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IRIS
Legal Observations
of the European Audiovisual Observatory

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INTERNATIONAL

COUNCIL OF EUROPE

European Court of Human Rights: Terentyev v. Russia

In one of its first judgments in 2017 related to the right to freedom of expression, the European Court of Human Rights (ECtHR) found a violation of a blogger's right under Article 10 of the European Convention on Human Rights (ECHR). The blogger, Mr Terentyev, a musician and jazz critic, had been convicted in Russia for defamation after he had published an article on his personal website about a local jazz festival which was scathingly critical of the festival and its president, Mr Y. Mr Terentyev used various corruptions of the festival president's surname to mock his professional competence. The jazz festival was described as being "a shoddy piece of work" and Mr Y.'s performance "crappy". Mr Y. sued the blogger for defamation, arguing that the article had been insulting and harmful to his reputation. The Syktyvkar Town Court found the applicant liable in defamation, stating that "[u]sing a distorted form of the plaintiff's patronymic and last name ... breaches the plaintiff's right to his own name and to his good name, which is unacceptable under the law". The Town Court also considered that the defamatory extracts undermined the honour and dignity of the plaintiff, while Mr Terentyev did not submit any evidence to the court showing that the impugned statements were true. The Town Court awarded Mr Y. 5,000 Russian roubles (about EUR 80) in damages and ordered Mr Terentyev to publish a retraction on his website. The Supreme Court of the Komi Republic dismissed his appeal. It endorsed the findings of the lower court in a summary judgment, holding that Article 10 of the Convention had not been breached because "the defendant published statements on the Internet which undermined the honour and dignity of the plaintiff as a person, pedagogue and musician and which contained negative information about him".

Mr Terentyev lodged a complaint with the ECtHR, arguing that his conviction for defamation amounted to a violation of his right to freedom of expression under Article 10 of the Convention. As this "interference" with Mr Terentyev's right to freedom of expression was "prescribed by law" under Article 152 of the Russian Civil Code and pursued the legitimate aim of the protection of the rights of others - namely the reputation of Mr Y. - what remained to be established was whether the interference was "necessary in a democratic society". The European Court refers to its standard approach, according to which it may be required to ascertain whether the domestic authorities have struck a fair balance when protecting two values guaranteed by the Convention - namely freedom of expression, as protected by Article 10, and the right to respect for private life enshrined in Article 8 of the ECHR, including the right to reputation. In a balancing exercise between those two rights the European Court leaves a certain margin of appreciation to the national authorities of the defending state, while the Court would require strong reasons for substituting its view for that of the domestic courts. However the domestic courts are required to carefully examine the context of the dispute, the nature of the impugned remarks and the criteria laid down in the Court's case-law, as elaborated in the 2012 Grand Chamber judgment in Axel Springer AG v. Germany (see IRIS 2012-3/1). In the present case, the ECtHR observes that the judgments of the domestic courts offer no insight into the context of the dispute: they did not discuss whether the article had contributed to a debate on a matter of public interest or whether it had been a form of artistic criticism, and did not explain why Mr Y.'s reputation had to be afforded greater protection on account of his being "a person, pedagogue and musician". The judgments at the domestic level were also remarkably laconic and contained nothing that would help the European Court to grasp the rationale behind the interference. The domestic courts made no genuine attempt to distinguish between statements of fact and value judgments; rather, they reprinted the impugned extracts of the article in their entirety, without subjecting them to meaningful scrutiny. Faced with this failure to give relevant and sufficient reasons to justify the interference, the ECtHR finds that the domestic courts cannot be said to have "applied standards which were in conformity with the principles embodied in Article 10" or to have "based themselves on an acceptable assessment of the relevant facts". Therefore the European Court concludes unanimously that there has been a violation of Article 10 of the ECHR. The Russian state is ordered to pay Mr Terentyev EUR 144 in respect of pecuniary damage and EUR 2,500 in respect of non-pecuniary damage.

• Judgment by the European Court of Human Rights, Third Section, case of Terentyev v. Russia, Application no. 25147/09, 26 January 2017
http://merlin.obs.coe.int/redirect.php?id=18362 EN

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Committee of Ministers: Convention on Cinematographic Co-production opens for signature

On 30 January 2017, at the International Film Festival in Rotterdam, the Council of Europe opened for

signature the new Convention on Cinematographic Co-production (the "Convention"). This instrument, adopted by the Committee of Ministers at the 1,261st meeting of the Ministers' Deputies, sets out the rules under international law for when cinematographic co-productions involving producers from at least three States are undertaken (see IRIS 2016-10/3).

One of the main developments of the Convention is that it grants flexible conditions for film producers in co-productions. Moreover, the Convention allows non-European countries to take advantage of its provisions. However, this instrument is limited to cinematographic works. The Explanatory Report of the Convention explains that audiovisual works are excluded because they are rarely created under co-production agreements and technological developments make it difficult to formulate a precise definition of them.

The Convention includes two appendices. The first of them refers to the procedure that must be followed in order to secure the award of co-producing status. The second appendix sets out the conditions to be met in order for a work to officially qualify as a co-production.

This instrument is the result of a revision, begun in 2008, of a previous version dates from 1992 (IRIS 1995-1/44). Moreover, the Convention's preamble has regard to the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions (Paris, 20 October 2005) (see IRIS 2005-10/1), which strives to strengthen activities related to cultural expressions around the world.

The Convention is intended to enter into force on the first day of the month following the expiration of a period of three months after the date on which three States, including at least two member states of the Council of Europe, have expressed their consent to be bound by the Convention. On 30 January 2017, 10 countries, including the Netherlands, Greece, Italy, Luxembourg, Malta, Norway, Portugal, Serbia, Slovakia and Slovenia, participated in the signature ceremony.

• Council of Europe Convention on Cinematographic Co-production (revised), Council of Europe Treaty Series - No. 220, 30 January 2017
http://merlin.obs.coe.int/redirect.php?id=18394 EN FR

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Parliamentary Assembly: Resolution and Recommendation on journalist safety and media freedom

On 24 January 2017, the Parliamentary Assembly of the Council of Europe (PACE) adopted a Resolution and Recommendation on attacks against journalists and media freedom in Europe (for a previous resolution, see IRIS 2015-4/2). The Resolution begins with PACE welcoming the establishment of the Platform to promote the protection of journalism and safety of journalists. The Platform allows the compilation of alerts regarding serious concerns about media freedom and the safety of journalists in Council of Europe member states by certain Partner Organisations (see IRIS 2017-2). However, PACE notes "with concern that, unfortunately, the relevance of this tool has been confirmed by the high number of cases which have given rise to alerts on serious threats to media freedom in Europe".

The Resolution then moves on to developments since its previous 2015 resolution (2035) on journalist safety, and "welcomes" the release of an Azerbaijani journalist from detention, and also Georgian legislation, "which provides a framework for freedom and stability of the media as well as the law on broadcasting". However, PACE expresses "regret" at having to reiterate a number of concerns identified in the 2015 resolution, including in relation to Ukraine; the closure of the broadcaster ATR and other Crimean-Tartar media in the Crimean Peninsula; and continued efforts in Georgia to change the ownership of the country's most popular pro-European television station, which has caused "continued concern". Further, it "notes with sadness that 16 journalists have died violently in member states since January 2015", and "strongly calls on the competent prosecutors to thoroughly investigate" a number of unresolved cases.

The Resolution makes specific calls on a number of countries in relation to media freedom, including Turkey, the Russian Federation, Azerbaijan, Hungary, Poland, France, Greece, and Belarus. Notably in the audiovisual context, the Resolution notes "that the situation of public service broadcasting is difficult in several member states [and] the Assembly recalls that the independence of such broadcasters from governments has to be ensured through law and practice. Governments and parliaments must not interfere in the daily management and editorial work of such broadcasters, which should establish in-house codes of conduct for journalistic work and editorial independence from political sides. Senior management positions should be refused to people with clear party political affiliations". Moreover, it welcomes "the efforts of the Ukrainian authorities to establish a strong public broadcasting system [and] the Assembly emphasises the importance of continuing without delay the full implementation of the public broadcasting law adopted by the Ukrainian Parliament in April 2014, and of transforming State media outlets into public service media".

Finally, in its Recommendation, PACE recommends that the Committee of Ministers (a) allocate adequate resources to the functioning of the Platform, to enable target follow-ups to the alerts, (b) remind member states of their commitment under Article 3 of the

Statute of the Council of Europe "to co-operate sincerely and effectively in the realisation of the work of the Platform", and (c) include Belarus in the countries addressed by the Platform.

