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## INTERNATIONAL

### COUNCIL OF EUROPE

#### European Court of Human Rights: M.L. and W.W. v. Germany

Since the judgment by the Court of Justice of the European Union (CJEU) in the case of Google Spain SL, Google Inc. v. Agencia Española de Protección de Datos (see IRIS 2014-6/3), and the explicit recognition in Article 17 of the General Data Protection Regulation (2016/679) of the right to erasure (“the right to be forgotten” - see IRIS 2018-6/7), the European Court of Human Rights (ECtHR) has introduced and applied important principles with regard to the “right to be forgotten” with respect to both Article 8 (the right to respect for private life) and Article 10 (the right to freedom of expression) of the European Convention on Human Rights (ECHR). In its judgment of 28 June 2018, the ECtHR dismissed a “right to be forgotten” application under Article 8 in respect of online information published on German media portals concerning the conviction for murder of two persons, M.L. and W.W.

The case concerned the refusal by the German Federal Court of Justice to issue an injunction prohibiting three different media organisations from continuing to allow Internet users access to documentation about a murder case, which listed the full names of the convicted murderers. In 1993 M.L. and W.W. were convicted of murdering a popular actor and sentenced to life imprisonment. When they were released on probation in 2007 and 2008, M.L. and W.W. brought proceedings against the radio station Deutschlandradio, the weekly magazine Der Spiegel, and the daily newspaper Mannheimer Morgen, requesting the anonymisation of the personal data in the documentation on them which had appeared on those media organisations’ respective Internet sites. In first-instance and appeal judgments the courts granted W.L.’s and W.W.’s requests, considering in particular that their interest in no longer being confronted with their past actions so long after their convictions prevailed over the public interest in being informed. However, the Federal Court of Justice overturned those decisions on the grounds that insufficient account had been taken of the media’s right to freedom of expression and, with regard to the mission of the media, the public’s interest in being informed.

Relying on Article 8 of the ECHR, M.L. and W.W. lodged an application with the ECtHR, complaining of a violation of their right to privacy constituted by the refusal of the German Federal Court of Justice to issue an injunction prohibiting the defendant media from keep-

ing on their respective Internet portals personal data concerning M.L.’s and W.W.’s criminal trial and conviction for murder. The ECtHR considered that although it was primarily on account of search engines that the information about the murder case could easily be obtained by Internet users, the interference complained of by M.L. and W.W. resulted from the decision by the media organisations themselves to publish and conserve this material on their respective websites; the search engines hence merely amplified the scope of the interference. It also observed that M.L. and W.W. were not asking for the removal of the reports in question, but only that they be anonymised, and that rendering material anonymous was a less restrictive measure in terms of press freedom than the removal of an entire article. On the other hand the substantial contribution made by Internet archives to preserving and making available news and information was to be taken into account, as archives constitute an important source for education and historical research, particularly as they are readily accessible to the public and are generally free. The ECtHR confirmed that the media have the task of participating in the creation of democratic opinion, by making available to the public old news items that they have preserved in their archives.

The ECtHR next examined the relevant criteria applied in other cases when balancing Article 8 and Article 10 rights, focusing on (1) the contribution to a debate of public interest, (2) the degree of notoriety of M.L. and W.W., (3) their prior conduct in relation to the media, and (4) the content, form and consequences of online reports (containing M.L. and W.W.’s names and photographs ) at issue.

The ECtHR reiterated that the approach to covering any subject is a matter of journalistic freedom, leaving it to journalists to decide what details ought to be published, provided that these decisions corresponded to the profession’s ethical norms. The inclusion in a report of individualised information, such as the full name of the person in question, is an important aspect of the press’s work, especially when reporting on criminal proceedings which have attracted considerable attention and contributed to a debate of public interest that remains undiminished with the passage of time. As to how well known M.L. and W.W. were, the ECtHR observed that they were not simply private individuals who were unknown to the public at the time their request for anonymity was made. The reports in question concerned either the conduct of their criminal trial, or one of their requests for the reopening of that trial, and thus constituted information capable of contributing to a debate in a democratic society. The ECtHR also noted that at an earlier stage, some years before their release on probation, M.L. and W.W. had themselves contacted the press, transmitting a number of documents while inviting journalists to keep the public informed about their requests to reopen the case. According to the ECtHR, this attitude put a different perspective on their hope of obtaining anonymity in the media reports, or on the right

to be forgotten online. With regard to the content and form of the contested documentation, the ECtHR considered that the texts at issue described a judicial decision in an objective and non-denigrating manner, the original truthfulness or lawfulness of which had never been challenged. It found that the dissemination of the contested publications had been limited in scope, especially as some of the material was subject to restrictions such as paid access or a subscription. The ECtHR also referred to the fact that M.L. and W.W. did not provide information about any attempts made by them to contact search engine operators with a view to making it harder to trace information about them.

In conclusion, having regard to the margin of appreciation left to the national authorities when weighing up divergent interests, the importance of maintaining the accessibility of press reports that have been recognised as lawful, and M.L.'s and W.W.'s conduct vis-à-vis the press, the ECtHR, unanimously, considered that there were no substantial grounds for it to substitute its view for that of the German Federal Court of Justice. Hence the ECtHR concluded that there had been no violation of Article 8 of the ECHR.

• *Arrêt de la Cour européenne des droits de l'homme, cinquième section, affaire M.L. et W.W. c. Allemagne, requêtes nos 60798/10 et 65599/10, rendu le 28 juin 2018* (Judgment by the European Court of Human Rights, Fifth Section, case of M.L. and W.W. v. Germany, Application nos. 60798/10 and 65599/10, 28 June 2018)

<http://merlin.obs.coe.int/redirect.php?id=19177>

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## European Court of Human Rights: **Mariya Alekhina and Others v. Russia**

After the international condemnation of the Russian authorities' targeting of the punk band Pussy Riot, the European Court of Human Rights (ECtHR) has found various violations of the band members' rights under the European Convention on Human Rights (ECHR). The ECtHR found violations under Article 3 (prohibition of inhuman or degrading treatment), Article 5 § 3 (the right to liberty and security) and 6 §§ 1 and 3 (c) of the ECHR (the right to a fair trial), in relation to the conditions of their transportation and detention in the courthouse, their pre-trial detention, their treatment during the court hearings and restrictions on the legal assistance afforded to them. Most importantly the ECtHR found that the criminal prosecution of and prison sentence imposed on the Pussy Riot members constituted a breach of their freedom of expression under Article 10 of the ECHR. The ECtHR also found a violation of Article 10 for having declared extremist and banned video material of the Pussy Riot available on the Internet.

The three applicants are members of the feminist punk band, Pussy Riot: Ms Mariya Vladimirovna Alekhina, Ms Nadezhda Andreyevna Tolokonnikova and Ms Yekaterina Stanislavovna Samutsevich. The group carried out a series of impromptu performances of their songs in various public areas in Moscow. According to Pussy Riot, their actions and performances were a response to the ongoing political process in Russia, and their songs contained "clear and strongly worded political messages critical of the government and expressing support for feminism, the rights of minorities and ongoing political protests".

The Pussy Riot members complained to the ECtHR about their conviction and imprisonment for attempting to perform one of their protest songs in a Moscow cathedral in 2012. The performance was meant to express disapproval of the political situation in Russia at the time and of Patriarch Kirill, the leader of the Russian Orthodox Church, who had strongly criticised the large-scale street protests across the country against the recently held elections. No service was taking place, but some people were inside the cathedral, including journalists invited by the band for the purposes of publicity. The performance only lasted slightly over a minute because cathedral guards quickly forced the band out. The band uploaded the video footage of their attempted performance to their website and to YouTube. The three Pussy Riot members were arrested shortly after the performance for "hooliganism motivated by religious hatred" and were held in custody and pre-trial detention for just over five months before being convicted as charged. The trial court found that the Pussy Riot action had been offensive and insulting. The court rejected the applicants' arguments that their performance had been politically and not religiously motivated, and they were sentenced to one year and eleven months imprisonment. All appeals against this decision were dismissed. The domestic courts also ruled that the performance had been offensive and banned access to the "extremist" video recordings Pussy Riot had subsequently uploaded onto the Internet.

With regard to the punk band's right to freedom of expression the ECtHR reiterated that this right includes freedom of artistic expression, which affords the opportunity to take part in the public exchange of cultural, political and social information and ideas of all kinds; the ECtHR considered that such an exchange of ideas by those who create and perform art was essential for a democratic society. The ECtHR also emphasised that opinions or artistic works, apart from being capable of being expressed through the media, can also be expressed through conduct.

In its assessment of the necessity in a democratic society of the interferences at issue, the ECtHR emphasised that Pussy Riot's actions had contributed to the debate about the political situation in Russia and the exercise of parliamentary and presidential powers. The ECtHR reiterated that there is little scope



under Article 10 § 2 of the ECHR for restrictions on political speech or debates on questions of public interest, and that very strong reasons are required to justify such restrictions. On the other hand, the ECtHR noted that Article 10 of the ECHR does not bestow any freedom of forum for the exercise of that right and does not create an automatic right of entry to private or publicly owned property. As the Pussy Riot performance had taken place in a cathedral, it could be considered to have violated the accepted rules of conduct in a place of religious worship; this conduct could have justified the imposition of certain sanctions in order to protect the rights of others. However, the applicants were charged with a criminal offence and sentenced to one year and eleven months in prison. The ECtHR noted that the applicants' actions did not disrupt any religious services, and nor did they cause any injury to people inside the cathedral or any damage to church property. It also observed that it was unable to discern any element in the domestic courts' analysis which would allow the applicants' conduct to be deemed to constitute incitement to (religious) hatred. The ECtHR found that the Pussy Riot performance neither contained elements of violence, nor stirred up or justified violence, hatred or intolerance of believers, and it reiterated that, in principle, peaceful and non-violent forms of expression should not be made subject to the threat of the imposition of a custodial sentence. The ECtHR reiterated that interference with freedom of expression in the form of criminal sanctions could have a "chilling effect" on the exercise of that freedom. The ECtHR concluded that the domestic courts had failed to adduce "relevant and sufficient" reasons to justify the criminal conviction and prison sentence imposed on the applicants and that the sanctions were not proportionate to the legitimate aim pursued.

With regard to the finding that the Pussy Riot video materials available on the Internet were "extremist" and to the placing of a ban on access to that material, the ECtHR found that the domestic courts had made no attempt to conduct its own analysis of the video materials in question; rather, it had relied solely on a report by linguistic experts, without specifying which particular elements of the videos were problematic under the Suppression of Extremism Act. The ECtHR was also of the view that a domestic court could never be in a position to provide "relevant and sufficient" reasons to justify interference with the rights guaranteed by Article 10 of the ECHR without some form of judicial review based on an assessment of the arguments advanced by the public authority against those of the interested party.

However, the domestic law had not allowed Pussy Riot to participate in the proceedings that led to the finding that their activities and material had been "extremist"; they had thus been deprived of any possibility to contest the allegations made by the public authority. There is no doubt that this kind of state action curtailing the right to freedom of expression is incompatible with Article 10 of the ECHR. The ECtHR thus came to the conclusion that declaring Pussy

Riot's online video materials "extremist" and placing a ban on access to them had not met a "pressing social need" and had accordingly been disproportionate to the legitimate aim invoked. The interference had thus not been "necessary in a democratic society" and had therefore violated Article 10 of the ECHR.

• Judgment by the European Court of Human Rights, Third Section, case of *Mariya Alekhina and Others v. Russia*, Application no. 38004/12, 17 July 2018  
<http://merlin.obs.coe.int/redirect.php?id=19178>

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### European Court of Human Rights: *Centrum för Rättvisa v. Sweden*

According to the European Court of Human Rights (ECtHR), the Swedish law permitting the bulk interception of electronic signals in Sweden for foreign intelligence purposes does not violate the right to privacy and correspondence under Article 8 of the European Convention on Human Rights (ECHR). The ECtHR reached this conclusion after a Swedish human rights not-for-profit organisation, *Centrum för Rättvisa* ("the Centrum"), lodged a complaint with the Strasbourg Court, alleging that Swedish legislation and practice in the field of signals intelligence violated and continued to violate its privacy rights under Article 8 of the ECHR.

"Signals intelligence" can be defined as the interception, processing, analysis and reporting of intelligence derived from electronic signals. These signals may be converted to text, images and sound. In Sweden, signals intelligence is conducted by the National Defence Radio Establishment (*Försvarets radioanstalt* - "the FRA") and regulated by the Signals Intelligence Act. Owing to the nature of its function as a non-governmental organisation scrutinising the activities of state actors, the Centrum argued that there is a risk that those of its communication activities carried out by means of mobile telephones and mobile broadband had been or could be intercepted and examined by way of signals intelligence. The Centrum has not brought any domestic proceedings, contending that there was or is no effective remedy for its Convention complaints.

The ECtHR considered that the contested legislation regulating signals intelligence establishes a system of secret surveillance that potentially affects all users of, for example, mobile telephone services and the Internet, without their being notified of such surveillance. And, because no domestic legal remedies provide detailed grounds in response to a complainant who suspects that his or her communications have been intercepted.

In these circumstances, the ECtHR accepted that an examination of the Swedish legislation in abstracto is justified. It emphasised that, especially where a power vested in the executive is exercised in secret, the risk of arbitrariness is evident; therefore it is essential to have clear, detailed rules on the interception of telephone and Internet communications, especially as the relevant technology available is continually becoming more sophisticated. In view of the risk that a system of secret surveillance set up to protect national security may undermine, or even destroy, democracy under the cloak of defending it, the ECtHR must be satisfied that there are adequate and effective guarantees against abuse. Any assessment of this question must depend on all the circumstances of the case, such as the nature, scope and duration of possible measures, the grounds required for ordering them, the authorities competent to authorise, carry out and supervise them, and the kind of remedy provided by the national law.

As the ECtHR considered that it is clear that the Swedish law permitting signals intelligence pursues legitimate aims in the interest of national security, it remained to be ascertained whether the law is accessible and contains adequate and effective safeguards and guarantees to be considered “foreseeable” and “necessary in a democratic society”.

The ECtHR found that the Swedish law indicates the scope for mandating and performing signals intelligence conferred on the competent authorities and the manner of the exercise thereof sufficient clarity, and it was satisfied that there are safeguards in place which adequately regulate the duration, renewal and cancellation of interception measures. Most importantly, permission to undertake interception measures have to be authorised by court order, and only after a detailed examination; it was only permitted in respect of communications crossing the Swedish border and not within Sweden itself; such measures could only last for a maximum of six months; and any renewal required a court review. The ECtHR found that the provisions and procedures regulating the system of prior court authorisation, on the whole, provide important guarantees against abuse. Examining the legislation on storing, accessing, examining, using and destroying intercepted data, the ECtHR was also satisfied that it provides adequate safeguards against the abusive treatment of personal data and thus serves to protect individuals’ personal integrity. Although a certain lack of specification in the provisions regulating the communication of personal data to other states and international organisations gives some cause for concern with respect to the possible abuse of the rights of individuals, on the whole, the ECtHR considered that the supervisory elements in place sufficiently counterbalance these regulatory shortcomings. Lastly, the ECtHR agreed with the Swedish Government that the lack of notification of surveillance measures is compensated for by the fact that there are a number of complaint mechanisms available - in particular those that could be exercised via the Data Protection Au-

thority, the Parliamentary Ombudsmen and the Chancellor of Justice. However, the ECtHR observed that the Swedish remedies available in relation to complaints relating to secret surveillance do not include recourse to a court, nor do they offer other effective remedies.

