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European Court of Human Rights: GRA Stiftung gegen Rassismus und Antisemitismus v. Switzerland

In a case against Switzerland, the European Court of Human Rights (ECtHR) strongly emphasised the right of a non-governmental organisation (NGO) to use robust language on its website to criticise a politician, and to label his discourse as racist speech. The NGO had posted a blog post during the heated political debate on the referendum on banning the construction of minarets in Switzerland, in which it referred to B.K., the president of a local branch of the Young Swiss People's Party (JSVP). In a public speech, B.K. had said that the Swiss guiding culture ("schweizerische Leitkultur") was based on Christianity and that minarets, as a symbolic sign of another culture, should not be tolerated. It was this speech and this reasoning that the NGO GRA Stiftung gegen Rassismus und Antisemitismus qualified as "verbal racism" on a blog post.

B.K. filed a claim with the District Court for the protection of his personality rights, requesting that the blog post be removed from the NGO's website and that the text be replaced with the court's judgment. After the District Court had dismissed his request, the High Court found the blog post at issue insulting, while considering that B.K.'s speech itself had not been racist. It therefore ordered that the impugned article be removed from the NGO's website and be replaced with the High Court's judgment. This judgment was confirmed by the Federal Supreme Court finding that the speech by B.K. did not deserve to be qualified as "verbal racism" as B.K. had only defended his own beliefs and culture, which did not result in a blanket denigration of the followers of Islam or show fundamental contempt for Muslims. The Federal Supreme Court also explained that although political debate on important issues for society deserved a solid and broad right of freedom of expression, this could not justify the dissemination of untruths nor the publication of value judgments that did not appear to be justified with regard to the underlying facts.

The ECtHR, however, did not agree with the Swiss Courts' findings and came to the conclusion that the interference with the rights of GRA Stiftung gegen Rassismus und Antisemitismus amounted to a violation of the NGO's right to freedom of expression under Article 10 ECHR. While the ECtHR accepted that the interference was prescribed by law, and that the interference pursued the legitimate aim of protecting the reputation and rights of others, it found that the interference with the NGO's rights not necessary in a democratic society. When examining the necessity of an interference in a democratic society in cases where the interests of the "protection of the reputation or rights of others" bring Article 8 ECHR into play, the ECtHR verified whether the domestic authorities struck a fair balance when protecting two values guaranteed by the Convention which may come into conflict with each other in certain cases, namely freedom of expression protected by Article 10 and the right to respect for private life enshrined in Article 8. The ECtHR repeated that "where the balancing exercise between those two rights has been undertaken by the national authorities in conformity with the criteria laid down in the Court's case-law, the Court would require strong reasons to substitute its view for that of the domestic courts". The ECtHR had, on earlier occasions, identified a number of criteria which may come into play in the context of balancing the competing rights at issue. The relevant criteria thus defined include: contribution to a debate of public interest; the degree of notoriety of the person affected; the subject of the news report; the prior conduct of the person concerned; and the content, form and consequences of the publication. The ECtHR recalled that it had previously accepted that when an NGO drew attention to matters of public interest, it was exercising a "public watchdog" role of similar importance to that of the press and may be characterised as a social "watchdog" warranting similar protection under the ECHR as that afforded to the press.

According to the ECtHR, there was no doubt that B.K.'s speech and the NGO's blog post concerned a very sensitive topic of "intense public debate in Switzerland" at the material time, while B.K. had willingly exposed himself to public scrutiny by stating his political views. Therefore, he had to show a higher degree of tolerance towards potential criticism of his statements by persons or organisations which did not share his views. According to the ECtHR, it could not be said that classifying B.K.'s speech as "verbal racism", when it supported an initiative which had already been described by various organisations as discriminatory, xenophobic or racist, could be regarded as devoid of any factual basis. Nor could the impugned description be understood as a gratuitous personal attack on, or an insult to B.K. The NGO's blog post did not refer to his private or family life, but to the manner in which his political speech had been perceived. In view of the foregoing, the impugned categorisation of B.K.'s statement as "verbal racism" on the NGO's website could hardly be said to have had harmful consequences for his private or professional life. The ECtHR particularly disagreed with the Swiss authorities' argument that describing someone's words as "verbal racism" could be associated by the average reader with an accusation of an offence punishable under Swiss criminal law. The ECtHR observed that the NGO had never suggested that B.K.'s statements fell within the scope of the criminal offence of racial discrimination under Article 261bis of the Swiss Criminal Code,

and it referred to the NGO's argument stressing the need to be able to describe an individual's statement as racist without necessarily implying criminal liability. As for the nature of the interference (the order to remove the impugned article from the NGO's website, to publish the conclusion of the second-instance court, the payment of CHF 3 335 plus tax in court fees and the reimbursement of B.K.'s legal costs amounting to CHF 3 830), the ECtHR was of the opinion that it may have had a "chilling effect" on the exercise of the NGO's freedom of expression "as it may have discouraged it from pursuing its statutory aims and criticising political statements and policies in the future".

In the light of all of the above-mentioned considerations, the ECtHR considered that the arguments advanced by the Swiss Government with regard to the protection of B.K.'s personality rights, although relevant, could not be regarded as sufficient to justify the interference at issue. The domestic courts did not give due consideration to the principles and criteria laid down by the Court's case law for balancing the right to respect for private life and the right to freedom of expression. Therefore, the ECtHR unanimously found that there had been a violation of Article 10 ECHR. The applicant NGO is to receive EUR 35 000 from the Swiss Government in respect of non-pecuniary damages and to cover the costs and expenses incurred both at domestic level and for the proceedings before the ECtHR.

• Judgment by the European Court of Human Rights, Third Section, case of GRA Stiftung gegen Rassismus und Antisemitismus v. Switzerland, Application no. 18597/13, 9 January 2018
http://merlin.obs.coe.int/redirect.php?id=19078 EN

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European Court of Human Rights: Hans Burkhard Nix v. Germany

A recent decision by the European Court of Human Rights (ECtHR) confirms the limits of freedom of expression in Germany in relation to the publication of Nazi-symbols. A German blogger complained under Article 10 of the European Convention of Human Rights (ECHR) about his criminal conviction for the offence of using symbols of unconstitutional organisations; however the ECtHR recently found no violation of his right to freedom of expression.

The applicant, Mr Nix, has a blog in which he writes about certain matters concerning economics, politics and society. One of his blog posts contained a picture of former SS chief Heinrich Himmler in SS uniform with the badge of the Nazi party, a swastika on his front pocket and a swastika armband. The picture, accompanied by a quotation by Himmler, was meant to illustrate the blog post in which Mr Nix accused a public official of acting in a racist and discriminatory manner towards his daughter, who is of German-Nepalese origin, with regard to a registration for a vocational training course. Parts of the post were written in vulgar and offensive language. The Munich prosecution authorities instituted criminal proceedings against Mr Nix, charging him with the offence of using symbols of unconstitutional organisations. After long proceedings, Mr Nix was ordered to pay EUR 10 per day for a period covering 120 days in application of Article 86a of the German Criminal Code that prohibits the publication of symbols of unconstitutional organisations. A constitutional request on the grounds that the Regional Court and the Court of Appeal had not examined his right to freedom of expression as protected by Article 5 of the German Basic Law, and Article 10 ECHR, was dismissed by the Federal Constitutional Court. In his complaint, Mr Nix referred to the case of Vajnai v. Hungary, in which the ECtHR had found that the applicant's criminal conviction for wearing a red star at a demonstration constituted a violation of Article 10 ECHR. The Federal Constitutional Court, however, considered the constitutional complaint inadmissible. Finally, Mr Nix lodged a complaint before the ECtHR, referring to his right to freedom of expression under Article 10 ECHR. He submitted, in essence, that the domestic courts had not taken all the circumstances of the case into account and had thus failed to consider that his blog post had constituted a protest against discrimination against children with a migrant background and against the working methods of the employment office, which he deemed to resemble those employed by the Nazis.

The ECtHR reiterated that Article 10 ECHR applies to the Internet as a means of communication and that the publication of photographs on an Internet site falls under the right to freedom of expression. It considered that Mr Nix's conviction for having displayed a picture of Himmler in SS uniform with a swastika armband in his blog post amounted to an interference with his right to freedom of expression, as guaranteed by Article 10 ECHR; such interference would infringe the ECHR if it did not meet the requirements of Article 10 section 2. It was therefore to be determined whether Mr Nix's conviction was "prescribed by law", whether it pursued one or more of the legitimate aims set out in that paragraph and whether it was "necessary in a democratic society" in order to achieve those aims.

The ECtHR noted that the purpose of Article 86a of the German Criminal Code was to prevent the revival of prohibited organisations and the unconstitutional ideas pursued by them, to maintain political peace, and to ban symbols of unconstitutional organisations in German political life. It therefore considered that the interference in question was in accordance with the law and pursued the legitimate aim of the prevention of disorder. Although there is little scope under

Article 10 section 2 ECHR for restrictions on political expression or on debating questions of public interest, the ECtHR reiterated that it had always been sensitive to the historical context of the High Contracting Party concerned when reviewing whether there existed a pressing social need for interference with rights under the Convention. In the light of their historical role and experience, states which experienced the Nazi horrors may therefore be regarded as having a special moral responsibility to distance themselves from the mass atrocities perpetrated by the Nazis. The ECtHR considered that the legislature's choice to criminally sanction the use of Nazi symbols, to ban the use of such symbols from German political life, to maintain political peace, and to prevent the revival of Nazism, must be seen against this background. It observed that the picture and symbol used in Mr Nix's blog post could not be considered as having any meaning other than that of Nazi ideology, which differentiated this case from the findings on the use of the red star in the Vajnai v. Hungary and Fratanoló v. Hungary cases.

The ECtHR accepted that Mr Nix had not intended to spread totalitarian propaganda, to incite violence, or to utter hate speech, that his expression had not resulted in intimidation, and that he may have intended to contribute to a debate of public interest. It noted, however, that the gratuitous use of the picture at issue was exactly what the provision sanctioning the use of symbols of unconstitutional organisations was intended to prevent; it was meant to pre-empt anyone becoming used to certain symbols by banning them from all means of communication. Having regard to the circumstances of the case, the ECtHR saw no reason to depart from the domestic courts' assessment that the applicant did not clearly and obviously reject Nazi ideology in his blog post, and while the criminal conviction of 120 day-fines was not negligible, the ECtHR noted that the sentence had been reduced from a prison sentence to a fine in the course of the proceedings and that Mr Nix had been convicted of a similar offence only a few weeks before he published the blog post at issue.

The ECtHR found, in light of all the circumstances of the case and referring to the historical experience of Germany, that the German authorities had adduced relevant and sufficient reasons and had not overstepped their margin of appreciation when interfering with Mr Nix's right to freedom of expression. The interference was proportionate to the legitimate aim pursued and was thus "necessary in a democratic society". Therefore, the application was considered manifestly ill-founded and was rejected as inadmissible.

• Decision by the European Court of Human Rights, Fifth Section, case of Hans Burkhard Nix v. Germany, Application No. 35285/16, 13 March 2018, notified in writing on 5 April 2018
http://merlin.obs.coe.int/redirect.php?id=19077 EN

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European Court of Human Rights: Stern Taulats and Roura Capellera v. Spain

Shortly after the majority judgment in the case of Sinkova v. Ukraine (see IRIS 2018-5/3), the European Court of Human Rights (ECtHR) has delivered a new judgment in a case of symbolic speech and expressive conduct as part of the right to freedom of expression guaranteed under Article 10 of the European Convention of Human Rights (ECHR). The case concerns the conviction of two Spanish nationals, Enric Stern Taulats and Jaume Roura Capellera, for setting fire to a photograph of the royal couple, turned upside down, at a public demonstration held during the Spanish King's official visit to the Catalan city of Girona in 2007. The ECtHR considered the act at issue as a political statement that did not constitute incitement to hatred or violence: according to the Court, an act of this type should be interpreted as the symbolic expression of dissatisfaction and protest. The ECtHR held that the criminal conviction of the applicants for insult of the Crown was not necessary in a democratic society.

In September 2007, while the King was on an official visit to Girona, the applicants set fire to a large photograph of the royal couple during a public demonstration. As a result, they were sentenced to 15 months' imprisonment for insult to the Crown in application of Article 490 section 3 of the Criminal Code. The penalty was subsequently replaced by a fine of EUR 2 700 each; in the event of failure to pay the fine in whole or in part, the applicants would have to serve a prison term. This judgment was upheld by the Audiencia Nacional, by ten votes to six, and the applicants did indeed pay the fine. However, they lodged an amparo appeal with the Constitutional Court, which concluded, by a majority of seven to four, that the act at issue fell outside the scope of freedom of expression, given that the applicants had been guilty of incitement to hatred and violence against the King and the monarchy. It stated that "burning in public, in the circumstances described, the photograph or image of a person entails incitement to violence against the person and the institution he or she represents, encourages feelings of aggression against the person and expresses a threat".

