OBSERVATOIRE EUROPÉEN DE L'AUDIOVISUEL
EUROPEAN AUDIOVISUAL OBSERVATORY
EUROPÄISCHE AUDIOVISUELLE INFORMATIONSSTELLE

IRIS
Legal Observations
of the European Audiovisual Observatory

IRIS 2018-7

OBSERVATOIRE EUROPÉEN DE L'AUDIOVISUEL
EUROPEAN AUDIOVISUAL OBSERVATORY
EUROPÄISCHE AUDIOVISUELLE INFORMATIONSSTELLE

IRIS
Legal Observations
of the European Audiovisual Observatory

Editorial Informations

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

Documentation/Press Contact:
Alison Hindhaugh
Tel.: +33 (0)3 90 21 60 10
E-mail: alison.hindhaugh@coe.int
Translations:
Sabine Bouajaja, European Audiovisual Observatory (co-ordination) • Paul Green • Katherine Parsons • Marco Polo Sarl • Nathalie Sturlèse • Brigitte Auel • Erwin Rohwer • Sonja Schmidt • Ulrike Welsch
Corrections:
Sabine Bouajaja, European Audiovisual Observatory (co-ordination) • Sophie Valais et Francisco Javier Cabrera Blázquez • Aurélie Courtinat • Barbara Grokenberger • Jackie McLelland • James Drake
Distribution:
Nathalie Fundone, European Audiovisual Observatory
Tel.:
+33 (0)3 90 21 60 06
E-mail: nathalie.fundone@coe.int
Web Design:
Coordination: Cyril Chaboisseau, European Audiovisual Observatory • Development and Integration: www.logidee.com • Layout: www.acom-europe.com and www.logidee.com
ISSN 2078-6158

OBSERVATOIRE EUROPÉEN DE L'AUDIOVISUEL
EUROPEAN AUDIOVISUAL OBSERVATORY
EUROPÄISCHE AUDIOVISUELLE INFORMATIONSSTELLE

IRIS

Legal Observations
of the European Audiovisual Observatory

INTERNATIONAL

COUNCIL OF EUROPE

European Court of Human Rights: ROJ TV A/S v. Denmark

The European Court of Human Rights (ECtHR) has rejected the application by the Denmark-based TV company ROJ TV A/S, which was convicted and deprived of its licence because some of its programmes were considered to have promoted the Kurdistan Workers' Party (PKK), which is listed as a terrorist organisation within the EU and in the US, Canada and Australia.

The case concerned the conviction of ROJ TV A/S for terrorism offences, as the Danish courts had found that a series of programmes broadcast by ROJ TV A/S between 2006 and 2010 had promoted the PKK. The Danish courts had found it established that the PKK could be considered a terrorist organisation within the meaning of the Danish Penal Code and that ROJ TV A/S had supported the PKK's terror operations by broadcasting propaganda for the PKK. It was fined and its licence withdrawn. ROJ TV A/S invoked Article 10 of the European Convention of Human Rights (ECHR) by complaining that its conviction and the withdrawal of its licence had interfered with and violated its freedom of expression.

The ECtHR found that the domestic courts had carefully assessed the evidence before them and conducted a balancing exercise, taking ROJ TV's right to freedom of expression into account. It did not find any elements indicating that the Danish courts did not base their findings on an acceptable assessment of the relevant facts. Most importantly, the ECtHR found that the television station could not benefit from the protection afforded by Article 10 ECHR, as it had tried to employ that right for ends which were contrary to the values of the ECHR by inciting violence and supporting terrorist activity. Because such expressions are in violation of Article 17 of the ECHR (prohibition on the abuse of rights), the complaint by ROJ TV A/S did not attract the protection of the right to freedom of expression. Under Article 17 of the ECHR "nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention." The purpose of Article 17 is to make it impossible for persons, groups or organisations to derive from the Convention a right to engage in any activity or perform any act aimed at destroying any of the rights and freedoms set forth in the Convention. The ECtHR reiterated that the decisive point when assessing whether statements, verbal or non-verbal, are removed from the protection of Article 10 by Article 17 of the ECHR is whether the statements in question are directed against the Convention's underlying values - for example, by stirring up hatred or violence - and whether by making the statement, the author attempted to rely on the ECHR to engage in an activity or perform acts aimed at the destruction of the rights and freedoms laid down in it.

The ECtHR reiterated that Article 17 ECHR is only applicable on an exceptional basis and in extreme cases (see Perinçek v. Switzerland, IRIS 2016-1/1). In the present case however, the ECtHR attached significant weight to the fact that the City Court of Copenhagen had found that the one-sided coverage (with repetitive incitement to participate in fighting and actions, incitement to join the organisation in question and its guerrillas, and the portrayal of deceased guerrilla members as heroes) had amounted to propaganda for the PKK, a terrorist organisation, and that it could not be considered to constitute only a declaration of sympathy. In addition, ROJ TV A/S had been financed to a significant extent by the PKK in the years 2006-2010. Furthermore, the High Court of Eastern Denmark had found explicitly that, having regard to the content, presentation and connection of the programmes of ROJ TV, the case concerned the promotion of the PKK's terror operations. The ECHR referred to the nature of the impugned programmes, which included incitement to violence and support for terrorist activity (elements extensively examined by the national courts). It also considered the fact that the views expressed in the programmes of ROJ TV A/S had been disseminated to a wide audience through television broadcasting and that they related directly to an issue which is paramount in modern European society - the prevention of terrorism and terrorist-related expressions advocating the use of violence. For these reasons ROJ TV A/S could not, under Article 17 of the ECHR, rely on the protection afforded by Article 10 of the ECHR. Therefore, the ECtHR was of the opinion that ROJ TV A/S was attempting to deflect Article 10 of the ECHR from its real purpose by employing this right for ends which were clearly contrary to the values of the ECHR. Consequently, the Court found unanimously that, by reason of Article 17 ECHR, ROJ TV A/S could not benefit from the protection afforded by Article 10 of the ECHR. The ECtHR considered the application incompatible ratione materiae with the provisions of the Convention; accordingly, the application by ROJ TV A/S was rejected by the Court. The decision by the ECtHR is final.

• Decision by the European Court of Human Rights, Second Section, case of ROJ TV A/S v. Denmark, Application no. 24683/14, 17 April 2018, notified in writing on 24 May 2018
http://merlin.obs.coe.int/redirect.php?id=19131 EN

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

IRIS
Legal Observations
of the European Audiovisual Observatory
OBSERVATOIRE EUROPÉEN DE L'AUDIOVISUEL
EUROPEAN AUDIOVISUAL OBSERVATORY
EUROPÄISCHE AUDIOVISUELLE INFORMATIONSSTELLE

European Court of Human Rights: Unifaun Theatre Productions Limited and Others v. Malta

On 15 May 2018, the European Court of Human Rights (ECtHR) delivered a judgment regarding a peculiar application of the Maltese Cinema and Stage Regulations. A theatre group, Unifaun Theatre Productions, had been prevented from producing and performing the play Stitching, owing to a ban imposed by the Board for Film and Stage Classification ("the Board"). This interference with the theatre group's right to freedom of expression was subsequently confirmed by the domestic courts, including the Constitutional Court of Malta. According to the Constitutional Court, the play contained several scenes that affected the morality and decency of the entire production, and it was within the Board's authority to assess that in line with the Cinema and Stage Regulations. The Constitutional Court referred to phrases which constituted disparaging and insolent remarks in respect of more than one belief, towards women and towards the suffering of the Jews in the Second World War. In the Court's view, the limits of decency had been breached by the blasphemy (an offence under Maltese law) contained within the play and by the vilification of the dignity of a people, a woman, children, and human beings in general, as well by the extreme glorification of sexual perversion. In upholding the legitimate and justified character of the interference with the theatre group's freedom of expression, the Constitutional Court, inter alia, referred to the case law of the European Court of Human Rights (ECtHR) in Otto-Preminger-Institut v. Austria (see IRIS 1995-1/1).

The theatre group lodged an application with the ECtHR, arguing that the complete ban on the production of the play Stitching was contrary to Article 10 of the European Convention of Human Rights (ECHR) guaranteeing the right to freedom of expression. The application was joined by two directors of Unifaun Theatre Productions, the artistic director of the play and two actors engaged to perform in the above-mentioned production.

Firstly, the ECtHR noted that the Government had not rebutted the applicants' claim that the Guidelines for Film Classification (on which the ban was based) had only been cited for the first time in the domestic proceedings, and that the Guidelines did not meet the requisite standard of law in so far as they were not accessible to the public. Secondly, in so far as the domestic authorities had relied on the Cinema and Stage Regulations, the ECtHR was of the opinion that the criteria mentioned in the Regulations (such as levels of morality, decency and good general behaviour), left room for unfettered power, since the law did not indicate with sufficient clarity the scope of any discretion conferred on such authorities and the manner of its exercise. Thirdly, the ECtHR found that a total ban was only possible in the case of films; stage productions did not fall under category to which such a ban could apply. Thus, there was no legal basis for the impugned ban.

On the basis of these considerations the ECtHR found that the law relied on by the Maltese Government was not of a sufficient quality and that the interference had been the result of a procedure not prescribed by law. As the interference had not been lawful within the meaning of the ECHR, the ECtHR deemed that it was not necessary to further determine whether the interference had been necessary in a democratic society. The ECtHR unanimously concluded that there had been a violation of Article 10 of the ECHR.

The judgment also contained a specific interpretation with regard to just satisfaction and the awarding of damages to victims of a violation of the ECHR under Article 41 of the ECHR. The applicants claimed EUR 4 299.20 in respect of pecuniary damage, covering the fees for the classification exercise, the purchase of performance rights, theatre bookings, promotional material and advertisements, and EUR 30 000 in non-pecuniary damage. The Maltese Government submitted that the applicants had been well aware that they would have to obtain the requisite permit to perform the play; thus, the expenses that they had incurred in respect of the play had constituted a self-imposed business risk taken in the knowledge that the play might be banned. The Government also considered that a finding of a violation would constitute sufficient just satisfaction, and that in any event the ECtHR should not award more than EUR 3 500 in non-pecuniary damage.

The ECtHR was of the opinion that despite the lack of clarity in the law as to whether a total ban might be possible, the applicants should have waited for a decision on the specific classification of the play (and thus knowledge of the applicable audience) before venturing into theatre bookings and promotional material and advertisements. It also considered that performance rights are likely to be required before such a procedure is undertaken at a cost, no matter its outcome. Thus, the ECtHR did not discern any causal link between the violation found and the pecuniary damage alleged it therefore rejected this part of the claim.

On the other hand, making its assessment on an equitable basis, the ECtHR awarded the applicants EUR 10 000, jointly, in respect of non-pecuniary damage. In addition, the ECtHR considered it reasonable to also award the applicants the sum of EUR 10 000, jointly, covering the costs for professional legal fees and court expenses.

