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IRIS

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of the European Audiovisual Observatory

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INTERNATIONAL

EBU: Appeal to Bosnia and Herzegovina

The Executive Board of the European Broadcasting Union (EBU) in Geneva has written to the authorities of Bosnia and Herzegovina expressing its concern at the deteriorating state of public service broadcasting in the country.

The EBU Executive Board called on the country's president to ensure that the government used its power and influence to safeguard the future of the national broadcaster Bosanskohercegovačka radiotelevizija (BHRT). To this end, immediate reforms of the national media laws were necessary.

The EBU warned that BHRT risked imminent closure, having been deprived of stable funding for many years; it was in substantial debt, was unable to pay salaries or bills, and could not meet contractual obligations. Its energy provider was also threatening to cut off its electricity supply because of unpaid bills.

In its letter, the EBU stated that the existence of public service broadcasters that were independent of the government, which lay at the heart of democratic societies, was of particular historical and strategic importance in Bosnia and Herzegovina. It was therefore vital to preserve public service broadcasting not only to keep the population informed, but also to promote the cohesion of the country by reflecting its cultural diversity.

The EBU concluded by saying that itself and its members were willing to provide every possible assistance and expertise to help the authorities concerned to secure BHRT's future.

In recent years, several attempts by the Bosnia and Herzegovina parliament to reform BHRT have failed due to disagreements. The broadcaster receives virtually no state funding for its programmes and has been operating at a loss for many years. It cannot guarantee a general interest channel or a reliable news service. One reason for the rapid decline of the heavily indebted broadcaster's economic situation is the inadequate collection of licence fees over recent years. Too many citizens fail to pay any licence fee at all, even though this is the broadcaster's primary source of income. Moreover, there is no system in place to actively collect the fees.

The broadcaster's current financial problems are due, in part, to an old conflict that continues to simmer in the background. Political representatives of Bosnian Croats recently repeated calls for the creation of a separate broadcaster for Bosnia and Herzegovina's Croatian population. The United Nation's international representatives had specifically tried to strengthen BHRT as part of the reconstruction of the country's broadcasting system in order to counter the disintegration of Bosnia and Herzegovina.

• European Broadcasting Union press release of 23 April 2017, "EBU joins international community in plea to save PSM in Bosnia and Herzegovina"
http://merlin.obs.coe.int/redirect.php?id=18605 EN

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COUNCIL OF EUROPE

European Court of Human Rights: Huseynova v. Azerbaijan

The European Court of Human Rights (ECtHR) recently dealt with a case that illustrates the dramatic situation of violence against journalists in some countries and the often remaining impunity for crimes against journalists (see IRIS 2017-3/3 and IRIS 2016-5/3). It also shows the difficulties the victims or their families can be confronted with in invoking the European Convention on Human Rights (ECHR).

Elmar Huseynov was a prominent independent journalist in Azerbaijan and the editor-in-chief of the weekly magazine Monitor. Various civil and criminal proceedings had been brought against him for the publication of critical articles about the President of Azerbaijan and members of his family, and about members of the parliament, government and other state officials. Moreover, copies of the magazine had been confiscated on several occasions and the domestic authorities sometimes prevented its publication. After having received threats because of his critical articles, and in particular shortly after having been told by a public official to stop writing about the President and his family, on 2 March 2005, Mr Huseynov was shot dead in his apartment building as he returned home from work. Huseynov's murder received widespread local and international media coverage and was unanimously condemned by various politicians, international organisations, and local and international NGOs. Criminal investigations were instituted immediately after the murder and numerous investigative actions were taken, but 12 years later the criminal proceedings were still ongoing and the perpetrators of the crime had not yet been prosecuted. Before the ECtHR, Ms Rushaniya Saidovna Huseynova alleged that her husband had been murdered by Azerbaijani State agents and that the authorities had failed to conduct an effective investigation, and hence breached Article 2 (the right to life) of the

European Convention on Human Rights (ECHR). She further alleged that the killing of her husband had constituted a breach of the right to freedom of expression (Article 10 ECHR), as he had been targeted on account of his journalistic activity.

With regard to the merits of the complaint and the alleged violation of Article 2 ECHR, the ECtHR observes that Ms Huseynova made allegations about the involvement of state agents or the state in general in the murder of her husband, because of his journalistic activity. The ECtHR however considered that there was no evidence for these allegations. The Court next referred to the duty of the state not only to refrain from the intentional and unlawful taking of life, but also to take appropriate steps to safeguard the lives of those within its jurisdiction. This involves a primary duty for the state to secure the right to life by putting in place effective criminal law provisions to deter the commission of offences against the person, backed up by law enforcement machinery for the prevention, suppression, and punishment of breaches of such provisions. It also extends, in appropriate circumstances, to a positive obligation on the authorities to take preventive operational measures to protect an individual or individuals whose lives are at risk. However, for a positive obligation to arise, it must be established that the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of a particular individual or individuals from the criminal acts of a third party, and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk. The ECtHR points out that Mr Huseynov had never applied to the domestic authorities for protection or informed them of any danger or threat to his life and it further observes that the law enforcement authorities had not been aware of any danger to his life, nor had they held any information which might give rise to such a possibility. The ECtHR concluded that it had no evidence indicating that the domestic authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of Mr Huseynov and failed to protect his right to life. Accordingly, there has been no violation of the substantive limb of Article 2 ECHR.

As to the procedural limb of Article 2 ECHR, with regard the alleged failure to carry out an effective investigation, the ECtHR did find a violation. The ECtHR referred to a number of shortcomings in the criminal investigation carried out by the domestic authorities. The ECtHR is of the opinion that the Azerbaijani authorities did not effectively examine the possibility of prosecuting the alleged perpetrators of the murder in Georgia by transferring the criminal case there, after the investigation had identified two suspects who were on the territory of the State of Georgia, which refused to extradite them. The ECtHR also noted that even though Ms Huseynova was granted victim status in the investigation, she has been constantly denied access to the case file during the investigation, and she only obtained copies of some documents from the case file for the first time when the Government submitted its observations to the ECtHR. That situation deprived her of the opportunity to safeguard her legitimate interests and prevented any scrutiny of the investigation by the public. The ECtHR furthermore considered that the criminal investigation was not carried out promptly, taking into account its overall length of over 12 years. Finally, it was apparent that the murder of Mr Huseynov could have a "chilling effect" on the work of other journalists in Azerbaijan. According to the ECtHR it does not appear that adequate steps were taken during the investigation to inquire sufficiently into the motives behind the killing of Mr Huseynov and to investigate the possibility that the attack could have been linked to his work as a journalist. On the basis of these findings the ECtHR concludes that the domestic authorities failed to carry out an adequate and effective investigation into the circumstances surrounding the killing of Ms Huseynova's husband. It accordingly held that there had been a violation of the procedural limb of Article 2 ECHR.

With regard to the complaint under Article 10, the ECtHR noted that the allegations arise out of the same facts as those already examined under Article 2. Having regard to its finding of a violation of Article 2 under its procedural limb because of the ineffectiveness of the investigation into the killing of Ms Huseynova's husband, the ECtHR considers that it is not necessary to examine the complaint under Article 10 ECtHR separately.

• Judgment by the European Court of Human Rights, Fifth Section, Huseynova v. Azerbaijan, Application no. 10653/10, 13 April 2017
http://merlin.obs.coe.int/redirect.php?id=18543 EN

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European Court of Human Rights: Milisavljević v. Serbia

The European Court of Human Rights (ECtHR) has recently found that the Republic of Serbia has acted in breach of the right to freedom of expression by convicting a journalist for insult of a well-known human rights activist. The ECtHR emphasises that criminal prosecution for insult of public figures is likely to deter journalists from contributing to the public discussion of issues affecting the life of the community. More than 10 years after the journalist lodged an application with the Court, the ECtHR came unanimously to the conclusion that the Serbian authorities' reaction to the journalist's article was disproportionate to the legitimate aim of protecting the reputation of others,

and was therefore not necessary in a democratic society, within the meaning of Article 10 (2) of the European Convention on Human Rights (ECHR).

The applicant is Ljiljana Milisavljević, who was a journalist employed at Politika, a major Serbian daily newspaper. In September 2003, Milisavljević wrote an article in Politika about Nataša Kandić, a Serbian human rights activist primarily known for her activities in investigating crimes committed during the armed conflicts in the former Yugoslavia. Kandić also advocated for full cooperation of the Yugoslav, and later Serbian authorities with the International Criminal Tribunal for the former Yugoslavia (ICTY), a highly controversial issue at that time in Serbia. A few weeks after the publication of the article Kandić started a private prosecution against Milisavljević. She claimed that the article had been written with the intent of belittling her in the eyes of the public, to present her as a traitor to Serbian interests and as a "paid servant of foreign interests and a prostitute who sells herself for money".

The First Municipal Court in Belgrade found that Milisavljević had indeed insulted Kandić by writing that "she has been called a witch and a prostitute". The court established that although the impugned phrase had been previously published in another article by another author in a different magazine, Milisavljević had not put it in quotation marks which meant that she agreed with it, thus expressing her opinion, with the intention of insulting Kandić. In view of no aggravating circumstances and a number of mitigating ones, no prison sentence or fines were imposed: the court only gave Milisavljević a judicial warning. This judgment was confirmed by the court of appeal, while in separate proceedings Milisavljević was ordered to pay Kandić approximately EUR 386 in respect of costs and expenses.

In 2006, Milisavljević lodged a complaint with the ECtHR, arguing that her right to freedom of expression as a journalist had been violated by the conviction for criminal insult. She also submitted that she had been later discharged from Politika and that her conviction appeared to have been the cause thereof, while her conviction also represented a threat and warning to all Serbian journalists. In determining whether the interference with the journalist's freedom of expression was necessary in a democratic society in the terms of Article 10 (2) ECHR, the Court applied the relevant considerations of (a) whether the article contributed to a debate of general interest; (b) how well known the person concerned was and what the subject was of the report; (c) the conduct of the person concerned prior to publication of the article; (d) the method of obtaining the information and its veracity; (e) the content, form, and consequences of the publication; and (f) the severity of the sanction imposed. When examining the necessity of an interference in a democratic society in the interests of the "protection of the reputation or rights of others", the ECtHR has to verify whether the domestic authorities struck a fair balance between the competing rights and values.

While there was no doubt that the article was published in the context of a debate on matters of public interest, the ECtHR further observed that the applicant is a journalist and in that capacity her task was to write an article about Kandić, a well-known human rights activist and undeniably a public figure. The crucial question was to determine what the impact was of the allegation that Kandić had been called "a witch and a prostitute". The ECtHR considered that the impugned words are offensive, but that it is clear from the formulation of the sentence that this is how Kandić was perceived by others, not by Milisavljević herself. It reiterated that a general requirement for journalists systematically and formally to distance themselves from the content of a quotation that might insult or provoke others or damage their reputation is not reconcilable with the press's role of providing information on current events, opinions, and ideas.

