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IRIS
Legal Observations
of the European Audiovisual Observatory

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INTERNATIONAL

COUNCIL OF EUROPE

European Court of Human Rights: Gîrleanu v. Romania

On 26 June 2018, the European Court of Human Rights (ECtHR) delivered an interesting judgment in support of investigative journalism, criticising the Romanian authorities' negligence in allowing leaks of secret, sensitive military information. The ECtHR found that the criminal prosecution of a journalist and the measures taken against him for disclosing classified information that gave evidence of the leaks, violated the journalist's right to freedom of expression as guaranteed under Article 10 of the European Convention on Human Rights (ECHR).

The applicant is Marian Gîrleanu, a local correspondent for the national daily newspaper România liberă. His articles covered various fields, including investigations into the activities of the armed forces and the police. In a television show, examples of leaks of secret, sensitive military information were criticised, and it was suggested that such information could also have reached terrorists. During the show, it was mentioned that some daily newspapers had received classified secret information about military operations, but had decided not to publish it, fearing possible damage to national security. A few days later, the newspapers România liberă and Ziua published articles drawing attention to the fact that confidential information which could have threatened national security had been leaked from a military unit in Afghanistan under the authority of the Romanian Ministry of Defence. Shortly afterwards, criminal proceedings were instituted against Gîrleanu and four other people, including another journalist and a former member of the army, for disclosing classified information on national security under Article 169 of the Criminal Code, and for the gathering and sharing of secret or confidential information under Article 19(1) of Law No. 51/1991 on national security. Gîrleanu's house was searched by the police, the hard drive of his computer was seized and he was taken into police custody. The next day, his pre-trial detention was authorised by a judge for a period of ten days, but after two days, he was released. Finally, he was convicted of having committed the crime proscribed by Article 19(1) of Law No. 51/1991 and ordered to pay an administrative fine of EUR 240 and the court fees. The hard drive that was seized remained confiscated. Gîrleanu complained to the ECtHR that he had been arrested, investigated and fined for gathering and sharing secret information, and that this interference with his right as a journalist to gather and disclose confidential information on national security had infringed his rights under Article 10 ECHR. Although the fine he had been ordered to pay might appear to be low, he argued that the detention and criminal proceedings had damaged his reputation as a journalist and led to him losing his permanent employment, and later to his dismissal from his job with the newspaper. The journalist received support before the ECtHR from the Guardian News and Media, Open Society Justice Initiative and the International Commission of Jurists as third-party interveners.

The ECtHR reiterated that the press exercises the vital role of "public watchdog" in imparting information on matters of public concern, while the gathering of information is an essential preparatory step in journalism and an inherent, protected part of press freedom. The ECtHR also referred to the concept of responsible journalism as a professional activity which enjoys the protection of Article 10 ECHR. That concept also embraces the lawfulness of the conduct of a journalist, and the fact that a journalist has breached the law is a relevant, albeit not decisive consideration when determining whether he or she has acted responsibly. While the interferences with Gîrleanu's right to freedom of expression were prescribed by law and could be considered to protect national security, the ECtHR did not agree with the Romanian government's view that the interferences at issue were necessary in a democratic society. In its assessment of this crucial aspect, the ECtHR applied the criteria of Stoll v. Switzerland (IRIS 2008/3-2) and it analysed the interests at stake, the conduct of the journalist, the review of the measure by the domestic courts and whether the penalty imposed was proportionate. In the Court's view, the documents in Gîrleanu's possession, as well as the fact that they had been leaked from the Romanian army, were likely to raise questions of public interest. He had not obtained the information in question by unlawful means and the investigation had failed to prove that Gîrleanu had actively sought to obtain such information. The ECtHR also noted that the information in question had already been seen by other people before Gîrleanu obtained the documents, and that it was the state's responsibility to organise its intelligence and military services and to train its personnel in such a way as to ensure that no confidential information is disclosed. The ECtHR noted that Gîrleanu was a journalist claiming to have made the disclosure in the context of a journalistic investigation, not a member of the army who collected and transmitted secret military information to others. The ECtHR was of the opinion that the domestic courts had not addressed the prosecutor's finding that the disclosure of the information under dispute was not likely to endanger national security and had failed to actually verify whether the information at issue could indeed have posed a threat to military structures. Moreover, although Gîrleanu invoked the guarantees provided by Article 10 ECHR, the domestic courts did not appear to have weighed the interests in maintaining the confidentiality of the documents in question over the interests of a journalistic inves-

tigation and the public's interest in being informed of the information leak and maybe even of the actual contents of the documents. Although the amount of the fine appears to be relatively low, the domestic courts held as established that Gîrleanu had intentionally committed a criminal offence against national security. In this perspective, the ECtHR reiterated that the fact that a person had been convicted may, in some cases, be more important than the minor nature of the penalty imposed. Furthermore, the sanctions against Gîrleanu had been imposed before publication of the secret information in question, which meant that the measures taken had the purpose of preventing him from publishing and sharing the secret documents he had in his possession. Finally, the ECtHR was of the opinion that after the de-classification of the documents in question and the prosecutor's finding that they were outdated and not likely to endanger national security, the decision on whether to impose any sanctions against the applicant should have been more thoroughly weighed. Therefore, the ECtHR considered that the measures taken against Gîrleanu were not reasonably proportionate to the legitimate aim pursued, in view of the interests of a democratic society in ensuring and maintaining freedom of the press. Accordingly, the ECtHR concluded that there had been a violation of Article 10 ECHR.