• Judgment by the European Court of Human Rights, Fourth Section, case of Unifaun Theatre Productions Limited and Others v. Malta, Application no. 37326/13, 15 May 2018
http://merlin.obs.coe.int/redirect.php?id=19130 EN

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

European Court of Human Rights: Stomakhin v. Russia

On 9 May 2018, the European Court of Human Rights (ECtHR) delivered, unanimously, an important judgment with regard to the conditions regarding interferences by public authorities with extremist speech. The ECtHR found that the Russian authorities had violated Article 10 of the European Convention of Human Rights (ECHR), which guarantees the right to freedom of (political) expression. With its judgment, the ECtHR urged governments to be cautious when considering what constitutes hate speech and what constitutes criticism of the authorities.

The case concerned Boris Vladimirovich Stomakhin's conviction for newsletter articles he had written on the armed conflict in Chechnya. Acting both as a journalist working for a magazine, but mostly as an activist (being the founder, owner, publisher and editor-in-chief of a monthly newsletter, Radikalnaya Politika ("Radical Politics"), Stomakhin published in 2003 a series of articles touching, to a great extent, on events in the Chechen Republic. The articles sharply criticised the Russian Government and the actions by the army there, and expressed support for the Chechen rebel separatist movement. According to the domestic courts, Stomakhin had justified extremist activities and had incited racial, national, and social hatred. He had justified and glorified acts of terrorism by Chechens, called for violence against the Russian people and declared that the Orthodox faith was an inferior one. Stomakhin argued that he had simply expressed his opinion on political events in Russia (in particular the conflict in Chechnya) and he denied supporting extremism. Stomakhin was found guilty of "having publicly appealed to extremist activities through the mass media" (Article 280 § 2 of the Russian Criminal Code) and of having committed "actions aimed at inciting hatred and enmity, as well as at humiliating the dignity of an individual or group of individuals on the grounds of ethnicity, origin, attitude towards religion and membership of a social group, through the mass media" (Article 282 § 1). The domestic courts also concluded that the impugned texts had had a clear extremist leaning and had incited actions prohibited by the Federal Law on Suppression of Extremist Activities. Stomakhin was sentenced to five years in prison and given a three-year ban on practising journalism. He served the sentence in full and was released in March 2011.

In 2007, while in prison, Stomakhin lodged an application with the ECtHR, complaining mainly about a violation of his right to freedom of expression. In its judgment, more than ten years later, the ECtHR reiterated that there is little scope under Article 10 § 2 ECHR for restrictions on political speech or on debate on questions of public interest and that "the limits of permissible criticism are wider with regard to the government than in relation to a private citizen or even a politician. In a democratic system the actions or omissions of the Government must be subject to the close scrutiny not only of the legislative and judicial authorities but also of public opinion. Moreover, the dominant position which the government occupies makes it necessary for it to display restraint in resorting to criminal proceedings, particularly where other means are available for replying to the unjustified attacks and criticisms of its adversaries". The ECtHR also reiterated that it may be considered necessary in democratic societies to sanction or even prevent all forms of expression that spread, incite, promote or justify violence, hatred or intolerance, provided that the restrictions or penalties imposed are proportionate to the legitimate aim pursued. Turning to the wording of the texts in question, the ECtHR considered that the impugned statements could be divided into three groups, and it examined each group separately. The first group of statements had justified terrorism, vilified Russian servicemen to the extent that they might have become targets for actual attack, and had praised Chechen leaders within the context of approving of violence. Those statements had therefore gone beyond the limits of acceptable criticism and the ECtHR found that the Russian courts' treatment of them had been proportionate. The ECtHR also found that some of Stomakhin's criticisms of Orthodox believers and ethnic Russians had incited hatred and enmity and that the Russian courts' considerations had been "relevant and sufficient" to justify a conviction.

However, the domestic courts had been too harsh in other aspects. In particular, some statements about the war had not gone beyond acceptable limits of criticism, which are wide when it comes to governments. The domestic courts had also taken other comments on Russian servicemen out of context, or had failed even to refer to any particular texts which, according to them, had had discriminatory or humiliating connotations with regard the national dignity of people practising the Orthodox religion. The ECtHR emphasised that it is an integral part of freedom of expression to seek historical truth, and that a debate on the causes of acts of particular gravity which may amount to war crimes or crimes against humanity should be able to take place freely. Moreover, it is in the nature of political speech to be controversial and often virulent, and the fact that statements contain hard-hitting criticism of official policy and communicate a one-sided view of the origin of and responsibility for the situation addressed by them is insufficient, in itself, to justify an interference with freedom of expression. Although some of Stomakhin's statements had been admittedly quite virulent in their language and had contained strongly worded statements, the ECtHR discerned no elements in them other than a criticism of the Russian Government and its actions during the armed conflict in the Chechen Republic and held that however acerbic they might have appeared, those statements had not gone beyond the acceptable limits, given the fact that those limits are particularly wide with regard to

the Government. Other statements had been published during an electoral campaign, a period "where it was particularly important that opinions and information of all kinds were permitted to circulate freely".

The ECtHR also stressed that it is vitally important that the domestic authorities adopt a cautious approach in determining the scope of "hate speech" crimes and strictly construe the relevant legal provisions in order to avoid excessive interference under the guise of action taken against "hate speech", where such charges are brought for the purpose of merely criticising the Government, state institutions, and their policies and practices.

Lastly, the ECtHR found that the Russian courts' reasons for the penalty imposed on Stomakhin had been limited to his personality and the social danger he had presented. The ECtHR referred to the fact that Stomakhin had been sentenced to five years' imprisonment and banned from practising journalism for three years, and that he had served this sentence in full. It left open the question of whether a ban on the exercise of journalistic activities, as such, was compatible with Article 10 of the ECHR. But the punishment to five years imprisonment it considered not proportionate. The ECtHR observed that Stomakhin had had no criminal record and thus had never been convicted of any similar offence. It also found that the circulation of the newsletter at issue was insignificant, and that it could not be said that the incriminated statements had been disseminated in a form that had been impossible to ignore. On the contrary, in the present case the potential impact of the impugned statements had been very limited. Therefore, the ECtHR found the punishment of five years imprisonment "an extremely harsh measure". Particularly bearing in mind the Russian authorities' failure to demonstrate convincingly "the pressing social need" to interfere with Stomakhin's freedom of expression in respect of a number of the impugned statements, as well as the severity of the penalty imposed on him, the ECtHR found that the interference in question had not been "necessary in a democratic society", and hence that there had been a violation of Article 10 of the ECHR.

• Judgment by the European Court of Human Rights, Third Section, case of Stomakhin v. Russia, Application no. 52273/07, 9 May 2018
http://merlin.obs.coe.int/redirect.php?id=19132 EN

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

Committee of Ministers: Protocol amending Convention 108 on protection of personal data

On 18 May 2018, the Committee of Ministers of the Council of Europe adopted a Protocol amending the Council of Europe's Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data ("Convention 108") (see IRIS 2012-2/6). The purpose of the Protocol is to modernise Convention 108 in order to better address emerging privacy challenges resulting from the increasing use of new information and communication technologies, the globalisation of processing operations and the ever-greater flows of personal data, and to strengthen the Convention's evaluation and follow-up mechanism.

The Protocol includes amendments to nearly all the Articles in Convention 108; a number of substantial amendments should be briefly mentioned. Firstly, a new Article 10 is added to the Convention, which requires that personal data processing apply the "privacy by design" principle: data controllers and, where applicable, processors, must examine the likely impact of intended data processing on the rights and fundamental freedoms of data subjects prior to the commencement of such processing, and shall design the data processing in such a manner as to prevent or minimise the risk of interference with those rights and fundamental freedoms. Secondly, a new Article 8 (on the transparency of processing) is also added to the Convention; that Article provides that data controllers must inform data subjects of the legal basis and the purposes of the intended processing, together with any necessary additional information, in order to ensure the fair and transparent processing of the personal data in question. Thirdly, the old Article 8 of the Convention is now replaced by a new Article 9 - renamed the "Rights of the data subject" - which sets out a list of rights that individuals enjoy. These rights include (i) the right of an individual not to be subject to a decision significantly affecting him or her based solely on an automated processing of data without having his or her views taken into consideration; and (ii) the right of an individual to obtain, upon request, knowledge of the reasoning underlying data processing where the results of such processing are applied to him or her.

Furthermore, in relation to the processing of special categories of data, the Protocol provides that the processing of the following types of data shall only be allowed where appropriate safeguards are enshrined in law (complementing those of the Convention): genetic data; personal data relating to offences, criminal proceedings and convictions, and related security measures; and biometric data uniquely identifying a person; personal data related to racial or ethnic origin, political opinions, trade-union membership, religious or other beliefs, health or sexual life. Notably, under the Protocol, the Convention now specifies that each signatory state to the Convention shall ensure that data controllers notify without delay at least the relevant supervisory authority of data breaches which may seriously interfere with the rights and fundamental freedoms of data subjects. Furthermore, the Protocol also seeks to strengthen the Conventions' Consultative Committee (now named the "Convention Com-

mittee"), which will evaluate compliance with the Protocol on the part of parties to the Convention. Under the Protocol, each state party undertakes to allow the Convention Committee to evaluate the effectiveness of the measures it has taken under its law to give effect to the provisions of this Convention

Lastly, it should be noted that in a recent Communication, the European Commission stated that in the light of the updating of Council of Europe Convention 108, the Commission will actively promote the swift adoption of the modernised text of the Convention with a view to the EU becoming a party to it (see IRIS 2018-4/10).

The Protocol was opened for signature on 25 June 2018.

• Protocol amending the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (ETS No. 108), CM(2018)2-final, 18 May 2018
http://merlin.obs.coe.int/redirect.php?id=19152 EN FR

• Protocol amending the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (ETS No. 108) Explanatory report, 18 May 2018
http://merlin.obs.coe.int/redirect.php?id=19154 EN FR

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

Parliamentary Assembly: Resolution on the status of journalists in Europe

On 25 April 2018, the Parliamentary Assembly of the Council of Europe (PACE) adopted a Resolution on the status of journalists in Europe. The draft of this resolution was previously adopted by PACE's Committee on Culture, Science, Education and Media on 4 December 2017 (see IRIS 2018-2/4). The adopted Resolution gives a stronger emphasis on the safety of journalists and media actors than its draft. In particular, PACE recommends that states take necessary steps to strengthen such protection, to stop harassment either of a judicial, administrative or financial nature, and put an end to impunity for attacks. Furthermore, the Resolution identifies specific matters to be addressed in changes of legislation of member states, such as protection from precarious working conditions that may bring undue pressures, providing wide legal definitions of journalistic work, repealing disproportionate and restrictive defamation laws, and ensuring procedural guarantees in libel proceedings where journalists are appearing as defendants.

Moreover, PACE recommends that member states support action plans to tackle the problem of gender inequality on the labour market in the media sector (including the drawing-up of studies containing statistical indicators) and the introduction of mechanisms aimed at encouraging employers' organisations to seriously tackle this problem in the long term. Furthermore, the Resolution recommends that journalists' right to freedom of association be respected, in particular as regards adhering to trade unions and journalists' associations. In addition, the Resolution notes the need to promote dialogue between employees and freelancers with their employers (by contrast, the draft resolution only referred to workers).