According to the ECtHR, the domestic courts also failed to make any balancing exercise whatsoever between Kandić's reputation and Milisavljević's freedom of expression, also referring to the latter's "duty, as a journalist, to impart information of general interest". The Serbian courts made no reference to the overall context of the text and the circumstances under which it was written, as their findings were rather limited to the fact that the impugned words were not put in quotation marks. In the ECtHR's view this amounted to a "terse and undeveloped reasoning" at the domestic level, which is in itself problematic "as it rendered any defence raised by the applicant devoid of any practical effect". The ECtHR found that the impugned article offered both positive and negative views about Kandić, and it considered that the impugned words could not be understood as a gratuitous personal attack on, or insult to, Kandić. The article did not refer to her private or family life, but showed how she was perceived professionally, as a human rights activist and a public figure. That being so, the ECtHR considered that she inevitably and knowingly exposed herself to public scrutiny, and should therefore have displayed a greater degree of tolerance than an ordinary private individual.

With regard the proportionality of the interference, the ECtHR disagreed with the Serbian Government's argument that the journalist's sentence was lenient: what matters was not that Milisavljević was "only" issued a judicial warning, but that she was convicted for an insult at all. The ECtHR emphasised that "irrespective of the severity of the penalty which is liable to be imposed, a recourse to the criminal prosecution of journalists for purported insults, with the attendant risk of a criminal conviction and a criminal penalty, for criticising a public figure in a manner which can be regarded as personally insulting, is likely to deter journalists from contributing to the public discussion of issues affecting the life of the community". On the

basis of all these considerations, the ECtHR concluded that there has been a violation of Article 10 ECHR.

• Judgment by the European Court of Human Rights, Third Section, Milisavljević v. Serbia, Application no. 50123/06, 4 April 2017
http://merlin.obs.coe.int/redirect.php?id=18544 EN

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Commissioner for Human Rights: Public service broadcasting under threat in Europe

On 2 May 2017, the Council of Europe's Commissioner for Human Rights issued a new Human Rights Comment on "Public service broadcasting under threat in Europe" (for a previous opinion, see IRIS 2011-4/2). The Comment is divided into a number of sections, including on the independence of public service broadcasters (PSBs), stable and adequate funding, new challenges, and disinformation, and concludes with a roadmap for the future.

The Comment begins by pointing to the Council of Europe's Platform to promote the protection of journalism and the safety of journalists (see IRIS 2017-2/2), and notes that there is an emerging trend of threats to the independence of public broadcasters or of their regulatory bodies. It also notes that the growing number of alerts on the Platform concerning political interference in the editorial line of public broadcasters, insufficient safeguards in legislation against political bias, or lack of appropriate funding to guarantee the independence of the public broadcasters.

On funding, the Commissioner noted that the system of financing public broadcasters is also of utmost importance since it has the potential to keep them politically dependent, and discusses a number of developments which occurred in Bulgaria, Romania, and Greece. On new challenges, the Commissioner notes that while in some circumstances a shift is still needed from being a "State broadcaster" to a "genuine public service media", increasingly public service media are engaging in new forms of communication and platforms, such as the Internet, and not just television and radio. Notably, on the issue of "outright disinformation" being "amplified by social media", the Comment states that the existence of a strong and genuinely independent public service broadcasting is all the more important. The Commissioner notes that the problem of disinformation will not be solved by restricting content or by arbitrary blocking, but by ensuring that the public has access to impartial and accurate information through public broadcasters which enjoy their trust (noting the Joint Declaration on freedom of expression and "fake news", disinformation and propaganda, adopted by four Special Rapporteurs on freedom of expression (see IRIS 2017-5/1)).

Finally, the Commissioner calls on member states to implement the Council of Europe standards, and ensure that legal measures are in place to guarantee PSBs' editorial independence and institutional autonomy, and avoid their politicisation; PSBs are provided with sustainable funding; members of management and supervisory bodies are appointed through a transparent process, taking into account their qualifications and professional skills and their duties related to working for the public service; they are provided with the necessary resources to produce quality programmes which reflect cultural and linguistic diversity, paying attention to minority languages.

• Commissioner for Human Rights, Public service broadcasting under threat in Europe, 2 May 2017
http://merlin.obs.coe.int/redirect.php?id=18545 EN FR

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EUROPEAN UNION

Court of Justice of the European Union: The Pirate Bay makes a communication to the public

On 14 June 2017, the Court of Justice of the European Union (CJEU) delivered its judgment in Stichting Brein v. Ziggo BV (Case C-610/15). The Court held that the making available and management of an online sharing platform (such as The Pirate Bay (TPB)) should be considered as an act of communication to the public for the purposes of Directive 2001/29 (the EU Copyright Directive).

The proceedings began in January 2012, when the District Court of The Hague ordered two Dutch internet access providers (Ziggo and XS4ALL) to block access to TPB. Stichting Brein, a foundation protecting the interests of Dutch copyright holders, had been granted the right to request the order (see IRIS 2012-2/31). In January 2014, the Court of Appeal in The Hague overturned the judgment of the District Court, after which Stichting Brein appealed to the Dutch Supreme Court. In November 2015, the Supreme Court referred two questions to the CJEU for a preliminary ruling (see IRIS 2016-1/22). Advocate-General Szpunar delivered his opinion on the questions in February 2017 (see IRIS 2017-3/5).

The Court began its judgment by deciding whether or not an "act of communication" for the purposes of Article 3(1) of the EU Copyright Directive occurs. The Court noted that based on previous case law, it can be inferred that as a rule, any act by which a user, with full knowledge of the relevant facts, provides its clients with access to protected works is liable to constitute such an act of communication.

Applying this rule to the present case, the Court confirmed that copyright-protected works are made available to the users of that platform in such a way that they may access those works from wherever and whenever they individually choose. Whilst the Court accepted that the works in question are placed online by the users, the Court agreed with AG Szpunar that the operators of the platform play an essential role in making those works available. In that context, the Court noted that the operators of the platform index the torrent files so that the works to which those files refer can be easily located and downloaded by users. TPB also offers - in addition to a search engine - categories based on the type of the works, their genre or their popularity. Furthermore, the operators delete obsolete or faulty torrent files and actively filter some content.

Having established that an act of communication occurs, the Court subsequently held that the protected works in question are in fact communicated to a public. Indeed, a large number of Ziggo's and XS4ALL's subscribers have downloaded media files using TPB, and the platform is used by a "significant" number ("several dozens of millions") of persons. The Dutch Supreme Court's decision was interpreted to have ascertained that the operators of TPB cannot be unaware that this platform provides access to works published without the consent of the rightsholders. Lastly, the Court noted that TPB has a profit-making purpose, which the Court held to be "not irrelevant", referencing previous case-law.

• Judgment of the Court (Second Chamber), Stichting Brein v. Ziggo B.V., Case C-610/25, 15 June 2017
http://merlin.obs.coe.int/redirect.php?id=18577 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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Council of the EU: Regulation on the cross-border portability of online content service

On 8 June 2017, the Council of the European Union adopted a new Regulation on cross-border portability of online content services in the internal market. The Regulation ensures that EU citizens that have lawfully purchased online subscriptions for content services (e.g. Netflix, Spotify) in their member state of residence can access and use these services when they travel across the EU and are temporarily outside their member state of residence. The Regulation is part of the Digital Single Market Strategy, presented by the European Commission in 2015 (see IRIS 2015-6/3).

The Regulation will overcome territorial licensing and exclusivity, which usually characterise the provision of online content services in the EU, and remove the so-called "geo-blocking" practices by requiring providers of online content services to enable their subscribers residing in a member state to use their subscription and access the legal content they have purchased or rented, on the same range of devices and the same range of functionalities when they travel in the EU and are temporarily present in other member state. The "portability" obligation will not require a separate licence or the renegotiation of existing licences between rightsholders and service providers. Instead, a "legal fiction" will be used, through a "localisation" mechanism, according to which the service providers will be deemed to carry out the relevant act of reproduction, communication to the public, making available of works, etc. on the basis of the respective authorisations they have already received from the rightsholders for the country of residence.

The Regulation applies only to paid content services - such as audiovisual, music, and e-book services, sporting events and other TV broadcasts - that are offered online by commercial providers by way of streaming, downloading, or other lawfully provided technical means, on a portable basis - without being limited to a specific location-, and against subscription. Free-of-charge online services offered by providers who choose to introduce portable services and agree to verify their subscriber's member state of residence may also enable the portability of their services. The regulation prohibits service providers from reducing the quality of delivery of the service.

The Regulation defines the place of residence as a place where a subscriber has "actual and stable" residence. Determining the place of actual residence is relevant for service providers who need to establish measures to verify the subscriber's place of residence. The Regulation lists several means of verificationand allows agreements between providers and rightsholders concerning verification measures, insofar as they are consistent with the Regulation. "The effectiveness and proportionality of a particular means of verification", including the type of service, should be taken into consideration. The Regulation introduces a list of verification measures such as subscriber's payment details, internet protocol, telephone contacts, etc. However, any of the adopted measures should adhere to the personal data protection rules. Besides the verification measures, the definition of the term "temporarily present" refers to a presence in a member state other than the place of residence "for a limited period of time", in a narrow

approach, since the Regulation will be only applicable when EU citizens travel on holidays or business purposes.

It is worth mentioning that the Regulation will apply retroactively, i.e. cross-border portability shall be made possible in the EU by service providers as soon as the regulation will enter into force. The Regulation will therefore apply to existing contracts and acquired rights, even for contracts concluded before the entry into force of the regulation.

• Regulation of the European Parliament and the Council of 24 May 2017 on cross-border portability of online content services in the internal market (2015/0284 (COD), 24 May 2017
http://merlin.obs.coe.int/redirect.php?id=18546 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 Parliament: Mandate to the Culture committee on a new directive on audiovisual media services

On 18 May 2017, the European Parliament gave a mandate to the Committee on Culture and Education to begin talks with the European Council on a new directive on audiovisual media services in view of changing market realities. The mandate has a special focus on the protection of children, new rules on advertising, and a 30% quota of European works on video-on-demand (VOD) platforms. The mandate, consistent with the amendments that the Culture Committee voted on 25 April 2017, was approved by 314 votes to 266, with 41 abstentions.

When referring to the protection of children, the mandate given by the Parliament seeks to: first, impose the obligation on video-sharing platforms to take corrective measures when users flag content as inciting violence, hatred, or terrorism. Second, prohibiting advertising and product placement for tobacco, electronic cigarettes, and alcohol in children's TV programs and video-sharing platforms. Regarding advertisements, the Parliament defined a maximum 20% daily quota with flexibility in the adjustment of advertisement periods. Self and co-regulation is also established as a first measure before the direct imposition of rules by the member state authorities.

In order to promote European cultural diversity, the Parliament agreed to the obligation for VOD platforms to offer at least 30% of European productions. This includes works in the language of the countries of distribution. Moreover, member states will be allowed to require VOD platforms to provide direct or indirect financial contributions to the development of European audiovisual productions. Those contributions should be proportional to the revenues received in the countries where they are being given.