Furthermore, individuals are not informed of whether their communications have actually been intercepted, and neither are they generally given reasoned decisions. However, it ruled that the total number of available remedies, although not providing a full and public response to the objections raised by the Centrum, must be considered sufficient in the present context, which concerns an abstract challenge to the signals intelligence regime itself and does not concern a complaint against a particular intelligence measure. In reaching this conclusion, the Court attaches importance to the earlier stages of supervision of the signals intelligence regime, including the detailed judicial examination by the Foreign Intelligence Court of the FRA’s requests for permits to conduct signals intelligence and the extensive and partly public supervision by several bodies (in particular the Foreign Intelligence Inspectorate).

Although the ECtHR stressed that it is mindful of the potentially harmful effects that the operation of a signals intelligence scheme may have on the protection of privacy, it acknowledged the importance for national security operations of a system such as the Swedish one, having regard to the present-day threats being posed by global terrorism and serious cross-border crime, as well as the increased sophistication of communications technology. The ECtHR was of the opinion that the Swedish system on signals intelligence reveals no significant shortcomings in its structure and operation and that it provides adequate and sufficient guarantees against arbitrariness and the risk of abuse. It therefore ruled that there had been no violation of Article 8 of the ECHR.

• Judgment by the European Court of Human Rights, Third Section, case of Centrum för Rättvisa v. Sweden, Application no. 35252/08, 19 June 2018

<http://merlin.obs.coe.int/redirect.php?id=19179>

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### **Committee of Ministers: Recommendation on rights of the child in the digital environment**

On 4 July 2018, the Committee of Ministers of the Council of Europe adopted a new Recommendation on Guidelines to respect, protect and fulfil the rights of the child in the digital environment. The Recommendation opens with a Preamble recognising that the digital environment is complex and subject to rapid

evolution, and is reshaping children's lives in many ways, resulting in opportunities for and risks to their well-being and enjoyment of human rights. Furthermore, the Committee of Ministers is conscious that information and communication technologies are an important tool in children's lives for education, socialisation, expression and inclusion, while at the same time their use can generate risks, including violence, exploitation and abuse.

The Committee of Ministers makes a number of recommendations to member states, including a recommendation that member states review their legislation, policies and practice to ensure that they are in line with the recommendations, principles and further guidance set out in the new Guidelines to respect, protect and fulfil the rights of the child in the digital environment, which are annexed to the Recommendation. Moreover, member states should promote the implementation of the Guidelines in all relevant areas and evaluate the effectiveness of the measures taken at regular intervals, with the participation of relevant stakeholders. Furthermore, member states should require business enterprises to meet their responsibility to respect the rights of the child in the digital environment and to undertake implementing measures, and encourage them to cooperate with the relevant state stakeholders, civil society organisations and children.

The new Guidelines to respect, protect and fulfil the rights of the child in the digital environment run to 15 pages, and include 124 sections. A number of provisions in the Guidelines concern the media and online media, and should be briefly mentioned. Firstly, information on the rights of the child, including in the digital environment; news; health; information on sexuality, among other useful resources to them, is particularly important. In particular, member states should ensure that children are able to locate and explore public-service media and high-quality content likely to be of benefit to them. Secondly, where member states make provisions on the media, these should involve children in active forms of communication, encouraging the provision of user-generated content and establishing other participatory schemes. Attention should also be paid to children's access to, and presence and portrayal in, online media.

Thirdly, in relation to digital literacy, member states should promote the development of digital literacy, including media and information literacy and digital citizenship education, in order to ensure that children have the ability to engage in the digital environment wisely and the resilience to cope with its associated risks. Digital literacy education should be included in the basic education curriculum from the earliest years, taking into account children's evolving capacities. Fourthly, member states are encouraged to cooperate with media, with due respect for media freedom, with educational institutions and other relevant stakeholders, to develop awareness-raising programmes aimed at protecting children from harmful

content as well as preventing their involvement in illegal online activities.

Lastly, member states should encourage all professional media outlets, and public service media in particular, to be attentive to their role as an important source of information and reference for children, parents or carers, and educators in relation to the rights of the child in the digital environment, with due regard to international and European standards on freedom of expression and information and freedom of media.

• Recommendation CM/Rec(2018)7 of the Committee of Ministers to member States on Guidelines to respect, protect and fulfill the rights of the child in the digital environment, 4 July 2018  
<http://merlin.obs.coe.int/redirect.php?id=19201>

EN FR

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## EUROPEAN UNION

### **Court of Justice of the European Union: Grand Chamber judgment on the concept of a data controller**

On 5 June 2018, the Court of Justice of the European Union (CJEU) delivered a judgment in the case of *Unabhängiges Landeszentrum für Datenschutz Schleswig-Holstein v Wirtschaftsakademie Schleswig-Holstein GmbH* (Case C-210/16). The judgment interprets the notion of a "controller" - one of the key concepts of the European data protection framework - within the context of a relationship between Facebook and the administrator of a fan page created on Facebook's platform. In addition, it clarifies the scope of the enforcement powers of the national data protection authorities in relation to local offices of non-European companies, such as Facebook.

The judgment addressed a request for a preliminary ruling from the Federal Administrative Court of Germany in a dispute between the Independent Data Protection Centre for the Land of Schleswig-Holstein, Germany ("the ULD") and the *Wirtschaftsakademie Schleswig-Holstein GmbH* ("the WSH"). The WSH operated a fan page on Facebook in order to provide educational services. The fan page was accessible to individuals, irrespective of whether or not they had an account on Facebook. As the administrator of the fan page, the WSH obtained anonymous statistical information regarding visitors to its fan page, which Facebook collected by placing cookies on users' devices. Neither Facebook nor the WSH informed users of the storage and functioning of the cookies or the subsequent processing of their personal data.



The key questions that the German court referred to the CJEU were: (1) whether the administrator of a fan page on Facebook qualifies as a personal data controller on a par with Facebook, and is therefore responsible for processing the personal data of fan page visitors; and (2) whether the ULD is competent to exercise enforcement powers against Facebook Germany, which, according to the division of tasks within the group, is not responsible for the processing of personal data.

Referring to its Google Spain judgment (see IRIS 2014-6/3), the CJEU reiterated that the concept of a “controller” should be interpreted broadly in order to ensure the “effective and complete protection” of individuals. The CJEU established that although the administrator of a fan page only receives statistics in anonymised form, it nevertheless contributes to the processing of the personal data of visitors of such a fan page by requesting Facebook to process such personal data and by defining the parameters and criteria for drawing up the statistics. Thus, the administrator of a fan page contributes to determining, jointly with Facebook, the purposes and means of processing visitors’ personal data; such an administrator therefore falls under the definition of “controller” under Data Protection Directive 95/46 (see IRIS 1998-10/4). Although since 25 May 2018 the Directive has been superseded by the General Data Protection Regulation (see IRIS 2018-6/7), this interpretation remains relevant, as the definition of “controller” has remained unchanged.

The CJEU also ruled that although Facebook Germany is only responsible for promoting and selling advertising space in Germany (while all the responsibility for processing personal data within Europe is assigned to Facebook Ireland), the ULD is nevertheless competent to exercise its powers in respect of Facebook Germany without calling on the supervisory authority of Ireland. The Court explained that the processing of the personal data of German visitors to the fan page is intended to improve Facebook’s advertising system - the major source of Facebook’s revenue. Therefore, the activities of Facebook Germany must be regarded as “inextricably linked” to the processing of the personal data at issue.

• Judgment of the Court (Grand Chamber), Unabhängiges Landeszentrum für Datenschutz Schleswig-Holstein v Wirtschaftsakademie Schleswig-Holstein GmbH, Case C-210/16, 5 June 2018

<http://merlin.obs.coe.int/redirect.php?id=19203>

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## Advocate General: Opinion in dispute between France Télévisions and Playmédia

Because France Télévisions is a public broadcasting body, its television channels are under a ‘must-carry’ obligation as provided for in Article 34-2 of France’s Freedom of Communication Act. In addition to conventional terrestrial broadcasting, France Télévisions also offers the possibility of viewing its television channels via streaming on its Internet site. The company Playmédia operates an Internet site on which it offers, inter alia, the live streaming of a number of television channels, including those operated by France Télévisions. There is no charge for access to the site; Playmédia uses advertising to finance its activity. Having tried in vain to get France Télévisions to conclude a distribution contract, Playmédia had the company summoned to appear in court in order to achieve this, invoking the must-carry obligation incumbent on France Télévisions. France Télévisions entered counter-claims against Playmédia, based on violation of its intellectual property rights. At the same time as these legal proceedings were in hand, Playmédia referred the matter to the national audiovisual regulatory authority (Conseil Supérieur de l’Audiovisuel - CSA) which, in May 2015, had issued formal notice to France Télévisions requiring it to stop opposing its services being relayed on the site in question. The public-sector group referred the notice to the Conseil d’État for cancellation, whereupon the Conseil d’État stayed its decision pending receipt of answers to several preliminary questions put to the Court of Justice of the European Union (CJEU).

In its referral, the Conseil d’État first asked the Court whether an undertaking that offers live streaming of television programmes online must be regarded as an undertaking providing an electronic communications network used for the distribution of radio or television broadcasts to the public within the meaning of Article 31(1) of Directive 2002/22/EC (the Universal Service Directive). Advocate General Szpunar said no, on the grounds that an undertaking that offers online viewing of television programmes supplies is not an electronic communications network but content directed at its users via such a network (in this case, the Internet). Such an undertaking was therefore not a supplier, but a user of such a network. The Advocate General noted that Playmédia had been wrong in asserting that it operated an electronic communications network.

Mr Szpunar went on to examine the compatibility of the must-carry and must-offer obligations (incumbent on television entities), to decide whether Directive 2002/22/EC, or any other provision of EU law, prevented a member state from imposing a must-carry obligation on undertakings not covered by Article 31 of the Directive which offer the live streaming of television programmes online, since the obli-



gation is accompanied by the mutual obligation incumbent on the television entities concerned not to oppose such broadcasting. In passing, the Advocate General also noted that, while the Court was obviously not competent to interpret the domestic law of member states, Article 34-2 of France's Freedom of Communication Act appeared to demand the relay broadcasting of programmes broadcast terrestrially, whereas Playmédia was only offering a link to France Télévisions' Internet site. He also noted that copyright issues might constitute a hindrance to compliance with the must-carry obligation and that this ought to be taken into account when imposing and implementing the obligation. He also deemed that a must-carry obligation based on Internet links would not be legally viable. Thus, in response to the questions raised, the Advocate General stated that Directive 2002/22/EC did not prevent a member state from imposing an obligation to carry specific television programmes on undertakings offering live streaming of television programmes online. Such a requirement should nevertheless be made in the general interest, such as the maintenance, as part of the cultural policy of that member state, of diversity in the television programmes available in its territory, and not be disproportionate in relation to this objective. This implies that the way such an obligation is applied must be transparent, and based on criteria that are objective, non-discriminatory, and known in advance. The national authorities are responsible for checking that these conditions are met. Additionally, these undertakings must first obtain the agreement of the holders of copyright and neighbouring rights protecting the items contained in the said programmes. Lastly, in response to the final question, the Advocate General stated that a member state that imposes a must-carry obligation beyond the scope of the application of Article 31 of Directive 2002/22/EC is not bound by the conditions applicable to an obligation covered by the Article.

We now have to wait for the CJEU's decision before the Conseil d'État and the Court of Cassation will be able to move on to the next stage in this dispute.

• *Conclusions de l'avocat général M. Szpunar, affaire C-298/17, France Télévisions c/ Playmédia, présentées le 5 juillet 2018* (Opinion of Advocate General Szpunar in Case no. C-298/17, France Télévisions S.A. v. Playmédia, delivered on 5 July 2018)

<http://merlin.obs.coe.int/redirect.php?id=19226>

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CS	DA	EL	ES	ET	FI	HU	IT	LT	LV	MT		
NL	PL	PT	SK	SL	SV	HR						

**Amélie Blocman**  
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## Council of the EU: Provisional Inter-institutional Agreement on new AVMS Directive

On 13 June 2018, following inter-institutional negotiations, the European Parliament, European Council, and European Commission published a Provisional Agreement on a proposal amending the Audiovisual Media Services Directive (2010/13/EU) (AVMSD), which was first put forward by the Commission in May 2016 (see IRIS 2016-6/3). The proposed version of the new Directive, running to 38 pages, makes substantial amendments to over 17 of the articles of the AVMSD and includes some new articles. A number of notable amendments should be mentioned.

Firstly, the amended Article 13(1) now provides that member states must ensure that media service providers of on-demand audiovisual media services under their jurisdiction ensure that European works make up at least 30% of their catalogues and ensure prominence of those works. Moreover, under Article 13(2), where member states require media service providers under their jurisdiction to contribute financially to the production of European works (including via direct investment in content and contributing to national funds), they may also require media service providers which target audiences in their territories but which are established in other member states to make such financial contributions; furthermore, those contributions must be proportionate and non-discriminatory.

Secondly, in relation to television advertising, the amended Article 23 provides that the proportion of television advertising spots and teleshopping spots between (i) 6 a.m. and 6 p.m. and (ii) 6 p.m. and midnight must not exceed 20% of airtime. Moreover, under the current wording of Article 23, the proportion of television advertising spots and teleshopping spots within a given hour of the clock shall not exceed 20% of airtime.

Thirdly, a new Chapter IXa is included which contains new provisions applicable to video-sharing platform services. A substantial definition of a video-sharing platform service is included; the new chapter defines a video-sharing service as one "04046 where the principal purpose of the service or of a dissociable section thereof or an essential functionality of the service is devoted to providing programmes, user-generated videos, or both, to the general public, for which the video-sharing platform provider does not have editorial responsibility, in order to inform, entertain or educate, by means of an electronic communications network 04046 and the organisation of which is determined by the video-sharing platform provider, including by automatic means or algorithms in particular by displaying, tagging and sequencing."

Notably, under a new Article 28a(1), member states must ensure that video-sharing platforms take “appropriate measures” to protect (a) minors from programmes, user-generated videos and audiovisual commercial communications which may impair their physical, mental or moral development; (b) the general public from programmes, user-generated videos and audiovisual commercial communications containing incitement to violence or hatred directed against a group of persons or a member of a group; and (c) the general public from programmes, user-generated videos and audiovisual commercial communications containing content the dissemination of which constitutes an activity which is a criminal offence under EU law, namely public provocation to commit a terrorist offence, offences concerning child pornography, and offences concerning racism and xenophobia. Notably, a new Article 28a(3) elaborates upon the “appropriate measures” to be applied to video-sharing platforms, but states that they “shall not lead to any ex-ante control measures or upload-filtering of content” which do not comply with Article 15 of the e-Commerce Directive (2000/31/EC).