Relying on Article 10 ECHR, the applicants complained before the ECtHR that the judgment finding them guilty of insult to the Crown amounted to a violation of their right to freedom of expression. On the same grounds, they also complained of a breach of Article 9 ECHR (freedom of thought, conscience and religion) read in conjunction with Article 10 ECHR.

The ECtHR agreed that the applicants' conviction amounted to an interference with their right to freedom of expression, and it considered that the interference was prescribed by law and pursued the legiti-

mate aim of protecting the reputation or rights of others.

As regards its necessity in a democratic society, the Court noted that the act at issue had been part of a political, rather than a personal critique of the monarchist institution in general, and of the Kingdom of Spain as a nation in particular. The impugned "staged event" had been part of a debate on the independence of Catalonia and the monarchistic structure of the state and a critique of the King as a symbol of the Spanish nation. Burning the picture had not constituted a personal attack on the King of Spain geared to insulting and vilifying his person, but a denunciation of what the King represented as the Head and the symbol of the state apparatus and the forces which, according to the applicants, had occupied Catalonia. This kind of expression falls within the sphere of political criticism or dissidence and corresponds to the expression of rejection of the monarchy as an institution. The ECtHR emphasised that the applicants had used symbolical elements clearly and manifestly linked to their practical political criticism of the Spanish State and its monarchistic form: the effigy of the King of Spain was the symbol of the King as the Head of the state apparatus; using fire and turning the photograph upside down expressed a radical rejection or refusal, and those two elements were used as the manifestation of criticism of a political or other nature; and the size of the photograph appeared to have been intended to ensure the visibility of the act in question, which had taken place in a public square. The applicants' act had therefore been one of the provocative "events" which were increasingly being staged to attract media attention and which merely used a certain permissible degree of provocation to transmit a critical message in the context of freedom of expression.

The ECtHR also found that the applicants' intention had not been to incite anyone to commit acts of violence against the King, even though the "performance" had entailed burning an image of the figurehead of the state. Indeed, an act of this type should be interpreted as the symbolic expression of dissatisfaction and protest. Even though the "staged event" had involved burning an image, it was a means of expressing an opinion in a debate on a public-interest issue, namely the institution of the monarchy. The ECtHR reiterated that freedom of expression extends to "information" and "ideas" that offend, shock or disturb: such are the demands of pluralism, tolerance and broad-mindedness, without which there would be no "democratic society". The ECtHR was not convinced that the impugned act could reasonably be construed as incitement to hatred or violence, neither could it be considered as constituting hate speech, given the irrelevance of Article 17 ECHR (prohibition of abuse of rights) to the present case. Finally, the ECtHR pointed out that the criminal penalty imposed on the applicants - a prison sentence, to be executed in the event of failure to pay the fine - amounted to an interference with freedom of expression which had been neither proportionate to the legitimate aim pursued nor necessary in a democratic society. The ECtHR therefore unanimously found a violation of Article 10 ECHR, while it deemed unnecessary any separate consideration of the complaint under Article 9 concerning the same facts. The applicants are to receive EUR 14 400 from the Spanish Government in respect of pecuniary damage and to cover costs and expenses both at domestic level and for the proceedings before the ECtHR.

• *Arrêt de la Cour européenne des droits de l'homme, troisième section, rendu le 13 mars 2018 dans l'affaire Stern Taulats et Roura Capellera c. Espagne, requêtes n° 51168/15 et n° 51186/15* (Judgment by the European Court of Human Rights, Third Section, case of Stern Taulats and Roura Capellera v. Spain, Application Nos. 51168/15 and 51186/15, 13 March 2018)
http://merlin.obs.coe.int/redirect.php?id=19079 FR

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European Court of Human Rights: Protocol No. 16 to the European Convention on Human Rights

On 12 April 2018, the French Government became the tenth High Contracting Party to ratify Protocol 16 to the European Convention on Human Rights (ECHR) and thus triggered the entry into force of the Protocol that establishes a referral mechanism between the national courts and the European Court of Human Rights (ECtHR). As the preamble states, the extension of the ECtHR's competence to give advisory opinions will further enhance the interaction between the ECtHR and national authorities, and thereby reinforce the implementation of the ECHR, in accordance with the principle of subsidiarity

Under Article 1 of Protocol No. 16, the highest courts and tribunals of a High Contracting Party, which are to be designated by the High Contracting Party, can request the ECtHR to give advisory opinions on questions of principle relating to the interpretation or application of the rights and freedoms set forth in the ECHR. The requesting court or tribunal may seek an advisory opinion only in the context of a case pending before it, and must give reasons for its request and shall provide the relevant legal and factual background of the pending case. Under Article 2, a panel of five judges of the ECtHR's Grand Chamber shall decide whether to accept the request for an advisory opinion, and if the panel accepts the request, the Grand Chamber shall deliver the advisory opinion. Moreover, while the Grand Chamber must give reasons for its advisory opinions, an individual Grand Chamber judge may deliver a separate opinion, including concurring or dissention opinions. Notably, Article 5 provides that advisory opinions are not legally binding.

It should be noted that under Article 47 of the ECHR, the Court may also, at the request of the Committee of Ministers, give advisory opinions on legal questions concerning the interpretation of the Convention and the Protocols thereto.

Following the French Government's ratification of Protocol No. 16, Article 8 has now been triggered, and the protocol will enter into force on 1 August 2018 ("the first day of the month following the expiration of a period of three months").

• Council of Europe, Protocol No. 16 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Council of Europe Treaty Series - No. 214, Strasbourg, 2 October 2013
http://merlin.obs.coe.int/redirect.php?id=19111 EN FR

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Committee of Ministers: Copenhagen Declaration on reform of the European Convention on Human Rights system

On 13 April 2018, the Copenhagen Declaration on the reform of the European Convention on Human Rights (ECHR) system was adopted following a High Level Conference in Copenhagen on 12 and 13 April 2018, under the Danish Chairmanship of the Committee of Ministers of the Council of Europe. The purpose of the Declaration is to address challenges facing the ECHR system and to find ways to improve the system.

The Declaration begins with the States Parties to the ECHR reaffirming their deep and abiding commitment to the ECHR. Importantly, the State Parties reaffirm their strong attachment to the right of individual application to the European Court of Human Rights (ECtHR) as a cornerstone of the system for protecting the rights and freedoms set forth in the ECHR. The ECHR system has made an extraordinary contribution to the protection and promotion of human rights and the rule of law in Europe. However, there is an ongoing reform process to ensure the system's viability, with State Parties underlining the need to secure an effective, focused and balanced ECHR system, where they effectively implement the ECHR at national level, and where the ECtHR can focus its efforts on identifying serious or widespread violations, systemic and structural problems, and important questions of interpretation and application of the ECHR.

Having regard to the reform process, the Declaration includes a number of recommendations on key issues facing the ECHR. First, the Declaration discusses the concept of "shared responsibility", which aims at achieving a balance between the national and European levels of the ECHR system. In this regard, the Declaration reiterates that strengthening the principle of subsidiarity is not intended to limit or weaken human rights protection, but to underline the responsibility of national authorities to guarantee the rights and freedoms set out in the ECHR. The second issue is that of the effective national implementation of the ECHR. The Declaration calls upon the States Parties to continue strengthening the implementation of the Convention at national level, including by checking, in a systematic manner and at an early stage of the process, the compatibility of draft legislation and administrative practice in the light of the ECtHR's jurisprudence.

Thirdly, on the execution of judgments, the Declaration reiterates that the States Parties have undertaken to abide by the final judgments of the Court in any case to which they are party, and strongly encourages the Committee of Ministers to continue to use all the tools at its disposal when performing the important task of supervising the execution of judgments. Fourthly, the Declaration turns to the role of the ECtHR, and notably welcomes the further development of the principle of subsidiarity and the doctrine of the margin of appreciation by the ECtHR in its jurisprudence. The Declaration underlines that for a system of shared responsibility to be effective, there must be good interaction between the national and European level. In this regard, the Declaration includes a number of specific recommendations, including inviting the ECtHR to adapt its procedures to make it possible for other States Parties to indicate their support for the referral of a Chamber case to the Grand Chamber when relevant, and encourages the ECtHR to support increased third-party interventions. The Declaration also makes a number of further recommendations concerning the ECtHR's case load, the selection of judges, and on the accession of the European Union to the ECHR. On this latter point, the Conference calls upon the European Union institutions to take the necessary steps to allow the process foreseen by Article 6 section 2 of the Treaty of the European Union to be completed as soon as possible. Finally, the Conference invited the States Parties, the ECtHR, the Committee of Ministers, the Parliamentary Assembly and the Secretary General of the Council of Europe to give full effect to the Declaration

• The High Level Conference meeting in Copenhagen on 12 and 13 April 2018 at the initiative of the Danish Chairmanship of the Committee of Ministers of the Council of Europe, "Copenhagen Declaration", 13 April 2018
http://merlin.obs.coe.int/redirect.php?id=19109 EN FR

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Parliamentary Assembly: Resolution on editorial integrity

On 25 April 2018, the Parliamentary Assembly of the Council of Europe (PACE) adopted a Resolution on the protection of editorial integrity. The Resolution opens with PACE noting that several challenges to the editorial integrity and independence of the media had arisen in the member states. PACE also recalled that the emergence of online media and media-like information sources had triggered a decline in revenue for traditional media. According to PACE, this factor, coupled with less profitable obsolete business models and increased threats from organised crime, terrorism and armed conflicts, compromised the independence of the media and their editorial integrity.

The Resolution recalls that criminal defamation laws, that sometimes include provisions for imprisonment, remain in the legal framework of a majority of member states. Based on this, PACE recalled and reaffirmed its Resolution 1577(2007), "Towards decriminalisation of defamation" (see IRIS 2007-10/104), where it stated that statements or allegations in the media, even when inaccurate, should not be punishable, provided they were made without knowledge of their inaccuracy, without any conscious intention to cause harm and on condition that their truthfulness was checked with proper diligence. Moreover, PACE also recalled that several member states had adopted surveillance and law-enforcement measures that reduced the media's capacity to investigate while relying on confidential sources of information. Furthermore, there has been an increase in threats, harassment, intimidation, surveillance, arbitrary deprivation of liberty, physical attacks, torture and the killing of journalists. These factors put pressure on the media to self-censor and sometimes there are no trustworthy mechanisms to report harassment or threats.

Based on this, PACE recommends that states fully implement Recommendation CM/Rec(2016)4 on the protection of journalism and the safety of journalists and other media actors (see IRIS 2016-5/3), with a view to fulfilling their positive obligation to protect media professionals and guarantee freedom of the media. PACE also recommends that member states fully respect the Council of Europe standards on the independence and pluralism of public service media. Furthermore, PACE recommends the review of national legislation regarding defamation, extra surveillance and law-enforcement powers in the name of countering terrorism, as well as the review of regulatory authorities in the media field. Moreover, member states are called upon to examine the imbalance of revenues between news media outlets and internet corporations and to find solutions to rectify this issue, including channelling some of the huge profits made from digital advertising placed on search engines and social media back to the media that invest mainly in reporting the news; this could be done, for example, via changes in taxation and copyright rules. Finally, the Resolution invites media professionals and outlets to increase their voluntary adherence to, and respect for professional codes of ethics; to refuse to carry out work infringing their ethical codes and integrity; to maintain their editorial staff separate from their advertisement and commercial departments; to develop internal oversight mechanisms such as a readers editor or ombudsperson; to establish or strengthen responsibility for the dissemination of fake news; and to organise training to enhance skills on new editorial challenges.

• Parliamentary Assembly of the Council of Europe, Resolution 2212 (2018) The protection of editorial integrity, Text adopted by the Assembly on 25 April 2018
http://merlin.obs.coe.int/redirect.php?id=19081 EN FR

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EUROPEAN UNION

Council of the EU: General Data Protection Regulation becomes applicable

On 25 May 2018, the European Union's General Data Protection Regulation became applicable, with the repeal of the previous Data Protection Directive (95/46/EC) also becoming effective (see IRIS 1998-8/21). The GDPR is now binding in its entirety and directly applicable in all member states. While the GDPR is directly applicable, the date of 25 May 2018 is also the deadline for member states to notify the European Commission of any national legislation adopted pursuant to a number of Chapters and Articles in the GDPR, including Chapter VI on independent supervisory authorities for monitoring the implementation of the GDPR; Article 83(9) on legal remedies in legal systems that do not provide for administrative fines; Article 84 requiring national legislation on penalties applicable to infringements of the GDPR; and Article 88 on data processing in the context of employment. Furthermore, from 25 May 2018, the European Data Protection Board will replace the Article 29 Working Party established under the previous Directive (see, for example, IRIS 2015-2/3).

The GDPR runs to 88 pages, with 173 Recitals, 11 Chapters, and 99 Articles, with its stated purpose being to lay down rules relating to the protection of natural persons with regard to the processing of personal data and rules relating to the free movement of personal data. The European Commission helpfully published guidance for all relevant actors on the implementation of the GDPR (see IRIS 2018-4/10), high-

lighting changes introduced under the GDPR, including 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 European Union.