On 23 May 2017, the Council reached a general approach for negotiation with the Parliament. This general approach is in line with some of the above mentioned issues of the mandate given by the Parliament: the quota of European production, the imposition of stringent requirements on alcohol and cigarette advertisements, and the protection of children from harmful audiovisual content, such as hate speech, violence, and terrorism.

The mandate and general approach come as part of the legislative procedure of a Directive proposal presented by the Commission in May 2016 as a part of the Digital Single Market Strategy (see IRIS 2016-6/3). Both the mandate and the general approach pave the way for negotiations between the Parliament and the Council, which will culminate in the final adoption of a new Directive.

• European Parliament, Decision to enter into interinstitutional negotiations: Coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services in view of changing market realities, 18 May 2017
http://merlin.obs.coe.int/redirect.php?id=18547 DE EN FR
CS DA EL ES ET FI HU IT LT LV MT
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• Committee on Culture and Education, Report on the proposal for a directive of the European Parliament and of the Council amending Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services in view of changing market realities, 10 May 2017
http://merlin.obs.coe.int/redirect.php?id=18550 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: Communication on mid-term review of Digital Single Market Strategy

On 10 May 2017, the European Commission published a Communication on the Mid-Term Review on the implementation of the Digital Single Market (DSM) Strategy: A Connected Digital Single Market for All. This Communication marks a two-year anniversary of the Digital Single Market Strategy published on 6 May 2015 (see IRIS 2015-6/3). The mid-term review discusses progress towards the implementation of the DSM strategy, identifies areas where more efforts are needed, and calls for further actions necessary for changing digital landscape.

Within the past two years, the Commission made proposals on all of the 16 DSM strategy's high priority

actions, presenting 35 proposals in total (see, for example, IRIS 2017-3/6, IRIS 2016-10/4, IRIS 2016-9/4, IRIS 2016-5/5, and IRIS 2015-10/4). Nevertheless, so far, only one of the Commission's proposals has been approved by co-legislators. Therefore, the Commission calls on the EU Parliament and the Council for swift agreements on the Commission's proposals under the DSM strategy. The mid-term review proposes to extend the DSM strategy "to keep up to date with emerging trends and challenges such as those related to online platforms, the data economy and cybersecurity." The Commission outlines three areas that require further EU action: (1) promoting fairness and responsibility of online platforms; (2) developing the data economy to its full potential; and (3) tackling cybersecurity challenges.

In relation to online platforms, the Commission will address the issues of unfair contractual clauses and platform-to-business trading practices. It will also focus on the problem of mechanisms and technical solutions for removal of illegal content in order to enhance their effectiveness while ensuring full respect to fundamental rights.

In the area of data economy, the Commission is planning to prepare legislative initiatives on the cross-border free flow of non-personal data by autumn 2017, and an initiative on accessibility and re-use of public and publicly funded data by spring 2018.

In cybersecurity, by September 2017 the Commission will review the 2013 EU Cybersecurity Strategy and the mandate of the European Union Agency for Network and Information Security (ENISA) to define its role in the changed cybersecurity ecosystem. The Commission will also focus on measures on cyber security standards, certification, and labelling, to make ICT-based systems, including connected objects, more cyber-secure. The mid-term review also flags the necessity of further investment in digital skills as well as infrastructure and technologies, such as quantum computing.

• Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the Mid-Term Review on the implementation of the Digital Single Market Strategy: "A Connected Digital Single Market for All" COM(2017) 228 final, 10 May 2017
http://merlin.obs.coe.int/redirect.php?id=18551 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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NATIONAL

AL-Albania

Regulator announces deadline for analogue broadcasting switch-off in capital

The Audiovisual Media Authority (Autoriteti I Mediave Audiovizive - AMA) issued an announcement on 8 May 2017 stating that the deadline for analogue broadcasting switch-off in the Tirana-Durres allotment would be 30 June 2017. The regulatory authority's statement was based on Act no. 97/2013 "On Audiovisual Media in the Republic of Albania," and on the Strategy for Switchover from Analogue to Digital Broadcasting, approved in 2012. The regulator is the key institution in charge of implementing the digital switchover in the country.

In this context, AMA invited all operators still broadcasting in analogue technology to prepare and take measures to support their programmes in the public broadcaster's network or in the commercial national networks that have been licensed for this purpose. The fifth and final national commercial network license was granted on January 2017, after a lengthy and controversial process.

At the same time, in its announcement, the regulatory authority called on citizens that are still using analogue technology to obtain decoders so that they can continue to watch television after the end of June. The Tirana-Durres allotment contains the capital and one of the country's major cities, and is one of the most densely populated areas.

• *Autoriteti I Mediave Audiovizive: "AMA nuk do të lejojë çeljen e kanaleve të reja televizive pa autorizim", 31.03.2017* (Press release of the Autoriteti I Mediave Audiovizive of 31 March 2017: AMA will not allow the launch of new TV channels without authorization)
http://merlin.obs.coe.int/redirect.php?id=18562 SQ

• *LIGJI NR. 97/2013 "PËR MEDIAT AUDIOVIZIVE NË REPUBLIKËN E SHQIPËRISË, 04.03.2013* (Act no. 97/2013 of 4 March 2013 on Audiovisual Media in Republic of Albania)
http://merlin.obs.coe.int/redirect.php?id=18423 SQ

• *STRATEGJIA E KALIMIT NGA TRANSMETIMENT ANALOGE NË¨ TRANSMETIMET NUMERIKE, 2012* (Strategy for Switchover from Analogue to Digital Broadcasting, 2012)
http://merlin.obs.coe.int/redirect.php?id=18563 SQ

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Regulator warns operators on broadcasting movies without broadcasting rights

The Audiovisual Media Authority (AMA) warned operators through a statement issued on 5 May 2017 that they needed to respect intellectual property rights when they broadcast movies in their programmes. The monitoring efforts of the regulatory authority have indicated that operators do not always possess the broadcasting rights of the Albanian or foreign movies they broadcast. AMA's statement emphasized that even though the regulatory authority had been drawing the attention of operators to this issue since October 2016, through official notes and imposing fines, audiovisual media in the country were still having problems observing copyright law.

The regulatory authority noted that, based on Act no. 97/2013 "On Audiovisual Media in the Republic of Albania," all television broadcasters must broadcast movies while respecting the norms and terms specified in the contracts and agreements they have with other parties. The regulatory authority called on operators to observe these contracts and agreements, noting that the broadcasting of movies without a contract or agreement is an administrative offense, punishable by a fine. In cases where this offense is repeated, it can lead to restrictions in the license terms or even the license being withdrawn.

AMA also reported that the contracts sent to it by operators were under review and that the monitoring process of audiovisual media would ensure the proper implementation of these contracts.

• *AMA nuk do të lejojë transmetimin e filmave pa të drejta, 5/5/2017*
(AMA will not allow the launch of new TV channels without authorization, the statement on operators' observance of broadcasting rights of 5 May 2017)
http://merlin.obs.coe.int/redirect.php?id=18562 SQ

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BG-Bulgaria

Report of the media regulatory authority on the pre-election campaign

The report of the Council for Electronic Media (CEM) represents the data and findings based on the specialised monitoring of the activity of media service providers during the pre-election campaign for the selection of Members of Parliament spanning the period from 24 February to 26 March 2017. On 21 February 2017, the Central Election Commission and the Council for the Electronic Media concluded an agreement on the principles and parameters of the specialised monitoring. The main purpose of the monitoring process was to establish the way in which the electronic media reflects the political subjects covered during the pre-election campaign; these media, by means of their public influence and specific forms of expression, give their audience the opportunity and the right to make its choice. The monitoring considered the paying and free forms of propaganda using two parameters - the number (frequency) and duration (seconds) of the candidates' appearances in the media. Paying and free political propaganda was examined in detail - by the number of information units, the duration, and the presence of the candidates on air.

The main criteria used for the evaluation of the content in compliance with the pre-election campaign were:

1. Transparency: the opportunity for society to form an opinion based on the value of the information, ideas and opinions distributed by the media.

2. The candidates' accessibility to media appearances - the transparency of negotiations and funding; the designation of paying propaganda; the opportunities for free participation; the participation for free media; media contents without limits: the attention given to voters with specific needsand adequate information for first-time voters.

3. Professional principles and standards to allow the audience to make an informed choice: objectivity, efficiency, the balanced representation of different platforms and messages through the regulated paying political advertising and provision of free broadcasting.

4. Tolerance: the non-admissibility of hostile speech, insults, slander or compromising speech.

5. The presentation of political diversity, media variety and innovative forms.

6. Political positioning in entertainment formats.

The monitoring of the pre-election campaign (24 February to 26 March 2017) ascertained active pre-election manifestations, as reflected by the electronic media. It is obvious that the pre-election campaign in the electronic media is much more active than the previous pre-election campaigns, monitored by the CEM. There is a trend towards more direct confrontation among the candidates for election in the form of discussion rounds. The debates, as the most attractive form for the audience, gained importance and interest among viewers in this campaign just because of media imitativeness. In a large number of debates, however, the monitoring registered repetition of the topics; thus, the focus, important for the viewers, was unbalanced and namely geared towards enabling the candidates standing for election as Members of Parliament to provide solutions to the listed issues. The

trend that political rhetoric shall find its place in the discussion forms as being the most attractive for the viewers was preserved. The monitoring considered that the disputes could not be distinguished from the perspective of the contents and also analytically. The tone among the participants in the political contest became tense and the monitoring linked it to the end of the campaign.

The paying political advertisement, especially in the form of videos, became extremely intensive in the week prior to the vote. The monitoring registered as a positive element the fact that free political participation was predominant in the pre-election media content; its domination over paying political advertisements, influenced by the parties' headquarters, favoured journalistic reflection and activity. The media expressed an active critical position on the controlled and "corporate" vote; many of them developed the topic in detail and backed it up with specific cases in their investigations, reports and interviews.

For the first time, the CEM followed the participation of men and women during the pre-election campaign. As regards the appearance of the participants in the media, the monitoring ascertained the significantly higher participation of men; the imbalance in terms of percentage ratio is 80 to 20 in favour of men.

For the first time, the CEM ascertained significant violations of the election and media legislation, regardless of the active media campaign. The violations based on the information provided by the CEM and sanctioned by the Central Election Commission focused on good morals, the undesignated paying forms of propaganda, and the distribution of sociological studies without the necessary requisites. In this campaign, there were no cases in which language of hatred and discrimination was used.

• Финален доклад Избори *2017 г., 11/4/2017* (Electronic Media Council, Final Report Elections 2017, 11 April 2017)
http://merlin.obs.coe.int/redirect.php?id=18564 BG

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CH-Switzerland

Federal Tribunal objects to exclusion of media from criminal proceedings

Through a recent landmark judgment, the Swiss Bundesgericht (Federal Tribunal) strengthened the principle of public court proceedings and the right of the media to effectively monitor the judicial system. The court unanimously upheld a complaint lodged by four journalists following their exclusion from a criminal trial concerning the attempted murder of a man by his wife's lover. The Zürcher Obergericht (Zurich High Court) had banned the media (and other members of the public) from attending the proceedings and the subsequent sentencing on the grounds that the victim and his two children might have been further traumatised by media coverage.