The proposal will now be sent for formal adoption by the Council and the European Parliament later in 2018.

• Provisional Agreement Resulting from Interinstitutional Negotiations, Proposal for a directive of the European Parliament and of the Council amending Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) in view of changing market realities (COM(2016)0287 - C8-0193/2016 - 2017/0151(COD)), 13 June 2018

<http://merlin.obs.coe.int/redirect.php?id=19180>

EN

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## REGIONAL AREAS

### **EBU: Western Balkan public service media sign MOU for future cooperation**

After six months of intensive work, the new EU-funded “Technical Assistance to Public Service Media in the Western Balkans” project was launched with a two-day conference on 26 June 2018.

The project aims to strengthen the independence of public service broadcasters in the Western Balkans (Albania, Bosnia and Herzegovina, Kosovo, FYR Macedonia, Montenegro and Serbia) and enhance their profile as public services. It hopes to achieve this through the development of suitable measures for improved funding models, the definition and implementation of journalistic standards and guidelines, and

regional exchange in the fields of investigative journalism and the development of a shared digitised archive platform. During the conference, representatives of six public service media organisations - Radio Televizioni Shqiptar (RTVSH) from Albania, Bosnian-Herzegovinian Radio Television (BHRT) from Bosnia and Herzegovina, Radio Televizioni i Kosovës (RTK) from Kosovo, Makedonska Radio-Televizija (MKRTV) from Macedonia, Radio Televizija Crne Gore (RTCG) from Montenegro and Radiotelevizija Srbije (RTS) from Serbia - demonstrated their support by signing a memorandum of understanding.

The conference was also attended by representatives of international organisations, high-ranking officials, political decision-makers and representatives of broadcasting regulators from the countries concerned.

With EUR 1.5 million of EU funding from the “IPA II - Civil Society Facility and Media Programme 2016-2017”, the project will run for two years. The European Commission’s programme manager, Karl Giancinti, said the European Union hoped the project would strengthen public service media and democratisation in the countries concerned. The General Director of the European Broadcasting Union (EBU), Noel Curran, said that this cooperation could bring about real change and have a positive impact on media and democracy throughout the region.

The project will be implemented by the International Federation of Journalists (IFJ), together with the EBU, the European Federation of Journalists (EFJ), the Balkan Investigative Reporting Network (BIRN), the Austrian public broadcaster (ORF) and the Eurovision Regional News Exchange for South East Europe (ERNO).

• European Broadcasting Union press release, 27 June 2018  
<http://merlin.obs.coe.int/redirect.php?id=19221>

EN

**Marc Großjean**  
*Saarland Appeal Court*

## FR-France

### **New CNC committee for checking regulations**

A new committee has just been set up at the National Centre for Cinematography and the Animated Image (Centre National de la Cinématographie et de l’Image Animée - CNC) - the Regulations Control Committee (Commission de Contrôle de la Réglementation). Created by the 2016 Creation Act, the Committee has been tasked with checking compliance with the rules applicable in the cinema and animated image sectors

(brought together in the Cinema and Animated Image Code (Code du Cinéma et de l'Image Animée) and the general regulations on financial support from the CNC), and imposing penalties on any natural or legal person who fails to comply. The penalties that may be imposed, depending on the gravity of the case, range from a warning or fine up to an operating ban. Thus, failure on the part of a professional to observe the rules on transparency or to draw up and submit production or operation accounts are infringements which would be particularly liable to sanctions.

Henceforth, whenever CNC staff note a failure to observe the applicable rules, the matter will be referred to an independent rapporteur from the Conseil d'État who will be instructed to carry out an investigation. This will be submitted to the new Committee, which will, totally independent of the CNC, reach a decision on follow-up and any penalties to be imposed. Depending on the gravity of the case, penalties will range from a warning up to the repayment of aid received from the CNC and even fines of as much as 5% of the undertaking's annual turnover.

The new Committee, whose members are representatives of professionals in the sector (cinema, audiovisual, video and multimedia; operators and originators), individuals who are qualified in the fields of business law, management and accounting, and members of the state's inspection services, has strict rules on recusal, designed to ensure its complete impartiality. Its decisions may be appealed against before the administrative courts. The new Committee is to be chaired for three years by a member of the Conseil d'État.

• *Communiqué de presse du CNC, "Installation de la nouvelle Commission de contrôle de la réglementation", 27 juillet 2018 (CNC press release, "Installation of the new Regulations Control Committee", 27 July 2018)*

<http://merlin.obs.coe.int/redirect.php?id=19227>

FR

**Amélie Blocman**  
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## NATIONAL

### BG-Bulgaria

#### Amendment in the media law due to the update of the CEM

In March 2018, the President of the Republic of Bulgaria, Rumen Radev, referred to the Constitutional Court with a request to declare a specific part of the Radio and Television Act (RTA) as being unconstitutional (file no. 7/2018, rapporteur: Kon-

statin Penchev). This request concerned Article 24 (Amended, SG No. 47/2010, effective 22.06.2010):

“(1) The Council for Electronic Media (CEM) shall consist of five members, of whom three shall be elected by the National Assembly and two shall be appointed by the President of the Republic.

(2) The National Assembly resolution and the presidential decree referred to in Paragraph (1) shall enter into force simultaneously.”

The head of state is of the opinion that Article 24 (2) of the RTA contradicts the conception laid down in the regulations for the establishment of the Council for Electronic Media. It causes inadequate management due to the fact that the periods when the parliament and the president have to update their quotas differ. According to Radev, the contested rule violates the principle of the division of power and the terms of office.

The problem with the rotation of the CEM's panel and the change of timing in the appointment of its members started in 2010, when, by means of an amendment to the law, the panel was reduced from 9 to 5 members. This change was, essentially, a divergence from the model for updating the panel that had been established in 1998 (IRIS 2010-8/18). At that time, Article 24(2) was not annulled by the Constitutional Court. In the case that has been brought before the Constitutional Court now, the reason for approaching the court was that the mandate of a CEM member in the President's quota had come to an end in June 2018. Up to that moment, the President had been waiting for the nomination of the Parliamentary 'quota' so that the decision of the National Assembly and the President's decree could be enforced at the same time, in accordance with the law. During the first rotation, after the reduction in the number of members (in 2012), there was a temporal discrepancy between the mandates of the CEM members from the two quotas which were nominated by the two different institutions.

Quota of the National Assembly: Sofia Vladimirova (27 April 2016 – 27 April 2022); Ivo Atanasov (23 July 2013 – 23 July 2019) and Rozita Elenova (27 April 2016 – 27 April 2022).

Quota of the President: Maria Stoyanova (1 June 2012 – 1 June 2018) and Betina Joteva (27 April 2016 – 27 April 2022).

The provision of Article 24(2) RTA caused problems for future members of the CEM selected by the President when taking office. They would have had to wait for the expiry of Ivo Atanasov's mandate at the end of July 2019 so as to observe the requirement that envisages the decision of the National Assembly and the President's decree to be enforced simultaneously and to overcome the discrepancy in nomination periods.

Before the Constitutional Court had taken a decision, the National Assembly accepted an amendment in the



act in a very quick procedure (the State Gazette, issue 44, dated 29 May 2018); through it, paragraph 2 of Article 24 was deleted. Consequently, on 4 June 2018, the Constitutional Court terminated the constitutional proceedings through lack of subject matter. Maria Stoyanova resigned after the expiry of her mandate and her resignation was voted on in a session of 5 June 2018, after which her position became vacant. The President appointed his representative on 28 June 2018.

- Законът за изменение на Закона за радиото и телевизията (Amendment Act of the Radio and Television Act, adopted by the 44th National Assembly on 16 May 2018)

<http://merlin.obs.coe.int/redirect.php?id=19192>

BG

- Определение за прекратяване на конституционно дело (Order to terminate a constitutional case of the Constitutional Court, 4 June 2018)

<http://merlin.obs.coe.int/redirect.php?id=19193>

BG

**Rayna Nikolova**  
New Bulgarian University

### Sector analysis on the competitive environment of the media market in Bulgaria

At the beginning of July 2018, the Commission for Protection of Competition announced its decision No. 717, dated 28 June 2018, in which it had carried out a sector analysis of the media market in the country. The research was done at the request of the Minister of Economics, the Minister of Finance and the Minister of Culture. During the research, the Commission for Protection of Competition - the national Competition Authority - got in touch with institutions, trade unions, associations and co-operations as well as with many undertakings, participants in the respective markets in the sector, so as to seek and inspect their assessment and opinion on the competitive environment of the media market in Bulgaria. With reference to the implementation of the sector analysis, the Commission sent questionnaires to the competition authorities in the EU member states through the European Competition Network in order to receive their assessments of the Bulgarian market.

The Commission found that on the radio and TV services market, on the market for the distribution of radio and TV content, on the market for the circulation of printed media and on the advertising market, there are no invincible barriers for new participants to enter the market or develop activity therein. Regarding online media, the Commission established that the barriers are very low for new entrants into the market. Online news services have been rendered in a digital environment, which hinders the presence and establishment of a market participant with a dominating position.

Concerning the TV services market, it was regarded as a normal phenomenon by the Commission that TV stands out in comparison to other media and advertising opportunities in regard to the volume of attracted advertisements. This is due to the fact that one can reach bigger audiences for a relatively short period of time. At the same time, a trend of decreasing trust in TV as the major advertising place has been detected compared to online advertising; despite the fact that the volume of online advertising is still considerably low, it has achieved significant growth recently.

The Commission considers it worthwhile recommending to the competent authorities and to the operating industrial organisations in the sector that they start a more intensive discussion aimed at introducing legislative measures or self-regulatory actions through which the problems that may arise in the sector could be overcome and through which, at the same time, normal competitiveness could be stimulated.

- Решение № 717 от 28.06.2018 г. (Decision No 717 dated 28 June 2018)

<http://merlin.obs.coe.int/redirect.php?id=19194>

BG

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### BY-Belarus

#### Amendments to media law further restrict freedom of Internet

Major changes in the 2008 Statute “On the Mass Media” (see IRIS 2008-8/9) were adopted by the Belarusian Parliament on 14 June 2018 and signed by the President on 17 July. They mostly deal with the changes in online media regulation.

Following the Russian Statute “On the Mass Media” (IRIS 2011-7/42), the Belarusian amendments introduce the notion of the “network publication” defined as “an Internet resource that has gone through the state registration along the procedure established by this Statute”, as well as related notions such as “owner of network publication,” “Internet resource” (defined as “Internet site, page of an Internet site, forum, blog, mobile app, other Internet resource (or its part), located in global computer network Internet, being used to disseminate mass information”) and “owner of online resources”.

The owners of online resources and of network publications shall be obliged to “analyse” all content as the law introduces their responsibility to prevent the dissemination of untruthful information that may harm state or public interest or defame individuals or legal



entities, or information using curse words or on suicides. The owners are also liable if their resources are used to disseminate information or comments by Internet users who have not gone through prior identification, as defined by the state.

Additionally, the amendments provide the Ministry of Information with the power of strict control over all online media. In particular, they allow it to block access to any online resources without a court decision, while a prior court decision is still required to stop all registered media (broadcast and print).

OSCE Representative on Freedom of the Media, Harlem Désir, made a statement on the Statute, saying: “No Ministry should have the exclusive power to block access to any online resource without a court decision. Content removal should require judicial oversight<sup>4046</sup> The adoption of these amendments sends a worrying signal about media freedom and pluralism - online and offline - in Belarus”.

Among other things, the amendments include a general ban on foreigners, foreign legal entities, Belarusian entities with at least 20 percent stock belonging to foreign or international entities, and stateless persons establishing media outlets in the country. In addition, the current law in Belarus already forbids citizens to contribute to foreign media without special state accreditation. The statute enters into force on 1 December 2018.

• О внесении изменений и дополнений в некоторые законы Республики Беларусь (Statute of the Republic of Belarus of 17 July 2018, N 128-Z “On amendments and additions to certain statutes of Republic of Belarus”)

<http://merlin.obs.coe.int/redirect.php?id=19188>

BE

• Legislative amendments further restrict media in Belarus, says OSCE media freedom representative. Press release of 18 June 2018

<http://merlin.obs.coe.int/redirect.php?id=19218>

EN

**Andrei Richter**

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## CY-Cyprus

### Extension of temporary television licences for one year to June 2019

Audiovisual media service providers under Cypriot jurisdiction will continue operating with temporary licences until the end of June 2019. Law 64(I)/2017 amending Article 56 of the Basic Law on Radio and Television Organisations L. 7(I)/1998, authorises the Radio Television Authority to extend the validity of TV licences for one more year for all operating service providers. The law was published in the Official Gazette on 29 June 2018. Licences issued since

the switch-over to digital television in July 2011 to authorise digital transmission remain temporary. A decision on amendments to the Basic Law 7(I)/1998 to respond to the conditions of the new environment and to enable the issue of permanent licences is still pending, therefore temporary licenses have been renewed each year since then. Thus, temporary licensing has now been extended until 30 June 2019.

With the same amending law, temporary licences granted to legal entities of public law have also been extended for one year, even in cases where they do not fulfil all the requirements set by law; this is applicable, inter alia, to CYTA (Cyprus Telecommunications Authority - Αρχή Τηλεπικοινωνιών 332'305300301377305), a semi-governmental organisation that operates IPTV. Its capital share and structure as a legal entity of public law deviated from the model set out in the Basic Law, which requires, among other things, capital share dispersion and a ceiling of 25% for any shareholder. After having operated in an analogue environment, unregulated for online providers, CYTA benefited from a special provision voted in 2011 and continued operating in the digital environment.

Furthermore, the amending law authorises the Radio Television Authority to issue temporary licences to new applicants, which are also valid until the aforementioned date.

The Basic Law has remained unchanged since December 2010, when provisions of the AVMS Directive 2010/13/EU were incorporated into Cyprus national law. In its report of June 2018, the competent parliamentary committee repeated the same comments as in 2017 to the plenary of the House of Representatives: that the extension of temporary licences was deemed necessary pending comprehensive amendments to the Basic Law that would address a broad spectrum of issues. This would update the law and adapt it to the new environment, enabling the issue of permanent licences. No details are available about the timing of these expected amendments.

• Αριθμός 64(331) του 2018 ΝΟΜΟΣ ΠΟΥ ΤΡΟΠΟΠΟΙΕΙ ΤΟΥΣ ΠΕΡΙ ΡΑΔΙΟΦΩΝΙΚΩΝ ΚΑΙ ΤΗΛΕΟΠΤΙΚΩΝ ΟΡΓΑΝΙΣΜΩΝ ΝΟΜΟΥΣ ΤΟΥ 1998 ΕΩΣ 2017, 321301. 4659, 29.6.2018 (Amending Law 64(I)/2018 of the Law on Radio and Television Organisations 7(I)/1998, 29 June 2018)

<http://merlin.obs.coe.int/redirect.php?id=19195>

EL

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## CZ-Czech Republic

### Czech Court decides against M7 Group concerning distribution of channels

The Municipal Court in Prague granted the application

of TV Prima for interim measures regarding Skylink decryption cards. Operators should not breach their contracts with TV Prima by distributing its programmes outside of the Czech Republic, thus running the risk of being penalised by global copyright holders for foreign programmes. In particular, the Court issued an interim injunction against M7 Group Luxembourg preventing it from distributing TV Prima channels actually intended for Czech viewers in Slovakia. The Court ordered M7 Group to block access to the channels Prima, Prima Cool, Prima Love, Prima Zoom, Prima Max and Prima Krimi on decryption cards supplied by the DTH platform Skylink in Slovakia. Furthermore, M7 Group was also obliged to stop offering and selling such cards in Slovakia. An appeal was lodged against that interim measure by M7 Group.

