHR) found that the blocking of websites and media platforms in Russia had violated the right to freedom of expression and information as guaranteed by Article 10 of the European Convention of Human Rights (ECHR). The cases concern different types of blocking measures, including collateral blocking (where the IP address that was blocked was shared with other sites), excessive blocking (where the whole website was blocked because of a single page or file) and wholesale blocking of media outlets for their news coverage. One case concerns a court order to remove a webpage with a description of tools and software for bypassing restrictions on private communications and content filters on the Internet, otherwise, the website would be blocked. The ECtHR once again highlighted the importance of the Internet as a vital tool in exercising the right to freedom of expression. It found that the provisions of Russia's Information Act, which was used to block the websites and online media outlets, had produced excessive and arbitrary effects and had not provided proper safeguards against abusive interferences by the Russian authorities. In each of the four cases, the ECtHR also found a violation of the right to an effective remedy under Article 13 ECHR: it found that the Russian courts had not carried out examinations of the substance of what had been arguable complaints of violations of the applicant's rights and that none of the remedies available to the applicants had been effective.

In the case of *Vladimir Kharitonov v. Russia*, the owner of a website lodged a court complaint, arguing that a blocking order by the Russian telecoms regulator (Roskomnadzor) against another website containing allegedly illegal content had also blocked access to his website, being hosted under the same IP address, but not containing any illegal content. The courts upheld Roskomnadzor's action as lawful without however assessing its impact on the applicant's website. In the *OOO Flavus and Others v. Russia* case, the applicants owned opposition media outlets which publish research and analysis that is critical of the Russian Government. After Roskomnadzor, on request of the Prosecutor General, blocked access to their websites because they were allegedly promoting acts of mass disorder or extremist speech, they unsuccessfully applied for a judicial review of the blocking measure. They also complained about the wholesale blocking of access to their websites, and of a lack of notice of the specific offending material, which they could therefore not remove in order to have access to their website

restored. The case of *Bulgakov v. Russia* concerns the blocking of a website by a local Internet service on the basis of a court judgment. The reason for the blocking was the availability of an electronic book in the files section of the website; a book which had been previously categorised as an extremist publication. Bulgakov deleted the e-book as soon as he found out about the court's judgment, but the Russian courts refused to lift the blocking measure on the grounds that the court had initially ordered a block on access to the entire website by its IP address, not just to the offending material. In *Engels v. Russia*, a court ordered a local Internet service provider to remove a webpage that contained information about bypassing content filters. It was argued that such information should be prohibited from dissemination in Russia as it enabled users to access extremist material on another, unrelated website. Following the court order, Roskomnadzor asked Engels to take down the offending content, otherwise the website would be blocked. Engels complied with the request, and at the same time lodged an appeal against the court order. However, Engels' complaint was rejected without addressing his main argument that providing information about tools and software for the protection of the privacy of browsing was not against any Russian law.

All the applicants complained in essence that the blocking of access to their websites or Internet platforms had been unlawful and disproportionate, and had therefore violated their rights under Article 10 ECHR. The ECtHR, in all four judgments, confirmed the importance it attaches to the right to freedom of expression on the Internet, referring to its earlier case law on the (wholesale) blocking of websites in which it took the approach "that owing to its accessibility and capacity to store and communicate vast amounts of information, the Internet has now become one of the principal means by which individuals exercise their right to freedom of expression and information. The Internet provides essential tools for participation in activities and discussions concerning political issues and issues of general interest, it enhances the public's access to news and facilitates the dissemination of information in general" (see also *Ahmet Yildirim v. Turkey*, Iris 2013-2/1). The ECtHR also recalled that the blocking of websites by rendering large quantities of information inaccessible substantially restricted the rights of Internet users and had a significant collateral effect. It added that the wholesale blocking of access to a website is an extreme measure which has been compared to banning a newspaper or television station. In all four cases, the ECtHR found a violation of Article 10 also in combination with Article 13.