The Federal Tribunal decided in favour of the excluded journalists. In its unanimous ruling, it acknowledged that a criminal court should protect victims of crime and their children from excessive publicity. However, this must be weighed against the legitimate interests of media reporting on criminal trials. The courts' handling of violent crime in particular needed to be effectively monitored. Journalists' watchdog function helped to promote thorough and fair court proceedings. The general public had a right to information in accordance with constitutional law principles (publicity of court proceedings, media freedom and freedom of information).

Referring to the case law of the European Court of Human Rights (ECHR), the Federal Tribunal emphasised that court judgments could never be kept completely secret, even when important interests needed protection. Although a ruling could be published in anonymous and abbreviated form, the media had to be able to understand the court's reasoning. Simply reading out the verdict was not sufficient, and a brief media release issued by the Zurich High Court was inadequate. The Federal Tribunal therefore ordered the court to give the journalists the full text of its reasoned judgment (in anonymous form).

The decision to exclude the accredited journalists from the court proceedings was also deemed disproportionate. Access to a main hearing, which should in principle be open to the public, should only be limited in exceptional circumstances and with great caution. The Federal Tribunal pointed out that Swiss law required police and public prosecutors' investigations to be kept secret, which in itself was a restriction of public access to the judicial process.

In its ruling, the Federal Tribunal also stressed that the right to attend a court trial was not a free pass for reckless media reporting. Journalists had to respect both legal boundaries (for example, the protection of privacy) and the rules of media ethics, and should therefore, in principle, only report on the trial in anonymous form.

• *Urteil 1B_349/2016, 1B_350/2016 des Bundesgerichts vom 22. Februar 2017* (Judgment 1B_349/2016, 1B_350/2016 of the Federal Tribunal of 22 February 2017)
http://merlin.obs.coe.int/redirect.php?id=18579 DE

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CZ-Czech Republic

Deduction of VAT of public service broadcasters

The Czech Parliament has approved an amendment to the VAT Act. This amendment clearly defines the rules for the calculation of a deduction coefficient for VAT in the public media and finally brings to an end a long period of legal uncertainty and conflicting interpretations of the law. At the same time, it opens the door to an important development for television and radio broadcasting. Czech Television and Czech Radio welcome the parliament's decision to support the amendments to the law on VAT. In the past, the interpretation of the law on VAT was exclusively in the hands of the financial authorities. It was not clear whether public service media could deduct VAT, and if so, how much. The new law sets out a clear procedure for the calculation of deductible VAT. In future, this change will avoid new problems emerging, caused in the past by the vague legal definition. At the same time, the adjustment of the VAT Act opens up opportunities for the essential development of television and radio broadcasting. Czech Television has declared that it intends to use the funds raised from the partial deduction of VAT first and foremost for the implementation of the second wave of digitization.

Czech Radio, for example, intends to use the revenue generated for the development of digital radio broadcasting; digitalization has been one of its priorities. Thanks to the technology of DAB, it will be possible for listeners to access additional services and receive broadcasting in a more stable manner and of a higher quality. Furthermore, Czech Radio wants to strengthen the development of new formats, original creation and the area of production in general.

The approved amendment is in accordance with EU law, which leaves the VAT question within the competence of the member states. Specific solutions in the individual countries of the European Union are therefore different; there are also states where the public service media are entitled to full deduction of VAT (the BBC in the United Kingdom and RAI in Italy). This question was also the subject of a case at the European Court of Justice (C-11/15).

• *Zákon č. /2017 Sb. , z 4.4.2017, kterým se mění některé zákony v oblasti daní* (Act Nr. /2017 Coll., from 4.4.2017 modifying some tax laws)
http://merlin.obs.coe.int/redirect.php?id=18565 CS

Jan Fučík
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DE-Germany

Sky complaint over live Bundesliga rights heard by OLG Düsseldorf

A complaint by pay-TV provider Sky concerning an order issued by the Bundeskartellamt (Federal Cartels Office) in relation to the auctioning of live Bundesliga rights has been rejected by the OLG Düsseldorf (Düsseldorf Regional Court of Appeal). In order to create legal certainty for the future, Sky had disputed the instructions laid down by the Federal Cartels Office for the German Football League tender procedure in 2016.

The Federal Cartels Office issued a "no single buyer" rule, which means that, from next season, Bundesliga matches will be broadcast live not only by Sky, but also by Eurosport (Discovery), which has acquired a number of rights packages to show live matches.

By lodging its complaint, Sky would not have been able to change the outcome of the auction, but the broadcaster stated that it wanted legal certainty for the future. Sky argued that the market distinction between free and pay-TV was wrong and that the importance of the ARD-Sportschau had been misjudged.

However, the presiding judge of the first cartel division disagreed, suggesting in the oral proceedings that the purpose of Sky's complaint was, with the help of cartel law, to restrict competition. He also made clear that Sky's action had no prospect of succeeding and told the Federal Cartels Office to open competition even further for the next auction of Bundesliga media rights. The complaint was dismissed as inadmissible.

What will happen next remains unclear. According to a Sky spokesperson, the company has not yet decided whether to appeal. Talks are still ongoing between Sky and Eurosport. Eurosport has secured the live broadcast rights for the Friday matches, the new Monday matches and some Sunday matches next season. The broadcasters are negotiating a sub-licensing agreement.

Bianca Borzucki
Kanzlei Ory

Draft amendment of Telecommunications Act to strengthen digital radio

On 3 May 2017, the Bundeskabinett (Federal Cabinet) adopted the draft Fourth Amendment of the Telecom-

munications Act (TKG-RefE), which is designed to promote radio digitisation.

Article 48 of the Telecommunications Act (TKG) is expanded under the draft, with the new Article 48(4) TKG-RefE stipulating that every new reception device made available for sale, rental or distribution by other means, if it is primarily intended for the reception of radio broadcasts and can display the name of the radio station, must be equipped with at least one interface that meets recognised technological standards and enables the user to receive and play digital content. The amendment therefore requires an interface to be provided, but does not specify a particular form of digital radio technology. Manufacturers can use both DAB+ and Internet radio, for example. The obligation only applies to devices with a digital display that can show the station's name; this is designed to ensure that the new rule only applies to higher-quality products. The fact that the rule only applies to devices primarily intended for the reception of radio broadcasts means that smartphones and tablets are excluded. Car radios, on the other hand, are subject to Article 48(4) TKG-RefE.

Under the new Article 48(5) TKG-RefE, reception devices brought into circulation before the amendment enters into force can continue to be offered for sale for a further 12 months after its entry into force.

According to its explanatory memorandum, the purpose of the draft amendment is to promote radio digitisation through the sale of suitable reception devices. The new rules should support radio digitisation and device sales across all digital transmission technologies. They should give the radio manufacturing industry sufficient time to change their production processes and to sell the devices that have already been produced.

• *Referentenentwurf des Bundesministeriums für Wirtschaft und Energie* (Draft Act of the Federal Ministry for Economic Affairs and Energy)
http://merlin.obs.coe.int/redirect.php?id=18606 DE

Bianca Borzucki
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FR-France

Playmédia/France TV: The Council of State passes several cases involving 'must-carry' requirements on to the CJEU

The dispute between Playmédia and France Télévisions will perhaps enable the Court of Justice of the European Union (CJEU) to clarify implementation of the 'must-carry' requirement. France Télévisions had called on the Conseil d'Etat (Council of State) to cancel the order issued by the national audiovisual regulatory authority (Conseil Supérieur de l'Audiovisuel - CSA) to comply with the provisions of Article 34(2) of the Act of 30 September 1986 and to refrain from opposing its programmes being streamed and carried live by the company Playmédia on its website. France Télévisions claimed that the authority was exceeding its powers. The company, claiming it was a distributor of services within the meaning of Article 2(1) of the Act of 30 September 1986, held it was covered by the provisions of Article 34(2) of the Act, which entitled the broadcasting of programmes edited by the company France Télévisions. In support of its appeal against the CSA's notice to comply on the grounds that the authority was exceeding its powers, the public-sector audiovisual group held that the conditions provided for in Article 31(1) of Directive 2002/22/EC were not met since it was not possible to assert that a significant number of Internet users used it as their principal means of receiving television broadcasts. It also held that the obligation to accept the broadcasting of its programmes on the Playmédia site would infringe its rights under intellectual property law. This was supported by a decision of the court of appeal in Paris in a decision on 2 February 2016, which had found the company guilty of unfair competition and infringement of copyright.

In its decision on 10 May 2017, the Conseil d'Etat, after recalling the terms of Article 31(1) on the 'must-carry' obligations contained in Directive 2002/22/EC on 'universal service' and Articles 34(2)(I) and 2(1) of the 1986 Act, stated that it was as a result of the combination of these provisions that the legislator had made provision for an obligation for certain television services that services distributors as defined were required to carry; these distributors may or may not be regarded as operators of electronic communications networks within the meaning of these Directives. Article 34(2) of the Act of 30 September 1986 does not repeat explicitly the conditions mentioned in Article 31(1) of Directive 2002/22/EC, and more particularly the condition that a significant number of final users of the networks subject to the broadcasting obligation must use them as their principal means of receiving radio or television broadcasts. It also follows from the provisions of Article 34(2) of the Act that the must-carry obligation incumbent on service distributors also requires the television services to accept such broadcasting, except where the distributor's offer of services is manifestly incompatible with respect for their public-service missions.

In light of these elements, the Conseil d'Etat found that the outcome of the dispute depended on the answers to five questions on the interpretation of the French legislation with regard to the Directive, which were specific to this case. Since they raise serious problems, the matter has been passed on to the CJEU.

• *Conseil d'Etat (5e et 4e sous-sect. réunies), 10 mai 2017, France Télévisions* (Conseil d'Etat (4th and 5th sub-sections together), 10 May 2017, France Télévisions) FR

Amélie Blocman
Légipresse

'Touche pas à mon poste' case: CSA calls for revision of sanction procedure

On 18 May Cyril Hanouna, the highly popular presenter of the television programme 'Touche pas à mon poste' - which attracts nearly one million viewers every evening - 'trapped' a homosexual live after posting a fake advertisement on a dating site. The hoax caused controversy, and the national audiovisual regulatory authority (Conseil Supérieur de l'Audiovisuel - CSA) received more than 25,000 complaints defending LGBT rights from viewers and associations who had been shocked by the sequence.

Under Article 15 of the Act of 30 September 1986 as amended, the CSA is required to "ensure that the programmes made available to the public by an audiovisual communication service do not contain any incitement to hate or violence on the grounds of race, gender, sexual orientation, religion or nationality". Reacting to the complaints, the CSA noted first that the channel, C8, had already been sent two orders to comply for its failure to respect human dignity and its encouragement of discriminatory behaviour, and announced that it had sent the information on to an independent rapporteur designated by the Vice-President of the Conseil d'Etat. By law, this is the only person in a position to investigate sanction procedures. It is only once the investigation was complete - and the rapporteur is the only person responsible for the timeframe - that the CSA, after a hearing, can pronounce any possible sanctions.