Another issue which was addressed by the final version of the Resolution and which signals the greater emphasis now placed on safety issues is the call to promote (in both the financial and operative sense) PACE's Platform to promote the protection of journalists and safety of journalists. Notably, PACE condemned the assassinations of journalists Daphne Caruana Galizia in Malta, Ján Kuciak in the Slovak Republic and Maxim Borodin in the Russian Federation and called on those countries' authorities to conduct effective investigations. These issues were added to the final draft after the Committee on Legal Affairs and Human Rights had urged that the Resolution explicitly address the above-mentioned issues and denounce the aforesaid assassinations. The Committee had also considered that the draft Resolution needed to take a wider approach to the definition of "journalists".

• Parliamentary Assembly of the Council of Europe, Resolution 2213 (2018) on the status of journalists in Europe, 25 April 2018
http://merlin.obs.coe.int/redirect.php?id=19133 EN FR

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

EUROPEAN UNION

European Commission: Lithuania's decision to suspend broadcast of "RTR Planeta" complies with EU rules

In a decision dated 4 May 2018, the European Commission found compatible with EU law the Lithuanian authorities' suspension for 12 months of the retransmission of a Russian-language channel, RTR Planeta, on the grounds of incitement to hatred. In its previous decisions of July 2015 and February 2017, the Commission reached the same conclusion regarding the temporary suspension of retransmission of RTR Planeta for three months by the Lithuanian authorities (see IRIS 2017-6/5). In the light of recurring infringements, on 14 February 2018 the Lithuanian authorities adopted a decision to temporarily suspend retransmission of RTR Planeta until 23 February 2019; the Commission was notified of that decision on 7 March 2018.

The suspension measure was based on the contents of three programmes dated 16 March 2017, 31 May 2017, and 3 November 2017. A programme broadcast on 16 March 2017 was considered to constitute incitement to war and hatred on the basis of nationality, as it called for physical violence against American and British people and threatened the invasion of Ukraine and France. Similarly, a programme broadcast on 31 May 2017 contained statements threatening the military occupation of foreign countries such as the Baltic States, Germany and France; it also contained statements remarking that Western people hate and despise Russians. The programme broadcast on 3 November 2017 included calls for war and violence against Ukraine. In its reply, the broadcaster RTR Planeta contended that the participants in the programmes had been exercising their freedom of expression.

According to the Commission, the Lithuanian authorities demonstrated that RTR Planeta had manifestly, seriously and gravely infringed Article 6 of the Audiovisual Media Services Directive (which stipulates that member states must ensure by appropriate means that audiovisual media services provided by media service providers under their jurisdiction do not contain any incitement to hatred based on race, sex, religion or nationality). In reaching this conclusion, attention was given to tension that the impugned statements on military conflicts involving Russia and destruction and/or occupation of Baltic States might provoke within Lithuania, as a former member state of the Soviet Union that has a sizeable Russian-speaking minority.

The Commission furthermore found the duration of the suspension measure (12 months) to be proportionate. In doing so, the Commission stressed the margin of appreciation afforded to member states when imposing measures on broadcasters for infringements of Article 6 of the Audiovisual Media Services Directive. The proportionality of the measure was further justified in the light of the fact that RTR Planeta had not altered its behaviour but had rather persisted in committing violations, despite the previous suspension measures imposed on it in respect of the same political talk show.

• European Commission, Lithuania's decision to suspend broadcast of the Russian language channel "RTR Planeta" complies with EU rules, 8 May 2018
http://merlin.obs.coe.int/redirect.php?id=19156 EN

• European Commission Decision of 4 May 2018 on the compatibility of the measures adopted by Lithuania pursuant to Article 3 (2) of Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services
http://merlin.obs.coe.int/redirect.php?id=19134 EN

Bengi Zeybek
Institute for Information Law (IViR), University of Amsterdam

European Commission: Proposed Directive on protection of whistleblowers

On 23 April 2018, the European Commission published a proposed Directive on the protection of persons reporting on breaches of Union law. The purpose of the Directive is to lay down common minimum standards for the protection of whistleblowers - i.e. persons who report (within the organisation concerned or to an outside authority) or disclose (to the public) information on a wrongdoing obtained within a work-related context.

The Directive's Explanatory Memorandum states that whistleblowers are often discouraged from reporting their concerns for fear of retaliation; the importance of providing effective whistleblower protection for safeguarding the public interest is increasingly acknowledged both at European and international level (the Explanatory Memorandum cites the Council of Europe's Committee of Ministers' Recommendation CM/Rec(2014)7 on the protection of whistleblowers) (see IRIS 2014-7/3). Furthermore, the absence of effective whistleblower protection raises further concerns regarding the negative impact of that absence on freedom of the media. Discussions at the second Annual Colloquium on Fundamental Rights on "Media pluralism and Democracy" highlighted the fact that protecting whistleblowers as sources of information for journalists is essential in order for investigative journalism to be able to fulfil its "watchdog" role (see IRIS 2016-7/5).

The Directive totals 30 pages, divided into five chapters, 23 articles, and 86 recitals. Article 2 of the Directive applies to persons working in the private or public sector who acquired information on "actual or potential unlawful activities or abuse of law" relating to a number of areas, including public health, consumer protection, financial services, corporate taxation, and protection of privacy. "Abuse of law" is defined as acts or omissions falling within the scope of Union law which do not appear to be unlawful in formal terms but defeat the object or the purpose pursued by the applicable rules. The Directive also applies to persons whose work-based relationship is yet to begin in cases where information has been acquired during the recruitment process or other pre-contractual negotiation.

Chapter 2 then sets out rules for internal whistleblower reporting and the following-up of reporting. Member states are required to ensure that legal entities in the private and public sector establish internal channels and procedures for reporting and following up on reports regarding actual or potential unlawful activities or abuse of law. Such channels and procedures shall allow for reporting by employees of such entities. Article 5 sets out the procedures for internal reporting and following up on reports. Furthermore,

Chapter 3 sets out obligations regarding external reporting and following up on such reports, with member states being required to designate which bodies have authority to receive and handle reports; those bodies must establish independent and autonomous external reporting channels (which should be both secure and ensure confidentiality) for receiving and handling information provided by whistleblowers.

Notably, Chapter 4 of the Directive concerns the protection of whistleblowers. In this regard, Article 13(1) provides that a person shall qualify for protection under the Directive, provided that they had reasonable grounds to believe that the information reported was true at the time of reporting and that this information falls within the scope of the Directive. Crucially, under Article 13 (4) a person publicly disclosing information regarding breaches falling within the scope of the Directive shall qualify for protection under the Directive where: he or she first reported internally and/or externally, in accordance with Chapters II and III, but no appropriate action was taken in response to the report within a certain timeframe; or he or she could not reasonably have been expected to use internal and/or external reporting channels owing to (i) an imminent or manifest danger to the public interest, or (ii) the particular circumstances of the case; or (iii) the existence of a risk of irreversible damage. Article 14 provides that member states shall take the necessary measures to prohibit any form of retaliation, whether direct or indirect, against whistleblowers who meet the conditions set out in Article 13.

• European Commission, Proposal for a Directive of the European Parliament and of the Council on the protection of persons reporting on breaches of Union law, COM(2018) 218 final, 23 April 2018
http://merlin.obs.coe.int/redirect.php?id=19159 EN

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

European Commission: Communication on completing a trusted Digital Single Market for all

The Communication of the European Commission (Commission) on completing a trusted Digital Single Market (DSM) takes stock of the work done on the implementation of the European DSM Strategy, which was published on 6 May 2015 (see IRIS 2015-6/3). In the Communication, the Commission provides an overview of the legislative proposals it has made over the last three years, reviews the progress of their adoption and implementation, and calls on its co-legislators - the European Parliament and the Council - to accelerate their work in order to meet the European Council's goal of concluding the DSM Strategy by the end of 2018.

Since the mid-term review of the DSM Strategy in May 2017 (see IRIS 2017-7/7), both the Commission and its co-legislators have made further progress towards its realisation. The Commission has delivered all 29 essential legislative proposals; the co-legislators have adopted 12 of those proposals (see, for example, IRIS 2018-4/7, IRIS 2017-7/6 and IRIS 2017-9/4) - 11 of them since the mid-term review of the. Although more progress has been made since last year, more than half of the Commission's proposals are still pending adoption; among them are the copyright proposals (see IRIS 2016-9/4), the amended Audiovisual Media Services Directive (see IRIS 2016-6/3), the Regulation on copyright and online transmissions of broadcasters (See IRIS 2018-1/10), the ePrivacy Regulation (see IRIS 2017-3/6), and the Electronic Communications Code (see IRIS 2016-10/4).

Besides the focus on the swift completion of the DSM by the end of 2018, the Communication draws specific attention to several issues. Firstly, the Commission praises the new European personal data protection regime introduced by the General Data Protection Regulation (GDPR), which has been directly applicable throughout the EU since 25 May 2018. Highlighting the role of the GDPR in building confidence in the digital economy and its strategic importance as "the global norm setter on data protection", the Commission requests EU member states to facilitate its immediate and direct application. Furthermore, the Commission urges its co-legislators to agree on the Regulation on the free flow of non-personal data and on the Electronic Communications Code by June 2018, and to expedite their work on the ePrivacy Regulation with a view to its adoption by the end of 2018. Secondly, the Communication stresses the importance of putting the right environment in place for the growth of the DSM in the future. The Commission draws specific attention to the regulation of social networks and digital platforms, especially when it comes to enhancing the transparency and fact-checking of digital content and measures effectively tackling illegal content online. In addition, it showcases its recently presented Data Package, addressing the issue of the reuse of private data for public purposes, and a framework to allow Europe to maximise the benefits of Artificial Intelligence. Last but not least, the Commission acknowledges that regulation alone will not make the EU a leader in the digital economy. Public and private investments in data, artificial intelligence and high-performance computing, as well as bridging the gaps in skills and digital connectivity, are essential in order to reap the benefits of the global data economy.

• Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions - Completing a trusted Digital Single Market for all, 15 May 2018, COM(2018) 320 final
http://merlin.obs.coe.int/redirect.php?id=19135 DE EN FR
CS DA EL ES ET FI HU IT LT LV MT
NL PL PT SK SL SV HR

• Annex to the Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions, 15 May 2018, COM(2018) 320 final
http://merlin.obs.coe.int/redirect.php?id=19136 DE EN FR
CS DA EL ES ET FI HU IT LT LV MT
NL PL PT SK SL SV HR

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

European Commission: Guidelines on Significant Market Power

On 26 April 2018, the European Commission adopted new Guidelines on market analysis and the assessment of "significant market power" ("SMP") under the EU regulatory framework for electronic communications networks and services ("the SMP Guidelines"). This follows a public consultation conducted in 2017 by the Commission on the review of the 2002 SMP Guidelines (see IRIS 2017-5/5 and IRIS 2002-9/10), and the publication of draft revised Guidelines in February 2018, along with an opinion from the Body of European Regulators for Electronic Communications (BEREC) (see IRIS 2018-4/11).