• Parliamentary Assembly of the Council of Europe, Resolution 2141 (2017) on attacks against journalists and media freedom in Europe, 24 January 2017
http://merlin.obs.coe.int/redirect.php?id=18363 EN FR

• Parliamentary Assembly of the Council of Europe, Recommendation 2097 (2017) on attacks against journalists and media freedom in Europe, 24 January 2017
http://merlin.obs.coe.int/redirect.php?id=18364 EN

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Parliamentary Assembly: Resolution and Recommendation on cyberdiscrimination and online hate

On 25 January 2017 the Parliamentary Assembly of the Council of Europe (PACE) adopted a Resolution and Recommendation on "Ending cyberdiscrimination and online hate". The Assembly, having regard to "Resolution 2069 (2015) on recognising and preventing neo-racism", urges member states to take further action for the protection of the online environment from unlawful speech.

Member states are called upon to ratify the Convention on Cybercrime (ETS No. 185) and to ensure that national legislation covers all forms of online incitement. The member states should provide assistance to law enforcement agencies and judicial bodies by providing training on the seriousness all forms of hate speech and also support the development of clear guidance on the recording of all reported incidents and investigation techniques. Member states should also support all activities aimed at raising awareness among citizens of the impact of hate speech, especially on children.

The Assembly recognised that hate speech is a "reflection of hate in our societies". It does not only concern racism and xenophobia, but can also take the form of "sexism, antisemitism, Islamophobia, misogyny, homophobia, and other forms of hate speech directed against specific groups or individuals". On the other hand, the Resolution calls for a balanced approach when regulating people's behaviour online so as to recognise the specificities of the online environment, such as the instant dissemination of content, the possibility of anonymity and the cross-border context of communication.

Particular attention was given to the role of Internet intermediaries with regard to preventing and combating hate speech. Member states are called upon to ensure that intermediaries act upon standards developed by the case-law of the European Court of Human Rights and that "clear and effective internal processes to deal with notifications regarding hate speech" are established.

Finally, the Recommendation asks the Committee of Ministers to review and update several policy documents addressing the problem of hate speech, online media and journalism.

• Parliamentary Assembly of the Council of Europe, Resolution 2144 (2017) on Ending cyberdiscrimination and online hate, 25 January 2017
http://merlin.obs.coe.int/redirect.php?id=18365 EN FR

• Recommendation 2098 (2017) on Ending cyberdiscrimination and online hate, 25 January 2017
http://merlin.obs.coe.int/redirect.php?id=18366 EN FR

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EUROPEAN UNION

Court of Justice of the European Union: Advocate General issues opinion on Stichting Brein v. Ziggo

On 8 February 2016, Advocate General Szpunar delivered his opinion in Stichting Brein v. Ziggo BV (Case C-610/15) concerning the liability of operators of indexing sites of peer-to-peer networks for copyright infringement.

The proceedings began in January 2012, when the District Court of The Hague ordered two Dutch internet access providers (Ziggo and XS4ALL) to block access to The Pirate Bay (TPB). Stichting Brein, a foundation protecting the interests of the Dutch copyright industry, had been granted the right to request the order (see IRIS 2012-2/31). In January 2014, the Court of Appeal in The Hague overturned the judgment of the District Court, after which Stichting Brein appealed to the Supreme Court.

In November 2015, the Supreme Court referred two questions to the Court of Justice of the European Union for a preliminary ruling (see IRIS 2016-1/22). The first was whether there is "a communication to the public under Article 3(1) of Directive 2001/29 by the operator of a website, if no protected works are available on that website, but a system exists 04046 by means of which metadata on protected works which is present on the users' computers is indexed and categorised for users, so that the users can trace and upload and download the protected works on the basis thereof."

AG Szpunar answered this question in the affirmative, provided that the operator "is aware of the fact that a work is made available on the network without the consent of the copyright holders and does not take action in order to make access to that work impossible." AG Szpunar noted the relevance of the role played by websites such as TPB in file-sharing on peer-to-peer networks, a role which was held to be "crucial" and "practically unavoidable". The AG stated that "works would not be accessible and the operation of the network would not be possible, or would at any rate be much more complex and its use less efficient, without sites such as TPB". Where an operator acts intentionally by allowing, expressly, the continuation of the illegal making available of protected works, it can be said to have made an act of communication to the public. The lack of an actual transmission by TPB was regarded to be irrelevant.

The second question posed by the Supreme Court was whether "Article 8(3) of Directive 2001/29 and Article 11 of Directive 2004/48 offer any scope for obtaining an injunction against an intermediary as referred to in those provisions, if that intermediary facilitates the infringing acts of third parties in the way referred to in Question 1". AG Szpunar focussed on article 8(3), as it was argued that it takes precedence over article 11. He said that even if the Court were to hold that an act of communication does not exist, an injunction should be permitted. Depriving internet users of access to information, by blocking the TPB site, was said to be proportionate to the significance and seriousness of the copyright infringements committed on that site.

• Opinion of Advocate General Szpunar, Case C-610/15, Stichting Brein v. Ziggo BV, XS4ALL Internet BV, 8 February 2017
http://merlin.obs.coe.int/redirect.php?id=18382 DE EN FR
CS DA EL ES ET FI HU IT LT LV MT
NL PL PT SK SL SV HR

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European Commission: Proposal for new e-Privacy Regulation

On 10 January 2017, the European Commission adopted a proposal for a Regulation concerning the respect for private life and the protection of personal data in electronic communications (e-Privacy Regulation). The proposed Regulation is a result of the review of the e-Privacy Directive (2002/58/EC) (see IRIS 2002-7/10) that was announced in the European Commission's Digital Single Market Strategy (see IRIS 2015-6:1/3).

The proposed Regulation updates the e-Privacy Directive to align it with technological developments and with the General Data Protection Regulation (GDPR) adopted in May 2016. It aims "to ensure stronger privacy in electronic communications, while opening up new business opportunities." Once adopted, the e-Privacy Regulation will be directly applicable throughout the EU.

The draft Regulation improves the existing e-privacy legal framework in a number of key ways. Firstly, it broadens the material scope of the e-privacy rules and clarifies their territorial scope. In contrast to the e-Privacy Directive (which applies only to the processing of personal data in electronic communications), the proposed Regulation covers the processing of "electronic communications data", which includes electronic communications content and electronic communications metadata that are not necessarily confined to personal data. Furthermore, unlike the e-Privacy Directive, the proposed Regulation is binding not only on electronic communications services providers, but also on providers of so-called "over-the-top" services and machine-to-machine communications. If adopted, the Regulation will apply to "electronic communications data processed in connection with the provision and use of electronic communications services in the [EU], regardless of whether or not the processing takes place in the [EU]." Thus, the territorial scope of its application is not limited to the EU.

Second, the proposed Regulation broadens the ability of businesses to process electronic communications metadata, such as location data. Under the new rules, the consent of the end-user is required just once - encompassing the processing of both communications content and metadata. For the purposes of the e-Privacy Regulation the end-user's consent will have the same meaning and will be subject to the same conditions as the data subject's consent under the GDPR.

Third, the proposed Regulation streamlines the rules on cookies. In particular, it clarifies that no consent is required for cookies that are necessary for the functioning of websites, cookies that improve Internet experience (for example by remembering shopping cart history) or cookies that are used by a website to count the number of visitors. In all other cases, the processing and storage of cookies is only allowed with the consent of the end-user. In line with the principles of data protection "by design" and "by default", as codified in the GDPR, the proposed rules also require Internet browsers to offer end-users the option of preventing third parties from storing cookies on their terminal equipment or processing cookies already stored on that equipment.

Finally, to ensure full consistency with the GDPR the proposed Regulation relies on the enforcement mechanism of the GDPR. Supervisory authorities in charge of the enforcement of the Regulation must have the power to impose penalties, including administrative fines, for any infringement of the e-Privacy Regulation. End-users are entitled to the same administra-

tive and judiciary remedies as those available for data subjects under the GDPR.

• European Commission, Proposal for a Regulation of the European Parliament and of the Council concerning the respect for private life and the protection of personal data in electronic communications and repealing Directive 2002/58/EC, 10 January 2017
http://merlin.obs.coe.int/redirect.php?id=18367 DE EN FR
BG CS DA EL ES ET FI HU IT LT LV
MT NL PL PT SK SL SV HR

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NATIONAL

BG-Bulgaria

Changes in the Media Law on individual use of spectrum

On 27 December 2016, Article 116j of the Radio and Television Act (RTA) was revoked. This amendment to the RTA was promulgated in issue 103 of the State Gazette. Article 116j was only introduced into the RTA in 2009; however, in 2015, the European Court of Justice decided that it violated European Union law. Therefore, in December 2016, the Council of Ministers introduced a bill which revoked Article 116j RTA.

Article 116j RTA:

(1) An undertaking, whereto the Communications Regulation Commission has granted an authorization for use of an individually assigned scarce resource in the radio spectrum, for provision of electronic communications over networks for digital terrestrial broadcasting, may not be a radio and television broadcaster;

(2) The restriction referred to in Paragraph (1) shall furthermore apply in respect of any parties related, within the meaning given by the Commerce Act, to the undertaking referred to in Paragraph (1).

