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IRIS
Legal Observations
of the European Audiovisual Observatory

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COUNCIL OF EUROPE

European Court of Human Rights: Rolf Anders Daniel Pihl v. Sweden

The decision in Rolf Anders Daniel Pihl v. Sweden deals with a complaint about an alleged breach of the applicant's right to privacy and reputation under Article 8 of the European Convention on Human Rights (ECHR), because the Swedish authorities had refused to hold the operator of a website liable for a defamatory blog post and an anonymous online comment. Again, the European Court of Human Rights (ECtHR) applies a crucial distinction between illegal hate speech and defamation, limiting the liability of the operator of the blog when it (only) concerns defamation, and not incitement to violence. The blog post at issue had wrongfully accused Mr. Pihl of being involved in a Nazi political party. The day after publication of the post, an anonymous person posted a comment calling Pihl "a real hash-junkie". The blog, which was run by a small non-profit association, allowed comments to be posted without being checked before publication. The commentators were considered responsible for their own statements, and therefore they were requested to "display good manners and obey the law". Nine days later Pihl posted a comment on the blog in reply to the blog post and comment about him, stating that both allegations were false and requesting their immediate removal. The following day the blog post and the comment were removed and a new post was added on the blog by the association - stating that the earlier post had been wrong and based on inaccurate information - and it apologised for the mistake. However, Pihl sued the association and claimed symbolic damages of SEK 1, approximately EUR 0.10. He submitted that the post and the comment constituted defamation, and that the association was responsible for the fact that the blog and the comment had remained on the website for nine days. The Swedish courts however rejected Pihl's claim. They agreed that the comment constituted defamation, but found no legal grounds on which to hold the association responsible for failing to remove the blog post and comment sooner than it had done. Pihl complained before the ECtHR that his right to privacy and reputation under Article 8 ECHR had been breached.

First the Court considered that the comment, although offensive, certainly did not amount to hate speech or incitement to violence, and accepted the national courts' finding that the comments at issue constituted defamation and, consequently, fell within the scope of Article 8. Next, the Court referred to its case law in Delfi AS v. Estonia (see IRIS 2015-7/1) and Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt v. Hungary (see IRIS 2016-3/2), and summarised the aspects that are relevant for the concrete assessment of the interference in question: "the context of the comments, the measures applied by the company in order to prevent or remove defamatory comments, the liability of the actual authors of the comments as an alternative to the intermediary's liability, and the consequences of the domestic proceedings for the company". As regards the context of the comment, the Court noted that the underlying blog post accused Pihl, incorrectly, of being involved in a Nazi political party, but also that the post and the subsequent comment were promptly removed and an apology published when Pihl notified the association of the inaccurate allegations about him. The Court attached particular importance to the fact that the association is a small non-profit association, and observed that it was also unlikely that the blog post and the comment at issue would be widely read. It considered that "expecting the association to assume that some unfiltered comments might be in breach of the law would amount to requiring excessive and impractical forethought capable of undermining the right to impart information via internet". As regards the measures taken by the association to prevent or remove defamatory comments, the Court noted that it was clearly stated on the blog that the association did not check such comments before they were published and that commentators were responsible for their own statements. The Court also referred to its earlier case law in which it held that "liability for third-party comments may have negative consequences on the comment-related environment of an internet portal and thus a chilling effect on freedom of expression via internet. This effect could be particularly detrimental for a non-commercial website". Turning to the liability of the originator of the comment, the Court observed that Pihl obtained the IP-address of the computer used to submit the comment, but that there were no indications that he took any further measures to try to obtain the identity of the author of the comment. Lastly the Court noted that Pihl's case was considered on its merits by two judicial instances at the domestic level before the Supreme Court refused leave to appeal. The Court further observed that the scope of responsibility of those running blogs is regulated by domestic law and that, had the comment been of a different and more severe nature, the association could have been found responsible for not removing it sooner, e.g. if it had concerned child pornography or incitement to rebellion or violence. In its overall conclusion the ECtHR again emphasised the fact that the comment, although offensive, did not amount to hate speech or incitement to violence and was posted on a small blog run by a non-profit association, which removed it the day after the applicant's request and nine days after it had been posted. In view of this, the Court finds that the domestic courts acted within their margin of appreciation and struck a fair balance between Pihl's rights under Article 8 and the association's opposing right to freedom of expression under Article 10 ECHR.

Therefore the Court found the application to be manifestly ill-founded.

• Decision by the European Court of Human Rights, Third Section, case of Rolf Anders Daniel Pihl v. Sweden, Application no. 74742/14, 9 March 2017
http://merlin.obs.coe.int/redirect.php?id=18454 EN

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EUROPEAN UNION

Court of Justice of the European Union: AKM v. Zürs.net

On 16 March 2017, the Court of Justice of the European Union (CJEU) delivered its judgment in AKM v. Zürs.net, concerning copyright and retransmission of broadcasts of a public broadcaster by a local cable network. The case arose following a dispute between the Austrian copyright collecting society AKM, and Zürs.net, which is a cable network operator that transmits television and radio broadcasts made initially by the Austrian national broadcaster ORF. Zurs.net had approximately 130 subscribers.

AKM requested that Zürs.net provide it with the number of subscribers connected to its cable network, and the content broadcast, and where appropriate, pay to it a fee, for making available works protected by copyright and related rights. However, Zürs.net pointed to paragraph 17(3)(2)(b) Urheberrechtgesetz (Austria's copyright law), which provides that transmission of broadcasts via a "communal antenna installation" when subscribers connected to the installation does not exceed 500 subscribers, does not constitute a new broadcast. Moreover, under the same provision, transmission of broadcasts of the national broadcasting corporation ORF using cables in Austria constitutes part of the original broadcast. Zürs.net argued that the broadcasts that it distributes cannot be regarded as new broadcasts and that it is therefore under no obligation to provide the information required by AKM. The Vienna Commercial Court decided to refer a question to the CJEU on whether the rules under Austria's copyright law concerning communal antenna installations, and transmission of broadcasts of the ORF that use cable services, was consistent with the InfoSoc Directive (2001/29/EC).

The Court first addressed the provision that transmission of programmes broadcast by the national broadcasting corporation, by means of cables, was part of the original broadcast. In particular, whether this rule was consistent with Article 3 of the Directive, which provides that authors have the exclusive right to prohibit communication to the public of their works. In this regard, the Court held that there had been no "communication to the public". The Court held that when they grant a broadcasting authorisation to ORF, the rightholders concerned are aware that the broadcasts made by that national corporation may be received by all persons within the national territory. Given that the distribution of the protected works by means of cables is carried out on the national territory and that the persons concerned have therefore been taken into account by the rightholders when they granted the original authorisation for the national broadcaster to broadcast those works, the public to which Zürs.net distributes those works cannot be regarded as a new public. Therefore, such a transmission is not subject to the requirement that authorisation be obtained from the rightholders under Article 3 of the Directive.

The Court then addressed the provision that transmission of broadcasts by means of a communal antenna installation, to which a maximum of 500 subscribers are connected, is not regarded as being a new broadcast. The Court held that such a provision "is likely" to attract economic operators wishing to take advantage of it, and to lead to the continuous and parallel use of a multiplicity of communal antenna installations. Consequently, this could result, over the whole of the national territory, in a situation in which a large number of subscribers have parallel access to the broadcasts distributed in that way. Such a provision could not be regarded as consistent with Article 5(3)(o), which allows an exception to Article 3, but only for "a use in certain cases of minor importance".

• Judgment of the Court of Justice of the European Union in Case C-138/16 Staatlich genehmigte Gesellschaft der Autoren, Komponisten und Musikverlegerregistrierte Genossenschaft mbH (AKM) v. Zürs.net Betriebs GmbH, 16 March 2017
http://merlin.obs.coe.int/redirect.php?id=18455 NN 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: Consultation on significant market power guidelines

On 27 March 2017, the European Commission launched a public consultation on reviewing the Commission's 2002 Guidelines on market analysis and the assessment of significant market power (SMP) under the regulatory framework for electronic communications networks and services (Framework Directive 2002/21/EC) (see IRIS 2002-9/10). The purpose of the

consultation is to review and update the Guidelines to coincide with the implementation of the proposed new European Electronic Communications Code (see IRIS 2016-10/4). The update of the guidelines shall take into account changes in the telecoms markets and recent developments in regulatory and competition law.

Article 15(2) of the Framework Directive requires that the Commission publish the Guidelines, and that the Guidelines are addressed to national regulatory authorities, which must take the "utmost account" of the Guidelines when defining relevant markets and assigning telecommunications operators with significant market power. This is with a view of imposing on the operators appropriate regulatory obligations to redress competition problems.

In the Consultation, the Commission is seeking to update several sections of the Guidelines. First, the Consultation asks a number of questions concerning the section of the Guidelines on market definition, including the main criteria for defining the relevant product market and whether there should be updated or additional guidance. Second, the Consultation examines Section 3 of the Guidelines, on the criteria for assessing significant market power, including on collective dominance. This is the largest section in the Consultation, and has detailed questions on recent Court of Justice of the European Union case law. Third, the Consultation considers Section 4 of the Guidelines, on the imposition of regulatory obligations on SMP operators by national regulatory authorities. Finally, the Consultation seeks input on a number of procedural issues under Section 5, concerning powers of investigation and cooperation procedures for the purpose of market analysis; and under Section 6 for consultation and publication of National Regulatory Authorities decisions.

The Consultation is open until 26 June 2017, and the Commission states that the responses will provide guidance to the Commission in the review process of the 2002 SMP Guidelines, in time for the implementation of the new European Electronic Communications Code.