The CSA also recalled that its Director General had already sent the rapporteur information about the programme 'Touche pas à mon poste' on two occasions in late 2016. It could not be held responsible for the amount of time taken for the procedure, which by law lay exclusively in the hands of the rapporteur. The CSA had indeed just received on 23 May the rapporteur's conclusions on the two 2016 cases, and would therefore now be able to deal with them appropriately. In the light of past experience and these repeated excesses, the CSA therefore found that it seemed to be necessary to amend the legal framework for the procedure, to make it more effective.

• *Communiqué du CSA du 23 mai 2017* (Communication by the CSA on 23 May 2017)
http://merlin.obs.coe.int/redirect.php?id=18581 FR

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Rules on audiovisual election propaganda revised

Emmanuel Macron's success in the presidential election on 7 May 2017 has added further fuel to the challenging of the principles of audiovisual regulation and observance of political diversity in the media. With the prospect of the parliamentary elections on 11 and 18 June 2017, the national audiovisual regulatory authority (Conseil Supérieur de l'Audiovisuel - CSA) issued a decision on 23 May 2017 laying down the total broadcasting times allocated to each political party or grouping for the upcoming parliamentary elections, and specifying their number and duration.

Contesting the amount of time allocated to him (7 minutes in the first round and 5 minutes in the second, compared with a total of 120 minutes for the Parti Socialiste, 103 for Les Républicains, 22 for the UDI, 15 for the Parti Radical de Gauche, and 7 for the Parti Communiste Français, inter alia) the new French President's 'L'Association En Marche!' entered a request for the Conseil d'État to hold an urgent hearing regarding a fundamental freedom (the 'référé-liberté' procedure) with a view to obtaining a suspension of the CSA's decision. Article L. 167(1) of the Electoral Code, which governs the allocation of airtime to the political parties and groupings for their campaigning for the parliamentary elections, provides that those of them that do not already have a seat in the lower chamber of parliament (which is the case of the new President's party 'L'Association En Marche!') are allowed 7 minutes airtime in the first round and 5 minutes in the second. Those political parties and groupings already represented in the lower house are allowed three hours airtime in the first round and one and a half hours in the second, divided into two equal lots between those parties and groupings belonging to the majority and those that do not.

'L'Association En Marche!', considering that this situation constituted a serious and immediate infringement of a number of fundamental freedoms, including equality before suffrage and the equitable participation of political parties and groupings in the democratic life of the country, also presented the Conseil d'Etat with a prior question of constitutionality, which was duly passed on to the Constitutional Council. Given the election schedule, the Council's members deliberated in less than 48 hours.

In its decision of 29 May 2017, the Constitutional Council found that it appeared that the methods used by the legislator to determine the amount of airtime allocated to those parties and groupings which no longer had, or had not yet obtained, representation in the lower chamber of parliament did not allow the granting of airtime that was manifestly out of proportion to their representativeness. It also noted that the amount of airtime was the same for all parties not

represented in the lower chamber, regardless of the importance of the ideas or opinions they represented. The Council therefore found that the contested provisions of Article L. 167(1) of the Electoral Code could lead to granting airtime on public-service media that was manifestly out of proportion to the participation of those political parties and groupings in the democratic life of the country. These provisions therefore disregarded Article 4(3) of the Constitution and affected equality before suffrage to a disproportionate extent.

The Constitutional Council has however decided to postpone abrogation of the contested provisions until 30 June 2018. It has also given the CSA the possibility of increasing (within limits) the airtime allowed to parties and groupings not represented in the lower chamber of parliament. On 1 June the CSA therefore laid down new times for the official campaign, allowing between one and five blocks of additional time to certain political formations. Two criteria were applied: the number of candidates in the parliamentary election; and the representativeness of the parties, more specifically in the light of the presidential election. As a result, Emmanuel Macron's party 'La République En Marche' will in the end have 42 minutes in the first round and 25 minutes in the second for its campaign clips.

• *Conseil d'Etat (ord. réf.), 29 mai 2017 (Conseil Constitutionnel, 31 mai 2017, Association en Marche !)* (Conseil d'Etat (order under the urgent procedure), 29 May 2017 (Constitutional Council, 31 May 2017, 'Association En Marche!')) FR

Amélie Blocman
Légipresse

GB-United Kingdom

Parliamentary Home Affairs Committee report on abuse, hate, and extremism online

On 1 May 2017, the House of Commons Home Affairs Select Committee published its report concerning how social media companies, including YouTube, Google, and Twitter, were policing their sites and taking suitable action to remove illegal content that constituted a hate crime. The Committee concluded that overall the social media companies were "shamefully far" from tackling illegal and dangerous content. The Committee recommended that the Government consult on stronger laws and a system of fines for companies failing to remove illegal content.

The Committee's enquiry was announced in July 2016 following the murder of Jo Cox MP in June 2016 in the lead-up to the EU referendum. There had been a marked increase in hate crime and one aspect of the inquiry concerned the role of social media in hate crime. The Committee acquired evidence from a wide range of sources including social media companies.

The Committee recognised that various social media and technology companies had considered the impact of online hate, abuse, and extremism has upon individuals. Also, the Committee welcomed some companies' efforts to reduce such online behaviour by publishing clear community guidelines, building new technologies, and promoting online safety for young people and schools. However, the evidence acquired before the Committee revealed that nowhere near enough was being done to tackle illegal and dangerous content published on companies' sites and to keep their users safe.

The Committee urged the companies to urgently improve the quality and speed of their responses to reports of dangerous and illegal content from wherever those reports derived.

The Committee considered it unacceptable that the companies refused to reveal the number of people they employ to safeguard users, or the amount they spend on public safety initiatives. The companies refused to give the information because of commercial sensitivity. The Committee's conclusions and recommendations included finding that "the biggest and richest social media companies are shamefully far from taking sufficient action to tackle illegal and dangerous content.... Given their immense size, resources and global reach, it is completely irresponsible of them to fail [to] abide by the law, and to keep their users and others safe". Further, the Committee praised Twitter for some of its technological initiatives but was overall disappointed at the lack of pace of development of technical solutions, and in particular criticised Google for currently only using its technology to identify illegal or extreme material to assist advertisers but not to remove illegal content proactively. The Committee commented in its conclusions and recommendations as follows: "Most legal provisions in this field predate the era of mass social media use and some predate the internet itself. The Government should review the entire legislative framework governing online hate speech, harassment, and extremism and ensure that the law is up to date". The Committee recommended that companies that fail to proactively search for and remove illegal material should pay towards the costs of the police doing so instead. An analogy was made with section 25 of the Police Act 1996 whereby football clubs pay for the policing around a stadium. The companies should publish quarterly reports on their safeguarding activities including number of staff, complaints, and action taken. Transparent reporting would encourage improved standards and competition between online platforms to find innovative solutions to these problems. If the companies refuse to do this voluntarily then the Government will consult on forcing them to do so.

• House of Commons Home Affairs Committee, Hate Crime: abuse, hate and extremism online, Fourteenth report of the Session 2016-2017, HC 609, 1 May 2017
http://merlin.obs.coe.int/redirect.php?id=18600 EN

• Department for Culture, Media and Sport, "Memorandum of Understanding between the UK Government, Scottish Government, Scottish Parliament and the Office of Communications", 28 April 2017
http://merlin.obs.coe.int/redirect.php?id=18601 EN

Julian Wilkins
Blue Pencil Set

Tony Prosser
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Memorandum of Understanding between the UK Government, the Scottish Government, the Scottish Parliament and Ofcom

A Memorandum of Understanding has been agreed setting out the relations between the UK Government, the Scottish Government and Parliament, and Ofcom, the UK communications regulator. The background to this was the Smith Commission report on further devolution to Scotland in 2014, which recommended that the power to approve Ofcom appointments to the board of MG Alba, the Gaelic language media service, should rest solely with the Scottish Ministers, not with UK ministers. It also proposed a formal consultative role for the Scottish Government and Parliament in setting priorities for Ofcom in Scotland, the power for Scottish Ministers to appoint a Scottish member to the Ofcom board, and requirements that Ofcom lay its annual report and accounts before the Scottish Parliament and appear before committees of that parliament when required. The UK Government accepted these proposals and they were implemented by the Scotland Act 2016.

Detailed implementation of the Act and relations between Ofcom and the Scottish institutions are governed by the new Memorandum of Understanding. This sets out a formal consultative role for the Scottish institutions in Ofcom's process of setting its strategic priorities with respect to its activities in Scotland. It sets out agreed guidance for the appointment of a Scottish member of Ofcom's board by the Scottish ministers, and for similar consultation in relation to the appointment of a Scottish member of Ofcom's Consumer Panel. The Memorandum also sets out detailed procedures for appointments to the board of MG Alba on the recommendation of Ofcom, which will undertake the initial search and selection of nominees. These procedures deal with such matters as conflicts of interest, transparency, and the language proficiency of the candidate. Membership of the board must include members nominated by the BBC and by the Scottish development agencies. A procedure is also set out for use where Ofcom and the Scottish Ministers cannot agree on an appointment. There will also be regular meetings between Ofcom and the Scottish Ministers on general matters, at least once per year. Ofcom's annual report and accounts must be sent to the UK Secretary of State and the Scottish Ministers, who will lay it before the Scottish Parliament.

IE-Ireland

Court of Appeal orders reduction in damages for defamation of lawyer in TV news report

The Court of Appeal has ordered that damages of EUR 140,000 awarded in the High Court against the broadcaster TV3 for defaming a lawyer in a news report be reduced to EUR 36,000 (for High Court judgment, see IRIS 2016-1/18). This was the first time the Court of Appeal considered the "Offer to make amends" provision under the Defamation Act 2009. In November 2013, lawyer David Christie was defamed by commercial broadcaster TV3 in a news bulletin reporting a court case which incorrectly identified him as his client, who he was representing in a criminal trial. Two days after the broadcast, Christie wrote to TV3 claiming the broadcast was defamatory and seeking a retraction, apology, and "substantial compensation". Shortly after, TV3 broadcast a correction and an apology stating that there was absolutely no suggestion that Mr Christie had been on trial for any offences and apologised to Mr Christie and his family for any distress and embarrassment. Following the apology, Mr Christie initiated defamation proceedings against TV3 and the broadcaster invoked section 22 of the Defamation Act 2009. This section provides that a person who has published a statement that is alleged to be defamatory may make an offer to make amends, which is defined as publishing a suitable "correction" and "apology" and paying compensation or damages. Where parties do not agree as to the amount of damages, the High Court can determine the amount. In 2016, the High Court assessed the starting point of the level of damages in a fully contested case of this kind as being a sum in the region of EUR 200,000. The Court awarded Mr Christie EUR 140,000 in damages taking into account the offer of amends and the apology. TV3 appealed that decision to the Court of Appeal, contending that the starting point of an award of EUR 200,000 in a case of this kind "is just too high" and "appropriate weight had not been given to the nature of the apology and the offer of amends."

