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IRIS 2018-3

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Editorial Informations

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ISSN 2078-6158

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INTERNATIONAL

COUNCIL OF EUROPE

European Court of Human Rights: Magyar Kétfarkú Kutya Párt v. Hungary

On 23 January 2018, the European Court of Human Rights (ECtHR) delivered its judgment in the case of Magyar Kétfarkú Kutya Párt v. Hungary, concerning a mobile application ("app") which allowed voters to anonymously share photographs of their ballot papers. Notably, the Court held that a fine imposed on a political party for distributing the app had violated the party's right to freedom of expression. The applicant in the case was the Hungarian political party Magyar Kétfarkú Kutya Párt. Three days before Hungary's 2016 referendum on the EU's migrant relocation plan, the applicant made the mobile app available to voters. The app allowed voters to upload and share photographs taken of their ballots, and also enabled voters to give the reasons for how they cast their ballot. The posting and sharing of photographs was anonymous. Following a complaint about the app, the National Election Commission issued a decision, finding that the app had infringed the principles of fairness of elections, voting secrecy, and the proper exercise of rights, and ordered the applicant to refrain from further breaches of section 2(1)(a) and (e) of the Act on Electoral Procedure and Article 2(1) of the Fundamental Law. The Commission also imposed a fine of EUR 2,700. On appeal, the Kúria (the Hungarian Supreme Court) upheld the Commission's decision regarding the infringement of the principle of the proper exercise of rights. The Kúria held that the purpose of the ballots had been to enable voters to express their opinion on the referendum question, and that taking photographs of ballots and subsequently publishing them had not been in line with this purpose. The Kúria overturned the remainder of the Commission's decision on the infringement of the secrecy of the electoral process. It found that there was no regulation prohibiting voters from taking photographs of their ballot papers in the voting booths and that their identity could not have been revealed through the mobile app. The Kúria reduced the fine to EUR 330.

The applicant made an application to the ECtHR, claiming a violation of its right to freedom of expression under Article 10 of the European Convention on Human Rights (ECHR). The first question for the Court was whether there had been an interference with the applicant's right to freedom of expression. The Court noted that the app had been developed by the applicant precisely in order that voters could share, via information and communication technologies, opinions through anonymous photos of invalid ballot papers. The app therefore possessed a communicative value, and constituted expression on a matter of public interest, as protected by Article 10 of the ECHR. What the applicant was reproached for was precisely the provision of the means of transmission for others to impart and receive information within the meaning of Article 10. Thus, there had been an interference with the applicant's right to freedom of expression.

The main question for the Court was then whether the interference had had a legitimate aim. Notably, the Court rejected both arguments put forward by the Government. Firstly, the Government argued that the measure had been aimed at ensuring the orderly conduct of the voting procedure and ensuring the proper use of ballot papers, and that these aims could fall under "the protection of the rights of others" (Article 10 § 2 of the ECHR). However, the Court held that the Government had not pointed to any other actual rights of "others" that would or could have been adversely affected by the anonymous publication of images of marked or spoiled ballots. The Government had not provided any elements showing that there had been a resultant deficiency in the voting procedure, facilitated by the posting of images of those ballot papers, which should have been addressed through a restriction on the use of the mobile app.

The Government's second argument focused on the violation of the principle of the proper exercise of rights, as laid down in section 2(1)(e) of the Act on Electoral Procedure, which, in their estimation, would also entail a violation of the rights of others. However, the Court held that it was not persuaded by this suggestion. The Court stated that while it was true that the domestic authorities had established that the use of the ballot papers for any other purpose than that of casting a vote infringed that provision, the Government had not convincingly established any link between this principle of domestic law and the aims exhaustively listed in paragraph 2 of Article 10. The Court concluded that the foregoing considerations were sufficient to enable the Court to conclude that the sanction imposed on the applicant political party for operating the mobile app did not meet the requirements of Article 10 § 2. There had therefore been a violation of Article 10.

• Judgment by the European Court of Human Rights, Fourth Section, case of Magyar Kétfarkú Kutya Párt v. Hungary, Application no. 201/17 of 23 January 2018
http://merlin.obs.coe.int/redirect.php?id=18921 EN

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European Court of Human Rights: Faludy-Kovács v. Hungary

On 23 January 2018, the European Court of Human

Rights (ECtHR) delivered its judgment in the case of Faludy-Kovács v. Hungary, concerning media coverage of a non-political public figure who had "actively sought the limelight", and the extent of her right to reputation.

The applicant in the case was the widow of the well-known Hungarian poet, György Faludy. In 2008, the Helyi Téma newspaper published a front-page article, with a photograph of the applicant and her late husband, with the headline "Trampling on the memory of Faludy. The widow does anything for the limelight". The article concerned an interview the applicant had given to another newspaper in which she revealed she wanted to have a child who would be a blood relative of both her and her late husband, and explained that she envisaged her own sister and her late husband's grandson being the parents of that child.

The applicant lodged a civil action against the publisher of Helyi Téma under Article 78 of the (old) Hungarian Civil Code, alleging a violation of her right to reputation. The Budapest Regional Court ordered a public apology and obliged the publisher to pay EUR 2,000 in damages. The court held that the statement that she had trampled on her husband's memory had infringed her right to reputation and dignity. However, the Budapest Court of Appeal reversed the previous judgment and held that the headline had not been a statement of fact but a value judgment expressed in connection with the applicant's own "peculiar" statements. The court also found that the headline could not have infringed the applicant's reputation since her own statements had been irrational and undignified, putting György Faludy's grandson in an embarrassing situation. The Kúria (the Hungarian Supreme Court) subsequently dismissed an appeal by the applicant, finding that the headline had constituted a value judgment concerning the unusual manner in which the applicant intended to start a family.

The applicant made an application to the ECtHR, claiming a violation of her right to reputation under Article 8 of the European Convention on Human Rights (ECHR). The main question for the Court was whether the domestic courts had struck a fair balance between the journalist's right to freedom of expression under Article 10 of the ECHR and the applicant's right to have her reputation respected under Article 8 of the Convention. Firstly, the Court held that the applicant, in her capacity as the widow of György Faludy and a well-known person in contemporary society, was a public figure and that she inevitably and knowingly exposed herself to public scrutiny. Secondly, the Court held that the applicant had actively sought the limelight so, having regard to the degree to which she was known to the public, her "legitimate expectation" that her private life would not attract public attention and would not be commented on was hence reduced. Thirdly, regarding the content, form and consequences of the publication, the Court held that the headline merely related to the applicant's own statements, as reproduced in the accompanying article, and did not contain unsubstantiated allegations. The fact that the headline had employed an expression which, to all intents and purposes, had been designed to attract the public's attention cannot in itself raise an issue under the Court's case-law. The Court considered that the headline introducing the statements of the applicant had to be considered as a matter of editorial choice that had been intended to provoke a reaction.

Fourthly, the information to which the journalist had reacted had been expressed voluntarily by the applicant in the course of an interview, and had not been acquired in circumstances unfavourable to her. Finally, regarding the contribution of the article to a debate of public interest, the Court noted that the domestic courts had reached their conclusions without going into an analysis of whether the article had concerned an issue of legitimate public interest. However, in the Court's view, in the circumstances of the present case, where the applicant gave an interview about her family plans clearly for the purposes of satisfying the curiosity of a certain readership, the question of whether the accompanying expression in issue covered a subject of public interest is of minor relevance. Thus, the absence of this element in the domestic courts' reasoning did not have an effect on the balancing exercise that they have conducted.

In the light of the foregoing, the Court held that domestic courts had struck a fair balance between the journalist's freedom of expression under Article 10 of the Convention and the applicant's right to have her reputation respected under Article 8. The potential negative consequences that the applicant might have suffered after the publication of the headline were not so serious as to justify a restriction on the right to freedom of expression guaranteed by Article 10. Thus, there had been no violation of Article 8 of the Convention.

• Judgment by the European Court of Human Rights, Fourth Section, case of Faludy-Kovács v. Hungary, Application no. 20487/13 of 23 January 2018
http://merlin.obs.coe.int/redirect.php?id=18922 EN

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European Court of Human Rights: Sekmadienis Ltd. v. Lithuania

On 30 January 2018, the European Court of Human Rights (ECtHR) delivered its judgment in the case of Sekmadienis Ltd. v. Lithuania, concerning freedom of expression and the regulation of commercial advertising deemed offensive. Notably, the Court unanimously found that an advertising company's freedom

of expression had been violated by the imposition of a fine under Lithuania's advertising law.

The applicant in the case - a Vilnius-based applicant company ran an advertising campaign in October 2012 introducing a clothing line by the designer R.K., including advertisements on R.K.'s website. The first advertisement showed a young man with long hair, a headband, a halo around his head and several tattoos wearing a pair of jeans, with a caption reading "Jesus, what trousers!" The second advertisement showed a woman wearing a white dress and with a halo around her head, accompanied by the reading "Dear Mary, what a dress!". After receiving over 100 complaints about the advertisements, the Lithuanian State Consumer Rights Protection Authority adopted a decision against the applicant company concerning a violation of Article 4 § 2 (1) of the Law on Advertising, which prohibits advertising that "violates public morals". The Authority held that the use of religious symbols for commercial gain exceeds the limits of tolerance; using the name of God for commercial purpose was not in line with public morals; and the inappropriate depiction of Christ and Mary in the advertisements was likely to offend the feelings of religious people. The applicant company was fined EUR 580. The decision was upheld on appeal.

The applicant company made an application to the ECtHR, claiming that there had been a violation of its right to freedom of expression under Article 10 of the European Convention on Human Rights (ECHR). The main question for the Court was whether the interference with applicant company's freedom of expression had been "necessary in a democratic society".

The Court ultimately found that there had been a violation of Article 10 of the Convention, and held that he domestic authorities had given absolute primacy to protecting the feelings of religious people, without adequately taking into account the applicant company's right to freedom of expression. In reaching this conclusion, the Court firstly accepted that the advertisements had created an unmistakable resemblance between the persons depicted therein and religious figures, and that the advertisements had had a commercial purpose, had had made no contribution to public debate. However, the Court considered that the advertisements did not appear to have been gratuitously offensive or profane, and nor had they incited hatred on the grounds of religious belief or attacked a religion in an unwarranted or abusive manner.

Notably, the Court reiterated that freedom of expression also extends to ideas which offend shock or disturb. In a pluralist democratic society those who choose to exercise the freedom to manifest their religion cannot reasonably expect to be exempt from all criticism. They must tolerate and accept the denial by others of their religious beliefs and even the propagation by others of doctrines hostile to their faith. In the Court's view, even though the advertisements had a commercial purpose and cannot be said to constitute "criticism" of religious ideas, the applicable principles are nonetheless similar.

Finally, the Court held that even assuming that the majority of the Lithuanian population would indeed find the advertisements offensive, the Court reiterated that it would be incompatible with the underlying values of the Convention if the exercise of Convention rights by a minority group were made conditional on its being accepted by the majority. Were this to be so, that minority group's right to, inter alia, freedom of expression would become merely theoretical rather than practical and effective, as required by the Convention. In the light of these considerations, the Court concluded that the domestic authorities had failed to strike a fair balance between, on the one hand, the protection of public morals and the rights of religious people, and, on the other hand, the applicant company's right to freedom of expression. There had therefore been a violation of Article 10 of the Convention.