• European Commission, Public Consultation on the Review of the Significant Market Power (SMP) Guidelines, 27 March 2017
http://merlin.obs.coe.int/redirect.php?id=18477 DE EN FR CS DA EL ES ET FI HU IT LT LV MT NL PL PT SK SL SV HR

• European Commission, Commission launches public consultation on the review of the Significant Market Power Guidelines, 27 March 2017
http://merlin.obs.coe.int/redirect.php?id=18480 EN

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UNITED NATIONS

United Nations: Joint declaration on freedom of expression and "fake News", disinformation, and propaganda

On 3 March 2017, a joint declaration on freedom of expression and "fake news", disinformation, and propaganda was adopted by the four special mandates for protecting freedom of expression (the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media, the Organization of American States Special Rapporteur on Freedom of Expression, and the African Commission on Human and Peoples' Rights Special Rapporteur on Freedom of Expression and Access to Information), with assistance of ARTICLE 19 and the Centre for Law and Democracy (CLD).

The declaration starts by taking note of and expressing concern at the increase of disinformation and propaganda in legacy and social media around the world, fuelled by both state and non-state actors. This kind of content, according to the special mandates, is designed to mislead a population and affect the public's right to know and individuals' rights to freedom of expression and to hold opinions.

The special mandates express alarm over actions by public authorities that undermine the role of journalists as public watchdogs, such as denigrating, intimidating, and threatening media by referring to them as 'members of the opposition', to be lying, or having a hidden political agenda.

The special mandates also deplore actions taken by governments against dissent and controlling public communication, such as: repressive rules regarding the establishment or operation of media; interference in operations by, among others, denying accreditation and prosecution based on political motives; laws restricting dissemination of content; states of emergency arbitrarily established; technical controls like the blocking, filtering, jamming, or closing down of digital spaces; and pressuring intermediaries to restrict content.

Notably, it refers to specific principles related to online content, such as that intermediaries should not be held liable for third party content related to their services unless they specifically intervene in that content or refuse to obey an order. Moreover, the blocking of entire websites, IP addresses, ports, or network protocols are considered to be extreme measures that can only be applied under the same conditions that are applied for justifying the restriction of freedom of expression.

When referring to the standards on disinformation and propaganda, the declaration states that general prohibitions on dissemination of information that comes from vague and ambiguous ideas are incompatible with the international guarantees for freedom of expression. Moreover, the declaration provides that criminal defamation laws should be abolished for being unduly restrictive.

Regarding the positive obligation of states to promote an enabling environment for freedom of expression, the declaration refers to the need to establish clear regulatory frameworks for broadcasters; ensure the presence of strong, independent and adequately resourced public service media; encourage measures to promote media diversity; promote media and digital literacy; and promote equality, non-discrimination, intercultural understanding, and other democratic values. Finally, the declaration gives a relevant value to the role of intermediaries and their responsibility to respect human rights. When addressing this issue, the declaration establishes that, when intermediaries intend to restrict third party content beyond their legal obligation, they must comply with basic standards, such as, among others: adopting clear, predetermined policies that are both easily accessed and understood by users; respecting minimum due process guarantees.

• Declaration by the United Nations Special Rapporteur on Freedom of Opinion and Expression, the Organization for Security and Co-operation in Europe Representative on Freedom of the Media, the Organization of American States (OAS) Special Rapporteur on Freedom of Expression and the African Commission on Human and Peoples' Rights Special Rapporteur on Freedom of Expression and Access to Information, Joint declaration on freedom of expression and "fake news", disinformation and propaganda, 3 March 2017
http://merlin.obs.coe.int/redirect.php?id=18456 EN

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United Nations: New Resolution on the right to privacy in the digital age

On 27 February 2017, the UN Human Rights Council passed a draft resolution on the right to privacy in the digital age. The Resolution calls upon member states to ensure that measures for the prevention of privacy breaches are effective and accessible, and in accordance with international human rights standards. Procedural and legislative framework regarding surveillance of communications should be reviewed. At the same time establishment of independent, effective, and competent domestic oversight mechanisms should be ensured.

The Resolution reiterates that the right to privacy enables enjoyment of other human rights, notably the right to freedom of expression and freedom of peaceful assembly and association, while facilitating individuals' participation in political, cultural, and social life. The problem of automated decision making processes, which may result in discrimination or have negative impact on the enjoyment of human rights, is also recognised. The Resolution emphasises that the processing of personal data without explicit and freely given individual consent for re-use and re-sales has significantly increased in the digital age. Therefore, member states are urged to develop legislative measures and remedies "addressing harm" caused by these methods of processing personal data.

The rapid development of technology has enhanced the capacities of business enterprises and governmental entities to undertake surveillance measures. The Resolution notes that aggregation of vast amounts of meta data "can reveal personal information that can be no less sensitive than the actual content of communication" and, consequently, reveal certain matters about an individual's behaviour and identity. In addition, the unlawful interception of communication and collection of personal data, "when undertaken extraterritoriality or on a massive scale", violates the right to privacy and other human rights and undermines the values of a democratic society. Therefore, member states are urged to respect international obligations in regard to practices of the interception of digital communication.

The Resolution draws particular attention to the relevance of technical solutions for the protection of confidentiality of digital communication, such as encryption and anonymity. The business sector is encouraged to work further on the improvement of these measures and the protection of the confidentiality of communication. Member states should refrain from interfering with the use of these technologies, while any restriction thereon should be compliant with international human rights law. Furthermore, member states should refrain from requiring business entities to disclose personal data in an unlawful or arbitrary way. Instead, they should propose the adoption of measures for the improvement of transparency mechanisms regarding such requests. Finally, the Resolution stresses the importance of fostering the improvement of digital literacy and technical skills necessary for the protection of human rights in the digital age. The United Nations High Commissioner for Human Rights is encouraged to engage in the analysis and debates concerning the principles and standards for the protection of the right to privacy, as well as to prepare a report in that regard for the thirty-ninth Human Rights Council session.

• UN Human Rights Council Resolution on the protection of privacy in the digital age (HRC/34/l.7), 22 March 2017
http://merlin.obs.coe.int/redirect.php?id=18482 EN FR

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NATIONAL

AL-Albania

Regulator concerned about practices of advertising spots in audiovisual media

The Audiovisual Media Authority (AMA) organised a roundtable discussion on 16 March 2017, prompted by several concerns related to the practices of audiovisual media services regarding advertising spots. After monitoring television stations, the regulator identified violations in relation to the duration of the advertising spots and teleshopping segments. According to Article 41 of Law 97/2013 "On Audiovisual Media" the duration of advertising spots or direct sales must not exceed 12 minutes per broadcasting hour. The regulator's monitoring results showed that both national and local television stations had violated this requirement, exceeding the allowed time for advertising on many occasions. Representatives of the regulator said they had communicated with audiovisual media operators both in written form and through individual meetings and had noticed a certain degree of reflection from operators in this respect. The Director of the Programming Section in AMA said that the monitoring of advertising practices of the audiovisual media had started in a regular manner from the end of 2015 and had continued in 2016, and he added that it was a priority for the regulator.

Another major concern identified during the monitoring of advertising practices was the advertising spots for medicines, medical institutions, and specialised doctors. For this purpose, representatives of the Order of Physicians and the Order of Pharmacists shared their own observations and concerns on the advertising spots broadcast on audiovisual media regarding medicines and medical institutions, based on the internal regulation and deontology of the profession of physicians and pharmacists. Another major concern was the practice of hidden advertising, often present in main news editions, as well as in programmes and talk shows, but not identified as such for the public.

• *Autoriteti i Mediave Audiovizive organizon tryezën e diskutimit: Transmetimi i reklamave dhe komunikimeve tregetare – dukuri dhe qasje ligjore ne tregun audioviziv* (Report on the meeting of the Audiovisual Media Authority)
http://merlin.obs.coe.int/redirect.php?id=18464 SQ

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Albanian Media Institute

BA-Bosnia And Herzegovina

Work of Parliament blocked, financial disaster for the public service

The public broadcasting system in Bosnia and Herzegovina comprising the national broadcaster BHRT and the constituent entity broadcasters RTVFBiH and RTRS, has been brought into a dead-end situation as it is evident that the national parliament will not discuss models for its funding any time soon. This political situation has been further cemented by a formal blockade of the House of Peoples of Bosnia and Herzegovina by the SNSD, the ruling party from the Republika Srpska. It decided not to participate in the work of the parliament's upper house as a result of a crisis created by a non-institutionally filed application for the revision of an aggression and genocide lawsuit against Serbia. Since decisions in the House of Peoples are confirmed by ethnic consensus, all legislative activity at state level has been blocked, including the funding of public services.

However, this has only institutionalised a months-long ongoing process without bringing the positions of the deeply divided ethnic constituent entities of Bosnia and Herzegovina any closer. All three public broadcasters had been funded primarily from the radio and television tax collected together with the money raised through landline phone bills. After years-long contracts with telecom operators had expired, and after several extensions, political party representatives in parliament were unable to agree on a new funding model. Serbian and Croatian parties hold opposing views regarding the funding model; the former prefer a different way of distributing the collected tax among the entity and national broadcasters, whereas the latter seek to maintain the current system of funding, but they criticize the fact that its programme does not show consideration for the cultural and political interests of the Croatian people.

The Croatian People's Assembly (HNS) and the Croatian Caucus Delegates in the Bosnia and Herzegovina Parliament's House of Peoples developed a Proposal for the Transformation of the Public Broadcasting System in Bosnia and Herzegovina so that Croatians would get their own public broadcasting service. These proposals were presented in the Bosnia and Herzegovina Parliament on 27 February. The head of HNS's Culture, Sport and Media Section said that Croatians, as a constituent people, have a constitutional right to create their own public broadcasting service in their own language. He stated that, guided by the principle of the constituency of peoples, the proposal offered "a new basic model for the public broadcasting service, better reflecting the constitutional structure of Bosnia and Herzegovina, could in-

clude an own broadcasting service for each of the three peoples, as well as an overarching broadcasting service reflecting the shared needs of all citizens of Bosnia and Herzegovina".“ A second option is to keep the two entity broadcasters, but to have two channels of Bosnia and Herzegovina Federation service - in both the Croatian language and Bosnian languages. The entity televisions would be funded from the budget and the national service would be funded through tax.