The introduction of Article 116j RTA was very controversial. For example, the Austrian Broadcasting Corporation (ORF) wanted to participate in the digitalization in Bulgaria through its daughter company ORS (Austrian Broadcasting Services) and therefore planned to apply for a scarce resource in the radio spectrum. However, Article 116j RTA was introduced and restricted ORF's possibility to be granted an authorization for the use of an individually assigned scarce resource in the radio spectrum.

As a result, the Parliamentary opposition filed a complaint with the Constitutional Court against the provision, requesting that this provision be declared unconstitutional due to its restrictions on free competition. On 4 June 2009, with decision no 3, the Constitutional Court dismissed the claim; the Court argued that if a radio and TV operator received permission to use an individually identified resource in the radio-frequency spectrum to send e-messages through networks for land digital broadcasting, it would result in restrictions on competition and be contrary to the interests of users (see IRIS 2009-8:8/8). The merger of a multiplex operator with a radio and TV operator and the establishment of a monopolistic position for this enterprise, which combines two functions, would result in a violation of the specific requirements. Similar deviations would have negative effects on the competition on the media market.

On 23 April 2015, the European Court of Justice came to a decision in the case C-376/13 (see IRIS 2015-6:1/2). The Court decided that by introducing Article 116j RTA, the Republic of Bulgaria had violated European Union telecommunications law. Following the Court's decision, the Council of Ministers revoked Article 116j RTA.

• Закон за изменение на Закона за радиото и телевизията (Act for Amendments of the Radio and Television Act)
http://merlin.obs.coe.int/redirect.php?id=18163 BG

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CZ-Czech Republic

Broadcasting regulator issued notice of violation of law for Czech TV

The Czech Broadcasting Law stipulates that a broadcaster shall provide objective and balanced information necessary for opinions to be formed freely; any opinions or evaluating commentaries shall be separated from the news. In its session on 10 January 2017, the Broadcasting Council of the Czech Republic issued a warning to the operator Czech Television following a violation of this provision of the Broadcasting law.

The alleged violation was committed on 9 November 2016, in a programme called "US election night", which was characterized as a news programme. According to the Broadcasting Council, Czech Television broadcast unbalanced and biased reporting in this programme, favouring one party, notably through the systematic and very one-sided criticism of only one of the candidates for US president.

There was a manipulative combination of the use of images and words in the report on the position of American celebrities with regard to both candidates; among those who supported Clinton, Clint Eastwood and Chuck Norris, amongst others, were displayed, that is to say actors who openly supported Donald Trump. This use of images with commentary in the wrong context thus created a false and misleading picture of reality. In the programme, four respondents - citizens of the United States of America - were given a chance to speak. All of these respondents were obvious Clinton supporters and opponents of Trump. The selection of respondents significantly influenced the tone of the show. Therefore, the operator committed a breach of the duty to provide objective and balanced information required for the free formation of opinions.

The Broadcasting Council also stated that situations occurred where the principle that opinions or evaluating commentaries shall be separated from the news was not respected. A potential victory of Trump was presented as dangerous, and his potential victory was interpreted as a negative phenomenon, namely by using emotionally coloured terms referring to natural disasters, (states in which the majority voted for Trump were marked in red and called a "tsunami"). In addition, the information was given, that when Trump becomes president, many Americans would prefer to emigrate from the United States. Emotionally tinged questions by moderators such as: "So far, therefore, in the opinion of some experts, can Donald Trump's victory be a threat to security, global security may we say?" had the same effect.

The main and, apart from a few marginal mentions, the only source of information from the media environment was selected from the US television channel CNN, which was repeatedly included in the programme. Even a few minutes of direct inputs were broadcast. According to the Broadcasting Council, this is a television programme which, before the elections, openly sympathized with candidate Clinton. This source selection for information also contributed to the overall unilateral tone of the show on US election night.

The Broadcasting Council stated that these parts of the programme had been in breach of the obligation to ensure that news and political affairs programmes follow the principles of objectivity and balance.

If a broadcaster breaches any obligations set out in the Broadcasting Law or any conditions stipulated in the law, then the Council shall warn such a broadcaster of the breach and shall grant such a broadcaster a grace period to take corrective action. The Council established the deadline for corrections as within 7 days of receiving the notice. Any further infringement of the same kind may result in a fine.

• *Tisková zpráva Rady z 10.1.2017 str.6* (Press release of the Broadcasting Council, 10 January 2017)
http://merlin.obs.coe.int/redirect.php?id=18379 CS

• *Upozornění na porušení zákona č.j.RRTV/2095/2017/-rud z 10.1.2017* (Notice of violation of the law, 10 January 2017) CS

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Centre Against Terrorism and Hybrid Threats

On 1 January 2017, the newly created Centre Against Terrorism and Hybrid Threats started operating. On 1 December 2016, the Prime Minister, together with the Interior Minister, presented the conclusions of the national security audit. The audit verified two basic capabilities of the State: the ability to identify specific security threats and to take preventive measures against them, and the ability to respond to crises which need to be addressed. Each chapter provides answers to questions such as: is the current legislation sufficient? Does the State have sufficient capacity? Does it have the ability to take appropriate action when needed? One of the recommendations that stemmed from the preliminary conclusions of the National Security Audit, which identified various types of hybrid threats as serious internal security threats, including terrorism, radicalisation and foreign disinformation campaigns, was creating a Centre Against Terrorism and Hybrid Threats.

The Centre is essentially a specialised analytical and communications unit. Given the competencies of the Ministry of the Interior, the Centre monitors threats directly related to internal security, which implies a broad array of threats and potential incidents relative to terrorism, soft target attacks, the security aspects of migration, extremism, public gatherings, the violation of public order and various crimes, as well as disinformation campaigns related to internal security. Based on its monitoring work, the Centre evaluates detected challenges and comes up with proposals for substantive and legislative solutions that it will also implement where possible. It also disseminates information and spreads awareness about the given issues among the general and professional public.

The Centre is a department of the Ministry of the Interior. It will have 15 to 20 employees. The Centre is not a new law enforcement agency, nor an intelligence service. It does not aim to censor nor remove content from the internet or other (printed) media. It works primarily with open sources available to all, and openly communicates with civil society, the media, and other subjects. The Centre does not initiate criminal proceedings, conduct interrogations, or lead proceedings against anyone.

• *Audit národní bezpečnosti* (Audit of national security)
http://merlin.obs.coe.int/redirect.php?id=18397 CS

• *Centrum proti terorizmu a hybridním hrozbám* (Centre Against Terrorism and Hybrid Threats)
http://merlin.obs.coe.int/redirect.php?id=18380 CS

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DE-Germany

Federal Supreme Court rules on comments made in satirical programme

In two rulings issued on 10 January 2017 (case nos. VI ZR 561/15 and VI ZR 562/15), the Federal Supreme Court (BGH) held that the comedians on ZDF's satirical programme "Die Anstalt" could continue to claim that two journalists working for the weekly newspaper "Die Zeit" are linked to organisations that deal with issues relating to security policy. It therefore rejected the libel actions brought by the journalists concerned.

On 29 April 2014, public service broadcaster ZDF transmitted the satirical programme "Die Anstalt", in which two comedians discussed two "Die Zeit" journalists' independence with regard to security policy. The journalists claimed that the comedians had falsely accused them of being active members, board members or advisory council members of various organisations that deal with issues relating to security policy. One also claimed that he had been falsely accused of writing a speech that was given by the Federal President at a security conference in Munich in January 2014, a speech on which he had subsequently reported favourably in his capacity as a journalist. The plaintiffs applied for an injunction against the defendant, ZDF.

On 8 September 2015, the Hanseatische Oberlandesgericht (Hanseatic Regional Court of Appeal - OLG) banned the satirical programmes (case nos. 7 U 121/14 and 7 U 120/14) and ordered the defendant not to broadcast the disputed comments.

However, the BGH quashed the appeal court rulings and dismissed the actions on the grounds that the court had misinterpreted the disputed comments. It underlined that, had the comments been correctly interpreted, it would have shown that the comedians had not made such comments, which therefore could not be prohibited. The meaning of a comment should always be judged according to its overall context. The BGH stressed that comments should not be dissociated from the satire they characterise; the satirical element should be taken into account when examining the content of such comments.. The decisive factor was how they would be interpreted by an impartial and reasonable viewer in the context in which they were made. For this reason, the only element of the disputed programme that should be scrutinised is the claim that the defendants were connected to the organisations mentioned. Since such connections did in fact exist, the statement was accurate and could not be prohibited.

• *Pressemitteilung des BGH zu den Urteilen vom 10. Januar 2017- VI ZR 561/15 und VI ZR 562/15* (Federal Supreme Court press release on the rulings of 10 January 2017 - VI ZR 561/15 and VI ZR 562/15)
http://merlin.obs.coe.int/redirect.php?id=18383 DE

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ZDF agrees new guidelines with TV production companies

ZDF has drawn up a new set of guidelines with television production companies in order to support the German creative industry. According to a joint press release issued by the public service broadcaster and producer associations on 13 December 2016, under the new agreement, production companies will benefit financially from the online exploitation of their work in particular.