The Municipal Court in Prague also issued two preliminary measures against M7 Group Luxembourg concerning the unauthorised distribution of the free-to-air channels TV Nova in Slovakia and TV Markiza in the Czech Republic. Under the terms of the preliminary decision, M7 Group is obliged to block access to TV Nova's programmes via decoder cards that allow users to access the DTH platform Skylink's services in Slovakia. At the same time, M7 Group cannot offer and sell decoder cards in Slovakia that allow access to TV Nova's free broadcast channels. Similarly, the preliminary measure also obliges M7 Group to block access to TV Markiza's programmes via decoder cards in the Czech Republic. Likewise, M7 Group may not offer and sell decoder cards in the Czech Republic that allow access to TV Markiza's free broadcast channels. TV Nova and TV Markiza are both owned by Central European Media Enterprises (CME), while the M7 Group operates Skylink, which provides DTH services in both the Czech Republic and Slovakia.

• *Předběžné opatření Městského soudu v Praze č.j. 1 Nc 7/2018 z 28.6.2018* (Interim Injunction Municipal Court in Prague Nr.1 Nc 7/2018 from 28 June 2018) CS

**Jan Fučík**  
Česká televize, Prague

### Fine for unfair commercial practice concerning advertisement on TV

The Council for Radio and TV Broadcasting imposed a fine of CZK 500 000 (EUR 20 000) on the advertiser of a commercial message — Central European Stone Trade Enterprises Kft. — due to unfair commercial practices. The Council stated that in the TV programme "Barrandov" on 30 March 2017, the advertiser infringed section 2 (1) (b) of the Czech Advertisement Regulation Act (Act No. 40/1995 Coll.) and Article 4 (3) of the Czech Consumer Protection Act (Act No. 634/1992 Coll.). It alleged that the advertiser had falsely declared that a piece of jewellery of the "Saint

Margaret Collection" could cure various physical and mental illnesses.

The moderator presented a ring, inter alia, with the words: "You can really even get a better life thanks to this ring", implying that the ring can "heal" and "cure". This, the Council stated, can be considered the equivalent of healing or curing actual diseases or at least it can be assumed that the average consumer would perceive such wording as equivalent. The alleged healing effects of the ring were otherwise constantly emphasised and presented as a major reason for buying the jewellery. Although the illnesses mentioned were very serious (for example, heart problems), there was no information given stating that the basis of their treatment needed to be standard medical procedures. The moderator talked about the "healing effects" of the ring continuously, to the extent that the viewers could get the impression that wearing it could be of vital importance for any such treatment of illnesses. Such a procedure, in the Council's view, could lead consumers to make a decision - purchasing a product - that they would not normally take. As a result, there may also be a potential health hazard for consumers who may be neglecting their health or necessary treatment on the basis of the information supplied in the advertisement. This poses a particular threat to vulnerable groups of consumers, notably the elderly, who are primarily targeted by the communication; this conclusion was reached based on the diseases that were mentioned in the advertisement that typically occur in elderly persons.

• *Rozhodnutí Rady pro rozhlasové a televizní vysílání č.j.RRTV/7814/2018-rud* (Decision of the Broadcasting Council Nr. RRTV/7814/2018-rud from 20 February 2018) CS  
<http://merlin.obs.coe.int/redirect.php?id=19219>

**Jan Fučík**  
Česká televize, Prague

### DE-Germany

### Federal Constitutional Court finds broadcasting fee broadly compatible with German Constitution

In a decision of 18 July 2018 (Case no. 1 BvR 1675/16), the Bundesverfassungsgericht (Federal Constitutional Court - BVerfG) declared that the German broadcasting contribution fee, which has been levied on every household to fund public service broadcasting in Germany since 2013, was broadly compatible with the German Constitution.

In accordance with Article 2 of the Rundfunkbeitragsstaatsvertrag (Inter-State Agreement

on the broadcasting contribution fee), the broadcasting contribution fee must be paid by every adult homeowner in Germany, regardless of how many public broadcasting services they actually use. The owners of multi-occupancy homes are jointly liable to pay the fee, which also covers any private vehicles they may own. Under the current rules, owners of second homes must pay another (reduced) fee to cover the use of broadcasting services in those homes. Institutions and businesses must also pay the fee, the size of which depends on the type of establishment and the number of employees, company vehicles and premises used. The Constitutional Court had received a number of complaints about this system, which replaced a device-dependent broadcasting fee.

The court decided that the broadcasting fee was broadly compatible with the Constitution. It meant that people who had the opportunity to benefit from the use of public service broadcasting could contribute to the costs, regardless of whether they actually made use of that opportunity. The possibility of business-related use also justified the arrangement whereby owners of business premises and of vehicles that were not solely for private use had to pay an additional fee.

Upholding a fee-payer's complaint that he should not have to pay the broadcasting fee for his second home, the Constitutional Court ruled that owners of more than one home should not have to pay the full fee for private use more than once. In this connection, the court decided that a fee-payer should not have to pay more than once for the same benefit, since this was incompatible with the principle of equality enshrined in Article 3(1) of the Grundgesetz (Basic Law - GG). It has therefore asked the legislature to adopt a new rule by 30 June 2020. Until then, however, owners of more than one home can apply to the ARD ZDF Deutschlandradio Beitragsservice, which collects the fee, for an exemption.

On the other hand, the court found that the application of the broadcasting fee to company vehicles was compatible with the Constitution. It held that the opportunity to receive broadcasts was beneficial for business premise owners because it enabled them to obtain information for their company and to keep their employees and customers informed and entertained. The same applied in relation to the reception of broadcasts in company vehicles. As far as rental cars were concerned (a large car rental company had filed a constitutional complaint because it owned a large fleet of vehicles), the fee was justified because higher rental prices could be charged for suitably equipped vehicles. The owners of business premises and company cars should pay for the advantages they gained from the ability to receive broadcasts. Since the practical arrangements governing payment of the broadcasting fee were therefore identical for business premises and vehicles, they were compatible with the Constitution.

• *Urteil des Bundesverfassungsgerichts vom 18. Juli 2018 (1 BvR 1675/16)* (Judgment of the Federal Constitutional Court, 18 July 2018 (1 BvR 1675/16))  
<http://merlin.obs.coe.int/redirect.php?id=19222>

DE

**Sebastian Klein**

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Brussels*

### **Draft new Inter-State Media Agreement and associated online consultation**

On 13 June 2018, the Broadcasting Commission of the German Bundesländer published a first working draft of an amended Rundfunkstaatsvertrag (Inter-State Broadcasting Agreement), which will be known as the new Medienstaatsvertrag (Inter-State Media Agreement).

According to Articles 30 and 70 of the Grundgesetz (Basic Law), legislative powers regarding the media in Germany are held by the Bundesländer, which have been coordinating their respective broadcasting laws by means of inter-state agreements since 1987. Through approval laws or resolutions adopted by the Länder, inter-state agreements are transformed into state law, as a result of which, to a large extent, the same broadcasting regulations now apply throughout Germany. The same has also been true of telemedia laws since 2007. The Länder seek consensus on these matters through a specially established Broadcasting Commission that serves as both a discussion forum for joint media policies and a decision-making body. Its conclusions are submitted to the Land governments and parliaments for a formal vote.

The Broadcasting Commission's new draft is designed in part to take into account the provisions of the revised Audiovisual Media Services Directive (AVMSD), on which the European Commission, Parliament and Council reached an agreement as part of trilogue negotiations on 26 April 2018; the Broadcasting Commission expressly noted that further adjustments might be needed before the Inter-State Media Agreement is finally adopted. Unrelated to the provisions of the AVMSD, the draft Inter-State Media Agreement provides in particular for the - partly amended - extension of the scope of application of certain broadcasting regulations to include media platforms, media intermediaries or user interfaces intended for use in Germany. For example, so-called overlays (where third-party content is superimposed on the screen, over the original television picture) will, as a rule, be prohibited and new regulations will be introduced to make services more transparent and easier to find via user interfaces. Media intermediaries, which reach more than 1 million users in Germany every month, are subject to specific transparency and anti-discrimination rules, as well as obligations to report to their respective Land media authority. Providers



of telemedia via social networks will also be obliged to inform their users if content or messages are automatically generated, mainly in order to counter the dissemination of false information.

In parallel with the publication of the draft, the Broadcasting Commission launched an online public consultation. Both media professionals and consumers are urged to submit their opinions and suggestions regarding the draft by 30 September 2018, a deadline that was extended on account of a huge public response. In the context of a changing media market and media landscape, this should ensure that an up-to-date set of regulations is adopted, equally benefiting all stakeholders - consumers, creative professionals and businesses.

- *Diskussionsentwurf eines Medienstaatsvertrages der Rundfunkkommission der Länder, Juli/August 2018* (Draft paper for discussion of an Inter-State Media Agreement, published by the Broadcasting Commission of the Länder, July/August 2018)

<http://merlin.obs.coe.int/redirect.php?id=19223>

DE

- *Pressemitteilung der Rundfunkkommission vom 23. Juli 2018* (Broadcasting Commission press release, 23 July 2018)

<http://merlin.obs.coe.int/redirect.php?id=19224>

DE

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## Federal Cartels Office approves ProSieben-Sat.1 and Discovery streaming platform

In a decision of 23 July 2018, the Bundeskartellamt (Federal Cartels Office) approved the joint plan of ProSiebenSat.1 Media SE and Discovery Communications to expand the video platform 7TV with the video streaming services “Maxdome” and “Eurosport-Player”.

The platform, which was set up by ProSiebenSat.1 Media SE and Discovery Communications with the Cartels Office’s approval in 2017, currently offers users video-on-demand services that are financed through advertising and live streaming of TV programmes broadcast by its parent companies. The Bundeskartellamt does not think the addition of Pro7’s “Maxdome” and “Eurosport-Player”, which is owned by Discovery Communications, will create a dominant market position, and therefore gave the joint venture the green light. It was true that “Maxdome” was well known for offering a large range of videos and that “Eurosport-Player” had raised its profile by acquiring the exclusive broadcasting rights for some football Bundesliga matches, which it had been showing since August 2017. However, this was not sufficient to create a dominant market position, since the pay video-on-demand market was expanding fast, with competitors including Netflix, Sky, Amazon, iTunes and public broadcasting services.

When examining the merger application, the Bundeskartellamt only considered the parties’ plans to expand their services through the addition of their own existing activities. It therefore noted that, if 7TV wished to add further content or cooperation partners in future, the project would need to be re-examined, taking account of the current market situation and the specific cooperation structure.

- *Pressemitteilung des Bundeskartellamts vom 23. Juli 2018* (Federal Cartels Office press release, 23 July 2018)

<http://merlin.obs.coe.int/redirect.php?id=19225>

DE

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## ES-Spain

### New Order regulating state aid

Order 769/2018, of 17 July 2018 - which establishes the regulatory basis of the aid provided for in Law 55/2007 of December 28 on Cinema, and which determines the structure of the Administrative Registry of Cinematographic and Audiovisual Companies (see IRIS 2008-4/18) -has been published in the Official Gazette.

The Order, which stems from the consensus among stakeholders in the cinematic sector - adapts the internal regulations regarding matters of cinematographic and audiovisual aids to reflect the principles established in the EU Communication from the Commission on state aid for films and other audiovisual works (2013/C C 332/1) (see IRIS 2014-1/7).

Improvements and novelties are introduced in respect of most forms of aid, with the aim of creating a system of aid more harmonised and adapted to the needs that arise in the various areas of creation, production, distribution and promotion in the film industry. The basic purposes are: to clarify the general documentation that applicants must submit according to the type of aid; to provide for the notification of all acts through an electronic address; and to establish a new way of distributing the funding from the Spanish government in the implementation of the activity, as well as the inclusion of the “Spanish Cinema” label as a new obligation for the beneficiaries of the aid.

For feature film productions (of Spanish nationality) to qualify for general and selective aid, their “cultural character” has to be proved. The Order contains a rewording of the cultural criteria that must be fulfilled.

It establishes, for the first time, the maximum number of selective procedures for which one project may



be submitted, and also establishes the possibility that calls for proposals may limit the maximum number of grants that each producer or production company (or related entities) may be awarded in order to ensure a better distribution of aid.

The aid is intended for either Spanish residents or foreigners with a permanent establishment in Spain. Films made by international co-productions may also benefit from the aid, as far as the Spanish co-producer's share is concerned. With regard to specific measures for general aid, the promotion of documentary feature films and international co-productions with Ibero-American countries, by lowering the minimum cost required to access this aid, stands out as a novelty.

The Order facilitates the granting of aid to animation projects by increasing the maximum allowed cost limit; moreover, the maximum allowed cost limit now does not apply to certain international co-productions with a majority Spanish participation and a Spanish director of recognised standing.

As regards the promotion of gender equality, the criteria for the evaluation of all applications for production aid have been modified, so that, in addition to giving points where women are responsible for a project's management, script and executive production, further points are awarded where women occupy at least 40% of the management positions in ten of the most relevant categories in the production of a film. Likewise, it is provided that in the event of male co-participation, the score awarded to a project will be proportional to the number of women involved as long as it is proven that they have the same level of responsibility as the men; this must be expressly reflected in the credit titles.

When calculating the level of aid to be awarded in respect of distribution, the expenses of measures taken to combat piracy are included as costs; such measures might include prevention and protection systems against illegal and unauthorised access and downloading, as well as monitoring and surveillance in social networks.

This state aid is centralised, and are without prejudice to any promotional measures that the Autonomous Communities might undertake under their own regulations.

• Orden CUD/769/2018, de 17 de julio, por la que se establecen las bases reguladoras de las ayudas previstas en el Capítulo III de la Ley 55/2007, de 28 de diciembre, del Cine, y se determina la estructura del Registro Administrativo de Empresas Cinematográficas y Audiovisuales (Order CUD/769/2018, of 17 July 2018)

<http://merlin.obs.coe.int/redirect.php?id=19206>

ES

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## FI-Finland

### Finnish government adopts a Media Policy Programme resolution

In July 2018, the Finnish Government adopted a resolution on the Media Policy Programme. The resolution includes objectives and measures extending all the way to 2023, while engaging various ministries across a number of sectors. All in all, 23 action points for seven different topics are envisioned.

The starting point for the resolution dates back to 2017 when the government decided to begin the preparation of a Media Policy Programme as part of its key project on digital business. The programme was prepared in cooperation with stakeholders, while a report (LVM 4/2018) on the current state of media policy was produced by the universities of Helsinki and Tampere to support the preparation. Alongside a description of the status quo, the report includes a model for a measurement tool, based on the results of the study, and accommodating 26 variables and 52 indicators for monitoring changes in the Finnish media and communication policy.