• Judgment by the European Court of Human Rights, Fourth Section, case of Sekmadienis Ltd. v. Lithuania, Application no. 69317/14 of 30 January 2018
http://merlin.obs.coe.int/redirect.php?id=18923 EN

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Committee of Ministers: Reply to the Parliamentary Assembly Recommendation on "Political influence over independent media and journalists"

On 10 January 2018, the Committee of Ministers of the Council of Europe issued its Reply to the Parliamentary Assembly Recommendation 2111 (2017) on "Political influence over independent media and journalists" (see IRIS 2017-8/4). The Reply essentially addresses the independence of the public service media and the recommendations made to the Committee of Ministers by the Parliamentary Assembly.

Having regard to the concerns expressed by the Assembly on the deteriorating situation regarding the independence of journalists, the Committee of Ministers recognises the need for an improvement in Member States' co-operation and action in tackling serious threats to media freedom. Within this context, the Committee recommends the governments of Members States to implement its Recommendation CM/Rec(2016)4 on the protection of journalism and safety of journalists and other media actors (see IRIS 2016-5/3).

With respect to the lack of proper guarantee of public service media underlined by the Assembly, the

Committee of Ministers notes, in particular, the concerns raised in the Secretary General's report "State of democracy, human rights and the rule of law" regarding the interference of governments in the appointment and dismissal procedures of members of public-service media boards in the year 2016.

In reply to the Assembly's recommendation under paragraph 5.2.1, the Committee of Ministers supports the Assembly's proposal to develop the principles laid down in its Recommendation on public service media governance CM/Rec(2012)1 in operational terms (see IRIS 2012-3/2). The development of the principles in operational terms in a context-specific manner and their tailor-made application are warranted, given the limitations on the harmonisation of legislation and the development of model provisions among the forty-seven Member States. The Committee of Ministers informs the Assembly that, for the 2018-2019 biennium, this work will be carried out by the CDMSI (Steering Committee on Media and Information Society) on implementation activities in relation to that recommendation.

Regarding the Assembly's recommendation in paragraph 5.2.2., regarding the design and implementation of targeted cooperation programmes aiming at promoting good practice in the governance of public service media, the Committee of Ministers notes that around twenty projects on promoting media freedom have been implemented in Member States and partner countries.

• Committee of Ministers of the Council of Europe, Reply to "Political influence over independent media and journalists" Parliamentary Assembly Recommendation 2111 (2017), 10 January 2018
http://merlin.obs.coe.int/redirect.php?id=18946 EN FR

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Platform for the promotion of journalism and the safety of journalists: Report of the partner organisations

The partner organisations of the Council of Europe's Platform for the promotion of journalism and the safety of journalists have issued their annual assessment Report on the state of media freedom and threats in Council of Europe member States (see IRIS 2017-8/5). The data in the report are based on an analysis of the alerts submitted to the Platform.

According to the Report, the lack of adequate investigation into the murder of Maltese journalist Daphne Caruana Galizia demonstrates the deterioration of media-freedom conditions in Europe. The Partner organisations have thus urged the Parliamentary Assembly of the Council of Europe to appoint a special rapporteur to be in charge of monitoring the investigation process. The Partners organisations also reiterated the Guidelines relating to judicial follow-ups to the killing of journalists approved by the Committee of Ministers of the Council of Europe in April 2016 (see IRIS 2016-5/3).

In 2017, there were 130 submitted alerts from twenty-nine countries. However, less than 30% of the alerts received a reply or any kind of reaction from the relevant Member State. Physical attacks on the safety and integrity of journalists (23%), as well as harassment and intimidation (23%), are the most frequently reported threats, followed by detention and imprisonment (21%). As stated in the Report, in respect of seventy-nine alerts (60%), the State appears to have been the source of the threat in question.

The number of reported physical attacks submitted to the Platform remains fairly high and in two cases their severity prompted journalists leave the country. In addition, five journalists were murdered in 2017; this - coupled with the fact that fifteen cases of murder and other types of threats were not adequately investigated - clearly shows that impunity "remains one of the single biggest challenges to the protection of journalists".

For all these reasons, the Partner organisations expressed concern that the Report indicates the worsening of the media conditions throughout Europe and called on member States to continue investigations and adopt effective measures to combat impunity.

• Partner organisations, Council of Europe's Partner Organisations on Media Freedom Raise Alarm after Grim Record in 2017 and Urge Close International Scrutiny over the investigation into Daphne Caruana Galizia's Murder, 19 January 2018
http://merlin.obs.coe.int/redirect.php?id=18941 EN FR
• Council of Europe, Safety of Journalists' Platform: a grim record in 2017, 19 January 2018
http://merlin.obs.coe.int/redirect.php?id=18943 DE EN FR

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EUROPEAN UNION

European Commission: Evaluation on the EU Code of Conduct on countering illegal hate speech online

On 19 January 2018, the European Commission published its third evaluation regarding the EU Code of Conduct on countering illegal hate speech online. This Code was launched in May 2016 in order to counter the spread of illegal hate speech online and was

committed to by four IT companies, namely Facebook, Twitter, YouTube and Microsoft. These IT companies agreed to remove, if necessary, illegal hate speech from their respective platforms within twenty-four hours of being notified by their users. Part of this agreement with the Commission was also to assess the progress and commitments made with regards to the implementation of this Code. In the light of this, a first evaluation by the Commission took place on 7 December 2016 and a second on 1 June 2017. Such evaluations are the result of monitoring exercises, based on notifications issued by civil society organisations and on a methodology that has been commonly agreed upon. This system permits an evaluation of how each platform treats a received request and whether it eventually leads to the removal of the content within the agreed timeframe.

The results of the third evaluation showed important progress made at different levels. Indeed, 70% of notified illegal hate speech is removed by the IT platforms, compared with 59% in the second evaluation and 28% in the first one. All IT companies have improved in that regard. Moreover, the agreed timeframe of twenty-four hours for reviewing notifications is respected in the majority of cases (81.7%), which is twice as much as in 2016 (40%). Reporting systems, transparency, staff of reviewers, and cooperation with civil society organisations have been ameliorated. Concerning transparency towards users, a positive trend has also been identified in respect of the fact that in 68.9% of the cases feedback is given to the notifying users. However, in that regard, Facebook and YouTube have only made minor improvements since the previous evaluation. Indeed, the former provided feedback in only 1.1% more cases (94.1% compared to 93.7% in 2017), while the latter increased the level of feedback given by only 0.1% (20.8 % compared to 20.7% in 2017). By contrast, Twitter made considerable progress as it went from giving feedback in 32.8% of cases in 2017 to 70.4 % (37.6% difference). Importantly, all IT companies treated differently notifications coming from "trusted" flaggers (originating from NGOs or public bodies) or general users. In the case of Facebook, however, these observed discrepancies were only minor (1.7%). Lastly, the most cited grounds for reporting hate speech were "ethnic origin" (17.1%), followed by "anti-Muslim" hatred (16.4%) and xenophobia (16%). Grounds such as race, religion or gender identity were only cited in a minority of cases (7.9%, 3.2% and 3.1%).

Having regard to these improvements, satisfaction was expressed by both Andrus Ansip, European Commission Vice-President for the Digital Single Market, and Věra Jourová, EU Commissioner for Justice, Consumers and Gender Equality. Indeed, the latter declared that "[t]he Code of Conduct is now proving to be a valuable tool to tackle illegal content quickly and efficiently". However, as was shown by the evaluation, more attention still needs to be paid by IT companies in the area of transparency."

• European Commission, Code of Conduct on countering illegal hate speech online - Results of the 3rd monitoring exercise, 19 January 2018
http://merlin.obs.coe.int/redirect.php?id=18924 EN

• European Commission, Countering illegal hate speech online - Commission initiative shows continued improvement, further platforms join, 19 January 2018
http://merlin.obs.coe.int/redirect.php?id=18925 DE EN FR

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European Commission: Austrian regulatory measures blocked

In a decision of 12 January 2018, the European Commission prevented Austrian regulator KommAustria from introducing measures that would place the national public service broadcaster ORF at an undue competitive advantage. The decision concerned KommAustria's plans for continued regulation of the market for analogue terrestrial radio broadcasting in Austria. Unlike other broadcasting markets, the analogue radio broadcasting market has not seen growing infrastructure competition or inter-platform competition due to the importance of analogue FM radio devices, particularly in cars.

KommAustria stated that this market had remained largely unchanged since it was last assessed in 2013. It therefore proposed further regulatory measures to the European Commission. However, the Commission criticised these proposals. In particular, it rejected the idea that the supply of radio transmission services by the main operator (ORS) to its parent company (ORF) should remain excluded from the regulated market. It also pointed out that ORS's only notable competitor had only a limited regional presence and only a few broadcasting sites. Another reason for rejecting the proposal was the fact that ORF would receive a different and arguably better service than its direct competitors and, as the majority owner of its supplier (ORS), could influence the latter's decisions concerning infrastructure development. Furthermore, under KommAustria's plans, ORF would also be subject to different price conditions than competing radio broadcasters.

The Commission therefore questioned the compatibility of the proposals with EU telecoms rules and the principles of EU competition law, and decided to block the implementation of the planned regulatory measures in their proposed form. After the Commission consulted the Body of European Regulators for Electronic Communications (BEREC) as part of the so-called Phase II investigation in November 2017, it became clear that its concerns were fully shared by the BEREC.

KommAustria will now prepare a new regulatory proposal taking the concerns of the BEREC and the Commission into account, and this will be subjected to further examination.

• European Commission press release of 15 January 2018
http://merlin.obs.coe.int/redirect.php?id=18965 EN

• *Beschluss der Kommission vom 12. Januar 2018 gemäß Artikel 7 Absatz 5 der Richtlinie 2002/21/EG (Rücknahme eines notifizierten Maßnahmenentwurfs) - Sache AT/2017/2020: Vorleistungsmärkte für Rundfunkübertragungsdienste in Österreich* (Commission decision of 12 January 2018 pursuant to Article 7(5) of Directive 2002/21/EC (Withdrawal of notified draft measure) - Case AT/2017/2020: Wholesale markets for broadcasting transmission services in Austria)
http://merlin.obs.coe.int/redirect.php?id=18966 DE

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UNESCO

UNESCO: Global Report on Convention on Diversity of Cultural Expressions

On 14 December 2017, UNESCO published its Global Report on the implementation of the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions. The Convention, adopted in 2005, and ratified in 2007, seeks to protect and promote the diversity of cultural expressions, and reaffirm the sovereign rights of States to maintain, adopt and implement policies and measures that they deem appropriate for the protection and promotion of the diversity of cultural expressions on their territory (see IRIS 2005-10/1 and IRIS 2007-2/1).

