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of the European Audiovisual Observatory

IRIS 2018-4

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European Audiovisual Observatory 76, allée de la Robertsau F-67000 STRASBOURG
Tel. : +33 (0) 3 90 21 60 00 Fax : +33 (0) 3 90 21 60 19
E-mail: obs@obs.coe.int www.obs.coe.int
Comments and Contributions to:
iris@obs.coe.int
Executive Director:
Susanne Nikoltchev
Editorial Board:
Maja Cappello, Editor • Francisco Javier Cabrera Blázquez, Sophie Valais, Deputy Editors (European Audiovisual Observatory)
Silvia Grundmann, Media Division of the Directorate of Human Rights of the Council of Europe, Strasbourg (France) • Mark D. Cole, Institute of European Media Law (EMR), Saarbrücken (Germany) • Bernhard Hofstötter, DG Connect of the European Commission, Brussels (Belgium) • Tarlach McGonagle, Institute for Information Law (IViR) at the University of Amsterdam (The Netherlands) • Andrei Richter, Media Academy Bratislava (Slovakia)
Council to the Editorial Board:
Amélie Blocman, Victoires Éditions

Documentation/Press Contact:
Alison Hindhaugh
Tel.: +33 (0)3 90 21 60 10
E-mail: alison.hindhaugh@coe.int
Translations:
Sabine Bouajaja, European Audiovisual Observatory (co-ordination) • Paul Green • Katherine Parsons • Marco Polo Sarl • Nathalie Sturlèse • Brigitte Auel • Erwin Rohwer • Sonja Schmidt • Ulrike Welsch
Corrections:
Sabine Bouajaja, European Audiovisual Observatory (co-ordination) • Sophie Valais et Francisco Javier Cabrera Blázquez • Aurélie Courtinat • Barbara Grokenberger • Jackie McLelland • James Drake
Distribution:
Nathalie Fundone, European Audiovisual Observatory
Tel.:
+33 (0)3 90 21 60 06
E-mail: nathalie.fundone@coe.int
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European Court of Human Rights: Alpha Doryforiki Tileorasi Anonymi Etairia v. Greece

On 22 February 2018, the European Court of Human Rights (ECtHR) delivered its judgment in Alpha Doryforiki Tileorasi Anonymi Etairia v. Greece concerning the fining of a broadcaster over hidden camera footage of a politician. The applicant in the case was the owner of a Greek television channel, ALPHA. In January 2002, ALPHA broadcast a television show named "Jungle" (326377´305363372373361) in which three videos filmed with a hidden camera were broadcast. In the first video, A.C., then a member of the Hellenic Parliament and chairman of the parliamentary committee on electronic gambling, was shown entering a gambling arcade and playing on two machines. The second video showed a meeting between A.C. and associates of the television host of "Jungle", M.T., during which the first video was shown to A.C. The third video showed a meeting between A.C. and M.T. in the latter's office.

Following a hearing in May 2002, the National Radio and Television Council (NRTC) found that the use of a hidden camera by the broadcaster in the three videos had not been in accordance with the law. The NRTC ordered the applicant company to pay EUR 100,000 for each of the two television shows in which the videos were shown, and to broadcast on three days in a row on its main news show the content of its decision. The applicant company appealed against the decision to the Supreme Administrative Court, and in April 2010, the court dismissed the appeal. The court held that broadcasting a secretly recorded image can only be justified if the legitimate broadcasting of such news is completely impossible or particularly difficult without broadcasting the image that was recorded by hidden means and which constitutes the source of the news. The Court found that the applicant company had not disputed that the images had been recorded by secret means and had not claimed that broadcasting of the news was absolutely impossible or extremely difficult without broadcasting the relevant images. Therefore, the applicant company's allegation that it had broadcast the impugned images for reasons of journalistic interest and of public interest was dismissed.

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 main question was whether the interference with the applicant's right to freedom of expression had been necessary in a democratic society. In this regard, the Court examined a number of criteria. Firstly, the Court held that the report contributed to a debate of public interest, including the conduct vis-à-vis electronic gambling of an elected representative who, additionally, was chairman of an inter-party committee on electronic gambling. Secondly, the Court found that A.C. was undeniably a prominent political figure. Thirdly, the Court examined the method of obtaining the information and its veracity - namely the circumstances under which the videos were taken. With regard to the first video, the Court held that the domestic authorities had failed to take into consideration the fact that it had been filmed in a public place - an element which, in the Court's view, weakens the legitimacy of any expectation of privacy A.C. might have had when he entered the gambling arcade. However, with regard to the second and third videos, the Court considered that it was clear under Greek criminal law that A.C. had been entitled to an expectation of privacy as he had entered private spaces with a view to discussing the recorded incidents and for his conversations not to be recorded without his explicit consent. Lastly, the Court examined the severity of the sanctions, and the Court held that the sanctions imposed were relatively lenient, though not insignificant, and that a number of factors were taken into account when imposing them, such as the applicant company's past behaviour in relation to similar incidents. The Court also considers that the sanctions imposed cannot be said to have had a deterrent effect on the press reporting on matters of public interest. In conclusion, the Court held that the reasons given by the Greek authorities were "relevant" and "sufficient" to justify the interference in respect of the second and third videos. However, the Court held that in so far as the first video is concerned, the domestic authorities failed to take into account the circumstances under which it was obtained. The Court attached great importance to the fact that it was not recorded in private premises and that the interference with A.C.'s rights under Article 8 was therefore significantly less serious. The Court is thus of the opinion that the domestic authorities should have included in their assessment the fact that A.C., by entering a gambling arcade, could legitimately have expected his conduct to have been closely monitored and even recorded on camera, especially in view of the fact that he was a public figure. Thus, there has been a violation of Article 10 of the ECHR in respect of the first video (the Court also found a violation of Article 6 of the ECHR over the length of the proceedings).The Court awarded the applicant EUR 33,000 in pecuniary damage (finding the applicant had paid only EUR 100,000 of the fine imposed in relation to all three videos), and awarded EUR 7,000 in compensation for non-pecuniary damage.

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• Judgment by the European Court of Human Rights, First Section, case of Alpha Doryforiki Tileorasi Anonymi Etairia v. Greece, Application no. 72562/10, 22 February 2018
http://merlin.obs.coe.int/redirect.php?id=18970 EN

Ronan Ó Fathaigh
Institute for Information Law (IViR), University of Amsterdam

European Court of Human Rights: Butkevich v. Russia

In a case about a Ukrainian journalist being arrested during an anti-globalisation protest in Russia, the European Court of Human Rights (ECtHR) has clarified that the gathering of information is an essential preparatory step in journalism, solidly protected as a part of press freedom. The ECtHR recognises that the media fulfil an important task in a democratic society, when providing information on the authorities' handling of public demonstrations and the containment of disorder. Therefore, any attempt to remove journalists from the scene of demonstrations must be subject to "strict scrutiny". The ECtHR found that the arrest, prosecution and conviction of the journalist had violated his right to freedom of expression under Article 10 of the European Convention of Human Rights (ECHR). The ECtHR also stated that in cases relating to public events, there is a close link between the freedoms protected by Articles 10 (freedom of expression) and 11 (freedom of peaceful demonstration) of the ECHR.

The case concerns the arrest and conviction of Maksim Aleksandrovich Butkevich, who was covering as a journalist an anti-globalisation protest in July 2006 in St Petersburg, during a G8 Summit. While observing the demonstration and taking photographs - including when the police started to disperse the gathering and to arrest some of the participants - two police officers approached the journalist and ordered him to cease his "unlawful actions". As Butkevich continued taking pictures, he was ordered to come in the police vehicle and was taken to and detained in a police station. Administrative-offence proceedings were brought against him for disobeying a lawful order of the police. The case was examined in an expedited procedure, and on the same evening as that on which the events had occurred he was heard by a judge and convicted as charged. He was sentenced to three days' detention. Two days later the appeal court reduced this sentence to two days and ordered his release, with immediate effect.

Butkevich lodged a complaint with the ECtHR, alleging that his administrative arrest and delayed release from detention had been unlawful (breach of Article 5 § 1 of the ECHR), that he had not been given a fair trial by an impartial court (breach of Article 6 § 1 of the ECHR), and that his freedom of expression had been interfered with in an unlawful and disproportionate manner by the Russian authorities (Article 10 of the ECHR). Third-party submissions were made by the Ukraine Government and by three NGOs - the Media Legal Defence Initiative (MLDI), Article 19: Global Campaign for Free Expression, and the Mass Media Defence Centre. After finding breaches of Article 5 § 1 and Article 6 § 1 of the ECHR, the ECtHR also came to the conclusion that Butkevich's rights as a journalist under Article 10 of the ECHR were violated by the Russian police and judiciary.

As regards Butkevich's pre-trial deprivation of liberty at the police station, the ECtHR considered that the Russian authorities had not provided any justification for the administrative arrest. Thus, the ECtHR concluded that this aspect of interference with the journalist's right to freedom of expression had not been "prescribed by law" within the meaning of Article 10 of the ECHR.

With regard to Butkevich's prosecution and his being sentenced to administrative detention, the ECtHR accepted the legality of the interference, as it had been aimed at pursuing the legitimate aim of prevention of disorder, but it did not accept that it had been necessary in a democratic society, in accordance with Article 10 § 2 of the ECHR. The ECtHR considered as a pertinent issue the question of whether Butkevich had identified himself as a journalist in a timely and adequate manner during the demonstration and in the subsequent proceedings, but it left no doubt that Butkevich was to be considered as acting as a journalist during the event at issue. The fact that Butkevich on the day of the event had not been acting on a journalistic assignment from any media outlet did not influence the finding that he had been acting as a journalist, with the intention of collecting information and photographic material relating to a public event and to impart them to the public via means of mass communication. While the ECtHR noted that the legitimate aim of preventing disorder weighed heavily in Pentikäinen v. Finland (see IRIS 2016-1/2), it was of the opinion that the present case was different in this respect, as there was nothing in the case file confirming that the demonstration had not been peaceful or that it had turned violent. According to the ECtHR the domestic authorities should also have questioned and investigated whether Butkevich's alleged actions had been excusable or had otherwise been mitigated, given his argument that he had been acting as a journalist. As the ECtHR was of the opinion that the domestic decisions did not suggest that there had been any kind of adequate assessment of this aspect of the case, and as the Russian authorities have not produced any relevant and pertinent reasons in order to justify the prosecution and conviction of Butkevich, it came to the conclusion, unanimously, that the journalist's right to gather information had been violated. The ECtHR lastly considered that it was not necessary in the present case to make further findings concern-

ing Butkevich's removal from the venue of the demonstration.

In application of Article 41 of the ECHR, the ECtHR awarded Butkevich EUR 7,000 in respect of non-pecuniary damage, and EUR 2,000 for costs and expenses related to the proceedings before the ECtHR.

• Judgment by the European Court of Human Rights, Third Section, case of Butkevich v. Russia, Application no. 5865/07, 13 February 2018
http://merlin.obs.coe.int/redirect.php?id=18969 EN

Dirk Voorhoof
Human Rights Centre, Ghent University and Legal Human Academy

European Court of Human Rights: Ivashchenko v. Russia

On 13 February 2018, the European Court of Human Rights (ECtHR) issued its judgment in Ivashchenko v. Russia concerning the inspection and copying of a journalist's laptop and storage devices by customs officials. The applicant in the case was a photojournalist with a photo agency, Photographer.ru. In early August 2009, the applicant travelled to Abkhazia to prepare a report (to be illustrated by photographs) on "the life of this unrecognised republic". On 27 August 2009, the applicant returned to Russia, and on arrival at the Adler customs checkpoint, presented his Russian passport, press card and a customs declaration, stating that he had electronic information devices (a laptop and flash memory cards) in his luggage. The applicant was examined by a customs officer to verify the information contained in the applicant's customs declaration by way of an "inspection procedure". After finding in the directory of the laptop an electronic folder entitled "Extremism (for RR)", which contained a number of photographs, the customs officer decided to copy it and other folders from the laptop for further examination by an expert, who could determine whether they contained any information of an extremist nature. 34 folders (containing some 480 subfolders with over 16,300 electronic files) were copied. The laptop remained with a customs officer for several hours. On 9 September 2009 the applicant was informed that a report had been commissioned from a criminal forensics expert to determine whether the data copied from his laptop contained any prohibited "extremist" content. In December 2009 a report concluded that the data contained no extremist material. According to the applicant, the DVDs with his data were handed back to him in November 2011.