The head of HNS's Culture, Sport and Media Section said that they believed this model could be acceptable to all sides and that it made all publics in Bosnia and Herzegovina equal. They had to accept the fact that Bosnia and Herzegovina was a highly plural society in terms of identity and that each of these segments had specific social, national and political characteristics, and that the public service should be a space within which each of these publics can make itself visible.

Immediately after the proposal was presented, a number of Bosnian political representatives rejected the proposed construction, considering it an additional division of the country. A parliamentary session to discuss this issue is uncertain due to the political crisis in Bosnia and Herzegovina.

Of the three public broadcasters, BHRT is in the direst situation:some of its accounts are blocked, salaries are late and claims by suppliers are accumulating. On multiple occasions, the management has warned that there is a danger of a total programme shutdown. The public services' trade union announced that there would be protests in front of Parliament and that the building's exit would be blocked.

• *Javna rasprava: Četiri kanala: HNS spremio prijedlog za reformu RTV-sustava* (Public hearing: Four channels: prepared HNS proposal to reform the broadcasting system)
http://merlin.obs.coe.int/redirect.php?id=18468 BS

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BG-Bulgaria

Taking advantage of a stronger position during negotiations for the distribution of 'bTV Media Group' Ltd. programmes

The Bulgarian Commission for the Protection of Competition (CPC) found in a decision of 28 February 2017 infringements under Article 37420 of the Law on Protection of Competition that 'bTV Media Group' Ltd had taken advantage of a stronger position during negotiations. It imposed a pecuniary penalty of BGN 2.915.514 (approximately EUR 1.500.000). The law prohibits any action or inaction of a commercial entity with a stronger negotiation position that contradicts conscientious commercial practice and that damages or can damage the interests of the weaker party during negotiations for potential clients. Unconscientious actions or inaction are those without objective economic grounds, such as the unfounded refusal for the provision or purchase of goods or services; the imposing of difficult or discriminatory conditions without reason; or the unfounded termination of commercial relations. A stronger negotiation position is identified based on the peculiarities of the structure of the applicable market and on the specific legal relations among the affected commercial entities. Factors taken into consideration are: the dependency level among them; the nature of their activity and the difference in its scope; and the probability of finding alternative commercial partners, including the existence of alternative sources for provision, and of alternative distribution channels and/or clients.

The proceedings were initiated at the request of 'Virginia-R N' Ltd., Bourgas, 'Vital-I' Ltd., Sandanski, 'Digital cable television' Ltd., Plovdiv and 'Cable Sat-West' Ltd., Blagoevgrad who reported on infringements related to Article 37420 on the part of 'bTV' and 'Nova Broadcasting Group' JSC. While examining the case, the Commission found that certain provisions of the General terms and conditions of 'bTV Media Group' Ltd. relating to the right to the wireless distribution of 'bTV Media Group' Ltd television programmes. in satellite (DHT) electronic communication networks, as well as their distribution in cable and IPTV electronic communication networks, were considered to be taking advantage of the company's stronger position. The General terms and conditions apply with respect to the cable (platform) operators who are clients of the media and obtain rights for the broadcasting of their television programmes.

Firstly, the Competition Protection Commission found that through its General Conditions, 'bTV Media Group' Ltd., in its capacity as a premise with a stronger negotiation position in its legal relations with the cable operators 'Vital-I' Ltd., Sandanski, 'Digit cable television' Ltd., Plovdiv and 'Cable Sat-West' Ltd., Blagoevgrad established the remuneration due by these operators based on a guaranteed minimum number of subscribers, which could not be decreased, even in the case of an established real number of subscribers which was lower than the agreed guaranteed minimum number.

Secondly, data brought to light during the proceedings showed that 'bTV' did not apply a clear and single criterion to identify the real number of subscribers for each of the operators. Instead, it used different sources of information and different methods to establish this number for each of them.

By the above-stated actions, the defendant-company imposed unreasonably heavy conditions on the cable operators 'Vital-I' Ltd., Sandanski, 'Digit cable televi-

sion' Ltd., Plovdiv and 'Cable Sat-West' Ltd., Blagoevgrad, and thus took advantage of its stronger negotiation position as specified by Article 37420 of the Law on Protection of Competition. By its resolution, the Commission imposed three separate sanctions of BGN 971.838 (approximately EUR 500.000) for each of the legal relations of bTV with the three cable operators, and it suspended the infringing actions, subject to immediate execution. As to 'Nova Broadcasting Group' JSC, the Commission established that there were no infringements.

• Решение на Комисията за защита на конкуренцията , Решение № АКТ *-220-28.02.2017* (Decision of the Competition Protection Commission, № АКТ -220-28.02.2017)
http://merlin.obs.coe.int/redirect.php?id=18465 BG

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Violations of the Election Code

The elections for the Bulgarian Parliament were scheduled for 26 March 2017. The Central Election Commission of the Republic of Bulgaria (the Commission) has initiated proceedings for infringement of the Election Code during the pre-election campaign. The infringement is claimed against the coalition parties of "Unification DOST" ("Dost" in the Turkish language means "friend"). The Commission found two videos in connection with the election campaign on the coalition's official website. One of the videos contains subtitles in a language (Turkish) other than Bulgarian.

The Central Election Commission claims that the publication of the clip with subtitles in a language other than Bulgarian is a violation of Article 181, paragraph 2 of the Election Code. According to the law, the election campaign must be conducted in the Bulgarian language.

On 11 March 2017, the Commission enacted Decision No. 4488- НС which led to the removal of the allegedly infringing video from the official website of "Unification DOST". The Commission also ruled to stop the broadcasting of the audiovisual material across all media as well as its dissemination on the Internet. The Commission found a violation of the provisions of Article 181, paragraph 2 of the Election Code.

The Commission received a further notification of a violation of the Election Code from the Council for Electronic Media. It is alleged that on 20 March 2017, during an interview with the political leader Veselin Mareshki, the media services provider "Nova Broadcasting Group" JSC broadcast sociological research by the agency "Gallup International". The information broadcast failed to contain any details on the client who commissioned the survey or the source of its financing.

According to Article 205, paragraph 1 of the Election Code, any publication of public opinion polls or sociological surveys in connection with the elections, carried out by means of a media service or in any other manner, from the day the President's decree announcing the elections is promulgated in the State Gazette until polling day, must contain, inter alia, information on the client who commissioned the poll or survey, the agency which conducted it, and the sources of financing of the poll or survey. On 21 March 2017, the Commission took Decision No. 4571- НС and found that there had been a violation of the provision of Article 205, paragraph 1 of the Election Code.

The Election Code provides that any person who violates a provision of the Code shall be liable to a fine or to a pecuniary penalty of between BGN 200 and BGN 2,000 (approximately EUR 100 to EUR 1000). The written statement ascertaining the violation shall be drawn up by the Chairperson of the Commission (Article 496, paragraph 1). The Election Code provides for the penalty decrees to be issued by the Regional Governor of Sofia.

• Решение № *4488-* НС на Централната избирателна комисия (Decision No. 4488- НС of the Central Election Commission)
http://merlin.obs.coe.int/redirect.php?id=18492 BG
• Решение № *4571-* НС на Централната избирателна комисия (Decision No. 4571- НС of the Central Election Commission)
http://merlin.obs.coe.int/redirect.php?id=18493 BG

Rayna Nikolova
New Bulgarian University

DE-Germany

Licence fee also applies to second homes

In eight different procedures, the Bundesverwaltungsgericht (Federal Administrative Court) decided on 25 January 2017 that the application of the broadcasting licence fee to second homes is compatible with the principle of equal treatment (case nos. 6 C 7.16, 6 C 11.16, 6 C 12.16, 6 C 14.16, 6 C 15.16, 6 C 18.16, 6 C 23.16 and 6 C 31.16).

The plaintiffs had argued that the full licence fee should not apply. Under the previous system, in which the fee had depended on ownership of a reception device, they had only been required to pay a reduced fee on the grounds that they only owned a radio or new type of reception device, but no television set. Under the new system, in which all home owners are liable, the plaintiffs must pay the full amount.

The plaintiffs who owned a second home also argued that the licence fee should not apply to their second homes.

Since the Bundesverwaltungsgericht had previously decided in a number of procedures that the home owners' obligation to pay the full licence fee was compatible with the Grundgesetz (Basic Law), in the procedures at hand it merely had to decide whether the application of the fee to second homes conformed to the principle of equal treatment.

The Bundesverwaltungsgericht decided that the application of the licence fee to second homes was compatible with the Grundgesetz. Linking the fee to home ownership was the most practical solution. It removed the need for expensive investigations, which intruded on people's privacy, and this was precisely why the legislator had changed the licence fee system. However, if exceptions were made for second homes, such investigations would again be necessary. In addition, only a few people were affected by the rule, that is to say, people who lived alone in both their first and second homes. In all other circumstances, the possibility of simultaneous use existed, which meant applying the licence fee to both homes was justified.

• *Urteil des Bundesverwaltungsgericht vom 25. Januar 2017, 6 C 11.16* (Ruling of the Federal Administrative Court of 25 January 2017, 6 C 11.16)
http://merlin.obs.coe.int/redirect.php?id=18470 DE

Gianna Iacino
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Cable providers must treat private broadcasters equally

On 23 February 2017, the Kommission für Zulassung und Aufsicht (Commission on Licensing and Supervision - ZAK) of the Landesmedienanstalten (regional media authorities) decided that platform operator NetCologne may not charge some private channels for carrying their programmes while, at the same time, carrying others free of charge.

Since 2015, during the introduction of a new business model, NetCologne GmbH had, one by one, been replacing its existing agreements with broadcasters with new ones. This meant that some broadcasters had to pay for their programmes to be distributed while others did not. A number of private broadcasters, including Sport1, complained about this to the Landesanstalt für Medien Nordrhein-Westfalen (North Rhine-Westphalia regional media authority - LfM), which was responsible for NetCologne.