Notably, there is a specific provision in the GDPR relating to the media, namely Article 85. It provides that member states shall by law reconcile the right to the protection of personal data pursuant to this Regulation with the right to freedom of expression and information, including processing for journalistic purposes and the purposes of academic, artistic or literary expression. Thus, for processing carried out for journalistic purposes or the purposes of academic, artistic or literary expression, member states shall provide for exemptions or derogations from Chapter II (principles), Chapter III (rights of the data subject), Chapter IV (controller and processor), Chapter V (transfer of personal data to third countries or international organisations), Chapter VI (independent supervisory authorities), Chapter VII (cooperation and consistency) and Chapter IX (specific data processing situations) if they are necessary to reconcile the right to the protection of personal data with the freedom of expression and information. Member states must notify the European Commission of national legislation adopted pursuant to Article 85. Notably, under Recital 153, where such exemptions or derogations differ from one member state to another, the law of the member state to which the controller is subject should apply. In order to take account of the importance of the right to freedom of expression in every democratic society, it is necessary to interpret notions relating to that freedom, such as journalism, broadly.

Finally, in relation to the audiovisual field, it should also be noted that Recital 153 provides that with regard to reconciling the rules governing freedom of expression and information, including journalistic, academic, artistic and/or literary expression, with the right to the protection of personal data, this should apply in particular to the processing of personal data in the audiovisual field and in news archives and press libraries.

• Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation)

http://merlin.obs.coe.int/redirect.php?id=19082 DE EN FR
CS DA EL ES ET FI HR HU IT LT LV
MT NL PL PT SK SL SV

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European Commission: Communication on tackling online disinformation

On 26 April 2018, the European Commission published the Communication on "Tackling online disinformation: a European approach", setting out the views of the Commission on the challenges associated with disinformation online. It was developed in consideration of consultations with citizens and stakeholders and of the report of the High Level Expert Group published on 12 March 2018 (see IRIS 2018-1/8 and IRIS 2018-5/7). Recognising the threat of online disinformation, particularly on policy making and electoral processes, and the cross-border dimension of online disinformation, the Communication lays out the essential principles and objectives that intend to guide actions to raise public awareness of disinformation and its effective management, together with specific measures that the Commission intends to take to tackle online disinformation.

The Communication firstly lays out the scope, context and main causes of disinformation. Based on the report of the High Level Expert Group, the scope of online disinformation addressed by the Communication is understood as "verifiably false or misleading information that is created, presented and disseminated for economic gain or to intentionally deceive the public, and may cause public harm". It further emphasises the economic, technological, political and ideological causes of the dissemination of disinformation, such as those stemming from the rise of platforms as the new entrants to the media landscape and their algorithm-based, advertising-driven and technology-enabled functioning, which privileges and rewards viral content and causes a wider dissemination of fake news.

The Communication proposes several measures to be taken by the Commission. These include fostering education and media literacy; the initiation of continuous dialogue to support member states in ensuring the resilience of elections against increasingly complex cyber threats, including online disinformation and cyberattacks; supporting quality journalism as an essential element of a democratic society;

and countering internal and external disinformation threats through strategic communication.

In order to ensure a more transparent, trustworthy and accountable online ecosystem, the Commission proposes to hold a multi-stakeholder forum on disinformation. This forum aims to provide a framework for efficient cooperation among relevant stakeholders, encompassing online platforms, the advertising industry and major advertisers, and media and civil society representatives, to tackle disinformation. The first expected output of the forum is an EU-wide Code of Practice on Disinformation, to be published by July 2018, with a view to having a measurable impact by October 2018. Its implementation is to be assessed by the Commission in consultation with stakeholders. The Code of Practice of Disinformation has various objectives, some of which are: providing for transparency on sponsored content, especially political advertising online, and on the functioning of algorithms; enabling third party verification; facilitating the discovery of and access to a variety of news sources representing alternative points of view by users; developing tools to identify and close fake accounts and to tackle the issue of automatic bots; and empowering fact-checkers, researchers and public authorities to continuously monitor online disinformation.

As regards fact checking, verifying and assessing the credibility of content in tackling online disinformation, the Communication stresses the role of fact-checking organisations. In this regard, the Commission firstly proposes to support the creation of an independent European network of fact-checkers to set common working methods and to facilitate the exchange of best practices. This network will be invited to participate in the above-mentioned multi-stakeholder forum. Additionally, the Commission suggests launching a secure European online platform on disinformation to support the network with cross-border data collection and analysis, as well as access to EU-wide data, thereby enabling the network to act as trusted flaggers.

• Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, "Tackling online disinformation: a European Approach, COM(2018) 236 final, 26 April 2018
http://merlin.obs.coe.int/redirect.php?id=19083 DE EN FR
CS DA EL ES ET FI HU IT LT LV MT
NL PL PT SK SL SV HR

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European Commission: Commission Notice on Brexit and EU rules in the field of copyright

On 28 March 2018, the European Commission published a Notice to stakeholders on the effect of UK withdrawal from the European Union under Article 50 of the Treaty on European Union, and the consequences in the field of copyright and related rights. The Notice on copyright follows a previous Notice on Brexit and EU rules in the field of audiovisual media services (see IRIS 2018-5/8). The Notice reiterates that unless a ratified withdrawal agreement establishes another date, all EU primary and secondary law will cease to apply to the United Kingdom from 30 March 2019, and the United Kingdom will become a third country. Furthermore, in the absence of any transitional arrangement that may be contained in a possible withdrawal agreement, the EU rules in the field of copyright will no longer apply to the United Kingdom. In view of considerable uncertainties, the purpose of the Notice is to explain the specific consequences in the field of copyright.

At the outset, the Notice states that the United Kingdom and the European Union are contracting parties to the main international copyright treaties, such as the World Intellectual Property Organization Copyright Treaty, the WIPO Performances and Phonograms Treaty, and the Agreement on Trade-Related Aspects of Intellectual Property Rights (the United Kingdom is furthermore a party to the Berne Convention for the Protection of Literary and Artistic Works, whereas the European Union is not). Thus, as of the withdrawal date, the international framework will govern the protection of copyright and related rights; the term of protection of copyright and certain related rights; the obligations concerning technological protection measures and rights management information; and the enforcement of copyright (as one of the intellectual property rights in part 3 of TRIPS), including border measures. The Commission notes that the multilateral international agreements mentioned "do not provide for the same type or level of protection in relation to certain rights and where applicable exceptions or limitations to those rights as that set out today in the EU copyright acquis."

The Notice then notes a number of specific consequences. First, in relation to broadcasters, as of the withdrawal date, broadcasters in the United Kingdom will no longer benefit from the mechanism provided for by Directive 93/83/EEC when providing cross-border satellite broadcasting of only having to clear rights in the member state where the signal is introduced. Correspondingly, broadcasters in the European Union will no longer be able to benefit from the mechanism provided for by the Directive when providing cross-border satellite broadcasting services to customers in the United Kingdom and they will have to secure clearance of the rights of all relevant rightsholders if they wish to broadcast to the United Kingdom. Secondly, Article 30 of Directive 2014/26/EU on the collective management of copyright and related rights and the multi-territorial licensing of rights in musical works for online use in the internal market provides for an obligation on a collective management organisation to represent another collective manage-

ment organisation for multi-territorial licensing (for the online rights in musical works) in certain cases. As of the withdrawal date, EU collective management organisations will not be subject to the obligation to represent collective management organisations based in the United Kingdom for multi-territorial licensing in accordance with Article 30 of Directive 2014/26/EU and vice versa. Thirdly, as of the withdrawal date, the mechanism of mutual recognition provided for by Directive 2012/28/EU on orphan works will no longer apply between the United Kingdom and the European Union. Consequently, orphan works which have been recognised in the United Kingdom by the withdrawal date will no longer be recognised in the European Union under Directive 2012/28/EU and the same will apply for orphan works recognised in the European Union, as the system of mutual recognition under Directive 2012/28/EU will no longer be available in the United Kingdom. As a consequence, this means that the uses of orphan works from the United Kingdom allowed under the Directive, notably as regards making them available online, will no longer be allowed for cultural institutions in the European Union and vice versa. Finally, the Notice also sets out the consequences for the access to published works for persons who are blind, visually impaired or otherwise print-disabled under Directive (EU) 2017/1564, and notes "in this context it is important to note that the United Kingdoms is currently not a party to the Marrakesh Treaty".

• European Commission, "Notice to stakeholders: withdrawal of the United Kingdom and EU rules in the field of copyright", 28 March 2018
http://merlin.obs.coe.int/redirect.php?id=19084 EN

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NATIONAL

AT-Austria

KommAustria rejects application for national radio licence

On 29 March 2018, KommAustria, Austria's regulatory authority for audiovisual media including radio, rejected applications by Antenne "Österreich" und Medieninnovationen GmbH for a nationwide commercial terrestrial radio broadcasting licence in accordance with sentences 1 and 2 of Article 28c(2) of the Austrian Privatradio-Gesetz (Private Radio Broadcasting Act - PrR-G) (Case no. KOA 1.010/18-010).

In the proceedings, Antenne "Österreich" und Medieninnovationen GmbH had argued that it met the requirements to hold a nationwide radio broadcasting licence under Article 28c(2) PrR-G. The applicant's service would be accessible to more than 60% of the Austrian population on account of its own licences combined with those that, if it were granted a nationwide licence, would be transferred to it by Entspannungsfunk Gesellschaft mbH (for Central Upper Austria, Klagenfurt), Radio Oberland GmbH (for Tirol-Oberland), Außerferne Medien Gesellschaft mbH (for Außerfern/Reutte), Alpenfunk GmbH (for Salzburg), Schallwellen Lounge GmbH (for Graz) and Weststeirische Regionalfernseh GmbH (for the Köflach area).

The regulatory authority rejected the applications on the grounds that, according to the PrR-G, licences could only be transferred to the holder of a nationwide licence (and therefore the respective transmission capacities could only be allocated under that licence) if they had not expired when the regulator decided on the application for a nationwide licence. In addition, the requirement that 60% of the population must be covered and that broadcasting operations must have been in place for at least two years both had to be met in relation to the licences already held by the applicant and those being transferred to it by third parties; furthermore, if a new licence was being granted to the same licence-holder, the duration of broadcasting operations should be calculated from the date on which the new licence came into force.

In light of this, KommAustria held that, when determining whether the requirement for 60% of the Austrian population to be covered was met, licences (and transmission capacities allocated to these licences) could only be taken into account if they were still valid when the regulatory authority took its decision and if broadcasting operations under those licences had been in place for at least two years. Although the regional licences already held by the applicant, combined with those transferred to it by third parties, covered 64% of the population, KommAustria concluded, on the basis of its aforementioned interpretation of the law, that the previous licence for Central Upper Austria held by Entspannungsfunk Gesellschaft mbH could not be taken into account because it had expired on 25 January 2018. The current licence for Central Upper Austria held by Entspannungsfunk Gesellschaft mbH could also not be taken into account because broadcasting operations under this licence had not yet been in place for two years. If the coverage rate of this licence was deducted from the total figure, only 55.3% of the Austrian population was covered, a figure that fell below the 60% threshold.

Article 28c(3) of the PrR-G is relevant in cases such as this. This provision states that, when calculating the coverage rate, regional licences that were due to be transferred should be included if they expire "within six months following the filing of the application due to lapse of time". While the applicant considered this condition to be met, the regulatory authority argued that this could only be treated as a 'catch-all' pro-

vision designed to ensure that KommAustria, for example, could not block the granting of nationwide licences by delaying the issue of regional licences.

As the proceedings continue, with a court interpretation of this rule likely to be published, the case is expected to have far-reaching effects on the commercial radio market in Austria. It seems that KommAustria has already begun preparing for this eventuality, since its detailed reasoning and justification of its decision under constitutional law suggests that it is expecting this decision to be challenged before the courts, possibly including the Constitutional Court.

• *Bescheid der KommAustria, KOA 1.010/18-010* (Decision of KommAustria, KOA 1.010/18-010)
http://merlin.obs.coe.int/redirect.php?id=19123 DE

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CH-Switzerland

Majority want a strong public radio and television service

The desire to safeguard a strong public audiovisual service throughout Switzerland and the overwhelmingly positive assessment of the service provided by the Schweizerische Radio- und Fernsehgesellschaft (Swiss Broadcasting Corporation - SRG) were, according to a representative survey, the main reasons for the recent rejection of a popular initiative entitled "Yes to the abolition of radio and television licence fees (abolition of Billag fees)". In the referendum on 4 March 2018, only 28.4% (833,630 people) voted to amend Article 93 of the Bundesverfassung (Federal Constitution), while 71.6% (2,098,139 people) rejected the proposal. Under the failed initiative, all Swiss radio and television services would have become commercially funded. The 54.4% turnout of eligible voters was higher than the Swiss average.

A survey of selected voters is conducted after every Swiss referendum. These VOTO surveys are funded by the Federal Chancellery and are designed to provide the authorities and the general public with useful information about the reasons behind the referendum result.