The applicant applied for judicial review, challenging the actions of the customs officials. In January 2010, the Prikubanskiy District Court of Krasnodar dismissed his application, finding that the data from the applicant's laptop had been copied for the purposes of examination, in compliance with Presidential Decree no. 310 on combating fascism and political extremism. On appeal, the Krasnodar Regional Court upheld the judgment, holding that the customs inspection had been authorised and carried out according to official customs procedures and that the data had been copied in line with Russian Presidential Decree no. 310 of 23 March 1995.

The applicant made an application to the ECtHR, claiming a violation of his right to private life under Article 8 of the European Convention on Human Rights (ECHR). Firstly, the Court held that there had been an interference with the applicant's right to private life, noting the search of his laptop (which had lasted several hours, allegedly without any reasonable suspicion of any offence or unlawful conduct), the copying of his personal and professional data (followed by their being forwarded for a specialist assessment), and the retention of his data for some two years. In the Court's view, those actions had gone beyond what could be perceived as procedures that were "routine", relatively non-invasive and for which consent was usually given. The Court then examined whether the interference had been in accordance with the law, and in particular whether Russian law provided protection against arbitrariness and adequate safeguards. Firstly, the Court held that it did not appear that the comprehensive measure used in the present case had to be based on some notion of a reasonable suspicion that someone making a customs declaration has committed an offence - namely one arising from the anti-extremist legislation pertinent to the present case. The apparent lack of any need for reasonable suspicion relating to an offence was exacerbated by the fact that the domestic authorities (ultimately the courts at the judicial review stage) had not attempted to define and apply such notions as "propaganda for fascism", "social, racial, ethnic or religious enmity" to any of the ascertained facts. Secondly, the Court held that the domestic authorities, including the courts, had not been required to give, and had not given, relevant and sufficient reasons for justifying the "interference" in the present case. In particular, it had not been considered pertinent by the domestic authorities to ascertain whether the impugned measures had been taken in pursuance of any actual legitimate aim (for instance the ones referred to by the Government). It was merely assumed that the identification of possible "extremist material" was required by the 1995 Presidential decree. It was not considered relevant, at any stage and in any manner, that the applicant was carrying journalistic material. The Court concluded that Russian Government had not convincingly demonstrated that the relevant legislation and practice afforded adequate and effective safeguards against abuse in a situation of applying the sampling procedure in respect of electronic data contained in an electronic device. Thus, they were not "in accordance with the law", and violated Article 8 ECHR (the Court also concluded that having regard to this finding, it was not necessary to examine the complaint under Article 10 ECHR). The Court awarded the appli-

cant EUR 3,000 in damages, and EUR 1,700 for costs.

• Judgment by the European Court of Human Rights, Third Section, case of Ivashchenko v. Russia, Application no. 61064/10, 13 February 2018
http://merlin.obs.coe.int/redirect.php?id=18971 EN

Ronan Ó Fathaigh
Institute for Information Law (IViR), University of Amsterdam

Committee of Ministers: Consultation on priority areas for the protection of journalism and safety of journalists

On 19 February 2018, the Council of Europe issued a call for submissions on the implementation of the Committee of Ministers' Recommendation CM/Rec(2016)4 on the protection of journalism and safety of journalists and other media actors (see IRIS 2016-1/3). It is stated that recent murders of journalists in Council of Europe states demonstrate the urgent need for redoubled action in the implementation of the 2016 Recommendation, and it is therefore necessary to initiate a more systematic implementation of the 2016 Recommendation. In this regard a detailed questionnaire on the 2016 Recommendation was released, calling for journalists, journalist associations and civil society members to evaluate the threats to media freedoms and propose the topics/areas that should be given priority implementation at this stage.

The questionnaire is based on the 2016 Recommendation, which includes detailed guidelines for the member states covering the four specific areas: prevention, protection, promotion of information and awareness-raising. On the basis of these four pillars and with the aim of achieving more systematic implementation of the Recommendation, the questionnaire will help determine the Council of Europe's priority implementation areas at this stage. The questionnaire consists of four parts and a number of indicators, each rated from 1 to 10, depending on the urgency of the subject matter. The first pillar is prevention, and concerns the legislative framework protecting journalism and journalists. The second pillar concerns protection through law enforcement machinery and redress mechanisms. The third pillar concerns prosecution, and how investigations must be effective (that is to say, capable of leading to the establishment of the facts and the identification and, if appropriate, the punishment of those responsible. The final pillar concerns the promotion of information, education and awareness-raising. The questionnaire recognises that some of the topics are interrelated and require coordinated action, so the respondents are asked to indicate the topics that should be addressed together. In addition, where relevant, the respondent may provide more detailed information concerning the specific risks and potential mitigating measures. The Council of Europe states that it is continuously working on the implementation of the 2016 Recommendation by supporting national authorities through cooperation assistance activities and by providing responses to challenges to media freedom and the safety of journalists. The implementation strategy will be applied in a few priority areas as a first step.

• Questionnaire on Recommendation on the protection of journalism and safety of journalists and other media actors, 19 February 2018
http://merlin.obs.coe.int/redirect.php?id=18996 EN FR

• Questionnaire on Priority areas for the implementation of Recommendation CM/Rec(2016)4 on the Protection of Journalism and Safety of Journalists and other Media Actors, 19 February 2018
http://merlin.obs.coe.int/redirect.php?id=18972 EN FR

Bojana Kostić
Institute for Information Law (IViR), University of Amsterdam

Recommendations of the OSCE and Council of Europe Conference on Internet Freedom

On 5 February 2018, the Conclusion and Recommendations from the Internet Freedom Conference 2017 were published. The event was co-organised by Austrian Chairmanship of the Organization for Security and Co-operation in Europe (OSCE), and the Czech Chairmanship of the Council of Europe Committee of Ministers. The conference was entitled "Internet Freedom: The Role and Responsibilities of Internet Intermediaries", and was held in Austria in October 2017.

The four sessions of the conference concerned four interrelated questions: the current state of Internet freedom across the participating states of the OSCE and COE member states regarding Internet intermediaries; the role of social media and search engines in shaping the public sphere; the way in which intermediaries are determining the unlawful nature of third-party content; and alternatives for developing a legal and policy framework that ensures Internet freedom, including liability exemptions and content moderation via transparent procedures.

The conference resulted in general recommendations on the subject matter and more specific recommendations to the states and to the intermediaries. Among the general recommendations are: (a) states have to engage with intermediaries to ensure the application of human rights and freedoms online and offline; (b) states, the private sector and civil society have to consider the scope of intermediaries' duties and responsibilities and how to reflect them in laws protecting citizens and enabling a dynamic Internet environment; (c) regulations must be read in the light of the commitment of all Council of Europe member states and OSCE participating states to the protection of human rights and freedoms; and (d) the approach to Internet

freedom should remain a holistic one, with the need to balance Internet freedom against other rights and freedoms. States should learn from best practices, including the implementation of the indicator-based Internet Freedom reporting model by the Council of Europe in its 2016 Recommendation (see IRIS 2016-5/2).

One of the many recommendations to the states is that new laws be assessed in the light of their human rights impact. Moreover, States need to explore the practices of intermediaries before making policy decisions. Secondly, states should engage with the Office of the OSCE Representative on Freedom of the Media and the Council of Europe and implement the recommendations made by these institutions. Thirdly, applying traditional media law to intermediaries' functions cannot be effective - laws must be tailored to those functions and normative approaches must be graduated and differentiated. Fourthly, intermediaries cannot be assigned the role of "judges" regarding the legality of content. There must be decisions from national authorities and a clear judicial process. Fifthly, law enforcement cooperation with intermediaries needs to be refined in order to overcome administrative, communicative and legal hurdles. States need to establish and support digital literacy and media literacy programmes.

Lastly, intermediaries should expand their capability to strike a balance between human rights and the fundamental freedoms of involved parties. Intermediaries should act as transparently as possible - the use of algorithms is not enough. Moreover, decisions either on implementing national enforcement decisions or voluntarily taking down content should be taken on the basis of predictable and transparent rules, due process and other applicable procedural guarantees. Notably, the general rule of liability exceptions for hosted content should not change. However, the model of notice-and-action should be refined by adding minimum content requirements and standardised flagging processes, including the possibility for affected parties to challenge over-removals. Moreover, content liability should have a graduated approach. This could be based either on the activity of the provider or the type of content in dispute. Openness regarding the design and use of algorithm decision-making should be used to counter unintentional side-effects.

• Organization for Security and Co-operation in Europe (OSCE) and Council of Europe (COE), Key Conclusions and Recommendation - Conference on Internet Freedom "The Role and Responsibilities of Internet Intermediaries", 5 February 2018
http://merlin.obs.coe.int/redirect.php?id=18998 EN

Emmanuel Vargas Penagos
Institute for Information Law (IViR), University of Amsterdam

EUROPEAN UNION

Court of Justice of the European Union: Classification of promotional channels on video platforms

In a ruling of 21 February 2018 (case C-132/17), the Court of Justice of the European Union (CJEU) explained that neither a video channel on a video platform (in this case, YouTube), on which Internet users can only view short promotional videos, nor videos posted on such platforms, can be classified as audiovisual media services in the sense of the Audiovisual Media Services Directive (AVMSD - 2010/13/EU).

The decision concerns a legal dispute between car manufacturer Peugeot Deutschland GmbH and the environmental and consumer protection organisation Deutsche Umwelthilfe e. V. Peugeot runs a channel on the YouTube platform, on which it posted a video lasting approximately 15 seconds with the title "Peugeot RCZ R Experience: Boxer" in early 2014. Deutsche Umwelthilfe brought an action against it before the Landgericht Köln (Cologne Regional Court - LG Köln), claiming that the failure to provide certain information on the new vehicle model being advertised in the video infringed Article 5(1) of the Verordnung über Verbraucherinformationen zu Kraftstoffverbrauch, CO2-Emissionen und Stromverbrauch neuer Personenkraftwagen (Regulation on consumer information on fuel consumption, CO2 emissions and energy consumption of new passenger cars - Pkw-ENVKV). Article 5(1) in conjunction with the first half of the first sentence of Article 5(2) Pkw-ENVK requires manufacturers and dealers to provide information on official fuel consumption and official specific CO2 emissions in advertisements for passenger cars. The same applies to promotional material distributed by electronic means and to advertising on electronic, magnetic or optical storage media.

The LG Köln upheld the action and the Oberlandesgericht Köln (Cologne Appeal Court) dismissed Peugeot's appeal. In subsequent appeal proceedings, however, the Bundesgerichtshof (Federal Supreme Court) asked the CJEU for a preliminary ruling because the second half of the first sentence of Article 5(2) Pkw-ENVK exempts audiovisual media services within the meaning of Article 1(1)(a) AVMSD from the information obligations, so the outcome of the dispute depended largely on the interpretation of EU law.

The CJEU ruled that the disputed service should not be classified as an audiovisual media service and referred primarily to the definition in Article 1(1)(a) AVMSD in conjunction with the explanation provided in recital 22. This recital states that the definition of an audiovisual media service should cover mass media in their function to inform, entertain and educate

the general public which, in the court's view, could not be regarded as the principal purpose of a promotional video channel, as required by the directive. Rather, the purpose of these videos was of a purely commercial nature, and to the extent that they could inform, entertain or educate viewers, they did so with the sole aim of achieving that purpose. Whether the other criteria of the definition of an audiovisual media service were met was irrelevant. The CJEU rejected Peugeot's assertion that Article 11 of the Charter of Fundamental Rights of the European Union had been breached through a difference in treatment between promotional videos and other videos on the grounds that promotional videos were not in a comparable situation to that of non-promotional programmes. Finally, such promotional videos could not be classified as audiovisual media services in the form of audiovisual commercial communications under Article 1(1)(a)(ii)(h), since they did not accompany and were not included in a programme in return for payment or for similar consideration or for self-promotional purposes. Rather, the Peugeot channel only contained individual videos that were independent of one another. According to the CJEU, the individual promotional images added by Peugeot at the beginning and end of its videos made no difference (in the sense, for example, that they amounted to commercial communications while the rest of the video could be considered as a programme), since they did not bring into question the promotional nature of the video as a whole.

• Judgment of the Court of Justice of the European Union (Ninth Chamber) of 21 February 2018, case C-132/17
http://merlin.obs.coe.int/redirect.php?id=19026 DE EN FR
CS DA EL ES ET FI HU IT LT LV MT NL PL PT SK SL SV HR

Christina Etteldorf
Institute of European Media Law (EMR), Saarbrücken/ Brussels

European Parliament: Regulation on addressing unjustified geo-blocking

On 28 February 2018, a new Regulation on addressing unjustified geo-blocking was published in the Official Journal of the European Union, following a European Parliament vote on 6 February 2018. The Regulation requires retailers to give access to goods and services on the same terms throughout the EU (however, copyright-protected works are exempted).