In May 2017, in considering the arguments in the Court of Appeal, Justice Hogan stated that the offer of amends procedure introduced by section 22 of the 2009 Act, "is one of the most significant changes effected by this legislation". In reaching his decision, Hogan recognised that while this was "a serious

defamation" of Mr Christie, "it was not at the level which would merit a starting point of EUR 200,000." The judge was of the opinion that, taking into account all the relevant factors including the one-off nature of the broadcast, its relatively short duration, the failure to name Mr Christie and the lack of animus towards him, and the fact that it was an obvious error to which those closest to Mr Christie, his family, friends, work colleagues and clients, would surely know, he considered that these factors mitigated the otherwise very serious nature of the defamation. Accordingly, the appropriate starting point for the Court of Appeal judge was a figure of EUR 60,000. Justice Hogan also asserted that while the apology published by TV3 was "satisfactory," meaning that TV 3 would be entitled to a substantial discount, he stated that, "that figure could itself have been higher had for example, the apology acknowledged that Mr Christie had been defamed and had apologised for the distress and embarrassment which the public had caused." Justice Hogan allowed the appeal "to the extent" that he reduced the starting figure of EUR 200,000 to EUR 60,000 and increased the level of discount from one-third to 40%. He accordingly substituted a figure of EUR 36,000 for the award of EUR 140,000 made by the High Court as the sum to be paid to Mr. Christie by way of damages for defamation.

• Christie v TV3 Television Networks Limited [2017] IECA 128, 04 May 2017
http://merlin.obs.coe.int/redirect.php?id=18553 EN

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General Scheme of Data Protection Bill 2017 and new legislation on cybercrime

On 12 May 2017, the Department of Justice and Equality published the General Scheme of the Data Protection Bill 2017. The Bill will give further effect in Irish law to the EU General Data Protection Regulation (GDPR) (2016/679). The Bill contains some notable features for the media: Article 85 of the GDPR obliges member states to reconcile the right to protection of personal data with the right to freedom of expression and information. Current law in Ireland in this regard is set out in section 22(A) of the Data Protection Acts 1988 and 2003, which gives effect to Article 9 of the 1995 Data Protection Directive. The Bill contains an exemption for many of the rights and obligations under the GDPR for processing that is carried out for journalistic purposes or for the purposes of academic, artistic, or literary expression, where compliance with the GDPR would be incompatible with the right to freedom of expression. The Bill gives expression to the final sentence in recital (153) GDPR, which states that "in order to take account of the importance of the right to freedom of expression in every democratic society, it is necessary to interpret notions relating to that freedom, such as journalism, broadly." Accordingly, this is intended to acknowledge activities such as blogging and the expression of views on social media." The Bill seeks to give effect to Article 85 GDPR and provides for a new 'case stated' mechanism which will permit the Data Protection Commission to refer a question of law arising in relation to the balance to be established between the right to data protection and the right to freedom of expression to be referred to the High Court for determination.

Moreover, on 18 May 2017, the first piece of Irish legislation specifically dedicated to dealing with cybercrime completed its passage through the Houses of Oireachtas (Parliament). The Criminal Justice (Offences Relating to Information Systems) Bill 2016, aims to safeguard information systems and the data that they contain. The legislation gives effect to the relevant provisions of an EU Directive on attacks on information systems (2013/40/EU) (see IRIS 2002-6/7) and also gives effect to many of the key provisions of a Council of European Convention on Cybercrime (see IRIS 2001-10/3) as certain offences are shared by both international instruments. The legislation creates new offences relating to unauthorised accessing of information systems, unauthorised interference with information systems or data on such systems; the unauthorised interception of transmission of data to or from information systems and; the use of tools, such as computer programmes, passwords or devices, to facilitate the commission of these offences relation to information systems. The definition of the term "information system" in the bill is purposely broad, encompassing all devices involved in the processing and storage of data and not just those considered to be "computer systems" in the traditional sense but also those that reflect the "range of modern communications and data storage technology currently available", including tablets and smart phones. The Bill establishes strong and dissuasive penalties for commission of the offences it contains, with the most serious offences possibly resulting in a term of imprisonment of up to 10 years.

• General Scheme of Data Protection Bill 2017
http://merlin.obs.coe.int/redirect.php?id=18554 EN
• Criminal Justice (Offences Relating to Information Systems) Bill 2016
https://www.oireachtas.ie/viewdoc.asp?DocID=30722 EN

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Broadcasting Authority allocates awards under Broadcasting Funding Scheme

On 22 May 2017, the Broadcasting Authority of Ireland (BAI) announced the allocation of EUR 5.5 million

to projects under its broadcasting funding scheme, "The Sound & Vision 3 Broadcasting Funding Scheme" (see IRIS 2016-9/22 and IRIS 2015-4/13). The scheme is created under section 154 of the Broadcasting Act 2009, which requires the BAI to "prepare" a funding scheme to support a number of objectives, including new television or radio programmes "including feature films, animation and drama on Irish culture, heritage and experience", "programmes to improve adult or media literacy", "programmes which raise public awareness and understanding of global issues impacting on the State and countries other than the State", and the development of archiving or programme material produced in Ireland.

The funding amounting to EUR 5.5 million was allocated to 119 projects following a detailed assessment process, with just over EUR 5 million allocated to 31 television projects, while some 88 radio projects will benefit from funding of EUR 480,000. A total of 220 applications for funding were made in this funding round of the scheme, "a slight decrease" from previous applications, with "documentary by far the most popular format for which funding was sought."

Chief Executive of the BAI, Michael O' Keefe, noted that the scheme is financed from the Broadcast Fund, which comprises 7 % of the annual net receipts from television licence fees. He stated that "at a time when measures are under consideration to counter television licence evasion, it is worth bearing in mind that any increase in revenue will also lead to an increase in the amounts available to support more projects" like these and "make a further contribution to the quality of the content available to Irish audiences."

• Broadcasting Authority of Ireland, "More than €5.5m allocated to 119 projects under Sound & Vision Scheme", 22 May 2017
http://merlin.obs.coe.int/redirect.php?id=18555 EN

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IT-Italy

Court of Appeal of Rome confirms that video-sharing platforms shall take down content even if the cease-and-desist letter does not include URLs

With decision no. 2833 published on 29 April 2017, the Court of Appeal of Rome confirmed in its entirety last year's ruling issued by the First Instance Court of Rome in the RTI vs. Break Media case (see IRIS 2016-6/18).

Break Media is an Internet portal that publicly offers free videos, created by Break Media itself or uploaded by users, on a platform that bases its business model on advertising. The platform, in fact, has an editorial team which manually categorises the videos on the basis of several criteria. Along with the videos, users are shown targeted advertising decided on the basis of users' preferences.

RTI - one of the major Italian broadcasters - is the copyright owner of a series of videos of TV shows published, without its authorisation, on the Break Media portal. RTI initially sent a cease-and-desist letter to Break Media requesting it to take down audiovisual content in violation of RTI's copyright. The letters did not include the URLs but mentioned the TV shows' names.

Break Media failed to comply with RTI's requests, and therefore the latter filed a suit to have the Court order Break Media to remove the content at issue.

The first instance Court ascertained that Break Media violated RTI's copyright by allowing the videos to remain online despite the cease-and-desist letters received. As a result, it ordered Break Media to pay RTI the amount of EUR 115,000 as damages for reimbursement, plus legal fees and expenses.

Break Media filed an appeal with the Court of Appeal of Rome against the first ruling. The panel rejected the appeal on all grounds and fully confirmed the first decision.

First, the Court of Appeal rejected Break Media's objection that the Court of Rome has no jurisdiction over the case. So, it confirmed the Italian Court's jurisdiction on copyright matters where the illicit conduct creates damage that produces its effects within the Italian territory.

Further, the Court confirmed that Break Media should be classified as a content-provider and not as a hosting provider. As such, it cannot benefit from the liability exception provided by the E-Commerce Directive (Directive 2000/31/EC) and the E-Commerce Decree (Legislative Decree no. 70 of 2003).

In any case, the Court also rejected Break Media's argument that it was not obliged to take down the content as RTI failed to indicate the URLs of the content at issue. Indeed, the Court ascertained that Italian law does not provide for an obligation to indicate the specific URLs in a cease-and-desist letter. The provider's actual knowledge exists when the copyright owner highlights with enough precision the content in violation of its right, so that the provider can identify and take them down.

• *Corte d'Appello di Roma - Sezione specializzata in materia d'impresa, sentenza n. 2833 del 29 aprile 2017* (Court of Appeals of Rome, Specialized Division for Business Matters, decision no. 2833 of 29 April 2017)
http://merlin.obs.coe.int/redirect.php?id=18556 IT

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MT-Malta

Election broadcasts

Following the dissolution of Parliament and the calling of a snap election on 3 June 2017 by the Prime Minister of Malta one year prior to the scheduled end of the legislature, the Broadcasting Authority has launched a scheme of election broadcasts for the political parties participating in the general elections. The political parties concerned are the two main political parties represented in the House of Representatives during the last legislature, namely the Labour Party (the party in government) and the Nationalist Party (the party in opposition), and the smaller parties, these being the Green Party - called "Democratic Alternative" -, the Alliance for Change, the Maltese Patriot Movement and the newly-formed Democratic Party, which held one seat in the House of Representatives prior to its dissolution after its leader had splintered from the Labour Party.

What is innovative about this general election is that the Nationalist Party (PN) and the Democratic Party have entered into a pre-electoral pact. These two political parties have united together in a "national force" (as it is being referred to). However, due to electoral law constraints, they have to contest the general election under the PN banner as the electoral law does not recognise the possibility of two or more registered political parties coming together to contest a general election under the umbrella of a new political grouping such as "national force". This has also meant that on the ballot vote only the name of the National Party will appear; candidates of the Democratic Party will be distinguished from those of the Nationalist Party through their designation of "Orange Party", orange being the colour adopted by the Democratic Party to distinguish it from the blue of the Nationalist Party, the red of the Labour Party and the green of the Green Party.

In so far as the Broadcasting Authority scheme of election broadcasts is concerned, broadcasting time allocated to the Democratic Party has also been subsumed under that of the Nationalist Party; thus, no time has been allocated to the Democratic Party per se but to the Nationalist Party in representation of both political parties.

The scheme of election broadcasts started on 8 May and ended on 31 May 2017. It was a very short scheme of 24 days in all. It consisted of two political debates between representatives of the two main political parties, the Labour Party and the Nationalist Party, two press conferences delivered by each one of the said parties, and a debate between representatives of the three smaller parties (the Green Party, the Alliance for Change and the Maltese Patriot Movement). The smaller parties were also entitled to deliver a message to the electorate, as were the two independent candidates. The scheme of election broadcasts closed with a debate between the leaders of the two main political parties, the Prime Minister and the Leader of the Opposition.

In addition to debates, press conferences and addresses to the electorate, the scheme also allowed the possibility of broadcasting party productions and political spots; for such productions/spots, the Labour Party and the Nationalist Party enjoyed 120 minutes each, the other three smaller parties were allocated 20 minutes each, whilst the independent parties were allocated no time at all.

The scheme of election broadcasts was transmitted by the public service broadcaster.