The LfM agreed with the complainants. The platform provider's claim that it could not introduce the new business model for all broadcasters simultaneously on account of the market position of individual broadcasters or broadcasting groups was not sufficient justification for its actions. Although there was no reason why it should not introduce new agreements and business models, there should not be a transitional period during which some broadcasters had to pay it to distribute their programmes while others did not. This was discriminatory and therefore breached the Rundfunkstaatsvertrag (Inter-State Broadcasting Agreement). The ZAK therefore thought that similar broadcasters should be treated equally and ordered NetCologne GmbH to actively reinstate equal treatment; otherwise, there was a risk that unequal treatment - including that of smaller private broadcasters - would be exacerbated further.

The charging of cable feed-in fees continues to occupy the courts in relation to a dispute that first erupted in 2012, following the cancellation of agreements between ARD and ZDF on the one hand and Vodafone and Unitymedia on the other. When ARD and ZDF refused to pay the fees on the basis of the 'must-carry' rules, Kabel Deutschland and Unitymedia submitted several complaints to the courts. In June 2015, the Bundesgerichtshof (Federal Supreme Court - BGH) had decided that the cable network was obliged to carry the channels, but that there was no obligation for them to pay for the privilege (rulings of 16 June 2015, case nos. KZR 83/13 and 3/14). The cable network operators lost EUR 27 million per year as a result of this decision.

• *ZAK-Pressemitteilung 04/2017 vom 23. Februar 2017: Einspeisekonditionen von Plattformbetreibern: ZAK setzt Gleichbehandlung von Anbietern durch* (Commission on Licensing and Supervision, press release 04/2017 of 23 February 2017: feed-in conditions of platform operators: Commission on Licensing and Supervision demands equal treatment of broadcasters)
http://merlin.obs.coe.int/redirect.php?id=18471 DE

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Internet streaming of World Handball Championships required authorisation

At its meeting in Stuttgart on 31 January 2017, the Kommission für Zulassung und Aufsicht (Commission on Licensing and Supervision - ZAK) of the Landesmedienanstalten (regional media authorities) decided that Deutsche Kreditbank (DKB) should have obtained a licence to provide a live Internet stream of matches in the World Men's Handball Championship. Although the media watchdog did not impose a fine in this case, it announced that it would take stricter measures against providers of similar streaming services in future.

Between 11 and 29 January 2017, DKB had provided a live stream of 51 of the 88 matches in the World Handball Championship on the handball.dkb.de website and on its own YouTube channel. Viewers were able to watch the matches in HD quality on the Internet and the streaming service was used over 18 mil-

lion times. All the matches shown included a live commentary. DKB provided a German commentator for the matches involving the German team, the opening match, the semi-finals and the final, while the other matches featured the signal provider's English commentator.

DKB officials did not think the streaming service needed to be either officially declared or authorised; however, the ZAK disagreed, classifying the transmission as a 'linear information and communication service aimed at the general public'. The broadcast of handball matches with a commentary, regardless of the language, was a journalistic service. The stream was not, therefore, a telemedium that did not require authorisation, but a form of broadcasting for which permission should have been sought.

In the ZAK's opinion, the journalistic nature of the service was not affected if a third party acquired the rights for secondary or parallel transmission in another country where it broadcast the matches under its own responsibility. This was true even if the content of the secondary or parallel transmission had not been altered, all the more so if it was a handball match with a German commentary.

Generally speaking, the distinction between television broadcasting and on-demand audiovisual media services is laid down in European law by the Audiovisual Media Services Directive (AVMSD). According to the AVMSD, an on-demand audiovisual media service is provided by a media service provider for the viewing of programmes at the moment chosen by the user and at his or her individual request on the basis of a catalogue of programmes. A television broadcast, on the other hand, is provided by a media service provider for the simultaneous viewing of programmes on the basis of a programme schedule. According to the Rundfunkstaatsvertrag (Inter-State Broadcasting Agreement), individual, linear programmes are excluded from the concept of broadcasting. In view of the large number of handball matches that were streamed on the Internet on the basis of a schedule, the ZAK had no doubt that this should be classified as broadcasting and therefore required authorisation.

The Bayerische Landeszentrale für neue Medien (Bavarian New Media Office - BLM) had instigated the administrative proceedings against DKB in agreement with the ZAK. In view of the specific circumstances of the case, it had decided not to request the immediate prohibition of the unauthorised broadcasts or a fine. In addition, DKB had immediately agreed to comply with the advertising rules applicable to broadcasting under the Rundfunkstaatsvertrag and to record the transmission of the matches in accordance with broadcasting law. In future, companies will need to check in good time whether the services they offer via streaming platforms require authorisation in order to avoid prohibition orders and fines. In view of the increasing number of such cases, the ZAK will consider this issue more closely and discuss new regulations within its expert committees and at other meetings.

• *ZAK-Pressemitteilung 02/2017 vom 31. Januar 2017: ZAK beanstandet Internet-Liveübertragung der Handball-WM 2017* (Commission on Licensing and Supervision, press release 02/2017 of 31 January 2017: Commission on Licensing and Supervision complains about live Internet streaming of the 2017 World Handball Championship)
http://merlin.obs.coe.int/redirect.php?id=18472 DE

Ingo Beckendorf
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ES-Spain

CAC denounces two child pornography websites to the prosecutor and the police

On 8 March 2017, the Catalan Audiovisual Council (CAC) denounced two child pornography websites to the State prosecution and to the Catalan police. The Council took this action following a complaint made against the two above-mentioned websites.

The two sites are in English and offer free-to-view photographs of underage girls who are nude or semi-nude. One of the two websites announces that on a pay-per-view basis, each user can access a range of 1,000 videos and 10,000 pictures banned on social networks.

The first website belongs to the profile of an online community based in the United States which is specialised in artistic content. After analysing this website, the CAC stated that the webpage contains pictures of girls that appear to be underage. The girls are in lingerie and are holding a camera or mobile phone in their hand, as if they had taken the photograph of themselves in a mirror.

Some of these pictures include the address of the second website with a title that suggests that they are teenagers. This second site shows girls that appear to be underage exhibiting their sexual organs, some of whom are in an explicit sexual act. The website announces that by means of payment or on a subscription basis, a user can access a large volume of videos and photograph which, according to the website, were banned on Facebook, Instagram and Snapchat.

In its report on these two websites, the CAC concluded that, given the characteristics of the graphic material and the fact that those presented in it appear to be underage, the content on display could be classified as child pornography and can, therefore, constitute conduct liable to be in breach of Article 189 of the Spanish Criminal Code.

• *Consell de l'Audiovisual de Catalunya, El CAC denuncia dues webs amb pornografia infantil a la Fiscalia i als Mossos d'Esquadra, 08/03/2017* (Catalan Audiovisual Council, Catalan Audiovisual Council denounces two child pornography websites to the prosecutor and the police, 8 March 2017)
http://merlin.obs.coe.int/redirect.php?id=18494 CA

Mònica Duran Ruiz
Catalan Audiovisual Council

CAC issues new general instruction regulating the Registry of audiovisual media services providers

By means of the Catalan Audiovisual Council (CAC) Agreement 15/2017of 8 February 2017, the Board of the CAC has passed a new general instruction regulating the Registry of audiovisual media services providers. This new general instruction was published in the Catalan Official Journal of 13 March 2017, and will come into force three months after its publication.

The general instruction, by way of its nineteen articles, establishes the Registry as a public record of both a declarative and administrative nature which falls under the competence of the CAC. The purpose of the Registry is to have nominal and descriptive information relating to audiovisual media services providers, including the incidents and changes which affect their licence or prior communication, as well as the rights and duties affecting its compliance, and other data and information determined by the general instruction.

This Registry aims at keeping orderly and comprehensive information on the audiovisual sector in Catalonia and ensuring its active dissemination to society as a whole.

• *ACORD 15/2017, de 8 de febrer, del Ple del Consell de l'Audiovisual de Catalunya, pel qual s'aprova la Instrucció general del Consell de l'Audiovisual de Catalunya per la qual es regula el Registre de prestadors de serveis de comunicació audiovisual de Catalunya* (Catalan Audiovisual Council (CAC) Agreement 15/2017, of 8 February 2017)
http://merlin.obs.coe.int/redirect.php?id=18469 CA

Mònica Duran Ruiz
Catalan Audiovisual Council

FR-France

Legal remedy sought by presidential election candidate wishing to take part in TV debate

On 16 March 2017, the Conseil d'Etat delivered its decision on an application brought by a candidate in the French presidential election to be allowed to participate in a television debate to which he had not been invited. In the case at issue, the television channel TF1 had announced its intention to organise, on 20 March 2017, a television debate between five candidates. Nicolas Dupont-Aignan, a declared candidate, called on the national audiovisual regulatory body (Conseil Supérieur de l'Audiovisuel - CSA) to order the channel to enable him to participate in the debate. In the absence of a favourable reply from the CSA, the candidate referred the matter to the Conseil d'Etat under the urgent procedure mechanism. He felt that TF1's decision constituted a serious and manifestly unlawful infringement of both his right of access to the audiovisual media in the context of a presidential election, and the principle of equity of treatment of candidates provided for in Article 3 I bis of the Act of 6 November 1962, in the version subsequent to the Organic Act of 25 April 2016, and the CSA's recommendation of 7 September 2016.

The Conseil d'Etat recalled that, under the terms of these provisions, the CSA drew up a number of recommendations regarding the 2017 presidential election; these provided that equity of treatment of the candidates should be observed in respect of each of the two following periods: the period from 1 February 2017 to the eve of the publication in the Journal Officiel of the list of candidates drawn up by the Constitutional Council; and the period from the date of publication of the list to the eve of the opening of the election campaign, at which point the requirement of equity becomes stricter. Furthermore, no provision confers on the CSA the power to take the place of audiovisual communication services in defining and implementing their own editorial policy. Not knowing whether the list of candidates would be published in the Journal Officiel before or after the debate, the judge deliberating under the urgent procedure noted that the principle of equity should, in the present case, be observed in respect of both the first or the second period of the campaign. In light of both the representativeness of Mr Dupont-Aignan and his contribution to the electoral debate, the speaking time and broadcasting time he has had since the start of February 2017 did not reflect an imbalance that is incompatible with the principle of equity in respect of the first period. The judge then continued to find that the fact that Mr Dupont-Aignan was not invited to take part in the debate scheduled for 20 March 2017 did not, taken in isolation, represent any failure to recognise the principle of equity. Taking into account firstly Mr Dupont-Aignan's representativeness and his contribution to the electoral debate, and secondly the proposal made to him for a ten-minute interview on the channel's main newscast during the week of 13 to 19 March, the judge deliberating under the urgent procedure found that the applicant's absence from the debate did not produce an imbalance that was incompatible with observance of the principle of equity. This was on the condition that the debate took place during the first period, and was not such as to compromise irremediably observance of the principle

of so-called "stricter equity" if it took place during the second period. Consequently, Mr Dupont-Aignan's application was rejected. On 4 April, Mr Dupont-Aignan took part in the first televised debate to have brought together all eleven election candidates on one studio platform.