Under Article 3 of the Regulation, geo-blocking includes "block[ing] or limit[ing] a customer's access to the trader's online interface for reasons related to the customer's nationality, place of residence or place of establishment." For example, a trader may not (for the above-mentioned reasons) redirect customers to a different online interface to that which the customer initially sought. The definition also covers "apply[ing] different general conditions of access" for location-related reasons, and the Regulation necessitates acceptance of payment (regardless of customer location), so long as the payment is made through an electronic transaction within the same payment brand and category, authentication requirements are fulfilled, and the transactions are concluded in a currency that the trader accepts.

While the new Regulation applies to a wide range of goods and services, materials protected under copyright, such as e-books and audiovisual products, are excluded from the Regulation. In this regard, Recital 8 states that audiovisual services, including services the principle purpose of which is the provision of access to broadcasts of sports events and which are provided on the basis of exclusive territorial licences, are excluded from the scope of this Regulation. Further, Article 1(5) provides that the Regulation shall not affect the rules applicable in the field of copyright and neighbouring rights, notably the rules provided for the Copyright Directive (2001/29/EC).

However, the Regulation also includes a Review clause under Article 9, which provides that by 23 March 2020 and every five years thereafter, the European Commission must report on the evaluation of the Regulation, taking into account the "overall impact ... on the internal market and cross-border impact, including in particular, the potential additional administrative and financial burden for traders stemming from the existence of different applicable regulatory consumer contract law regimes." Notably, the first evaluation will assess whether the Regulation "should also apply to electronically supplied services the main feature of which is the provision of access to and use of copyright protected works or other protected subject matter, including the selling of copyright protected works or protected subject matter in an intangible form."

Lastly, it should also be noted that there is another proposed Regulation laying down rules on the exercise of copyright and related rights applicable to certain online transmissions of broadcasting organisations and retransmissions of television and radio programmes (see IRIS 2018-10), which is currently before the European Parliament.

The Geo-Blocking Regulation enters into force on 23 March 2018, and will apply from 3 December 2018.

• Regulation (EU) 2018/302 of the European Parliament and of the Council of 28 February 2018 on addressing unjustified geo-blocking and other forms of discrimination based on customers' nationality, place of residence or place of establishment within the internal market and amending Regulations (EC) No 2006/2004 and (EU) 2017/2394 and Directive 2009/22/EC
http://merlin.obs.coe.int/redirect.php?id=18976 DE EN FR
CS DA EL ES ET FI HU IT LT LV MT NL PL PT SK SL SV HR

• European Parliament, Parliament votes to end barriers to cross-border online shopping, 6 February 2018
http://merlin.obs.coe.int/redirect.php?id=18977 DE EN FR
CS DA EL ES ET FI HU IT LT LV MT
NL PL PT SK SL SV HR

Ellen Coogan
Institute for Information Law (IViR), University of Amsterdam

European Commission: Imposing Swedish ban on alcohol advertising on two UK broadcasters is not compatible with EU law

On 31 January 2018, the European Commission decided that Sweden's intention to impose a ban on alcohol advertising on two UK-based broadcasters that target mainly Swedish audiences is not compatible with EU law. This is the first Commission decision to be based on Article 4 of the Audiovisual Media Services Directive (2010/13/EU) (AVMSD).

Under the AVMSD, the laws applicable to a broadcaster are determined on the basis of the country-of-origin principle. According to this principle, a broadcaster must comply only with the rules of the EU member state in which it is established, even if it broadcasts to other member states. Therefore, in this case, the UK-based broadcasters were only subject to UK law, which does not contain a ban on alcohol advertising. As a result, the broadcasters could legally broadcast commercial alcohol advertisements to Sweden, where a ban on alcohol exists.

Article 4 of the AVMSD allows a member state to impose stricter measures against a broadcaster established in another member state if that broadcaster "provides a television broadcast which is wholly or mostly directed towards its territory". Several conditions must be met before such stricter measures can be imposed. Most importantly, the member state must assess whether the broadcaster in question established itself in another member state in order to circumvent stricter rules that would have otherwise been applicable; and obtain a Commission decision recognising that the relevant measures are compatible with EU law.

In support of its decision that Sweden's intention to impose a ban on alcohol advertising on two UK-based broadcasters is not compatible with EU law, the Commission highlighted that the burden of proof that the broadcasters were trying to circumvent Sweden's stricter rules lies with Sweden. The Commission held that Sweden had not met the burden of proof. Relying on the case law of the Court of Justice of the European Union the Commission also noted that "it is compatible with the country-of-origin principle and the [principle of] freedom of establishment that a company chooses its place of establishment in a Member State other than that in which revenues are made".

This decision demonstrates the importance of the country-of-origin principle - the cornerstone of the legal framework under the AVMSD. The Commission's proposal for the revision of the Directive of 25 May 2016 maintains this principle (see IRIS 2016-6/3). This proposal is currently under negotiation in the so-called trilogue meetings by the Council, European Parliament and the European Commission.

• Commission Decision of 31 January 2018 on the incompatibility of the measures notified by the Kingdom of Sweden, pursuant to Article 4(5) of Directive 2010/13/EU of the European Parliament and of the Council on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services
http://merlin.obs.coe.int/redirect.php?id=18973 EN
• European Commission, Press release, "Commission decides that the Swedish intention to impose a ban on alcohol advertising on two UK broadcasters is not compatible with EU rules", 31 January 2018
http://merlin.obs.coe.int/redirect.php?id=18999 EN

Svetlana Yakovleva
Institute for Information Law (IViR), University of Amsterdam/ De Brauw Blackstone Westbroek

European Commission: Recommendation on measures to effectively tackle illegal content online

On 1 March 2018, the European Commission issued a Recommendation on measures to effectively tackle illegal content online. The Recommendation addresses the need for IT companies and member states to put in place a series of operational measures for the effective removal of illegal content, as well as necessary safeguards intended to protect users' fundamental rights. This Recommendation should be seen in the light of the Communication of September 2017 on tackling illegal content online, in which the Commission emphasised the increasing responsibility of Internet intermediaries in the countering of illegal content online and thereby issued different guidelines and principles to be taken into account by them (see IRIS 2017-10/7). In the 2017 Communication, it was made clear that additional measures might see the light of day if, on the basis of the results of the Commission's monitoring, more progress would need to be made. The present Recommendation constitutes one of those additional measures and builds further on various voluntary initiatives already undertaken by hosting service providers in their fight against illegal content online, such as the EU Code of Conduct on countering illegal hate speech online (see IRIS 2018-3/6).

The Recommendation has one general part (Chapter II) which is concerned with all types of illegal content. Illegal content is defined as "any information which is

not in compliance with Union law or the law of [the] Member State concerned". As was stated in the Commission's press release, this includes terrorist content, incitement to hatred and violence, material depicting child sexual abuse, counterfeit products and copyright infringement. In order to counter more effectively such type of content, IT companies are encouraged to ameliorate their notice and action procedures to allow their users to submit sufficiently precise and adequately substantiated notices, as well as "trusted flaggers" to issue notifications by means of fast-track procedures. Moreover, in order to avoid the over-removal of content, content providers shall always be given the chance to issue counter-notices. Furthermore, the Recommendation encourages companies to have in place a system which allows them to take proactive measures in respect of illegal content. In order to limit removals to content that is illegal, as well as to respect users' fundamental rights, effective and appropriate safeguards shall exist that encompass human oversight and verification. The Recommendation also emphasises the need for hosting service providers to cooperate together and to share their best practices among each other and especially with SMEs. Lastly, under certain circumstances dealing with criminal offences, hosting providers and member states should cooperate together.

The Recommendation also has a specific part which deals solely with terrorist content (Chapter III). Having regard to the urgent nature of such type of content, hosting service providers should have in place fast-track procedures allowing them to process referrals as fast as possible. In light of this, Member States should provide their national competent authorities with the necessary resources for effective identification and submission of referrals. Hosting service providers are also advised to take proactive measures which would ensure that previously removed terrorist content cannot be uploaded again. Moreover, cooperation between hosting providers (especially with SMEs), as well as between hosting providers and the relevant authorities, is encouraged. Lastly, the Commission recommends that hosting service providers remove terrorist content within one hour of being notified through referral. Importantly, both member states and hosting service providers should collaborate with the Commission,by submitting to it all relevant information, with a view to the latter monitoring progress. As stated in the Recommendation's preamble, such monitoring process might give rise to additional steps, which could include the proposal of binding acts of Union law.

• European Commission, Recommendation on measures to effectively tackle illegal content online, 1 March 2018
http://merlin.obs.coe.int/redirect.php?id=19001 DE EN FR

Eugénie Coche
Institute for Information Law (IViR), University of Amsterdam

European Commission: Guidance on the direct application of the General Data Protection Regulation

In the light of the General Data Protection Regulation, which will become directly applicable on 25 May 2018 and will replace the Data Protection Directive (95/46/EC) and the Police Directive (2016/680/EU), the EU Commission issued a Communication aimed at guiding all relevant actors in their preparations vis-à-vis this new legal instrument. The Communication first provides an overview of the main legal changes, in terms of rights and obligations, which will be brought about by the Regulation. It then lists the different initiatives that have already been taken at EU level in view of the coming into force of such legislation, followed by recommendations on what should still be done by both the EU and Member States. Lastly, it sets out different measures which the Commission intends to take in the near future.

As opposed to its predecessor, the Regulation will avoid fragmentation within the EU as it will be directly applicable in all EU member states. Moreover, third-country companies which process EU citizens' personal data will fall within the scope of the Regulation. Other novelties include rules on data protection by design and by default; new rights for individuals, such as the "right to be forgotten" and the right to data portability; and the imposition of sanctions of up to EUR 20 million or 4% of a company's worldwide annual turnover. Stronger protection will also be given in respect of personal data breaches and, in the light of the new accountability principle, a data protection impact assessment will sometimes be required by controllers or processors. Lastly, the obligations and responsibilities of both processors and controllers are clarified, the enforcement system is given more weight through a review of the data protection authorities' governance competences, and a higher level of protection is ensured for data transfers outside the EU.

Concerning the preparatory works undertaken so far at EU level, both the Article 29 Working Party (which in May 2018 will become the European Data Protection Board) and the Commission have taken action. The former has mainly issued guidelines in which it interpreted different provisions and aspects of the Regulation in order to create more legal certainty. The Commission has been supporting both member states (by setting up an expert group) and data protection authorities (by encouraging the work of the Article 29 working party. Furthermore, in the light of the updating of Council of Europe Convention 108, the Commission states that it will actively promote the swift adoption of the modernised text of the Convention with a view to the EU becoming a party to it.

The Commission calls on member states to adapt their

legislation in order to align it with the Regulation. They should also ensure the independence of their national data protection authorities by providing them with the necessary resources. Lastly, all organisations (especially SMEs) falling within the scope of the Regulation shall review their data policy cycle (so as to clearly indentify which data they hold, for what purpose and on what legal basis), in order to comply with their new obligations under the Regulation.

The Commission itself will, in the coming months, complement its previous efforts by providing stakeholders with a practical online tool consisting of questions and answers; by awarding grants aimed at providing support, training and awareness-raising; by possibly issuing implementing or delegated acts to further support the implementation of the new rules; by integrating the Regulation into the European Economic Area (EEA) Agreement and by clarifying the legal consequences of a withdrawal agreement between the EU and the UK. Lastly, one year after the coming into force of the Regulation, in May 2019, the Commission will report on the Regulation and take action in the event of significant problems.

• European Commission, Communication from the Commission to the European Parliament and the Council - Stronger protection, new opportunities - Commission guidance on the direct application of the General Data Protection Regulation as of 25 May 2018, 24 January 2018
http://merlin.obs.coe.int/redirect.php?id=19005 DE EN FR

Eugénie Coche
Institute for Information Law (IViR), University of Amsterdam

European Commission: Draft Guidelines on Significant Market Power

On 14 February 2018, the European Commission published its draft Guidelines on market analysis and the assessment of significant market power (the SMP Guidelines) under the EU regulatory framework for electronic communications networks and services. This follows a public consultation conducted from March to June 2017 by the Commission on the review of the 2002 SMP Guidelines (see IRIS 2017-5/5 and IRIS 2002-9/10). The Commission also published a 50-page Explanatory Note accompanying the new Guidelines.