According to the VOTO survey, the majority of voters (60%) feared that the SRG would not survive if the licence fee were abolished; 73% of those questioned said they had a high or very high level of confidence in the SRG; 70% use the SRG's TV or radio service on a daily basis; and 69% describe its quality as good or very good.

However, the clear rejection of the initiative does not mean that the Swiss people do not want any kind of change: 58% of the survey participants said that the SRG should now be reformed and downsized. The most common reason given by those who voted in favour of the proposal was the amount of the current licence fee, which was the deciding factor for 36% of the initiative's supporters.

The age category with the highest proportion of yes votes was 40-49 (40%). However, contrary to original expectations, the rejection rate was greatest among the youngest group of voters (the 'Netflix' generation): only 20% of 18- to 29-year olds voted in favour of the proposed constitutional amendment.

As well as calling for the abolition of the licence fee, the popular initiative demanded that the Confederation not subsidise radio and television stations or run its own channels in peace time, and that broadcaster licences be regularly auctioned. It also wanted the current public service remit to be removed from the Federal Constitution, which states that radio and television should contribute to education and cultural development, to the free shaping of opinion and to entertainment; take account of the particularities of Switzerland and the needs of the cantons; present events accurately; and allow a diversity of opinions to be expressed appropriately.

Article 93 of the Federal Constitution remains unaltered following the referendum of 4 March 2018. However, fundamental changes to the law are in the pipeline, with a new Gesetz über elektronische Medien (Electronic Media Act) set to replace the Radio- und Fernsehgesetz (Radio and Television Act - RTVG) in a few years' time. The authorities hope to table a preliminary draft for public consultation in the summer.

• Results of the VOTO survey on the Swiss referendum of 4 March 2018, 19 April 2018 DE FR
• Provisional official referendum result and comments by the Federal Council, 4 March 2018 DE FR
• Media release on preparations for a future Electronic Media Act, 12 March 2018 DE FR

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DE-Germany

Facebook should not have deleted comment

According to media reports, the Landgericht Berlin (Berlin Regional Court - LG Berlin) decided in an interim procedure on 23 March 2018 (Case no. 31 O

21/18) that Facebook had acted unlawfully by deleting a user's comment on the grounds of alleged breaches of its guidelines. The decision is significant, not least because it is the first time since the Netzwerkdurchsetzungsgesetz (Network Enforcement Act - NetzDG) entered into force that a court has ruled on Facebook's deletion strategy in a real-life case.

The decision concerns events that took place in January 2018. A Facebook user had posted the following comment on an article from the Basler Zeitung which included quotes from the Hungarian Prime Minister concerning Germany's refugee policy: "The Germans are becoming ever more stupid. No wonder, since every day they are littered with fake news from the left-wing system media about 'skilled workers', declining unemployment figures or Trump." Facebook reacted by deleting the comment and blocking the user for 30 days. After a written warning was sent by the user, his account was unblocked, but the comment was not reinstated. However, the user applied for a preliminary injunction, which the LG Berlin granted.

According to the media, the court did not explain its reasoning, which is very common for decisions issued in injunction proceedings on account of their urgent nature. However, since such proceedings include a weighing up of the opposing interests of both the applicant and the respondent, taking into account the lawfulness or otherwise of the disputed measure, the ruling at least suggests that the court found that there was at least a possibility that the deletion of the comment had been illegal and that, in any case, the user's interests were predominant.

This decision will serve to heighten the fears of those who had warned that the introduction of strict deletion obligations under the NetzDG would threaten freedom of expression. However, it should be acknowledged that, while this is a decision relating to an individual case, statistics will emerge over the coming months that are sure to provide an insight into deletion practices as a whole and their impact on freedom of expression and diversity of opinion. A final decision on the lawfulness of the comment and, therefore, of its deletion will, however, be taken as part of the principal proceedings.

• *Landgericht Berlin, Beschluss vom 23. März 2018 (Az. 31 O 21/18)* (Berlin Regional Court (interim procedure), case no. 31 O 21/18, 23 March 2018)
http://merlin.obs.coe.int/redirect.php?id=19095 DE

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ES-Spain

Adoption of Royal Decree-Law transposing the Collective Management Directive

Two years after the transposition deadline (and in order to avoid a penalty already announced by the EU) the Spanish Government recently adopted Royal Decree-Law 2/2018 of 13 April 2018 (official gazette of 14 April 2018), which transposes Directive 2014/26/EU of 26 February 2014 on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market. Royal Decree-Law 2/2018 also transposes into Spanish law Directive (EU) 2017/1564 of 13 September 2017 on certain permitted uses of certain works and other subject matter protected by copyright and related rights for the benefit of persons who are blind, visually impaired or otherwise print-disabled and amending Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society.

Further changes have also been made through an amendment to the Intellectual Property Act, although these are not required under an EU directive. For example, the deadline set out in Article 20.4 on cable retransmission rights is extended from three to five years, bringing it into line with the general five-year deadline for intellectual property rights laid down in Article 177. Article 25.8 on private copying compensation has also been amended with the introduction of a one-year deadline for requests for reimbursement of private copying compensation in certain specific cases.

With regard to the transposition of Directive 2014/26/EU, it should first be noted that part of this reform had already been introduced through the Act amending the Intellectual Property Act, implemented under Act 21/2014 of 4 November 2004, which increased the transparency obligations and monitoring of collective management entities. A special system for the calculation of fees by collecting societies was also introduced through the 2014 reforms, as laid down in Article 157 of the Act amending the Intellectual Property Act (now Article 164). This provision requires collecting societies to establish general fees in accordance with a method approved by a decree of the Ministry of Education, Culture and Sport following a report by the National Markets and Competition Commission (CNMC) and with the agreement of the Governmental Executive Committee for Economic Affairs. In other words, this fee calculation system only applies to collecting societies, regardless of where they are based and whether or not they have received

the approval of the Ministry of Education, Culture and Sport for compulsory collective management.

Independent collective management entities, which were introduced when the Directive was incorporated into Spanish law, are excluded from this fee calculation system and therefore benefit from a more favourable system than that of collecting societies. The situation has become more difficult for collecting societies because the ministerial decree approving the fee calculation method - Decree ECD/2574/2015 of 2 December 2015 - was recently annulled by the Supreme Court (third chamber) in its judgment of 22 March 2018.

Furthermore, the Spanish legislature has decided to allow collective management entities based outside the European Union to operate on Spanish territory. These entities are subject to different obligations to those that apply to EU-based collecting societies (Article 151.2). Initially, the Spanish legislator, although not bound by the Directive, should have limited the possibility of intervening in the collective management of intellectual property rights to EU-based entities.

It should also be noted that a particular characteristic of Spanish law is the distortion resulting from the exclusion of private collective management entities from the mediation, arbitration and monitoring functions held by the First Section of the Intellectual Property Commission (Sección primera de la Comisión de Propiedad Intelectual) under Article 194 of the Act amending the Intellectual Property Act.

Lastly, the first additional provision of the Royal Decree 2/2017 on the amendment of the statutes of collecting societies states that, within a year of the entry into force of this royal decree, collecting societies approved by the Ministry of Education, Culture and Sport must agree to the modification of their statutes to reflect the Act amending the Intellectual Property Act resulting from the royal decree. Collecting societies that have collected EUR 100 million or more during the year preceding the entry into force of the royal decree must comply with the obligation stipulated in the previous paragraph within three months of the entry into force of the royal decree.

• *Real Decreto-ley 2/2018, de 13 de abril, por el que se modifica el texto refundido de la Ley de Propiedad Intelectual, aprobado por el Real Decreto Legislativo 1/1996, de 12 de abril, y por el que se incorporan al ordenamiento jurídico español la Directiva 2014/26/UE del Parlamento Europeo y del Consejo, de 26 de febrero de 2014, y la Directiva (UE) 2017/1564 del Parlamento Europeo y del Consejo, de 13 de septiembre de 2017* (Royal Decree-Law 2/2018 of 13 April 2018 (official gazette of 14 April 2018))
http://merlin.obs.coe.int/redirect.php?id=19129 ES

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FR-France

Conseil d'Etat dismisses appeal against abolition of advertising during children's programmes on France Télévisions' on-demand audiovisual media services

Legislation enacted on 20 December 2016 abolished commercial advertising during children's programmes on public-sector television channels. In application of this legislation, a Decree adopted on 22 December 2017 added Article 27-1 to France Televisions' contractual specifications. It is worded as follows: "Advertising spots in programmes primarily intended for viewing by children under the age of 12. The following may not include any advertising other than generic advertisements for goods and services in respect of the health and development of children: 1. Programmes primarily intended for viewing by children under the age of 12 that are made available to the public via the services referred to in Article 3(6); 2. All or part of the services referred to in Article 3(6) that are primarily intended for viewing by children under the age of 12". Article 3(6) of the same contractual specifications provides that "France Télévisions shall, either directly or through subsidiaries, edit on-demand audiovisual media services permitting its television programmes to be made available repeatedly to the public and more generally proposing an offer with additional content. The company shall develop an offer of communication services for the public online which shall extend, supplement or enrich the programmes available on the services listed above."

In respect of the present case, the SNRT-CGT France Télévisions trade union applied to the Conseil d'Etat for the cancellation of Article 3 of the Decree of 22 December 2017, which had added the above-mentioned provisions to France Télévisions' contractual specifications. In support of its demand, it submitted a preliminary question on constitutionality in respect of Article 2 of the aforementioned Act of 20 December 2016.

The Conseil d'Etat reiterated that, under the terms of Article L. 2131-1 of the Employment Code (Code du Travail), "The exclusive purpose of trade unions [was] to study and defend the rights and material and moral interests, both collective and individual, of the persons mentioned in their constitution." To justify its view, the applicant union argued that the ban on showing advertising during programmes primarily intended for viewing by children under 12 years of age was resulting in a loss of income in France Télévisions' budget amounting to EUR 19 million, for which it was not receiving compensation from the State. The Conseil d'Etat reiterated, however, that the provisions of the Decree of 22 December 2017 only applied to on-demand audiovisual media services and online ser-

vices aimed at the public. The income the company received for services showing advertisements during the repeat showing of programmes primarily intended for viewing by children under the age of 12 represented no more than a very small proportion of the total amount of its resources. The Conseil d'Etat found that, under the circumstances, the disputed provisions could therefore not be regarded as affecting the employment or working conditions of the company's employees.

The Conseil d'Etat also stated that the union's contesting of the constitutionality of the legislative provisions abolishing advertising directed at children under the age of 12 in all the programmes broadcast by France Télévisions by putting forward a preliminary question on their constitutionality had no effect on the admissibility of its application.

Consequently, since the applicant union had failed to provide any proof of its standing to call for the cancellation of Article 3 of the Decree of 22 December 2017, its application was judged inadmissible and was rejected, without any need to deliberate on the application for the preliminary question on constitutionality to be referred to the Constitutional Council.

• *Conseil d'État (5e ch.), 26 avril 2018 - SNRT-CGT France Télévisions* (Conseil d'Etat (5th chamber), 26 April 2018 - 'SNRT-CGT France Télévisions' trade union)
http://merlin.obs.coe.int/redirect.php?id=19097 FR

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Proposed legislation to combat fake news: Conseil d'Etat gives its opinion

On 19 April 2018 the Conseil d'Etat made public its opinion on the proposed legislation to combat fake news that is to be examined by Parliament in the next few weeks. Since the 2008 revision of the Constitution, the leader of either of the Assemblies may submit proposed legislation to the Conseil d'État for its opinion, and 2015 saw the end of the tradition of secrecy regarding such opinions.

The Conseil d'Etat observed firstly that "French law already contains a number of provisions aimed, in substance, at combating the circulation of fake news, following various separate paths of logic". Thus, combating fake news was a long-standing and recurrent concern on the part of the legislature. Recent news has, however, revealed that fake news is now being circulated according to new lines of logic and using different vectors. The Conseil d'Etat therefore admits that the present state of the law, particularly with regard to elections, does not necessarily make it possible to counter all the risks thrown up by these new phenomena. The Conseil d'Etat went on to note that the proposed legislation mentioned not only "fake news" but also "false information", which has a wider scope since it does not include the condition that the information at issue has already been divulged. With a view to making the text consistent and understandable, it is therefore suggested that the terms be harmonised and that the more effective notion of "fake news" be applied. In addition, to avoid any disproportionate infringement of freedom of expression, the Conseil d'Etat recommends that combating fake news be systematically limited to those cases in which it is established that the "news" is being circulated with the deliberate intention of causing cause harm.

Concerning Section 1 and the obligation of transparency during an election period, which requires platforms of any significant size to observe an obligation of additional transparency on pain of criminal sanctions, the proposed legislation requires them to disclose to their users the identity and capacity of parties paying them remuneration in return for the promotion of news content, together with the sums of money involved. After particular examination of the compatibility of this provision with EU law, the Conseil d'Etat felt that the limitation on freedom of trade was not disproportionate in relation to the objective of general interest of providing the population with enlightened information during election periods. It nevertheless suggested a number of amendments clarifying certain terms, including "news content", that were deemed insufficiently precise. The Conseil d'Etat also suggested that news content "connected with a debate of general interest" should be included. Concerning the new mechanism for urgent proceedings, the Conseil d'Etat went on to point out the difficulty of identifying "events constituting fake news" in legal terms (particularly when the courts were required to deliberate within a short space of time) and the uncertainty of the effectiveness of the procedure (action taken too late or even at the wrong time). The Conseil d'Etat nevertheless felt that this new legal remedy did not in itself constitute a disproportionate infringement of freedom of expression, and also made a number of comments aimed at achieving a better calibration of the new procedure.