ZDF is the largest single customer in the German TV production market. Under one of the new agreement's key provisions, a one-off additional payment of up to 1% above the figure previously agreed in the production contract will be paid for fully financed, commissioned productions that remain accessible via ZDF's telemedia services for more than 30 days. This payment will be capped at EUR 1.5 million. ZDF will also support the development of successful programmes and the creative industry with its small and medium-sized production companies, and will set up an innovation fund worth EUR 2 million each year. This will be used to finance project and script development contracts, for example.

The new guidelines also state that whenever ZDF does not fully finance a production, the production company concerned will receive exploitation rights in proportion to the value of its own investment. It will also retain such rights if concepts and ideas that it develops on the broadcaster's behalf and that are financed by the new innovation fund are not used. In such cases, the production company concerned can use the results of its work in the future.

The new guidelines also take into account the protocol declaration of the Länder on the 19th Rundfunkänderungsstaatsvertrag (Agreement Amending the Inter-State Broadcasting Agreement). In the declaration, the Länder acknowledged the progress made in terms of balanced contractual conditions between public service broadcasters and film and television production companies that have been achieved in

recent years through partnership agreements, and called for appropriate contractual conditions to be continued in the future.

ZDF will initially apply these guidelines to commissioned productions during the funding period ending on 31 December 2020. It will hold annual consultations with the production companies or the relevant producer associations to discuss the practical implementation and application of the guidelines.

The key principles on the transparency of cooperation with producers of commissioned television productions, agreed by ZDF and the Allianz Deutscher Produzenten (German Producers' Alliance) in 2014, remain valid.

• *Das ZDF und die Fernsehproduzenten - Rahmenbedingungen einer fairen Zusammenarbeit* (ZDF and TV production companies - a framework for fair cooperation)
http://merlin.obs.coe.int/redirect.php?id=18384 DE

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FR-France

Decree reforming the classification of cinema films

In February 2016, after undertaking broad consultations, Jean-François Mary, Chairman of the Film Classification Board, submitted to Minister for Culture Audrey Azoulay a report on the classification of cinematographic works with regard to minors aged between 16 and 18. The report had been commissioned after considerable controversy was caused by the courts' cancellation of the licences issued to a number of films containing scenes of non-simulated sexual activity (including Love and La Vie d'Adèle) or scenes of extreme violence (including Salafistes). Despite the fact that at the time the Minister announced that a decree would be issued in the near future aimed at "making the current scheme for classifying films more flexible" - and even though the source of the controversy continues - it has taken almost exactly a year for the announced text to finally appear.

Previously, Article R. 211-12 of the Cinema and Animated Film Code had provided that any film containing "scenes of non-simulated sexual activity" would automatically be banned from being shown to under-18s. In line with the recommendations set out in the Mary report, the Government wanted to stop this being automatic and to lay down criteria that would enable the licensing board to make a balanced appreciation of the desirability and nature of a film's classification.

The Decree provides that "if the work or document [in question] includes scenes of sexual activity or violence [the term used previously was "extreme violence"] which - particularly by their cumulative effect - may be seriously disturbing for minors, or present violence in a favourable manner, or render banal [the concept of] violence 04046", then the film's licence must include a ban on it being shown to under-18s, whether or not it has an "X" rating. The licensing board has exercised its discretion in deciding on measures that are "proportionate to the need to protect children and young people, and in keeping with the sensitivities and stages in personality development specific to each age group".

The Decree also provides that if a film includes scenes of sexual activity or extreme violence "the aesthetic approach or the narrative process on which the work or document is based" may justify the film's licence including a ban on it being shown to under-18s without necessarily requiring it to be given an "X" rating (which would automatically bar the film from receiving any aid).

The Mary report also raised the issue of the initiation of court proceedings in respect of a film's licence. To simplify the appeals procedures, speed up the legal process, and harmonise case-law, the Decree provides that the Administrative Court of Appeal in Paris shall have jurisdiction at the first and last instance to deal with appeals lodged against decisions made by the Minister for Culture regarding the issuance of licences to films. However, parties retain the possibility of appealing to the Conseil d'Etat in the final instance.

The text has been welcomed by professional organisations in the sector. It entered into force the day after its publication, except for the arrangements altering the Code of Administrative Justice, which will apply to appeals lodged on or after 1 March 2017.

• *Décret n°2017-150 du 8 février 2017 relatif au visa d'exploitation cinématographique* (Decree No. 2017-150 of 8 February 2017 on film licensing)
http://merlin.obs.coe.int/redirect.php?id=18398 FR

Amélie Blocman
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CSA rules on presidential election come into force

The official presidential campaign began in the media on 1 February 2017, in accordance with the CSA's recommendation of 7 September 2016, which was adopted under the Act of 24 April 2016.

The campaign is divided into three stages.

(i) From 1 February to 20 March candidates and their supporters will enjoy equal speaking time and airtime.

This will be calculated for each declared or presumed candidate – not for each political grouping. The principle of equity means that television channels and radio stations must allocate speaking time and airtime to the candidates and their supporters according to their degree of authority within the respective grouping and their actual involvement in the campaign.

(ii) From 20 March until 9 April (inclusive), equal speaking time and airtime are to apply under comparable programming conditions (according to four time slots set by the CSA).

(iii) From 10 April until 9 May, the principle of equal speaking time and airtime must apply, subject to the same programming conditions.

In a communication on 8 February 2016, the CSA presented its report on speaking time allocated over the previous six months of the pre-electoral period, as defined in its meeting of 29 June 2016. The CSA had pointed out repeatedly during this period, both by means of issuing general statements and directly to the editors concerned, that it was necessary to ensure a balanced representation of all the political groupings. It appears that, following these interventions, particular care has been taken to redress the serious imbalances that had been observed at one point on the TF1 and M6 television channels (specifically, the overexposure of the Parliamentary opposition – see IRIS 2017-2/17). On this occasion, the CSA emphasised more particularly the involvement of the public service channels in the provision of programmes devoted to political news; it noted that the issues of both the number of hours of airtime and balance had been respected.

At the same time, the CSA rejected an application from the Front National party, which felt it had been at a disadvantage in terms of speaking time during the pre-electoral period and wanted to have the benefit of a "carry-over" to the new period beginning on 1 February. "The rules applicable to the calculation of speaking time do not permit any carry-over from one period to the next", according to the written reply from the CSA's President. It should be recalled that editors had notified the CSA of "difficulties" encountered in the replies they had received from the Front National party to their proposed allocations of speaking time.

• *Temps de parole (1er août 2016 - 31 janvier 2017) : un bilan équilibré, communiqué du CSA du 8 février 2017* (Speaking time (1 August 2016- 31 January 2017): a balanced result; notice from the CSA of 8 February 2017)
http://merlin.obs.coe.int/redirect.php?id=18399 FR

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Facebook and Google join forces with French media to combat fake news

Facebook and Google have simultaneously announced the deployment in France in the near future of arrangements for flagging fake news.

To achieve this, Facebook has joined forces with eight French partner organisations in the media (Le Monde, Agence France-Presse, BFM-TV, France Télévisions, France Médias Monde, L'Express, Libération, and 20 Minutes) so that users can flag information they believe to be fake. The links flagged are to be gathered together on a portal to which the partner media organisations will have access, and they will then be able to check the information. If two partner organisations determine that the reported content is fake and post a link that attests to this, the content will then be visible to users with an icon indicating that two "fact-checkers" question the truthfulness of the information. If a user wishes to share the content, a window will open with a warning. It will not be possible to use such content for advertising on Facebook. Additionally, sites circulating fake information will have reduced visibility.

A similar scheme was set up in the United States in December with the support of five media organisations, and another is to be launched soon in Germany.

At the same time Google (through its media division Google News Lab) and the media network First Draft announced on 6 February the launch of CrossCheck, a collaborative checking tool. Here again the aim is to contain the circulation of misleading and false information. Sixteen editorial teams have joined the new effort (including AFP, Les Echos, Le Monde, France Télévisions, and La Provence), as have several technology companies. Members of the public will be able to report dubious content encountered on the Internet or social networks, or ask questions on a specialist platform so that CrossCheck's partners can investigate and reply to requests directly on the platform. The platform is to be launched on 27 February, before the French presidential election. Facebook has been accused of having indirectly promoted the election of Donald Trump by helping to propagate fake content in favour of the Republican candidate.

Amélie Blocman
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GB-United Kingdom

RT's Cross Talk discussion programme breaches Ofcom's impartiality rules

On 19 December 2016, Ofcom held that an episode of RT's Cross Talk discussion programme breached Rule 5.2 of Ofcom's Broadcasting Code by failing to ensure due impartiality in a debate that it aired concerning NATO and its relationship with Russia. RT is a global news and current affairs channel produced in Russia and funded by the Federal Agency for Press and Mass Communications of the Russian Federation. In the UK, RT broadcasts on satellite and digital terrestrial platforms and is licensed to TV Novosti.