• Judgment by the European Court of Human Rights, Fourth Section, case of Gîrleanu v. Romania, Application No. 50376/09, 26 June 2018
http://merlin.obs.coe.int/redirect.php?id=19229 EN

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European Court of Human Rights: Egill Einarsson v. Iceland (No. 2)

In Iceland, a person (hereafter, X) posted a critical and defamatory comment on a Facebook page, commenting on a recent interview given by Egill Einarsson, against whom complaints had been formulated concerning the rape of women. At the material time, Einarsson was a well-known personality in Iceland who, for years, had published articles, blogs and books and had appeared in films, on television and other media, under pseudonyms. Upon completion of the police investigation, the public prosecutor dismissed all cases against Einarsson because the evidence which had been gathered had not been sufficient or likely to lead to a conviction. The interview, with a photo of Einarsson on the cover of the magazine, initiated many reactions and a Facebook page was set up to encourage the editor of the magazine to remove Einarsson's picture from its front page. Extensive dialogue took place on the site that day, and X posted the comment: "This is also not an attack on a man for saying something wrong, but for raping a teenage girl ... It is permissible to criticise the fact that rapists appear on the cover of publications which are distributed all over town ...". A district court found X's comment on Facebook defamatory and declared the statements null and void. However, it dismissed Einarsson's claim for the imposition of a criminal punishment on X under the Penal Code, and it rejected the claim to have X carry the cost of publishing the main content and reasoning of the judgment in a newspaper. Furthermore, the district court did not award Einarsson non-pecuniary damage and concluded, finally, that each party should bear its own legal costs. These findings were confirmed by the Supreme Court of Iceland.

Einarsson complained to the European Court of Human Rights (ECtHR) about a violation of his right to respect for his private life and reputation, as provided in Article 8 of the European Convention on Human Rights (ECHR). The starting point for this was indeed that the right to protection of one's honour and reputation is encompassed by Article 8 ECHR of the Convention as part of the right to respect for private life, even if the person is criticised in a public debate. In order for Article 8 to come into play, the attack on personal honour and reputation must attain a certain level of seriousness and must have been carried out in a manner causing prejudice to the personal enjoyment of the right to respect for private life. The ECtHR pointed out that the choice of the means to secure compliance with Article 8 in the sphere of inter-individual relationships is, in principle, a matter that falls within the contracting states' margin of appreciation, and that the nature of the state's obligation to potentially restrict to some extent the rights secured under Article 10 for another person depends on the particular aspect of private life that is at issue. The Court reiterated that where the balancing exercise between the rights under Article 8 and 10 ECHR had been undertaken by the national authorities in conformity with the criteria laid down in the Court's case law, the ECtHR would require strong reasons to substitute its view for that of the domestic courts. It also recalled that the member States of the Council of Europe may regulate questions of compensation for non-pecuniary damage differently. The ECtHR also recalled that domestic courts have a margin of appreciation in assessing how to remedy a finding at national level that a violation of the right to private life had occurred.

With regard to the concrete circumstances of the case, the ECtHR referred to the fact that the district court, confirmed by the Supreme Court, had taken into account Einarsson's previous behaviour; the public reputation he had made for himself; the material produced by him and its substance, which was often ambiguous and provocative and could be interpreted as an incitement to sexual violence; the dissemination of the comment: on a Facebook page amongst hundreds or thousands of other comments; and the fact that the statements were removed by X as soon as Einarsson had so requested. The Icelandic courts found that Einarsson had received "full judicial sat-

isfaction" by the comments being declared null and void. The ECtHR found that it could not be held that the protection afforded to Einarsson by the Icelandic courts - finding that he had been defamed and declaring the statements null and void - was not effective or sufficient with regard to the state's positive obligations or that the decision not to grant him compensation deprived Einarsson of his right to reputation and, thereby, emptied the right under Article 8 ECHR of its effective content. The ECtHR further noted that although the domestic courts had accepted to declare the impugned statements null and void, they had not accepted all of Einarsson's claims. Against this background, it could not be said that the domestic courts had handled the issue of legal costs in a manner that appeared unreasonable or disproportionate. These elements were sufficient for the ECtHR to conclude that the national authorities had not failed in their positive obligations and had afforded Einarsson sufficient protection. Accordingly, there had been no violation of Article 8 ECHR.

• Judgment by the European Court of Human Rights, Second Section, case of Egill Einarsson v. Iceland (No. 2), Application No. 31221/15, 17 July 2018
http://merlin.obs.coe.int/redirect.php?id=19230 EN

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European Court of Human Rights: Savva Terentyev v. Russia