Article 15(2) of the Framework Directive 2002/21/EC requires that the Commission publish the SMP Guidelines, which shall be in accordance with the principles of competition law. The SMP Guidelines set out the principles to be applied by national regulatory authorities (NRAs) when defining relevant markets and assigning telecommunications operators with significant market power. This is aimed at imposing on operators appropriate regulatory obligations to redress competition problems.

The revised SMP Guidelines reflect developments in case-law and address issues which have become more prominent in recent years, such as the transition from monopolistic to oligopolistic market structures in some countries. While oligopolistic markets are often characterised by strong competition, they are perceived as difficult to tackle when this is not the case. The revised SMP Guidelines will give practical guidance to regulators on how to identify market failures (such as coordinated anti-competitive strategies by network operators) in a legally secure manner, and will therefore enhance predictability for all market participants.

The SMP Guidelines provide guidance on (a) the main criteria for defining the relevant market, (b) product market definition - including demand-side substitution, supply-side substitution, and whether a "chain substitutability" or "chain of substitution" exist; (c) geographic market definition, and (d) assessing SMP - including single SMP and joint SMP. Notably, "over-the-top" (OTT) services are discussed under product market definition. The Guidelines note that the relevant product market comprises all products or services that are sufficiently interchangeable or substitutable, not only in terms of their objective characteristics, their prices or their intended use, but also in terms of the conditions of competition and/or the structure of supply and demand in the market in question. In particular, the Guidelines state that OTT services or other Internet-bound communication channels have emerged as a competing force to established retail communications services. As a result, NRAs should assess whether such services may, on a forward-looking basis, provide partial or full substitutes to traditional telecommunications services. Moreover, where no sufficient substitutability patterns can be established to warrant including such OTT-based services in the relevant product market, NRAs should, nevertheless, consider the potential competitive constraints exercised by these services at the stage of the SMP assessment.

Following publication of the draft revised Guidelines, the Commission has now asked the Body of Regulators for Electronic Communications (BEREC) (see IRIS 2010-3/4) to provide an opinion on drafts of the revised SMP Guidelines and its accompanying Explanatory Note. The Commission "will take this opinion into account" before the adoption of the final revised Guidelines and Explanatory Note.

• European Commission, Guidelines on market analysis and the assessment of significant market power under the EU regulatory framework for electronic communications networks and services, 14 February 2018
http://merlin.obs.coe.int/redirect.php?id=18974 EN

• European Commission, Staff working document - Explanatory Note, Guidelines on market analysis and the assessment of significant market power under the EU regulatory framework for electronic communications networks and services, 14 February 2018
http://merlin.obs.coe.int/redirect.php?id=18975 EN

Ronan Ó Fathaigh
Institute for Information Law (IViR), University of Amsterdam

NATIONAL

AL-Albania

Regulator amends Broadcasting Code

The Audiovisual Media Authority (AMA) approved the amendments made to the Broadcasting Code on December 2017. The Broadcasting Code was first drafted and approved in 2014 by the regulator. In 2017, the Council of Complaints, the body in charge of public complaints related to ethics in broadcasting programmes, started a revision process of this Code. According to AMA's press release, this revision was necessary "in view of the swift development of the audiovisual media industry, the trends in programme production, as well as the way information and entertainment offered by audiovisual operators is consumed by audiences."

The revised version of the Broadcasting Code was discussed with stakeholders in two rounds. On 15 May 2017, the regulator presented the revisions to its partners and to organisations that cater to vulnerable groups. These organisations included the Commissioner on the Right to Information and the Protection of Personal Data, the Agency for the Protection of Children's Rights, the Observatory for Children's rights, the Association of Blind Persons, the departments of journalism at the university, etc. The second consultation meeting took place on 21 September 2017, leading to a renewed round of discussions on the Code's content, following the suggestions that AMA had received. The draft of the Broadcasting Code was also submitted to an online public consultation process lasting 30 days in order to open its content to relevant public discussion, which would eventually be reflected in the Code's final form. The final version of the Broadcasting Code was approved by the AMA Board on 11 December 2017.

The Broadcasting Code aims to serve as a guide for audiovisual operators regarding ethical dilemmas that might arise, following the spirit and stipulations of the Law on Audiovisual Media. The Code's main sections include: the guiding principles; privacy and data protection; rules on news editions; child protection in terms of media coverage; interviewing and advertisements; programme warning signals; the coverage of disabled persons; rules on advertising; and the role of the Council of Complaints. While the Code is not intended to be exhaustive, its principles should assist audiovisual media in judging the content of the programmes they produce.

• *NJOFTIM PËR MEDIA, 11 Dhjetor 2017* (Decision of the Audiovisual Media Authority to approve the revised Broadcasting Code)
http://merlin.obs.coe.int/redirect.php?id=18982 SQ

• *KODI I TRANSMETIMIT PËR MEDIAN AUDIOVIZIVE (Miratuar me Vendimin e AMA-s, nr. 228, datë 11.12.2017)* (Revised version of the Broadcasting Code)
http://merlin.obs.coe.int/redirect.php?id=18983 SQ

Ilda Londo
Albanian Media Institute

AT-Austria

KommAustria rejects private broadcasters' complaint against TV channels ORF eins and ORF 2

On 14 February 2018, the Austrian regulator KommAustria rejected a complaint by several private broadcasters against public service broadcaster ORF (case no. KOA 11.220/18-001). According to the private broadcasters, the analysis of the two channels' evening schedules over the previous 18 months had shown that the quality of ORF's evening prime-time programmes broadcast between 8 p.m. and 10 p.m. had, at least on the channels ORF eins and ORF 2, been inadequate. They had therefore asked KommAustria to issue a decision confirming these findings.

One of ORF's obligations under Article 3(1) of the ORF-Gesetz (ORF Act) is to provide two Austria-wide television channels. According to Article 3(8) of the Act, ORF's service provision mandate also includes the operation of a special-interest (television) sports channel and a special-interest (television) channel for information and culture. Article 4(3) states that "the balanced overall service must contain an equivalent proportion of sophisticated substantive elements. The annual and monthly television schedules must be designed in such a way that, as a rule, there is a choice of high-quality programmes at evening prime time (8 p.m. to 10 p.m.)."

The private broadcasters' complaint was rejected. In KommAustria's opinion, the wording of the Act covers not only the two channels ORF eins and ORF 2, but also the other ORF channels, namely, the special-interest channels ORF III Kultur und Information and ORF Sport+. Since these channels had not been included in the private broadcasters' analysis, the complaint had no material basis. In 2012, KommAustria

had largely upheld a complaint from private broadcasters concerning the balance between the information, culture, entertainment and sport categories on ORF eins and ORF 2. However, it had added that ORF's special-interest channels would also be taken into account if future complaints were received.

KommAustria's decision is not yet legally binding; it is not yet known whether the private broadcasters will appeal.

• *Bescheid der KommAustria vom 14. Februar 2018 KOA 11.220/18-001* (KommAustria decision of 14 February 2018, KOA 11.220/18-001)
http://merlin.obs.coe.int/redirect.php?id=19024 DE

Sebastian Klein
Institute of European Media Law (EMR), Saarbrücken/ Brussels

BE-Belgium

Court orders Facebook to stop tracking users on third-party sites

The Court of First Instance in Brussels has ordered Facebook to stop tracking users on third-party sites, and to destroy all similar data it has illegally collected thus far. The judgment is the latest in a long-running legal battle between the Belgian Privacy Commission and Facebook. The former started court proceedings against the social network site in 2015, when a study revealed that Facebook tracked non-users and logged out users for advertising purposes through "data cookies" on external websites ("third-party tracking"). Summary proceedings resulted in a judgment by the Brussels Court of Appeal that found that the Belgian courts do not have jurisdiction over Facebook (Court of Appeals Brussels (Nl.) (18e k.) Nr. 2016/KR/2, 29 June 2016). However, this latest judgment is the first to examine the merits of the case, and follows the reasoning of the Belgian Privacy Commission and its interpretation of the 1992 Belgian Privacy Act (Wet van 8 december 1992 tot bescherming van de persoonlijke levensfeer ten opzichte van de verwerking van persoonsgegevens).

In its judgment of 16 February 2018, the Brussels Court of First Instance established its jurisdiction over Facebook by drawing an analogy with the Court of Justice of the European Union's Google Spain case (see IRIS 2014-6/3) to indicate that the activities of Facebook and Facebook Belgium are inextricably linked, since the activities of the latter are aimed at the economic gain of the former, and Facebook and its activities - which encompass the processing of personal data - are the means by which the Belgian establishment can carry out its activities. As a result, Belgium can apply the 1992 Privacy Act on the basis of Article 4(1)(a) of the Data Protection Directive (95/46/EC) and Facebook Ireland, which is responsible for the processing of personal data, must ensure Facebook Belgium's compliance with national legislation.

As for the merits of the case, the court finds that Facebook's use of cookies, social plug-ins and "pixels" on third-party websites to track browsing behaviour are in violation of Belgian privacy law. The main conclusion is that Facebook's cookie banner, cookie policy and data policy do not adequately inform users that the company collects cookies and other data when the data subject visits a third-party website containing Facebook social plug-ins, even if the individual involved never had, or no longer has, a Facebook account, or is no longer signed in. This is a violation of Article 9, §2, d) of the 1992 Privacy Act, which in turn gives rise to two further infringements. Firstly, because of the inadequate information regarding third-party tracking, users cannot be said to have given valid consent to the processing of that data, contrary to Article 5, a) of the Act and Article 129 of the Electronic Communications Act (Wet van 13 juni 2005 betreffende de elektronische communicatie - WEC). Secondly, the inadequacy of the information renders it impossible to fairly process the data, which is a requirement under Article 4 of the 1992 Privacy Act.

As a result of these infractions, the court ordered Facebook to halt the third-party tracking of anyone browsing from Belgium, for as long as the company policy does not conform to Belgian privacy regulations. Furthermore, the social network is ordered to destroy all personal data it has illegitimately obtained in this way. Lastly, the company must publish the entire judgment on its own website, as well as publish the last three pages in both French and Dutch Belgian newspapers. Non-compliance with this order will result in the imposition of a daily fine of EUR 250,000 per day, up to a maximum fine of EUR 100 million.

• *Nederlandstalige Rechtbank Van Eerste Aanleg (24e k.) Nr. AR/2016/153/A, 16/02/2018* (Court of First Instance Brussels (24e k.) Nr. AR/2016/153/A, 16 February 2018)
http://merlin.obs.coe.int/redirect.php?id=19008 NL

Carl Vander Maelen
Ghent University

CZ-Czech Republic

The Constitutional Court and freedom of expression

The First Chamber of the Constitutional Court upheld TV Nova's constitutional complaint that a fine from the Council for Radio and Television Broadcasting for the "Handbook on What Clothes in the Church"

("Příručka poradí, co do kostela") report violated TV Nova's right to freedom of expression. The Constitutional Court annulled the judgment of the Supreme Administrative Court, the judgment of the Municipal Court in Prague and the decision of the Council for Radio and Television Broadcasting relating to the violatation of Article 17 (1) of the Charter of Fundamental Rights and Freedoms (freedom of expression).

The complainant was fined CZK 200 000 (equivalent to EUR 8 000) by the Council for Radio and Television Broadcasting (RRTV) for the report "The Handbook on What clothes in the Church", broadcast on TV on 24 August 2012. The RRTV stated that this report violated the obligation to ensure that the principles of objectivity and balance are observed in news and political-journalistic programmes (section 31, paragraph 3 of the Radio and Television Broadcasting Act). This decision was unsuccessfully attacked by an action before the Municipal Court in Prague and subsequently by a cassation complaint to the Supreme Administrative Court. The broadcaster then turned to the Constitutional Court with a constitutional complaint.

According to the complainant, the report complied with the topic and the views of the people interviewed in the report and was thus a protected exercise of freedom of expression. The complainant also defended the whole procedure by saying that the disputed report had a funny way of drawing attention to the existence of a guide to rules on dressing for church in the summer heat.

The Constitutional Court stated that the objectivity of the programme consisted in ensuring that the viewer is able to draw his or her own conclusions and not simply adopt the opinion of the editorial staff. The Broadcasting Council's requirements for a specific report exceed this minimum standard and do not attach sufficient importance to the commercial nature of the applicant's broadcasting. Freedom of speech as a fundamental political right not only protects the propagation of thought-sensitive messages, it also protects the right of each and every person to express his or her opinions in a humorous form, with a reasonable degree of exaggeration or irony. Therefore, the Constitutional Court confirmed the complainant's view.