The 250-page Report, entitled "Re-Shaping Cultural Policies", is designed to analyse progress achieved in implementing the Convention, which has now been ratified by 146 Parties, including the European Union. The Report is the work of ten independent experts, together with the Secretary of the Convention, and a consulting firm specialised in data collection and analysis. The Report is grounded in analysis of "Quadrennial Periodic Reports" submitted by the parties, and is divided into four overall thematic sections, which reflect a framework to monitor the impact of the Convention's implementation.

The first goal is to support sustainable systems of governance for culture. In particular, the first four chapters address this challenge, including analysing policies and measures to promote the diversity of cultural expressions (Chapter 1); public service media as producers, commissioners, distributors, disseminators and mediators of high-quality cultural content (Chapter 2); the implications of the rapidly evolving digital environment (Chapter 3); and the contribution of civil society actors to policy implementation in areas such as the production and distribution of cultural goods and services (Chapter 4). Notably, a key finding is that new policy frameworks adapted to the digital context are beginning to respond to the challenges of horizontal and vertical media convergence.

The Report's second section concerns the goal of achieving a balanced flow of cultural goods and services. In this regard, Chapter 5 analyses the mobility of artists and other cultural professionals; Chapter 6 analyses recent trends with regard to flows of cultural goods and services, and notes that digital distribution platforms, exchange networks and export strategies, mostly in the audiovisual sector, are helping "global South" countries enter the international market of cultural goods and services; and Chapter 7 examines the influence of the Convention on other international legal treaties and agreements, notably in the trade arena. Furthermore, a key finding is that domestic quotas are an effective measure to increase national audiovisual production, eventually leading to an increase in exports.

Next, the third section addresses the goal of integrating a cultural dimension in sustainable development frameworks. Chapter 8 analyses how implementation of the Convention has had a positive impact on policies, plans and programmes in the domain of sustainable development. Notably, 86% of the parties that have adopted a national development plan or strategy have included references to the cultural dimension of development, and over two-thirds of these are from the "global South".

The final section of the Report concerns the promotion of human rights and fundamental freedoms. Chapter 9 examines gender equality, and finds that the 2005 Convention cannot be properly implemented without actively promoting gender equality among creators and producers of cultural expressions, as well as among citizens, in terms of access to and participation in cultural life. Lastly, Chapter 10 discusses artistic freedom, and reports that attacks on artistic freedom in 2016 perpetrated by both state and non-state actors, mostly against musicians, rose significantly; while laws dealing with terrorism and state security, criminal defamation, religion and "traditional values" have been used to curb artistic and other forms of free expression.

• UNESCO, 2005 Convention Global Report "Re-Shaping Cultural Policies", 14 December 2017
http://merlin.obs.coe.int/redirect.php?id=18926 EN FR

• UNESCO, 2005 Convention Global Report "Re-Shaping Cultural Policies" - Summary, 14 December 2017
http://merlin.obs.coe.int/redirect.php?id=18927 EN FR

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AT-Austria

CJEU to answer questions on hate speech classification

In a decision of 25 October 2017 (6Ob116/17b), Austria's Oberste Gerichtshof (Supreme Court - OGH) submitted a series of questions to the Court of Justice of the European Union (CJEU) concerning the legal classification of so-called hate speech and its consequences under European law. In particular, the questions concern the scope of hosting providers' obligations to take down illegal content in the light of Directive 2000/31/EC (E-Commerce Directive).

The (interim) decision concerned hate speech published on the Facebook social network. On 3 April 2016, a private user of the online platform, registered as 'Michaela Jaskova', shared a news article comprising a photograph of an Austrian MP and accompanying text concerning her party's position on refugee policy. In the text, the user called the politician, among other things, a "miese Volksverräterin" (wretched traitor to her people) and a "korrupte(s) Trampel" (corrupt oaf), who "has not earned a single cent through honest work in her entire life". Her party was also described as a "Faschistenpartei" (party of fascists).

The politician initially contacted Facebook directly to ask for the article to be deleted and for the user's real name and personal details to be disclosed - requests that were both rejected. It was only when she successfully applied to the courts for an injunction that the social network removed the article concerned.

In the legal proceedings, which have now reached the OGH, the MP also applied for injunctive relief against Facebook concerning identical and/or similar comments in the accompanying text. She argued, inter alia, that Facebook could easily have identified the defamatory content and should therefore have deleted it. She claimed that, since the company had failed to remove the article after being requested to do so, it was unable to rely on the liability exemption for hosting providers contained in Article 16 of the Austrian E-Commerce-Gesetz (E-Commerce Act).

In response, Facebook claimed that a hosting provider was only required to take action if it became aware of an illegal act or information and if its unlawfulness was obvious to a legal layman. This was not the case here because the disputed text concerned a topic that was highly controversial, it argued.

This therefore raised the question of whether and when the operator of a social network such as Facebook has a specific obligation to check content. According to the OGH, previous case law concerning Article 18 of the E-Commerce Act suggested that such an obligation existed if the operator had been made aware of at least one infringement that created the risk of further infringements by individual users. However, since Articles 16 and 18 of the E-Commerce Act were designed to transpose the E-Commerce Directive, they should be interpreted in the light of European law.

According to the OGH, the general question of whether, in order to protect an individual's personality rights (honour) after an infringement had been identified, a social network operator could be obliged to filter content in such a way as to identify identical and/or similar content could not clearly be answered on the basis of legal principles derived from previous ECJ case law concerning the interpretation of EU law. It was therefore necessary to clarify in general terms whether, following an unlawful act that infringed personality rights, the operator could also be obliged to prevent further infringements of the same personality rights, because this was not a 'general obligation' to monitor 'information which they transmit or store' within the meaning of Article 15(1) of Directive 2000/31/EC, but an obligation arising from an actual infringement.

On these grounds, the OGH submitted the following questions to the CJEU:

"1. Does Article 15(1) of the E-Commerce Directive, in general, contradict any of the following obligations of a hosting provider who fails to immediately remove illegal information, and not only illegal information in the sense of Article 14(1)(a) of the Directive but also other identical information:

- worldwide?

- in the relevant member state?

- of the user concerned worldwide?

- of the user concerned in the relevant member state?

2. If the answer to question 1 is no: does this also apply to similar information?

3. Does this also apply to similar information if the operator is made aware of the circumstances?"

• *Beschluss des OGH, 6Ob116/17b, 25. Oktober 2017* (Decision of the OGH, 6Ob116/17b, 25 October 2017)
http://merlin.obs.coe.int/redirect.php?id=18964 DE

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ES-Spain

CAC proposes ban on gambling advertisements during watershed

On 10 January 2018, the Catalan Audiovisual Council (CAC) Board members passed unanimously Agreement 1/2018 in response to the request made by the Ministry of Finance and Public Administrations on the draft Royal Decree (906/2017) on commercial communications regarding activities involving gambling and "responsible gambling".

The CAC is in favour of banning gambling and betting advertisements before the "watershed" - that is to say from 6:00am to 10:00pm. The Council also considers that it should be appropriate to eliminate the involvement of famous people in these kinds of commercial communications (including when these people are advising on responsible gambling); it also considers that access by minors to free games should be limited. Bonuses that incentivise gambling should also not be permitted.

The CAC considers that, given the repercussions that these activities may have (especially in respect of minors, young people and vulnerable people), special attention should be given to these groups in terms of pathological gambling as an addictive disorder and its impact on the public health.

The data indicates a very important growth in online gambling and a parallel increase in compulsive gambling arising from this phenomenon; it also indicates that the trend is aggravated by the fact that people take less time to develop an addiction when the gambling is online. In this regard, the CAC pointed out that it ordinarily takes between seven and ten years to develop a gambling addiction, but in the case of online games it only takes between one to two years. The result is that among people aged under twenty-six, online gambling is the main cause of gambling addiction.

It is noted that many of these advertisements are run during sports broadcasts, and consist of advertising online gambling and gambling operators. Specifically, according to a report by the CAC (18/2017), online gambling ads accounted for 45% of advertising during sports radio broadcasts, and 20% of football match advertising.

• *Consell de l'Audiovisual de Catalunya, Acord 1/2018, d'observacions al Projecte de reial decret de Comunicacions comercials de les activitats del joc i joc responsable* (Catalan Audiovisual Council, Agreement 1/2018, on the royal decree draft on gambling and responsible gamblinging audiovisual commercial communications, 10 January 2018)
http://merlin.obs.coe.int/redirect.php?id=18928 CA

• *Consell de l'Audiovisual de Catalunya , Anàlisi de la presència de continguts en relació amb el joc I les apostes en línia* (CAC warning on the protection of minors and online advertising and online gambling, 2 March 2017)
http://merlin.obs.coe.int/redirect.php?id=18948 CA

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FI-Finland

Several amendments to the legislation on electronic media

On 12 January 2018, amendments to the Information Society Code (see IRIS 2015-3/11) were enacted which enter into force on 1 June 2018. Firstly, the Code will be renamed the Act on Electronic Communications Services (ECSA). Secondly, among the core amendments, the provisions on the issuance of programme licences will include new conditions for granting and withdrawing such licences. Alongside previous conditions, the Finnish Communication Regulatory Authority (FICORA) must grant the licence should there not be a manifest reason to suspect that the applicant will violate Section 6 on age limits, pursuant to the Act on Audiovisual Programmes or commit an act of incitement to hatred, pursuant to Sections 10-10a of Chapter 11 of the Criminal Code (§ 25 ECSA). Similarly, in addition to previously existing conditions, the licence may be withdrawn in cases where the licence holder repeatedly and gravely violates section 62(2)(1) of the Lotteries Act on the marketing of gaming activities or section 6 on age limits, pursuant to the Act on Audiovisual Programmes (§ 32 ECSA). A condition concerning incitement to hatred had been included earlier. With the new act, such a condition is also included in the provisions on granting a licence for analogue radio activity (§ 36).

Thirdly, the act brings about changes in the supervision fees for broadcasting. The fee for the national public service broadcaster, Yleisradio, has been raised owing to the increase in supervision tasks (from EUR 165,000 to EUR 220,000), whereas the fee for commercial broadcasters has been lowered (from EUR 16,000 to 14,000; from EUR 800 to 600; from EUR 8000 to 6000) (§ 294 ECSA).

Fourthly, radio advertising will have no time limits, but must still be separated from radio programmes (§ 223 ECSA). Fifthly, the obligation to attach audio and text services to television programming is formulated wider than before. The newly enacted provisions place the duty on public service programming as well as on programming transmitted pursuant to a nationwide programme licence which cater for several groups of the public. More detailed provisions will

be laid down by a Decree (technique, costs, programming catering for several groups of the public) (§ 211 ECSA). Lastly, the provisions on quotas for European works have been amended so that broadcasters must now reserve only a major part of their annual free-to-air broadcasting time for such works (§ 209(1) ECSA). Pay-TV is thus no longer included. Moreover, should a broadcaster's programming not reach the required proportion of programming it must report to FICORA on the issue and, upon request, submit a plan for achieving the goal (§ 209(2)). According to the bill (HE 82/2017 vp), broadcasters have had difficulties in meeting the previously existing demands, and more flexibility is needed.