The Media Policy Programme resolution aims to safeguard diversity and pluralism in Finnish media, while supporting accountability, accessibility, cooperation and participation. The importance of media and journalistic content for society and democracy is acknowledged, together with the need to combat disinformation and promote citizens' opportunities to receive diverse and reliable information. For its part, technology neutrality is hailed as an important starting point for media and communications policy. Moreover, the programme does not interfere with the mandate of the national public service broadcaster, Yleisradio (Yle). Nonetheless, cooperation between Yle and commercial media companies is promoted.

The objectives and measures as proposed include the following: (1) Support for accountable media and journalism: decreased VAT for electronic publications (considering EU law); boosting innovation; (2) Foreseeable regulation, the impact at EU level: a level playing field and consideration for platforms, including scrutiny for algorithms and uniform rules for data utilisation; (3) Support for digital distribution: the importance of fast broadband access; testing new ways of distribution (for example 5G broadcasting); (4) Enhanced media literacy and related skills: targeting new groups with media education (adults); combatting disinformation and hybrid operations/influencing; (5) Increased awareness of disinformation, combatting hate speech and illegal content: fact checking, in cooperation with social media platforms; combatting hatred against journalists; (6) Accessibility via technology: Yle's role in development, coupled with co-

operation across the field; and (7) Cooperation and participation of stakeholders in the preparation of media policy: the establishment of a media policy network which will meet regularly and engage officials, companies, producers, researchers and NGOs; systematic monitoring of media policy; further development of the measurement tool modelled in the background report (LVM 4/2018).

The measures of the resolution will be carried out within the framework of the state budget, while EU funding might also be applicable. The execution of the objectives and measures will be monitored in the media policy network. The state of policy will be regularly mapped by conducting cross-sectoral research.

• *Liikenne- ja viestintäministeriö, Valtioneuvoston periaatepäätös mediapoliittisesta ohjelmasta, 5.7.2018* (Ministry of Transport and Communications, Government resolution on the Media Policy Programme, 5 July 2018)

<http://merlin.obs.coe.int/redirect.php?id=19207>

FI

• *Marko Ala-Fossi et al., Media- ja viestintäpolitiikan nykytila ja sen mittaaminen. Liikenne- ja viestintäministeriön julkaisu 4/2018* (The state of media- and communications policy and how to measure it. Publications of the Ministry of Transport and Communications 4/2018)

<http://merlin.obs.coe.int/redirect.php?id=19181>

FI

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## FR-France

### Conseil d'Etat confirms two CSA sanctions against C8

In three decisions issued on 18 June 2018, the Conseil d'Etat (the Council of State - a body of the French Government that acts both as legal adviser to the executive branch and as the Supreme Court for administrative justice) ruled on appeals lodged by the television channel C8 against three heavy sanctions imposed last year by the French national audiovisual regulatory authority (Conseil supérieur de l'audiovisuel - "the CSA") following inappropriate behaviour during the programmes "Touche pas à mon poste" and "TPMP! Baba hot line". The Conseil d'Etat quashed one of the sanctions and upheld the other two.

In the first case, the presenter of a programme broadcast on 7 December 2016 had invited a female commentator to play a game in which she had to touch and identify various parts of his body with her eyes shut. After getting her to touch his chest and arm, the presenter put her hand on his crotch. The commentator reacted by protesting and saying how typical this kind of behaviour was. The CSA considered that, by showing this sequence, C8 had breached its obligations as a broadcaster regarding the image of women, the fight against stereotyping and violence,

and general control of its programmes. In a decision of 7 June 2017, it prohibited C8 for two weeks from broadcasting advertisements during and for fifteen minutes before and after the programme. According to the Conseil d'Etat, showing the presenter behaving in such a manner could only have trivialised unacceptable behaviour which, in some cases, could constitute a criminal offence. This type of conduct had put the person concerned in a degrading situation and had portrayed a stereotyped image of the woman that had reduced her to the status of a sex object. In these circumstances, the Conseil d'Etat ruled that the decision to punish C8 for this incident had been justified and did not constitute a disproportionate restriction on the freedom of expression.

In the second case, the presenter of a programme shown on 18 May 2017 had broadcast telephone conversations between himself and respondents to a fake advertisement previously posted on a dating website in which the author had described himself as bisexual. The CSA considered that this sequence had breached the obligations of television broadcasters to promote the values of integration and solidarity upheld by the French Republic, to combat discrimination and to respect personal rights regarding privacy, image, honour and reputation. It therefore imposed a fine of EUR 3 million on C8. Ruling on C8's appeal, the Conseil d'Etat noted that the voices of the people concerned had not been disguised and that the presenter had invited them to reveal personal information about where they lived, their age or their profession, which meant that they might be recognised. Moreover, they had not been told that their words were being broadcast, and the presenter had encouraged them to use excessively coarse language to describe their sexual habits and private life, even though they had had no idea that what they said would be broadcast to the public. The Council of State stressed that the presenter had consistently tried to portray a caricature of homosexual people that could only encourage prejudice and discrimination against them. It therefore decided that the decision to impose a sanction had been justified and did not constitute a disproportionate restriction of the freedom of expression.

However, the Conseil d'Etat overturned the CSA's third sanction against C8 following a hidden camera sequence broadcast in "Touche pas à mon poste" on 3 November 2016. The presenter and a commentator had been shown visiting the house of someone posing as a producer, filmed by a hidden camera. Following an altercation between the presenter and the "producer", the latter had fallen to the ground, apparently unconscious. The presenter and his bodyguard had tried to stop the commentator calling the police and to force him to accept responsibility for the incident. At least initially, the commentator, who it seems was not told that the incident had been staged until the following day, had appeared shaken by the presenter's behaviour. He had calmly telephoned the police even though he had been urged not to.

Considering that this sequence had infringed human dignity, the CSA decided, on 7 June 2017, to prohibit C8 from broadcasting advertisements during and for 15 minutes before and after the programme “Touche pas à mon poste” for one week. The Conseil d’Etat held, contrary to the CSA, that in view of his behaviour throughout the sequence, the presenter had not been shown in a degrading or humiliating light or in a way that violated his dignity. Therefore, in view of the humorous nature of the programme and the need to protect freedom of expression, the Conseil d’Etat ruled that the broadcast of the sequence, to which the commentator had consented and on which he had agreed to comment, had not infringed C8’s licence, which required it to respect human dignity in its programming. The CSA’s decision was therefore quashed.

• *Conseil d’Etat (5e et 6e ch. réunies), 18 juin 2018, Société C8 (n° 412071)* (Conseil d’Etat (5th and 6th chambers combined), 18 June 2018, C8 (no. 412071)) FR

• *Conseil d’Etat (5e et 6e ch. réunies), 18 juin 2018, Société C8 (N° 414532)* (Conseil d’Etat (5th and 6th chambers combined), 18 June 2018, C8 (no. 414532)) FR

• *Conseil d’Etat (5e et 6e ch. réunies), 18 juin 2018 - Société C8 (n° 412074)* (Conseil d’Etat (5th and 6th chambers combined), 18 June 2018, C8 (no. 412074)) FR

**Amélie Blocman**  
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**Dispute between production company that owns “Le bureau des légendes” marks and publisher of a book on the series**

The audiovisual production company that produced the television series “Le bureau des légendes”, which has been broadcast on Canal Plus since 2015 (with season four set to be shown later this year) initiated urgent proceedings against the publisher of a collection of books entitled “La série des series” after discovering that a book entitled “Le bureau des légendes - Politique du secret” was about to go on sale. The book’s cover included not only the title of the work but also its word mark and figurative mark “Le bureau des légendes”, which had been registered by the production company in relation to the publication of books and the poster of season one in particular. Explaining its decision to take legal action on the basis of Article L. 716-6 of the Intellectual Property Code, the company said that it did not wish to stop the publication of the book - only the reproduction of its marks on the cover. It requested that the publisher be prohibited (on pain of a penalty) from continuing the allegedly infringing acts and from promoting the launch of, launching and selling the book.

The interlocutory Court stated that the owner of a registered mark could prevent a third party from using a sign identical or similar to its own mark without its

consent if it was used for products or services identical or similar to those for which the mark was registered and if it affected or was liable to affect the functions of the mark (in particular its essential function - namely, to guarantee the identity of the origin of the marked goods or services to the consumer or end user by enabling him, without any possibility of confusion, to distinguish the goods or services from others which had another origin).

The court observed that - as in the case of the other books previously published in the same collection in relation to other television series (such as “House of Cards”, “Les experts”, “Friends”, and “Plus belle la vie”) with an identical editorial structure in which the title of the series analysed appeared along with an image representing the series - the disputed book was a unique literary work that, although a product, was designed to analyse the series in question, viewed as a cultural object, in order to help readers understand it better. Therefore, the use of the sign in the book’s title was not a unique use constituting a mark because it did not identify the product (that is to say the physical medium in which it was contained) but the work itself, which was given physical form by that medium. It therefore only served to identify the book as an independent literary work, which was itself independent of the television series that it analysed.

Similarly, the court considered that the function of the sign of the semi-figurative mark reproduced on the cover page (which was identical to the season one poster, in which the said semi-figurative mark “Le bureau des légendes” appeared) was not to identify goods and services designated by the mark in question; rather (as had been the case with the poster when season one was first released) to designate, identify and make reference to the audiovisual work in question, which it described and analysed. Lastly, the origin of the disputed book was identified not through the use of the disputed signs, but through the mention of its author’s name and the publisher’s sign (“PUF”), which showed the consumer where the product had come from. In view of all these elements, the court held that no mark had been used and that there had been no likely infringement of the aforementioned marks in the sense of Article L. 716-6 of the Intellectual Property Code. The production company’s requests were therefore dismissed.

• *TGI de Paris (ord. réf.), 6 avril 2018 - The oligarchs production c/ Humensis* (Regional court of Paris (urgent procedure), 16 April 2018 - The Oligarchs Productions v. Humensis) FR

**Amélie Blocman**  
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## CSA warns RT to respect honesty and rigour of information

At its plenary assembly on 28 June 2018, the French national audiovisual regulatory authority (Conseil supérieur de l'audiovisuel - "the CSA") decided to issue an official warning to RT France (the French-language outlet of Russian international news channel RT) regarding its failure to ensure honesty, rigour and diversity of points of view in its television news bulletin on 13 April 2018, which was mainly devoted to the situation in Syria. The bulletin included a report entitled *Attaques simulées* ("Simulated Attacks"), which contested whether the chemical attacks in the Syrian region of Eastern Ghouta had actually happened and blamed the Jaysh al-Islam group for staging their effects on the population.

In 2015, the CSA and RT signed an agreement requiring RT France to report news with greater "honesty and independence". Under the same agreement, RT also set up an ethics committee at the CSA's request.

The CSA observed that the testimony of a Syrian witness had been dubbed with a voice saying words that "bore no resemblance with what he had said." The translation had actually concerned a different, longer version of the video, which had not been broadcast. "Even though the mistranslated words were actually spoken, this mistake demonstrates a failure to exercise the required level of rigour in the presentation and processing of information," the CSA stated.

It also noted that the dubbed translation of a different witness account had blamed the Jaysh al-Islam group for ordering the local population to simulate the effects of a chemical attack - even though the witness had not mentioned any particular organisation. Since this had changed viewers' understanding of the situation, it constituted a second breach of the channel's agreement with the CSA. Finally, the CSA noted that, as a whole, the report on the situation in Syria had shown a marked imbalance in its analysis which, on a topic as sensitive as chemical weapons, had not laid out the different points of view.

In response, RT France President Xenia Fedorova, said: "The dubbing of the wrong translation on a video broadcast on 13 April was a purely technical error which has been corrected. RT France covers all subjects, including the Syrian conflict, in a totally balanced manner, by giving all sides a chance to comment. We have agreed to continue working productively with the CSA in order to maintain the high quality of our content."

• *Assemblée plénière du CSA du 27 juin 2018* (CSA plenary assembly of 27 June 2018)

<http://merlin.obs.coe.int/redirect.php?id=19228>

FR

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## Reform in public audiovisual sector - Government announces its decisions

On 4 June 2018, Minister for Culture Françoise Nyssen presented her plan for the reform of the public audiovisual sector. Stressing the need to involve all the professionals in the sector and the creation branch, she appointed a consultative task group which made its conclusions public on 18 July 2018.

The first work area identified by the task group concerned an increase in the offer of local programmes, which should involve tripling the number of regional programmes on France 3, covering all programme genres: news, documentaries and magazine programmes, service broadcasts, sport, etc. The second work area identified was the need to enrich and develop the offer of programmes for young people. Apart from television programmes, the mission advocates the development of other types of broadcasting, so that the public service offer remains a benchmark for the younger generations, who are gradually turning away from television in favour of digital uses. At the same time, a benchmark offer of animated works, free from advertising, will be offered in a secure digital environment for parents and children, as well as a joint offer for teenagers and young adults (15- to 30-years-olds), which will particularly promote short and innovative formats. As announced by the Minister for Culture, an educational platform common to the undertakings in the public audiovisual sector will also be launched in 2019. The conclusions of the consultative task group also indicate that the current organisation of the public audiovisual sector does not afford the overseas territories the visibility they need. On all these points (the local offer, the offer for young people, the representation of overseas territories, digital strategy), companies will define the operational way in which they will apply the guidelines laid down by the government. The government has indeed confirmed that it is to maintain the investments in creation (560 million euros for France Télévisions and Arte), triple regional programming on France 3, and invest an additional 150 million euros in the digital offer by 2022. The advertised aim is to help gain control over public expenditure: by 2022, savings of 190 million euros (compared with the 2018 budget) will need to be made by all the audiovisual companies in the public sector, including 160 million euros by France Télévisions and 20 million euros by Radio France.

The governance of the entities and the reform of the contribution to the public audiovisual sector are to be debated as part of the reform of the 1986 Freedom of Communication Act, which will also transpose the AMS Directive into French law, cover the regulation of public and private operators, and include a section on advertising. The text should also cover the relationships between both channels and producers and



channels and access providers. It ought to be submitted at the end of the year.

• *Bilan de la consultation - Commission de concertation sur la réforme de l'audiovisuel public, 18 juillet 2018* (Result of the consultation - Concertation commission on the reform of the public audiovisual sector, 18 July 2018)

<http://merlin.obs.coe.int/redirect.php?id=19200>

FR

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## GB-United Kingdom

### Supreme Court rules on ISPs' liability for website blocking fees

On 13 June 2018, the UK Supreme Court held in *Cartier International AG & Ors v British Telecommunications Plc & Anor* that Internet service providers (ISPs) should not bear the costs incurred in implementing counterfeit site-blocking injunctions issued against them under section 37(1) of the Senior Courts Act 1981.