• *Ústavního soudu (7.2.2018 č.j. I.ÚS 4035/14)* (Decision of the Constitutional Court (7.2.2018 č.j. I.ÚS 4035/14))
http://merlin.obs.coe.int/redirect.php?id=19021 CS

Jan Fučík
Česká televize, Prague

Warning for Czech TV

The Council for Radio and Television Broadcasting (hereinafter referred to as the Council), as the central administrative authority, issued a warning to the broadcaster Česká televize for breach of the provisions of Section 31 (3) of Act No. 231/2001 Coll. (Broadcasting Act), an infringement which the operator shall have committed by broadcasting the programme item Václav Moravec's Questions - Part 2 on the CT24 programme at 1.05 p.m. on 22 October 2017. Specialists Tomáš Sedláček and Jan Svejnar, both of whom have long been promoting the adoption of the euro, were invited as guests to participate in a discussion on the issue of the adoption of the euro in the Czech Republic; two guests who share the same opinion on the issue for which they received considerable space within the programme. In contrast, no one was invited to represent a different view on this important topic.

Thereby, the broadcaster was, according to the Council, presenting a major issue in a one-sided manner. In the Council's view, this was a violation of Section 31 (3) of Act No. 231/2001 Coll. (Broadcasting Act), which requires the broadcaster to ensure that news and political-journalistic programmes are guided by the principles of objectivity and balance.

The Council sets a 7-day rectification deadline from the date of receipt of this notice. If a broadcaster breaches any obligations set out in the Broadcasting Act, then the Council shall warn such a (re)broadcaster of the breach and shall grant such a (re)broadcaster a grace period to take corrective action. If corrective action is taken within the prescribed period, the Council shall not impose any penalty.

• *Upozornění na porušení zákona č.j. RRTV/15810/2017 ze dne 7.11.2017* (Infringement Notification No RRTV / 15810/2017 of 7 November 2017) CS

Jan Fučík
Česká televize, Prague

DE-Germany

OLG Köln says Unitymedia can use router for WLAN hotspots

In a ruling of 2 February 2018 (case no. 6 U 85/17), the Oberlandesgericht Köln (Cologne Appeal Court - OLG Köln) decided that the telecommunications provider Unitymedia could use its customers' routers to create a nationwide WLAN network without obtaining the express consent of the customers concerned.

Before the case began, the cable network operator Unitymedia had already started using its customers' routers to build a WLAN network, which it hoped would be Germany's largest. Customers in the Bundesländer of North Rhine-Westphalia, Hessen and

Baden-Württemberg would have been able to access 1.5 million WiFi hotspots by the end of 2016. From a technical point of view, customers' routers would emit two signals: one for private use and the other for the public WLAN network. The public network would be accessible to the provider's other customers. The plaintiff in the proceedings was a consumer association, which argued that customers' routers should only be used with their express consent. The first-instance ruling of the Landgericht Köln (Cologne Regional Court - LG Köln) of 9 May 2017 (case no. 31 O 227/16) agreed and upheld the consumer association's complaint.

The OLG Köln, however, overturned this decision. It held that it was questionable whether an unacceptable nuisance had been caused to customers under the terms of Article 7 of the Gesetz gegen den unlauteren Wettbewerb (Act against unfair competition - UWG). Although the router connection could be classified as a nuisance, it was not, after careful consideration, unacceptable. The company had a legitimate interest in extending its service by offering this additional benefit, while other customers also had an interest in being able to use WiFi hotspots away from their homes. Bearing this in mind, the nuisance caused to the customer by the newly connected signal was negligible. Moreover, customers could object to it at any time by opting out of the system operated by Unitymedia. This was a decisive factor as far as the OLG Köln was concerned; it thought the nuisance would have been unacceptable if this option had not been available.

The ruling is not yet legally binding, since the OLG Köln senate allowed an appeal to be lodged with the Bundesgerichtshof (Federal Supreme Court).

• *Pressemitteilung des OLG Köln vom 2. Februar 2018* (Press release of the Cologne Appeal Court, 2 February 2018)
http://merlin.obs.coe.int/redirect.php?id=18984 DE

Sebastian Klein
Institute of European Media Law (EMR), Saarbrücken/ Brussels

FR-France

Conseil d'Etat rejects appeal against removal of Radio France president

The Association de défense de l'audiovisuel public (Association for the defence of public audiovisual services - ADAP) asked the interim relief judge of the Conseil d'État to overturn the decision of the national audiovisual regulatory authority (Conseil Supérieur de l'Audiovisuel - CSA) dated 31 January 2018 withdrawing the mandate of the Radio France President, Mathieu Gallet (see IRIS 2018-3/14). In support of its request, the ADAP argued that the contested decision constituted a serious and clearly unlawful violation of the freedom of audiovisual communication, firstly because it had no lawful grounds and, secondly, because its grounds breached the principle of the independence of the public media. Furthermore, it argued that the revocation procedure, assuming that it was a form of sanction, had not been based on any reason or identified misconduct that could justify such a sanction and ignored the non bis in idem principle, under which nobody can be tried or punished twice for the same offence. It added that the matter was urgent because the execution of the disputed decision could create an irreversible situation by triggering the appointment of a new President of Radio France. The ADAP pointed out that, under its statutes, it was required to "protect the independence of the public media, their strategy, management and editorial commitment" and to "support them, including by appealing against any decisions that are unjustified or that infringe upon their rights04046".

However, the Conseil d'Etat ruled that the ADAP was not entitled to demand the suspension, nor the annulment, of the CSA's decision to withdraw the mandate of the President of one of the companies mentioned in Article 47-5 of the Act of 30 September 1986. The application was deemed inadmissible and rejected, in accordance with Article L. 522-3 of the Code of Administrative Justice. The Conseil d'État's decision conforms with established case-law. In 1977, it rejected, on the same grounds, an appeal by trade unions representing the staff of the Office de radiodiffusion-télévision française (French Radio and Broadcasting Office - ORTF), which had overseen public radio and television in the 1960s and 1970s, against a decree removing the ORTF President/Director General from office.

• *Conseil d'Etat (ord. réf.), 28 février 2018, Association de défense de l'audiovisuel public* (Conseil d'Etat (interlocutory order), 28 February 2018, Association de défense de l'audiovisuel public) FR

Amélie Blocman
Légipresse

Minister for Culture legally able to issue licence preventing the film 'Bang Gang' being shown to under 12s

On 26 January 2018, the Conseil d'Etat delivered a decision that adds another stone to the edifice of jurisprudence on the issue of certificates for films likely to be harmful to young people or undermine respect for human dignity. In the case at issue, two associations had called on the courts to annul the Minister for Culture's decision granting a certificate to the film "Bang Gang (A Modern Love Story)" that prevented

its showing to anyone under 12 years of age without warning, on the grounds that she had exceeded her powers. The film, screened in cinemas since January, depicts a 16-year-old girl who, wanting to attract the attention of one particular boy, sets up a collective game during which her gang of friends will discover, test, and push back the limits of their sexuality. First the administrative tribunal and then the court of appeal rejected the applications brought by the complainant associations, which then appealed to the Conseil d'Etat.

The Conseil d'Etat reiterated that it was for the administrative court to which appeals were made in respect of the exceeding of powers with regard to the classification measures provided for in Article R. 211-12 of the Cinema and Animated Image Code (Code du Cinéma and de l'Image Animée) to assess the legality of the classification measure adopted by the Minister in respect of the film taken as a whole. It noted that, in justifying their decision, the judges of the appeal court had taken into account the absence of any incitement for young viewers to emulate the disputed scenes in assessing whether or not the film was such as to infringe the objectives of protecting young people and respect for human dignity (particularly by encroaching on the sensitivity of a young audience), and that their decision had not been flawed by virtue of any legal error. The Conseil d'Etat also noted that although the film included several scenes during which the pupils who are the heroes of the film indulge in group sex under the effect of alcohol and drugs, these scenes - which were simulated - were not in any realistic manner, but rather in a distant and indirect manner. They also form a coherent part of the overall storyline of the work, the aim of which was to relate, without being judgmental, the idleness of a group of young people, the practices in which they decide to over-indulge, and all the consequences thereof. Thus, the administrative court had been correct in its assessment of the facts of the case and in finding that the Minister for Culture had been legally justified in awarding the film "Bang Gang" a licence that included a ban on showing it to anyone under 12 years of age. The appeal lodged by the complainant associations was rejected.

• *Conseil d'Etat, (10e et 9e ch. réunies), 26 janvier 2018, Association Promouvoir et a.* (Conseil d'Etat, (10th and 9th chambers combined), 26 January 2018, Association "Promouvoir" and others) FR

Amélie Blocman
Légipresse

No appeal possible against CSA refusal to remind France Télévisions of its obligations with regard to handling information

In a decision delivered on 14 February, the Conseil d'Etat made a number of points that needed to be made in respect of public-sector television channels. In the case at issue, the TV channel France 2 had broadcast as part of its 'Envoyé Spécial' programme a news report that questioned the quality of bathing water in the municipality of Cassis, near Marseille. Subsequently, the municipality sent a letter to the national audiovisual regulatory authority (Conseil Supérieur de l'Audiovisuel - CSA) calling for it to issue a "reminder of their obligations" to the heads of France Télévisions "regarding the treatment and presentation of information". After examining the news feature at issue, the CSA's president informed the municipality of its refusal to uphold the application. The municipality of Cassis referred the matter to the Conseil d'Etat, calling for the decision to be cancelled.

The Conseil d'Etat recalled that, under Articles 48-1 et seq. of the Act of 30 September 1986, the CSA had powers to oblige the public-sector channels to meet the obligations imposed on them by the legislation in force: it could issue formal notice to comply; order the suspension of a programme, or a fine; require the offender to publish a communiqué on the air; or refer the matter to the disputes section of the Conseil d'Etat.

In the case at issue, the application by the municipality of Cassis was not calling on the CSA to exert any of the powers listed in Articles 48-1 et seq. of the Act of 30 September 1986, but merely to remind France Télévisions of the obligations incumbent on it under the Act and its schedule of obligations, pointing out that this fell within the scope of the CSA's regulatory mission if it noted a failing that was not such as to justify implementation of the said powers. The Conseil d'Etat added that neither such a reminder, possibly combined with a warning regarding future behaviour, nor the refusal to issue it constituted decisions with an adverse effect, against which it was possible to appeal. The application brought by the municipality of Cassis was therefore declared inadmissible.

• *Conseil d'Etat, (5e et 6e ch. réunies), 14 février 2018, Commune de Cassis* (Conseil d'Etat, (5th and 6th chambers combined), 14 February 2018, Municipality of Cassis) FR

Amélie Blocman
Légipresse

Media chronology: proposals from mediators prior to legislative reform

Mediators Dominique d'Hinnin and François Hurard, who were appointed by the government to promote an agreement on media chronology, have submitted a "compromise scenario" to the professionals in the cinema and audiovisual sector with a view to "shortening all the sequences for exhibiting" cinematographic works and, "consequently, the theoretical periods of exclusivity" of the various channels for broadcasting.

In view of the stalemate in the professional negotiations and the urgent need to adapt regulations that most of the parties concerned find rigid, anachronistic and inappropriate, Minister for Culture Françoise Nyssen appointed the mediation mission in October of last year, prior to revising the 2009 professional agreement that currently governs the matter.

Informed by about forty interviews carried out since the start of the year and by a number of written contributions, the scenario presented and revealed in the press envisages exclusivity in cinema theatres for four months, or three months in the case of a waiver. If the film is not as successful as expected, it could - after three months - be shifted to the windows for DVD and video on demand (VOD). For a film to have the benefit of this waiver, the rightsholders would have to submit a declaration to the national cinema centre (Centre National du Cinéma and de l'Image Animée - CNC) on the basis of the actual or extrapolated number of tickets sold. The cinema mediator could intervene in the event of disagreement.

The window for pay television (including Canal Plus), which currently opens eight months after a film's first screening, would be brought forward to seven months (or six in the case of a successful application for a waiver), from which point operators in this sector would have exclusivity for eight months. A list of eligibility criteria has been drawn up for this first window: the stakeholders must abide by the French regulations; pay the CNC tax; conclude an agreement with the professional organisations in the cinema sector under the auspices of the CNC; be commissioned by the national audiovisual regulatory authority (Conseil Supérieur de l'Audiovisuel - CSA); and make a financial commitment in favour of the cinema (the amount would vary according to the number of subscribers). A second window would open fifteen months after a film's first screening for pay television channels making less of a contribution to cinema financing.