In the case of *Vladimir Kharitonov v. Russia*, the ECtHR came to the conclusion that it was incompatible with the rule of law if a legal framework failed to establish safeguards capable of protecting individuals from the excessive and arbitrary effects of blocking measures, such as those imposed on the basis of section 15.1 of the Russian Information Act. When exceptional circumstances justify the blocking of illegal content, the state agency making the blocking order

must ensure that the measure strictly targets the illegal content and has no arbitrary or excessive effects, irrespective of the manner of its implementation. Any indiscriminate blocking measure which interferes with lawful content or websites as a collateral effect of a measure aimed at illegal content or websites amounts to arbitrary interference with the rights of the owners of such websites. The ECtHR found that the blocking order did not satisfy the foreseeability requirement under the ECHR and did not afford the applicant the degree of protection from abuse to which he was entitled by the rule of law in a democratic society.

In *OOO Flavus and Others v. Russia*, the ECtHR found that the decision by the Prosecutor General to qualify the content of the media outlets at issue as extremist speech had no basis in fact and was therefore arbitrary and manifestly unreasonable. The ECtHR held that targeting online media or websites with blocking measures because they are critical of the government or the political system can never be considered a necessary restriction on freedom of expression, and it also found that the blocking orders had no legitimate aim and were not necessary in a democratic society. Furthermore, it came to the conclusion that Russian legislation did not afford the applicants the degree of protection from abuse to which they were entitled by the rule of law in a democratic society, taking into consideration the fact that the ECtHR also found in other cases against Russia that it was difficult, if not impossible, to challenge a blocking measure on judicial review (see also *Kablis v. Russia*, IRIS 2019-7/1).

In *Bulgakov v. Russia*, the ECtHR emphasised that blocking access to a website's IP address has the practical effect of extending the scope of the blocking order far beyond the illegal content which had originally been targeted. Apart from having no legal basis, the Court also found that there were no sufficient procedural safeguards to protect individuals from the excessive and arbitrary effects of blocking measures, such as in the case at issue. The Russian courts also neglected to consider whether the same result could be achieved with less intrusive means or to carry out an impact assessment of the blocking measure to ensure that it strictly targets the illegal content and has no arbitrary or excessive effects, including those resulting from the method chosen to implement it.

In *Engels v. Russia*, the ECtHR found that the legal provision of the Information Act on which the blocking order was based was too vague and overly broad to satisfy the foreseeability requirement. The ECtHR also noted that the utility of filter-bypassing technologies cannot be reduced to a tool for malevolently seeking to obtain extremist content. Even though the use of any information technology can be subverted to carry out activities which are incompatible with the principles of a democratic society, filter-bypassing technologies primarily serve a multitude of legitimate purposes, such as enabling secure links to remote servers; channelling data through faster servers to reduce page-loading time on slow connections; and providing a quick and free online translation. None of these

legitimate uses were considered by the Russian court before issuing the blocking order; it merely focused on the possibility that filter-bypassing software could give access to extremist content. The ECtHR clarified that information technologies are content-neutral and that they are a means of storing and accessing: "Just as a printing press can be used to print anything from a school textbook to an extremist pamphlet, the Internet preserves and makes available a wealth of information, some portions of which may be proscribed for a variety of reasons particular to specific jurisdictions. Suppressing information about the technologies for accessing information online on the grounds they may incidentally facilitate access to extremist material is no different from seeking to restrict access to printers and photocopiers because they can be used for reproducing such material. The blocking of information about such technologies interferes with access to all content which might be accessed using those technologies." In the absence of a specific legal basis in domestic law, the ECtHR found that the "sweeping measure" in the case of Engels was not only excessive, but also arbitrary. Furthermore, during the subsequent procedures, Engels was not afforded the degree of protection from abuse to which he was entitled by the rule of law in a democratic society.

Judgment by the European Court of Human Rights, Third Section, in the case of Vladimir Kharitonov v. Russia, Application no. 10795/14

<http://hudoc.echr.coe.int/eng?i=001-203177>

Judgment by the European Court of Human Rights, Third Section, in the case of OOO Flavus and Others v. Russia, Applications nos. 12468/15, 23489/15, and 19074/16

<http://hudoc.echr.coe.int/eng?i=001-203178>

Judgment by the European Court of Human Rights, Third Section, in the case of Bulgakov v. Russia, Application no. 20159/15

<http://hudoc.echr.coe.int/eng?i=001-203181>

Judgment by the European Court of Human Rights, Third Section, in the case of Engels v. Russia, Application no. 61919/16

<http://hudoc.echr.coe.int/eng?i=001-203180>