• *Conseil d'Etat (ord.réf.), 16 mars 2017, M. Dupont-Aignan* (State Council (judgment delivered under the urgent procedure), 16 March 2017, Mr Dupont-Aignan)
http://merlin.obs.coe.int/redirect.php?id=18473 FR

Amélie Blocman
Légipresse

Base for tax on advertising broadcast by TV channels found unconstitutional

In a decision delivered on 30 March 2017, the Constitutional Council pronounced on the constitutionality of the tax on advertising broadcast by television channels, instituted by Article 302 bis KG of the General Tax Code, in its version subsequent to the Act of 15 November 2013. The tax, payable by all television service editors established in France, is calculated according to the ex-VAT amount of the sums paid by advertisers to the editors of television services "or to the advertising networks" for broadcasting their advertising spots.

In the case at issue, a prior question on constitutionality had been raised on the occasion of a claim brought by the company EDI-TV for the repayment of the tax on advertising broadcast by the television channels due for the year 2015. The applicant company claimed that the provisions of Article 302 bis KG of the General Tax Code ignored the principle of equality before charges levied by the state, on the grounds that the tax to which they subjected television service editors was based in part on sums of money received by third parties, namely the "advertising networks". The tax was therefore being established without taking into account the taxpaying abilities of its taxpayers.

The Constitutional Council noted that the contested provisions include, in the basis for the tax due from the editors of television services, the amounts paid by advertisers to advertising networks. They consequently resulted in subjecting a taxpayer to taxation using a base that included income not at that taxpayer's disposal. The Council found that by laying down the principle of the subjection, of television service editors to payment of a tax calculated on the basis of sums not at their disposal, in all cases and regardless of circumstances, the legislator had ignored the requirements resulting from Article 13 of the 1789 Declaration. Consequently, the phrase "or advertising networks" included in the first sentence of paragraph II of Article 302 bis KG of the General Tax Code was declared contrary to the Constitution. As there was no reason to postpone the effects of the declaration of unconstitutionality, the declaration was to take effect as soon as it was published. Notwithstanding, the declaration may not be invoked in respect of taxation not contested prior to that date.

• *Conseil Constitutionnel, 30 mars 2017, Edi-TV* (Constitutional Council, 30 March 2017, Edi-TV)
http://merlin.obs.coe.int/redirect.php?id=18474 FR

Amélie Blocman
Légipresse

Application for suspension of licence to show subtitled original and French dubbed version of the film 'Sausage Party' to under-12s

On 8 March 2017, the Conseil d'Etat (Council of State) deliberated on an application for the suspension of two film licences issued by the Minister for Culture for the animated film 'Sausage Party', which prohibited the film from being shown to anyone under 12 years old. The appeal was lodged by a number of associations against the judgments delivered under the urgent procedure rejecting their application. One of the licences had been issued for the original version of the film, the other for the French version.

The applicant associations claimed, in support of their appeal, that the licencing board had failed to view the French version of the film. The Conseil d'Etat recalled that, under the regulatory provisions of the Cinema Code, a work that was to be made available both in its original version and dubbed into French required the issue of a licence for each format. If the licencing board is consulted in such a case, it is required to submit an opinion providing the Minister for Culture with suitable information regarding each of the licences to be issued. As provided for in the Cinema Code, if the licencing board, when viewing the work in its original version, has at its disposal the full and final dialogue in French, it is not required, on pain of the procedure being irregular, to view separately each of the formats.

In the case at issue, however, the documents in the file lodged with the judge did not show that the licencing board, at the time it viewed the film 'Sausage Party' in its original version, had had at its disposal the dialogue of the version dubbed into French. In doing so, and whereas it had not been not claimed that it had viewed the version of the film dubbed into French, the Conseil d'Etat found that it had not been put in a position to appreciate the specific features of the dubbed version compared with the original subtitled version. In the circumstances, the Conseil d'Etat found that the judge had committed an error at law in considering that the fact that the licencing board had

viewed only the original version of the film in order to deliver its opinion of both of the formats did not appear likely to have had any influence over the decision made or to have deprived the interested parties of any guarantee.

The applicants also claimed, in support of their referral, that there was no warning accompanying the issue of the licence for the original subtitled version of the film. The judge deliberating under the urgent procedure had felt that the audience was sufficiently informed of the content of the film and of the aspects that were likely to cause offence to younger audiences. This was because, firstly, there was a ban on the film being shown to anyone under 12 years old, which is exceptional in the case of an animated film. Secondly, it was due to the conditions for the film being shown, particularly because of the nature of its title and the promotional poster, and the content of the trailer shown before the film's release. On the basis of these elements, the Court had found that the requirement to provide potential audiences with information about the particularities of the film did not require the licence issued to the subtitled original version of the film to be accompanied by a warning, and the Conseil d'Etat held that the judge deliberating under the urgent procedure had committed a further error at law on this point. The contested judgment rejecting the application for the suspension of the licence issued to the subtitled version and to the dubbed French version of the film 'Sausage Party', which banned showing the film to anyone under 12 years old, was therefore cancelled.

• *Conseil d'Etat, (10e et 9e sous-sect. réunies), 8 mars 2017, Associations Promouvoir et Juristes pour l'enfance* (Council of State, (9th and 10th sub-sections together), 8 March 2017, the associations 'Promouvoir' and 'Juristes pour l'Enfance')
http://merlin.obs.coe.int/redirect.php?id=18498 FR

Amélie Blocman
Légipresse

Change in scheme for television channels contributing to audiovisual production

The Decree amending the scheme requiring editors of television services broadcast terrestrially to contribute to the production of audiovisual works has now been published. It amends Decree No. 2010-747 of 2 July 2010, in order to account for a number of agreements reached recently between service editors and the organisations representing the audiovisual producers.

For the main part, the new Decree introduces the possibility for the national audiovisual regulatory body (Conseil Supérieur de l'Audiovisuel - CSA) to reduce the independent part of the contribution required of an editor of television services devoted to stock works in return for undertakings in favour of increasing the independence of production. In doing so, the CSA may reiterate the requirements contained in these agreements in the convention it concludes with the service editor in question. The CSA thus becomes authorised to reduce the independent part of the contribution devoted to stock works provided for in Article 15 of the Decree of 2 July 2010. However, this is prohibited from being less than 8% of annual net turnover for the previous year, in return for undertakings in favour of increasing the independence of production. The aim of this measure is two-fold. Firstly, it allows service editors greater flexibility in managing the rights they hold in return for their investment in production, thereby enabling them to adapt to the new competition context, marked by the arrival of new players and changes in the way works are used. Secondly, it guarantees to independent producers that the flexibility allowed to editors will be accompanied by new protection in their favour (duration of rights, criteria for capital independence, etc.).

For certain types of works, the Decree adds the possibility of waiving the editor's minimum financing threshold (fixed at 70%), giving the editor the right to hold coproduction shares in the independent part of the obligation. The waiver cannot result in determining a lower financing threshold than 60%. The aim is, for certain types of works (particularly fiction), to allow editors more latitude in holding coproduction shares and thus receiving income from the works they finance. The Decree also introduces the possibility of excluding income not directly connected with broadcasting from the contribution base.

In order to determine compliance with the requirement to broadcast 120 hours of new European works between 8 and 9 pm, the Decree also introduces the possibility of extending the time-slot for calculating such broadcasting (from 9 to 9.30 pm) in return for a smaller allowance for broadcasting repeats, which are currently allowed up to 25% of airtime. This change makes it possible to take into account the evolution in programming practices that are changing in line with audiences and their expectations, with the first evening broadcasts tending to start later than was previously the case. Lastly, the Decree states that the contribution of an on-demand audiovisual media service to the development of the production of audiovisual works may be considered globally, along with the contribution of television services belonging to the same group.

• *Décret n°2017-373 du 21 mars 2017 portant modification du régime de contribution à la production d'œuvres audiovisuelles applicable aux éditeurs de services de télévision diffusés par voie hertzienne terrestre et aux éditeurs de services de médias audiovisuels à la demande* (Decree No. 2017-373 of 21 March 2017 amending the scheme requiring editors of television services broadcast terrestrially and editors of on-demand audiovisual media services to contribute to the production of audiovisual works)
http://merlin.obs.coe.int/redirect.php?id=18499 FR

Amélie Blocman
Légipresse

Publication of Decree laying down rules applicable to the new ethical committee at each national public-sector audiovisual company

The Decree of 21 March 2016 amending the terms of reference of the national public-sector audiovisual companies lays down the common rules applicable to the new ethical committees established at each of the national programming companies (France Télévisions, Radio France, and the company responsible for the audiovisual sector outside France). The 'Media Independence' Act of 14 November 2016 added to the Act of 30 September 1986 an Article 30-8, which provides for the founding of a committee on honesty, independence and diversity in news and programmes, whose members are independent, including each television editor broadcasting political and general news terrestrially, and each generalist radio station broadcasting nationwide. Referrals may be made to these committees by "the governing bodies of the editor, by any mediator, or by any person" to obtain a pronouncement on observance of the demands they supervise.