Ofcom considered a complaint about an episode of Cross Talk broadcast on 11 July 2016 in respect of alleged bias against America and the West concerning the role and conduct of NATO (North Atlantic Treaty Organisation) towards Russia. The programme was presented by Peter Lavelle, with guests Dmitry Babich and Mark Sleboda, following the NATO summit in Warsaw on 8-9 July 2016.

The Ofcom decision includes a transcript of part of the conversation between the presenter and his guests about the increased NATO presence in countries bordering Russia, and that such activity was provocative and risked misunderstandings and possible confrontation with Russia. Also, polls undertaken in certain NATO countries suggested that the majority of the population of those countries was opposed to NATO. During the programme various captions appeared, including "Russia: Military buildup is part of NATO's 'anti-Russia' hysteria", and "Critics: calling Russia aggressive is tactic to get NATO to spend more".

Ofcom considered the broadcast warranted investigation under Rule 5.5 of the Code, which reads, "Due impartiality on matters [relating to] political or industrial controversy and matters relating to current public policy must be preserved by any person providing a service. This may be achieved within a programme or over a series of programmes taken as a whole."

RT admitted to Ofcom that the programme had breached Rule 5.5 but in mitigation cited its programme called Worlds Apart broadcast on 14 July 2016, in which a retired US army general gave a favourable viewpoint of NATO. RT admitted having increasing difficulty getting commentators to balance viewpoints, and this was causing "problems" for RT. Moreover, RT had experienced some technical problems, so captions showing alternative viewpoints during the Cross Talk show could not be aired; however, RT has introduced a new system.

RT has since taken down the offending Cross Talk episode from their website, and is reviewing its compliance procedures and training "as a matter of urgency" and is "taking steps to minimise" any future mistakes."

Ofcom decided there had been a breach of Rule 5.5. While Ofcom took account of Article 10 of the European Convention on Human Rights (ECHR), in fulfilling its statutory duty it had to balance freedom of expression against the need to preserve "due impartiality". Due impartiality did not mean equal time and impartiality could be achieved within one programme or over a series of programmes. If persons with alternative opinions were not available then there were various editorial methods to help maintain impartiality, such as captions outlining an alternative opinion; however, Ofcom stressed that solely including captions would not necessarily address the need for due impartiality.

Whilst RT had in other programmes used comments from persons with different views to those appearing on the Cross Talk programme there had to be a distinct editorial link between the different programmes, which was not the case here. The episode of Cross Talk used no material presenting an alternative opinion about NATO from any other RT broadcast. A broadcaster can be flexible in how it achieves due impartiality but this had not been achieved on this occasion.

Ofcom noted that RT had recorded a number of breaches of Section 5 in other programmes, including its Going Underground broadcast (see IRIS 2016-9/18). Ofcom has requested that RT attend a meeting to discuss its compliance in this area.

• Ofcom Broadcast and On Demand Bulletin, Issue number 319, 19 December 2016, p. 18
http://merlin.obs.coe.int/redirect.php?id=18395 EN

Julian Wilkins
Blue Pencil Set

Fox News breaches Ofcom's Rule 9.2 by holding out advertising as editorial content

On 19 December 2016 Fox News - broadcast on the digital satellite platform and owned by Fox News Limited Liability Company - was found to be in breach of Rule 9.2 of Ofcom's Broadcasting Code for insufficiently distinguishing between its editorial content and an advertising segment in its "Fox and Friends" programme. "Fox and Friends" is a weekday news and general discussion programme broadcast from New York between 6 a.m. and 9 a.m. (EST) and simultaneously in the UK between 11 a.m. and 2 p.m. (GMT). Ofcom received a complaint concerning a "Fox and Friends" segment called "It's Your Money" and broadcast on 28 June 2016.

The "It's Your Money" section is a three-way discussion between the programme's two presenters and Megan Meany, a representative of the website Mega Morning Deals. Each discussion focused on a particular product offered exclusively to "Fox and Friends" viewers at a discounted price. Apart from the dialogue between the presenters and the representative, there were several on-screen graphics detailing pricing and product information, including the original price and the discounted price.

Ofcom invited Fox News to comment on the allegation of it having breached Rule 9.2, which states: "Broadcasters must ensure that editorial content is distinct from advertising."

Fox's response included the observation that the programme had a relaxed informal tone and covered an array of subjects, with Mega Morning Deals segment offering helpful consumer advice and details of available discounts. Neither Fox News nor its presenters received any financial reward from the segment. Furthermore, the broadcaster considered that due regard should be had to the right to freedom of expression enshrined in Article 10 of the European Convention on Human Rights (ECHR). Although Fox News did recognise Ofcom's obligations under the Communications Act 2003 regarding the setting of standards for broadcast content, Fox News said: "It remains an important principle that expression rights should be restricted only where it is necessary and proportionate to do so."

For the purposes of Rule 9.2, Fox News considered that the "It's Your Money" section was sufficiently differentiated from the regular editorial content by use of unique graphics and music to indicate to the viewer a shift between editorial and non-editorial content. Fox News said the section was not promotional as it was alerting viewers to available discounts rather than the products themselves. Also, it added that the section did not constitute advertising and no distinction under Rule 9.2 was required.

Ofcom responded by stating that its statutory duty is to set standards for broadcast content, including compliance with international obligations such as the Audiovisual Media Services (AVMS) Directive concerning advertising on television. The AVMS Directive places limits on the amount of advertising that broadcasters are permitted to transmit, and one of its provisions is designed to maintain a distinction between advertising and editorial content, and includes the requirement that television advertising be kept visually and or audibly distinct from programming. This requirement is reflected in Ofcom's Code on the Scheduling of Television Advertising (COSTA) and the Broadcasting Code. COSTA applies to advertising and the Code to programming itself. The requirement for a distinction between content and advertising was aimed at preventing content being controlled by advertisers and also preventing broadcasters from using editorial airtime for advertising purposes to subvert the AVMS Directive's limits on the amount of airtime allowed for advertising.

Ofcom said that the codes do not prevent broadcasters from offering and promoting goods and services that may be of interest to viewers. However, advertising and programming had to be distinct. Ofcom concluded that the segment on "Fox and Friends" was presented as content. Its regular presenters were in conversation with Megan Meany and the purpose of the section was to promote the sale of goods. The presenters reaction to the discounts ("Wow, what a saving") formed part of the promotional role and the overall content was akin to advertising. Although the segment was presented and classed as programming it did not detract from it being akin to advertising; more should have been done to make the differentiation between editorial and advertising, and the failure to do so was a material breach of Rule 9.2.

• Ofcom Broadcast and On Demand Bulletin, Issue number 319, 19 December 2016, p. 51
http://merlin.obs.coe.int/redirect.php?id=18395 EN

Julian Wilkins
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BBC Trust upholds complaint of lack of impartiality in interview with Leader of the Opposition

The BBC Trust's Editorial Standards Committee considers complaints about unfair treatment in BBC programmes. It has upheld a complaint about an item relating to the Leader of the Opposition, Jeremy Corbyn, broadcast in the main evening news bulletin.

The item was broadcast three days after the Paris shootings and just before the then Prime Minister, David Cameron, was due to make a speech announcing the government's anti-terrorism policy. A clip was included of Mr Corbyn stating that he was not happy with a "shoot-to-kill" policy and that it could be dangerous and counter-productive. The report said this was the answer to a question put to him about whether he would be "happy for British officers to pull the trigger in the event of a Paris style attack". He had not in fact been asked that question; the response was in fact to a previous question about whether he would be happy to allow police or the military to "shoot to kill" on British streets. In the same interview, he had also supported stronger security measures involving the police. The report also stated that "[the Prime Minister's] message and the Labour leader's couldn't be more different".

A complaint was made by a member of the public that if the BBC had thought that Mr Corbyn was opposed to permitting police to open fire when terrorists were committing mass murder, that question should have been put to him. The Committee considered that it was not accurate to present Mr Corbyn's reply as a response to a question he had not been asked and

then to rely on the response to a different question to support the claim of major disagreement with the Prime Minister. It found that there was no evidence of bias or of any intent by the BBC to misrepresent Mr Corbyn's position. However, given the importance of the issues involved, the BBC had a particular duty to ensure the accuracy of the context in which politicians' views are best understood by audiences. Here the inaccuracy on a highly contentious political matter meant that this standard had not been achieved and so the item was not duly impartial.

• BBC Editorial Standards Committee, "News at Six, BBC One, 15 November 2015", issued January 2017
http://merlin.obs.coe.int/redirect.php?id=18368 EN

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Non-domestic TV channels: changes to access service obligations

On 2 December 2016, Ofcom published a document announcing several decisions regarding the enhancement of "access services" to "non-domestic" television channels, which are channels licensed by Ofcom for transmission to other EU member states.