The free-to-view television channels (TF1, M6, France 2, etc.) would be entitled to broadcast films 19 months (or 17 months in the case of a successful waiver application) after their first screening in a cinema, compared with 30 months at present, with an 8-month period of exclusivity. The application of this sequence would be conditional on concluding an interprofessional agreement that included catch-up TV and an extension of the perimeter of the obligations to the "group". Virtuous broadcasters would also have to reserve 3.2% of their turnover for the cinema. Without an agreement, the window for free-to-view television services that devote less money to the cinema (D8, W9, TMC) would not open until 27 months after the first screening, that is to say, at the same time as the window granted to operators of video-on-demand services to subscribers (subscription VOD). Subscription VOD platforms could be granted this window on condition that they meet a number of criteria, including devoting 21% of their turnover to the pre-financing of works. As for SVOD services headquartered outside France (Netflix, Altice Studios) which observe the AMSD regulations and devote less than 15% of their turnover to investment in new French works, their window would not open until 35 months after the first screening (instead of 36 months at present).

Lastly, the final window, devoted to free-to-view VOD on YouTube or Dailymotion, would open 43 months after a first screening, instead of 48 months as at present.

The parties concerned have until 19 March 2018 to make their opinions on these proposals known. If a consensus is reached, a professional agreement would then be drafted and prepared for signature. Otherwise, the Ministry of Culture has let it be known that the government has not excluded the possibility of passing legislation along the lines sketched out by the mediation mission.

The SACD's reaction to this in a press release was to deplore the fact that, "despite some progress" mainly with regard to bringing the windows forward generally, the proposed new chronology created distortion and unequal treatment between the digital platforms operating by subscription which, with the same investment obligations as for pay television services, would find themselves subjected to a very unfavourable broadcasting regime. It also deplored the fact that compliance with the legislation on intellectual property was not one of the virtuous conditions that would allow the windows for premium television channels, and in particular Canal Plus, to be brought forward to seven months, whereas it was for digital platforms on subscription. It should be recalled that the SACD and Canal Plus have been tussling for months: the SACD claims that Canal Plus shows films and fiction and animation works on most of its television services without obtaining authorisation from their authors.

• *« Scénario de compromis » pour l'évolution des fenêtres de diffusion des films* ("Compromise scenario" for changes in windows for showing films) FR

Amélie Blocman
Légipresse

Canal+ follows Orange in battle between TF1 and its distributors

Following in Orange's footsteps (see IRIS 2018-3/15), Canal+ has entered the battle between TF1 and its distributors. Angered by TF1's demands for payment for carrying its channels, the Canal+ group decided on 1 March 2018 to cease broadcasting them (TF1, TMC, TFX, TF1 Séries Films and LCI) until an agreement was reached between the parties.

Orange, for its part, had, a month earlier, "only" blocked access to MyTF1 (without touching the live

channels), and cancelled its advertising campaigns with TF1. A week after Canal+ pulled the plug, Culture Minister Françoise Nyssen responded by pointing out that all French viewers, thanks to DTT, were entitled to receive 27 free national channels. Despite a high coverage rate of around 95% of the French mainland population, DTT was not available in some rural and mountainous areas. In order to guarantee equality between all French citizens, the law stated that everyone should be able to receive these 27 channels free of charge via satellite. Free DTT channels were therefore obliged to make their signal available to a satellite distributor free of charge. The minister said that Canal+'s decision to suspend the signal of the TF1 Group's channels for people who only had its TNT Sat (satellite DTT) service - thus depriving them of all access to the group's five free channels - therefore violated the principle of universal coverage. The national audiovisual regulatory authority (Conseil Supérieur de l'Audiovisuel - CSA) and the national telecommunications regulator (Autorité de régulation des communications électroniques et des postes - ARCEP) also urged the Canal+ Group to restore access to these channels via its TNT Sat service. As a result, Canal+ agreed to switch the TF1 satellite signal back on, but left its other subscribers without the TF1 group channels.

At the same time, Orange and TF1 announced the signing of a "new global distribution agreement" for the group's channels - TF1, TMC, TFX (ex NT1), TF1 Séries Films (ex HD1) and LCI - for Orange subscribers, "as well as the non-linear services associated with these channels", which had been suspended since 1 February this year. TF1 is thought to have agreed to lower its demands, with Orange now paying between EUR 10 million and EUR 15 million per year.

Meanwhile, in a press release published on 10 March, Canal+ confirmed that all free channels of the TF1 group were available on all networks to all its subscribers (ADSL, fibre and Internet): "Since it has been confirmed in the last few days that the broadcast of free channels would remain free, and that only complementary services (replay, start over, etc.) could be chargeable, the Canal+ group has decided to gradually reintroduce the free channels of the TF1 group. Canal+ subscribers should not have to pay for free-to-air channels, which have obtained free frequencies for this purpose from the state." The group also said it was ready to negotiate "reasonable" remuneration for the distribution of value-added services associated with these channels.

• *Communiqué de presse du groupe Canal +, 1er mars 2018* (Canal+ group press release, 1 March 2018)
http://merlin.obs.coe.int/redirect.php?id=18987 FR

• *Communiqué de presse du ministère de la Culture, 7 mars 2018* (Ministry of Culture press release, 7 March 2018)
http://merlin.obs.coe.int/redirect.php?id=18988 FR

• *Communiqué de presse du groupe Canal +, 10 mars 2018,* (Canal+ group press release, 10 March 2018)
http://merlin.obs.coe.int/redirect.php?id=18989 FR

Amélie Blocman
Légipresse

GB-United Kingdom

Digital "golden oldies" television channel is found to have breached rule against broadcasting offensive language

On 19 February 2018, Ofcom issued a notable decision on the inclusion of racially offensive language in classic drama series. This adjudication concerns a broadcast by the Licensee, Talking Pictures TV Ltd, an entertainment channel which broadcasts classic films and archive programmes. It is said that the family-run digital channel is watched by two million people a week. The programme complained about - by just one complainant - was an episode of A Family At War, a British period drama series made between 1970 and 1972, about the experiences of a family from Liverpool during the Second World War. The episode in question, 'Hazard', was produced in 1971 and showed one of the main characters serving in the British army in Egypt in 1942, focusing on his encounter with another soldier.

The nub of the complaint was the broadcasting of "offensive language", namely, the word "wog" which, at the time, was taken to mean "works on government service' and was not considered a racial slur. Ofcom considered that this raised potential issues under Rule 2.3 of the Broadcasting Code, which states, "In applying generally accepted standards broadcasters must ensure that material which may cause offence is justified by the context". Rule 2.3 of the Code implements Ofcom's duty under Section 319 of the Communications Act 2003, namely that "generally accepted standards are applied to the contents of television and radio services so as to provide adequate protection for members of the public from the inclusion in such services of offensive and harmful material".

The Licensee argued that it believed that the inclusion of the potentially offensive racist language in this episode was justified by the context - "being 'honest to the realities of the war time period04046 shocking as that may be, and broadcast within the constraints and conventions of the time'". Further, the Licensee scheduled the programme at a later time than other episodes and decided not to issue pre-broadcast warnings because it "felt the programme contained strong contextual justification and would be clearly understood by our viewers".

Finally, the Licensee stated that it had suspended any further broadcast of this episode. It also said that it had contracted a third-party expert to conduct a review of "all content containing racial language" to complement its existing compliance system.

Ofcom decided that the use of the offending term was, on the basis of research, highly objectionable (the word "wog" is considered by audiences to be a derogatory term for black people and to be among the "strongest language" and "highly unacceptable without strong contextualisation"), and thus, requires strong contextualisation to justify it being broadcast. The Licensee argued that its use by the character was to show he was flawed and that it was not condoned by others, although this was contested by Ofcom; it also thought that the scheduling before the 21:00 "watershed" and the lack of any warning counted against the Licensee.

Ofcom acknowledged the steps taken by the Licensee to improve its compliance in this area. However, it was Ofcom's view that the broadcast of this offensive language exceeded generally accepted standards and it has asked the Licensee to attend a meeting to discuss its approach. By way of further context, it may be worth noting that Talking Pictures was previously found in breach of the Code for the broadcast of racially offensive language without sufficient contextual justification on 9 January 2017 and 8 January 2018 (for material broadcast on 24 August 2016 and 13 September 2017 respectively).

- Ofcom's Broadcast and On Demand Bulletin, Issue 348, 19 February 2018, p. 7
http://merlin.obs.coe.int/redirect.php?id=19013 EN
- Ofcom's Broadcast and On Demand Bulletin, Issue 320, 9 January 2017
http://merlin.obs.coe.int/redirect.php?id=19014 EN
- Ofcom's Broadcast and On Demand Bulletin, Issue 345, 8 January 2018
http://merlin.obs.coe.int/redirect.php?id=19015 EN

David Goldberg
deeJgee Research/ Consultancy

TV ads in breach of the Code of Broadcast Advertising

On 21 February 2018, the UK Advertising Standards Authority (ASA) banned two television advertisements on the grounds that they breached the UK Code of Broadcast Advertising (BCAP Code) rules relating to the protection of children. The decisions provide helpful guidance on alcohol advertising, and advertisements which may be harmful to children.

The first television advertisement was for a discount supermarket chain, Aldi Stores Ltd, and formed part of their 2017 Christmas campaign, which featured a computer-generated image of a carrot in a number of parodies of popular films. The advertisement at issue opened with the carrot stating: "I see dead parsnips." The line was intended as a darkly humorous reference to a famous line of the 1999 supernatural thriller film Sixth Sense. This was followed by a voice-over rhyme about alcohol, saying: "There were a few spirits that cold Christmas night. Award winning bottles for raising a toast and one frightened carrot had just seen a ghost." Scenes of various bottles of spirits were included throughout the advertisement. It ended by showing the carrot being frightened by another character dressed up as a ghost with a white blanket over it. The complaint alleged that it was irresponsible because it was likely to appeal strongly to people under the age of 18, which is the legal age for buying alcohol in the United Kingdom. Aldi responded by saying that the overall theme of the advertisements in their festive campaign was largely adult in nature and made references to popular films which were several decades old and therefore unlikely to appeal to children. Because it promoted alcohol, the advertisement in question was not aired during, or adjacent to, programmes aimed at under-18s, in compliance with the ASA guidelines.

The ASA noted that the advertisement was subject to a broadcast restriction, but several of its attributes were deemed to breach the BCAP Code's social responsibility rules for alcoholic drinks which, among other things, provide that alcohol advertisements "must not be likely to appeal strongly to people under 18, especially by reflecting or being associated with youth culture or showing adolescent or juvenile behaviour" (rule 19.15.1). More specifically, the carrot had a high-pitched voice, similar to that of a young child. The character was also being sold as a soft toy during the Christmas period and was popular amongst children. Although the dialogue made use of a pun on "spirits," its overall tone, supplemented with choir music in the background, was reminiscent of a children's story. Moreover, the ending of the advertisement, which showed the carrot being frightened by a ghost-like character, would appear "particularly funny" to younger children. Consequently, the ASA found that the overall effect of the budget retailer's advertisement was likely to resonate with, and appeal strongly to, under-18s. It upheld the complaint and ruled that the advertisement must not appear again in its current form.

The second television advertisement was for a chewing gum sold under the trade name Extra by Wrigley Company Ltd. It showed a young woman standing in a football kit on a football pitch whilst chewing gum, seemingly preparing to take a penalty kick. The complaints alleged that the woman's portrayal encouraged a practice which raised a risk of harmful imitative behaviour by children. Wrigley considered the advertisement to be acceptable because it did not show the character in full motion when chewing; however, the ASA noted that the young woman featured prominently in a setting familiar to many children and, although she was depicted stationary, she

seemed to have already been chewing gum during the game. The accompanying voice-over - "But her legs are trembling, not yours. Time to shine. Extra" - was taken to endorse unsafe behaviour in sporting activities. Accordingly, the advertisement breached BCAP Code rules concerning harm and offence, and the protection of children. Among other things, they require that advertisements not include material that is likely to condone or encourage behaviour that prejudices health or safety (rule 4.4) and could be dangerous for children to emulate (rule 5.2). Taking into account several reported incidents of people choking on gum whilst playing sports, the ASA upheld the complaints and ruled that the advertisement should not be aired again in its current form.

• Advertising Standards Authority, ASA Ruling on Aldi Stores Ltd, 21 February 2018
http://merlin.obs.coe.int/redirect.php?id=19016 EN

• Advertising Standards Authority, ASA Ruling on The Wrigley Company Ltd, 21 February 2018
http://merlin.obs.coe.int/redirect.php?id=19017 EN

Alexandros K. Antoniou
University of Essex

HR-Croatia

The Electronic Media Council calls for the reduction of intolerant and offensive speech in the media

The Electronic Media Council calls for the reduction of intolerant and offensive speech in the media. Based on the legal framework of the Electronic Media Act, the Electronic Media Council has concluded that in 37 reported cases of possible hate speech in electronic publications and television and radio programmes in the Republic of Croatia in 2017, there were no actual cases of hate speech. However, it can be concluded that there was a lot of offensive and impassioned speech.

