European Court of Human Rights: OOO Mediafokus v. Russia

IRIS 2023-3:1/23

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In a judgment of 17 January 2023, the European Court of Human Rights (ECtHR) found that the wholesale blocking of access to a new website of an online media company on the grounds that its content "mirrored" the proscribed content on its former website amounted to a violation of the right to freedom of expression and information as guaranteed under Article 10 of the European Convention on Human Rights (ECHR). Although judgments of the ECtHR have minimal impact on the practices of the Russian authorities, the judgment in OOO Mediafokus is also relevant for other member states of the ECHR, as the Court's judgment provides for extra guarantees to protect freedom of expression in the digital environment (see also IRIS 2020-8/11). A blocking order referring to the entire domain name of a website only, rather than identified specific problematic webpages is to be considered as an arbitrary interference by the authorities, while a blocking order of a new website simply because it "mirrors" the content of another (blocked) website at least requires a clear and foreseeable legal basis. The ECtHR also emphasised that authorities had to give website owners an opportunity to remove the offending content before a blocking decision took effect.

The applicant company, OOO Mediafokus, is the owner of the online magazine Ezhednevnyy Zhurnal at www.ej.ru. Since March 2004 it has been publishing research and analysis by political scientists, economists and journalists, many of whom have been critical of the Russian authorities. In 2014 the Prosecutor General requested the telecoms regulator Roskomnadzor to block access to the company's website and its "mirrors" once they were identified. In 2015, OOO Mediafokus created a new website at www.ej2015.ru; the content of the original website was not moved to the new website. In 2017, Roskomnadzor informed the company's web hosting service provider that access to the website www.ej2015.ru had been restricted on the basis of the Prosecutor General's blocking request of March 2014 as the new website was a "mirror" of the original one and contained "calls for extremist activities". As the URL addresses of pages containing offending material were not specified, OOO Mediafokus asked Roskomnadzor to identify the web pages containing "calls for extremist activities". Roskomnadzor replied that they had detected content on the new website which was "identical" to the content of the old website and fell within the scope of the Prosecutor General's blocking request of March 2014, but gave no details as to the nature or location of the offending content. OOO Mediafokus'

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judicial complaints were dismissed, first by the Taganskiy District Court in Moscow, and subsequently by the Moscow City Court. Both the Moscow City Court and the Supreme Court of Russia, respectively, refused OOO Mediafokus to lodge a cassation appeal.

The ECtHR disagreed with the findings of the Russian authorities. First, the ECtHR noted that the domestic law allowed the authorities to block websites featuring specifically listed offending content, but also enabled the website owners to have access restored once the offending content had been taken down. However, for that possibility to be realistic, the offending content had to be clearly identified, otherwise the owner of the website would not know which content had to be removed in order for access to be restored. The ECtHR observed that the 2014 request by the Public Prosecutor to block the new website had not refered to any allegedly illegal content that had only appeared in 2015 on the new website. Accordingly, it had not complied with the legal requirement that the blocking measure must specify the location of the web page permitting illegal content to be identified.

Furthermore, in so far as the blocking measure targeting the new website relied on the reference to “mirror” websites in the text of the 2014 request, the ECtHR observed that the term “mirror website” had not been defined in any legislation. Hence, the domestic law did not provide for the possibility of blocking websites simply for being “mirrors” of another, and there were no legal criteria for establishing that one website was another's "mirror". In the absence of such criteria, the domestic courts’ finding that the new website should be blocked solely on the basis that it shared a similar name and the same owner with the previously blocked one did not have a clear and foreseeable legal basis.

Finally, the ECtHR refered to previous cases against the Russian Federation finding that Russian law contained no procedural safeguards capable of protecting website owners from arbitrary interference. Russian law did not provide for any form of participation in the blocking proceedings and did not give them an opportunity to remove the offending content before the blocking decision took effect. Nor did it require the authorities to assess the impact of the blocking measure, to justify the necessity and proportionality of the interference with the freedom of expression online, and to ascertain that the blocking measure strictly targeted the unlawful content and had no arbitrary or excessive effects, including those arising from blocking access to the entire website (IRIS 2020-8/11). It followed that the blocking order was not “prescribed by law” because the OOO Mediafokus’ new website had been blocked on the basis of an arbitrarily applied concept of “mirror” websites and without the identification of any offending content. There had therefore been a violation of Article 10 ECHR, without the need for the ECtHR to examine whether the interference had also pursued a legitimate aim which was “necessary in a democratic society”.

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Judgment by the European Court of Human Rights, Third Section (sitting as a Committee) in the case of OOO Mediafokus v. Russia, Application no. 55496/19, 17 January 2023

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