The appellants in this case are the five largest providers of networks through which subscribers can access content online but who do not provide, store or monitor content themselves. The respondents are well-known companies belonging to the Richemont Group. They design, manufacture and sell luxury-branded goods, infringing copies of which had been offered, according to the evidence, on some 46 000 websites. In 2014, the respondent companies obtained injunctions in the High Court against the appellants, requiring them to block access to specified "target websites" selling counterfeit goods in breach of their trademarks. Whilst such orders are available to copyright holders under section 97A of the Copyright, Designs and Patents Act 1988, there is no corresponding statutory provision relating to trademarks. Hence, the respondents had relied upon the general injunctive power available to the High Court under the Senior Courts Act.

In 2016, the Court of Appeal decided that the High Court had jurisdiction to make an order of the kind sought by Richemont. Moreover, both the court of first instance and a majority of the Court of Appeal took the view that it was implicit in the Information Society Directive (2001/29/EC) and the Enforcement Directive (2004/48/EC) that it was entirely appropriate for a national court to order that the costs of any such injunction should be borne by the intermediary. As Jackson LJ observed, the compliance costs are "part of the price which the ISPs must pay for the immunities which they enjoy under the two Directives".

The appeal to the Supreme Court centred on the issue of cost allocation, specifically in relation to the implementation of website-blocking orders. The pivotal question with which it was concerned was: "When an injunction is obtained against an innocent intermediary to prevent the use of his/her facilities by wrongdoers for unlawful purposes, who should pay the cost of complying with the order?" Overturning the decisions of the lower courts, the Supreme Court held that neither the relevant EU Directives nor the Court of Justice of the European Union had set any rules on the incidence of compliance costs. Lord Sumption stated - and the remaining four justices agreed - that this was a matter for individual member states to decide "within the broad limits set by the relevant EU principles of effectiveness and equivalence, and the requirement that any remedy should be fair, proportionate and not unnecessarily costly."

Applying the ordinary principles of English law, the Supreme Court endorsed the neutral role played by ISPs as "mere conduits" of Internet traffic and unanimously ruled that innocent intermediaries were entitled to be indemnified by rightsholders against the costs of complying with a website-blocking order, unless there were good reasons for a different order. In the Court's judgment, "there is no legal basis for requiring a party to shoulder the burden of remedying an injustice, if he has no legal responsibility for the infringement and is not a volunteer but is acting under the compulsion of an order of the court." Lord Sumption emphasised that website-blocking injunctions are directed to the rightsholders' protection in the pursuit of their "own commercial interest" and compliance with the order inures to their benefit. He added: "It is not ordinarily or naturally a cost of the business of an ISP which has nothing to do with the rights in question but is merely providing a network which has been abused by others".

Finally, as far as litigation costs are concerned, applicants are, in general, responsible for their own costs of applying for a website-blocking order. In this case, however, Lord Sumption agreed that the first instance judge had properly exercised his discretion in awarding costs against the ISPs because they had made the litigation a "test case" and had, uncommonly, "strenuously resisted" the application.

• *Cartier International AG & Ors v British Telecommunications Plc & Anor* [2018] UKSC 28

<http://merlin.obs.coe.int/redirect.php?id=19208>

EN

• *Cartier International AG & Ors v British Sky Broadcasting Ltd & Ors* [2016] EWCA Civ 658

<http://merlin.obs.coe.int/redirect.php?id=19209>

EN

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## Judgement in the case *Sir Cliff Richard v. BBC*

Sir Cliff Richard OBE (Sir Cliff), a popular singer whose career spans over 50 years, was awarded damages and costs in the High Court of Justice against the British Broadcasting Corporation (BBC) for their infringement of his privacy during a South Yorkshire Police (SYP) investigation against him concerning an alleged historic sex crime which was not pursued. Mr Justice Mann presided over a twelve-day trial during which he balanced Sir Cliff's right to privacy flowing from Article 8 of the European Convention on Human Rights (ECHR) introduced into English law by the Human Rights Act 1998 (the Act) and the BBC's right to freedom of expression under Article 10 ECHR. Sir Cliff also claimed under the Data Protection Act 1998 but Mr Justice Mann made no finding as Sir Cliff's privacy claim succeeded.

London's Metropolitan Police Service (MPS) conducted an enquiry, Operation Yewtree, into alleged sex crimes perpetrated by well-known persons which led to successful convictions. Some investigations culminated in no further action being taken. The MPS pursued an allegation that Sir Cliff had committed a sexual offence against an underage boy at a Christian Evangelist event during the 1980s. As it was a single allegation, MPS transferred the case to SYP.

On 9 June 2014, BBC reporter Daniel Johnson understood that the police were investigating Sir Cliff. After speaking with Mr Johnson, SYP decided to co-operate with him to prevent the premature publication of a story and to avoid the investigation being comprised. On 15 July 2014, SYP met with Mr Johnson and, based on the trial evidence, felt compelled to inform him of their intention to search Sir Cliff's apartment. The information was provided on the condition that the BBC did not report it in order not to compromise the investigation or invade Sir Cliff's privacy.

The BBC emails showed a marked disrespect for the police investigation, seeing this as an opportunity to beat its rivals with the story. The BBC filmed the police search of Sir Cliff's apartment in a private estate from a helicopter. All the footage from the helicopter would be shared between the BBC and its competitor, ITN, which received a late notification, thus ensuring that the BBC would be the first to broadcast. Sir Cliff was in Portugal when the BBC teams were sent there. The BBC tried to contact Sir Cliff, but it was difficult to reach him. When Sir Cliff learned of the search and filming, he was shocked and waited for advice from his lawyers. The BBC gave Sir Cliff little time to respond, including bringing injunction proceedings, before the first broadcast. The police search appeared on the BBC's live rolling news channel, on its website and on terrestrial channels.

When balancing Article 8 and Article 10 ECHR, reference was made to section 12 of the act, which deter-

mines whether it is in the public interest for material to be published. The court recognised the "duty" of the press to disseminate information, subject to its obligations and responsibilities, on all matters of public interest. Factors when balancing a person's privacy against the public interest include the degree of contribution to a debate of general interest; the degree of notoriety of the person and the subject of the report; the past conduct of the person concerned; the method of obtaining the information and its veracity; the content, form and consequences of publication; and whether the sanction to prevent disclosure is a proportionate interference with freedom of expression.

Section 12(4)(b) of the act provides that the court must take into account any relevant privacy code, such as the BBC's editorial guidelines which, in the section entitled "The Public Interest", state that private information should not be brought into the public domain unless there is a public interest that outweighs the expectation of privacy. There is no single definition of the term "public interest", but this includes the exposure or detection of a crime and the disclosure of information that helps people better comprehend or make decisions on matters of public importance. Essentially, under the guidelines, the greater the intrusion, the greater the public interest required to justify it.

The sequence of events suggests the desire to obtain a scoop by showing helicopter shots of the search, and the disclosure of Sir Cliff's identity exceeded the public interest in knowing the identity of the person under investigation. The BBC failed to prove the public interest that justifies the revelation of Sir Cliff's name and the filming of the search. The BBC's counsel contended that Sir Cliff's claim risked undermining the long-standing freedom of the press to report police investigations. Mr Justice Mann said the Human Rights Act gave legislative authority to restrain the press when the balancing act was justified, as in Sir Cliff's case, whereby Article 8 ECHR took precedence over Article 10 ECHR on freedom of expression.

Mr Justice Mann determined that damages for loss of reputation were inherent to the tort of privacy and awarded Sir Cliff GBP190 000 (approximately EUR 210 139) for general damages. The BBC's conduct was not reckless but negligent, and their submitting the coverage for an award caused Sir Cliff additional distress given their "pride and unrepentance" and the repetition of the invasion of privacy. The amount of GBP20 000 (approximately EUR 22 110) was awarded as aggravated damages. Mr Justice Mann determined that SYP should contribute to the damages. Although SYP had disclosed details of the search to the BBC, their motive was not personal gain, but rather to deflect the BBC from prematurely reporting and potentially prejudicing the investigation. The judge determined that the damages would be apportioned 35/65% between SYP and the BBC respectively, with the BBC paying all aggravated damages.

• Richard v. The British Broadcasting Corporation (BBC) & Anor [2018] EWHC 1837 (Ch) (18 July 2018)  
<http://merlin.obs.coe.int/redirect.php?id=19182>

EN

**Julian Wilkins**  
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## Parliamentary committee report on tackling fake news and interference in elections in social media

The House of Commons Digital, Culture, Media and Sport Committee (the Committee) has published its Disinformation and 'fake news': interim report (the Report). A further, substantive report will be published in autumn 2018. The Report's remit expanded from the phenomenon of fake news distributed through social media to also include other activities which, unless addressed, would endanger the future of democracy. The Committee took account of events such as evidence of election influencing through the Russian state-sponsored manipulation of social media and, similarly, attempts by private companies to influence elections and law-breaking by certain UK Leave campaign groups during the 2016 EU Referendum.

The Committee recommended that the term 'fake news' be rejected and replaced by "misinformation" and "disinformation"; this should give consistency of meaning across platforms and assist in the drafting of regulation and enforcement. Furthermore, the Committee recommended that the government use the rules given to Ofcom under the Communications Act 2003 to set and enforce content standards for television and radio broadcasters, including rules relating to accuracy and impartiality, as a basis for setting standards for online content. Ofcom's plans are expected this autumn.

The Report noted that the law was lagging behind a fast-changing technological landscape and the Committee recommended a move to more principle-led regulation to enable a more nimble adaptation to changing technology. The Committee recommended the formation of a working group of experts to collate and define standards to combat misinformation and help the public verify the authenticity of information.

In relation to data protection, the Report recommended an increase in the powers and size of the Information Commissioner (ICO), including its technical capability, a measure considered necessary and which could potentially be funded by a levy on tech companies like Facebook and Google. According to the Report, the ICO should be empowered to audit the algorithms and security of social media companies to ensure responsible conduct; moreover, social media companies must accept responsibility for content that

appears on their sites. The Committee refuted assertions, such as those from Facebook, that they are technical platforms, considering that they are more akin to publishers. The Committee recommended that a new category of tech company be formulated which tightens tech companies' liabilities and which is not necessarily either a "platform" or a "publisher".

The Committee supported the UK's Electoral Commission's (EC) suggestion that all electronic campaigning should have easily accessible digital imprint including the identity of the publisher and funder. It also supported empowering the EC to compel organisations to provide information during the investigation of a possible electoral law breach. Moreover, it recommended that the EC establish an advertising code for social media during elections.

Social media companies' terms and conditions concerning an individual's data were considered long, complicated and confusing, so greater clarity and simplicity was deemed necessary to highlight a user's rights over his or her own data. It was recommended that a professional, global code of ethics be developed by tech companies, in collaboration with the UK and other governments, academics and other interested parties, to determine acceptable practice, including when evolving new technologies and algorithms. The Committee observed that tech companies acted like monopolies and the government needed to give this consideration. The Committee recommended levying social media companies to fund digital literacy as part of the education curriculum, including subjects such as how to identify fake news and how to ensure responsible use of social media.

Finally, the Committee advised the UK and other governments to share information on risks, vulnerabilities and best practices in order to counter Russian interference in elections. It also endorsed the 16 July 2016 interparliamentary meeting of the Atlantic Council to maintain the integrity of a nation's election process and an individual's data.

• House of Commons Digital, Culture, Media and Sport Committee, Disinformation and 'fake news': Interim Report, HC 363, 29 July 2018  
<http://merlin.obs.coe.int/redirect.php?id=19210>

EN

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## Ofcom issues decision on misleading on-air tweets in a new current affairs programme broadcast on RT

On 16 July 2018, Ofcom, the UK communications regulator, issued a notable decision concerning the first episode of a new current affairs programme broadcast on RT. The Alex Salmond Show is a political and



current affairs series hosted by the former First Minister of Scotland, Alex Salmond, and produced by his own production company, Slàinte [Gaelic for “good health”] Media. RT is a global news and current affairs channel produced in Russia and funded by the Federal Agency for Press and Mass Communications of the Russian Federation. In the United Kingdom, the channel broadcasts on satellite and digital terrestrial platforms. The licence for RT is held by Autonomous Non-profit Organisation TV-Novosti (“TV Novosti” or the “Licensee”).

A complaint was received concerning its first show claiming that four out of six tweets used to direct discussion and debate purported to come from real viewers whereas, in reality, the tweets were “sent by people connected either directly or indirectly to the production of the programme or to the presenter in some way.”

Ofcom considered that this raised an issue under the Broadcast Code Rule 2.2: “Factual programmes or items or portrayal of factual matters must not materially mislead the audience”.

It concluded that viewers would have been under the impression that the four questions quoted by Mr Salmond had originated from members of the public wholly unconnected with the programme or with him, when this was not, in fact, the case, meaning that, as a result of failure to disclose this information, viewers were misled. “Because viewer trust in this current affairs programme would have been undermined, we considered that this was materially misleading.”

This investigation is one of eleven currently being undertaken by Ofcom into RT’s broadcast output (see IRIS 2018-7/18).

• Ofcom, Broadcast and On Demand Bulletin, Issue 358, 16 July 2018, p. 19  
<http://merlin.obs.coe.int/redirect.php?id=19211>

EN

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## Information Commissioner’s Office issues Notice of Intent to fine Facebook GBP500 000

In 2017, the Information Commissioner’s Office (ICO) launched a formal investigation into the use of data analytics for political purposes, and the investigation is expected to continue until October 2018. On 11 July 2018, the ICO published a progress report as well as a second report, Democracy Disrupted: Personal information and political influence, which sets out a number of policy recommendations arising from the investigation so far. Of the actions detailed by the progress report, the most high-profile is the one against Facebook. The ICO issued a Notice of Intent

to fine it GBP500 000, the maximum amount under section 55A of the Data Protection Act 1998 (DPA). It found serious breaches of the first (fairness) (DPP 1) and seventh (security) (DPP 7) data protection principles (DPP) in contravention of section 4(4) DPA.

The case concerned the access a researcher had to Facebook users’ data via an app that users could download. It potentially gave the researcher access to their friends’ data too. These users would not be aware of this, let alone have consented to the processing of their data. Facebook changed its policies in 2015 to allow access to a more restricted range of data, but the app developers were allowed to retain the data they had previously acquired. Although Facebook had platform policies regarding usage of data, it had taken no steps to ensure that the apps using Facebook data were doing so in accordance with its policy; there was no system in place according to which a review could take place. Furthermore, Facebook had taken no steps to verify that the data was being used in accordance with an undertaking given which limited use to academic, not commercial purposes.

The ICO determined that Facebook Ireland as well as Facebook based in the United States of America were joint controllers of Facebook users’ personal data and that they processed that personal data in the context of a UK establishment, thus bringing them within jurisdiction based on Google Spain (see IRIS 2014-6/3) and a domestic appellate decision in which it was considered, *CG v Facebook and McCloskey* [2016] NICA 54. The breach of DPP 1 came about because of the access to friends’ data without their knowledge or consent; Facebook had not attempted to prevent this behaviour. It was not prohibited by the platform policy. By permitting this, Facebook’s processing was deemed unfair; no valid consent could be given under these circumstances. The fact that an individual could have adopted more stringent privacy settings did not render the processing fair, as Facebook did not provide information to suggest that this sort of processing could take place. Furthermore, Facebook had taken no steps to monitor the use of the app. The breach of DPP 7 arose because Facebook had taken no measures to prevent the collection of data by the app, and had not monitored access to data - indeed, it was unaware of what was going on until the story was reported in the press.