The Conseil d'Etat also validated, albeit with a number of caveats, Section II of the proposed legislation, which amends the Audiovisual Communication Act of 30 September 1986. The French national audiovisual regulatory authority (Conseil Supérieur de l'Audiovisuel - CSA) will be able to refuse to conclude, or to unilaterally terminate, a convention with a legal entity under the control or influence of a foreign state if its service is likely to infringe France's fundamental interests. The Conseil d'Etat also validated the special new policing power attributed to the CSA, which would henceforth be authorised to suspend, until the end of voting operations, the broadcasting by any means of electronic communication of a service from a legal entity controlled or under the influence of a foreign state considered to be deliberately aiming to affect the accuracy of the upcoming ballot. The same

applied to extending the CSA's referral to the Conseil d'Etat under the urgent procedure with the aim of stopping the broadcasting by a services distributor (rather than merely a satellite operator) of a television service falling within France's field of competence if its programmes infringed any of the principles mentioned in Articles 1, 3-1 and 15 of the 1986 Act. Concerning Section III of the proposed legislation and the duty incumbent on platforms to cooperate in combating the circulation of fake news, on pain of criminal sanctions, the Conseil d'Etat advocated retaining no more than the obligation incumbent on IAPs and hosts to publish information on the resources that they devoted to combating the circulation of fake news. On the other hand, the Conseil d'Etat was not in favour of the obligation (under the proposed legislation) to set up a mechanism enabling anyone to report such content or the obligation to report to the public authorities any activities involving the circulation of fake news.

• *Avis du Conseil d'État, 19 avril 2018* (Opinion of the Conseil d'Etat, 19 April 2018)
http://merlin.obs.coe.int/redirect.php?id=19099 FR

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Copyright breached by audiovisual adaptation of autobiography

The Tribunal de Grande Instance (regional court) in Paris was asked to decide whether a film portraying the director's family history could constitute an infringement of the copyright relating to an autobiography written by his father a few years earlier.

In 2007, the plaintiff published an autobiography Téhéran-Paris, which tells the story of an Iranian man, describing his childhood, his activities as a political opponent of the Shah and Mullah regimes, his escape from Iran with his wife and son, and his arrival in France. After the author's son, a comedian and actor, wrote and directed the film Nous trois ou rien ("All Three of Us"), which tells his family's story, the plaintiff in 2015 brought a lawsuit against him and the film's producers and distributor for infringement of copyright and, in the alternative, parasitism. The publisher, claiming that the film breached its copyright because it was an unauthorised adaptation of the Téhéran-Paris book, demanded compensation of EUR 100,000 for the damage suffered, a ban on the continued exploitation of the film and the amendment of the work's title, author and publisher on the "declaration sheet" of the SACD (Société des Auteurs et Compositeurs Dramatiques - the French collective rights organisation).

The publisher argued that the different characteristics (narrative structure, locations, characters, stories and descriptions of the fate of certain characters) of the book were identical in the audiovisual work. Comparing the works in detail, it pointed out that 68 passages of the book had been meticulously reproduced in the film. In response, the defendants argued that the autobiographical material on which the book was based was free for anyone to use and that the book had been written in a historical register, while the film was written in a different, humorous style. Similarly, the narrative structure was different and the characters in the film were enriched compared to the book.

In its ruling of 22 March 2018, the court observed, firstly, that the common theme and biographical nature of the two works meant that there were bound to be similarities between the events described, the locations in which they took place and their main protagonists. Nevertheless, it held that copyright could have been infringed if the elements that had been copied made the original work unique and, by their nature, extent and systematic character, went beyond simple reminiscences resulting from a common source of inspiration.

In both the book and the film, the storyline followed the chronological order of the protagonists' lives. Since this was not an original structure, its use in the film did not infringe copyright. Similarly, the presence of the same characters and locations in both works was a necessary consequence of their biographical nature rather than of copyright breaches. Therefore, the originality of the Téhéran-Paris book did not lie in each event that it described, but in the choice of events from the author's life and the way in which they were illustrated through specific anecdotes. The court noted that no fewer than 35 scenes in the film reflected passages in the book. It considered that these similarities, through their nature and number, were the result not of simple reminiscences drawn from the common theme of the two works but of family stories heard by the defendant, the son of the biography's author, as he claimed. It noted that this filial relationship between the film and the book had been mentioned by the defendant himself in an interview with a national newspaper.

The film Nous trois ou rien therefore infringed copyright because it was an unauthorised adaptation of the literary work Téhéran-Paris. The alternative claims of unfair and parasitic competition were therefore dismissed as devoid of purpose. Fixed compensation of EUR 15,000 was awarded to the plaintiff, while the defendant was ordered to amend the film's SACD declaration sheet so that it mentioned the book on which it was based, as well as its authors and publisher. The court also ordered that its decision should be published.

• *TGI de Paris (3e ch., 1re sect.), 22 mars 2018, Les Editions de l'Atelier c/ M. H. Tabib, N. Dolle, SA Gaumont et a.* (Tribunal de Grande Instance de Paris (3rd chamber, 1st section), 22 March 2018, Les Editions de l'Atelier vs M. H. Tabib, N. Dolle, SA Gaumont and others) FR

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Reporting on current criminal proceedings: France Télévisions called to order

At its plenary assembly on 11 April 2018, the French national audiovisual regulatory authority (Conseil Supérieur de l'Audiovisuel - CSA) issued formal notice to France Télévisions to abide by the provisions of its contractual specifications with regard to the particular attention required when broadcasting news in connection with ongoing criminal proceedings. Referral had been made to the CSA following the broadcasting during the Envoyé Spécial programme last December of an item on women who had brought a complaint after being raped or sexually assaulted by their hierarchical superior. The larger part of the item was devoted to the case of one woman who had accused a (male) politician of group rape and who was a civil party to a case being heard at that time in the criminal courts that was receiving substantial attention in the media.

After examining the sequence at issue, the CSA found that there was no particular challenge to the presumption of innocence in favour of the accused party. It did find, however, that the combination of the credit given to the woman who was a civil party to the case, the replies of witnesses to questions, and the off-camera comments had rendered the report unbalanced, as its main focus had been on the charges brought against the politician in question.

Article 35 of France Télévisions' contractual specifications specifically provides that: "When current legal proceedings are referred to on air, the company must ensure, in its overall treatment of the case, that the case is treated in a measured manner [and with meticulousness and honesty; treatment of the case must not hamper the proceedings; and pluralism must be ensured by presenting the various submissions in the case, in particular by ensuring that the parties concerned or their representatives are given the opportunity to make their views known."

The CSA considered that the lack of a measured approach in referring to a current court case during a report, particularly as it had been broadcast just hours after the civil party concerned had been heard and before the jury had deliberated, constituted a failure to abide by these provisions, and consequently issued a formal notice against the public-sector audiovisual group.

• *CSA, décsion du 11 April 2018* (CSA, decision of 11 April 2018)
http://merlin.obs.coe.int/redirect.php?id=19128 FR

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Minister for Culture lists her three 'battles' in favour of French cinema

In a speech delivered on 18 April at a reception in honour of the French films selected for the next Cannes Film Festival, Minister for Culture Françoise Nyssen referred to her three "battles" in defence of the French cinema.

Firstly, this June will see the holding of a "session in favour of gender equality in the cinema", at which a series of measures will be discussed with all the representatives of the sector, beginning with the drawing-up of an equality charter, agreement with which would become a condition for receiving the Centre national du cinema et de l'image animée (French national centre for cinema, CNC) aid. The charter will have to broach the matter of equal pay, and a system of bonuses will be set up for those films that are particularly exemplary in terms of parity or the promotion of women to certain key posts within their teams. The Minister also said she wanted to create a fund to help young female directors worldwide to develop and produce their films. The fund would be open to female directors from anywhere in the world.

The Minister's second "battle" in favour of the cinema involved the support for film-making, in particular with the support from the CNC, almost half of which is selective aid that allows France to be "the" country of "auteur" cinema, and the home of filmmakers from all over the world. Increased tax credits also enabled France to attract a considerable level of investment. Lastly, the Minister announced that film-making would play a key role in the current reform of the public audiovisual sector.

The Minister's third "battle" in respect of the cinema lay in regulation, with current negotiations focusing on the Audiovisual Media Services Directive, and more particularly the quotas for European works imposed on VOD platforms and the fight to combat the delocalisation of channels and platforms. The Minister also reiterated that she was in favour of regulating mediation on media chronology, although no agreement appears to be forthcoming.

Lastly, the Minister indicated her determination to take action against all forms of piracy, by developing the "graduated response" mechanism and giving priority to the fight against pirate sites, so that all their sources would dry up and they would simply disappear. She announced that the HADOPI (Haute Autorité pour la Diffusion des Œuvres et la Protection

des Droits sur Internet - a Government body in charge of copyright enforcement online) would be compiling blacklists so that advertisers, payment services and browsers would be able to know which sites were illegal and stop dealing with them. The aim was to block or de-reference such sites, together with all mirror sites that were created when a principal site closed down. This power could be conferred on HADOPI, under the supervision of a judge, in order to address the two-fold requirement of the rapid, lasting suppression of piracy sites over time. The Minister recalled that "nothing like this has been thought of since HADOPI was created, which was nearly ten years ago", and reiterated her desire for the role and powers of HADOPI to be strengthened and, symbolically, for its name to be changed in order to mark the beginning of a new era.

• *Discours de Françoise Nyssen, ministre de la Culture, le 18 avril 2018* (Speech by Françoise Nyssen, Minister for Culture, 18 April 2018)
http://merlin.obs.coe.int/redirect.php?id=19098 FR

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Agreement on the Audiovisual Media Service Directive unanimously welcomed in France

Following trilateral discussions between the Parliament, the Council and the European Commission on the revision of the Audiovisual Media Services Directive (AMSD), which began almost a year ago, the agreement reached on 24 April 2018 has been unanimously welcomed by the French National Centre for Cinema and the Moving Image (CNC), the Higher Audiovisual Council (CSA) and the Minister of Culture, who labelled it "balanced and ambitious". Françoise Nyssen said that the text, which marks a new stage in audiovisual regulation, "is exactly what France wants as regards the promotion of cultural diversity, the financing of its creative industries and public protection". Under the agreement, European works will need to constitute at least 30% of the catalogues of video-on-demand services such as Netflix. At France's initiative, the Council and Parliament increased the 20% minimum quota that was originally proposed. The agreement also requires television channels and video-on-demand services to contribute to the funding of film-making in the countries that they target, regardless of where they are based. This will help to reduce the distortion of competition, prevent opportunistic relocation and protect the financing of French film-making. "In concrete terms, this means that, for the first time ever, Europe accepts the idea of including all foreign-based broadcasters that target our market within the ecosystem of the European cultural exception," said Dominique Bredin, CNC president.

Lastly, the scope of audiovisual regulation is extended to cover video-sharing platforms such as YouTube, which were previously excluded. From now on, these platforms will need to take steps to protect minors and combat hate speech and violent content, including such material disseminated via live broadcasts. The member states' audiovisual regulators will therefore be required to monitor the implementation and effectiveness of these measures. For its part, the CSA warmly welcomed the extension of the directive's scope to include video-sharing platforms, social networks and web-based live broadcasting platforms. It was pleased that rules had been introduced for these new services and that the rules governing linear and on-demand audiovisual media services (AVMS) had been harmonised.

The Minister of Culture announced that the AMSD would be transposed into French law through an audiovisual bill, to be tabled at the end of 2018.

• *Communiqué de presse du Ministère de la Culture* (Ministry of Culture press release)
http://merlin.obs.coe.int/redirect.php?id=19100 FR
• *Communiqué de press du CSA* (CSA press release)
http://merlin.obs.coe.int/redirect.php?id=19101 FR

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GB-United Kingdom

First English "right to be forgotten" trial against Google LLC

On 13 April 2018, the English High Court made its first de-listing order against Google LLC. The Court gave judgment after the trial of two claims based on the right to have personal information "de-listed" or "de-indexed" by the operators of Internet Search Engines (for the pre-trial hearing, see IRIS 2018-3/16).

The two unrelated claimants, NT1 and NT2, who were anonymised, received convictions many years ago in relation to their business activities. The convictions in these cases are now "spent", that is to say, can be effectively ignored after a certain amount of time under the terms of the Rehabilitation of Offenders Act 1974. Both claimants complained of results returned by Google Search that featured links to third-party reports about their convictions. They sought orders requiring the blocking and/or erasure of their data on the grounds that such information was "not just old, but out-of-date, irrelevant, of no public interest and/or otherwise an illegitimate interference with their rights." Google argued that the inclusion of such results was and remained legitimate.