Access services (required for domestic channels since 2005) comprise subtitles, audio description and signing. The provision of such services enables people with impairments to their sight and/or hearing to access television. The obligation has been imposed on non-domestic channels since 2014. Certain exceptions (mainly with respect to signing) apply to channels with "smaller audiences".

Three main changes are announced in the document: first, the transitional period for non-domestic channels with smaller audiences, originally ending on 31 December 2016, will be extended to 31 December 2017. In the meantime, signing requirements can be met by the provision of additional subtitling. Second, after January 2018, non-domestic broadcasters with smaller audiences must meet rising targets for sign language; failing that, such broadcasters must make increasing financial contributions to Ofcom-approved alternative arrangements. However, if Ofcom is satisfied that sign language users in any particular country would prefer other arrangements, Ofcom may allow other arrangements, such as increased levels of subtitling, instead.

Finally, from 1 January 2018, channels broadcasting to Iceland, Liechtenstein and Norway - that is, EEA countries where the Audiovisual Media Services Directive applies - will be required to provide access services on the same basis as those targeting EU Member states.

• Ofcom, Non-domestic TV channels: changes to access service obligations, 2 December 2016
http://merlin.obs.coe.int/redirect.php?id=18396 EN

• Ofcom, 2015 Consultation: Non-domestic TV channels: proposals to modify access service obligations, 14 October 2015
http://merlin.obs.coe.int/redirect.php?id=18369 EN

• Patrick Mitchell and Ed Chalk, Ofcom announcement on non-domestic TV channels: changes to access service obligations, 5 January 2017
http://merlin.obs.coe.int/redirect.php?id=18370 EN

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Council of State decision on digital television licences

The plenary session of the Council of State, Greece's supreme administrative court, published on 13 January 2017 its decision no. 95/2017 on the application by Antenna TV for the nullification of Ministerial Decision No. 4297/1.3.2016 of the Minister of the State by which the Minister transferred to the Secretariat General of Information and Communication the authority to licence four HD, nationwide, free to air, DTT providers. The announcement of the outcome of the internal deliberation of the court on 26 October 2016 had already resulted in the interruption of the licensing procedure, which had reached the point of the allocation of the four licences (see IRIS 2016-9/20).

According to the majority of the Plenary, the licensing procedure was flawed from the outset because it sidestepped the competent (under the Constitution and the law) independent authority - that is, the National Council for Radio and Television (ESR). The court confirmed well-established jurisprudence, adjudicating that the meaning of paragraph 2 of Article 15 of the Constitution (which stipulates that radio and television are under the direct supervision of the State and that the ESR is the competent authority for the supervision and imposition of administrative sanctions on radio and television) is that the Council has exclusive authority to licence such providers. According to the reasoning of the decision, the Government, when regulating the operation and licensing of radio and television service providers, must cooperate with the ESR and other competent (in relation to technical issues) authorities. On those grounds, the Council of State annulled the ministerial decision conferring the power of organising the licensing procedure on the Secretariat of Information and Communications.

The announcement of the Council of the State's ruling sparked a tense debate between Government and the Opposition regarding the next steps that should be

taken. Finally, the Parliament passed, on 3 November 2016 two amendments to Law 4339/2015 by which the ESR was given the power to give its opinion regarding (a) the number and the kind of free-to-air DTT licenses to be allocated, and (b) the starting auction price. The opinion of the Authority is binding on the Minister who, in case of disagreement, can only abstain from taking a decision.

Changes in law facilitated the members of the Conference of the Presidents, a special Parliamentary body authorised to elect the members of the ESR, to reach an agreement and elect new members of the Authority after seven unsuccessful attempts (see IRIS 2016-5/20). In its session of 11 November 2016, this parliamentary body appointed (after a proposal by the opposition party Nea Dimokratia) as the new President of the ESR Mr Athanasios Koutromanos, former President of Arios Pagos (Greece's high civil court), together with seven other members.

The ESR has recently begun a public consultation with interested parties before determining its final decision on the number and the kind of licences to be granted. However, at the same time, applications for the annulment of other Ministerial Decisions that have a direct impact on the content of the upcoming tender (such as the one determining the number and the kind of employees in each licensed company) are still pending before the Council of the State.

• ΑΡΙΘΜΟΣ *95/2017* - ΤΟ ΣΥΜΒΟΥΛΙΟ ΤΗΣ ΕΠΙΚΡΑΤΕΙΑΣ - ΟΛΟΜΕΛΕΙΑ (Council of State decision no. 95/2017, 13 January 2017)
http://merlin.obs.coe.int/redirect.php?id=18371 EL

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IE-Ireland

Court of Appeal judgment of disclosure of journalists' notes

The Irish Court of Appeal has ruled that the discovery of journalist's notes and other background material pertinent to an alleged defamatory publication concerning a former member of An Garda Síochána (Ireland's National Police Service), Lynda Meegan, is to be refused on the grounds that it was not specific enough to be granted.

The proceedings arose following an article which appeared in the Sunday Times newspaper on 14 September 2014. The article entitled "Convicted bomb maker was recipient of Garda intelligence" stated inter alia that a senior figure in the Continuity IRA had been identified by Special Branch as the person who had received sensitive information from a former Garda about operations against dissident republicans. The article named Joe Fee, "a convicted bomb maker from Monaghan" as "the focus of an investigation into the disclosure of information likely to be of use to terrorists". The article further stated that "the female officer is said to have sent texts to Fee and alerted him to the identities of dissidents arrested by Gardaí" and that the texts were "intercepted by Crime and Security, the Garda agency responsible for spying on dissidents". The article stated that "the officer, who cannot be named, resigned after being confronted" and that "she is the subject of a continuing criminal investigation".

The plaintiff, Ms Meegan, "states that she is the former member of An Garda Síochána referred to in the article and pleads that these allegations are false and defamatory of her". The Court of Appeal noted that "it is not disputed by the defendant newspaper, the Sunday Times, that Lynda Meegan is indeed the person referred to in the article, although the newspaper contends that she has not been identified in the piece in question". In the High Court, Justice Barr ordered discovery of the journalists' notes and other background material relevant to the alleged defamatory publication on the basis that the plaintiff was entitled in principle to the discovery as a consequence of The Sunday Times' plea of the defence of fair and reasonable publication on a matter of public interest pursuant to section 26 of the Defamation Act 2009, subject only to questions of journalistic privilege and legal professional privilege.

In the Court of Appeal, Judge Hogan observed that section 26 of the Defamation Act is a "novel provision" which "has yet to be successfully invoked in any reported defamation case" and is "clearly designed to provide a defence for publishers who show that they acted bona fide and that the publication was fair and reasonable having regard, in particular, to the matters set out in section 26 (2) of the 2009 Act".

Justice Hogan highlighted that in discovery, the material sought "must be both relevant and necessary" and was of the opinion that Ms Meegan had "not yet established that such discovery" was either of these. He opined that "the present section 26 defence is so general and imprecise" that Ms Meegan "cannot at present know the nature of the actual section 26 defence she will have to meet at trial, nor the facts which may be relevant in the context of any such defence." Judge Hogan stated that the "modern thinking" on discovery "suggests that discovery requests should be specific and focussed, so that the courts should be willing to confine categories of documents to what is genuinely necessary for the fairness of the litigation."

In reversing the decision of the High Court, Justice Hogan held that "it is at present premature to assess whether the discovery sought is genuinely necessary for the proper conduct of this litigation, at least until the scope and extent of the section 26 defence

is clarified" and "particulars of the facts proposed to be relied upon" by the Sunday Times "in support of that defence are duly ascertained, whether by further pleading or by particulars."

• Meegan v Times Newspapers Limited t/a The Sunday Times [2016] IECA 327, 09 November 2016
http://merlin.obs.coe.int/redirect.php?id=18372 EN

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Broadcasting Authority rejects a number of complaints about the Rose of Tralee

The Broadcasting Authority of Ireland (BAI) has rejected five complaints concerning separate comments made by two contestants on the Rose of Tralee programme broadcast on RTÉ One in August 2016. The Rose of Tralee is a light entertainment television programme featuring young women of Irish descent from around the globe who take part in the competition to be selected as the 'Rose' for the coming year. The BAI's decision was notable for considering the issue of entertainment programmes featuring unplanned discussion of matters of public debate, and its consequence for broadcasters' duties.

The complaints were submitted under the Broadcasting Act 2009 and various sections of the BAI Code of Programme Standards and the BAI Code of Fairness, Objectivity and Impartiality in News and Current Affairs. The complaints centered on two concerns: first, an interview with the North Carolina Rose and her comments in relation to attending Mass while in Ireland, and secondly, an interview with the Sydney Rose and her comments on Ireland's 8th Amendment to the Constitution concerning abortion.