The Council and the Agency for Electronic Media will continue to work proactively on this issue. This year, they will organise, inter alia, a series of workshops for media providers on recognising and preventing hate speech as well as offensive and inappropriate discourse in current affairs programmes and other media contents.

The role of the media in society is to promote tolerance and high standards of civilization. The Council invites all media providers to actively contribute to social cohesion and to adopt responsible behaviour, considering the great influence they have on their respective audiences.

• *Vijeće za elektroničke medije apelira na smanjenje netolerantnog i uvredljivog govora u medijskom prostoru* (Call for the reduction of intolerant and offensive speech in the media)
http://merlin.obs.coe.int/redirect.php?id=19023 HR

Nives Zvonarić
Ministry of Culture, Zagreb

Safer Internet Day

The Croatian Regulatory Authority for Network Industries (HAKOM), in partnership with the Center for Missing and Abused Children, the Faculty of Education in Osijek, the City of Osijek and VIPnet L.t.d. and with the support of the Government's Office for Cooperation with NGOs, organised a central national celebration of the international Safer Internet Day. On that occasion, a brochure entitled "How to Protect a Child in the World of Internet, Network Technologies and Mobile Phones" was presented to the public. The brochure offers practical and useful information on possible Internet hazards as well as on safe behaviour, privacy and personal data protection measures, and the responsible use of social networks. The brochure is adapted to the current level of network technology development and social networking trends, and includes Internet security guidelines, virtual world behaviour rules and cyberbullying prevention instructions. Furthermore, the brochure also contains useful recommendations for parents as well as the results of the first national comparative research on Child Safety on the Internet, which was conducted in September and October of last year as part of the EU Kids Online project.

The first Croatian Children's Safety Charter was signed on the same day by three Croatian telecom operators (Vipnet, Croatian Telecom, Tele2), HAKOM, the Safer Internet Center and the Center for Missing and Abused Children. The reasons for signing the Charter are: to raise public and parent awareness of this important topic; to demonstrate dedication and willingness to participate in the creation of a better and safer environment for children on the Internet; and to promote the protection of children and young people.

• *Kako zaštititi dijete u svijetu interneta, mrežnih tehnologija i mobilnih telefona* (Brochure "How to Protect a Child in the World of Internet, Network Technologies and Mobile Phones")
http://merlin.obs.coe.int/redirect.php?id=19022 HR

Nives Zvonarić
Ministry of Culture, Zagreb

IE-Ireland

Complaint upheld over presenter's remark describing journalist as a "Holocaust denier"

On 6 February 2018, the Broadcasting Authority of Ireland (BAI) upheld a complaint in relation to remarks made by a presenter describing a journalist as a "Holocaust denier" as being "unfair" and "likely to mislead audiences as to his views". The complaint concerns "Morning Ireland", a news and current affairs programme broadcast each weekday morning from 7 a.m. until 9.a.m. on the public service broadcaster, RTÉ Radio 1.

The complaint was submitted under Section 48(1) (a) of the 2009 Broadcasting Act (which deals with Fairness, Objectivity and Impartiality in News Content) and Section 4 of the BAI Code of Fairness, Objectivity & Impartiality in News and Current Affairs. The complainant asserted that the description of the journalist, Kevin Myers, as a Holocaust denier on the Morning Ireland programme in July 2017, had been "an absurd claim" based on a newspaper article written by Mr. Myers several years previously "under a misleading headline" and that the journalist took issue with the word "holocaust" "on account of its Greek origin meaning "destroy by fire." The complainant added that Mr. Myers had written many times about the Holocaust and the suffering of the Jews and that "it is ridiculous and offensive to label him as 'Holocaust denier'." The complainant also asserted that "no senior member of the Irish Jewish community has called him 'a denier'""

In response to the complaint, RTÉ stated that the references on the programme to Mr. Myers in this context related to articles written by Mr. Myers for the Irish Independent and Belfast Telegraph newspapers in 2009. In those articles, Myers referred to himself as a "Holocaust denier", with his chief issue being the use of the original Greek word itself, stating that there was no single "holocaust" as the genocide in question had taken many forms. RTÉ stated that in describing Myers as a Holocaust denier, its presenter was merely using "Mr Myers" own words". The broadcaster maintained "that if [Mr Myers] is being referred to around the world as a Holocaust denier, it is because he described himself as such."

In assessing the complaint, the BAI Compliance Committee had regard to the obligations set out in the Code of Fairness, Objectivity and Impartiality in News and Current Affairs. Rule 4.3 of the Code obliges broadcasters to deal fairly with persons referred to in news and current affairs content. Rule 4.19, requires that "views and facts shall not be misrepresented or presented in such a way as to render them misleading" and that presenters "should be sensitive to the impact of their language and tone in reporting news and current affairs so as to avoid a misunderstanding of the matters covered." Having reviewed the broadcast, it was the opinion of the Committee that these obligations had not been met in the broadcast. While noting that "Mr. Myers had described himself as a 'Holocaust denier' in a typically provocative newspaper article that he had written, it was evident from the article as a whole that his description did not in fact amount to a statement denying the genocide of the Jewish people at the hands of the Nazi regime. Rather, the article was a comment on how language is used and the criminalisation of individuals or groups who engage in Holocaust denial." In this context, "the comments by the presenter were considered to lack fairness to Mr. Myers and both misrepresented his views in a manner which would likely mislead audiences as to his views". Accordingly, the complaint was upheld.

• Broadcasting Authority of Ireland, Broadcasting Complaint Decisions, 6 February 2018, p. 26
http://merlin.obs.coe.int/redirect.php?id=18978 EN

Ingrid Cunningham
School of Law, National University of Ireland, Galway

Authority upholds complaint regarding presenter's comments about sexual assault

On 6 February 2018, the Broadcasting Authority of Ireland (BAI) upheld a complaint concerning comments made by a programme presenter on 8 September 2017 about the sexual assault of a woman in the UK and issues of responsibility. The complaint concerns "High Noon", a programme which features current affairs, news and interviews, broadcast daily at noon on a commercial station, Newstalk 106-108FM. The complaint was submitted under Section 48(1)(b) (harm and offence) of the Broadcasting Act 2009 and the BAI Code of Programme Standards (namely, Principle 2 on the "Importance of Context") The complaint centred on comments made by the presenter, George Hook, after he had read out the details of a court case in the UK dealing with a sexual assault. The court heard that the woman had willingly gone to a hotel room with a man that she had met, and she had been assaulted by a different man who had also been in the same room. The presenter went on to describe the rape as "awful" and then stated inter alia, "But when you look deeper into the story you have to ask certain questions. Why does a girl who just meets a fella in a bar go back to a hotel room? She's only just barely met him ... then is surprised when somebody else comes into the room and rapes her." The presenter later posed the question: "Is there no blame now to the person who puts themselves in danger?"

The complainant submitted that "it was not appropriate for the presenter to blame an alleged victim of

sexual assault for the fact that she was raped" and that it is "offensive and harmful". The complainant also took issue with the fact that "only after 24 hours of uproar" did the broadcaster Newstalk issue an apology. In response, the broadcaster stated that the day after the initial broadcast, the presenter and Newstalk had issued an apology for the on-air remarks. Two days later, the presenter while on-air, had issued a further, more detailed, apology. Newstalk had stated on 22 September 2017, after an internal investigation had been concluded, that George Hook would be stepping down from his lunchtime slot.

In assessing the complaint, the BAI Compliance Committee stated that broadcasters are "obliged to have due regard for audience expectations and, in live programming, take timely corrective action where unplanned content is likely to have caused offence. The Committee also observed that broadcasters are required to take due care when broadcasting content with which audiences may identify and which can cause distress, particularly in relation to content such as sexual violence. Taking these obligations into account, the Committee observed that the High Noon programme and its presenter's sometimes provocative style are well established and understood by the audience. The Committee also recognised that it is permissible in broadcasting to deal with the question of personal responsibility in covering issues of crime and criminal behaviour. However, the Committee was of the opinion, that "this topic was raised in the programme in the context of a then ongoing UK court case about rape, and the issue of personal responsibility was described by the presenter as "the real issue in this matter". As such, the Committee believed "that the manner and context of raising the issue of personal responsibility in the context of a specific case of alleged rape caused undue offence and there was a strong possibility of causing distress to audience members who might personally identify with this issue." The Committee acknowledged that the broadcaster "subsequently undertook remedial action" and had "accepted the substance and validity of the complaint." It also remarked that "the presenter explicitly stated that he did not condone rape." However, the Committee were of the opinion that the broadcaster had a responsibility to take greater care to prevent the possibility of undue offence and harm, including taking timely corrective action where content is likely to have caused offence.

• Broadcasting Authority of Ireland, Broadcasting Complaint Decisions, 6 February 2018, p. 30
http://merlin.obs.coe.int/redirect.php?id=18978 EN

Ingrid Cunningham
School of Law, National University of Ireland, Galway

IS-Iceland

Injunction prohibiting the media from reporting on the financial dealings of the former Prime Minister of Iceland

The Reykjavik District Court on 2 February 2018 delivered a judgment in the case of Glitnir Holdco v. Reykjavik Media and Stundin (case nr. E-3434/2017) concerning an injunction issued by the Reykjavik District Commissioner in October 2017. The injunction prohibited media outlets from reporting on the financial dealings of the clients of an Icelandic bank, Glitnir Holdco, including Bjarni Benediktsson, former Prime Minister and current Financial Minister of Iceland.

The editor of Stundin magazine was informed of the injunction when their offices received a visit from representatives of the District Commissioner and Glitnir Holdco. The representatives demanded that all previous reporting on the Prime Minister's time as an MP posted on Stundin's website should be deleted. Furthermore, they demanded that all documentation that contributed to this reporting be handed over, and that Stundin cease all reporting on the subject, referring to concerns regarding the confidentiality of financial information.

The Reykjavik District Court rejected the injunction on the basis that the reporting did not interfere with the right to privacy owing to the fact that the information concerned a Prime Minister who had through his duties subjected himself to a certain level of public scrutiny. Furthermore, the nature of the information contained in the reporting was deemed to be of particular relevance to the public debate in a democratic society.

The Court relied on Article 10 of the European Convention of Human Rights (ECHR) and referred to the relevant jurisprudence of the European Court of Human Rights (ECtHR) when determining whether the restriction on freedom of expression was necessary in a democratic society. The fact that the injunction was requested twelve days before parliamentary elections was also considered to be of relevance by the Court. In this regard, the Court affirmed that the right to free and democratic elections is closely related to the right to freedom of expression, and both form the foundations of a democratic society. However, since the judgment of Reykjavík District Court was appealed against by Glitnir Holdco, the injunction on Stundin and Reykjavík Media will remain in effect for another year until it has been considered by the appeals court.

It is worth mentioning that the journalists of Reykjavík Media, in cooperation with SVT and RÚV, were also behind the famous television 2016 exposé of the Panama Papers investigation that was aired on RÚV

and led to the resignation of the then-Prime Minister Sigmundur Davíð Gunnlaugsson.

The injunction case has drawn sharp criticism from the Journalists' Union of Iceland, among others. The OSCE Representative on Freedom of the Media, Harlem Désir, expressed his concerns and stressed that prior restraints on publication, such as injunctions, need to be used with caution and applied in very limited circumstances. The Media Commission of Iceland has also expressed its concerns to the parliament about how injunctions towards media are decided in Iceland, and its possible chilling effects on freedom of expression.

- *Héraðsdóms Reykjavíkur 2. febrúar 2018 í máli nr. E-3434/2017 (District Court of Reykjavik, Judgment in the case of Glitnir Holdco v Reykjavik Media and Stundin (case nr. E-3434/2017), 2 February 2018 https://www.heradsdomstolar.is/heradsdomstolar/reykjavik/domar/domur/?id=c0f5ea01-4ecc-446a-8a93-48c6205c5ed6* (District Court of Reykjavik, Judgment in the case of Glitnir Holdco v Reykjavik Media and Stundin (case nr. E-3434/2017), 2 February 2018)
http://merlin.obs.coe.int/redirect.php?id=19009 IS
- OSCE Representative on Freedom of the Media, OSCE media freedom representative concerned about ban on reporting about Icelandic bank, 18 October 2017
http://merlin.obs.coe.int/redirect.php?id=19010 EN

Heiðdís Lilja Magnúsdóttir
The Media Commission (Fjölmiðlanefnd), Iceland

IT-Italy

Italian Communication Authority releases report on the consumption of information

On 19 February 2018, the Department of Economics and Statistics of the Italian Communications Authority (AGCOM) released a report on the consumption of information (the "Report"). The drafting of the Report comes into being as result of AGCOM competence to monitor the information system and ensure the protection of pluralism of information, both on the supply and demand side of the news media market. Also, AGCOM has stressed that the monitoring of the news system is part of a global scenario where some negative phenomena are growing, including the spread of fake news and misinformation.