The amendments proposed in the bill were amended during the legislative process. Importantly, the Constitutional Law Committee found some of the proposed changes unacceptable or in need of adjustment, such as proposed changes regarding conditions for the granting of licences under the Lotteries Act and the breadth of discretion in deciding whether to refuse to grant a programme licence in the absence of a high enough threshold for the assessment. All in all, the Committee pointed to the problems around content-related provisions with regard to licensing.

• *Laki tietoyhteiskuntakaaren muuttamisesta* (Act on amending the Information Society Code 68/2018, 12 January 2018)
http://merlin.obs.coe.int/redirect.php?id=18949 FI

• *Hallituksen esitys eduskunnalle laiksi tietoyhteiskuntakaaren muuttamisesta* (Government bill for act amending the Information Society Code (HE 82/2017 vp))
http://merlin.obs.coe.int/redirect.php?id=18950 FI

• *Perustuslakivaliokunnan lausunto hallituksen esitys eduskunnalle laiksi tietoyhteiskuntakaaren muuttamisesta* (Statement of the Constitutional Law Committee on the Government bill for act amending the Information Society Code (PeVL 40/2017 vp, 19 October 2017))
http://merlin.obs.coe.int/redirect.php?id=18951 FI

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FR-France

Conseil d'Etat refuses to annul Cinema Code definitions of pornographic and violent films

Two associations asked the Conseil d'Etat to annul the following provisions of Decree no. 2017-150 of 8 February 2017 on film classification: "II. - The classification measure 04046 is proportionate to the need to protect children and young people, and in keeping with the sensitivities and stages in personality development specific to each age group and with respect for human dignity. If the work or document in question includes scenes of sexual activity or extreme violence which - particularly by their cumulative effect - may be seriously disturbing for minors, or present violence in a favourable manner or render it banal, the licence must be subject to one of the measures described in sections 4 ['banned for under-18s'] and 5 ['banned for under-18s and from excluded from receiving aid'] of part I. In cases described in the above paragraph, the aesthetic approach or the narrative process on which the work or document is based may justify the licence being subject only to the measure described in section 4 of part I."

In the opinion of the Conseil d'Etat, these provisions correctly apply Article L. 311-2 of the Cinema and Animated Film Code by defining works that constitute pornographic films and films that incite violence and which must therefore be included on the list of films falling under either of these categories and are ineligible to receive selective aid. These are defined as works that include scenes of sexual activity or extreme violence which - particularly by virtue of their cumulative effect - may be seriously disturbing for minors, present violence in a favourable manner or render it banal, without any aesthetic approach or narrative process justifying the licence being subject only to a ban in respect of under-18s on the basis of section 4 of part I of Article R. 211-12, which may also be legally determined in order to meet the need to protect children and young people, and to safeguard human dignity.

The associations that submitted the request also claimed that the disputed provisions breached Article 227-24 of the Penal Code, which states that: "The manufacture, transport, [or] distribution by whatever means and however supported, of a message bearing a pornographic or violent character, inciting terrorism, seriously violating human dignity, or encouraging children to play games that put them in physical danger, and the trafficking in such a message, is punished by three years' imprisonment and a fine of EUR 75,000, in the event that the message may be seen or perceived by a minor." The Conseil d'Etat believes that the scope of the violent and pornographic messages referred to in the aforementioned provisions of the Penal Code is broader than that of pornographic films and films that incite violence that must be included in the list referred to in Article L. 311-2 of the Cinema and Animated Film Code, according to the definitions contained in Article R. 211-12 of the latter code. These provisions do not infringe Article 227-24 of the Penal Code, since they at least prevent under-18s from watching films that include scenes of sexual activity or extreme violence that may be seriously disturbing for minors, present violence in a favourable manner or render it banal. The requests were therefore rejected and the decree declared lawful.

• *Conseil d'Etat (10e et 9e sous-sect.), 28 décembre 2017, Associations Promouvoir et Action pour la dignité humaine* (Conseil d'Etat (10th and 9th subdivisions), 28 December 2017, Promouvoir and Action pour la dignité humaine) FR

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CSA president wants regulation extended to digital audiovisual services

• *Discours d'Olivier Schrameck aux vœux du CSA, 23 janvier 2018* (Address by Olivier Schrameck at CSA New Year event, 23 January 2018)
http://merlin.obs.coe.int/redirect.php?id=18936 FR

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In expressing his good wishes for the New Year, the President of the national audiovisual regulatory authority (Conseil Supérieur de l'Audiovisuel - CSA, Olivier Schrameck summed up the achievements of the past year and presented the CSA's prospects for the coming year. He called for an "essential readjustment of all the regulatory equilibria", with regulation extended to include digital audiovisual services, in terms of both scope and method. This would cover relations between the traditional audiovisual media and services platforms, the articulation of public-service and market offers, the balance between those audiovisual media that use radio frequencies and those that do not, the balance between linear offers and the multiplication of access routes, and demand for delinearised offers.

Entirely in keeping with the declarations made by the French President (see IRIS 2018-2/17) that opened the way for such an extension of regulation, 2018 could, in this respect, "constitute a real turning point", said Olivier Schrameck.

Despite the 17 legislative acts concerning the CSA passed by the previous legislature, the desired readjustment has been "only marginal". Therefore, it is deemed "necessary to ensure the profound rebooting of functions and regulatory methods in the digital era: relations between the traditional audiovisual media and services platforms, the articulation of public service and market offers, the balance between those audiovisual media that use radio frequencies and those that do not, the balance between linear offers and the multiplication of access routes, and demand for delinearised offers," added Mr Schrameck.

Olivier Schrameck listed the various areas of implementation: (i) accompanied, concerted and supervised self-regulation (such as the implementation of the classifications adopted in the video-game sector for the protection of minors), (ii) co-regulation, (iii) participatory regulation, and (iv) more generally, the various forms of flexible legislation - settling differences, mediation, conciliation, and taking into account "inter-professional" agreements - which would "make it possible to prefer discussion to confrontation, and agreement to subjection".

In conclusion, he emphasised that "04046 regulation is not just about guidance, and even less about sanctions, but more about promotion and federation, taking account of diversity and complementary [aspects] within a naturally cohesive chain of values".

CSA terminates mandate of Mathieu Gallet as President of Radio France

On 31 January 2018, the national audiovisual regulatory authority (Conseil Supérieur de l'Audiovisuel - CSA), meeting in plenary assembly, decided to withdraw the mandate of Radio France's President, Mathieu Gallet. The decision, to take effect on 1 March, follows a court judgment delivered on 15 January giving him a one-year suspended prison sentence and fining him EUR 20,000 for favouritism during his term of office at the French national audiovisual institute (Institut National de l'Audiovisuel - INA). He has lodged an appeal.

Since the 2013 reform, under Article 47-4 of the Act of 30 September 1986, the presidents of France's public audiovisual companies (France Télévisions and Radio France, the companies with responsibility for France's external audiovisual sector) are appointed by the CSA by a majority vote of their members. Their mandate may be withdrawn, subject to a decision whose reasoning is substantiated, under the same conditions. In the present case, the CSA reached its decision after proceedings involving both parties and a collegial debate.

In its decision, the CSA emphasised that it had been conscious, at the time Mathieu Gallet was appointed head of Radio France in February 2014, of the serious sense of public service demonstrated by the shortlisted candidates. A considerable amount of legislation has been passed in recent years with regulating the obligations of public figures and officers, with a view to ensuring exemplary behaviour on their part. The French President and the Minister for Culture have also announced plans for far-reaching reform of the public audiovisual sector, giving rise to advance debate among all the stakeholders in the sector and members of parliament (see IRIS 2018-2/17). The reform demands concerted action between the public authorities and the heads of these companies, and the full ability of the latter to implement the envisaged transformation of the functioning and missions of the companies in a calm, efficient manner. Even though Mr Gallet has appealed against his court sentence and has the benefit of the presumption of innocence, the CSA stresses that the judgment indicates the move towards criminalising disregard for the provisions of the section of the French Criminal Code dealing with failure to comply with a duty of probity. Emphasising the current context - in which the credibility and

exemplary behaviour of heads of public undertakings are more than ever necessary for preserving trust on the part of the State the Parliament and the public - the CSA, in "the general interest of the public audiovisual service", has therefore terminated Mr Gallet's mandate.

• *CSA, décision n°2018-13 du 31 janvier 2018 mettant fin aux fonctions du président de Radio France* (CSA, Decision No. 2018-13 of 31 January 2018 terminating the mandate of the President of Radio France)
http://merlin.obs.coe.int/redirect.php?id=18967 FR

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High tensions between TF1 and Orange

TF1 and French television distributors remain at war after the audiovisual group launched a fierce battle with the operators in 2016 in an attempt to obtain payment for its free-to-air channels, which it had previously provided free of charge. TF1's demands follow the creation of its new TF1 Premium service, which combines its unencrypted channels, the MYTF1 catch-up service and new add-on services (start-over, enhanced catch-up, etc.). Whereas new agreements were signed with Altice-SFR in November 2017 and Bouygues Telecom (TF1's parent company) in January 2018, negotiations with Canalsat (Canal Plus), Iliad (Free) and Orange have stalled. As a result, on 1 February TF1 withdrew its MYTF1 TV catch-up service for Orange customers and issued a writ, demanding that Orange cease distributing its channels because it had failed to renew its distribution agreement. Since the writ was not issued under emergency proceedings, there is still time for the parties to reach an agreement. Meanwhile, TV viewers can use the TF1 free-to-air channel catch-up service at MYTF1.fr and via the MYTF1 app for mobile and tablet. The channels are also still available for all television viewers on digital terrestrial television.

Gilles Pélisson, CEO of the TF1 group, referring to other examples of European operators paying audiovisual groups for their content (for instance, Orange and Altice pay for the TF1 signal in Belgium), explained: "We are asking for a few cents per subscriber. Orange has 10 million subscribers and is nine times the size of TF1."

Although the national audiovisual regulatory authority (CSA) does not believe it should interfere in commercial agreements between two private companies (especially while TF1 remains available via free DTT), it expressed "its concern and willingness to help facilitate these discussions, taking into account viewers' interests and the economic situation of the operators concerned".

The case continues.

• *TF1, communiqué de presse du 1 février 2018, Fin des accords de distribution du service MYTF1 et des chaînes en clair du groupe TF1 avec Orange* (TF1 press release, 1 February 2018)
http://merlin.obs.coe.int/redirect.php?id=18968 FR

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GB-United Kingdom

Decisions on the right to be forgotten and media reporting

On 18 January 2018 and 22 January 2018, two decisions were delivered in cases concerning the right to be forgotten, although the matters raised in these pre-trial hearings are procedural, both flagging up the impact - in different ways - of such orders on freedom of expression. The NT1 case concerns two claims brought against Google LLC. The two claimants (NT1 and NT2) are unconnected, but the legal issues raised in the claims are the same. Both NT1 and NT2 were convicted of offences, but those convictions are now "spent" under the Rehabilitation of Offenders Act 1974. After citing paragraphs 80-81 of the Google Spain judgment (see IRIS 2014-6/3), Nicklin J equated the act as a pre-existing version of a right to be forgotten, suggesting: "[t]he underlying rationale is that, for all but the most serious offences, people should not have a lifelong "blot" on their record but should be able to live without that shadow, and the consequences it may have for their employment or other areas of their life".