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

The revised Guidelines reflect the latest developments in case-law and address issues which have become more prominent in recent years. Those issues have been identified by the Commission as including the competitive impact of online service providers that have entered the market and started to offer Internet-based services, and the transition from monopolistic to oligopolistic market structures in some countries.

The SMP Guidelines provide guidance on (a) the main criteria for defining the relevant market, (b) product market definition - including demand-side substitution, supply-side substitution, and "chain of substitution"; (c) geographic market definition, and (d) assessing SMP - including "single SMP" and "joint SMP". Notably, in relation to "over-the-top" (OTT) services, the final version of the SMP Guidelines took into account suggestions by BEREC on the draft revised Guidelines. In particular, BEREC invited the Commission to distinguish the potential impact of OTT services depending on the market being considered.

The Guidelines now state that OTT services or other Internet-related communications paths have emerged as a "potential" competing force to established retail communications services. As a result, NRAs should assess whether such services may, on a forward-looking basis, constitute partial or full substitutes for traditional telecommunications services.

Furthermore, the Guidelines provide that NRAs should also consider whether the market power of an incumbent operator can be constrained (in terms of price) by products or services from outside the relevant market and underlying retail market(s), such as OTT players operating on the basis of providing online communications services. Thus, even where an NRA has considered that constraints coming from these products and services at retail level are not sufficiently strong for the retail market to be effectively competitive or are not sufficiently strong to act as indirect constraint on the provision of wholesale services (for the purpose of the wholesale market definition), potential constraints should still be assessed at the SMP assessment stage. Given that, currently, OTT providers do not provide access services themselves, they do not generally exercise competitive pressure on access markets.

• European Commission, Significant Market Power guidelines updated to safeguard competition in the telecoms market, 27 April 2018
http://merlin.obs.coe.int/redirect.php?id=19160 EN
• European Commission, Communication from the Commission: Guidelines on market analysis and the assessment of significant market power under the EU regulatory framework for electronic communications networks and services (2018/C 159/01), 7 May 2018
http://merlin.obs.coe.int/redirect.php?id=19161 DE EN FR
CS DA EL ES ET FI HU IT LT LV MT
NL PL PT SK SL SV HR
• Body of European Regulators for Electronic Communications, BEREC Opinion on draft SMP Guidelines, 16 March 2018
http://merlin.obs.coe.int/redirect.php?id=19164 EN

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

UNITED NATIONS

UN/OSCE: Joint Declaration on Media Independence and Diversity in the Digital Age

On 2 May 2018, in the light of World Press Freedom Day on 3 May, a Joint Declaration on Media Independence and Diversity in the Digital Age was adopted by the four special mandates for protecting the right to freedom of expression (the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media, the Organization of American States Special Rapporteur on Freedom of Expression, and the Special Rapporteur on Freedom

of Expression and Access to Information of the African Commission on Human and Peoples' Rights).

The Declaration starts by recalling the importance of an independent and diverse media for, inter alia, the functioning of democratic societies. It then identifies the current dangers for media freedom - including safety, legal, political, technological and economic threats - and sets out different principles in order to address these.

It first reminds the states of their positive obligation to both create an enabling environment for the seeking, receiving and imparting information and ideas and to protect media freedom. Concerning media safety, states have a positive obligation to afford protection to journalists and others who are at risk of being attacked.

In order to address legal threats, the Declaration stresses the importance of the rule of law in both the offline and online environment. When regulating online platforms or when requiring them to regulate content themselves, international law principles such as due process and transparency shall be respected. With regard to political threats, politicians should refrain from undermining the independence of the media and shall therefore not exercise pressure on online platforms to engage in content regulation. Moreover, politicians shall always comment or criticise the media in an accurate way in order to avoid any form of stigmatisation.

In order to counter technological threats, states shall respect the rule of law when conducting (digital) surveillance. Identifying confidential journalistic sources in an indirect way - through digital means - should be avoided. When implementing the "right to be forgotten", the requester should always demonstrate that the potential substantive harm to his/her privacy overrides any relevant right to freedom of expression. A balancing test, between the two rights involved, must thus always take place.

Concerning economic threats, states should outweigh these by allowing the media to access state resources in a transparent, fair and non-discriminatory way. A competitive environment should be secured, in which competition law rules are respected and where abuse of a dominant market position is precluded. In order to prevent monopolies or undue concentration of media or cross-media ownership from occurring, states should require transparency of media ownership.

The Declaration ends by reiterating the responsibility of media outlets and online platforms to respect human rights. It encourages them to adopt codes of conducts and fact-checking systems and to put in place self-regulatory systems. Online platforms should be as transparent as possible toward their users. They should refrain from exercising any undue influence on the work of the media and should respect its independence.

• Declaration by the United Nations Special Rapporteur on Freedom of Opinion and Expression, the Organization for Security and Co-operation in Europe's Representative on Freedom of the Media, the Organization of American States' Special Rapporteur on Freedom of Expression, and the Special Rapporteur on Freedom of Expression and Access to Information of the African Commission on Human and Peoples' Rights, "Joint Declaration on Media Independence and Diversity of Media Content", 2 May 2018
http://merlin.obs.coe.int/redirect.php?id=19138 EN FR

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

NATIONAL

AT-Austria

KommAustria blocks ORF plans for exclusive YouTube channel and "Flimmit" pay-TV service

In two decisions published at the start of May, the Austrian regulator KommAustria imposed new limits on public service broadcaster ORF's Internet-based activities. KommAustria rejected requests from the broadcaster to set up its own channel on the online video platform YouTube (KOA 11.278/18-001) and refused to grant public service status to the commercial online video library "Flimmit", which it owns through subsidiary companies, so that it could be partially funded through the licence fee (KOA 11.280/18-004).

ORF had hoped that by setting up its own YouTube channel it would be able to increase its social media presence and make its own productions available outside its own online video platform ORF TVthek from where, under current legislation, programmes can only be downloaded for seven days after they are broadcast. KommAustria did not deny that ORF's social media presence on a platform such as YouTube could help it to fulfil its core public service remit in the sense that it made public service content more accessible, which was important for democratic and political reasons. However, it disagreed with the way in which ORF wanted to develop such a presence. If a channel was set up only on YouTube, for example, other video platforms would automatically be put at a disadvantage. Such discrimination was unlawful under Article 2(4) of the Bundesgesetz über den Österreichischen Rundfunk (Federal Act on the Austrian Broadcasting Corporation - ORF-G). The creation of a YouTube channel would also weaken the existing ORF TVthek, which the legislator considered to be important for the "effective fulfilment of the core public service remit". Finally, KommAustria did not rule out the possibility of making programmes available for a longer period of time on the existing platform.

In a separate request, ORF had asked to add a streaming service to its public service activities. Under this plan, the online video library "Flimmit" would be operated under its public service remit, with 95% of its content comprising previous ORF TV broadcasts and the remaining 5% made up of third-party content. The service would be funded through subscription fees, individual download charges and part of the broadcasting licence fee. However, in KommAustria's opinion, this financing strategy which, together with the impact of potential factors of uncertainty, had not been adequately explained in the application, failed to demonstrate that the service would be financially sustainable. Financial sustainability had to be demonstrated under Article 4f(1) ORF-G. The proposed financing concept for the new video library did not specify how much of the funding would need to come from ORF licence fee revenue. This was due partly to uncertainty over factors such as user acceptance, that is to say future subscriber and download figures, and the payment of producers' rights, and partly to a lack of clear information about which costs would be covered by users' subscription or individual download fees.

Neither of these KommAustria decisions are final, although ORF has indicated that it has abandoned its plans to set up its own YouTube channel.

• *Bescheid KOA 11.278/18-001* (Decision KOA 11.278/18-001)
http://merlin.obs.coe.int/redirect.php?id=19173 DE
• *Bescheid KOA 11.280/18-004* (Decision KOA 11.280/18-004)
http://merlin.obs.coe.int/redirect.php?id=19174 DE

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

First 5G auction to be held by RTR

The Austrian Rundfunk und Telekom Regulierungsbehörde (Regulatory Authority for Broadcasting and Telecommunications - RTR) has concluded the last of three consultations on the first 5G frequency auction and is therefore almost ready to auction the two 5G pioneer bands in the 3.4-3.8 GHz spectrum range.

Since the terms and conditions of the auction had already been largely decided following the first two consultations, the RTR, acting on behalf of the awarding authority, Telekom-Control-Kommission (TKK), used the third consultation to instigate dialogue between all stakeholders and to put the final touches to the auction process. The TKK pointed out that 5G, with its new possibilities for industry, would also be popular with energy suppliers who wanted to broaden their product portfolio and regional Internet providers who would be able to offer a fast Internet connection to customers in remote areas. In order to promote competition, the TKK decided to subdivide the 5G frequencies regionally so that, although large operators could bid for a package of frequencies and obtain nationwide network coverage, existing local broadband providers would also be able to purchase frequencies in their region. By limiting the number of frequencies that can be acquired, single bidders can be prevented from buying the majority of frequencies and ousting competitors from the market. The TKK proposed spectrum caps of 140 to 160 MHz, with the quantity depending on the region and the operator, to be discussed as part of the consultation. The TKK also laid down certain coverage requirements in order to prevent frequency stockpiling. Depending on the frequency and region, bidders must provide 5G in up to 1,000 locations, for example. On the basis of national and international benchmarks, the TKK set minimum bid prices which, for all the available frequencies combined, total around EUR 30 million.

Following completion of the consultation and hearing, the final tender documents will be drawn up and the auction will take place in autumn 2018.

On 18 April 2018, before publishing the tender documents, the TKK published a special notice concerning the ban on agreements relating to frequency auctions. It expressly mentioned strict collusion rules, with examples including collaboration between bidders or potential bidders designed to influence the course or outcome of the auction. The TKK also warned against publicly announcing participation in the auction, bids and bidding strategies, and conveying information or dropping hints via the media. It explained that these rules should be applied prior to the auction procedure and that any such conduct could, in the worst case scenario, lead to exclusion from the process.

• *Pressemitteilung der RTR* (RTR press release)
http://merlin.obs.coe.int/redirect.php?id=19171 DE
• *Dokumente der Konsultation* (Consultation documents)
http://merlin.obs.coe.int/redirect.php?id=19172 DE

Tobias Raab
Stopp Pick & Kallenborn

2017 RTR conciliation report shows telecommunications and media infringements at a record low

In its 2017 conciliation report, Austria's Rundfunk und Telekom Regulierungs-GmbH (Regulatory Authority for Broadcasting and Telecommunications - RTR GmbH), which provides operational support for the Austrian broadcasting and audiovisual media regulator Kommunikationsbehörde Austria (KommAustria), founded in 2001, recorded a steady fall in the number of cases submitted to it in the telecommunications and media fields. According to the report, users only

submitted 1 893 cases for conciliation in these two fields last year. This represents a 5% drop compared with the previous year and is the lowest figure for 15 years. A record 84% of these cases were successfully resolved by the conciliation body in 2017.

