European Court of Human Rights (Grand Chamber): NIT S.R.L. v. the Republic of Moldova

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The Grand Chamber of the European Court of Human Rights (ECtHR) has found no violation of the right to freedom of expression and information in a case concerning the withdrawal of a television station's licence in Moldova. The licence of the television channel NIT was revoked in 2012 because of the failure to provide balanced political coverage, and in particular, for its biased support of the communist opposition party in Moldova (PCRM) and its harsh criticism of (members of) the Government and its supporting coalition, the Alliance for European Integration (AEI). The ECtHR was satisfied that the Moldovan authorities had struck a fair balance between the general interest of the community in order to protect media pluralism and the right to freedom of expression of the television station as guaranteed by Article 10 of the European Convention on Human Rights (ECHR). Three judges dissented, arguing that the revocation decision was marred by serious procedural shortcomings, also raising substantial questions about the Moldovan media regulator's impartiality in the process.

The case concerned a media company's allegation that its television channel NIT had been shut down for being overly critical of the Government and, in particular, whether domestic law could impose an obligation of neutrality and impartiality in the news bulletins of a television station with nationwide coverage. After having imposed over a period of several years multiple sanctions against the NIT television channel, the Audiovisual Coordinating Council (ACC) decided to withdraw NIT's broadcasting licence. The ACC based its decision on a monitoring report of the news bulletins of all television channels with nationwide coverage regarding compliance with Article 7 of the Audiovisual Code 2006. This article on political and social balance and pluralism provides that when giving airtime to a political party, a broadcaster shall also give airtime to other political parties within the same type of programme and in the same time slot, without any unjustified delay and without favouring a certain party, regardless of the percentage of its parliamentary representation. It appeared from the monitoring report that most of the NIT news bulletins were devoted to political matters and that the reporting was clearly biased in favour of the activities of the PCRM and its members and supporters, without providing an opportunity to respond to criticism and attacks on the Government and its supporting coalition parties of AEI. The ACC found that this imbalance was in breach of Article 7 § 2 of the Audiovisual Code and it revoked the broadcasting licence as a justified interference after it had gradually

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applied all the other sanctions provided for in the Code.

NIT challenged, unsuccessfully, the decision by the ACC before the Court of Appeal and the Supreme Court. The Supreme Court emphasised that the measure of revocation of NIT's licence had been necessary in order to enforce the rules concerning pluralism of opinions and in order to enforce the rule of law. NIT subsequently lodged an application with the ECtHR, complaining that the revocation of its broadcasting licence had breached its right to freedom of expression under Article 10 ECHR.

The ECtHR adjudicated the present case from the perspective that the negative obligation of the State not to interfere with the right to freedom of expression is linked to the question of whether the State complied with its positive obligation to put in place a proper legal and administrative framework guaranteeing media pluralism. It considered that the relevant domestic law was formulated sufficiently clearly in order to fulfil the requirements of precision and foreseeability under Article 10 § 2 ECtHR, and it therefore found that the impugned interference was "prescribed by law". It also accepted that the interference corresponded to the legitimate aim of protecting the "rights of others", while the ECtHR was not persuaded by the Government's suggestion that the impugned measure had been imposed in the interests of "national security" or "public safety" or for the "prevention of disorder". With regard to the decisive question whether the revocation of NIT's licence had been necessary in a democratic society, the ECtHR reiterated that the most careful scrutiny on the part of the ECtHR is called for when the measures taken or sanctions imposed by a national authority are capable of discouraging the participation of the press in debates over matters of legitimate public concern and that there is little scope under Article 10 § 2 ECHR for restrictions on political speech or on debate on matters of public interest. The Court also reiterated that there could be no democracy without pluralism: "Democracy thrives on freedom of expression. It is of the essence of democracy to allow diverse political programmes to be proposed and debated, even those that call into question the way a State is currently organised, provided that they do not harm democracy. In order to ensure true pluralism in the audiovisual sector in a democratic society, it is not sufficient to provide for the existence of several channels or the theoretical possibility for potential operators to access the audiovisual market. It is necessary in addition to allow effective access to the market so as to guarantee diversity of overall programme content, reflecting as far as possible the variety of opinions encountered in the society at which the programmes are aimed". The ECtHR considered the principle of media pluralism crucial for the effective protection of media freedom. The ECtHR observed that a number of national licensing systems in Europe tended to rely on the diversity of perspectives provided by the different licensed operators, coupled with structural safeguards and general obligations of fair coverage, while other national systems required stricter content-based duties of internal pluralism. According to the

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ECtHR, Article 10 ECHR "does not impose a particular model in this respect". It recalled that the internal pluralism policy chosen by the Moldovan authorities and embodied in the Audiovisual Code 2006 had received a positive assessment by Council of Europe experts. While the policy chosen by the national authorities could be viewed as rather strict, the case related to a period before Moldova transitioned to terrestrial digital television, when the number of national frequencies was very limited and when the authorities had to put in place broadcasting legislation ensuring the transmission of accurate and balanced news and information reflecting the full range of political opinions. The ECtHR also referred to its judgment of 17 September 2009 in *Manole a.o. v. Moldova* (IRIS 2009-10/1), in which it found that from February 2001 until September 2006 the Moldovan authorities had violated freedom of expression and media pluralism by not sufficiently guaranteeing the independence and pluralism of Teleradio-Moldova (TRM), the State-owned broadcasting company, which became a public broadcasting company in 2002.