NT1 and NT2 each complained that Google, in its capacity as a search engine, continued to return links to information about their respective convictions when their names were searched, some of which were links to newspaper articles reporting the original criminal proceedings. Neither NT1 nor NT2 is a politician or celebrity; they are private individuals. NT1 and NT2 will be the first English cases to consider the specific issue of the rehabilitation of offenders.

The claimants sought reporting restrictions under section 11 of the Contempt of Court Act, on the basis that allowing the media to report their respective identities would defeat the purpose of the right to be forgotten. Although section 12(2) of the Human Rights Act, which requires the media to be notified of an application that would "affect the exercise of the Convention right to freedom of expression", does not apply to contra mundum orders (orders applying to everyone rather than a specific party), it is still desirable that the media be notified where possible. The giving of notice is important because it gives potentially affected media organisations the opportunity, if

so desired, to put forward reasoned arguments challenging the order. On this basis, the hearing for the order was postponed, although more limited reported restrictions remained in place pending that hearing. While the court accepted that in general the media is used to reporting in such a manner as not to identify individuals, reporting of the facts in this case could be sufficient to identify individuals involved, or at least some of them. This may then affect the scope of any section 11 order.

The claims in the ABC case relate to user-generated content posted by Square Mile News, hosted by Blogger.com, a platform operated by Google. Square Mile News contains news reports of court proceedings which are posted anonymously. The case does not seem to relate to Google in its capacity as a search engine. ABC lodged an application for an interim injunction requiring the defendant, described as Google Inc, to block all access to pages on Square Mile News blog websites relating to ABC's conviction for the duration of the hearing of the applicant's claim for a permanent injunction and damages relating to claims of (a) libel; (b) misuse of private information; (c) breach of Articles 3, 6 and 8 of the European Convention on Human Rights; (d) malicious falsehood; and (e) breach of the Data Protection Act 1998. Google had refused to take any action with regard to the news reports as it merely hosts the third-party content. The application was dismissed - not on its merits, but because the applicant had served the legal documents on Google UK Limited, rather than the correct entity - Google LLC (see IRIS 2018-1/2, Tamiz v Google). The Court's permission would be required to serve the legal documents outside the jurisdiction. Furthermore, as any injunction would affect freedom of expression, it seems that notice under section 12 of the Human Rights Act would be required. The trial of the claim brought by NT1 is due to commence on 27 February 2018, and that of NT2 is due to commence on 12 March 2018.

• NT1 v Google LLC [2018] EWHC 67 (QB) (Rev 3),18 January 2018
http://merlin.obs.coe.int/redirect.php?id=18929 EN
• ABC v Google Inc [2018] EWHC 137 (QB), 1 February 2018
http://merlin.obs.coe.int/redirect.php?id=18930 EN

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CMA provisional findings on 21st Century Fox and Sky Plc merger

Following last year's phase one enquiry by Ofcom and the Competition and Markets Authority (CMA) concerning the proposed merger between 21st Century Fox and Sky Plc (see IRIS 2017-8/26), the CMA has commenced the phase two enquiry, publishing its provisional findings on 23 January 2018. The CMA concluded that Fox taking full control of Sky is not in the public interest due to media plurality concerns. However, the CMA considered that Fox and Sky had a genuine commitment to broadcasting standards in the UK.

The CMA observed that the Murdoch Family Trust (MFT) controls Fox and News Corporation (News Corp), which between them already have a significant interest in UK news, whether television, radio, online or newspaper platforms. The MFT news outlets are consumed by nearly a third of the UK population, and have a combined share of public news consumption greater than all other UK news providers, except the BBC and ITN. If Fox, and as a consequence MFT, had control of Sky Plc's Sky News then this would give MFT too much influence over public opinion and the political agenda. Despite the broad range of other news providers, the CMA did not consider they have sufficient presence to moderate or mitigate the increased MFT influence if the merger proceeded. Anne Lambert, the Chair of the CMA independent investigation group, said: "Media plurality goes to the heart of our democratic process. It is very important that no group or individual should have too much control over public opinion and the political agenda". The CMA has presented three possible remedies to address media plurality concerns. Firstly, prohibit the merger. Secondly, undertake structural remedies, including the recommendation that Sky News be spun off into a new company, or the divestiture of Sky News. Thirdly, behavioural remedies, including enhanced requirements regarding the editorial independence of Sky News.

The new Secretary of State for Digital, Culture, Media and Sport, The Right Honourable Matt Hancock MP, laid the CMA's preliminary findings before Parliament. The Secretary of State exercises a quasi-judicial decision-maker role concerning the proposed merger. The CMA's inquiry group has until 1 May 2018 to provide the Secretary of State with its final report. The Secretary of State will make the final decision by 14 June 2018. The Secretary of State has confirmed that the CMA recognises that the proposed acquisition by The Walt Disney Company of some of Fox's assets, including Sky, may settle the concerns about the Fox Sky merger. Despite such an acquisition being uncertain in its timing and form, the CMA will take account of any implications of the Disney transaction relative to the proposed remedies to ensure media plurality. The CMA's investigation into the commitment of Fox, Sky and MFT to maintaining broadcasting standards concluded that they all had a genuine commitment, and that Fox taking control of Sky was thus not likely to work against the public interest. Fox was an established broadcaster in the UK, having held licences for over twenty years. The broadcaster had implemented practices and procedures to ensure broadcasting standards. Although there had been issues about some of its unedited simulcast international feeds into the UK, this did not outweigh the overall comprehensive steps taken to maintain a committed broadcasting standard in the UK.

Fox News had faced sexual harassment allegations by US employees and whilst they were of a serious nature the CMA had provisionally determined that these did not directly relate to the attainment and maintenance of broadcasting standards and should therefore not detract from Fox's (and MFT's) UK commitment to broadcasting standards. Likewise, Sky had a good track record in the UK of maintaining broadcast standards.

MFT's News Corp had faced serious shortcomings with its News of the World newspaper prior to 2012, having failed to comply with press standards and the law. However, News Corps had undertaken a drastic intervention, including the closure of the News of the World and implementing new processes and procedures for its other New Corps titles. The CMA provisional findings showed there had been no cause for concern since these new procedures had been introduced.

- Competition and Markets Authority, Anticipated acquisition by 21st Century Fox, Inc of Sky Plc: Provisional findings report, 23 January 2018
http://merlin.obs.coe.int/redirect.php?id=18953 EN
- Competition and Markets Authority, "CMA provisionally finds Fox/Sky deal not in the public interest", 23 January 2018
http://merlin.obs.coe.int/redirect.php?id=18954 EN

Julian Wilkins
Blue Pencil Set

Ofcom imposes GBP 120,000 fine on Al Arabiya News

On 25 January 2018, Ofcom issued a sanction decision concerning Al Arabiya News, which is an Arabic language news and current affairs channel. The Ofcom licence for Al Arabiya News is held by Al Arabiya News Channel FZ-LLC. The issue concerned unfair treatment and unwarranted infringement of privacy in connection with the obtaining of material included in a programme broadcast by Al Arabiya News in February 2016 about an attempt in February and March 2011, by a number of people (including the complainant, Mr Hassan Mashaima) to turn Bahrain from a kingdom into a republic. The programme included footage of the complainant as he explained the circumstances which had led to his arrest and conviction for his participation in these activities. In Ofcom's adjudication published on 24 April 2017, Ofcom's executive body found that the programme had breached Rules 7.1 and 8.1 of the Ofcom Code namely, that "[b]roadcasters must avoid unjust or unfair treatment of individuals or organisations in programmes" and that "[a]ny infringement of privacy in programmes, or in connection with obtaining material included in programmes, must be warranted". Ofcom found that the programme omitted to state that the Bahrain Independent Commission of Inquiry had confirmed in 2011 that Mr Mashaima had been mistreated and tortured while in detention, leading to his confession, and that the BICI had also recommended that the court case against him be dropped.

According to the wording of the sanction decision, Ofcom found that the programme had included footage of an interview with Mr Mashaima which had had the potential to materially and adversely affect viewers' perception of him and the broadcaster had not made clear what steps it had taken to ensure that material facts had not been presented, omitted or disregarded in a way that was unfair to Mr Mashaima. Furthermore, the broadcaster had not provided Mr Mashaima with an appropriate and timely opportunity to respond to the allegations of wrongdoing being made about him in the programme as broadcast. Mr Mashaima had had a legitimate expectation of privacy in relation to the filming and subsequent broadcast of the footage of him without his consent. In the circumstances, Mr Mashaima's legitimate expectation of privacy had not been outweighed by the broadcaster's right to freedom of expression and the audience's right to receive information and ideas without interference. The broadcaster had therefore unwarrantably infringed Mr Mashaima's privacy in respect of the obtaining of the material included in the programme and in the programme as broadcast.

Ofcom's decision is that the appropriate sanction should be a financial penalty of GBP 120,000 and that the licensee should be directed to broadcast a statement of Ofcom's findings, on a date to be determined by Ofcom, and that it should be directed to refrain from broadcasting the material found in breach again. Ofcom considered that the degree of harm caused to the complainant was very serious. The programme was found to be unjust or unfair to the complainant, such that a reasonable viewer would consider that he was confessing to having committed the crimes for which he was convicted and that he was willingly providing details of those events, when that may not have been the case.

- Ofcom Sanction Decision: Sanction 108 (17) Al Arabiya News Channel FZ-LLC, 25 January 2018
http://merlin.obs.coe.int/redirect.php?id=18952 EN
- Ofcom Broadcast and On-Demand-Bulletin, Issue No. 327, 24 April 2017, p. 69
http://merlin.obs.coe.int/redirect.php?id=18532 EN

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Revised Editors' Code of Practice

The Editors' Code of Practice, under which the clear majority of Britain's newspaper, magazine and news website journalists operate, was reviewed in 2017, and changes to it became effective from 1 January 2018.

The Code is regarded as the "cornerstone" of the UK press self-regulatory system. Its rules, which are framed by the Editors' Code of Practice Committee, set standards that the voluntarily subscribing industry members have agreed to maintain. Editors and publishers can be held to account via the Independent Press Standards Organisation (IPSO), which became the new regulatory body for the industry on 8 September 2014. However, IPSO has not yet sought formal approval from the Press Recognition Panel, which was established following the Leveson Report recommendations in the aftermath of the phone-hacking scandal to ensure that any future press regulator meets certain standards (see IRIS 2013-2/29).

The Code covers various aspects of journalistic activity, such as crime reporting, confidential sources and financial journalism. Since its first publication in 1991, it has been amended several times to adapt to developments in the industry, technology and public attitudes. Three changes were introduced in 2018, after a public consultation which attracted approximately 4,000 responses.