The main reason given by the regulator for these positive figures is its motto "Smart statt hart" (smart not hard), which reflects its efforts to promote open dialogue on equal terms between operators and customers. With operators keen to settle cases quickly and amicably, RTR GmbH was not required to take harsh measures to protect consumers.

According to the conciliation body, there was a noticeable increase in the number of disputes relating to (i) data roaming charges following the introduction of the new EU roaming rules (2016: 117, 2017: 216), and (ii) mobile network quality (2016: 79, 2017: 148). The largest category of disputes (629 cases) concerned the interpretation of contracts, including unclear clauses or terms of cancellation. The 2017 report mentioned a total of 80 cases relating to pay-TV services. Seven of these were billing disputes (five fewer than the previous year) and 71 concerned other contractual matters (27 fewer than in 2016). Two cases did not fall into any category, according to the regulator. In contrast, there was a sharp fall in the number of billing disputes involving third-party services (2016: 398, 2017: 247), which was again a result of the operators' general willingness to cooperate.

As part of its data collection activities, RTR GmbH has also set up a new report line for telephone number misuse following an increase in the number of so-called 'ping calls' that many Austrians were bombarded with at the start of this year. These calls involve people with foreign numbers making a call but disconnecting before it is picked up. They do this in order to provoke the call recipient to ring back, which is not only a nuisance but can also be expensive where long-distance calls are concerned. Until now, there have been no concrete figures showing how many Austrians have actually received or are receiving ping calls, so the new report line should help collect this information and offer some relief.

Since the Austrian legislator appointed RTR GmbH as the sector-specific consumer protection body in 1997, its conciliation body has, according to its own figures, conducted around 60 000 procedures, answered more than 50 000 written queries and held tens of thousands of telephone consultations. In accordance with the 'Digital First' initiative, cases, information and queries can be submitted easily via a web portal without any red tape.

• *Tätigkeitsbericht der Schlichtungsstellen* (RTR conciliation bodies' activity report)
http://merlin.obs.coe.int/redirect.php?id=19170 DE

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

BG-Bulgaria

CEM's report on the coverage of a catastrophe on the Trakia highway

On 13 April 2018, a bus travelling in the direction of Sofia overturned on the Trakia highway near Vakarel. Six people were killed, four people were left in a serious condition, and dozens were injured.

The Council for Electronic Media (CEM) monitored the programmes of commercial media service providers (NOVA TELEVISION, BTV, CANAL 3 and EVROPA) and the programmes of the national public providers (BNT 1 and radio program HORIZONT) on 13 and 14 April 2018. The purpose of the monitoring was to assess (i) the media's compliance with the requirements set out by the Radio and Television Act in respect of the protection of the privacy of those affected by the incident.

The monitoring in connection with the coverage of the accident established that there was a rapid media reaction. The making of one of the monitored reports involved an disproportional breach of privacy; this once again highlights the need to observe a basic principle relating to the privacy of citizens that is enshrined in the Radio and Television Act.

The excessive visual exposure of the incident and the intrusive behaviour of on-the-spot reporters from two major commercial media service providers provoked a strong response among a significant part of the journalists - there were many negative comments in the media, on websites and on social networks. Until now, CEM has received 12 complaints, most of which claim that there had been a violation of professional standards.

On the other hand, the monitoring noted the broadcasting of emergency phone numbers and of information regarding how drivers could circumvent the congestion caused by the accident; information on how to donate blood had also been disseminated. No names of injured people had been announced. The coverage did not contain footage of the victims of the accident.

CEM has repeatedly emphasised that the right to privacy and the right of freedom of expression do not take precedence over one another. Media service providers should both provide citizens with an opportunity to receive full information and ensure non-interference in their privacy. This is another case in which media coverage was guilty of a lack of balance between the exercise of the two fundamental rights guaranteed by the existing legislation.

• Доклад на СЕМ за отразяването на тежката катастрофа на автомагистрала „442400460472470417" (CEM's report on the coverage of the severe catastrophe of Trakia highway)
http://merlin.obs.coe.int/redirect.php?id=19143 BG

Rayna Nikolova
New Bulgarian University

DE-Germany

Regional media authorities classify BILD live streams as broadcasting

On 18 April 2018, the German Landesmedienanstalten (regional media authorities) decided that three live streams offered online by BILD, Germany's highest-circulation newspaper, whose website, Bild.de, is the most viewed German newspaper site on the Internet, should be classified as broadcasting. The newspaper had failed to obtain the licence that, according to Article 20 et seq. of the Rundfunkstaatsvertrag (Inter-State Broadcasting Agreement - RStV), is required to broadcast legally in Germany. The media authorities' decision concerned the streams "BILD live", "Die richtigen Fragen" and "Bild Sport-Talk mit Thorsten Kinhöfer". Their Kommission für Zulassung und Aufsicht (Commission on Licensing and Supervision - ZAK) considered that the streams fell under the legal definition of broadcasting because they were regularly shown for simultaneous linear reception in accordance with a programme schedule. Exemptions granted to services that were technically accessible to fewer than 500 viewers or that did not include editorial content did not apply in this case, according to the ZAK.

During the year prior to the ZAK's decision, the competent media authority, Medienanstalt Berlin-Brandenburg (mabb), had held several discussions with BILD concerning the need for a licence. However, the newspaper had refused to apply for one, even though they can be obtained relatively inexpensively. It was warned that the streams would be banned if it did not apply for a licence.

This is not the first time an Internet service in Germany has been told it needs a broadcasting licence: back in April 2017, the NRW regional media authority contacted the largest German YouTube channel about this subject. A lengthy tug of war followed, ending in January 2018 when a broadcasting licence was applied for (and later granted). Other YouTube channels and streaming providers have since followed suit. In the meantime, content providers seem to have become more aware of their obligations, as demonstrated by the fact that the first broadcasting licence for a Facebook live stream (#imländle) was granted earlier this year by the Landesanstalt für Kommunikation Baden-Württemberg (Baden-Württemberg regional communication authority - LFK).

• *Pressemitteilung der Landesmedienanstalten vom 18. April 2018* (Press release of the regional media authorities, 18 April 2018)
http://merlin.obs.coe.int/redirect.php?id=19175 DE

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

FR-France

Courts authorise showing of "The Man who Killed Don Quixote" to close Cannes Film Festival

In the late 1990s, Terry Gilliam wanted to embark on the production of a film he referred to as "The Man who Killed Don Quixote", inspired by Cervantes' novel. He could have had no idea that more than twenty years later, the film's release for screening in cinemas and its status as the closing film of the Cannes Film Festival would be dependent on a court decision. In addition to the many incidents that occurred during filming, a dispute arose between the author/director and the company Alfama Films Production and its manager Paulo Branco. This reached breaking point in August 2016 when Gilliam felt that the conditions imposed by the producer would not allow him to make the film he had had in mind for all that time. The film was therefore produced by other companies, but the initial producer felt that his contract with Terry Gilliam - and all the associated rights - was still valid.

The regional court (tribunal de grande instance - TGI) in Paris was called on to deliberate on the dispute over ownership of the production rights; on 19 May 2017 it rejected the author/director's application for the courts to terminate the contract binding him to the original producer. The latter's application for filming to be suspended was also rejected. The case went to appeal in April 2018 and was scheduled for deliberation by the Court of Appeal in Paris on 15 June. And so it was that the film company and its manager (on learning that the film was to be shown on 19 May 2018 to close the Cannes Film Festival) had the Festival's organiser, AFFIF, summoned to appear in court to hear the court ban the screening of the film.

In its decision delivered on 9 May 2018, the court, sitting under the "urgent procedure" at the TGI in Paris, noted initially that it was apparent from the contracts and court decisions already delivered (proceedings had also been instigated in the United Kingdom) that Alfama Films Production was justified in claiming

benefit of the rights arising from the contract it had concluded with Terry Gilliam in terms of the transfer of future author's rights within the context of carrying out its activities as producer in exchange for the payment of an advance on part of the revenue generated by the showing of the film. The applicant company and its manager were also justified in claiming that they had an option to acquire a licence to use the film's scenario. These elements thus confirmed that the contracts with applicant company and its manager (in respect of producing the film) had not been terminated, even though in the end the film had been made by Terry Gilliam and produced with companies other than the applicant parties. The latter also produced evidence that they were indeed the holders of rights that had been disregarded by the continuation without their agreement of the project to produce and screen the film. The judge therefore felt that the violation of those rights was characteristic of a "manifestly unlawful disturbance", within the meaning of Article 809 of the [French] Code of Civil Proceedings, and that steps should be taken to put a stop to that disturbance.

The judge went on to reiterate that the court was required to put a stop to any disturbance brought to its attention, applying the measure most appropriate to the aim being pursued and compromising as little as possible the rights and interests of each of the parties. It was pointed out that the applicants, who were calling for a ban on the screening of the film, paradoxically acknowledged that the presentation at the international film festival's closing session "is probably the most highly valued promotion tool for producers and filmmakers". Their application was found to be manifestly disproportionate to the rights that they were entitled to claim on the basis of the contracts. The judge noted that they had devoted themselves to the project for a short period of time (between March and August 2016) and had invested approximately EUR 300 000, whereas the director, Terry Gilliam, had been working on the film for more than 25 years and the other producers had contributed more than EUR 16 million towards its financing. It was also noted that while nobody could anticipate how a work would be received by audiences and critics after it had been shown at Cannes, the applicants had produced no objective reasons that might point to any risk for the screening of the film in the future, apart from alleging possible artistic weaknesses in the film; they did not even produce evidence that they had actually viewed the film. Lastly, it was emphasised that the TGI in Paris, in its judgment on the merits of the case in 2017, had not found that the production of the film without the agreement and participation of the applicant production company constituted an infringement of copyright or a violation of economic rights.

In the light of these elements, the court found that the requested ban on the screening of the film would manifestly exceed what was fair and necessary in order to put a stop to the disturbance invoked, and accordingly ordered the AFFIF, at its own expense, to screen a warning to audiences stating that the screening of the film at the close of the Festival in no way prejudiced the dispute between the parties, which had not yet been resolved.

And so the film was screened on 19 May 2018 to close the Cannes Film Festival, and in cinema theatres.

• *TGI de Paris (ord. réf.), 9 mai 2018, Alfama Films Production et Paulo Branco c/ Association française du festival international du film et a.* (Regional court of Paris (urgent procedure), 9 May 2018, Alfama Films Production and Paulo Branco v. Association Française du Festival International du Film and others) FR

Amélie Blocman
Légipresse

Minister for Culture announces first part of her plan to reform the public audiovisual sector

On 4 June 2018, Minister for Culture Françoise Nyssen presented her plan for the reform of the public audiovisual sector - one of the election promises of the President of the Republic. The Minister explained the Government's approach, which is based on work carried out collectively over several months by the representatives of the six companies in the public audiovisual sector (Ina, France Médias Monde, Radio France, Arte, TV5 Monde, and France Télévisions). She stated that the "transformation of content" ought to be the priority: "[I]n this period of digital upheaval, we must give priority to investment in content rather than in any one method of broadcasting". Thus, the Minister wishes to see the public audiovisual sector reaffirm its difference and become "a committed medium that dares to be creative" (through new formats and original writing) and "anticipates uses linked with technological changes".