In its judgment in Savva Terentyev v. Russia, the European Court of Human Rights (ECtHR) recognised a very high level of protection of freedom of speech concerning insulting comments about police officers published on a weblog. The ECtHR confirmed that some of the wording in the blog post was offensive, insulting and virulent, but it found that the (emotional) comments, as a whole, could not be seen as inciting to hatred or violence against police officers. The applicant in this case, Savva Terentyev, a resident of the Komi Republic of Russia, had a blog hosted by livejournal.com, a popular blog platform. Police action on the premises of a local newspaper during a pre-election period had resulted in sharp criticism on social media and websites. Savva Terentyev also posted a comment on his website entitled "I hate the cops, for fuck's sake". In his blog post, he compared police officers to pigs, and he went on to say that "only lowbrows and hoodlums - the dumbest and least educated representatives of the animal world" become police officers in Russia. He also suggested that it would be great "if in the centre of every Russian city, in the main square ... there was an oven, like at Auschwitz, in which ceremonially (..) infidel cops would be burnt. The people would be burning them. This would be the first step to cleansing society of this cop-hoodlum filth." Soon afterwards, criminal proceedings were brought against Terentyev under Article 282, section 1 of the Russian Criminal Code. Terentyev was found guilty of "having publicly committed actions aimed at inciting hatred and enmity and humiliating the dignity of a group of persons on the grounds of their membership of a social group". The town court found that he had "negatively [influenced] public opinion with the aim of inciting social hatred and enmity, escalating social conflict and controversy in society and awakening base instincts in people" and "[set] the community against police officers in calling for [their] physical extermination by ordinary people". It considered that the crime committed by Terentyev was "particularly blatant and dangerous for national security [as] it [ran] against the fundamentals of the constitutional system and State security". Terentyev was given a suspended sentence of one year's imprisonment. He complained to the ECtHR that this criminal conviction had violated his right to freedom of expression, as provided in Article 10 ECHR. The ECtHR assumed that the interference with Terentyev's right to freedom of expression was "prescribed by law" and aimed to protect the rights of others, namely Russian police personnel. With regard to the assessment of the question of necessity in a democratic society, the ECtHR first recalled that "there is little scope under Article 10 § 2 ECHR for restrictions on political speech or on debate on questions of public interest. It is the Court's consistent approach to require very strong reasons for justifying restrictions on such debate, for broad restrictions imposed in individual cases would undoubtedly affect respect for the freedom of expression in general in the State concerned". The ECtHR accepted that it may be necessary in democratic societies to sanction or even prevent forms of expression which spread, incite, promote or justify violence or hatred based on intolerance, provided that any "formalities", "conditions", "restrictions" or "penalties" imposed are proportionate to the legitimate aim pursued. Next, the ECtHR examined the nature and wording of the impugned statements, the context in which they were published, their potential to lead to harmful consequences, and the reasons adduced by the Russian courts to justify the interference in question.

The ECtHR reiterated that offensive language may fall outside the protection of freedom of expression if it amounts to wanton denigration; but the use of vulgar phrases in itself is not decisive in the assessment of an offensive expression as it may well serve merely stylistic purposes: style constitutes part of the communication as the form of expression and is as such protected together with the substance of the ideas and information expressed. The ECtHR stressed that not every remark which may be perceived as offensive or insulting by particular individuals or their groups justifies a criminal conviction in the form of imprisonment. It is only through careful examination of the context in which the insulting or aggressive words appear that one can draw a meaningful distinction between shocking and offensive language which is pro-

tected by Article 10 ECHR and that which forfeits its right to tolerance in a democratic society. The key issue in the present case was whether Terentyev's statements, when read as a whole and in their context, could be seen as promoting violence, hatred or intolerance. It was also emphasised that the statements had raised the issue of the alleged involvement of the police in silencing and oppressing political opposition during the period of an electoral campaign and therefore touched upon a matter of general and public concern, a sphere in which restrictions of freedom of expression are to be strictly construed. With regard to the content of the statements, the ECtHR noted that the passage about "[ceremonial]" incineration of "infidel cops" in "Auschwitz-[like]" ovens was particularly aggressive and hostile in tone. However, contrary to the domestic courts' construal, it was not convinced that that passage could actually be interpreted as a call for "[the police officers'] physical extermination by ordinary people". Rather, it was used as a provocative metaphor, which frantically affirmed Terentyev's wish to see the police "cleansed" of corrupt and abusive officers ("infidel cops). It is furthermore of relevance that the remarks in Terentyev's blog did not personally attack any identifiable police officers, but rather concerned the police as a public institution. A certain degree of immoderation may be acceptable, particularly where it involves a reaction to what is perceived as the unjustified or unlawful conduct of civil servants. In the Court's view, as a member of the state's security forces, the police should display a particularly high degree of tolerance to offensive speech, unless such inflammatory speech is likely to provoke imminent unlawful actions in respect of its personnel and expose them to a real risk of physical violence. The ECtHR was not convinced that Terentyev's comment was likely to encourage violence capable of putting the Russian police officers at risk. Furthermore, his blog had only a minor impact, as it drew seemingly very little public attention, and the comments had remained online for only one month, as Terentyev removed them from the Internet after he found out the reasons for a criminal case being brought against him. Finally, the Court reiterated that a criminal conviction is a serious sanction; moreover, the imposition of a prison sentence for an offence in the area of a debate on an issue of legitimate public interest is compatible with freedom of expression as guaranteed by Article 10 ECHR only in exceptional circumstances, notably where other fundamental rights have been seriously impaired, as, for example, in the case of hate speech or incitement to violence. The ECtHR was not convinced that Terentyev's comment had the potential to provoke any violence with regard to the Russian police officers, thus posing a clear and imminent danger which required his criminal prosecution and conviction. The ECtHR stressed "that it is vitally important that criminal law provisions directed against expressions that stir up, promote or justify violence, hatred or intolerance clearly and precisely define the scope of relevant offences, and that those provisions be strictly construed in order to avoid a situation where the State's discretion to prosecute for such offences becomes too broad and potentially subject to abuse through selective enforcement". On the basis of these considerations, the ECtHR came to the conclusion that Terentyev's criminal conviction did not meet a "pressing social need" and was disproportionate to the legitimate aim invoked. The interference was thus not "necessary in a democratic society" and accordingly violated Article 10 ECHR.