NT1's claim related to three links returned by Google Search, providing information about his conviction in the 1990s of conspiracy to account falsely and his four-year custodial sentence. NT2 sought to de-list eleven links to publications about his conviction more than ten years ago of conspiracy to carry out surveillance and his imprisonment for six months. The two claims were tried separately and in turn. They involved, however, the same judge (Warby J.) and the outcomes with respect to each cause of action matched each other.

Warby J. dismissed Google's argument that either claim was a defamation claim in disguise and an abuse of the Court's process. The judge also ruled that NT1 had failed to make out any of the complaints of inaccuracy he had made in respect of the three links, but upheld NT2's single inaccuracy complaint in relation to a "misleading" national newspaper item about the claimant's criminality. The Court assessed NT2 as "an honest and generally reliable witness," whose evidence was accepted on most of the points of dispute.

A significant ruling in the judgment was that Google could not rely on the section 32 exemption of the Data Protection Act 1998 (DPA) regarding the "special purposes" of journalism. Google had not processed this data for journalistic purposes, or alternatively, not only for these purposes. Warby J. accepted Google's argument that the concept of journalism in EU law is a broad one, but concluded that it is "not so elastic that it can be stretched to embrace every activity that has to do with conveying information or opinions".

Google had difficulty in showing the existence of a condition in Schedule 3 of the DPA which justified its processing of "sensitive" personal data (in these cases, relating to criminal convictions). The judge found that only condition 5 was satisfied: "the information contained in the personal data has been made public as a result of steps deliberately taken by the data subject." Warby J. held that, in line with the open justice principle, a claimant's criminal conduct is a positive step towards making information about that offence public.

In Warby J.'s analysis, the issue of whether Google's processing breached the remaining requirements of the DPA collapsed into the application of the CJEU's Google Spain balancing exercise (see IRIS 2014-6/3). On the facts of NT1's case, some weight was attached to the claimant's post-conviction conduct: NT1 had shown difficulty in accepting his guilt, had misled the public and the Court, and had shown no remorse over any of these matters. He remained in business and, according to the judge, the information served the purpose of minimising the risk that he would continue to mislead, as he had done in the past. Ultimately, NT1 was not successful in obtaining orders requiring Google to de-list. The claim for the misuse of private information also failed and there could be no question of compensation.

A de-listing order was, however, made in the case of NT2, whose conviction was not one involving dishonesty and was based on a guilty plea. He had expressed genuine remorse and there was no evidence of any risk of repetition. His ongoing business activities were in a field quite different from that in which he had been operating at the time. His past offending was of little relevance to anybody's assessment of his suitability to engage in relevant business activity now (or in the future) and there was no real need for anybody to be warned about that activity. However, Warby J. ruled in NT2's case that his claim for misuse of private information had been successful but no award of damages was appropriate because Google was entitled to rely on the s 13(3) DPA defence that it took reasonable care.

• NT1 & NT2 v Google LLC [2018] EWHC 799 (QB) (13 April 2018)
http://merlin.obs.coe.int/redirect.php?id=19115 EN

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Regulator finds BBC in breach of due impartiality rule for failure to challenge climate change sceptic

The Ofcom Broadcasting Code now applies to the BBC and complaints of breaches are considered by Ofcom, the UK communications regulator (see IRIS 2017-5/23). Two complaints were made by leading scientists about an interview on climate change with Lord Lawson, former Chancellor of the Exchequer, a leading climate change sceptic, on the BBC's flagship news and current affairs radio programme, Today. The complainants considered that the BBC had breached the Code's requirements of due accuracy and due impartiality in news and that significant mistakes in news should normally be acknowledged and corrected quickly and appropriately.

As one of five interviewees before the premiere of Al Gore's film "An Inconvenient Sequel", Lawson had claimed that we subsidise renewable energy but tax fossil fuels, and that "all of the experts" say that there has not been an increase in extreme weather events; that over the last 10 years, the average world temperature had slightly declined. The complainants maintained that these statements had not been properly challenged. The BBC accepted that it had not met the standards set out in its Editorial Guidelines; it has since taken a number of actions in response, for example, publishing a report on the BBC News website highlighting criticisms of the interview and identifying inaccuracies in some of the content, and examining some of the more contentious claims in the Today programme on the following day. The programme makers had sought to achieve due impartiality by giving appropriate weight to other perspectives.

The BBC had had to consider an earlier complaint about an interview with Lord Lawson on the Today programme in 2014; at that time, the complainant claimed that as Lord Lawson had been in discussion with an eminent climate scientist, this had given listeners the impression of parity between their views. The BBC then accepted that it should have made it sufficiently clear that Lord Lawson represented a minority view on the science of climate change so that listeners could judge his contribution accordingly.

On the recent complaints, Ofcom found that the first statements about the subsidisation and taxation of different fuels were correct on the position in the United Kingdom, though not globally, so there had been no breach of the due accuracy requirements. However, the statements maintaining that all the experts say that there has not been an increase in extreme climate events and that the average world temperature has slightly declined were incorrect and were not sufficiently challenged. Ofcom was particularly concerned, as this breach involved the same contributor discussing the same topic on the same programme as in 2014. Both broadcasts had lacked clarity about the minority position of Lord Lawson's views on the science of climate change. Thus, the programme was not duly accurate. However, there had been no breach of the requirement to acknowledge mistakes appropriately, as the BBC had made attempts to do so.

• Ofcom; 'Today, BBC Radio 4, 10 August 2017, 06.00', Ofcom Broadcast and On Demand Bulletin, Issue 351, 9 April 2018, p. 32
http://merlin.obs.coe.int/redirect.php?id=19116 EN

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The Sikh Channel's live health show presented by a homeopathic practitioner infringed Broadcasting Code

On 23 April 2018, Ofcom, the UK communications regulator, issued a notable decision on the promotion of homeopathic medicine on television, finding that the programme failed to advise the audience to also seek independent medical advice. The decision concerned the Sikh Channel, which is a faith and cultural television channel. It broadcasts in Punjabi and English. The Sikh Channel Community Broadcasting Company Limited, registered in Birmingham, England, is the licensee.

A viewer complained about a show, Live: Herbal Medicine, aired in June 2017. Although the channel broadcasts in English and Punjabi, most of this programme was in Punjabi. Ofcom commissioned a translation into English, which was accepted by the Sikh Channel. The basis of the complaint was that the programme promoted the presenter's homeopathic clinic. Throughout most of the broadcast, a banner (in English) was shown near the bottom of the screen which said: "Live: Herbal Medicine - To take part in the show please call: [studio telephone number] Contact: [telephone numbers of the presenter's homeopathic clinic]". The banner also included the promotion of homeopathy and the recommendation of medicines, without also advising the audience to seek a general practitioner's opinion about the medicines (acknowledged by the licensee as a "key failure" in this matter). Furthermore, the licensee recognised that the presenter's promotion of his own services was an infringement of the rules.

Ofcom considered that this material raised potential issues under the following Code rules: Rule 2.1, where generally accepted standards must be applied to the contents of television services so as to provide adequate protection for members of the public from the inclusion in such services of harmful material; Rule 9.4, which states that products, services and trademarks must not be promoted in programming"; and Rule 9.5, which provides that "no undue prominence may be given in programming to a product, service or trademark. Undue prominence may result from: the presence of, or reference to, a product, service or trademark in programming where there is no editorial justification; or the manner in which a product, service or trademark appears or is referred to in programming". The Sikh Channel said that after Ofcom had made it aware of the complaint, it withdrew all further programmes which featured the presenter, and that there should have been a warning to viewers that his views were his own, and not endorsed by the channel. It also said that it had "no plans to make any further such broadcast" and the licensee acknowledged "it should not have taken a complaint from Ofcom for [it] to react" and that it "should have been more vigilant".

Ofcom found the channel in breaches of Rules 2.1, 9.4 and 9.5. Notably, Ofcom expressed its concern with the presenter's claims to be able to treat a number of serious illnesses and conditions, including cancer, schizophrenia, heart conditions and Parkinson's disease, and with the fact that the programme appeared to directly encourage viewers to follow the presenter's advice without first consulting their own GP or seeking appropriate independent medical advice. Ofcom concluded by reminding the licensee that, under the terms of its Ofcom broadcast licence, it is responsible for ensuring that the material it broadcasts complies with the Code and that it must have in place sufficiently robust compliance procedures."

• Ofcom, "Live: Herbal Medicine Sikh Channel, 7 June 2017, 16:00", Ofcom Broadcast and On Demand Bulletin, Issue 352, 23 April 2018, p. 7
http://merlin.obs.coe.int/redirect.php?id=19117 EN

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IPSO decision on breach of Editors' Code

On 5 April 2018, the Independent Press Standards Organisation (IPSO), one of the two UK press self-regulatory bodies, issued a notable decision on accuracy in news reporting. The decision concerned a complaint made by an East London local authority, Tower Hamlets Borough Council, about an article the Times newspaper headlined "Judge rules child must leave Muslim foster home", part of a series dealing with fostering arrangements. The sub-headline referred to the judge praising the newspaper for "exposing council's failure" and stated that "the judge ordered the council to conduct an urgent investigation into issues reported by the Times". The underlying concern reported by the Times was the cultural appropriateness of the placement. In the article complained of, the Times wrote that the child was "removed from her Muslim foster parents yesterday and reunited with her family as a judge urged councils to seek 'culturally matched placements' for vulnerable children". The Council complained that the reporting had created a false impression and had not reflected the fact that the Council had made the application for the child to be placed with the maternal grandmother and moreover implied that the judge's comments constituted criticism directed at the Council, a point which the Times disputed. The Council further argued that the report breached the accuracy requirements because the newspaper had not reported that the child's grandmother was also a Muslim. The Times argued that the religion of the grandmother was disputed and in any event there was a difference between living with a non-practising Muslim and with Muslims who adhered to what appeared to be a conservative form of the religion. On this basis, the Times denied that the omission had been misleading.

The IPSO Committee found that the article was misleading. The suggestion conveyed by the article overall was that there was a failure by the Council in the placement that it had organised. Further, while there may have been a delay in carrying out the necessary checks on the grandmother before the child could be placed with her, the article went further. It implied that the judge had found against the Council as regards its assessment of the child's needs in organising the foster placement. This was not what the court had decided, or even what might be implied by the ruling. In this, IPSO Committee found a breach of Clause 1(i) of the Editors' Code - that the "Press must take care not to publish inaccurate, misleading or distorted information or images, including headlines not supported by the text" and, as the Times had made no attempt to correct matters, there had also been a violation of Clause 1(ii) - the obligation to correct and (where appropriate) print an apology (see IRIS 2018-3/19).

The IPSO Committee took a different view as regards the omission of the grandmother's religion. In this, the fact that it was accepted by all parties that the grandmother was not religiously observant was significant. IPSO also did not accept that it had been misleading to raise questions about cultural appropriateness without reporting also that the child was well taken care of, as the Council had argued. The IPSO Committee concluded that that assessment did not mean that statements regarding concerns about cultural appropriateness that the newspaper raised were untrue. The IPSO Committee also did not find that the article's claim that the complainant had tried to "block the story" breached Article 1(i). The Council had complained that certain documents had been unlawfully leaked so that the publication of the article would be an offence. Further, a security guard had tried to stop a journalist from attending the hearing; the report of this, however, was not imputed to the Council. The IPSO Committee determined that the adjudication should be published in full on page 6 of the newspaper, or further forward. The accompanying headline was to make clear that IPSO has upheld the complaint against The Times, and refer to its subject matter. The wording of the publication was to be agreed in advance. The adjudication was also to be published on the Times's website, appearing in the top 50% of stories for 24 hours.

• Independent Press Standards Organisation, Decision of the Complaints Committee 20480-17 Tower Hamlets Borough Council v The Times, 5 April 2018
http://merlin.obs.coe.int/redirect.php?id=19118 EN

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IE-Ireland

Broadcasting Authority allocates EUR 5.9 million under Broadcasting Funding Scheme

On 10 April 2018, the Broadcasting Authority of Ireland (BAI) announced the allocation of EUR 5.991 million to projects under its broadcasting funding scheme, "The Sound & Vision 3 Broadcasting Funding Scheme." The scheme is operated under section 154 of the Broadcasting Act 2009, which requires the BAI to "prepare" a funding scheme to support a number of objectives, including new television or radio programmes including feature films, animation and drama on Irish culture, heritage and experience, programmes to improve adult or media literacy, programmes which raise public awareness and understanding of global issues impacting on the State and countries other than the State, and the development of archiving or programme material produced in Ireland (for previous schemes, see IRIS 2017-7/23, IRIS 2016-6/17 and IRIS 2015-4/13).

The funding was allocated to 126 radio and television projects following a detailed assessment process, with just over EUR 5.368 million allocated to 33 television projects, while some 93 radio projects will benefit from funding of EUR 622,000. A total of 231 applications seeking total funding of almost EUR 17 million were made in this funding round of the scheme. The number of applications and the amount of funding sought was "slightly lower" than the previous rounds, with documentary by far the most popular format for which funding was sought by applicants in radio and television. The BAI stated that the applicants comprised a good spread of broadcasters associated across commercial, community and public service radio and television.