This is not yet a final decision; a decision will be made once the ICO has received a response from Facebook later in August 2018.

• Information Commissioner’s Office, Investigation into the use of data analytics in political campaigns: Investigation update, 11 July 2018

<http://merlin.obs.coe.int/redirect.php?id=19212>

EN

• Information Commissioner’s Office, Democracy disrupted? Personal information and political influence, 11 July 2018

<http://merlin.obs.coe.int/redirect.php?id=19213>

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• Information Commissioner’s Office, Notice of Intent - Facebook Ireland Ltd, Facebook Inc., 19 June 2018

<http://merlin.obs.coe.int/redirect.php?id=19214>

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• CG v. Facebook Ireland Limited and McCloskey [2016] NICA 54, 21 December 2016  
<http://merlin.obs.coe.int/redirect.php?id=19183>

EN

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## GE-Georgia

### Constitution promulgates freedom of Internet

In October 2017 and March 2018, the Georgian Parliament adopted a de-facto new Constitution of Georgia. Among numerous changes, the text provides for some significant changes in the foundations of media regulation in the country.

In particular, the current Article 24 of the Constitution, that proclaims freedom of information, freedom of mass media, a ban on censorship and a ban on the state or individuals monopolising the mass media or communication means, has been transformed into new Article 17 (“Freedom of thought, information, mass media and Internet”).

It contains a new paragraph that promulgates, for the first time at constitutional level, freedom of Internet: “Everyone shall have the freedom to access and use the Internet.”

Paragraph 6 of Article 17 additionally guarantees the independence of the public broadcaster from state agencies, and its freedom from political and substantial commercial influence.

Furthermore, paragraph 7 of Article 17 now stipulates “the institutional and financial independence of a national regulatory body created to guarantee pluralism in media, the exercise of rights to freedom of expression through mass media, the prevention of a monopoly within mass media or over the sources of disseminating information, and also to guarantee the protection of the rights of consumers and entrepreneurs operating in the field of broadcasting and electronic communication”.

The new Constitution of Georgia will enter into force upon the President of Georgia, who will be elected at the end of 2018, taking an oath of office.

Earlier, the OSCE Representative on Freedom of the Media, Harlem Désir, welcomed the amendments to Georgia’s Constitution: “Recognition of the growing importance of the Internet and the potential of genuine public service broadcasting in the country’s fundamental law represents an important step forward for freedom of expression and media freedom in Georgia,” he said.

• [U+10E1][U+10D0][U+10E5][U+10D0][U+10E0][U+10D7][U+10D5][U+10D4][U+10D9][U+10DD][U+10DC][U+10E1][U+10E2][U+10D8][U+10E2][U+10E3][U+10E2] (Constitution of Georgia (as amended by the Constitutional Law of Georgia No. 1324 of 13 October 2017 and Constitutional Law of Georgia No. 2071 of 23 March 2018))

<http://merlin.obs.coe.int/redirect.php?id=19216>

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• OSCE media freedom representative concludes country visit to Georgia, addresses reforms and developments affecting media freedom. Press release of 4 October 2017

<http://merlin.obs.coe.int/redirect.php?id=19217>

EN

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## IE-Ireland

### Data Protection Act 2018 enacted

On 24 May 2018, the Data Protection Act 2018 was enacted following publication of the Data Protection Bill in February 2018 (see IRIS 2018-3/21) and the General Scheme of the Bill in May 2017 (see IRIS 2017-7/22). The purpose of the 2018 Act is to give further effect to the European Union’s General Data Protection Regulation (2016/679) (GDPR), which became applicable in all member states on 25 May 2018 (see IRIS 2018-6/7). While the GDPR is directly applicable, a number of its provisions require member states to enact domestic legislation, and 25 May 2018 was also the deadline for member states to notify the European Commission of national legislation adopted pursuant to a number of chapters and articles in the GDPR.

Similar to the GDPR, the Data Protection Act 2018 is a lengthy piece of legislation, running to 184 pages. However, two sections of the Data Protection Act 2018 are of particular relevance for the media. The first is section 43, which concerns data processing and freedom of expression and information. Under Article 85 of the GDPR, member states must by law reconcile the right to the protection of personal data pursuant to this Regulation with the right to freedom of expression and information, including processing for journalistic purposes and the purposes of academic, artistic or literary expression. Thus, section 43(1) of the Data Protection Act 2018 provides that the processing of personal data for the purpose of exercising the right to freedom of expression and information, including processing for journalistic purposes, is exempt from compliance with the provisions of the GDPR specified in section 43(2), where, having regard to the importance of the right of freedom of expression and information in a democratic society, compliance with the provision would be incompatible with such purposes. The GDPR provisions listed in section 43(2) are Chapter II (principles), other than Article 5(1)(f), Chapter III (rights of the data subject), Chapter IV (controller and processor), Chapter V (transfer of personal data to third countries and international organisations), Chapter VI

(independent supervisory authorities) and Chapter VII (cooperation and consistency). Notably, section 43(5) provides that in order to take account of the importance of the right to freedom of expression and information in a democratic society, that right shall be interpreted in a broad manner.

The second section of particular relevance is section 44 on data processing and public access to official documents under the Freedom of Information Act 2014 (see IRIS 2015-1/25). Under Article 86 of the GDPR, personal data in official documents held by a public authority may be disclosed in accordance with Union or member state law to which the public authority is subject in order to reconcile public access to official documents with the right to the protection of personal data, pursuant to this Regulation. In this regard, section 44 of the Data Protection Act 2018 provides that for the purposes of Article 86, personal data contained in a record may be disclosed where a request for access to the record is granted under and in accordance with the FOI Act 2014, pursuant to a freedom of information request.

• Data Protection Act 2018, 24 May 2018  
<http://merlin.obs.coe.int/redirect.php?id=19185>

EN

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## Decision on public broadcaster's impartiality

On 27 June 2018, the Broadcasting Authority of Ireland (BAI) issued a notable decision on a public broadcaster's compliance with impartiality rules in its coverage of the possible imminent resignation of a government minister. By a majority, the BAI Executive Complaints Forum found that the RTÉ current affairs programme, where the minister in fact resigned the following day, had not infringed requirements of the Broadcasting Act 2009 nor the BAI Code of Fairness, Objectivity and Impartiality in News and Current Affairs.

The decision concerned Claire Byrne Live, a well-known current affairs programme broadcast by the public broadcaster RTÉ on its RTÉ One television channel. The programme at issue was broadcast on the evening of 27 November 2017, and concerned a news story regarding the discovery of an email in the Department of Justice that appeared to indicate that the then Minister of Justice may have been aware of a controversial legal strategy being adopted against a police whistleblower (see, relatedly, IRIS 2017-4/23). A complaint was made to the BAI about the programme, arguing that it lacked impartiality, as the broadcaster appeared to make a collective decision that the email in question represented prime facie evidence of poor

political judgement and then demanded the political head of the minister. The complainant also argued that the presenter became an active participant in the political attack on the minister.

The BAI considered the complaint under Section 48(1)(a) of the Broadcasting Act 2009, and Rules 4.1 and 4.2 of the BAI Code of Fairness, Objectivity and Impartiality in News and Current Affairs, which provide that the broadcast treatment of current affairs, including matters which are either of public controversy or the subject of current public debate, is fair to all interests concerned and that the broadcast matter is presented in an objective and impartial manner and without any expression of his or her own views.

In its decision, the BAI first reiterated that broadcasters must ensure that current affairs content is compiled, produced and presented in a manner which is and can be seen to be, independent, unbiased and without prejudgement. It further noted that broadcasters are required to facilitate a range of views and to ensure that presenters do not express their own views such that a partisan position is advocated. Next, the BAI noted that the focus of the programme was on the potential political ramifications of the discovery of the email, including the potential for the Minister for Justice resigning or being asked to resign and the possibility of a general election being called if she didn't. The BAI found that while a considerable proportion of the programme was focussed on the possible resignation of the minister, the presenter facilitated the expression of a range of views across the party political spectrum and the government representative was given ample time to convey his opinions on the matter. The programme also presented on-screen and read out tweets from the Minister for Justice on the issue and reported the views expressed by the government press office. The BAI found no evidence in the content of a collective decision by the broadcaster to seek the resignation of the Minister for Justice. The BAI was also of the view that the questions and interventions by the presenter were appropriate in the context of the programme and the breaking news story and found no evidence of any expression of her own views or advocacy of a partisan position.

In light of these considerations, the BAI Executive Complaints Forum concluded, by a majority, that there had been no infringement of the requirements of the Broadcasting Act 2009 nor the BAI Code of Fairness, Objectivity and Impartiality in News and Current Affairs.

• Broadcasting Authority of Ireland, Broadcasting Complaints Decisions, June 2018, 27 June 2018, p. 50  
<http://merlin.obs.coe.int/redirect.php?id=19184>

EN

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## IT-Italy

### Italian Parliament approves ban on gambling advertising

On 7 August 2018, the Italian Parliament approved a set of economic and social measures by passing into law the so-called 'Dignity Decree' issued by the government in July (Law Decree 12 July, 2018, No. 87) (the "Decree").

Among other things, the Decree has established a general ban on gambling advertising with a view to increasing consumer protection and preventing gambling addiction (Iudopathy).

Pursuant to Article 9, paragraph 1, the following is banned: any form of advertising, including indirect advertising, relating to games or gambling with winnings in money, however carried out and in any means, including sporting, cultural or artistic events, TV and radio broadcasting, the daily and periodic press, and any genre of publications, billboards and Internet.

Despite the broad scope of the ban, the Decree also provides for some exceptions. In particular, the following types of advertising are excluded from the ban: national lotteries with deferred number draw, as set forth in Article 21, paragraph 6, of Law Decree 1 July 2009, No. 78 as converted, with amendments, into Law 3 August 2009, No. 102; local events, as set forth in Presidential Decree 26 October 2001, No. 430 (Decreto del Presidente della Repubblica); and logos on safe and responsible gambling of the Customs and Monopolies Agency (Agenzia delle dogane e dei monopoli).

Furthermore, pursuant to Article 9, paragraph 5, of the Decree, advertising agreements already existing at the date of the entry into force of the Decree will remain valid until the expiration date and in any case no later than 14 July 2019 (that is to say, a year from the entry into force of the Decree).

The effective date of the ban is 14 July 2018. According to Article 9, paragraph 1, of the Decree, starting from 1 January 2019, the ban will be applicable to sponsorships of events, activities, gatherings, programmes, products or services and to all forms of communication of promotional content, including visual and acoustic citations and the superimposing of the name, brand, symbols, activities or products whose advertising, pursuant to the same provision, is prohibited.

In the case of a breach of the ban, Article 9, paragraph 3, of the Decree establishes a pecuniary administrative fine amounting to 5% of the value of the

sponsorship or of the advertising, and in any case no lower than EUR 50 000 for each violation. The Italian Communication Authority (AGCOM) is competent to investigate violations and to impose the said fines.

• *Disposizioni urgenti per la dignità dei lavoratori e delle imprese, Decreto-Legge 12 luglio 2018, n. 87, convertito con modificazioni dalla Legge 9 agosto 2018, n. 96 (Law Decree 12 July, 2018, no. 87)*  
<http://merlin.obs.coe.int/redirect.php?id=19186>

IT

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## LV-Latvia

### Amendments to the Electronic Mass Media Law adopted

On 20 June 2018, new amendments to the Latvian Electronic Mass Media Law (EMML) which provide inter alia that public service broadcasters leave the advertising market, as well as other important amendments, were decided. As several of the amendments introduce significant new concepts and rules, there are relevant transition terms provided in the amendments and different dates for full implementation.

The decision requiring public service broadcasters to leave the commercial advertising market will come into force in 2021, subject to the right to receive additional public funding from the state budget to the amount of EUR 14 million annually. According to the annotation of the amendments, such guaranteed and independent funding would serve as grounds for ensuring the editorial independence of public service media. Advertising will continue to be allowed with respect to certain cultural and sports events, as well as when specifically required by the rightsholders of licensed content, with respect to certain sponsored events, and in other exceptional cases.

Further noteworthy amendments include one whereby the Electronic Mass Media Council will conclude a contract with the state-owned company Latvian Radio and Television Centre on ensuring the free-to-air broadcasting of public service programmes by digital terrestrial transmission. There will be additional financing granted for this purpose, taking into account the rules for state aid, which have to be cleared with the European Commission. Thus, these amendments only come into force on 1 January 2020. The Electronic Mass Media Council has until 30 June 2019 to submit an update on the process to the Saeima (the Latvian Parliament). The aim of this additional support is to technically reach the whole of the Latvian territory (according to the annotation to the draft amendments, terrestrial transmission can reach 99.6 percent of the Latvian territory and 99.9



percent of households) and to ensure the democratic, social and cultural needs of the population.

In order to promote the transparency of media ownership, broadcasters will have the new obligation to reveal their ownership structure within the process of receiving broadcasting and retransmission permits. Also, any change in the beneficial owner will have to be notified. The existing holders of broadcasting and retransmission permits, as well as providers of on-demand services, have until 31 December 2018 to notify the Electronic Mass Media Council of their beneficial owners.

The amendment also introduces a new competence for the Electronic Mass Media Council: the power to restrict the retransmission of certain channels in Latvia if another European Union or EEA member state has already initiated the restriction, in accordance with Article 3 of the Audiovisual Media Services Directive.

In order to fight piracy and the distribution of unlicensed television channels, the Electronic Mass Media Council received an additional new competence: to restrict the operation of certain web pages which retransmit unlicensed contents without a retransmission permit. The Council will be able to issue a binding order restricting the use of the relevant domain name for up to 6 months. There will be supporting Regulation of the Cabinet of Ministers to clarify this procedure in more detail. These amendments will come into force on 1 January 2019.

There are also new requirements with respect to the state language applicable to transfrontier channels licensed in Latvia. In case the transfrontier channel may also be received in Latvia, the channel must have an audio channel available in the Latvian language too (Article 32(5)).

• *Grozījumi Elektronisko plašsaziņas līdzekļu likumā, Latvijas Vēstnesis, No. 128 (6214), 28.06.2018* (Amendments to the Electronic Mass Media Law, published in Latvian Journal No. 128 (6214) on 28 June 2018)

<http://merlin.obs.coe.int/redirect.php?id=19220>

LV

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## NL-Netherlands

**Twitter user and Dutch website liable for disseminating explicit content of well-known TV personality**

On 25 July 2018, Amsterdam District Court ruled that both a Twitter user and GeenStijl, a popular Dutch website (see IRIS 2016-9/3), acted unlawfully by disseminating, without her consent, sexually explicit

(video) material of a well-known Dutch TV personality and singer. The content, which had been made in private by the claimant, had, for unclear reasons, appeared and circulated on the messaging service WhatsApp. The Twitter user had subsequently posted a tweet that contained the content, accompanied by a hashtag with the name of the claimant. GeenStijl, for a short period of time, referred to that tweet by means of an embedded link in a blog post.