• Judgment by the European Court of Human Rights, Third Section, case of Savva Terentyev v. Russia, Application No. 10692/09, 28 August 2018
http://merlin.obs.coe.int/redirect.php?id=19231 EN

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EUROPEAN UNION

Court of Justice of the European Union: Online publication of a photograph is a new communication to the public

On 7 August 2018, the Court of Justice of the European Union (CJEU) ruled in the dispute between Land Nordrhein-Westfalen, a state of Germany, and Dirk Renckhoff, a photographer. The case concerned the publication of a photograph taken by Mr Renckhoff on a freely accessible school website. The photograph had been downloaded from an online travel portal and subsequently used by a pupil as a means of illustration for his/her workshop presentation. Below the photograph, the pupil had made reference to the online travel portal, which did not have any restrictive measures in place to prevent the photograph from being downloaded.

Mr Renckhoff claimed that his copyright, and more particularly his reproduction right and his right of making available to the public, had been infringed by Land Nordrhein-Westfalen, which is responsible for the educational supervision of the school. Mr Renckhoff argued that he had given a right of use exclusively to the operators of the online travel portal but not to the subsequent school website. The Appeal Court (Higher Regional Court of Hamburg) had doubts as to whether the requirement of 'new' public, implied from case law in the act of communication to the public, had been met. The question referred to the CJEU therefore concerned the interpretation of Article 3(1) of Directive 2001/29/EC.

In order to answer this question, the Court started by recalling that a photograph may be protected by copyright in case it amounts to an intellectual creation which reflects the author's personality and expresses

the latter's free and creative choices. Concerning the author's exclusive right of communication to the public, the Court pointed out that 'any use of work carried out by a third party without such prior consent must be regarded as infringing the copyright in that work' and that such an exclusive right must be interpreted broadly. However, in order for an author to claim infringement of his right, two cumulative criteria must be met. First, there must be an 'act of communication' of a work and, secondly, communication of that work must be made to a 'public'. Whereas the Court found the first requirement to be met, the second requirement formed the main obstacle.

Taking into account that both the initial communication of the photograph on the online travel portal and its subsequent communication on the school portal were made with the same technical means, the Court turned to the question of whether the communication was made to a 'new public'. Having regard to the 'preventive' nature of authors' rights, the Court held that authors would be deprived of their effective rights if it did not recognise that the posting on one website of a work previously posted on another website with the consent of the copyright holder constituted a communication to a new public.

According to case law, the author should retain control over his works and thereby also be able to put an end to the exercise, by a third party, of previously authorised exploitation rights. Moreover, the Court pointed out that no exhaustion rule applies to the act of communication to the public. Not recognising, in the present case, that a communication to the public had occurred would deprive the copyright holder of his/her opportunity to claim an appropriate reward for the use of his/her work. In light of all these elements, the Court concluded that a communication to the public had taken place.

It is important to note that the Court deemed it irrelevant that the copyright holder did not limit the ways in which Internet users could use the photograph. Furthermore, the Court drew important distinctions between the present case and the Svensson case (See IRIS 2014-4/3), which concerned the use of hyperlinks. First, hyperlinks contribute to a greater extent than in the present case to the sound operation of the Internet. Consequently, it is important to recognise that a communication to the public took place in order to guarantee that a fair balance is struck between, on the one hand, the intellectual property rights of rightsholders and, on the other hand, the right to freedom of expression of Internet users, as well as the question of public interest. The right to education was not at stake when determining whether a right to communication had occurred. Secondly, unlike in the present case, the preventive nature of the rights of the holder are preserved in the context of hyperlinks. Removal of the work from the initial website would render all subsequent hyperlinks obsolete. Lastly, in the present case, the user played a decisive role in communicating the work to a public. He first had to reproduce the photograph on a private server and then post it on a website other than that on which the work had been initially communicated. In the case of hyperlinks, users are more passive. In light of all the foregoing considerations, the Court concluded that a communication to the public had occurred and that consent of the rightsholder was required for publication of the photo on the subsequent school website.

• Case C-161/17, Land Nordrhein-Westfalen v. Dirk Renckhoff, Judgment of the Court of Justice of the European Union (Second Chamber), 7 August 2018
http://merlin.obs.coe.int/redirect.php?id=19232 DE EN FR
CS DA EL ES ET FI HU IT LT LV MT
NL PL PT SK SL SV HR

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REGIONAL AREAS

International Organisation of La Francophonie: Launch of a practical guide on combating hate-speech in the audiovisual media

On the occasion of an international conference on dialogue between cultures and religions held in Fez (Morocco) between 10 and 12 September 2018, the International Organisation of La Francophonie (IOF) officially presented its practical guide entitled "Lutter contre les discours de haine dans les médias audiovisuels: normes, jurisprudence, bonnes pratiques et études de cas" (Combating hate speech in the audiovisual media: standards, case-law, good practices, case studies). The guide brings together the final results of a pilot project coordinated by the expert Jean-François Furnémont in partnership with three authorities that are members of the French-speaking network of media regulators, Réseau Francophone des Régulateurs des Médias (REFRAM): Morocco's main audiovisual communication authority, the Haute Autorité de la Communication Audiovisuelle (HACA); Côte d'Ivoire's main authority on audiovisual communication, the Haute Autorité de la Communication Audiovisuelle (HACA); and Tunisia's independent high authority on audiovisual communication, the Haute Autorité Indépendante de la Communication Audiovisuelle (HAICA).