By "committed medium", the Minister explained, she meant a medium that undertakes the three major missions of public service broadcasting: proximity (tripling the number of hours of regional programming on France 3, more synergies with France Bleu), news and the discussion of ideas, and education. To achieve this, the Minister announced the launch on 6 June 2018 of a platform ("Vrai ou fake") dedicated to decrypting fake news, to be hosted on France Info's website. A pooled range of educational content directed at the general public is also to be launched.

The audiovisual public service therefore needed to take risks in terms of creation. The Minister announced that she had "ring-fenced" the EUR 560 million invested annually in the production of content. In addition, two new digital platforms are to be launched for the this purpose: (i) a new arts and culture "medium", to be launched at the end of June

2018, bringing together hundreds of hours of recordings, podcasts, and web series gathered from the output of the six public companies, and (ii) "youth" programming common to Radio France, France Télévisions and France Médias Monde, with short, innovative formats. "This is one of the major features of the reform, aimed at winning back young audiences".

Stressing the need to anticipate digital-related uses and satisfy "digital natives", the Minister also announced a substantial investment in digital technology, with a joint investment of a further EUR 150 million on the part of the companies in the public audiovisual sector. There is also a desire to invest in the construction of a solution for an on-demand offer, in line with the uses that are currently growing rapidly. But "to do so, choices have to be made", and the Minister has already announced that at the very least France Télévisions would be freeing up the broadcasting channel occupied by France 4 and that a consultation procedure would be launched regarding the maintenance of France Ô on that channel.

Insisting on the need to involve all interested professionals in the audiovisual and creative sectors, the Minister announced that she had appointed a task force to carry out this consultation.

The Minister announced that in the course of 2019 - after the consultation process is finished - she would be tabling three bills on the reform of governance, regulation in the digital age, and the reform of the contribution to the public audiovisual sector.

• *Discours de Françoise Nyssen, le 4 juin 2018* (Speech by Françoise Nyssen on 4 June 2018)
http://merlin.obs.coe.int/redirect.php?id=19146 FR

Amélie Blocman
Légipresse

GB-United Kingdom

Ofcom opens seven new investigations of RT news channel for potential breaches of due impartiality rules under Broadcasting Code

On 18 April 2018, in a notable 18-page report, Ofcom announced that it has opened seven new investigations into the observance of due impartiality by the television channel RT News, which is licensed by the regulator through ANO TV Novosti. The investigations concern RT's alleged conduct since the occurrence of an incident in Salisbury, England on 4 March 2018, when Sergei Skripal and his daughter, suffered injury arising from an unlawful assault (possibly carried out with a nerve agent). The British Government asserted in an announcement on 14 March 2018 that "this represented an unlawful use of force by the Russian State against the UK"; the allegation is denied by the Russian Federation.

Between 2011 and 2018, Ofcom has had to investigate fifteen incidents concerning RT, two of which concerned breaches of advertising minutage rules; the remainder concerned due impartiality, misleading material, fairness, and the use of offensive language (see, for example, IRIS 2017-3/15, IRIS 2016-9/18, IRIS 2016-1/15, IRIS 2015-5/15). All fifteen investigations found that breaches had occurred. Ofcom regarded the advertising-related breaches as less severe infringements compared to the other complaints such as those concerning a lack of due impartiality. Ofcom reported no breaches against RT in 2015 and 2017. Ofcom has also noted that until 2018, RT's overall compliance record was not particularly good, compared with that of other news broadcasters of this type.

TV Novosti is financed by the Russian Federation, by whom Ofcom considers it is ultimately controlled. However, a number of broadcasters are state-funded, such as the BBC, Qatar's Al Jazeera Media Network and Japan's NHK Cosmomedia (Europe) Limited. State-controlled broadcasting services licensed by Ofcom have to comply with the Broadcasting Code. Ofcom has regard to (i) UK-focused audiences and (ii) its own need to be alert to breaches of the rules relating to due impartiality and due accuracy in news.

Since the 4 March incident, Ofcom has gathered material giving reason to investigate RT for a number of potential breaches of the Broadcasting Code. TV Novosti holds an Ofcom licence under each of the 1990 and 1996 Broadcasting Acts. Section 3(3) of both Acts provides that Ofcom: "shall not grant a licence to any person unless satisfied that the person is a fit and proper person to hold it; and 04046 shall do all that they can to secure that, if they cease to be so satisfied in the case of any person holding a licence, that person does not remain the holder of the licence."

The withdrawal of a broadcaster's licence would be regarded as constituting a major interference with freedom of expression. The threshold for finding a broadcaster not fit and proper to hold a broadcast licence is high.

The regulation of a broadcaster is undertaken partly to protect the public from harm, and Ofcom's Broadcasting Code stipulates the obligation to ensure due accuracy in news and due impartiality. Failure by a broadcaster to comply with the Broadcasting Code and any licence condition on a serious, repeated or ongoing basis may suggest a lack of fitness and properness. When considering this Ofcom will look at the broadcaster's conduct but also at those who exercise material influence or control over the broadcaster. Ofcom in the course of its regular activity has monitored RT's programmes - intensively so since the Salisbury incident. Although RT's audiences expect to see a Rus-

sian take on news and current affairs, Ofcom requires RT to preserve due accuracy and impartiality to a level similar to that of UK-focused channels.

Since 14 March 2018 Ofcom has observed an increase in the number of RT's programmes that they consider warrant investigation as containing potential breaches of the Broadcasting Code, as it relates to the requirement for due impartiality. That is why Ofcom has opened seven new investigations and will investigate these as quickly as possible, in a manner that complies with the requirement to observe fair process.

• Ofcom, Update on the RT service - new broadcasting investigations and approach to fit & proper, 18 April 2018
http://merlin.obs.coe.int/redirect.php?id=19165 EN

Julian Wilkins
Blue Pencil Set

Decision on portrayal of Leader of the Opposition in programme on UK/Russia relations

On 10 May 2018 the BBC Executive Complaints Unit (ECU) delivered its decision on the portrayal of the Leader of the Opposition, Jeremy Corbyn, in a current affairs programme on UK/Russian relations. Following an incident in the English town of Salisbury (an ex-Russian KGB officer had been allegedly attacked with a nerve agent) and a subsequent House of Commons appearance on the matter by Mr Corbyn, BBC's Newsnight programme presented a studio discussion about his position.

48 people complained to the ECU that the studio's backdrop had been deliberately contrived to convey an impression of pro-Russian sympathy on Mr Corbyn's part. Several grounds were advanced for this conclusion.

Firstly, it was claimed the image had been manipulated to make Mr Corbyn look more Russian than in the photograph from which it had been taken, particularly by altering the appearance of his hat. However, the BBC clarified that the photograph had not been photoshopped or manipulated. Some complainants understood this clarification to mean that it had been shown unaltered. However it was immediately apparent from the backdrop that the source images had been modified. In fact, the graphics team had increased the contrast to ensure enough definition on screen; moreover, they had given the whole backdrop a colour wash for a stylised effect. Newsnight's graphics team regularly treats images of politicians from all parties (and other people) in this way in order to create a strong studio backdrop for whichever story is being covered. As a result of this treatment, much of the detail of Mr Corbyn's hat that had been visible in the original photograph was lost, and the hat appeared in silhouette. This was the effect which suggested to some complainants a likeness to a Russian-style fur hat.

Secondly, it was claimed that the superimposition of the image against a Moscow skyline had compounded this effect. The BBC responded that a visual montage is a device commonly used in television programmes in order to highlight a story or theme. The use of the technique in news programmes such as Newsnight is intended to epitomise the story rather than to express or invite a particular attitude to it, and the montage used in the item in question was no exception. As the focus of the 15 March item was on Mr Corbyn's reaction to the claim that Russia was responsible for the nerve agent attack, it was entirely apt for the backdrop to combine his image with this backdrop (as had also been done on the previous evening's edition of the programme that had concerned an item on UK/Russia relations).

Thirdly, it was felt that the selection of a photograph in which Mr Corbyn was wearing (what some described as) a "Lenin-style cap" was also intended to suggest a Russian association. However, the BBC argued that the photograph was chosen because it was a typical and readily recognisable image of Mr Corbyn, which had been used many times across the media without remark. Complaints about its use on this occasion focused on the supposedly Russian associations of the Lenin-style cap that he was wearing in the photo shown. However, this objection conflicts with the objections of those who maintained that it was the alleged photoshopping of the hat that had given it a more Russian appearance. The BBC's position was that neither objection had any basis in fact.

Lastly, some complainants also complained that the programme's choice of focus constituted bias against Mr Corbyn. In introducing the item, the presenter made clear the rationale for the choice of focus. She asked: "Did Jeremy Corbyn misread the mood of his party in the Commons yesterday when he refused to point the finger at Russia?". She also said: "Today, Corbyn clarified, stressing his condemnation of the attack and saying the evidence pointed towards Russia. But he reiterated the need not to rush ahead of evidence in what he referred to as the fevered atmosphere of Westminster."

The ECU concluded that there were no grounds for regarding the contents of the item as less than impartial or fair to Mr Corbyn. The ECU decided not to uphold the complaints.

• BBC Executive Complaints Unit, "Newsnight, BBC Two, 15 March 2018: Use of Jeremy Corbyn's image: Finding by the Executive Complaints Unit", 10 May 2018
http://merlin.obs.coe.int/redirect.php?id=19139 EN

David Goldberg
deeJgee Research/ Consultancy

Arabic satellite news channel in breach of the Ofcom rules on offensiveness

On 8 May 2018 the UK's communications regulator, Ofcom, determined that Al Hiwar, a satellite news channel broadcasting to Arab communities in the UK and Middle East, had breached the rules concerning the causing of harm and offence under Ofcom's Broadcasting Code. The licence for Al Hiwar is held by Sage Media Ltd.

As part of its routine monitoring activities, Ofcom assessed the daily current affairs programme Free Speech, which broadcasts in Arabic. The second half of the programme featured a live discussion concerning protests across several Arab countries and elsewhere in the Middle East in response to the Israeli authorities' controversial decision to install electronic security gates at the al-Aqsa Mosque in July 2017. The al-Aqsa Mosque is located in the Old City of Jerusalem and is considered to be one of the most holy sites in Islam. The widespread protests were referred to in the programme as a "Day of Mobilisation" and the presenter expressed his deep disappointment in many Arab rulers "say[ing] nothing" and "hid[ing] their head[s] in the sand." The presenter subsequently invited viewers to phone in and share news regarding demonstrations or protests that might have taken place in their countries.

Exchanges between the presenter and the callers indicated that the subject matter discussed was quite emotive. Ofcom took the view that two particular contributors' statements had had the potential to cause material offence as they appeared to have referred to the use of violence as "a legitimate alternative to peaceful protests" against the Israeli authorities' actions. In Ofcom's opinion, the audience would not have reasonably expected to hear explicit references to "armed resistance within Palestine and abroad" (a caller from Libya) and the use of weapons "for the right cause, which is jihad" (another caller from Palestine).