Adopting the recommendations contained in the opinion delivered by the national audiovisual regulatory body (Conseil Supérieur de l'Audiovisuel - CSA) on 22 February 2017, the text leaves it to the board of directors of the editor in question to determine the exact number of members of its ethical committee (between 5 and 7), who elect their own chair. The company's board of directors may, on its own initiative or on the basis of a proposal from the committee, terminate the mandate of any member who has failed to refrain from publicly adopting any position on matters currently under investigation, or who has failed to observe the confidential nature of its deliberations. As recommended by the CSA, there is no intention that the committee's members should be remunerated, although they may obtain the reimbursement of travel and accommodation expenses incurred in the context of their duties.

The committee is to meet "at least" once every half-year, whenever its chair or a majority of its members so request. Any member may ask for an item to be put on the agenda, and the committee may hear any person it considers to be of use and, protected by confidentiality as afforded by law, may request communication of any document likely to elucidate relevant issues. It also guarantees anonymity for anyone consulting it, should the person so request. The committee's annual report, indicating applications handled and cases passed on to the CSA, will be made public.

• *Décret n°2017-363 du 21 mars 2017 portant modification des cahiers des charges des sociétés nationales de programme France Télévisions, Radio France et de la société en charge de l'audiovisuel extérieur de la France* (Decree No. 2017-363 of 21 March 2017 amending the terms of reference of the national programme companies France Télévisions, Radio France and the company responsible for the audiovisual sector outside France)
http://merlin.obs.coe.int/redirect.php?id=18500 FR

Amélie Blocman
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GB-United Kingdom

Referral of Sky bid on media plurality grounds

Openreach, the infrastructure division of the BT Group (BTG), will become a distinct company with its own staff, management, purpose, and strategy, thus addressing competition concerns held by Ofcom. BT has voluntarily agreed to implement these changes and as a consequence it averts Ofcom's requirement to introduce regulations to effect the change (see IRIS 2017-2/18 and IRIS 2016-4/16).

Openreach Limited was incorporated at UK Companies House on the 24 March 2017. As a distinct company Openreach will have its own directors who will be legally required to make decisions in the interests of customers and not BT. The majority of directors will be independent of BT, with Openreach setting its own strategy and annual operating plans albeit within a budget set by BTG. The Chief Executive will be appointed by Openreach's board and accountable to them; although the appointment can be vetoed by BTG, such veto has to be notified to Ofcom.

The Chief Executive will be responsible for other executive appointments and will report to Openreach's Chair. However, there will be a secondary accountability to BTG's Chief Executive limited to legal, fiduciary, and regulatory obligations. The 32,000 staff employed by Openreach will be transferred from BTG to the new company. However, the existing Crown Guarantee would need to be maintained for Openreach staff, who are members of the BTG pension scheme. The Crown Guarantee is a piece of legislation that ensures the UK government underwrites BTG's obligations to the BT Pension Scheme. Only the government can change the operation of the Guarantee, and legislation will be required to change the existing legislation so as to encompass staff being transferred to Openreach.

BT will retain ownership of assets such as the physical access network, but Openreach will control the building and maintenance of these assets. Branding

will be distinct and BTG will not be reflected in Openreach's promotion of its own brand. There will be an obligation to consult with customers such as Talk Talk, Sky, and Vodafone on large scale investments; such consultations will be confidential without details being disclosed to their competitor BTG. It is not clear if there will be a separate and confidential consultation phase between Openreach and BTG.

The reforms follow concerns that BT had retained control of Openreach's decisions, whilst other telecoms companies had not been consulted sufficiently on investments that affect them. This gave rise to Ofcom being concerned about there being fair competition in the marketplace. Openreach do not operate in Northern Ireland, but BTG will extend the benefits of the changes to BT Northern Ireland, including greater independence, confidentiality, and independent branding to take account of specific local opportunities and circumstances. Once all BTG's proposals are implemented, they will be released from their undertakings to Ofcom who will announce how they will monitor and enforce the new structure for Openreach.

• Ofcom, BT agrees to legal separation of Openreach, 19 March 2017
http://merlin.obs.coe.int/redirect.php?id=18487 EN

Julian Wilkins
Blue Pencil Set

Ofcom clears Sky news of "fake news" accusation and UK Parliamentary committee investigates the effect of "fake news"

A Sky News report broadcast on 7 August 2016 showing an interview with alleged gun dealers in Romania was determined by Ofcom not to have been staged or faked, nor lacking in impartiality. As a consequence Ofcom found the report had not breached Rule 5.1 of Ofcom's Broadcasting Code. The Sky studio introduction to the report said that "A Romanian Gang has told Sky News it's prepared to sell automatic weapons to anyone, including terrorists ... Our chief correspondent Stuart Ramsey has travelled to Romania to meet the gun dealers who claim to have thousands of weapons." The two alleged gun dealers wear hoods to hide their identity and show the news crew various weapons including hunting guns and an AK 47 available for sale. The package includes footage from the Charlie Hebdo attack and reference in the commentary to the AK 47 being the terrorist's "weapon of choice".

Ofcom received over 190 complaints following the report, and the Directorate for Investigating Organised Crime and Terrorism in Romania issued a statement on the report. Sky rebutted the complaints that the news report was fake and that the alleged terrorist had been paid by the news organisation. The interview had taken some time to organise and had been arranged through an experienced UK-based "media fixer", who had introduced a Romanian fixer/interpreter. Sky had worked with the UK fixer before and he had worked for other media organisations too. Both fixers had been paid by Sky for their services, but Sky had not paid money to the arms dealers. Sky produced documentation of the payments and to whom they had been paid. The news organisation admitted some of the weapons shown were hunting weapons. Both Stuart Ramsey and the Sky Head of Security, also present at the interview, had extensive experience of conflict zones and believed that many of the weapons they inspected were of military grade, in particular the AK-47.

Ofcom accepted that nowhere in the broadcast report do Sky state weapons had been sold to terrorists, but the dealers do say they are "willing" to sell to anyone. Ofcom applied Rule 5.1 of the Code, stating that "News, in whatever form, must be reported with due accuracy and presented with due impartiality". The Code makes clear that "due" means adequate or appropriate to the subject and nature of the programme. Ofcom restated that due impartiality may be preserved in a number of ways and it is an editorial decision as to how to present a news story with due impartiality. As such Ofcom found, taking consideration of the report itself, Sky's representations, including disclosed evidence, that there was no breach of Rule 5.1 and that due impartiality had been preserved.

Separate from and not a consequence of the Sky News report and Ofcom's decision, on 30 January 2017 the UK Parliament's Culture, Media, and Sport Committee launched an inquiry into "fake news", particularly through social media and the Internet, whereby stories of uncertain provenance and accuracy were being accepted by some public members as true.

The Committee would investigate various issues including what "fake news" was; what impact "fake news" has on public understanding of the world, and also the public response to traditional journalism; whether different demographic groups are more effected by or susceptible to "fake news" than others; whether changes in the selling and advertising placement have encouraged "fake news" to promote greater web traffic; the responsibilities of search engine and social media platforms including the viability to use computer-generated algorithms to identify genuine reporting from fake news. Written submissions had to be submitted by 3 March 2017 and the Committee is expected to report later this year. The Committee's chairman Damian Green MP said at the inquiry's launch; "the growing phenomenon of fake news is a threat to democracy and undermines confidence in the media in general."

• Ofcom Broadcast and On Demand Bulletin, Issue number 322, 6 February 2017, p.39
http://merlin.obs.coe.int/redirect.php?id=18488 EN

• The Culture, Media and Sport Committee, 'Fake news' inquiry, 30 January 2017
http://merlin.obs.coe.int/redirect.php?id=18489 EN

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Ofcom's new rules on elections and referendums

On 9 March 2017, Ofcom published a statement setting out its decision to remove the concept of the list of "larger parties" from the rules on party political and referendum broadcasts ("PPRB Rules"); and changes to apply Section Five (due impartiality and due accuracy) and Section Six of the Broadcasting Code. The revised PPRB Rules and the revised rules in Sections Five and Six of the Code came into effect on 22 March 2017, in accordance with the transitional arrangements in the BBC Charter and Agreement.

Effective 3 April 2017, Ofcom assumed responsibility as the first external regulator for the BBC. On that date, the BBC Trust ended and it became Ofcom's duty to uphold the BBC's editorial standards and to regulate the competitive effects of its services.

The previous PPRB Rules required certain licensed broadcasters to offer a minimum of two party election broadcasts (PEBs) to each of the defined "larger parties"; in relation to broadcasters' own election programming, broadcaster were required to give "due weight" to the "larger parties"; and, when broadcasting items that feature candidates discussing or raising issues about the constituencies or electoral areas they are contesting, broadcasters were required to ensure candidates representing the larger parties were offered the opportunity to take part. However, under the new PPRB Rules, Ofcom has removed the concept of a list of "larger parties", and instead broadcasters "use their own judgement, based on the criteria of past electoral support and/or current support". Rule 14 now provides that "the number of PEBs should be determined having regard to the circumstances of a particular election, the nation in which it is held, and the individual party's past electoral support and/or current support in that nation".

• Ofcom's rules on due impartiality, due accuracy, elections and referendums: 1.Removing the list of larger parties and 2 Applying the rules to the BBC
http://merlin.obs.coe.int/redirect.php?id=18484 EN
• BBC Charter and Agreement (commenced, January 1st 2017)
http://merlin.obs.coe.int/redirect.php?id=18457 EN
• Note to Broadcasters and On Demand Service Providers, Issue 326 of Ofcom's Broadcast Bulletin 3 April 2017
http://merlin.obs.coe.int/redirect.php?id=18485 EN

• New procedures for handling content standards complaints, investigations and sanctions for BBC programmes
http://merlin.obs.coe.int/redirect.php?id=18486 EN

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Ofcom becomes the BBC's first independent external regulator

On 3 April 2017, pursuant to The Royal Charter for the Continuance of the British Broadcasting Corporation (BBC) Royal Charter (the "Charter") the communications regulator Ofcom will regulate the BBC, succeeding the role previously undertaken by the BBC Trust. Ofcom will be the first external and independent regulator of the BBC. The Charter took effect on 1 January 2017 and expires on 31 December 2027.