The first part of the guide attempts to make up for the absence of a universally accepted definition of the term "hate-speech" by identifying what the concept involves, referring to the work carried out by a number of United Nations institutions and the Council of Europe. The second part compiles all the international legal instruments and standards on hate speech and emphasises the main provisions of relevance to the

media and their regulation, ranging from the most legally binding standards to non-binding texts. The third part gives an overview and comparative analysis of the legal and normative framework of the countries that are REFRAM members with regard to hate speech in the audiovisual media. A description of the legal framework at the international level then demonstrates that only three court systems provide supranational mechanisms for the protection of human rights: the European Court of Human Rights (set up by the Council of Europe), the African Court on Human and Peoples' Rights (set up by the African Union), and the Inter-American Court of Human Rights (set up by the Organization of American States).

There is also a guide to good practices for promoting a culture of tolerance on the part of both media and regulators, which lists specific initiatives undertaken by certain stakeholders such as the public authorities, regulators, and the media. The guide also includes two case studies on the presence of hate speech carried out by the Moroccan and Tunisian media regulation authorities in their respective audiovisual environments. The work closes with a "digital library" on hate speech that lists all the relevant documents from various institutions with authority in this field.

This is a comprehensive tool for combating hate speech in the audiovisual media; it is directed at all stakeholders concerned with issues concerning the rule of law, democracy, and fundamental rights and freedoms.

• *« Lutter contre le discours de haine dans les médias audiovisuels, Normes, jurisprudence, bonnes pratiques et études de cas, Guide pratique », Organisation internationale de la Francophonie* (Combating hate speech in the audiovisual media: standards, case-law, good practices, case studies - a practical guide), International Organisation of La Francophonie)
http://merlin.obs.coe.int/redirect.php?id=19271 FR

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UNITED NATIONS

Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism: Facebook's 'terrorism' definition is too broad

In her letter of 24 July 2018 addressed to Facebook CEO Mark Zuckerberg, the UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism expressed her concerns about the platform's use of an overly broad definition of 'terrorism' and 'terrorist organizations'. The Special Rapporteur, an independent expert appointed by the UN's Human Rights Council, also expressed her concerns about the seeming lack of a human rights approach in Facebook's content moderation policies.

In its Community Standards, Facebook defines terrorism as: 'Any non-governmental organization that engages in premeditated acts of violence against persons or property to intimidate a civilian population, government or international organization in order to achieve a political, religious, or ideological aim.' According to the Special Rapporteur, this definition incorrectly equates all non-state groups that use violence in pursuit of any goals or ends to terrorist entities. She states that only a subset of violent acts committed by a non-state actor could be qualified as terrorism. The Rapporteur points out that the use of an imprecise and overly broad definition is particularly worrying in light of a number of governments seeking to stigmatise diverse forms of dissent and opposition (whether peaceful or violent) as terrorism. Lastly, the Rapporteur expresses her concern over the unclarity of how Facebook determines whether a person belongs to a particular group and whether the respective group or person is given the opportunity to meaningfully challenge such a determination.

In her letter, the Special Rapporteur underlines the important role that Facebook and other companies functioning on the basis of business models centred around hosting third-party content play in offsetting terrorist activity online. At the same time, she reiterates the importance of such activity being carried out in compliance with these companies' responsibility not to unduly interfere with the human rights of their users.

According to the Rapporteur, the definitions adopted and employed by Facebook should be compatible with standards set by international law, including international human rights law and international humanitarian law. She therefore urged Facebook to seek to connect with the model definitions as advanced by the mandate of the Special Rapporteur. More generally, the Rapporteur urged Facebook, as well as other similar companies, to incorporate a human rights approach into its policies, in line with the UN Guiding Principles on Business and Human Rights.

• UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, 24 July 2018
http://merlin.obs.coe.int/redirect.php?id=19245 EN

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NATIONAL

AL-Albania

Commercial operators propose an amendment entitling them to public funds from the licence fee

A group of owners of commercial media held a meeting with the regulatory authority, the Audiovisual Media Authority (AMA), on 11 June 2018, with the aim of discussing the commercial operators' request to receive part of the licence fee allocated to the public broadcaster in Albania. The proposal was drafted by the Association of Electronic Media, an association representing the main commercial media owners in the country; present at the meeting there were directors and owners of two national stations and four local ones.

The proposed amendment stipulated that a "broadcasting fund" would be set up to support commercial broadcasters. The source of funding for this support would be the licence fee currently benefiting the public broadcaster in Albania. The funds collected for the licence fee would be divided in the following manner: 50% would remain with the public broadcaster and another 20% would also go to public broadcaster for the purpose of enabling the distribution of decoders for the population, while the remaining 30% of the collected amount would go to the private broadcasters. Once digital switchover is completed, the commercial and public broadcasters would share 50% of the funds collected. In the view of the media owners (as published in an AMA press release), the process of digital switchover has increased the costs of commercial broadcasters, while the advertising market has shrunk, and this proposed amendment would serve to rebalance the market.