The regulator recognised that Al Hiwar's audience was likely to have expected that events relating to the al-Aqsa Mosque would be discussed on the channel. It also considered the licensee's representations that it had not sought to pre-select contributors prior to the broadcast and that the presenter had interjected responses to callers' utterances. Nevertheless, Ofcom held that the overall context of the programme was not sufficient to justify the "highly offensive nature" of the two above-mentioned callers' comments. In its decision, it stressed that presenters of programmes involving viewer participation play a key role in steering the general direction of discussion and ensuring that potentially offensive comments are contextualised appropriately, especially in cases involving highly charged subject matters such as this one. The regulator acknowledged that the presenter did intervene, but found that he did not rebut the callers' views and positive references to violent action. In Ofcom's view, "this lack of challenge or counter-balance in the programme was likely to have increased the potential for offence in this case". Al Hiwar was consequently found in breach of the Ofcom Code because the contributors' statements had been inconsistent with generally accepted standards in the UK and the material that had been broadcast was not justified by contextual factors (Rule 2.3).

Moreover, the regulator believed that the content of the programme raised issues under its Rule 3.1 which requires that television or radio services must not include material likely to encourage or incite the commission of crime, or lead to disorder. In determining whether material violates this rule, Ofcom considers all the relevant circumstances, including the nature of the content, its editorial purpose and any likely effects. In this case, the status of the two above-mentioned callers from Libya and Palestine was of relevance too: neither of them appeared to be people who were "authoritative or who might have otherwise been in a position to exert influence over the audience". Although their comments had been "highly offensive" and could not be justified by the context, they were unlikely to have had the potential to incite crime or disorder, given the fact that all the other contributors to the programme had referred to "mobilisation" in terms of peaceful demonstrations. In the light of these factors, no breach of Rule 3.1 was found.

• Ofcom, Broadcast and On Demand Bulletin, Issue 353, 8 May 2018, p. 6
http://merlin.obs.coe.int/redirect.php?id=19166 EN

Alexandros K. Antoniou
University of Essex

HR-Croatia

Campaign "For Higher Visibility of Women's Sports in Electronic Media"

2 May 2018 saw the launch of the first part of a campaign within the project "For Higher Visibility of Women's Sports in Electronic Media". As a part of the campaign, which lasted for two weeks, two video spots and two radio spots were broadcast on numerous radio and television stations in the Republic of Croatia.

The purpose of the project is to affirm women's sports in society, especially team sports, and to encourage wider media coverage of them, thereby raising the awareness of the importance of the visibility of women's sports in media. The promotional campaign

aims to ensure higher visibility of women's sports in the news and on sports channels, to increase the length of female athletes' statements during sports reports, and to present women as athletes, coaches, selectors, sports journalists, referees and/or sports enthusiasts. One of the goals of the project is to enable women to freely choose the sports they want to practice, especially those which are traditionally considered to be men's sports.

As part of the campaign, ambassadors for the project shall be present as guests on various television and radio shows.

• *AEM ZA VECU VIDLJIVOST V1* (Campaign video "For Higher Visibility of Women's Sports in Electronic Media")
http://merlin.obs.coe.int/redirect.php?id=19168 HR

• *AEM ZA VECU VIDLJIVOSTI V2* (Campaign video "For Higher Visibility of Women's Sports in Electronic Media")
http://merlin.obs.coe.int/redirect.php?id=19169 HR

Nives Zvonarić
Ministry of Culture, Zagreb

IE-Ireland

BAI Report on the effect of Access Rules

On 16 May 2018, the Broadcasting Authority of Ireland (BAI) published its Report on the Effect of the BAI Access Rules. The BAI's Access Rules set down quantitative and qualitative requirements in respect of the provision of subtitling, Irish Sign Language and audio description, which broadcasters are required to meet (see IRIS 2016-9/21). Under Section 43 (c) of the Broadcasting Act 2009, the BAI is required to develop Access Rules that set out the specific steps that each television broadcaster must take to promote the understanding and enjoyment of television programmes by those who are blind or partially sighted, those who are deaf and hard of hearing, and those who are hard of hearing and partially sighted.

The 235-page Report, which includes three Appendices, sets out the findings of the statutory review of the Access Rules undertaken in 2017 by the BAI. Under Section 45(3) of the Broadcasting Act 2009, the BAI is required to review the effect of the Access Rules every two years and to provide the Minister for Communications, Climate Action and Environment with a report on the outcomes of this review; a report which is then laid before both Houses of Parliament (Oireachtas).

The Report is divided into section on methodology, review findings, potential policy options, and conclusions, in addition to a consultant's report on stakeholder research to information the Access Rules review, and a jurisdictional review of regulations, practice and related legislation in respect of the provision of access services in audiovisual media in a range of jurisdictions. A number of notable findings and potential policy options should be mentioned.

Firstly, in terms of the effectiveness of the Access Rules, the BAI states that the quantity and range of access service provision on television services continues to increase annually. RTÉ 1, for example, provides up to 94% subtitling during peak time periods of viewing. The quality and reliability of access service provision has also improved over this time, although real challenges remain in this area. Moreover, the level of engagement between broadcasters and access users and their representatives has improved since the last review, and this is a welcome trend. Furthermore, broadcasters continue to be engaged meaningfully in their approach to their requirements to provide access services with investment ongoing and also via the inclusion of accessible provisions on their online players (which is not a requirement of the BAI's Rules). In addition, compliance levels with the Access Rules overall is good, and where issues have arisen, broadcasters have been responsive and addressed these issues. However, compliance with quality requirements remains an issue for some (but not all) broadcasters.

The Report also considers areas where further action is merited by the BAI, including the following: firstly, the issue of the quality-of-access provision requires further intervention on the part of the BAI. The Report states that the review and the BAI's own engagements with broadcasters (as well as the experience of broadcasters at a European level) clearly indicates that this is a complex issue that is impacted by a number of factors. It is also evident that broadcasters have engaged with this challenge and there is nothing to indicate that problems with quality arise principally from poor standards in respect of the application of the quality requirements. Secondly, the targets and the approach to target-setting have also emerged as issues requiring further attention. There are very divergent views evident from the engagement with stakeholders, with broadcasters indicating that they are not in a position to increase provision above current levels and users advocating a move towards 100% provision. At the same time, users have also questioned the value of live subtitling and whether broadcaster resources allocated to access provision might be better spent elsewhere. The review findings indicate that further refinements to the mechanisms for setting targets may be warranted, such as giving consideration to peak time provision.

The Report concludes by noting that a public consultation on revised Rules will be undertaken in 2018 with a view to implementing new requirements from the beginning of 2019

• Broadcasting Authority of Ireland, Report on the Effect of the BAI Access Rules (2017), 16 May 2018
http://merlin.obs.coe.int/redirect.php?id=19140 EN

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

IT-Italy

Public consultation launched on AGCOM regulation on promotion of European audiovisual works

On 9 May 2018, by resolution no. 184/18/CONS, the Italian Communication Authority (AGCOM) launched a public consultation on the draft regulation governing the promotion of European audiovisual works and works of producers that are independent of broadcasters (so called "independent producers"). The draft regulation was adopted in accordance with the delegation of legislative powers provided by Article 44-quinquies of Legislative Decree no. 177 of 31 July 2005 ("TUSMAR"), introduced by the recently approved Legislative Decree no. 204 of 7 December 2017 as part of the "Franceschini Reform" (see IRIS 2018-2/24).

The draft regulation sets out, first of all, a definition of "European independent producers". In order for a producer to fall within this scope, two requirements have to be met: (i) the exercise of audiovisual production, and (ii) the lack of any relationship (including control or affiliation) with audiovisual media service providers subject to Italian jurisdiction. Furthermore, one of the following conditions must be fulfilled: (i) no more than 90% of the production may be allocated to the same provider of audiovisual media services, or (ii) the producer must be a secondary rights holder. The 90% threshold is calculated according to the overall amount of the revenues obtained by the producer as remuneration for the services offered to audiovisual media service providers.

Article 4 and Article 5 respectively regulate the content quotas and investments quotas applicable to broadcasters. As regards content quotas, Article 4 reflects the content of Article 44-bis of TUSMAR: on the one hand, it provides a gradual increase of the relevant quotas (53% for 2019, 56% for 2020, and 60% from 2021); on the other hand, it establishes a sub-quota in respect of Italian original works, corresponding to 1/2 of the transmission time established in respect of the public service broadcaster and 1/3 of the transmission time established in respect of private broadcasters from 2019 onwards. In addition to the above, national broadcasters shall reserve, on a weekly basis, 6% of "prime time" to cinema, fiction, animation and/or original documentaries of Italian original expression, regardless of where they were produced. The percentage is raised to 12% for the public service broadcaster. "Prime time" is defined as the timeframe encompassing programmes starting or finishing between 18h and 23h.

With respect to investment quotas, Article 5 of the draft regulation confirms that 10% of annual net revenues has be reserved by commercial broadcasters for the pre-purchase, purchase or production of EU works for 2018; that threshold is increased to 12.5% for 2019 (10.4% of which for independent producers) and of 15% from 2020 onwards (12.5% of which for independent producers). Moreover, broadcasters are required to reserve for the pre-purchase, purchase or production of cinematographic works of Italian original expression (regardless of where they were produced) by independent producers a percentage of 3.2% of annual net revenues; that figure is increased to 3.5% for 2019, to 4% for 2020 and to 4.5% from 2021 onwards.

Article 6 regulates on-demand service providers. The draft regulation confirms that a quota amounting to 30% of the catalogue has to be reserved for EU recent works and a sub-quota of 50% of the same for content of Italian original expression (regardless of where it was produced).

An investment quota of 20% of annual net revenues in Italy has to be reserved for EU works of independent producers, particularly recent ones (i.e. released in the last five years), while a sub-quota of not less than half of that percentage is provided for works of Italian original expression (regardless of where it was produced). In accordance with the recently enacted legislation, the draft regulation also specifies that from January 2019 the said quota shall be binding on providers that have editorial responsibility for output targeting Italian consumers, even if such providers are based abroad.

Broadcasters and on-demand service providers are entitled to obtain derogations from the obligations noted above if special conditions are met (e.g. they did not make any profit in the last two years through the relevant audiovisual media services).

• *Consultazione pubblica sullo schema di regolamento in materia di obblighi di programmazione e investimento a favore di opere europee e di opere di produttori indipendenti* (Regulation governing the promotion of European audiovisual works and works of independent producers - Delibera n. 184/18/CONS, 11 April 2018 (published 9 May 2018))
http://merlin.obs.coe.int/redirect.php?id=19167 IT

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

MD-Moldova

Broadcaster fined for airing Russian programme

On the basis of the recently adopted amendments to Moldova's Audiovisual Code (see IRIS 2006-9/27), which were signed into law by the President of the Parliament of the Republic of Moldova on 10 January 2018, the national media regulatory authority, the Council for Coordination of the Audiovisual Sector (CCA) (see IRIS 2015-5/24), imposed on a national television network a fine roughly amounting EUR 3 500 (MDL 70 000).