Commenting on the announcement, Chief Executive of the BAI Michael O' Keefe stated: "The implementation of the funding rounds under Sound & Vision 3 assists the BAI in achieving its mission to foster diverse and culturally relevant content for Irish audiences. It is also a key support in delivering on the BAI strategic themes of Promoting Plurality & Diversity, Enhancing Innovation and Sectoral Sustainability, and Empowering Audiences" (see IRIS 2017-4/25).

• Broadcasting Authority of Ireland, "More than €5.9m allocated to 126 projects under Sound & Vision Scheme", 10 April 2018
http://merlin.obs.coe.int/redirect.php?id=19085 EN

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Broadcasting Authority finds that media group's ban on Irish Times journalists raises no compliance issues

On 28 March 2018, the Broadcasting Authority of Ireland (BAI) concluded its consideration of a ban imposed by an Irish media group on journalists from the Irish Times newspaper from appearing on any of its stations. It follows a complicated controversy arising from a programme broadcast in September 2017, and has resulted in four decisions from media regulators. The issue arose on 6 October 2017, when Communicorp Group Ltd., an Irish media group which holds five broadcasting licences with the BAI (including the broadcasters Newstalk FM and Today FM) published a statement confirming that "no Irish Times journalist will be accepted as a contributor on any of its stations until further notice." Communicorp stated that an Irish Times article in September 2017 concerning Newstalk FM had constituted a "deliberate and damaging attack on both the station and its staff" and that as the Irish Times had refused to apologise, the station "has no choice but to make this decision".

The Irish Times article on 12 September 2017 concerned a controversy over a Newstalk FM programme broadcast four days earlier on 8 September 2017. The programme presenter had made comments concerning the sexual assault of a woman in the UK and issues of responsibility. Indeed, on 6 February 2018, the BAI upheld a complaint over the programme under the Broadcasting Act 2009, finding 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" (see IRIS 2018-4/28).

Following publication of The Irish Times article, Communicorp also made a complaint to the Press Council of Ireland. In December 2017, the sub-committee of the Press Council of Ireland rejected the complaint, finding that The Irish Times had taken sufficient remedial action to resolve the complaint. The Managing Editor of Newstalk sought and was granted a right of reply on behalf of Newstalk's management team and its employees, and the right of reply was published by the Irish Times four days after the original article and was of a similar length to the original article. The article was held to be an opinion piece which therefore had enjoyed a wide measure of protection under the Preamble to the Code of Practice. On 9 March 2018, following an appeal by Communicorp, the Press Council of Ireland upheld the Press Council sub-committee's decision in full.

After Communicorp's statement that it would be banning contributors from The Irish Times, the BAI requested that its Compliance Committee consider whether any issues arose in respect of compliance by the contractor stations with the statutory provisions and the terms of the individual contracts held with the BAI. Following this process, the Committee concluded that, while the prohibition put in place by Communicorp was regrettable, no compliance issues arose from the prohibition in the context of the provisions of the five contracts held by Communicorp, the provisions of the 2009 Broadcasting Act and the principles and rules set out in the BAI Code of Fairness, Objectivity and Impartiality in News and Current Affairs. In particular, it was the opinion of the Committee that there was no evidence to support the view that the prohibition constituted an impediment to the ability of the contractors for the five services in question to meet their programming commitments or the warranties set out in each contract. However, the Committee also stated that the ban was contrary to the spirit of one of the key components of the BAI Mission to "promote a plurality of voices, viewpoints, outlets and sources in Irish media" and expressed its unease and regret at this outcome. The BAI considered the Committee's views, and agreed with its findings. However, it also shared "unease" at the situation, and has decided that it will seek to address the question of the operation of prohibitions of this nature in general policy terms through the proposed introduction of the BAI Plurality Policy and revision of the current Ownership and Control Policy.

• Broadcasting Authority of Ireland, "BAI Statement re. Communicorp Group", 28 March 2018
http://merlin.obs.coe.int/redirect.php?id=19086 EN
• Press Council of Ireland, "Communicorp and The Irish Times", 9 March 2018
http://merlin.obs.coe.int/redirect.php?id=19087 EN
• Broadcasting Authority of Ireland, Broadcasting Complaint Decisions, 6 February 2018, p. 30
http://merlin.obs.coe.int/redirect.php?id=18978 EN
• Communicorp Group Ltd., "Statement from Communicorp", 6 October 2017
http://merlin.obs.coe.int/redirect.php?id=19088 EN

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IT-Italy

Landmark Decision in Wikimedia v. Cesare Previti Concerning ISPs' liability for online defamatory content

On 19 February 2018, the Court of Appeal of Rome published the appellate decision in the case between the Wikimedia Foundation and Mr. Cesare Previti, a former Italian politician. The case arose when Mr. Previti retrieved purportedly defamatory statements included in his biography on the online encyclopaedia Wikipedia, whose services are provided by the Wikimedia Foundation, based in San Francisco. He sent a take-down notice to Wikimedia, but received no response. Accordingly, Mr. Previti sued Wikimedia, seeking to have the latter censured for its failure to promptly remove the allegedly defamatory content reported.

The first-instance Court of Rome dismissed Mr. Previti's demands it a decision published on 20 June 2013. The judge stated that the Italian E-Commerce Decree (Legislative Decree no. 70 of 2003) could not be applied to Wikimedia, because the latter is not based in the European Union, and Article 1, par. 2, letter d) of the Decree excludes the applicability of its provisions to services established outside the European Economic Area. Moreover, the judge ruled that Wikimedia's liability could be established under the general provisions on tort claims enshrined in Sections 2043 and following of the Italian Civil Code. Mr Previti in fact had not been able to prove any subjective element (wilful intent or negligence) in Wikimedia's allegedly illicit activity. It was therefore impossible to ascertain the presence of joint liability on the part of Wikimedia and the author of Mr Previti's biography, the latter being solely liable for any unlawful content. The respondent could not in fact be considered liable for failure to ensure the correctness/unlawfulness of the information disseminated via its service. This was even more true if one were to consider that Mr. Previti could have avoided any damage caused had he himself accessed and amended his personal biography on Wikipedia.

Mr. Previti lodged an appeal against the Court of Rome's decision. Mr. Previti argued that the Court of Rome had erred in not considering the ex-parte communication sent to Wikimedia, which allegedly proved the latter's co-liability in the defamation conduct. Furthermore, he argued that Wikimedia's ability to intervene in the services provided via its site confirmed its capacity to generally control its content and therefore seemingly constituted further proof of its joint liability along with the biography's author under the Italian principles of tort law. Mr. Previti attempted also to frame Wikimedia's activities under Section 2050 of the Italian Civil Code, which provides for tort liability for so-called "dangerous activities" and exonerates the damaged party from the burden of proving a subjective element.

The Court of Appeal entirely rejected Mr. Previti's appeal and fully confirmed the first-instance decision, albeit correcting its reasoning. Indeed, even though Wikimedia is based outside the European Economic Area, the E-Commerce Decree provides a set of rights and obligations that through the years have become part of the legal background applicable to all ISPs such as Wikimedia. Since there is no provision under Italian law that imposes upon providers an obligation to monitor their services, no liability can be recognised for failure to prevent the alleged defamation from occurring.

On the liability regime, the appellate judges clarified that hosting providers can be held liable only after they are made aware of the presence of illicit activities/content on the services that they host, making clear that no general monitoring obligation exists. In contrast to what happens with copyright/IP claims, defamation complaints raised with ex parte notices cannot reasonably be cited to firmly deem a hosting provider like Wikimedia "on notice" of the presence of unlawful content, or be considered to trigger its obligation to take down content in order to avoid liability. This circumstance separates the case at hand from the jurisprudence developed in connection with copyright/IP claims. Similarly, the ex-parte notices sent by Mr. Previti do not demonstrate the subjective element (wilful intent or negligence) required by Italian tort law to recognise any liability whatsoever on the part of Wikimedia. Indeed, Mr. Previti's objections were absolutely generic and unsupported, while Mr. Previti's biography on Wikipedia was based on appropriate evidence, such as case law citations. Therefore, no element of the crime of defamation exists. The alleged clear unlawfulness of a certain statement is insufficient to deem Wikimedia jointly liable from a criminal law perspective. The Court of Appeals additionally clarified that if Wikimedia had failed to comply with a specific take-down order issued and properly served by the relevant administrative/judicial authority under

the E-Commerce Decree, it could have suffered consequences also under criminal law.

• *Corte d'Appello di Roma, sentenza n. 1065/2018, pubblicata il 19 febbraio 2018, R.G. 4312/2013* (Court of Appeals of Rome, ruling no. 1065/2018, published on 19 February 2018, docket no. 4312/2013)
http://merlin.obs.coe.int/redirect.php?id=19119 IT

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Court upholds fine imposed on website for failing to prevent minors from viewing violent erotic content

On 13 March 2018, the District Court of Gelderland upheld a fine imposed on a website by the Dutch Media Authority (Commissariaat voor de Media) (CvdM) for failing to take (technical) measures that would prevent minors below the age of 16 from viewing violent erotic content. The fine was reduced by the court for the reason that the reasonable term for adjudication had been exceeded, thereby violating the fundamental right to a fair trial.

The claimant makes and operates websites which provide erotic content, including videos, pictures and written stories. The claimant also concluded agreements with suppliers for the provision of content. The CvdM found violent erotic material on the claimant's website [U+2012] namely, two videos entitled "Teenager raped by four men" and "Tied up and shockingly raped". These videos had been accessible without any (technical) age verification measure and had immediately started playing upon the webpage being opened. According to the CvdM, these videos could seriously harm the physical, mental and moral development of minors below the age of 16. As such, the claimant had breached the Media Act, for which the Commissioner imposed a fine of EUR 75,000.

The claimant contested the categorisation of "on demand commercial media service" under the Media Act. According to the claimant, her website only functioned as a platform, for which she had no editorial responsibility. The agreements concluded with the suppliers of content left no room for the claimant to refuse to allow content on the website. According to the court, the agreements did not obligate the claimant to place the content offered by the suppliers. Moreover, it had been demonstrated that the claimant viewed the content for reasons of classification before placing it on the website. For these reasons, the court found that the claimant exercised effective control over the offering of media content for the website, for which she bore editorial responsibility.

The claimant furthermore argued that the principle of lex certa (foreseeability) had been violated, arguing that the legal provision applied did not clearly describe the prohibited conduct. The court found that the conduct of the claimant had clearly violated the rule of Article 4.6(2) of the Media Act. It did not fall within a grey area of application. Moreover, the fact that a rule had such a grey area did not indidated a violation of the lex certa principle Other arguments advanced by claimant also failed.

The court reduced the fine for the reason that the reasonable term for adjudication had been exceeded, thereby violating the fundamental right to a fair trial under Article 6 of the Convention of for the Protection of Human Rights and Fundamental Freedoms (ECHR). Under ECHR case law, in the case of a punitive sanction, the reasonable term is exceeded where a court of first instance has not given judgment within two years of the claimant being notified of the fine. In this case, the term was exceeded by more than twelve months. Therefore, the court reduced the fine to EUR 65,000.

• *Rechtbank Gelderland 13 maart 2018, ECLI:NL:RBGEL:2018:1112* (District Court of Gelderland 13 March 2018, ECLI:NL:RBGEL:2018:1112)
http://merlin.obs.coe.int/redirect.php?id=19090 NL

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Proposal for an amendment of the Act on supervision of collective management organisations

On 12 April 2018, the Dutch legislature published a proposal for an amendment of the 2003 Act on the Supervision of Collective Management Organisations of Authors' Rights and Neighbouring Rights (Wet toezicht collectieve beheersorganisaties auteurs- en naburige rechten). The main aim of the amendment is to increase the effectiveness of the supervision of the collective management organisations and to change the funding system for that supervision. Collective management of authors' rights and neighbouring rights in the Netherlands is carried out by collective management organisations and independent management entities. These organisations supervise the use of materials of rights holders and collect compensation for the use of such materials; that compensation is the distributed to the rights holders. One of the advantages of such a system for users of protected material is that they only have to engage in contracts with one organisation and not with several rights holders.

The Act on the Supervision of Collective Management Organisations of Authors' Rights and Neighbouring Rights contains rules that collective management organisations and independent management

entities have to comply with. The Supervisory Board of Collective Management Organisations of Authors' Rights and Neighbouring Rights (College van Toezicht collectieve beheersorganisaties Auteurs- en naburige rechten) is appointed to supervise these organisations regarding their compliance with the rules. One of the amendments ensures that the Board will be able to intervene more quickly. Currently, the Board must give advice to the collective management organisation before it is authorised to instruct the collective management organisations or impose a fine. This obligation will no longer exist under the amended Act, with the result that the Board will be able to exercise supervision in a more effective manner. Moreover, the Board will be able to exercise reinforced, targeted supervision if it has legitimate reason to doubt a collective management organisation's policy. If the Board is of the opinion that change is necessary, it will be authorised to compel improvements by means of an improvement plan or to demand behavioural change within a short amount of time.