With this history and context in mind, the ECtHR was satisfied that the reasons behind the decision to interfere with NIT's freedom of expression had been relevant and sufficient and that the domestic authorities had balanced the need to protect pluralism and the rights of others, on the one hand, and the need to protect the television company's right to freedom of expression on the other. The Grand Chamber's judgment developed the Court's case-law on pluralism in the media and clarified the interrelationship between the internal and external aspects of media pluralism, the scope of the margin of appreciation afforded to States, and the level of scrutiny applicable to restrictions in this area. It also outlined the factors for assessing a regulatory framework and its application. The ECtHR observed that the implementation of the requirements on internal media pluralism was monitored by the ACC, a specialist body established by law. It stressed the important role which regulatory authorities play in upholding and promoting media freedom and pluralism, and the need to ensure their independence given the delicate and complex nature of this role. The ECtHR agreed with the approach and findings by the ACC, also emphasising that it was not persuaded that NIT news reporting had contributed to political pluralism in the media in any meaningful way. The ECtHR furthermore set out why it considered the revocation of NIT's licence a proportionate measure, and why it considered the proceedings at the domestic level fair, with sufficient procedural safeguards. The ECtHR observed that the revocation of its licence did not prevent NIT from using other means, such as the Internet, to broadcast its programmes, including news bulletins, while NIT had also continued to share content through its Internet homepage and its YouTube channel. Moreover, the impugned measure did not have a permanent effect as NIT could have reapplied for a broadcasting licence one year after its licence had been revoked. The ECtHR also found that there was no concrete evidence to support the allegation that the ACC sought to hinder NIT from expressing critical views of the Government or pursued any other ulterior

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purpose when revoking the licence. The Grand Chamber of the ECtHR concluded that the domestic authorities had acted within their margin of appreciation and that the interference with NIT's right under Article 10 ECHR was thus "necessary in a democratic society". There had accordingly been no violation of that Article in the present case. The ECtHR also concluded that there has been no violation of NIT's property rights under Article 1 of Protocol no. 1 to the Convention. The ECtHR dismissed the complaints based on Article 6 § 1 (right to fair trial), Article 13 ECHR (right to an effective remedy) and Article 14 (prohibition of discrimination).

Three judges dissented with the Grand Chamber's majority as to the finding of no violation of Article 10 ECHR. The judges Pavli (Albania), Lemmens (Belgium) and Jelić (Montenegro) considered it highly relevant that the NIT channel appeared to be the only national operator that gave prominence to the views of the country's only opposition party at the time: "With its disappearance from the broadcasting scene, it seems obvious that there was an adverse impact on overall pluralism. This argument cannot translate into a licence for minority voices to break the law with impunity, but it is nevertheless an important consideration". The dissenters also expressed the opinion that the requirement in Article 7 § 2 of the Audiovisual Code to give equal airtime to political parties "within the same type of programme and in the same time slot", suffered from both vagueness and potential overbreadth, and that it could be quite difficult to implement that requirement in practice without significantly undermining a broadcaster's editorial independence. While the dissenting judges agreed with much of the majority analysis of the generally applicable principles and the possible grounds justifying the revocation NIT's broadcasting licence, they disagreed with the conclusion that the decisions of the national authorities were accompanied by sufficient procedural safeguards. Confirming the important role of independent regulatory authorities, the dissenters emphasised that it is essential that both the ECtHR and domestic courts scrutinised quite carefully any interferences with media freedoms by such regulatory authorities, to ensure that their decision-making is not marred by any signs of bias or lack of fair treatment. Strict scrutiny is especially important in cases of revocation of a licence as a form of prior restraint, subjecting a national broadcaster to the ultimate sanction ("the nuclear option") of delicensing for supposed failures of internal pluralism. Five factors in the present case called for strict scrutiny by the ECtHR: the presence of a strict national model of internal pluralism, based on legislative provisions that were liable to open-ended and subjective enforcement; the imposition of the ultimate sanction on the broadcaster with immediate effect; the fact that the particular operator represented the main opposition voice in the country's broadcasting scene; certain concerns about the ACC's independence; and the obvious chilling effects that a licence revocation in these circumstances would have on other broadcasters and the national political discourse generally. The dissenting opinion refers to the weak methodology used by the ACC for its monitoring of pluralism compliance, the difficulties of applying the standards of Article 7 § 2 of the

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Audiovisual Code to news editions and the extremely hasty manner in which the final ACC decision was taken. The latter raised serious questions about the procedural fairness and NIT's ability to present an effective defence before the ACC. All in all the dissenting opinion found that the revocation decision was marred by serious procedural shortcomings that not only undermined NIT's ability to properly defend its interests but also raised substantial questions about the ACC's impartiality in the process. As the national courts had also failed to promptly address and remedy these shortcomings, the dissenting judges concluded that there had been a violation of NIT's rights under Article 10 ECHR.

Judgment by the European Court of Human Rights, Grand Chamber, in the case of NIT S.R.L. v. the Republic of Moldova, Application no. 28470/12, 5 April 2022

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