The 2018 amendments allowed broadcasters and cable operators to disseminate television and radio programming containing information about current, military and political affairs that was produced in the EU countries, the US or Canada, as well as in other countries that have ratified the European Convention on Transfrontier Television. However, it also introduced steep fines for violations of the above provision; this made the amendments somewhat confusing, as they introduced penalties for violations of the provisions allowing certain actions.

The CCA unanimously decided to impose a fine of MDL 70 000 on General Media Group Corp. Ltd., the founder of the Prime television network, for a live re-broadcast, on 1 March 2018, of the annual address of the Russian President Vladimir Putin to the Federal Assembly of the Russian Federation.

At the CCA hearings on 5 April 2018, the broadcaster claimed that the programme had not fallen under any of the categories defined by law. It also said that the live broadcast was neither unforeseen in the listings, nor initiated by Prime, whereas its editorial content could not be anticipated by the re-broadcaster. It assured the CCA that it would do its utmost to ensure that "such problems do not arise in the future".

• *Cu privire la examinarea sesizării Asociației Obștești Comunitatea pentru advocacy și politici publice „WatchDog.md", f/nr. din 12.03.2018* (Decision N 9/53, 5 April 2018, of the Council for Coordination on Audiovisual "Upon the complaint of the Public Association Community for Advocacy and public policy 'WatchDog.md', issued on 12 March 2018")
http://merlin.obs.coe.int/redirect.php?id=19142 RO

Andrei Richter
Catholic University in Ružomberok (Slovakia)

MT-Malta

New Media and Defamation Act for Malta

The Media and Defamation Act, Act No. XI of 2018, was passed on 24 April 2018. After it comes into force, it will replace the Press Act of 1974 (with regard to Legal Notice 150 of 2018 dated 8 May 2018, it already came into force on 14 May 2018).

It must be noted that there were two Media and Defamation Bills presented to the House of Representatives during 2017. The first was Bill No 192, dated 24 February 2017. However, it provoked such a negative reaction that during the parliamentary session ending in May 2017, the Government agreed to overhaul it. In fact, it lapsed when Parliament was subsequently dissolved. After the start of the present legislature, a revamped Media and Defamation Bill (Bill No 17) of 2017, dated 22 November 2017, was presented to the House of Representatives; this Bill was eventually enacted as Act No XI of 2018.

The new law will abolish the crime of criminal libel; pending criminal libel cases will be, ex lege, discontinued. Furthermore, it will no longer be possible for any person to issue a precautionary warrant of seizure [a court order that effectively safeguards the creditor's interest by seizing property belonging to the debtor, which property is deposited in court or kept under the custody of a third party, until the creditor's claim is properly determined and converted into an executive title], warrant of seizure of a commercial going concern, or a garnishee order [a court order issued to third parties who might be in possession of money or movable property belonging to the debtor] in security of any defamation claim. Defamation occurs when serious harm or the likelihood of serious harm to a person's reputation arises. Such a person can be either a physical person or a legal person; however in the case of the latter, defamation may apply only in the event that that legal person suffers a financial loss or faces the likelihood of such a loss.

Apart from the defence of truth - that is to say, that the statements complained of are substantially true - a new "defence of honest opinion" is provided by the new law. For such a defence to be pleaded successfully, the statement complained of will have to constitute an honest opinion; moreover, the defendant will have to indicate the basis of that opinion and be able to successfully argue that an honest person could have held the opinion on the basis of either (i) any fact that existed at the moment at which the statement was published or (ii) anything asserted to be a fact in a privileged statement published before the statement complained of. Both types of defence (that is to say, the "defence of truth" and the "defence of honest opinion") shall apply even where the complainant

is a public figure. Another defence - that of "general application" - relates to a publication on matters of public interest.

A statement may be privileged if it relates to a scientific or academic matter and has been peer-reviewed. The new law also lists a number of instances of privileged publications in respect of which no defamation may apply. The law distinguishes between defamation and slander and sets a lower limit of moral damages in relation to slander. In setting the level of damages, the court must take into account the economic capacity of the defendant and the impact that an award of damages will have on the offending medium concerned. Mediation is also suggested to expedite proceedings, though not made compulsory. Criteria are also provided for the assessment of damages.

Defamation actions can be instituted against website editors. Multiple legal actions cannot be brought against the same person for similar statements. Courts are empowered to order a website editor to remove the defamatory statement in question.

The right of reply is retained but is now enforced through the imposition of civil, not criminal, sanctions. Trade libel, like defamatory libel, is retained but obscene libel is decriminalised. Defamation of a deceased person is retained, provided that the plaintiff demonstrates that his or her own reputation has been harmed. The registration of editors and publishers with the Media Registrar is no longer compulsory.

• Media and Defamation Act, 2018
http://merlin.obs.coe.int/redirect.php?id=19141 EN MT

Kevin Aquilina
Faculty of Laws, University of Malta

RO-Romania

The PBS' Law, back to the Parliament

On 3 May 2018, the Romanian President, Klaus Iohannis, sent the Act for amending and completing Law No. 41/1994 on the organisation and functioning of the Romanian Radio Broadcasting Society and the Romanian Television Society (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) to Parliament for review.

The draft Law had previously been adopted by the Romanian Senate (the upper chamber) on 3 April 2018. The Act intended to increase, through Art. 19 (2), the number of members of the Boards of Administration of the Romanian radio and television public broadcasters to be proposed by Parliament. It also raised the total number of the members of each Board from thirteen to fifteen. On the other hand, the new draft Law intended to ease, through Art. 19 (1), the attainment of a majority of votes on the membership of the Boards in a joint sitting of the two Chambers.

In his request to Parliament, President Iohannis noted that these legislative interventions raise issues both in terms of correlation with the other provisions of Law no. 41/1994, as well as regarding the clarity and predictability of the norms. The President drew attention to the fact that the modification of Art. 19 (1) should be correlated with the modifications made to Art. 19 (6) in respect of the approval of the lists of candidates for the Councils, and to Art. 20 (3) in respect of the dismissal of members of the Boards - both require a qualified majority of 50% + 1 of MPs' total votes.

The new required majority provided by the legislature for the appointment of members of the Boards of Administration of the two companies will also apply to their dismissal; Parliament will appoint the members of these Councils by a vote of the majority of the parliamentarians present in a joint sitting of the two Chambers, while their dismissal will require a qualified majority vote (50% + 1) of the total number of deputies and senators of the Romanian Parliament.

After the law is enacted, the parliamentary groups of the two Chambers would have ten seats on the Boards, compared to the current eight provided by the law at present, which means a total of fifteen members in each Council. However, the modification of Art. 19 (2) should have been correlated with the modification of Art. 18 (2) of the existing Law, which clearly stipulates that each Board of Administration of the public radio and television is composed of 13 members.

• *The Cerere de reexaminare asupra Legii pentru modificarea art. 19 din Legea nr. 41/1994 privind organizarea și funcționarea Societății Române de Radiodifuziune și Societății Române de Televiziune - comunicat de presă 03.05.2018* (Request for review of the 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 - press release 03 May 2018)
http://merlin.obs.coe.int/redirect.php?id=19144 RO

Eugen Cojocariu
Radio Romania International

Results of the public consultation on the allotment of radio spectrum for terrestrial digital broadcasting

The Autoritatea Naţională pentru Administrare şi Reglementare în Comunicaţii (National Authority for Management and Regulation in Communications, ANCOM) has published the results of a questionnaire

on spectrum allotment for terrestrial digital broadcast multiplexes, which was issued in March 2018 (see, inter alia, IRIS 2009-9/26, IRIS 2010-3/34, IRIS 2010-9/35, IRIS 2012-8/34, IRIS 2013-6/30, IRIS 2014-4/26, IRIS 2014-5/29, IRIS 2014-9/27, IRIS 2015-5/33, IRIS 2015-7/28, IRIS 2016-2/26, IRIS 2017-1/29, IRIS 2017-4/32, IRIS 2018-5/29).

Following the consultation with the electronic communications market regarding the allocation of the spectrum available on the VHF and UHF band for digital terrestrial broadcasting services, ANCOM will propose some legislative amendments that will allow the auctioning in 2018 of digital terrestrial broadband multiplexes, said Sorin Grindeanu, President of ANCOM.

The proposed legislative amendments would (i) allow the auctioning of digital terrestrial broadcast multiplexing, (ii) call for proposals to set the licence fee for T-DAB multiplexes, and (iii) amend the decision on the charging procedure for the use of radio spectrum. After the auction, proposals would be made to (i) change the strategy for the transition from analogue terrestrial to digital terrestrial television and (ii) implement multimedia services at national level in order to encourage the development of digital terrestrial broadcasting systems T-DAB+.

For the spectrum available on the VHF band (174-230MHz), the proposals received by the Authority were aimed at transforming the VHF digital television multiplex into four T-DAB + national multiplexes. This change would allow for more spectral resources for digital terrestrial digital broadcasting, thus creating a larger number of programmes, both national and regional/local, as well as a multiplex dedicated to broadcasting public programmes. Another option that will be considered when planning the auction is the division into four T-DAB+ national multiplexes in the 174-216 MHz band, and forty-seven regional multiplexes in the 216-230 MHz band; this would create an environment favourable to the dissemination of a large number of programmes of different genres, of maximum quality.

Regarding the UHF band (470-694 MHz), the respondents appreciated that the sharing of spectrum resources in a national multiplex and thirty-six regional multiplexes (MUX 3) would constitute a balanced solution, considering that the option of allocating two national multiplexes (MUX 3 and MUX 6) would be preferable as regards the profit that could be obtained through sales of the Frequency User Licensee in respect of the two national multiplexes.

Regarding the service coverage obligations for T-DAB+ and DVB-T2, the respondents considered it preferable to impose both geographical and demographic coverage obligations on the national multiplex in respect of the broadcasting of public radio programmes and the installation of a number of transmitters for the other T-DAB+ multiplexes and DVB-T2 multiplexes. At the same time, it was considered necessary to lay down a schedule regarding the coverage obligations for the multiplex dedicated to the broadcasting of public broadcasting programmes; this would govern the first-stage coverage of densely populated urban areas and the main road and rail links, followed by the extension of coverage to national level.

Concerning the content of T-DAB+ multiplexes, the respondents considered that this should be made up of diverse national and regional public and private audio programming, as well as niche, specialised and/or generated content for periods of time associated with events of general interest - together with any associated and independent data and images). As regards DVB-T2 multiplexes, content should be the same as that allowed to the multiplexes; it follows that the current legislation needs to be amended so that the operators of these multiplexes have the same set-up rights as those enjoyed by the other platforms (CATV, DTH, etc.).

• *ANCOM a publicat rezultatele chestionarului referitor la alocarea spectrului pentru multiplexurile de radiodifuziune digitală terestră - comunicat de presă 09.05.2018* (ANCOM issued the results of the questionnaire on the allotment of radio spectrum for terrestrial digital broadcasting services - press release 09 2018)
http://merlin.obs.coe.int/redirect.php?id=19145 RO

Eugen Cojocariu
Radio Romania International

Agenda

Book List