In her interview with the presenter, the North Carolina Rose stated that Mass was "really holy" and the "act of sitting down and standing up was like going to a gym and being given a 'biscuit' at the end", to which the presenter retorted, "was it gluten free?" One complainant argued that the conversation allowed the contestant to "ridicule, make fun of, and generally rubbish the Irish Roman Catholic Mass". RTÉ defended the exchange as "giving a light-hearted, humorous and respectful account of her attendance at mass", and deemed that there was "nothing blasphemous, nor was there an abuse of religions". The BAI rejected the complaints, stating that, while the comments were "irreverent and humorous" and some audience members may have been offended, participants in the programme have the right to their views and the right to frame their own experiences in their own words". The BAI were of the opinion that the comments "were not of a nature that they would cause widespread offence".

The BAI also rejected two complaints regarding an interview with the Sydney Rose "who was allowed to air her views on the 8th Amendment to the Irish Constitution and who also asked the Irish people to support the repeal of this amendment." According to one complainant, the comments "constituted an unwarranted interference in the internal affairs of the Irish democracy"."

RTÉ stated that the "personal view on the 8th Amendment to the Constitution expressed by the Sydney Rose in a live, unplanned, unscripted and unforeseen supplement to her answer on a question about her work with survivors of domestic violence, certainly related to a topic of public debate". However "the brief articulation of a personal opinion did not, in the view of RTÉ, generate current affairs content from what is essentially human interest entertainment."

In its ruling, the BAI found that the comments were the Sydney Rose's "personal opinion, made in the context of a light entertainment interview whose focus was on her character and her interests". The Committee also found that the presenter "did not specifically elicit her views on the topic of Ireland's abortion laws nor did he pursue this topic further".

Accordingly, the BAI rejected the complaints.

• Broadcasting Authority of Ireland, Broadcasting Complaint Decisions, 31 January 2017, pp. 15-31
http://merlin.obs.coe.int/redirect.php?id=18373 EN

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BAI holds broadcaster "failed to take appropriate action so as to avoid undue offence"

The Broadcasting Authority of Ireland (BAI) has upheld a complaint, in part, against the broadcaster 98FM regarding the treatment of a caller who related her story on air regarding her decision to terminate a pregnancy following a diagnosis of a fatal foetal abnormality.

The complaint was submitted under the Broadcasting Act 2009: the BAI Code of Fairness, Objectivity and Impartiality in News and Current Affairs and the BAI Code of Programme Standards. The complainant, Mrs Jennifer Ryan, stated that she received a call from "Dublin Talks", a talk and phone-in show, "asking if she would take part in the programme the following day." Mrs Ryan said she was "assured", having spoken to the production staff, "that it would be a 10-minute chat with the presenter just to relate the story of her and her husband's decision to terminate her pregnancy following a diagnosis of fatal foetal abnormality." Having outlined her reasons on air for taking the decision to end the pregnancy, the presenter then

invited callers to give their views. Mrs Ryan stated that one of the callers was permitted to make "several hurtful and grossly offensive comments", to which she was invited to react by the presenter; however, she said that she felt it difficult to answer to such offensive comments and the presenter finally decided to take control of the discussion again and to end her participation in the programme, while keeping the caller who had made the offensive comments about her on air. The complainant asserted that, having been subjected to "horrific abuse and cross-examination from a listener, she was then denied any right of reply by the programme makers".

98FM contended that Mrs Ryan "did not have to agree to go on the show" and had been told it was "a caller-based show and there would be other callers involved". 98FM maintained that when other callers were introduced, she "was given an opportunity to respond to each one". 98FM claimed that when one caller "went too far and questioned the veracity of her story, the presenter intervened and stated that to suggest such a thing was outrageous".

The BAI Compliance Committee noted that Mrs Ryan "had agreed to speak publicly on the topic of abortion and fatal foetal abnormality" and therefore "should reasonably expect to be questioned about this topic and her views". The BAI did not consider that there were grounds to uphold the complaint further to Principles 5 (respect for persons) and 7 (privacy) of the BAI Code of Programme Standards, given the nature of the programme, the audience expectation and Mrs Ryan's agreement to participate in the programme.

However, the BAI Committee concluded that the programme did not meet the obligation for fairness set out in the BAI Code of Fairness, Objectivity and Impartiality in News and Current Affairs or the obligation included in the BAI Code of Programme Standards "to take timely corrective action where unplanned content is likely to have caused offence" (Principle 2). In reaching its decision, the Committee had regard to "the facilitation during the programme of a caller who made a range of abusive and offensive remarks" against Mrs Ryan. While the Committee were of the opinion that Mrs Ryan "should have expected to be questioned on her personal experiences and any views she may have on the broader issue of abortion", the caller in question inter alia repeatedly queried her honesty, "made allusions (both direct and indirect) to her complicity in what he considered to be murder," and "implied that she was lying so as to advance the cause of those who favour liberalising Ireland's abortion law"." The BAI noted it was evident that the caller's remarks were causing "clear offence to the audience". Given this fact and given that the caller's comments "were made directly to a caller who had undergone a traumatic experience", the BAI were of the view "that the programme makers had failed to take appropriate action so as to avoid undue offence to audiences and to the complainant". Accordingly, the Committee upheld the complaint in part.

• Broadcasting Authority of Ireland, Broadcasting Complaint Decisions, 31 January 2017, pp. 4-9
http://merlin.obs.coe.int/redirect.php?id=18373 EN

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IT-Italy

Supreme Court rules again on the digital terrestrial television channels line-up

By the judgment handed down on 15 November 2016 and published on 20 January 2017 (no. 1547/2017), the Italian Supreme Court (Joint Sections) has written the last chapter of the seven-year-old battle (see IRIS 2016-3/23) over the Regulation on the digital terrestrial television channel line-up ("LCN"), adopted in 2010 by the Italian Communication Authority (AGCOM) by resolution no. 366/2010/CONS.

The saga that has (likely) ended up with such a decision began right after the approval of the LCN regulation, which was challenged by several local broadcasters who alleged that LCN positions had not been allocated in accordance with the relevant law. The Council of State, the highest administrative court in Italy, took four decisions in August 2012 voiding the LCN regulation in its entirety. Then, in October 2012, AGCOM issued a draft of the new LCN regulation that was eventually adopted after a public consultation in March 2013 (resolution no. 237/13/CONS). This second LCN regulation was also challenged by some broadcasters as it assigned the positions 7, 8 and 9 to national channels rather than to local channels. According to AGCOM, there were no grounds for attributing these positions otherwise, as their allocation was based on the preferences of Italian viewers. Upon a complaint filed by Telenorba, a large local broadcaster, the Council of State, by decision no. 6021/2013, partially invalidated the second LCN regulation, finding that AGCOM had not complied with the principles laid down by the Council of State judgments of 2012. By the same decision, the Council of State appointed an extraordinary commissioner ("commissario ad acta") to amend the LCN plan in accordance with the criteria set forth in the previous decisions. According to the highest administrative court, after the invalidation of the first numbering plan and in order to adopt the new LCN plan, AGCOM should have carried out a survey on viewers' preferences in 2010, when the first LCN regulation was adopted. The same decision is at the roots of two different proceedings. On the one hand, the decision was appealed before the Supreme Court. In judgment no. 1836/2016, the Supreme Court found that, from a practical point of view, it would have been impossible for AGCOM, in

2013, to draft the plan according to viewers' preferences in 2010; in the view of the Supreme Court, the analogue switch-off which had occurred in the period in-between had significantly affected users' habits and this meant that (i) it was practically impossible for AGCOM to carry out such a survey on choices as they were before the switch off; and (ii) it was necessary for AGCOM to consider the impact of the transition on viewers' preferences in order to release the new LCN plan.

In the meantime, however, the extraordinary commissioner appointed by the Council of State had taken a resolution on April 2015 whereby she held that even adopting the point of view of viewers' preferences in 2010, positions 7, 8 and 9 would have been correctly allocated to national channels.

Telenorba then asked the Council of State to invalidate the extraordinary commissioner's resolution. The highest administrative court delivered its decision two days after the Supreme Court judgment on the appeal of decision no. 6021/2013, rejecting the complaint and upholding the extraordinary commissioner's resolution which had, in the meantime, been deprived of any power as a consequence of Supreme Court judgment no. 1836/2016.

Even this Council of State decision has been challenged before the Supreme Court. In this last chapter of the saga, the Supreme Court has found that the voidance of decision no. 6021/2013 of the Council of State has triggered a situation where all the acts and activities carried out on that legal basis no longer have effect. Nor is it possible, in the Supreme Court's view, to challenge the extraordinary commissioner's resolution, which is no longer effective. Consequently, the Court ruled that Telenorba cannot obtain the LCN positions assigned to national channels.

• *Suprema Corte di Cassazione, sezioni unite, sentenza n. 1547 del 20 gennaio 2017* (Italian Supreme Court, Joint Sections, decision no. 1547 of 20 January 2017)
http://merlin.obs.coe.int/redirect.php?id=18374 IT

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Supreme Court issues decision concerning website where defamatory comments posted by users

On 27 December 2016, the Italian Supreme Court published a decision through which it confirmed the conviction of the owner of the website www.agenziacalcio.it for defamation. The defamatory comment had first been posted by a user of the same website.