Prior to 3 April 2017, the BBC was already subject to certain Ofcom regulation, such as that concerning the protection of children, hatred and abuse, religion, and fairness issues. However, as from the 3 April 2017, the balance of the Ofcom rules will apply, including accuracy and impartiality, elections and referendums, and commercial references in programmes. The Charter stipulates that Ofcom must prepare and publish an Operating Framework that contains the provisions Ofcom consider appropriate to secure effective regulation of the activities of the BBC as set out in the Charter and the Agreement between the Her Majesty's Secretary of State for Culture, Media, and Sport and the BBC (the Framework Agreement).

Ofcom must set an operating licence for the BBC in accordance with the Operating Framework containing regulatory conditions appropriate to ensure the BBC fulfils its Mission; promotes the BBC's Public Purpose to secure distinctive output and services; and secures that audiences in Scotland, Wales, Northern Ireland, and England are well served. Further duties are placed upon Ofcom to consider the BBC's impact on fair and effective competition, as well as holding the organisation accountable (including the application of sanctions where necessary) for its output and services. This includes securing the observance of content standards in accordance with Ofcom's Standards and Fairness Codes. Ofcom plans to publish their final operating licence by the end of September 2017, although the actual timing is linked to the BBC's interim annual plan, which forms part of the regulator's overall consultation. Additionally, by the end of September 2017 Ofcom will publish their final statement on performance measures and procedures.

Pursuant to the Charter, Ofcom must ensure and enforce compliance by the BBC including content standards, competition requirements, and other requirements set out in the Agreement. Regarding competition Ofcom will consider the relationship between

the BBC's public service activities and its commercial subsidiaries' activities to ensure their conduct does not distort the open market, or create unfair advantage for the BBC's commercial entities. The BBC will be subject to procedures implemented by Ofcom to deal with any complaints about the broadcaster's television, radio, and on-demand programmes, including procedures concerning how investigations are conducted and sanctions Ofcom can impose for any breach.

Ofcom must prepare and publish an annual report, in response to the BBC's own yearly report, to include the regulator's assessment of the broadcaster's compliance with specified requirements. Further, Ofcom must publish two or more detailed periodic reviews on the BBC's performance in fulfilling its Mission and promoting its Public Purposes. Any governance functions undertaken by the BBC Trust will be conducted by the BBC's new unitary board of directors, which will govern and run the broadcaster as well be ultimately responsible for editorial and management decisions.

- Ofcom, Ofcom outlines plans for regulating the BBC's performance, 29 March 2017
http://merlin.obs.coe.int/redirect.php?id=18490 EN
- Royal Charter for the continuance of the British Broadcasting Corporation, December 2016
http://merlin.obs.coe.int/redirect.php?id=18458 EN
- The Agreement between the Her Majesty's Secretary of State for Culture, Media and Sport and the BBC, December 2016
http://merlin.obs.coe.int/redirect.php?id=18459 EN

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IE-Ireland

High Court rules on order to reveal Facebook user's identity

On 8 February 2017, the High Court refused an application for an order against Facebook Ireland Ltd to identify an anonymous source for defamatory postings on their platforms on the basis that the right to a person's good name must give way to the right to life and bodily integrity of another in the event of a conflict.

In a previous decision in 2016, Justice Binchy had refused the plaintiff, Mr Fred Muwema, certain orders which would have had the effect of requiring Facebook to take down certain defamatory postings concerning him which were posted by a pseudonymous source:"Tom Voltaire Okwalinga" ("TVO") on Facebook (see IRIS 2016-10/16). Conversely, Justice Binchy had indicated that he would grant Mr. Muwema's application for a "Norwich Pharmacal Order" (court order for the disclosure of documents or information) with the intent of "revealing the identity and location of the person(s) operating under the name of "TVO" and Facebook had chosen not to oppose that order. However, "before the order could be perfected" Facebook sought leave to introduce "new evidence" with a view to opposing the order, notwithstanding that the interlocutory hearing had concluded. Facebook's application was opposed by Mr Muwema.

The new evidence put forward by Facebook was that they had became aware of the possibility that revealing the identity of TVO, "a political activist" who has been 'marked for arrest' by the Ugandan Government" could pose a risk to his/her safety and that he/she may be "likely to suffer torture, cruel, inhumane treatment" at the hands of State agents of Uganda. Facebook stated that it had received multiple requests from Ugandan Government actors to "take down the contents from TVO's page, to shut down the page and/or to reveal TVO's personally identifiable information." Attempts had also been made "to call Facebook before Uganda's Parliament to compel it to produce the information that would facilitate the arrest of the person(s) behind TVO's account". Various reports on infringements of the rights to freedom of expression, assembly and association in Uganda were also adduced in evidence.

In reaching his decision to allow Facebook to admit the new evidence, which Mr Muwema had argued was "grounded upon hearsay", Justice Binchy was satisfied that the evidence was "sufficient to raise serious concerns about the possible impact of a Norwich Pharmacal Order upon the safety and welfare of TVO, if identified." According to Justice Binchy, Facebook was to be "commended for taking the trouble to bring this evidence to the attention of the court, given that it has no vested interest in doing so." Taking all of the evidence into account, including evidence put forward by the executive director of a human rights organisation in Uganda, Justice Binchy stated that by granting the relief sought, it was "probable that TVO will suffer human rights abuses at the hands of the Ugandan authorities." The judge recognised that he had already found the postings concerning Mr Muwema to be defamatory and if the identity of TVO was not revealed then Mr Muwema would be "left without any relief to vindicate his good name." The issue was therefore a "weighing of the right of Mr Muwema to vindicate his good name on the one hand and the right to life and bodily integrity of TVO on the other." Justice Binchy stated that "it must be correct to say that a person's right to his good name must take second place to the right to life and bodily integrity of another where the threat to bodily integrity is sufficiently serious" as he believed it to be in this case. Justice Binchy refused the application by Mr Muwema on a conditional basis; that Facebook having the means to communicate with TVO, "should notify TVO that unless the offending postings are removed within fourteen days from the date of delivery of this judgment" then Mr Muwema "will be entitled to renew his application for Norwich Pharmacal relief which will be duty granted."

• Muwema v Facebook (No. 2) [2017] IEHC 69
http://merlin.obs.coe.int/redirect.php?id=18460 EN

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New General Commercial Communications Code

On 28 March 2017, the Broadcasting Authority of Ireland (BAI) launched its new General Commercial Communications Code. It replaces the previous code introduced in 2010 under section 42 of the Broadcasting Act 2009 (see IRIS 2011-7/29). The new code follows a public consultation held in 2016 on the draft code (see IRIS 2016-8/23).

The new code is divided into 22 sections and sets out the general rules and principles, definitions, and requirements regarding particular products and services on both radio and television. However, the code does not cover services provided over the Internet, nor does it cover on-demand audiovisual services made available in the Republic of Ireland. The Code covers inter alia the advertising of food, alcohol, medicines, health services, financial services and products, cosmetic treatments, gambling, premium-rate telecommunications' services, teleshopping and prohibited communications. The new code has a series of changes to its rules, including an expansion of the rules to "gambling" and not just betting services. Rule 20.4 of the code states that commercial communications that seek to promote services to those who want to gamble shall not contain anything deemed to be a "direct encouragement to gamble", which replaces the previous prohibition on "encouragement to bet".

The new code also contains a new prohibition in relation to commercial communications for electronic cigarettes (Rule 4.4); however, this does not apply to electronic cigarettes and refill containers that are considered as medicinal products or medical devices. Moreover, the code also clearly defines the difference between product placement and sponsorship: if a product or service is built into the action of the programme, it is product placement; if sponsor announcements or references are shown during a programme but are not part of the plot or narrative of the programme, they qualify as sponsorship.

The new code will come into effect on 1 June 2017.

• Broadcasting Authority of Ireland, General Commercial Communications Code, March 2017
http://merlin.obs.coe.int/redirect.php?id=18461 EN

• Broadcasting Authority of Ireland, BAI launches revised General Commercial Communications Code, 28 March 2017
http://merlin.obs.coe.int/redirect.php?id=18462 EN

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IT-Italy

Italian Administrative Court dismissed all appeals against AGCOM copyright regulation

On 30 March 2017, almost exactly three years after its entry into force, all of the appeals against the Autorità per le garanzie nelle comunicazioni (Italian Communications Authority - AGCOM) Regulation on copyright protection online have been dismissed by two judgments of the Italian Regional Administrative Tribunal for Latium (TAR). The judgments, released in February but made publicly available only two months later, conclude a long legal dispute, arising from the appeals made by associations representing Internet service providers, web-TVs, and consumers.

The Regulation was adopted in 2013 and entered into force on 31 March 2014 (see IRIS 2014-3:1/31), pursuant to the provisions of the Italian Copyright Law (no. 633/41 as amended), assigning to AGCOM monitoring competences on copyright protection in the field of electronic communications, the E-Commerce Decree (no. 70/2003) implementing the E-Commerce Directive 2000/31/EC), and the Italian Audiovisual Media Service (AVMS) Code (n. 177/2005) implementing the Audiovisual Media Services Directive 2007/65/EC.

The plaintiffs appealed in 2014 against the Regulation, denying AGCOM's competence to regulate in the field of copyright infringements online and asking the Court to declare it incompatible with the national and European legal framework. To achieve the utmost accuracy in evaluating the appeal, the TAR, in September 2014, while confirming AGCOM's competence and the compatibility of the Regulation with the law, raised a question of compatibility with the Italian Constitution of a number of articles of the aforementioned decrees, submitting them to the Italian Constitutional Court.

On 9 December 2015, with judgment no. 247/2015, the Constitutional Court declared the questions inadmissible, confirming the compatibility of the targeted provisions with the fundamental principles of the Constitution.

With judgments no. 04100-04101/2017, the TAR dismissed the appeals, stating without any doubt that, according to the Italian copyright law, the AVMS Code,

and the E-Commerce Decree, AGCOM is the administrative authority competent in the field of copyright protection on electronic communications networks.