The proposed amendment stated that, in return for financial support, commercial television would broadcast public awareness messages and campaigns, and the funds collected would be divided between the commercial operators according to their audience share; until a proper mechanism for determining the respective audience shares of the media outlets was in place audience share would be established according to each television channel's advertising revenue.

During the meeting organised with representatives of AMA, the directors and owners of commercial media argued that the funds would serve to improve the quality of their content and increase their credibility. In addition, they also said that the law would strengthen investigative journalism, and by improving their financial situation make them less vulnerable to economic pressure.

The Association of Electronic Media asked the regulator to consider the proposed amendment and also to forward it to other relevant bodies and institutions. At the moment the licence fee for Albanian public broadcasters is among the lowest in Europe, amounting to about EUR 0.80 per month, which each household pays with its electricity bill.

• *Takim konsultativ në AMA për propozimet e grupeve të interesit për ndryshime në ligjin 97/2013* (Press release of the Audiovisual Media Authority on the meeting and consultation with the media owners)
http://merlin.obs.coe.int/redirect.php?id=19234 SQ

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CH-Switzerland

New rules for SRG: more public service, no targeted advertising

The Swiss Government has granted a new licence to the Schweizerische Radio- und Fernsehgesellschaft (Swiss Broadcasting Corporation - SRG) for the 2019-2022 period. The licence imposes more stringent requirements concerning the public service provided by the broadcaster. It comes barely six months after the referendum on the popular initiative entitled "Yes to the abolition of radio and television licence fees (abolition of Billag fees)", which had called the SRG's future into question. The initiative had been overwhelmingly rejected on 4 March 2018, with 71.6% of voters opposed to it. However, the majority of people questioned in a survey had said that the SRG should now be reformed and downsized (see IRIS 2018-06).

The new licence contains a host of new obligations for the SRG. For example, it must spend at least half of its licence fee income on news services (Article 6 of the new licence). It must also invest adequate resources in culture and education (Article 7(4)), with the Bundesrat (Federal Council) expecting a similar level of spending in this area as is currently the case (that is to say, around 25% of the licence revenue). In the entertainment category, the SRG should lead by example (Article 9). The new licence increases the requirement for SRG channels to be distinctive, demanding a unique overall service with innovative in-house productions that reflect the Swiss identity ('Swissness'). The licence now also regulates sports reporting, which is popular with the public (Article 10). The SRG must report not only on major events such as the Olympic Games and the football World Cup, but also on minority and grassroots sports.

In general terms, the licence requires the SRG to be willing to take risks and innovate (Article 11), to take all language regions into account (Article 12), and to serve young people (Article 13), people with a migrant background (Article 14) and people with sensory disabilities (Article 15). It clarifies and extends quality assurance requirements. For example, the SRG must establish quality standards for all types of content, and processes for evaluating compliance with those standards.

The SRG's rights and responsibilities are regulated not only in the licence but also in the Radio- und Fernsehgesetz (Radio and Television Act - RTVG) and the Bundesrat's Radio- und Fernsehverordnung (Radio and Television Ordinance - RTVV). Amongst other things, these instruments regulate admissible forms of advertising. At the end of August 2018, the Bundesrat rejected the idea of allowing new forms of advertising under the RTVV. The government had originally proposed that the SRG should be allowed to broadcast different commercials for different target groups (targeted advertising). However, this had been strongly opposed in the public consultation. For example, serious doubts had been expressed over the compatibility of targeted advertising with the notion of public service. Targeted advertising promoted the commercialisation of media services financed through the licence fee and would lead to greater audience fragmentation. The Eidgenössische Medienkommission (Swiss Media Commission - EMEK), an independent committee of experts set up by the Bundesrat, was also sceptical: public service providers should not use people's private data to target them with commercial messages. In view of the results of the consultation process, the Bundesrat withdrew its proposal. Targeted advertising therefore remains reserved for unlicensed television broadcasters.

• *Concession octroye´e a` SRG SSR (Concession SSR) du 29 aou^t 2018 (e´tat au 1er janvier 2019)* (SRG licence for the 2019-2022 period)
http://merlin.obs.coe.int/redirect.php?id=19264 DE FR

• *Concession SSR - Rapport explicatif* (Explanatory report on the new licence)
http://merlin.obs.coe.int/redirect.php?id=19265 DE FR

• *Rapport de l'OFCOM, Avril 2018 : « Procédure de consultation concernant la modification de l'ordonnance sur la radio et la télévision - Résumé des résultats »* (Report of the Federal Communication Office "Consultation on the amendment of the Radio and Television Ordinance - summary of results", April 2018)
http://merlin.obs.coe.int/redirect.php?id=19267 DE FR

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CY-Cyprus

Advertising ban on public service media provider CyBC

The Council of Ministers of the Government of Cyprus decided on 5 September 2018 to ban the Cyprus Broadcasting Corporation (CyBC), the public service media provider, from airing paid commercial advertising and engaging in telemarketing. At the same meeting, the Council of Ministers amended the relevant provision in the State budget and increased the grant to the CyBC in order to compensate for its loss of income from advertising and telemarketing.

There is no indication in the announcement about the date on which the decision will take effect or whether any relevant amendment or law will be forwarded to the House of Representatives. The announcement stated that "The Council of Ministers also approved an increase in the (Government) grant to CyBC in the 2019 budget to offset the loss of revenue from advertising and approved a draft bill, in the event it is considered appropriate". However, the law on the Cyprus Broadcasting Corporation, L. 300A, may require extensive amendments to reflect this decision, since all EU AVMS Directive provisions relevant to advertising and telemarketing are incorporated in this law.