The claimant argued that both the act of tweeting the content by the Twitter user, and of providing a link to that content by GeenStijl, had led to the dissemination of that content without her consent and therefore resulted in an unjustified violation of her privacy. She claimed a total sum of EUR 450 000 for damages, of which EUR 250 000 for the compensation of moral damages.

In its judgment, the Court balanced the claimant's right to respect for her private life (Article 8 of the European Convention on Human Rights (ECHR)) and the right of the Twitter user and GeenStijl to freedom of expression (Article 10, ECHR). The Court made it clear that it is in principle unlawful to disseminate (explicit) content that clearly belongs to the private sphere when it cannot be reasonably assumed that the person depicted in that content had agreed to that dissemination. It rejected the copyright-based argument made by GeenStijl that the use of an embedded link, which, according to GeenStijl, merely functioned as a reference to the real public location of the content, could not qualify as the dissemination of that content. The Court deemed a discussion about the technique of dissemination "not interesting" with regard to the question of the lawfulness of that dissemination.

The defendants also argued that the content had already circulated widely and that they merely wanted to point out the hypocrisy of other news outlets who, while condemning the leaking of the content, at the same time also eagerly reported about it. The Court, however, found that the defendants, in doing so, insufficiently took into account the interests of the TV personality. This led the Court to the conclusion that, having weighed up all the circumstances, the claimant's right to a private life had, in this case, to prevail over the Twitter user's and GeenStijl's right to freedom of expression..

With regard to the damages, the Court rejected the claim for pecuniary damages and considerably lowered the claim for non-pecuniary damages to EUR 30 000, for which the Twitter user and GeenStijl are jointly liable.

• *Rechtbank Amsterdam 25 juli 2018, ECLI:NL:RBAMS:2018:5130* (District Court of Amsterdam, 25 July 2018, ECLI:NL:RBAMS:2018:5130)

<http://merlin.obs.coe.int/redirect.php?id=19187>

NL

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## RO-Romania

### The Audiovisual Law, back to the Parliament

More initiatives to modify the Audiovisual Law No. 504/2002 with further modifications and completions were partly rejected and partly approved by the Romanian Parliament (see, inter alia, IRIS 2013-3/26, IRIS 2014-1/37, IRIS 2014-7/29, IRIS 2014-9/26, IRIS 2015-10/27, IRIS 2016-2/26, IRIS 2016-10/24, IRIS 2017-1/30, IRIS 2017-7/28, IRIS 2018-6/30).

On 7 May 2018, the Romanian Senate (upper chamber of the Parliament) rejected a draft law for the modification of the Audiovisual Law No. 504/2002. The decision of the Senate is final. This draft law had already been rejected earlier by the Chamber of Deputies (lower chamber) on 5 September 2017. According to the initiators, the draft law was intended to be a first step towards an efficient and well-defined legislative framework for the education of the population with regard to emergency situations, due to the major seismic risk facing Romania and, in particular, Bucharest, its capital city. According to a newly proposed Article 6 (3), any kind of interference with the content, the form or the ways of presenting the elements of the programme services, by the public authorities or by any natural or legal persons, Romanian or foreign, is forbidden except for the public interest messages of the Ministry of Internal Affairs (MAI) concerning behaviour during earthquakes. A new paragraph 5 of Article 21 was proposed, stating that any broadcaster under Romanian jurisdiction must ensure the publicity of the public interest notices of the MAI on earthquake behaviour, free of charge, every year on March 4 (the date of the last devastating earthquake that hit Romania in 1977), but also each time an exercise simulates the actions of authorities following an earthquake.

In another decision on the same day, 7 May 2018, the Senate rejected a further draft law for the modification of the Audiovisual Law No. 504/2002. The decision of the Senate is final, although, in this case, the draft law had earlier been approved by the Chamber of Deputies on 4 April 2018. According to the initiators, the draft law was intended to provide a definition for non-commercial audiovisual communications in the Audiovisual Law and to determine their forms: public interest announcement, social campaign and charity appeal. The initiators pointed out that the Audiovisual Law does not contain any definition in its Article 17 (1) d) No. 9 (audiovisual commercial communications) of non-commercial audiovisual communications, even though the Audiovisual Code (Decision No. 220 of 2011 regarding the Regulatory Code of the Audiovisual Content) provides rules in its section No. 10 on non-commercial campaigns.

In that draft law, a new Article 1(151) was proposed that would have defined non-commercial audiovisual communication as audio or visual messages designed to directly promote action by informing and warning the population; actions of an exclusively social nature; or philanthropic humanitarian activities. Furthermore, it would have clarified that these messages accompany or are included in a free programme and extend to public interest campaigns and charitable appeals. After Article 38, four new articles were proposed, Article 381 - 384, which intended to include legal conditions and limitations to be observed by the different types of non-commercial audiovisual communications. The initiators also intended to enlarge the existing list of eight public interest announcements in Article 120 (5) with announcements on dangerous hydrometeorological phenomena, the announcement "For the health of the national economy, buy products made in Romania!" and the announcement "[U+059E][U+201F]For a healthy environment, teach the children to respect nature!" All of these amendments will not enter into force due to the Senate rejecting them.

On the other hand, the Chamber of Deputies (lower chamber of the Romanian Parliament) adopted a draft law on 13 June 2018 for the modification and completion of the Audiovisual Law. According to Article I of the draft law form voted by the deputies, two new paragraphs, (4) and (5), will be added to Article 421 of the Audiovisual Law. Paragraph 4 states that in order to ensure the right of access of hearing-impaired people to audiovisual media services, the television programme services with national coverage, in whatever way they are broadcast and part of digital packages, will broadcast Romanian cinematographic productions, short or long, as well as documentaries, with Romanian subtitles. The obligation to subtitle them is the exclusive responsibility of the copyright holder. Furthermore, paragraph 5 states „The technological solution adopted for the implementation of the provisions of paragraph 4 must allow the option to remove the subtitles from the screen.” According to Art. II of the draft law, these modifications will enter into force on 1 January 2019 if the Senate approves them, too, when it votes on them in the coming months.

• *The Propunere legislativă privind completarea și modificarea Legii nr. 504 din 11 iulie 2002 a audiovizualului - forma inițiatorului* (Draft Law on the modification and completion of the Law no. 504 of 11 July 2002 on the audiovisual - the form of the initiator)

<http://merlin.obs.coe.int/redirect.php?id=19197>

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• *The Propunere legislativă pentru modificarea și completarea Legii audiovizualului nr. 504/2002 - forma adoptată de Camera Deputaților* (Draft law for amending and completing the Audiovisual Law no. 504/2002 - the form adopted by the Chamber of Deputies)

<http://merlin.obs.coe.int/redirect.php?id=19198>

RO

• *The Propunere legislativă pentru modificarea și completarea Legii nr.504/2002 a audiovizualului - forma adoptată de Camera Deputaților* (Draft law for amending and completing the Law no. 504/2002 on the audiovisual - the form adopted by the Chamber of Deputies)

<http://merlin.obs.coe.int/redirect.php?id=19199>

RO

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## New state aid scheme for cinematographic industry

On 13 June 2018, by way of a Government Ordinance, the Romanian Government adopted a State Aid Scheme for Supporting the Cinematographic Industry (see IRIS 2004-2/35, IRIS 2011-2/5 and IRIS 2018-2/29).

The Government Ordinance was published in the Official Journal of Romania No. 508 of 20 June 2018. This state aid scheme is multiannual and will run until the end of 2020. The maximum annual budget of this new fiscal incentive is 233 million lei, which is equivalent to about EUR 50 million. The total maximum budget is 698 million lei, equivalent to about EUR 150 million for the period 2018-2020. According to this new scheme, up to 45% of the eligible costs for film productions realised on Romanian territory can be covered, under the following conditions:

- non-reimbursable financial allocations of 35% of the total eligible expenditure for the purchase, rental and manufacture of goods and/or services occasioned by the development of film and film production projects in Romania, as well as for fees, salaries and other payments to individuals, related to project implementation;

- non-reimbursable financial allocations of 10% in addition to the basic allocation (35%), provided there is tourist promotion of a geographical area, a city or Romania as such within the cinematographic production.

These financial allocations are granted provided that at least 20% of the total budget of the project is realised on Romanian territory.

This form of financial allocation is intended for Romanian or foreign registered enterprises that meet cumulatively a number of conditions, including: the realisation of the eligible costs for the implementation of the project, in total, must have a value of at least EUR 100 000; the cultural character of the project must have been proven; and it must fulfil the eligibility conditions approved by order of the President of the National Commission for Strategy and Prognosis, the body in charge of the implementation of state aid.

The state aid is granted for the production of films, regardless of the medium in which they are exploited; these could be short- and medium-length fiction films, television series, films for direct distribution on video or the Internet, or any other type of support, artistic documentation or animation films. The maximum amount of state aid may not exceed EUR 10 million for each project financed under the scheme.

By promoting this state aid scheme, the government aims to stimulate film production by encouraging private initiative in the fields of the creation, financing,

production and distribution of Romanian films or films made with Romanian participation. The government estimates that introducing fiscal incentives will benefit the film and television industry in Romania by supporting top-level professional training, promoting Romanian productions at international level and creating new jobs in the creative industries.

In that context, the Romanian Deputy Prime Minister, Ana Birchall, took part in the Ischia Global Film & Music Fest in Italy on July 19-21 2018 to promote the package of advantages designed to support co-production in the Romanian cinematographic industry. She invited filmmakers to make co-productions for the film industry through the state aid scheme and pointed out that the scheme makes Romania one of the most attractive destinations in Europe for film co-production.

• *Hotărârea Guvernului nr. 421 din 13 iunie 2018 pentru instituirea unei scheme de ajutor de stat privind sprijinirea industriei cinematografice* (Government Decision no. 421 of 13 June 2018 on the establishment of a State Aid Scheme for Supporting the Cinematographic Industry)

<http://merlin.obs.coe.int/redirect.php?id=19196>

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## RU-Russian Federation

### Amendments restrict exhibition at film festivals

The Federal Statute “On amendments to the Federal Statute “On State Support for Cinematography of the Russian Federation” was adopted by the State Duma on 26 July 2018 and signed by the President on 3 August. The amendments to the 1996 cinema statute (see IRIS 1999-2/17 and IRIS 2014-6/32) specify the regulation of foreign film exhibition at festivals in Russia.

The law now provides a definition for a “film festival” as “a cultural and educational event that is held in accordance with the regulations (rules) as approved by the organizers of this event, presents in itself screening of specially selected films and can have a contest programme consisting of films rated by the jury”. The Ministry of Culture is now empowered to approve on an annual basis a list of international film festivals to be held in Russia in accordance with the by-laws and criteria that shall be developed and approved by the government.

The changes were made to specify the current permission to exhibit foreign films at international film festivals in Russia without an exhibition permit as stipulated in Article 5.1 of the Statute “On State Support



for Cinematography of the Russian Federation". Currently, this article allows the exhibition without a permit (see IRIS 2016-5/29) of: 1) any films made for TV and shown on television, 2) foreign films exhibited at international festivals held in Russia, and 3) films in the public domain that were produced in the Russian Empire or the USSR if the exhibition is of a non-commercial nature and is organized by museums, cultural centres, libraries or educational institutions.

The amendments now stipulate that the rules to exhibit without a permit shall remain valid only if the international film festival is on the Ministry list, has a contest programme consisting of films rated by the jury, and lasts for up to 10 days, where a participating film is shown no more than twice.

The amendments enter into force on 3 November 2018.

• О внесении изменений в Федеральный Закон "О государственной поддержке кинематографии Российской Федерации" (Federal Statute of 3 August 2018 N 335-FZ "On amendments to the Federal Statute "On State Support for Cinematography of the Russian Federation")

<http://merlin.obs.coe.int/redirect.php?id=19189>

RU

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## UA-Ukraine

### Court hearing on Russian broadcasts ends

At a hearing on 29 May 2018, the Kyiv District Administrative Court finally considered the merits of the case and provided its decision in relation to the legality of Russian rebroadcasts via cable systems in Ukraine. The case started in 2014 (see IRIS 2015-5/38 and IRIS 2017-1/33) and in the meantime, the retransmission of all Russian channels concerned was suspended as an interim restrictive measure.

The case was brought by the national media regulator to acknowledge the illegal nature of the content of unspecified Russian TV programmes and to ban the distribution of certain Russian TV channels in cable systems in Ukraine. The lawsuit was filed against "Torsat", the local distributor of several Russian channels, as well as the Ukrainian cable TV distributor "Vertikal-TV", and Russian TV companies First Channel, "TV-Tsentr", VGTRK, NTV and "RBK-TV".

The plaintiff, the National Council on Television and Radio Broadcasting (see IRIS 1998-4/14), claimed that the programmes blatantly violated Ukrainian broadcasting law and the European Convention on Transfrontier Television. The main topic and particularity of the Russian programmes in question were claimed to

be the propaganda of exclusiveness, the superiority or inferiority of persons based on the criteria of their ideology, belonging to one nation or another, propaganda advocating a change in the constitutional order in Ukraine and its territorial integrity through violence and the use of Russian Federation military forces, the dissemination of interethnic and national enmity, etc.

The defendants raised the objections that, in particular, the regulator's demands amounted to censorship, which is forbidden by the Constitution of Ukraine, and prevented citizens from obtaining "pluralistic information". They asked the court to dismiss the lawsuit.

Earlier, in 2014 and 2015, the same court had assigned two expert opinions on the Russian programmes concerned from the Kyiv State Research Institute of Court Expertise. In the experts' opinion "some of the remarks made in the programmes contain calls for a violent change in the constitutional order in Ukraine, calls for war, aggression; their propaganda, propaganda of exclusiveness, the superiority or inferiority of persons based on the criteria of their religious beliefs, ideology, belonging to one or other nation or race, physical or property status, social origin; statements aimed at the territorial integrity of Ukraine; calls to violate public order and for mass disturbances", as well as the use of instruments of psychological pressure and propaganda. The court agreed with this opinion.

The court found that the dissemination of the programmes in Ukraine presented a threat to the "informational security" of the state and therefore required action by the regulator to protect the state's "informational environment". As the Constitution, while indeed banning censorship, allows for limitations to the right to free expression in the interests of national security, territorial integrity or public order, a decision to uphold the considered demands of the national regulator does not denote censorship.

At the same time, the regulator's demand that the court ban the distribution of particular Russian TV channels in cable systems in Ukraine was found to be ungrounded and inappropriate as the law did not envision such action. The court noted that the regulator could have appealed to the court with a request to annul the relevant licenses issued earlier by the regulator permitting their distribution in Ukraine.

Therefore, the court only decided that the programmes of specific Russian TV channels did not correspond to the provisions of the statutes "On Information" and "On Television and Radio Broadcasting", as well as to Article 7 of the European Convention on Transfrontier Television. The demand to ban further distribution of the channels was dismissed.

On 24 June, the same court reviewed a request by one of the defendants in the case, Torsat, to provide an explanation of the decision of 29 May. The particular grounds for the request were not stated in the

court decision, but the court found the earlier decision logical and clear and dismissed the request.

- Decisions of the District Administrative Court of Kyiv, case No. 826/3456/14, 29 May 2018, 24 June 2018 **NN**

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