Regarding one of the most relevant profiles of the appeal, the compatibility of AGCOM's proceedings with those of ordinary courts, the TAR stated that the administrative procedure outlined in the Regulation is not committed to pursuing "primary" copyright violations, which remain under the exclusive competence of the judiciary, since the same Copyright Law declares, at Article no. 156, that its own provisions shall not affect the application of the E-Commerce Decree. Thereby, the TAR affirms that the Law itself has introduced a "double track" protection mechanism, in which, alongside the private enforcement of the judicial authority, there is also the possibility of activating a public enforcement in front of AGCOM as the competent administrative authority. This authority is consequently entitled to adopt orders towards the Internet services providers: the two actions can operate together to ensure effective and fast protection of copyright.

• *TAR Lazio, Sezione prima, sentenze Reg.Prov.Coll. n. 04101/2017* (Italian Administrative Tribunal for Latium, First Section, judgments no. 04101/2017)
http://merlin.obs.coe.int/redirect.php?id=18495 IT

• *TAR Lazio, Sezione prima, sentenze Reg.Prov.Coll. n. 04100/2017* (Italian Administrative Tribunal for Latium, First Section, judgments no. 04100/2017)
http://merlin.obs.coe.int/redirect.php?id=18496 IT

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Legislative proposal on fake news

The spreading of fake news on the Internet is a highly debated social and legal issue, and one that has also been debated in Italy, in particular during the recent constitutional referendum campaign. Accordingly, lawmakers and regulators are approaching this legal issue with a view to preventing patently false information from circulating via the Internet.

After the President of the Italian Competition Authority called for new rules on fake news, a legislative proposal was submitted by Senator Adele Gambaro on 7 February 2017 ("DDL Gambaro") in the Senate of the Republic.

The bill aims at introducing specific provisions criminalising different conduct relating to the circulation of fake news. First of all, the DDL Gambaro provides for the adoption of Article 656-bis of the Criminal Code. According to this provision, whoever publishes or circulates via the Internet fake news or exaggerated or biased information on manifestly ill-founded or false facts and circumstances shall be punished by a fine of up to EUR 5,000. Where the same conduct constitutes defamation, the aggrieved person may ask for the damages he/she actually suffered and seek additional pecuniary compensation.

Additionally, the DDL Gambaro introduces another criminal offence, namely Article 265-bis of the Criminal Code. According to this article, whoever circulates or communicates, including via the Internet, false, exaggerated or biased rumours or news likely to cause public alarm or threaten public interests in any way, or which may have a misleading impact on the public opinion, shall be punished by a fine of up to EUR 5,000.

Further conduct that the DDL Gambaro wishes to criminalise is contained in the new Article 256-ter of the Criminal Code. Under this provision, whoever carries out, including via the Internet, a hate speech campaign against certain individuals or against the democratic process shall be punished by at least two years' imprisonment and a fine of up to EUR 10,000.

Finally, the proposal also concerns the ISPs' obligations in respect of the activities and content posted by users. Pursuant to Article 7, ISPs must regularly monitor content, paying particular attention to any content that generates a substantial degree of interest among users, in order to assess the reliability and truthfulness of this content. In the event of an ISP determining that certain content does not meet this requirement, it must promptly remove the content in question; if the ISP fails to do so, it may be punished in accordance with Article 656-bis of the said Criminal Code.

• *Senato della Repubblica, disegno di legge n. 2688, 7 febbraio 2017* (Senate of the Republic, bill no. 2688, 7 February 2017)
http://merlin.obs.coe.int/redirect.php?id=18463 IT

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AGCOM resolution on relevant markets in audiovisual media services sector

On 9 March 2017, the Autorità per le garanzie nelle comunicazioni (the Italian Communications Authority - AGCOM), released Decision No. 41/17/CONS concerning "Recognition of relevant markets in audiovisual media services sector, in accordance with Article 43, paragraph 2, of Legislative decree 31 July 2015, no. 177". The Decision represents the end of the first phase of a complicated administrative procedure that began with Decision No. 286/15/CONS (siehe IRIS 2015-7/21), aimed at recognising the relevant markets in the audiovisual media services (AVMS) sector and at understanding whether there are some players in a dominant position in breach of the pluralism principle.

According to AGCOM, the procedure was started in light of several changes which had occurred in recent years and which had modified the audiovisual media sector with respect to the previous procedure completed in 2010 (Decision n. 555/10/CONS). The main changes refer to the following issues: (i) the conclusion of partnerships and mergers between media services players themselves and between broadcasters and operators in different sectors, including telecommunications; (ii) the evolution of the audiovisual market, which seems to be increasingly aimed at aggregation and content distribution.

In this first phase, AGCOM had identified the relevant markets by the typical antitrust parameters: Article 43 of Legislative decree 31 July 2005, No. 177 (the Italian Audiovisual media services Code) states that the Authority shall follow the principles set out by Articles 15 and 16 of EU Directive 2002/21/EC, and shall take into account such elements as revenues; the level of competition within the system and the entry barriers; the size of the enterprise economic efficiency; as well as quantitative indexes related to the diffusion of radio and television programmes, publishing products and cinematographic or phonographic works. After the investigation, the Authority carried out a public consultation (Decision No. 342/16/CONS) in which three relevant markets were identified: (a) national free AVMS market; (b) local free AVMS market; and (c) national pay AVMS market. However, the Authority has specified that the second phase will not take the local free AVMS market into consideration because (after the entry into force of Decree Law No. 145/2013, converted with modification by Law No. 9/14) this specific sector has undergone several changes because of the need to reorganise the set of terrestrial frequencies.

As regards online content, AGCOM has distinguished two kinds of operators: the players that provide a streaming or downloading service for remuneration, and the players that distribute free content. The former have been included in the pay AVMS market, because this kind of service could be considered as being similar to and replaceable with the traditional pay TV/pay-per-view broadcasters since both provide attractive or premium content for a subscription or a transaction.

Regarding free content on the Internet, this has been excluded from the analysis because it is outside the product perimeter for two main reasons: first, some of these services cannot be considered as AVMS according to Article 2, lecter a) of the Italian AVMS code. Secondly, free content that could be compared to free television seems to be more in competition with all the other internet players than with the traditional free broadcasters, considering that it is enhanced through online advertising. However, AGCOM has revealed that online services have an impact on the competition inside the so-called integrated communications system (SIC - the economic sector consisting of daily and periodic press; annual and electronic publishing, including through the Internet; audiovisual media services and radio services; cinema; external advertising; initiatives of communications of products and services; and sponsoring). For this reason, the free online audiovisual media services could be evaluated in the second phase.

• *Delibera n. 41/17/CONS, recante "Individuazione nei mercati rilevanti nel settore dei servizi di media audiovisivi, ai sensi dell'art. 43, comma 2, del decreto legislativo 31 luglio 2005, n. 177 (Fase 1)"* (Decision No. 41/17/CONS on "Recognition of relevant markets in audiovisual media services sector, in accordance with article 43, paragraph 2, of Legislative decree 31 July 2005, no. 177 (Phase 1)")
http://merlin.obs.coe.int/redirect.php?id=18491 IT

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PL-Poland

Polish telecommunications company cautioned for anti-competitive advertising

The Polish Office of Competition and Consumer Protection (UOKiK) has decided that advertising by Vectra Ltd was anti-competitive because it had failed to sufficiently inform customers that the price would be increased after the promotional period.

Vectra Ltd provides telecommunications services such as cable TV, Internet access and fixed-line telephony in Poland. Between September and December 2015, it organised a sales promotion under the slogan "You can have it all for 10 zlotys". During that period, all services offered by the company were available for PLN 10. The various advertisements for the special offer (including radio announcements) made no reference at all to any price increase, even though Vectra had planned to raise the fees for each service after only two or three months of contracts concluded for a period of 18 months or two years, for example.

The Office of Competition and Consumer Protection therefore launched an investigation and concluded that the advertising was liable to mislead consumers. It ruled that the failure to mention a subsequent price increase had generated the interest of customers and induced them to sign contracts that they would not have otherwise signed. Vectra should somehow have made it known that it planned to raise prices after a few months.

However, during the proceedings, Vectra voluntarily decided to compensate all customers who had taken advantage of the promotional offer.

Vectra was also ordered by the UOKiK to inform the public that the offer had been liable to mislead consumers. This statement, lasting at least 15 seconds,

should be broadcast three times by the company itself. Vectra must also file a report on the performance of its obligations.

This is not a one-off decision; it forms part of the UOKiK's current efforts to exert pressure on telecommunications service providers and punish them for breaking the rules, in order to ensure that they protect consumers and respect the law in future.

• UOKiK press release of 8 February 2017
http://merlin.obs.coe.int/redirect.php?id=18497 EN

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RO-Romania

Modifications of the conditions for issuing and amending the notice of retransmission

The Consiliul Naţional al Audiovizualului (National Audiovisual Council - CNA) adopted Decision No. 128 of 14 March 2017 with regard to amending CNA Decision No. 72/2012 on the conditions for issuing and amending the notice of retransmission (see inter alia IRIS 2015-8/29).

A single modification was approved to Article 4 concerning the elements of the notice of retransmission, in the sense that the existing Article 4 became Article 4(1) and a new paragraph (2) was added:

2) The frequency allocation of program services shall reflect the following requirements: a) the television program services are grouped by their topical category; b) the frequencies for radio services are allocated after the allocation of frequencies for television program services. Decision No. 72/2012 had already been modified by the CNA Decision No. 350/2015 in relation to the rules to be observed by the service programmes providers as regards must-carry programmes.

• *Decizia nr. 128 din 14 martie 2017 pentru modificarea Deciziei Consiliului Naţional al Audiovizualului nr. 72/2012 privind condiţiile de eliberare şi modificare a avizului de retransmisie* (Decision No. 128 of 14 March 2017 with regard to amending the National Audiovisual Council's Decision No. 72/2012 on the conditions for issuing and amending the notice of retransmission notice)
http://merlin.obs.coe.int/redirect.php?id=18466 RO

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Agenda

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