The study relies on two main assumptions - i.e. that (a) information can reach individuals only if they make a decision to access media and a further decision to access news content, and (b) news consumption does not necessarily takes place in an effective manner. The findings of the research show that almost all of the Italian population accesses the media in order to be informed, and that over 80% of citizens access information on a regular basis (i.e. every day); and also that the "informational diet" of Italians is characterised by a marked phenomenon of "cross-media" (i.e. using three or four means to obtain information), which affects now more than three quarters of the population; only a small proportion of Italians (around 5%) is not informed at all.

As to the use of media for news, the study reports that television is the medium with the greatest informational value, followed by the Internet, radio and newspapers. AGCOM has stressed that more and more people rely on the Internet to search and access news, and over a quarter of the population deems it the most important to get information, although some concerns may arise in respect of the reliability of online information sources, which is perceived to be lower than that of traditional media.

Part of the research has been focused on the minor's consumption of information. In this respect, a dual social system has emerged: on the one hand, some minors do not become informed at all or are informed through a single medium only; on the other hand, there are groups of minors with regular access to a plurality of media and sources of information.

Special attention is also paid to the dynamics concerning the consumption of online news. In this regard, online information is accessed mainly through algorithmic sources (e.g. social networks and search engines), while there is a more limited use of editorial sources. For 19.4% of the population algorithmic sources are the most important ones. Thus, search engines and social networks are ranked, respectively, third and fourth among the various sources of information.

However, algorithmic sources may also raise some reliability issues, since less than 24% of the consulted population deems these sources to be actually trustworthy. The Report also highlights the role of digital platforms, which are increasingly considered to be gatekeepers for access to information, for both publishers and consumers. These actors are said to act as intermediaries for access to online information by individuals. Furthermore, they are significantly affected by ideological polarisation, which results in the spread of radicalised positions and the creation of ideological bubbles.

Lastly, the Report focuses on access to and consumption of political or electoral-related information. It observes that when it comes to electoral news, citizens have a less broad and articulated consumption of information - that is to say less cross-media and hybrid compared to their consumption of general information. Generally speaking, a relationship is shown between citizens and sources of information: the more these sources are chosen to access general and current news, the more likely to be used by citizens to form their political opinion. However, the so-called "echo-chambers" are quite recurrent, since individuals tend to discuss only within a very selective and ideologically close circle. The Report, in this respect, stresses that the polarisation is generally operating at

the level of the choice of the medium; this then becomes viral as a consequence of the actions carried out on social networks by users, coupled with the use of algorithms.

• *Autorità per le Garanzie nelle Comunicazioni, Rapporto sul consumo di informazione, 19 febbraio 2018* (Italian Communication Authority, Report on the consumption of information, 19 February 2018)
http://merlin.obs.coe.int/redirect.php?id=19011 IT

• Italian Communication Authority, Report on the Consumption of Information - Executive Summary, 19 February 2018
http://merlin.obs.coe.int/redirect.php?id=19012 EN

Ernesto Apa & **Marco Bassini**
Portolano Cavallo & *Bocconi University*

KZ-Kazakhstan

Amendments on information security

On 28 December 2017, the President of the Republic of Kazakhstan signed into law amendments to the National Mass Media Law (see IRIS 2009-10/20) which had previously been adopted by parliament, as well as 21 other statutes. They relate to the issues of informational security, propaganda, the protection of privacy, foreign broadcasting, and access to information.

In particular, a new article in the media law sets out "basic principles" of mass media activity. Two of the four principles prescribed are "objectivity" and "veracity" (Article 2-1). In addition, the same law (Article 2) now provides a definition of propaganda which reads as follows:

"propaganda in the mass media is understood as the dissemination of views, facts, arguments and other information, including deliberately distorted, for the formation of a positive public opinion about information prohibited by the legislation of the Republic of Kazakhstan and/or for inducement of an unlimited circle of persons to commit an unlawful act or to stay inactive."

Certain types of propaganda serve as a reason to suspend or annul the governmental permission necessary for media outlets to function (Article 13).

The Law of the Republic of Kazakhstan on Mass Media (paragraph 1-1 of Article 14) now permits media outlets to use pictures of a person without his/her permission in cases where:

1) it is taken at public events where the person is present or is taking part;

2) it is part of information on the person's public activities, and has been published by the person himself/herself in open sources;

3) it is done in order to protect constitutional or public order, human rights and freedoms, and the health and morality of the population.

The amendments specify the procedure for media outlets to obtain information from the public authorities and set the time limit within which the editorial office should respond to an inquiry at seven working days (it had previously been three days).

The same law amends the Statute on Telecommunications (see IRIS 2004-10/32) by establishing a state monopoly on information security that includes the control over Internet traffic across national borders (Article 9-2) and within the country (Article 23), as well as permitting fast procedures for blocking access to websites with unlawful information (Article 41-1).

The Broadcasting Statute of Kazakhstan (see IRIS 2012-3/28) was also amended to expand the notion of "broadcasting" (and relevant norms) to the online dissemination of programmes and channels (Article 1), and to further restrict the activities of foreign broadcasters (Article 18-1).

The OSCE Office of the Representative on Freedom of the Media commissioned an independent legal analysis of the amendments when they were still in draft form. The reviewer noted that, while some provisions of the draft make it compatible with international legal standards, a multitude of exceptions and amendments to the established possibilities, rights, and freedoms largely impair their potential. In particular, he noted that the definition of "propaganda" lacks narrowly defined subject-matter and legal clarity. It allows for unproportioned sanctions against the media, including those acting in a lawful way or at least in good faith.

Most of the provisions of the new statute entered into force 10 days after its official publication.

• О внесении изменений и дополнений в некоторые законодательные акты Республики Казахстан по вопросам информации и коммуникаций (Statute of the Republic of Kazakhstan N 128-VI of 28 December 2017 "On amendments and addenda to some legal acts of the Republic of Kazakhstan on issues of information and communications")
http://merlin.obs.coe.int/redirect.php?id=19019 RU

• Комментарии к проекту закона Республики Казахстан " О внесении изменений и дополнений в некоторые законодательные акты Республики Казахстан по вопросам информации и коммуникаций " (Final legal review of draft law of the Republic of Kazakhstan On Amendments and Addenda to Some Legal Acts of the Republic of Kazakhstan on Issues of Information and Communications. Written by Dmitry Golovanov and commissioned by the OSCE Office of the Representative on Freedom of the Media, August 2017)
http://merlin.obs.coe.int/redirect.php?id=19020 RU

Andrei Richter
Catholic University, Ružomberok

LT-Lithuania

Lithuania suspends Russian TV channel RTR Planeta for one year

At a meeting on 14 February 2018, Lithuania's Radio and Television Commission (LRTK) decided to suspend the reception of Russian television channel RTR Planeta for one year. In a press release, the media watchdog said that the decision had been taken due to frequent legal violations by the broadcaster. In the broadcasting regulator's opinion, RTR Planeta had breached the EU Audiovisual Media Services Directive (AVMSD) and the Lithuanian Law on the Provision of Information to the Public three times in 2017. It had incited viewers to hatred among nations and instigated war in its programmes "Duel. Vladimir Solovjov Programme", "Evening with Vladimir Solovjov" and "60 Minutes".

The LRTK contacted the broadcaster, the institution in Sweden that had registered the channel and the European Commission about the matter. However, it did not receive a reply from RTR Planeta, and the Swedish Broadcasting Commission has no powers to ensure that such infringements are not repeated. As a result, the LRTK has now ordered its domestic television and Internet providers to suspend the broadcast of RTR Planeta for one year from 23 February.

RTR Planeta is a Russian state television channel transmitted abroad via cable and satellite (in Europe via "Hot Bird 6"). In Germany, it is part of the pay-TV services of cable network operators Vodafone Kabel Deutschland and Unity Media.

Lithuania and Latvia had previously suspended the channel for three months in April 2014. The Latvian broadcasting authority had based its decision on the fact that RTR Planeta had justified military action against a sovereign state during the war in Ukraine. The Minister of Foreign Affairs of Lithuania also stated that the channel had breached journalistic quality standards and incited to war and hatred. For example, it had broadcast Vladimir Zhirinovsky's calls for Russian tanks to be sent to Ukraine and Brussels. Lithuania also banned transmission of the channel for three months in April 2015 and December 2016. On both occasions, the European Commission decided that the suspensions were in conformity with EU law, since Lithuania had demonstrated that RTR Planeta had violated the ban on incitement to hatred. It held that the channel had tried to provoke tension and violence between Ukrainians and Russians, as well as towards EU and NATO member states, especially Turkey.

Lithuania has also repeatedly suspended a number of other Russian television channels in the past. Its media authority has consistently based its decisions on biased reporting by the broadcasters concerned and the associated political influence thereby exerted. Although they undoubtedly restrict the freedom of expression, supporters of such decisions in politics and the media say that they have become an inevitable response to the propaganda that is being spread with increasing levels of aggression by Russian state broadcasters.

• LRTK press release
http://merlin.obs.coe.int/redirect.php?id=18986 EN

Ingo Beckendorf
Institute of European Media Law (EMR), Saarbrücken/ Brussels

NL-Netherlands

Hosting provider ordered to block access to lawful website and to provide contact details of website owner

On 10 January 2018, Overijssel District Court ruled that Your Hosting, a Dutch internet service provider hosting the website www.gabme.org, was obliged to block access to the website and to provide the contact details of the website owner.

The claimant initiated the case over a report circulating on the internet accusing him of fraud and money laundering. Consequently, the claimant had suffered damage as a result of a decrease in his business's revenues. The report referred to the website www.gabme.org. GABME is a non-existant organisation for which no contact details were provided on the website. The claimant was therefore unable to get into contact with the domain-name holder, which is why he turned to the hosting provider. At the District Court, the claimant first of all demanded an order blocking access to the website. Secondly, he sought provision of the website owner's contact details, such as payment details and the IP addresses used for the creation of the website, in order to be able to start a separate procedure to hold the website owner liable for the severe, unfounded accusations on his or her website.

In its decision, the District Court refers to Article 6:196c paragraph 4 of the Dutch Civil Code, a provision based on Article 14 of the E-Commerce Directive (2000/31/EC). According to this provision, a hosting provider such as Your Hosting cannot be held liable for the information that it stores on its internet service if it does not have actual knowledge of the unlawful activities or information and is not aware of facts or circumstances which render the unlawful character apparent. When it obtains such knowledge or awareness, it is obliged to immediately remove the information or disable access to the website.

Your Hosting states that the information on the website is not unlawful in itself. According to the District Court, this argument is insufficient to avoid liability. Even though the website does not provide unlawful information about the claimant, the website is part of a "construction with an unlawful character" ("constructie met een onrechtmatig karakter"). All the information on the website is published for the purpose of making the accusations against the claimant, with the result that the website falls under the scope of Article 6:196c paragraph 4 of the Dutch Civil Code. Since Your Hosting did not remove the information or disable access to it on the claimant's first notice, it can be held liable.

Regarding the second claim, the District Court weighed the interests of both the claimant and the defendant. It based its reasoning on a decision by the Dutch Supreme Court of 25 November 2005 (Lycos/Pessers), in which the Supreme Court stated that the interest of the claimant in the provision of identifying data prevails over the interest of the hosting provider in not infringing its client's privacy (see IRIS 2006-2/101). Therefore, Your Hosting is obliged to provide the contact details of the website owner of www.gabme.org since there are no other means of identifying the infringer.

- *Vzr. Rechtbank Overijssel 10 januari 2018, ECLI:NL:RBOVE:2018:202, 22/01/2018* (District Court of Overijssel, 10 January 2018, ECLI:NL:RBOVE:2018:202, published 22 January 2018)

http://merlin.obs.coe.int/redirect.php?id=19018 NL

Nathalie Rodriguez
Institute for Information Law (IViR), University of Amsterdam

Agenda

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