• *Broadcasting Authority, [08/17] General Elections 2017 - Political Debate, 14 May 2017* (Broadcasting Authority, [08/17] General Elections 2017 - Political Debate, 14 May 2017)
http://merlin.obs.coe.int/redirect.php?id=18557 MT

• *Broadcasting Authority, [09/17] General Elections 2017 - Political Debate, 16 May 2017* (Broadcasting Authority, [09/17] General Elections 2017 - Political Debate, 16 May 2017)
http://merlin.obs.coe.int/redirect.php?id=18558 MT

• *Broadcasting Authority, [10/17] General Elections 2017 - Press Conference, 19 May 2017* (Broadcasting Authority, [10/17] General Elections 2017 - Press Conference, 19 May 2017)
http://merlin.obs.coe.int/redirect.php?id=18559 MT

• *Broadcasting Authority, [11/17] General Elections 2017 - News Conference, 23 May 2017* (Broadcasting Authority, [11/17] General Elections 2017 - News Conference, 23 May 2017)
http://merlin.obs.coe.int/redirect.php?id=18560 MT

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NL-Netherlands

Court finds "ironic" news website can rely upon the quotation exception to copyright

On 12 May 2017, the District Court of Amsterdam ruled that not only serious media, but also media of an ironic nature can rely upon the quotation exception to copyright. The case concerned a Dutch news website, 925.nl, which publishes ironic articles. In one of these articles, the website discussed the takeover of Sapph Intimates B.V., a lingerie webshop that went bankrupt in 2011 and that used the claimant's photograph of the former Olympic swimmer Inge de Bruijn in swimwear on their poster. The poster with the claimant's photograph was therefore also shown in the ironic article by the news website. The article stated that Roland Kahn, also owner of America Today clothing, bought Sapph out of "pure sleaziness", calling it "not the best move businesswise".

The photographer claimed that his copyright had been infringed, as no permission had been asked for the use of his photograph by the news website. As a defence, the news website claimed that this lack of permission was justified under the quotation exception under section 15a of the Dutch Copyright Act (see IRIS 2010-1: Extra).

In its judgment, the Court assessed whether all the requirements for the quotation exception had been fulfilled. Regarding the requirement of lawful disclosure of the work quoted from, the Court ruled that the photograph had been lawfully disclosed as part of the poster in an advertising campaign. As the company was known for its controversial posters, the Court found it logical that the poster formed part of the article discussing this company. It stated that the poster did not form a predominant part of the article and that the meaning of the article would not have changed if another poster had been shown; therefore, the photograph was not individually exploited by the news website. The quote was thus in accordance with what is generally regarded as reasonably acceptable and the number and size of the quoted parts were justified by the purpose. While the news website had not clearly indicated the name of the author of the photograph, the company that had originally published the poster with the photograph had also failed to do so; therefore, the website could not be reproached for the lack of indication of the source. The last two requirements of source indication and observation of moral rights were thus fulfilled as well.

The Court rejected the claimant's argument that the medium quoting a copyright protected work has to be of a serious nature; a news website can also rely on this exception when it is of an ironic nature. The serious character of a medium can therefore not form an extra requirement, nor should a medium of an ironic nature be subject to stricter requirements than for serious media. However, the Court recognised that the character of the medium can have an influence on the question of whether the second quotation requirement, to be generally regarded as acceptable, is fulfilled.

• *Rechtbank Amsterdam, 12 mei 2017, ECLI:NL:RBAMS:2017:3442* (District Court of Amsterdam, 12 May 2017, ECLI:NL:RBAMS:2017:3442)
http://merlin.obs.coe.int/redirect.php?id=18602 NL

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NO-Norway

Norwegian Media Authority publishes survey on fake news

By request from the Norwegian Ministry of Culture, the Norwegian Media Authority (NMA) carried out a survey on fake news in March 2017, and the results were published on 3 April 2017. The survey was designed by the NMA, and based on similar studies on fake news which were carried out in the United States and Sweden (see also IRIS 2017-5/21). A representative sample of 1 000 people aged between 18-80 were asked questions about the sharing and spreading of fake news, the ability to detect such news, and who they thought was responsible for preventing its dissemination and for increasing media literacy among the population. The survey was carried out by a polling institute in March 2017. The survey shows that over half (55%) of the respondents suspected that they, weekly or more often, read news that they considered to be inaccurate; 45% reported reading news, weekly or more often, that they considered to be deliberately falsified; nearly a quarter (23%) of respondents said they had shared a news story that they later realised was fake on at least one occasion; and 15% reported that they had shared a news story they knew or suspected to be fake on at least one occasion.

When asked where they most often read false information presented as news, a fairly large majority of the respondents pointed to the Internet and social media: 62% mentioned Facebook, 15% search engines, 14% YouTube,12% alternative news websites, and 21% pointed to traditional media. Following on from this, it is interesting that the survey shows that for almost 90% of respondents, traditional media such as newspapers, radio and television have a very big responsibility (68%) or quite a big responsibility (21%) for preventing the spreading of fake news. The expectations towards social media's responsibility is a bit lower, with 49% expressing the view that social media has a very big responsibility and 33% asserting that social media has quite a big responsibility. Only a little over a quarter (27%) considered that the population has a substantial responsibility in preventing the spreading of fake news. When asked what they do when they come across a news story that they suspect is false, a little over a third (37%) of respondents stated that they did not do anything. At the same time, 35% answered that they checked via web search; 24% checked via traditional media, and 18% checked "fact check services" (see IRIS 2017-3/14); 4% stated that they contacted the editor or journalist; and 13% stated that they addressed fake news in the comments field or in social media.

To be able to detect fake news and know what to do

about it, it is vital to have a variety of media literacy skills and knowledge about source criticism. The survey shows that Norwegians believe that increasing media literacy and source criticism is primarily the responsibility of traditional media (50%), closely followed by schools and education (47%) and public authorities (46 %); 38% stated that social media has a very large responsibility and 26 percent that the responsibility rests with the population. The NMA is amongst those who work actively to increase media literacy skills in the Norwegian population. After the NMA presented the survey on fake news, the Ministry of Culture asked the NMA to prioritise the work on media literacy this year. One of the planned measures is to conduct a similar survey on fake news aimed at young people between the ages of 15 and 18 years old. This survey will be carried out through the Norwegian Safer Internet Centre, which is part of the European Connecting Europe Facility Programme, and coordinated by the NMA. The findings will form the foundation for developing a new educational resource aimed at this age group.

• *Falske nyheter - En webundersøkelse utført av Sentio Research for Medietilsynet, 3/4/2017* (Norwegian Media Authority, Fake News, 3 April 2017)
http://merlin.obs.coe.int/redirect.php?id=18561 NO

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RO-Romania

Modification of the Audiovisual Law concerning television advertising

On 13 April 2017, the President of Romania, Klaus Iohannis, promulgated the organic Law no. 66/2017 for the repealing of Article 29ˆ1 of the Audiovisual Law no. 504/2002, with further modifications and completions. The above-mentioned article referred to the acquisition of television advertising space. Law no. 66/2017 was published in the Official Journal of Romania no. 273/19.04.2017 (see IRIS 2016-10/24).

The law was unanimously adopted by the Senate (upper chamber of the Romanian Parliament) on 20 March 2017 and had previously been adopted by the Chamber of Deputies (lower chamber) on 15 June 2016. The main provision of the repealed article was that any acquisition of television advertising space may be made by an intermediary only in the name and on behalf of the final recipient of television advertising. According to the initiators, Article 29ˆ1 of the Audiovisual Law had to be repealed because the effect produced by this provision was not the one expected: a significant decrease in the profits of the most important media agencies and, implicitly, a decrease in their contributions to the state budget.

The Romanian Government made some observations, but left Parliament to decide on the appropriateness of adopting this legislative initiative. The introduction of Article 29ˆ1 in the Audiovisual Law was meant to eliminate distortions in the way prices are set on the advertising market, according to the considerations of the government. The Legislative Council issued a positive opinion, but warned that by repealing Article 29ˆ1, a situation of legislative vacuum would be triggered, making the original law subject to a lack of predictability with regard to how contracts for advertising space would be concluded. This warning was similar to the one issued by the government.

The Legal, Discipline and Immunities Committee and the Committee on Economic Policy, Reform and Privatization of the Chamber of Deputies had issued positive opinions on the draft law. In the Senate, the Committee on Budget, Finance, Banking and Capital Market and the Committee on Regional Development, State Assets Management and Privatization issued negative opinions. On the other hand, the Senate's Committee on Culture and Mass-Media issued a positive opinion to repeal Article 29ˆ1, and added that the Committee had received letters supporting the repeal from the International Advertising Association and the Union of Advertising Agencies in Romania, which considered that Article 29ˆ1 had introduced unjustified commercial constraints that had affected relationships between customers, agencies and broadcasters.

• *Lege Nr. 504/2002 din 11 iulie 2002 Legea audiovizualului Text iˆn vigoare iˆncepaˆnd cu data de 22 aprilie 2017* (Audiovisual Law no. 504/2002 (consolidated version))
http://merlin.obs.coe.int/redirect.php?id=18603 RO

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A new way to appoint the management of the telecom watchdog

On 27 April 2016, the Government of Romania adopted the Emergency Government Decree no. 33/2017 for the modification and completion of Article 11 of the Government Decree no. 22/2009 on the establishment of the National Authority for Administration and Regulation in Communications (ANCOM - the telecom watchdog) (see IRIS 2009-5/31 and IRIS 2010-7/31).

According to the new version of Article 11(1), the management of ANCOM is provided by a president and two vice presidents, proposed by the government and appointed by the plenary of the parliament, with the majority of the present MPs. A new paragraph 11

provides that the nominations shall be forwarded to the permanent offices of the two Chambers of Parliament within 30 days of the date of vacancy. Prior to the approval of this Emergency Decree, the ANCOM management was appointed by the President of Romania, at the proposal of the government. All the positions, of president and vice presidents, were vacant at that moment.

On 11 May 2017, the senators and deputies voted by a large majority in favour of Adrian Diță becoming the ANCOM President for a six-year mandate.

A dispute arose between the Presidential Administration of Romania and the government on the matter. Mădălina Dobrovolschi, the spokesperson for the President of Romania, Klaus Iohannis, said that the adoption of the Emergency Government Decree to modify the procedure for appointing the National Authority for Administration and Regulation in Communications Management is another alarming signal regarding the non-transparent manner in which the government acts. Dobrovolschi stated that if the government had wanted to solve this situation by way of an urgent formula, it had the tools and it also had the time to do so, because, after all, ANCOM had had no management for months, so the situation could have been solved by using the legislation in force, simply by appointing other people for the vacancies.

In line with the president's opinion, the interim leader of the National Liberal Party (opposition), Raluca Turcan, sent a letter to the Romanian Ombudsman asking him to appeal to the Constitutional Court concerning the Emergency Government Decree no. 33/2017, which amended the procedure for appointing the president of ANCOM so that he would be appointed by parliament instead of by the President of Romania. The letter mentions that the government did not provide justification for the urgency procedure, and that the ordinance was adopted without the Legislative Council's opinion.