The first change concerns Clause 2 on privacy. It now states that, in considering an individual's reasonable expectation of privacy, account should be taken not only of the complainant's own public disclosures of information - as the previous version of the Code stated - but also of "the extent to which the material complained about is already in the public domain or will become so." This factor is not entirely new; it mirrors the existing wording of paragraph 3 of the public interest clause of the Code. The Editors' Codebook, the handbook that sets the Code in context, explains that its inclusion in Clause 2 aims to address "the challenge of effectively regulating global digital publications which are owned and domiciled in the UK but also have editorial operations in other jurisdictions producing content which can be viewed in the UK." The Committee recognises that difficulties can arise in relation to content which potentially violates the privacy clause in the UK but is nonetheless widely and legitimately published on overseas-owned websites with a large readership in the UK.

The amended wording of Clause 2 also adds clarity in respect of its practical application to complaints involving material taken from social media like Facebook. In deciding whether the republication of such material to illustrate a story was intrusive, the regulator is often influenced not only by what the material in question featured, but also the extent to which the material was already in the public domain, who had placed it there, what disclosures of private information the complainant had previously made, and what privacy settings were in place.

The second change relates to clause 09 on reporting crime. A new section was inserted requiring editors to generally refrain from naming children under the age of 18 "after arrest for a criminal offence, but before they appear in a youth court." Under the current law, automatic restrictions on identifying juveniles apply only if or when the case reaches a youth court hearing. This additional section strengthens the protection afforded to young defendants but does not affect news gatherers' right to name juveniles who appear in a Crown Court or whose anonymity is lifted.

Finally, the third change brings Clause 11 more into line with the law by requiring the press and their respective websites not to identify "or publish material likely to lead to the identification of a victim of sexual assault", unless they are legally free to do so. Whilst editors' responsibilities are made clearer, care should be taken when stories involving victims of sexual assault are posted on publications' social media sites, where they can be commented upon by users who may reveal victims' identities either out of malice or merely plain ignorance.

- The Editors' Code of Practice (incorporates changes taking effect from 1 January 2018)

http://merlin.obs.coe.int/redirect.php?id=18955 EN

- The Editor's Codebook (incorporates changes taking effect from 1 January 2018)

http://merlin.obs.coe.int/redirect.php?id=18956 EN

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HU-Hungary

Hungarian media authority fines pay-TV broadcaster UPC

On 27 December 2017, the Hungarian media regulator, Nemzeti Média- és Hírközlési Hatóság (NMHH), imposed a fine of HUF 121 million (approx. EUR 391 000) on TV channel UPC Direct for a serious infringement. It stated that the fine exceeded the financial advantage gained by the broadcaster from the infringement.

The fine was imposed because, two years ago, UPC Direct had offered so-called triple-play services, that is to say, a bundled package of telephone, television and Internet, in the Hungarian city of Cegléd without informing the regulatory body. The regulator did not register the service until 28 September 2017 and concluded that UPC Direct had been offering it without official authorisation. The company had also failed to guarantee compliance with technical standards or legislative provisions.

This is not the media group's first infringement. It was fined HUF 30 million (approximately EUR 97 500) in May 2017 for launching cable television in the Hungarian city of Jászberény without permission.

UPC Direct is not purely a pay-TV broadcaster. It mainly carries programmes for Central and East European cable networks and a few digital TV channels,

including some Polish, Czech and Hungarian channels. They are all encrypted in Cryptoworks and received via Hotbird satellite. UPC Direct was formed when Cyfra+ merged with Wizja TV.

• *Súlyos jogsértés miatt 121 millió forintos hírközlési bírság a UPC-nek* (NMHH press release)
http://merlin.obs.coe.int/redirect.php?id=18935 HU

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IE-Ireland

Data Protection Bill 2018 published

On 1 February 2018, the Minister for Justice and Equality, Charlie Flanagan, launched the publication of the 2018 Data Protection Bill 2018. The Bill will give effect to the General Data Protection Regulation (GDPR (2016/679), which will become law within the EU on 25 May 2018. The Bill repeals the 1988 and 2003 Data Protection Acts, with the exception of those provisions relating to the processing of personal data for the purposes of national security, defence and the international relations of the State, thereby giving effect to Directive (EU) 2016/680 on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and for those and other purposes to amend the Data Protection Act 1988.

The Bill generally follows the General Scheme of the Bill released in May 2017 (see IRIS 2017-7/22). The Bill comprises eight Parts, includes, inter alia, the establishment of a Data Protection Commission, and allows for up to three commissioners to be appointed for terms of between four and five years. Part 3 of the Bill contains three chapters, giving further effect to a number of Articles in the GDPR, where Member States retain a margin of flexibility. Section 29 of the Bill deals with the "consent of children in relation to information society services" and specifies thirteen years of age as the "digital age of consent", for the purposes of Article 8 GDPR. Article 8 GDPR specifies sixteen years of age as the digital age of consent, but allows Member States to provide by law for a lower age (which can be no lower than 13 years. This in effect means that where "information society services", as defined in Article 4 GDPR, are offered directly to children, the processing of a child's personal data will be lawful only if, and to the extent that, consent is given or authorised by the holder of parental responsibility over the child. In such cases, "the service provider must make reasonable efforts to verify that consent is given or authorised by the holder of parental responsibility."

Section 37 of the Bill deals with "data processing and freedom of expression and information" and gives effect to Article 85 of the GDPR, which provides that it is for national law to reconcile the right to protection of personal data with the right to freedom of expression and information, including "processing for journalistic purposes or for the purposes of academic, artistic or literary expression." An explanatory and Financial Memorandum to the Bill highlights that "[b]oth the right to protection of personal data and the right to freedom of expression and information are enshrined in Articles 8 and 11 of the EU Charter of Fundamental rights respectively, and in this context, [section] 37 (3), provides that the Data Protection Commission may refer, "on its own initiative 04046 any question of law which involves consideration of whether processing of personal data is exempt from certain provisions of the GDPR on freedom of expression and information grounds to the High Court for its determination. The Bill may be subject to change as it progresses through the Oireachtas (parliament) before becoming enacted as law, which must be in time for the deadline of 6 May 2018 for Directive (EU) 2016/680, in addition to the coming into force of the GDPR on 25 May 2018.

• Data Protection Bill 2018 [No. 10 of 2018], 1 February 2018
http://merlin.obs.coe.int/redirect.php?id=18958 EN

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Report of the Joint Committee on the Future Funding of Public Service Broadcasting

On 13 December 2017, the Report of the Joint Committee on the Future Funding of Public Service Broadcasting was laid before the Irish Parliament. The 323-page Report follows an extensive public consultation process, and evidence from broadcasters and platform providers, to investigate possible viable alternative funding models for public service broadcasting. The Report makes a number of notable recommendations.

Firstly, the Committee recommends that a broadening of the existing charging regime be expanded to capture every household consuming media, regardless of the technology used. Such a new regime would incorporate all households, and not just those in possession of a traditional television set. The Committee recommends that the introduction of a non-device-dependent public service broadcasting charge (household-based) is feasible, efficient and practical considering the increasing threats to the sustainability of current licence fee revenues.

Secondly, the Committee recommends that the existing proportional allocation of licence fee monies be scrutinised and revised to ensure that any monies realised by the implementation of the anti-evasion strategy are provided to a diversity of existing and new sources in a fair and equitable way. Priorities may include restoring the public broadcaster, TG4, to more sustainable funding levels, and funding independent regional, local and community radio and television (as direct funding for their public service obligations under the Broadcasting Act 2009). The Committee recommends that the Minister establish a new scheme to assist these radio stations in the provision of local news and current affairs programmes. The scheme envisaged would be administered by the Broadcasting Authority of Ireland (BAI), and amend the BAI Sound & Vision Scheme (see IRIS 2017-7/26) to allow funding for a wider category of broadcasting to be supported.

Thirdly, the Committee agrees in principle to the introduction of re-transmission fees and giving RTÉ the capacity to negotiate with suitable platform providers (without prejudice to meeting their public service obligations). Re-transmission fees are fees paid by pay television platforms to broadcasters for the right to distribute (or re-transmit) the broadcasters' channels. The Report states that in Ireland, the free-to-air channels RTÉ, TG4 and TV3 are distributed over a variety of pay television platforms, including eir, Sky, Virgin Media and Vodafone. At present, these platforms do not pay the broadcasters re-transmission fees for carrying their channels, and broadcasters do not pay for the transmission of their channels by the platforms. Moreover, under section 114 (f) of the Broadcasting Act 2009, RTÉ is obligated "to establish, maintain and operate a television broadcasting service and a sound broadcasting service which shall have the character of a public service [which] shall be made available, in so far as RTÉ considers reasonably practicable, to Irish communities outside the island of Ireland." The Committee also considers that a provision should be included to review the negotiation process in relation to re-transmission fees.

Finally, the committee recommends that all references in legislation to "public service broadcasting" and "public service broadcasters" should be changed to "public service media", where appropriate.

• Houses of the Oireachtas Joint Committee on Communications, Climate Action and Environment, Report of the Joint Committee on the Future Funding of Public Service Broadcasting, 13 December 2017
http://merlin.obs.coe.int/redirect.php?id=18957 EN

• TV licence should be replaced by broadcasting charge - Communications Committee report, 13 December 2017
http://merlin.obs.coe.int/redirect.php?id=18931 EN

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IS-Iceland

Commission on the operating environment of independent media delivers report

On 25 January 2018, the Commission on the operating environment of independent media presented to the Icelandic Minister of Culture and Education, Ms. Lilja Alfreðsdóttir, its report entitled "The operation environment of the media - Commission proposals on an improved operation environment of independent media." The Commission proposed various changes to the current media policy instrument: firstly, a time-limited 25% refund of costs directly related to the production of news and current affairs in the media. The refund will apply to all licensed and registered media; television, radio, newspapers, magazines and web media that cover news and current affairs. This means that media service providers can only apply for a refund owing to the cost of the news department, but not the cost of producing media content unrelated to news and current affairs. Secondly, the majority of the Commission proposed that the public service broadcaster RÚV withdraw from the advertising market as soon as possible. Two members (out of five) of the Commission did not support the proposal and provided a joint dissenting opinion. Thirdly, VAT on all media subscriptions and retail sales (including Internet media and on-demand services) should be lowered to 11% (from the current 24%.)

Fourthly, the majority of the Commission proposed that "commercial communications" in respect of alcoholic beverages and tobacco products should be allowed, within the framework of international commitments. Two members of the Commission did not support the proposal and provided a joint dissenting opinion. Fifthly, a partial refund of the cost of providing Icelandic subtitles and Icelandic dubbing within an audiovisual media content (both linear and on-demand). Sixthly, media service providers should be able to apply for exemptions from the obligation to provide Icelandic subtitles and Icelandic dubbing owing to special circumstances to the Icelandic regulator for the media (the Media Commission) Lastly, the Commission proposed that media advertising bought by government organisations and municipalities should be transparent with regard to the identity of the organisation funding it, the identity of the media receiving the funding and the amount of money spent on advertising ..