The decision of the Cabinet does not affect other forms of commercial communication, such as barter agreements, prizes, sponsorships and product placement or web-based advertisements.

In recent years, CyBCs' income from advertising ranged between EUR 3.1 million (2014) down to EUR 1.8 million in 2017. In the same period, the State grant to the CyBC amounted to EUR 25 million annually, which is lower by far than sums granted in earlier years. For example, the subsidy amounted to EUR 43 million in 2010, and EUR 40 million in 2011. The economic crisis that hit Cyprus and prompted public spending cuts brought the subsidy down to the above-mentioned annual EUR 25 million.

The official announcement regarding the decision refers to discussions that preceded it, which were conducted between the executive power and the governing council of CyBC, as well as with the media regulator, the Cyprus Radio Television Authority (CRTA). In a statement, the Chairman of the CyBC agreed with the decision in principle, saying that CyBC should look into finding other forms and ways of funding, such as European projects and other activities beyond traditional advertising.

The discussion about banning advertising from public service broadcasting emerged at least five years ago, when the Democratic Rally (DISY), the party of the

President of the Republic, drafted a bill to this effect; in the intervening years, that draft bill has not been discussed in any way in the House.

• Αποφάσεις του Υπουργικού Συμβουλίου για τα Ιατροσυμβούλια και τον τερματισμό των εμπορικών διαφημίσεων από το ΡΙΚ (Press release on decisions of the Council of Ministers on 05 September 2018)
http://merlin.obs.coe.int/redirect.php?id=19256 EL

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DE-Germany

BGH refers questions to ECJ concerning YouTube's liability for copyright breaches

In a decision of 13 September 2018 (Case no. I ZR 140/15 - YouTube), the Bundesgerichtshof (Federal Supreme Court - BGH) referred a number of questions to the European Court of Justice (ECJ) for a preliminary decision concerning the liability of the YouTube Internet video platform operator for copyright breaches linked to content uploaded by third parties.

The case follows a claim brought by a music producer after a YouTube user had uploaded several videos containing musical works by the singer Sarah Brightman. The producer claimed that he had produced one of the albums featured in the videos and owned exclusive rights to exploit it. In November 2008, the producer demanded that the video platform operator, YouTube LLC, and its parent company, Google Inc., sign a declaration with a penalty clause, promising not to copy or make available to the public audio recordings or musical works from his catalogue. In response, YouTube LLC removed some of the videos, but similar videos became available again just a few days later. The producer then took legal action against Google Inc. and YouTube LLC, requesting an injunction, disclosure of information and damages.

The lower-instance courts LG Hamburg (Hamburg district court, ruling of 3 September 2010, Case 308 O 27/09) and OLG Hamburg (Hamburg appeal court, ruling of 1 July 2015, Case 5 U 175/10) largely upheld the request. However, the BGH decided to suspend the appeal proceedings brought by both parties in order to submit to the ECJ the following questions concerning the interpretation of Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society, Directive 2000/31/EC on electronic commerce and Directive 2004/48/EC on the enforcement of intellectual property rights:

- Does the operator of an Internet video platform on which users make available to the public videos containing copyright-protected content without the rightsholder's permission carry out 'communication to the public' in the sense of Article 3(1) of Directive 2001/29/EC if:

it generates advertising revenue from the platform, and the uploading process is automatic, requiring no prior approval or control by the operator;

the operator, in accordance with the terms of use, obtains a global, non-exclusive, free licence to use the videos for the period during which they are made available;

the operator, in the terms of use and as part of the uploading process, states that copyright-infringing content may not be uploaded;

the operator provides a system through which rightsholders can block infringing videos;

the operator displays search results in the form of ranking lists and content-related categories on the platform, and shows registered users a selection of videos recommended on the basis of videos they have previously watched;

- if it has no actual knowledge of the availability of copyright-infringing content or, upon obtaining such knowledge, immediately removes it or blocks access to it? Does the activity of the operator of such an Internet video platform fall under the scope of Article 14(1) of Directive 2000/31/EC and does the actual knowledge of illegal activity or information and awareness of facts or circumstances from which the illegal activity or information is apparent, as mentioned in this provision, have to concern actual illegal activities or information?

- Is it compatible with Article 8(3) of Directive 2001/29/EC if a rightsholder is unable to obtain an injunction against a service provider whose service is used to store information provided by a user, and has been used to infringe copyright or related rights, unless a clear infringement has been notified and a second such infringement has subsequently been committed?

- If the answer to the previous questions is no: should the operator of an Internet video platform in the circumstances described in the first question be considered an infringer in the sense of Articles 11 (1st sentence) and 13 of Directive 2004/48/EC, and can such an infringer's obligation to pay damages under Article 13(1) of Directive 2004/48/EC be made conditional on the infringer (i) having acted deliberately in terms of his own infringing activity and that of the third party, and (ii) having known or been reasonably expected to know that users were using the platform to infringe intellectual property rights?

• *Pressemitteilung Nr. 150/2018 des BGH vom 13. September 2018* (BGH press release no. 150/2018 of 13 September 2018)
http://merlin.obs.coe.int/redirect.php?id=19240 DE

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ES-Spain

CNMC requires two broadcasters to ensure that their magazine programmes and gatherings comply with the Audiovisual Law

On 26 July 2018, the Spanish Comisión Nacional de los Mercados y la Competencia (National Commission of Markets and Competition, CNMC), in two separate decisions, required that two broadcasters, Atresmedia and Mediaset, comply with the principles of Law 7/2010 of March 31 on General Audiovisual Communication (LGCA).