• *Ordonanța de urgență a Guvernului nr.33 din 27.04.2017 pentru modificarea și completarea art. 11 din Ordonanța de urgență a Guvernului nr. 22/2009 privind înființarea Autorității Naționale pentru Administrare și Reglementare în Comunicații* (Emergency Government Decree no. 33/2017 for the modification and completion of Art. 11 of the Government Decree no. 22/2009 on the establishment of the National Authority for Administration and Regulation in Communications)
http://merlin.obs.coe.int/redirect.php?id=18566 RO

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RU-Russian Federation

Supreme Court rules on free use of photographs

The Civil Code of the Russian Federation allows, under certain conditions, free use of works without the consent of the author and without payment of remuneration, but with a mandatory indication of his or her name and the source of borrowing. In particular, it is permitted to cite for informational purposes in the volume justified by the purpose of the quotation.

The Supreme Court of the Russian Federation adjudicated in a civil case filed by a famous Russian blogger against the website archi.ru which covers issues related to architecture, history and current affairs. At issue was the use of 22 photographs by the plaintiff in 14 weekly reviews of the defendant.

The first instance dismissed the case as an abuse of copyright law. The second and third instances overruled the decision in favour of the plaintiff, noting in particular that it is not possible to "quote" images by using them as such to illustrate current affairs.

The Supreme Court ruled that the position of the appeals courts does not follow the provisions of the Civil Code and that quoting is allowed once the work, including photography, has become publicly available on a legal basis.

• Определение Верховного Суда РФ от *25.04.2017 N 305-ЭС 16-18302* по делу *N А 40-142345/2015* (Ruling of the Judicial Collegium on Economic Disputes of the Supreme Court of the Russian Federation of 25 April 2017, N 305- ЭС 16-18302)
http://merlin.obs.coe.int/redirect.php?id=18567 RU

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Adoption of Development Strategy of Information Society

On 9 May 2017, the President of the Russian Federation Vladimir Putin approved his Decree Стратегия развития информационного общества в Российской Федерации на 2017 - 2030 годы (Development Strategy of the Information Society in the Russian Federation in 2017-2030). The Strategy supersedes a similar act from 2008, then approved by the Government of the Russian Federation.

The document consists of 65 paragraphs, divided into six chapters. The text begins with a list of general notions, followed by the description of Russia's place

in the modern information society, an enumeration of the national priorities in developing an information society, a preferential scenario for such a society and the parameters for its success.

In particular, priority is given to traditional Russian spiritual and moral values and the observance of norms of behaviour based on these values when using information and communication technologies - these values can be found among the principles laid down in the Strategy (paragraph 3).

The pace of technology, as the Strategy explains, "has significantly exceeded the possibilities of most people in the learning and application of knowledge". Their focus in the world outlook has thus been shifted from science, education and culture to entertainment and reference-type searches, characteristic of the "massive superficial perception of information." This form of information consumption "contributes to the formation of imposed patterns of behavior that gives an advantage in achieving economic and political goals to those States and organizations that own technology for dissemination of information" (paragraph 16).

One of the prescribed instruments of the Strategy will be the improvement of legal instruments for those media and technological platforms, which by many criteria could be referred to as the mass media outlets but legally are not defined as such. They are online online TV, news aggregators, social networks, websites, messengers (paragraph 26).

• УКАЗ ПРЕЗИДЕНТА РОССИЙСКОЙ ФЕДЕРАЦИИ О Стратегии развития информационного общества в Российской Федерации на *2017 - 2030* годы *, 09//05/2017, N203* (Decree of the President of the Russian Federation "On Development Strategy of Information Society in the Russian Federation in 2017-2030" of 9 May 2017, N203)
http://merlin.obs.coe.int/redirect.php?id=18571 RU

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TM-Turkmenistan

Law on privacy adopted

On 20 March 2017, President Berdymukhamedov of Turkmenistan signed into law the Statute on Information on Personal Life and Its Protection, which consists of 33 articles split into six chapters.

The Statute introduces definitions of key notions mostly related to different aspects of or actions related to personal data.

The principle of consent-based data collection, storage and processing is accompanied by a list of exceptions such as for the purposes of law enforcement, statistics, the protection of human rights, and other purposes provided by the national statutes. One of the exceptions is "for the purposes of lawful professional journalistic activity or activity of a mass media outlet, or scholarly, literary or other creative activity under condition of observance of human rights and liberties" (para 6 Art. 9).

No special office has been established to oversee the implementation of the statute; the Prosecutor-General of Turkmenistan has been tasked to do it as part of his routine duties.

The Statute enters into force on 1 July 2017.

• ЗАКОН ТУРКМЕНИСТАНА Об информации о личной жизни и её защите (Act "On Information on Personal Life and Its Protection", officially published on 29 March 2017 in the national daily "Neytralniy Turkmenistan")
http://merlin.obs.coe.int/redirect.php?id=18570 RU

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UA-Ukraine

Sanctions against Russian online and broadcast companies

On 20 May 2017, President Petro Poroshenko of Ukraine signed a decree that enforced the expanded list of sanctions against mostly Russian persons and legal entities.

The earlier President's Decree N549/2015 of 16 September 2015, now superseded, included four TV companies: First Channel - World Network, RTR-Planeta, Rossiya-24, and NTV. The current decree, which expands the list to 468 legal entities, now refers to such TV companies as TV-Center, TNT, RBC, NTV-Plus, Zvezda, Moskva-24, Peterburg, Ren-TV, and OTV (Public Television).

In addition to the broadcasters, the decree has introduced sanctions against certain internet companies, including popular services Yandex, Mail.ru, and social networks Odnoklassniki (OK.ru) and Vkontakte (VK).

The sanctions mean that any of these companies can be stopped or restricted in the provision of telecommunication services and the use of general access telecommunication networks in Ukraine.

In most cases, the sanctions have been introduced for a period of three years, in other cases, for one year.

The National Commission for the State Regulation of Communications and Informatization of Ukraine, the authority for state regulation and control in the areas

of telecommunications and the use of radio frequencies, has distributed a memorandum to Ukrainian operators and ISPs on the obligatory enforcement of the sanctions, reminding them of administrative penalties (fines) should the decree not be implemented.

• Про рішення Ради національної безпеки і оборони України від *28* квітня *2017* року " Про застосування персональних спеціальних економічних та інших обмежувальних заходів *(* санкцій *)*" (Decree of the President of Ukraine N133/2007of 15 May 2017 On the Decision of the National Security and Defense Council of Ukraine of 28 April 2017 "On introduction of individual special economic and other restrictive measures (sanctions)")
http://merlin.obs.coe.int/redirect.php?id=18568 UK

• Інформаційне повідомлення . До уваги операторів , провайдерів телекомунікацій , *16/05/2017* (National Commission for the State Regulation of Communications and Informatization, Memorandum "Attention of operators, providers of telecommunications", 16 May 2017)
http://merlin.obs.coe.int/redirect.php?id=18569 UK

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New mechanisms to combat audiovisual piracy on the Internet

The Law on State Support of Cinematography in Ukraine (see IRIS 2017-6/30), which was signed into law on 20 April 2017 by the President of Ukraine, entered into force on 26 April 2017.

The law provides for a set of rules aimed at easing copyright enforcement on the Internet and creates a secondary liability regime for third party copyright and related rights infringements through the introduction of a new 'Notice and Takedown' procedure.

As per the established procedure, the copyright and related rightsholder must send a Notice to the website owner to take down the allegedly infringing material. Upon receipt of the Notice, the website owner must, within 48 hours, terminate access to the infringing material on the website and give notification of it to the rightsholder. If the website owner declines to comply with the Notice or if there is insufficient information in the WHOIS databases (public database for domain name's owners) to identify the website owner, the rightsholder can send the Notice directly to the hosting provider. Within 24 hours of receiving the Notice, the hosting provider must send it to the website owner and, within 48 hours, terminate access to the infringing material. The website owner can send a notification to the hosting provider objecting to the termination of access to the allegedly infringing material. The hosting provider shall restore access to such material if the rightsholder has not provided him with documents confirming that he has initiated court proceedings within 10 working days.

This procedure may be applied only to audiovisual works, musical works, computer programs, videograms, phonograms, and broadcasts (Ph. 1 Article 52-1). According to Article 52-1 of the Law on Copyright and Related Rights, the website (web page) owners that respond to the rightsholder's Notice and prevent access to the allegedly infringing material in accordance with the requirements of the procedure, are exempt from liability, except in cases of repeat (two or more) infringement allowed by website and web page owners not complying with the Notices, related to the same infringing materials on their web pages within a three month period.

In order to prevent the practice of unfair competition and abuse, the applicant may only file the Notice through a legal representative (attorney-at-law). The Notice shall include a set of information, such as the applicant's identification, the proof of rights ownership over the disputed content and it shall attach the supporting documents to it.

At the same time, the amendments of Articles 164-17 and 164-18 of the Code on Administrative Offenses of Ukraine establish that website owners and hosting providers will be held liable in the case of inaction regarding the protection of copyright and related rights on the Internet; failure to respond or provide a timely response, as well as the submission of incorrect information in response to a Notice; non-provision of accurate information in the domain name's owners section of the public (WHOIS) databases; and false statements by the applicant about rights ownership in the Notice will be subject to a fine.

A provision of the Criminal Code of Ukraine has also expanded the scope of criminal liability to include copyright infringement in the audiovisual sphere, for example 'camcoding', card sharing, and the financing of these actions (Ph. 1 Article 176 Code). Specifically, the paragraph on the criminalization of these activities was introduced in accordance with the International Intellectual Property Alliance's (IIPA) recommendations regarding priority actions and legal reforms in Ukraine, presented in the 2017 Special 301 Report on C opyright Protection and Enforcement.

These latest amendments were part of the intellectual property system reform undertaken in Ukraine and aim to prescribe clear regulatory mechanisms to facilitate law enforcement practice. They also establish the legislative framework for the Supreme Court on Intellectual Property as stipulated in the Ukrainian Law on the Judiciary and Status of Judges (Article 31), which will be applied for settling disputes in this area.

• Закон України « Про авторське право та суміжні права » (Act "On Copyright and Related Rights" of 23 December 1993 N 3792-XII as amended on 23 March 2017)
http://merlin.obs.coe.int/redirect.php?id=18572 UK

• Кодекс України про адміністративні правопорушення (Code on Administrative Offences of 7 December 1984 N 8073-X as amended on 23 March 2017)
http://merlin.obs.coe.int/redirect.php?id=18573 UK

• Кримінальний кодекс України (C riminal Code of 5 April 2001 N 2341-III as amended on 23 March 2017)
http://merlin.obs.coe.int/redirect.php?id=18574 UK

• Закон України « Про судоустрій і статус суддів » (Act "On the Judiciary and Status of Judges" of 2 June 2016 N 1402-VIII)
http://merlin.obs.coe.int/redirect.php?id=18575 UK

• International intellectual property alliance (IIPA). 2017 Special 301 report on copyright protection and enforcement
http://merlin.obs.coe.int/redirect.php?id=18576 EN

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Agenda

Book List