The former Icelandic Minister of Culture and Education, Mr Illugi Gunnarsson, appointed the Commission in 30 December 2016 with a mandate to evaluate the operating environment of independent media and propose changes to the legal environment and/or other necessary changes with the purpose of

improving the operating environment of independent media. The current Minister of Culture and Education, Ms Lilja Alfreðsdóttir, has welcomed the proposals and said that they will be helpful in shaping policy and further government action to strengthen the operation of independent media. Furthermore, the Minister has decided to create a new policy strategy for Icelandic media and increase the efforts of the Iceland Government in support of independent media in Iceland.

• *Rekstrarumhverfi fjölmiðla - Tillögur nefndar um bætt rekstrarumhverfi einkarekinna fjölmiðla, 25. janúar 2018* (The operation environment of the media - Commission proposals on an improved operation environment of independent media, 25 January 2018)
http://merlin.obs.coe.int/redirect.php?id=18959 IS

Heiðdís Lilja Magnúsdóttir
The Media Commission (Fjölmiðlanefnd)

IT-Italy

Self-regulatory guidelines for online platforms for next general elections published by Italian Communication Authority

On 1 February 2018, the Italian Communication Authority (AGCOM) published guidelines to ensure equal treatment of parties/candidates on online platforms within the context of the next general elections. The guidelines are the result of the work performed within the context of a working group established by AGCOM containing representatives from major online platforms and newspapers.

Although the guidelines constitute self-regulatory "soft law" and do not therefore have specific legal value, they nonetheless provide helpful insight into how operators and stakeholders are approaching Italian election laws. The latter, in fact, are not per se applicable online, and commentators struggle to determine which principles can also be applied to regulate the online environment.

The document covers six topics. First, equal treatment of political subjects. The Par Condicio Law (Law no. 28 of 22 February 2000) on offline information requires that television and radio grant candidates/parties equal treatment when certain conditions are met. Even though similar rules are not applicable to the Internet, there are nonetheless general principles that are valid in respect of all means of communication. For example, online platforms should make sure that all political actors have equal access to means of communication. In particular, it is advisable that they be properly informed of the instruments that each platform makes available to them for the delivery of political messages online. Each political actor should be free to choose which instruments to use in a non-discriminatory manner.

Secondly, as regards what concerns online political advertising, in compliance with the law on political advertising, the buyer shall clearly specify political nature of each message and shall indicate the name of the "committente responsabile" (i.e. the person responsible for purchasing the political advertising). These elements must be included in the advertisement or, at least on the website to which the advertisement links.

Thirdly, in respect of illicit content and content whose dissemination is forbidden (such as polls), online platforms must set up tools by which to report defamatory content against candidates; similarly, online platforms should allow AGCOM to quickly report the presence of online polls/surveys in the fifteen days preceding an election day, which are forbidden by law.

Fourthly, with regard to public entities' social media accounts, the working group notes that public entities should refrain from using social media for political communication during election periods.

Fifthly, it is "desirable" that online platforms prevent political groups from carrying out political campaigning online on an election day and the day before, in compliance with the legal restrictions already in place regulating traditional means of campaigning. Lastly, as concerns fact-checking methods, AGCOM specifically recommends that Google and Facebook enhance those fact-checking mechanisms already in place.

• *Autorità per le garanzie nelle comunicazioni, Linee guida per la parita` di accesso alle piattaforme online durante la campagna elettorale per le elezioni politiche 2018* (AGCOM, Guidelines for equal access to online platforms during the election campaign for the 2018 general elections, 1 February 2018)
http://merlin.obs.coe.int/redirect.php?id=18960 IT

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Italian Communication Authority issues resolution on equal airtime for general elections

On 10 January 2018, the Italian Communication Authority (AGCOM) issued Resolution No. 1/18/CONS to enact the provisions of the Par Condicio Law (Law No. 28 of 22 February 2000) applicable to private broadcasters during the electoral period preceding the general elections to be held on 4 March 2018. In particular, the resolution aims at ensuring the respect of some core principles, including pluralism, impartiality, independence and the completeness of media coverage of elections.

With respect to broadcast media, specific rules are laid down to allot time in political communication programmes (that is to say, programmes where political parties discuss their plans) among (a) the parties already sitting in parliament, (b) the parties that are

represented by at least two members in the European Parliament, (c) the parties that have at least one MP and represent linguistic minorities; and (d) the members of the so-called "Gruppo Misto", that is to say, those MPs who are not affiliated with any political party.

In this respect, equal airtime rules are framed in a different way in Phase I (that is to say, the period from the official announcement of the election to the candidate-filing deadline) and in Phase II (that is to say, the period running from the presentation of candidates to the end of the electoral campaign).

Private radio and television broadcasters are allowed to offer party political broadcasts. The broadcasting of political programmes and party political broadcasts is made available free of charge. Party political broadcasts are made available on an equal footing among the various political parties. TV broadcasts may last from one to three minutes, while the duration is from thirty to ninety seconds for radio broadcasts. Furthermore, they shall not interrupt other programmes and are distributed among four time frames per day, each one of which shall include at least three broadcasts. A party political broadcast cannot be broadcast twice within the same time frame. In any case, no political party is allowed to broadcast more than two party political broadcasts within the same day. The broadcasting of party political broadcasts is not considered to constitute advertising for the purposes of the relevant advertising limits.

Particular rules are provided with respect to information programmes, including news programmes and newscasts. In addition to principles such as pluralism, impartiality and independence, AGCOM calls for information programmes to pay special attention to a balanced gender representation and the plurality of parties and candidates. Editors, journalists and presenters are required to comply with these principles in order to avoid affecting the equal chances of everyone concerned.

The AGCOM resolution also points out that, if in the context of information programmes it happens that a journalist supports a certain view, appropriate time must be reserved to journalists representing different opinions in order to guarantee pluralism and completeness of information. The resolution also contains other provisions which apply to local broadcasters, who have a special status deriving from the Par Condicio Law.

As far as print media are concerned, the resolution specifies that they are permitted to publish political advertisements until the day before the end of the electoral period; if print media wish to do so, they are required to issue a public notice specifying the conditions under which the publication takes place, including, among other things, fees and acceptance criteria. Political advertisements must feature the words 'messaggio elettorale' (political advertisement) in order for the public to identify the content as such.

Finally, the resolution also mentions opinion polls, to which an ad hoc resolution applies (No. 256/10/CSP). As to the enforcement of the rules on equal airtime, the Regional Committees of Communication (CO.RE.COM.) are competent to monitor the compliance with the applicable legislation and regulations and to report any violation. AGCOM may impose administrative sanctions as a result of the procedure established by Article 27 of the resolution.

• *Autorità per le garanzie nelle comunicazioni, delibera n. 1/18/CONS* (Italian Communication Authority, Resolution No. 1/18/CONS, 10 January 2018)
http://merlin.obs.coe.int/redirect.php?id=18961 IT

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NL-Netherlands

Court orders five other ISPs to temporarily block access to The Pirate Bay

On 12 January 2018, Midden-Nederland District Court, in the Dutch city of Lelystad, ordered five Internet Service Providers (ISPs), through an interim injunction, to temporarily block access to the Pirate Bay (TPB) until both the The Hague District Court and the Dutch Supreme Court had given their judgments in the main proceedings.

The dispute concerns BREIN, a foundation which protects the rights and interests of Dutch copyright holders, and five ISPs, namely T-Mobile, Tele2, CAIW, Zeelandnet and KPN, which give their end-users access to TPB. Based on Art 26d of the Dutch Copyright Act and Art 15e of the Dutch Related Rights Act, BREIN, the claimant in the dispute, requested the court to order all ISPs to block access to the domain names and IP addresses through which TPB operates.

Having regard to similarities in terms of cases, the court based its reasoning on an earlier judgment, decided by the The Hague District Court on 22 September 2017, in which BREIN also required ISPs, namely ZIGGO and XS4ALL, to cease their activities with regards to the giving of access to TPB (see IRIS 2017-10/23). By referring to that court's reasoning, in which the CJEU's preliminary judgment of 14 June 2017 (see IRIS 2016-1/22, IRIS 20173/5, and IRIS 2017-7/4) was taken into account, Midden-Nederland District Court concluded that the blocking measures were justified, proportionate and effective. The fact that such measures can be circumvented by use of technical means is irrelevant. In the view of the court, what counts is that these measures make it more difficult for end-users to access TPB, amounting to a decrease in users' visits to that website and thus in illegal downloading. As concerns the "urgent interest"

of the claimant in obtaining a preliminary injunction, the court took into account that BREIN had only recently — in December 2017 — brought proceedings in the main action and, therefore, that a final judgment could not be expected in the short term. Moreover, taking into account the CJEU judgment in which it was found that TPB itself infringed copyright law by making an act of "communication to the public", which led to blocking measures in the case of Ziggo and XS4ALL, the Court inferred that the "urgent nature" of the claim was present.

Besides having to block access to TPB within ten days, all ISPs were also required to pay a penalty sum for non-compliance amounting to EUR 10 000 and an additional EUR 2 000 for each day of further infringement; however, such a fine cannot exceed EUR 1 million. Moreover, all ISPs, except KPN, were required to jointly pay the procedural costs amounting to EUR 15 859. The reason why KPN was exempted from the latter costs is because its subsidiary SX4ALL already complied with the earlier blocking measures issued by The Hague District Court, and consequently, unlike the other ISPs, KPN did not file a defence against BREIN. Finally, Zeelandnet was ordered to pay an additional EUR 2 500 because it had argued that the judge lacked competence for ruling on the dispute.

Concerning KPN, the blocking measures will have to stay in place until the Dutch Supreme Court has given a ruling in the main proceedings between BREIN and Ziggo/XS4ALL, which were suspended on 13 November 2015. With regard to the other ISPs, their blocking measures will have to last until the court of first instance has decided on the main proceedings initiated by BREIN on 13 December 2017.

• *Rechtbank Midden-Nederland, 12 januari 2018, C/16/448423/KG ZA 17-382, KPN & T-Mobile & TELE2 & Zeelandnet &CAIW/BREIN* (District Court Midden-Nederland, 12 January 2018, C/16/448423/KG ZA 17-382, KPN & T-Mobile & TELE2 & Zeelandnet &CAIW/BREIN)
http://merlin.obs.coe.int/redirect.php?id=18962 NL

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Broadcasting suspect's image in Dutch television programme unlawful

On 27 December 2017, the District Court of Gelderland ruled that broadcasting the image of a murder suspect's face in a television programme did not contribute to the public debate and was therefore unlawful.

In 2016, the claimant in this case was ordered to serve a prison sentence of 7.5 years for attempted provocation of murder. Hidden camera footage had been discovered in which the claimant closed a murder deal and gave instructions to his associates. The footage was broadcast by SBS in 2012 on national television, in Misdaadverslaggever, a frequently watched crime reporting television programme produced by Endemol. In the broadcast of the television programme, the claimant discusses the murder of one of his business competitors. Even though his name is not mentioned, his face is clearly recognisable. Endemol considered it of great importance that the claimant's face was not blurred, because his face shows a cold and careless expression.