The Amendment Act also contains provisions that protect the collective management organisations. The scope of prior supervision is clarified in order to avoid legal uncertainty among the organisations. Moreover, the Act provides for a confidentiality clause regarding information concerning the collective management organisations. It forbids the Board from giving out information to citizens on request that the Board holds for the purpose of the its duty of supervision. Furthermore, the Dutch legislature proposes that the supervision will no longer be fully funded by taxation income, but that the costs of supervision will partly be borne by the collective management organisations and independent management entities themselves. In conclusion, this proposal seeks to ensure that the Supervisory Board of Collective Management Organisations can act with sufficient means and capacity when there is a risk of a violation of the rules [U+2012] if necessary by imposing effective and deterrent sanctions. On the other hand, the proposal aims to ensure that collective management organisations are able to carry out their tasks without experiencing unjustified impediments arising from the supervision.

• *Wijziging van de Wet toezicht en geschillenbeslechting collectieve beheersorganisaties auteurs- en naburige rechten* (Amendment of the Act on supervision and dispute resolution of collective management organizations of authors' rights and neighbouring rights, 12 April 2018)
http://merlin.obs.coe.int/redirect.php?id=19120 NL

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The Law on public service broadcasting back to Parliament

The Romanian Senate (the Upper Chamber of the Parliament) passed on 3 April 2018 the Law amending Article 19 the Law no. 41/1994 on the organisation and functioning of the Romanian Radio Broadcasting Society and the Romanian Television Society, the public broadcasters (see, inter alia, IRIS 2013-5/37, IRIS 2013-10/36, IRIS 2014-1/38, IRIS 2014-2/30, IRIS 2014-4/25, IRIS 2014-6/30, IRIS 2014-7/30, IRIS 2015-6/33, IRIS 2015-8/26, IRIS 2016-5/28, IRIS 2017-3/26, IRIS 2017-8/31, IRIS 2017-10/31, IRIS 2018-1/35 and IRIS 2018-2/30).

The decision of the Senate was final. The Lower Chamber (the Chamber of Deputies) had tacitly passed the draft law on 21 February 2018. The modification was proposed by Eugen Tomac, an MP from the Popular Movement Party of the opposition.

The new version of Article 19 (1) rules that the members of the Board of Administration of the Romanian Radio Broadcasting Corporation and the Board of Administration of the Romanian Television Corporation shall be appointed by a vote of the majority of the deputies and senators present at a joint session of the two Chambers. Previously, the members had been appointed by a qualified majority vote (50% + 1) of the total number of deputies and senators of the Romanian Parliament.

The new version of Article 19 (2) a) provides that the joint parliamentary groups of the two Chambers shall submit proposals for ten seats, according to the political configuration and the respective parties' weight in Parliament. This means that the two Boards of Administration will be composed of 15 members each, instead of 13 members, as at present. Under the existing wording of Law no. 41/1994, Parliament proposes eight members of the Boards of Administration. The remaining five members are designated by the President of Romania (one seat), the Romanian Government (one seat), the parliamentary group of national minorities (one seat), and the employees of the two public broadcasters (two seats). The amendment's sponsor in Parliament argued that not all the parliamentary groups are now represented on the Boards of Administration, which means that the political configuration of Parliament is not completely refleted in the composition of the Boards of Administration of the public radio and television broadcasters.

• *The Propunere legislativă pentru modificarea art.19 din Legea nr.41/1994 privind organizarea şi funcţionarea Societăţii Române de Radiodifuziune şi Societăţii Române de Televiziune - expunerea de motive* (Draft Law on amending the Art. 19 of the Law no. 41/1994 on the organization and functioning of the Romanian Radio Broadcasting Society and the Romanian Television Society - statement of reasons)
http://merlin.obs.coe.int/redirect.php?id=19121 RO

• *The Propunere legislativă pentru modificarea art.19 din Legea nr.41/1994 privind organizarea şi funcţionarea Societăţii Române de Radiodifuziune şi Societăţii Române de Televiziune - forma adoptată de Camera Deputaţilor* (Draft Law on amending the Art. 19 of the Law no. 41/1994 on the organization and functioning of the Romanian Radio Broadcasting Society and the Romanian Television Society - form adopted by the Chamber of Deputies)
http://merlin.obs.coe.int/redirect.php?id=19122 RO

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Initiatives to modify the Audiovisual Law

More initiatives to modify the Audiovisual Law no. 504/2002 with further modifications and completions were or are discussed in the Romanian Parliament (see inter alia IRIS 2013-3/26, IRIS 2014-1/37, IRIS 2014-7/29, IRIS 2014-9/26, IRIS 2015-10/27, IRIS 2016-2/26, IRIS 2016-10/24, IRIS 2017-1/30, IRIS 2017-7/28).

The Romanian Senate (upper chamber of the Parliament) rejected on 19 February 2018 a proposed combined modification of the Law no. 148 of July 26, 2000, regarding the advertising and of the Law no. 504/2002 on the audiovisual. The decision of the Senate was final. The draft law had been approved by the Chamber of Deputies (lower chamber of the Parliament) on 28 June 2016. According to the initiators, the draft law was intended to limit the ads for gambling, because of the possible addiction to these games especially of young people.

According to a new proposed Article 131 to the Law no. 148/2000, the advertisement for gambling should be permitted only inside spaces specially designed for this kind of activity or in magazines addressed to gamblers. The initiators had also proposed a new paragraph (9) after Article 29 (8) of the Law no. 504/2002 on the audiovisual, according to which the audiovisual commercial communications intended for gaming is forbidden.

On the other hand 55 Romanian MPs coming from all the political groups tabled on 12 March 2018 a draft law for the modification and completion of the Audiovisual Law. They proposed to add a new paragraph (4) to the Article 421 of the Audiovisual Law, according to which, in order to ensure the right of access to the audiovisual media services of the hearing impaired, the programs of television programs with national and local coverage will ensure the Romanian subtitling of the Romanian audiovisual works, such as cinematographic films or films made for television - series and documentary films.

The initiators declared that in Romania there are 30,000 of deaf or hearing impaired persons, who have to be protected and offered equal access to social life as the people without disabilities have. The draft law is in line with the UN Convention on the rights of people with disabilities, ratified by Romania in 2011, added the initiators.

• *The Propunere legislativă pentru modificarea şi completarea Legii nr.148 din 26 iulie 2000, privind publicitatea precum şi a Legii nr.504/2002 a audiovizualului* (Draft law for amending and completing the Law no. 148 of July 26, 2000, regarding the advertising and the Law no. 504/2002 on the audiovisual) RO

• *The Propunere legislativă pentru modificarea şi completarea Legii audiovizualului nr. 504/2002* (Draft Law on the modification and completion of the Audiovisual Law no. 504/2002)
http://merlin.obs.coe.int/redirect.php?id=19092 RO

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Joint Statement on Correct and Objective Public Information and Respect for the Rights of National Minorities

The members of the National Audiovisual Council (Consiliul Naţional al Audiovizualului [U+2012] CNA) and the representatives of the broadcasters of Romania met and issued on 23 January 2018 a Joint Statement on Correct and Objective Public Information and Respect for the Rights of National Minorities (see, inter alia, IRIS 2017-4/31 and IRIS 2017-6/27).

The Statement was triggered by the fact that in 2018 Romania celebrates 100 years since the territories inhabited predominantly by Romanians united in a national state [U+2012] causing historical disputes with neighboring states and some national minorities [U+2012] and that numerous breaches of the provisions of the audiovisual legislation occurred in recent times. The Council has found that mainly the Article 3 (2) of the Audiovisual Law no. 504/2002, as well as the Article 47 and 70 of the Audiovisual Code (CNA Decision no. 220 /2011) were breached by the broadcasters. The goal of the meeting was to share ideas about the best editorial means to treat subjects which could affect the rights of the minorities of all kind.

The Council and the representatives of broadcasters declared they believe that particular attention should be paid to the manner in which different events are reflected on radio and television stations, with due respect for human rights and fundamental rights. It is important that there is no form of incitement to national, racial or religious hatred and discrimination in audiovisual programs and no generalizing defamatory assertions against a group or community, they say.

It is necessary to present in the news and debates programs addressing issues of public interest regarding ethnic, religious or sexual minorities a point of view of those minorities, stated the parties. The members of the CNA and the representatives of broadcasters stated their full readiness to intensify the collaboration in order to ensure free expression with respect to audiovisual legislation for the benefit of the viewing / listening public.

The provisions of the audiovisual legislation the most breached by broadcasters are:

- Article 3 (2) of the Audiovisual Law no. 504/2002 with further modifications and completions: All providers of audiovisual media services have the obligation to provide objective information to the public by presenting the facts and events correctly and to favour the free formation of opinions.

- Article 47 of the Audiovisual Code (CNA Decision 220/2011 with further modifications and completions): (1) It is prohibited to broadcast in any audiovisual program any form of incitement to national, racial or religious hatred, to discrimination and the commission of genocide crimes against humanity and war crimes. (2) The broadcasting of any form of racist, anti-Semitic or xenophobic manifestations in audiovisual programs is prohibited. (3) Generalized defamatory assertions against a defined group(s) of gender, age, race, ethnicity, nationality, citizenship, religious beliefs, sexual orientation, education level, social category, medical condition or physical characteristics are prohibited. (4) Generalized defamatory assertions against a person based on their belonging to a group/community defined by gender, age, race, ethnicity, nationality, nationality, religious beliefs, sexual orientation, level of education, social category, medical conditions or physical characteristics are prohibited.

Article 70 of the Audiovisual Code: In the news and debates programs addressing issues of public interest regarding ethnic, religious or sexual minorities, a point of view of the minorities will be presented.

• *The Declarație comună privind informarea corectă și obiectivă a publicului și respectarea drepturilor minorităților naționale 23.01.2018* (Joint Statement on Correct and Objective Public Information and Respect for the Rights of National Minorities, 23 January 2018)
http://merlin.obs.coe.int/redirect.php?id=19091 RO

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Slovenia going ahead with the new Strategy on Radio Frequency Spectrum Management

On 6 April 2018, the Slovenian Agency for Communication Networks and Services (AKOS) published a Strategy on Radio Frequency Spectrum Management. The document which was in public consultation until 22th of April 2018 is a 3 year strategy aiming to follow technology development particularly in the field of broadband mobile communications symbolised by 4G and anticipated 5G which may be considered as a future platform for Broadcasting, Public Protection and Disaster Relief (PPDR) and Private Mobile Radio (PMR) - also known as Professional Mobile Radio.

The goals of the proposed Strategy are:

- Timely provision of sufficient spectrum needed for implementation of the latest technologies providing a stable environment for operators and other investors;

- Enabling digital inclusion of citizens at the highest possible territorial penetration;

- Encouraging investment and development as well as the timely introduction of new regulatory models when implementing new innovative services in the field of wireless electronic communications;

- Using spectrum to achieve a high social economic development;

- Providing connectivity between people and devices in all segments of social society such as traffic, transportation, health and energy;

- Establishing conditions for implementation of radio systems for Public Protection and Disaster Relief (PPDR) and Connected Autonomous Driving (CAD) as well as increasing spectrum demand for mobile communications;

- Maintaining efficient competition on the wireless communication markets;

- Providing sufficient spectrum for all services.

The Strategy addresses a wide range of radio frequency spectrum but among others the Agency is planning to follow the convergence of public mobile and broadcasting services in the UHF band as well as the transition from DTT to LTE and 5G in the time period 2018-2023. In 2018 three development projects are planned:

- 5G and public mobile and broadcasting services convergence in the UHF as well as transition from DTT to LTE,

- Preparatory activities for 700 MHz tender for mobile services,

- Strategy on development of Public Protection and Disaster Relief (PPDR) infrastructure.

An auction of the 700 MHz band is dependent on adoption of the European Electronic Communications Code (EECC) anticipated in June 2018. Given that the 700 MHz band is currently used for digital terrestrial television (DTT) until 30.6.2020 according to the Decision (EU) 2017/899, the frequencies licensed at the public auction will apparently be used for test purposes. The use of the 700 MHz band has to be coordinated with neighbouring countries who have already announced delays in releasing the 700 MHz band for new services:

- Hungary, not before 6.9.2020

- Croatia, not before 26.10.2021

- Italy, not before 30.6.2022

The strategy does not address the concept of free-to-air (FTA) services where one does not need to be a subscriber of the operator. Regarding the DTT platform there is no survey on why people are watching television channels via DTT but one can assume that the cost of subscription to television services might be a relevant factor.

• *Agencija za Komunikacijska Omrežja in Storitve, Strategija upravljanja z radiofrekvenčnim spektrom, April 2018* (Agency for Communication Networks and Services of the Republic of Slovenia, Strategy on Radio Frequency Spectrum Management, April 2018)
http://merlin.obs.coe.int/redirect.php?id=19093 SL

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Agenda

Book List