The latter, in fact, posted a defamatory comment concerning "C.T.", the person targeted by the statement, below an article on the website. At the time, C.T. was President of the National Youth League of the Italian Football Association ("FIGC") and he is currently serving as President of the FIGC.

In order to corroborate his statement, the user sent the alleged criminal record of C.T. to the website owner via e-mail. The website owner posted an autonomous article on the website a few days later, recalling the same facts as mentioned in the user comment and citing links to C.T.'s alleged criminal records. Furthermore, in this article the website owner replied to a press release issued by the FIGC asking if the act of questioning whether C.T had been elected legally constitutes defamation.

However, despite the offensive nature of the comment, which in the Court's opinion was known to the website owner, the latter voluntarily kept the comment online, contributing to the defamation of C.T.; an indication of his knowledge of this lay in the fact that the defamatory nature of the comment was at no time challenged by the website owner during the judicial proceedings.

Based on what had emerged from the Supreme Court's ruling, C.T. then filed a criminal report for the crime of defamation, and the public prosecutor issued a preventive seizure order against the website.

Before the first instance Court of Bergamo, the website owner was acquitted, but the acquittal was later reversed by the Court of Appeals of Brescia.

The last instance appeal, before the Supreme Court of Cassation, was rejected and the conviction is now final.

• *Corte Suprema di Cassazione, V sez. penale, 27 dicembre 2016 (data ud. 14 luglio 2016), n. 54946* (Supreme Court of Cassation, 5th criminal division, 27 December 2016 (date of hearing 14 July 2016), n. 54946)
http://merlin.obs.coe.int/redirect.php?id=18375 IT

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LU-Luxembourg

ALIA imposes a warning on RTL to report accurately and truthfully

In a decision dated 12 January 2017, the Independent Audiovisual Authority of Luxembourg (Autorité Luxembourgeoise Indépendante de l'Audiovisuel, ALIA) found that CLT-Ufa had violated its obligations regarding the impartiality, objectivity and accuracy of reporting in relation to its programme RTL Télé Lëtzebuerg. Due to the small size of the Luxembourg audiovisual market, there is no genuine public service

broadcaster; however, CLT-Ufa has been put in charge of certain public service missions laid down in a licensing agreement and in the accompanying book of obligations (cahier de charges) concluded with the Luxembourg government. It is thus incumbent on CLT-Ufa to provide programmes in the Luxembourgish language on its channel RTL Télé Lëtzebuerg.

One sequence of the programme entitled "Den Nol op de Kapp" ("Hitting the nail on the head"), broadcast on 3 October 2016, received public attention, including substantial press coverage. It featured an interview with Mr Erico Lunghi, the Director of the Musée d'art moderne (Museum of Modern Art), which had been cut to dramatise the interview and portray Mr Lunghi in a bad light. In essence, the interview gave the impression that Mr Lunghi had threatened the journalist, and he was actually disciplined for his behaviour by the government minister in charge of this matter; he eventually resigned. ALIA, acting in accordance with Article 35sexies (3), investigated the case upon its own motion and examined whether the broadcaster had violated the Law on Electronic Media, the obligations ensuing from its book of obligations, or any internal codes of conduct. Representatives of the broadcaster were invited to several hearings.

The question of whether internal procedures regarding the independence of journalists and the editorial independence of programme producers had been sufficient was put forward by ALIA's director who manages the authority's investigations pursuant to Article 35bis(B)(2)(2), but was not pursued further.

The focus of the decision was the use of the "jump cuts" technique, a technique whereby sound and images are separated in order to attribute a different sound to the images. During the hearings, CLT-Ufa did not deny that it had modified the material, but considered that the modifications had not changed the meaning of the interview. ALIA, on the other hand, underscored that a particular responsibility is incumbent on CLT-Ufa as it is a dominant player in the Luxembourgish market for both radio and audiovisual media services acting under specific obligations. As such, the broadcaster was expected to supply programmes of a particular quality and integrity in which viewers could trust.

When comparing the programme broadcast with the entirety of the material recorded, ALIA found that the reportage eliminated a sequence of about 30 seconds from the interview, thus stringing together two sentences that Mr Lunghi had originally said apart from each other. The viewer was thus confronted with an affirmative statement with a tenor that was much stronger than in reality.

ALIA's decision outlines the exact course of the conversation and is also based on a comparison of the originally recorded material ("rushes") and the extracts that were subsequently broadcast. This comparative video is available on ALIA's website. As a result of the manipulation of the sound and the images, an appearance was created that distorted what had actually happened, reinforcing the perception of Mr Lunghi's behaviour as negative.

ALIA thus sanctioned the non-compliance with several provisions of CLT-Ufa's book of obligations regarding the impartiality, accuracy and objectivity of information, and consequently imposed a warning.

• *Décision DEC005/2017-A007/2016 du 12 janvier 2017 du Conseil d'administration de l'Autorité luxembourgeoise indépendante de l'audiovisuel concernant une plainte à l'encontre du service RTL Télé Lëtzebuerg.* (Decision of 12 January 2017 of the Board of Directors of the Independent Audiovisual Authority of Luxembourg concerning a complaint directed at the service RTL Télé Lëtzebuerg)
http://merlin.obs.coe.int/redirect.php?id=18376 FR

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RO-Romania

President promulgates law on cutting the public radio and TV fee

On 6 January 2017, the Romanian President promulgated Act no. 1/2017 that slashes 102 non-fiscal taxes and duties, including the public radio and TV fees, the consular and citizenship fees and the Environment Fee. The law was published in the Official Journal of Romania no. 15 of 6 January 2017. According to an amendment adopted in the Budgets Committee of the Chamber of Deputies, the law enters into force on 1 February 2017, at the beginning of the first month following its publication in the Official Journal of Romania.

On 28 December 2016, the Chamber of Deputies (the lower Chamber of the Romanian Parliament) rejected the President's request to re-examine the law. Previously, on 27 December 2016, the upper Chamber, the Senate, had also rejected the re-examination of the law. The Social Democrat Party (PSD, the main party in the ruling coalition) had promised to cut the 102 non-fiscal taxes and duties in the electoral campaign for the recent parliamentary elections held on 11 December 2016, which the PSD won by a very large margin.

The Romanian President had previously challenged the law before the Constitutional Court, which ruled on 16 December 2016 that the law was compliant with the Romanian Constitution. Then, on 23 December 2016, the President asked the Parliament to re-examine the law. With regard to cutting the licence fee for public radio and television broadcasters, he considered that the decision of whether or not to cut the licence fee for Radio Romania and the Romanian

Television should only be taken after a large debate. The President also considered that cutting the licence fee could create very important functional problems for the Public Broadcasting Service (PBS) and could diminish the quality of the journalistic contents, combined with the risk of reduced editorial independence, due to the public radio and TV stations' financial envelope being potentially subject to political control.

According to the specialists, the republished Act 41/1994, which regulates the activity of the Romanian public radio and television broadcasters, will have to be further modified to clarify the legal status of the two PBS, which will be completely financed from the State budget, but which are, in the existing form of the Act 41/1994, public services of national interest, editorially independent, under Parliamentary control.

• *Legea privind eliminarea unor taxe şi tarife, precum şi pentru modificarea şi completarea unor acte normative - forma pentru promulgare* (Act on cutting some taxes and tariffs, as well as on the modification and completion of more laws - form sent for promulgation)
http://merlin.obs.coe.int/redirect.php?id=18381 RO

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SE-Sweden

Zlatan Ibrahimović wins slander lawsuit

On 9 January 2017, the Swedish District Court of Värmland sentenced the athletics coach, lecturer and former CEO of the Swedish National Cross Country Skiing Team, Ulf Karlsson, to fines amounting to a total of SEK 24,000 for gross slander of the footballer Zlatan Ibrahimović. Mr Karlsson had been charged with making statements during a debate on doping in team sports in which he claimed that Mr Ibrahimović had used doping during his time as a player in Juventus FC.

The case against Mr Karlsson included two separate charges: according to Mr Ibrahimović, Mr Karlsson had slandered him both during the debate and in an interview with a reporter in connection with the debate; this interview was eventually published in a newspaper.

Mr Karlsson was convicted for gross slander with regard to the debate. However, he was acquitted on the other charge with reference to the fact that the statements in question were made by Mr Karlsson to a journalist; by making the statement directly to a journalist, the statement was covered by the Swedish Freedom of the Press Act. This meant in turn that liability for the published statement was with the editor in chief of the newspaper.

Neither of the parties has appealed against the judgment.

• *Case nr B 1576-16, 9 January 2017* (Case nr B 1576-16, 9 January 2017)
http://merlin.obs.coe.int/redirect.php?id=18378 SV

Erik Ullberg and Christoffer Lundmark
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Agenda

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