The claimant alleged a violation of his right to privacy, and claimed compensation for damages of EUR 500 000. To decide whether Endemol and SBS had committed an unlawful act against the claimant, the district court weighed the interests of the claimant against those of the defendant. The interests at stake were the right to privacy as embodied in Article 8 of the European Convention on Human Rights (ECHR) and the right to freedom of expression as protected by Article 10 ECHR. In order to decide which of these rights prevail, the district court took into account all relevant circumstances of the case at issue. According to the district court, it was relevant that the claimant's face was not blurred and that the television programme gave a detailed overview of the claimant's background; his profession, prior prison sentences and his participation in the discussed murder were all covered.

The district court also noted that special attention needed to be paid to the position of the press. It is the vital job of the press to spread information and ideas that contribute to the public debate, while the public has a right to receive these ideas and information. The district court ruled that the general interest of the public in this case was to be informed about the phenomenon of "murder on order", but that there was no necessity to warn the public about the claimant, since he was already incarcerated. Neither is he a public figure, which is an important factor when deciding on which of the rights prevails in this specific case. The district court was of the opinion that revealing the face of the claimant in the television programme did not contribute to the public debate on "murder on order" in general, and had led to unnecessary interference in the claimant's privacy. The district court concluded that the defendant could have made a useful contribution to the public debate without revealing the claimant's face and was therefore liable for the immaterial damages of EUR 3 000 that the claimant now suffers.

• *Ktr. Rechtbank Gelderland 27 december 2017, ECLI:NL:RBGEL:2017:6890* (District Court of Gelderland, 27 December, ECLI:NL:RBGEL:2017:6890) (published 10 January 2018))
http://merlin.obs.coe.int/redirect.php?id=18963 NL

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RO-Romania

ANCOM Law Goes to the Constitutional Court

On 15 January 2018, the Romanian President, Klaus Iohannis, sent to the Constitutional Court a notice on the Law on the approval of the Government Emergency Decree No. 33/2017, which stipulates that the president and vice-presidents of the National Authority for Management and Regulation in Communications in Romania (ANCOM) shall be appointed by the plenum of the parliament by the majority vote of the present senators and deputies (see IRIS 2009-5/31, IRIS 2017-7/29 and IRIS 2018-1/36).

Prior to the aforementioned Government Emergency Decree, the ANCOM management was appointed by the President of Romania, at the proposal of the government, and there were no provisions about the maximum period to propose nominations for the vacant ANCOM management positions. The President of Romania argued that overseeing ANCOM, as mentioned by both European regulations and by the relevant constitutional provisions, had become a genuine guardianship control under which the legislative power can dismiss ANCOM's leadership without complying with the requirements of Directive 2009/140/EC. The President drew attention to the lack of evidence to justify the use of the Emergency Decree and to highlight the existence of the extraordinary situation and the urgency of the regulation.

Iohannis considers that the law adopted by parliament contains a number of new provisions to the decree which have been approved by a procedure contrary to the principle of bicameralism. He pointed out that the Senate, as a decision-making chamber, had adopted a series of amendments detailing the procedure for appointing ANCOM's management, but had also adopted some amendments amending other texts of Government Emergency Decree No. 22/2009 which had not been considered by the government and, consequently, by the Chamber of Deputies. These changes concerned: the remuneration of the ANCOM president and vice-chairs; the assimilation of the positions of president and vice-president of ANCOM to a ministerial position, namely secretary of state; the procedure for the dismissal of the president and vice-presidents of ANCOM; the submission to the parliament of ANCOM's annual report and the effects of the rejection of this report by parliament (dismissal of ANCOM's management); the regulation of the situation in which the vacancy of the position of President of ANCOM takes place.

Klaus Iohannis also drew attention to the fact that the legislative interventions in the Law on the approval of the Government Emergency Decree No. 33/2017 ran counter to Directive 2002/21/EC, as amended by Directive 2009/140/EC, by affecting ANCOM's independence, impartiality and neutrality. The president stated that as a result of the above-mentioned decree, only the government and the parliament remained in the procedure to appoint ANCOM's management, and any participation of the president in the procedure to designate ANCOM's president and his/her substitutes had disappeared, which raised the question of whether the management of this autonomous administrative authority would be able to function within the parameters of independence, neutrality and impartiality as established by the European regulations, thus endangering not only the functioning of ANCOM as a genuine regulatory authority, but also the legislative harmonisation within the European Union.

• *The Sesizare de neconstituționalitate asupra Legii privind aprobarea Ordonanței de urgență a Guvernului nr. 33/2017 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* (Referral of unconstitutionality to the Law on the approval of Government Emergency Ordinance No. 33/2017 for the modification and completion of Article 11 of the Government Emergency 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=18933 RO

• *The Ordonanța de urgență a Guvernului nr. 33/2017 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* (Government Emergency Decree No. 33/2017 for the modification and completion of Article 11 of the Government Emergency Decree No. 22/2009 on the set up of the National Authority for Management and Regulation in Communications)
http://merlin.obs.coe.int/redirect.php?id=18801 RO

Eugen Cojocariu
Radio Romania International

Promulgation of the new Cinematography Law

On 11 January 2018, the Romanian President, Klaus Iohannis, promulgated Law No. 15/2018 on the approval of the Government Emergency Decree No. 67/2017 on Cinematography (see inter alia IRIS 2002-7/30, IRIS 2003-2/23, IRIS 2016-10/23, IRIS 2017-8/32 and IRIS 2018-1/34).

Law No. 15/2018 was published in the Official Journal of Romania No. 35 of 16 January 2018. The Senate, the upper chamber of the Romanian Parliament, adopted the document on 14 November 2017 and the Chamber of Deputies, the lower chamber, on 20 December 2017. The deputies' decision was final.

Government Emergency Decree No. 67/2017 modifies and completes Government Decree No. 39/2005 on Cinematography and one of its main provisions is to increase the duration of the direct credit reimbursement for the production of films from 10 to 20 years. The new form of the law also aims at giving the Romanian film industry financial support to produce films

dedicated to the centennial of the union of the territories inhabited predominantly by Romanians, celebrated in 2018, or films dedicated to well-known personalities and special cultural actions.

By prolonging the repayment period from 10 to 20 years, it is expected that the non-reimbursed amounts will be collected better due to the fact that the producer will continue to exploit the film, given the financial and administrative capacity of film producers to exploit their own productions under these conditions. At the same time, the amendment supports the correction of the situations created by the lack of correlation between the regulations in the field of cinema and the tax legislation regarding VAT, in conjunction with the state aid measures at national and community level, according to the explanatory memorandum to the normative act.

• *The Proiect de Lege privind aprobarea Ordonanței de urgență a Guvernului nr.67/2017 pentru modificarea și completarea Ordonanței Guvernului nr.39/2005 privind cinematografia - forma pentru promulgare* (Draft Law for the approval of the Government Emergency Decree No. 67/2017 on the modification and completion of the Government Decree No. 39/2005 on Cinematography - form sent for promulgation)
http://merlin.obs.coe.int/redirect.php?id=18934 RO

• *The Ordonanța de urgență a Guvernului nr. 67/2017 pentru modificarea și completarea Ordonanței Guvernului nr. 39/2005 privind cinematografia* (Government Emergency Decree No. 67/2017 on the modification and completion of Government Decree No. 39/2005 on Cinematography)
http://merlin.obs.coe.int/redirect.php?id=18804 RO

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Domain names can be classified as property that can be seized

On 22 December 2017, the Swedish Supreme Court announced that the appeal on the decision to seize The Pirate Bays ("TPB") Swedish domain names would not be granted a probationary permit, meaning that the Swedish Court of Appeal's decision would remain unchanged.

The legal proceeding against the Swedish domain organisation Punkt SE (ISS) was initiated in April 2015, when the Swedish prosecutor filed a complaint with the objective of hindering access to TPB through their Swedish domain names. "Thepiratebay.se" and "Piratebay.se" were both used for the illegal file sharing of copyright-protected works.

The prosecutor argued that the domain names constituted means or tools which facilitate copyright infringement. According to the Swedish Copyright Act, property that is used for crime, such as copyright infringement, may be seized by the Swedish State with the purpose of preventing further infringements.

The Stockholm District Court, which is the first instance in Sweden, and the Swedish Court of Appeal held that the TPB domain name constitutes property than can be seized by the Swedish State. According to the Swedish Court of Appeal, the following features of the domain name constitute strong grounds which indicate that it can be regarded as a property right: an exclusive right; an asset of an economic value; can be transferred; and in some respects, has functions which are similar to the functions of a trademark.

Hence, it is now no longer possible to access TPB via their Swedish domain, but the seizure as such does not hinder TPB from using other domain names. The judgment, as such, extends the possibility to prosecute against online copyright infringement through the seizure of domain names.

• *Högsta domstolen, Ma˚l nr B 2787-17, 22 december 2017* (Supreme Court of Sweden, No. B 2787-17, 22 December 2017)
http://merlin.obs.coe.int/redirect.php?id=18932 SV

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Conflicting judgments on journalistic freedom

On 11 January 2018, the Constitutional Court of Turkey ruled upon constitutional complaints that the detention on remand of two journalists, MA and ŞA, for more than 16 months without convincing evidence was a violation of their right to freedom of press/expression and their right to liberty and security. The court rejected the rest of the complaints that they had also been the victims of a violation of their fair trial rights and of ill-treatment.

Constitutional complaint procedure was introduced in Turkey with an amendment in the constitution in 2010. By empowering the Constitutional Court to receive individual applications, the parliament aimed at creating a domestic remedy for human rights violations before the victims directly reached the European Court of Human Rights (ECtHR). The new remedy has been operating as of September 2012. Since then, the Turkish Constitutional Court (TCC) has received thousands of applications alleging breach of various rights in the constitution.

The applicants MA and ŞA were charged with terrorist crimes linked to the failed coup attempt of July

15, 2016. Their cases are pending before the first instance court. They argued before the TCC that they had not used language which may be understood explicitly or implicitly as supporting violence or terrorist organisations. They also denied their alleged link with the coup plotters.

In cases where the TCC finds a violation upon an individual application, the system, as established by parliamentary statute, works as follows: the TCC sends the case file to the original (or final) court for a decision to remedy. The original/first instance/final court is supposed to hold a re-trial hearing to reach a conclusion in line with the TCC's judgement.

In fact, under the Turkish Constitution (Article 153/6) the TCC's judgments are binding for judicial, executive and legislative organs; private and public persons; and institutions. In spite of this, the first instance court rejected the release of the applicants and blamed the TCC for overstepping its powers. This unprecedented response from a lower court in a legal system is now being discussed among lawyers in the country. As a result, applicants have now directed their cases to the ECtHR with the argument that the constitutional complaint procedure in their case has proved to be ineffective.

• *Türkiye Anayasa Mahkemesi, Mehmet Hasan Altan Başvurusu (2), 11.01.2018, No: 2016/23672; Şahin Alpay Başvurusu, 11.01.2018, No: 2016/1092. Bkz. Resmi Gazete, 19 Ocak 2018, Sayı: 30306* (Turkish Constitutional Court, Application of Mehmet Hasan Altan (2), 11.01.2018, No: 2016/23672; Application of Şahin Alpay, 11.01.2018, No: 2016/1092. See Official Gazette, 19 January 2018, No: 30306) TR

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Agenda

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