Entertainment programmes are subject to a balance between the right to freedom of expression and information (as long as that information is true and correct) and the right of individuals to protect their image, intimacy and honour. Both rights are awarded the same level of protection in the Spanish Constitution, but, depending on the particulars of each case, one prevails over the other. The LGCA prohibits the broadcast of content that may incite hatred against any personal or social circumstance. In addition, the LGCA recognises the principle that information should comply with the requirements of veracity. The CNMC requested the broadcasters Atresmedia and Mediaset to avoid broadcasting contents in their magazine-type programmes and gatherings that may entail hatred or disrespect for the honour, privacy and image of individuals, and reminded them of the duty of diligence when verifying the veracity of the information. This request came after complaints were filed by an individual following the way information was handled with respect to a person who was initially suspected, and subsequently exonerated in connection with the disappearance and murder of a minor in Almería last February. The images were aired on Antena 3, La Sexta and Telecinco.

The CNMC required the broadcasters to ensure that any information given regarding events that arouse interest in society not include hypotheses or conjectures about possible culprits when these are identified or information is given to identify them. Nor should they spread rumors, speculation or unconfirmed information; not even when it is part of an entertainment rather than a purely informative programme.

• *Atresmedia SNC / DTSA / 094/18* (Atresmedia SNC / DTSA / 094/18)
http://merlin.obs.coe.int/redirect.php?id=19246 ES

• *Mediaset SNC / DTSA / 095/18* (Mediaset SNC / DTSA / 095/18)
http://merlin.obs.coe.int/redirect.php?id=19247 ES

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FR-France

Does the special scheme granted to the INA for using audiovisual archives comply with Directive 2001/29 on copyright?

The holders of the rights to the works of a deceased jazz drummer claimed that the Institut National de l'Audiovisuel (the National Audiovisual Institute - the INA) was marketing a number of video clips and a disc on its website that reproduced some of the musician's performances without their authorisation. They had the INA summoned to appear in court to obtain compensation for the infringement of the rights that they hold, invoking Article L. 212-3 of the Code de la Propriété Intellectuelle (the Intellectual Property Code - CPI). Since the adoption of legislation on 1 August 2006 amending Article 49 of the Act of 30 September 1986, the INA has indeed enjoyed the benefit of a simplified authorisation scheme that allows it to waive Articles L. 212-3 and L. 212-4 of the CPI, which lay down the conditions for its use of the work of performers contained in its audiovisual archives and the corresponding remuneration and scales of payment for such use; such payments are governed by agreements between the performers and the INA. The question at issue was whether this special scheme freed the INA from the obligation to obtain authorisation from the jazz drummer's rightsholders.

SPEDIDAM (a society managing performers' rights) applied to be joined to the case, calling on the court to order the INA to pay it damages in compensation for the collective prejudice suffered by the performing profession. Upon appeal, the Court of Cassation dismissed the claims, and the musician's rightsholders appealed again to the Court of Cassation.

The Court of Cassation began by reiterating the terms of Article L. 212-3 of the CPI, and went on to note that Directive 2001/29(EC) on the harmonisation of certain aspects of copyright and related rights in the information society, in particular its Articles 2(b) and 3.2(a), provided that performers had the right to authorise or prohibit the reproduction and the making available of their performances, but that Article 5 allowed member States to provide for exceptions to this principle of prior authorisation. However, the Court of Cassation noted that the special waiver granted the INA did not fall within the scope of any of the exceptions and limitations that the member States were allowed to provide for under Article 5.

In support of their appeal, the claimants invoked a CJEU judgment delivered on 16 November 2016 in the case of Soulier and Doke regarding the digital use of books that were out of print and not available in any other form, which stated that while the protection provided for by Articles 2 and 3.1 of Directive 2001/29 EC did not prevent national regulations pursuing an objective in the cultural interest of consumers and society in general, pursuit of that objective could not be used to justify allowing an exception not provided for by the EU legislature in the Directive.

The Court of Cassation found that this solution could not be applied in the case at issue, and noted the question of whether Articles 2(b), 3.2(a) and 5 of the Directive should be interpreted as opposing the waiver scheme enjoyed by the INA in application of Article 49 II of the Act of 30 September. It added that this question was a determining factor in dealing with the case that had been submitted to it, and that it raised a serious difficulty. The Court of Cassation therefore decided to refer the matter to the CJEU. To be continued

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• *Cour de cassation (1re ch. civ.), 11 juillet 2018 - Spedidam et a. c/ INA* (Court of Cassation (1st chamber (civil)), 11 July 2018 - SPEDIDAM and others v. INA) FR

Amélie Blocman
Légipresse

Civil actions relating to literary and artistic property: clarification of regional courts' exclusive jurisdiction

On 28 June 2018, the Court of Cassation issued a judgment explaining in detail the exclusive jurisdiction assigned by the Code de la propriété intellectuelle (Intellectual Property Code - the CPI) to the regional courts in relation to literary and artistic property. It referred to Article L. 331-1, paragraph 1 of the CPI, which states that "civil actions and requests concerning literary and artistic property, including those relating to unfair competition, fall under the exclusive jurisdiction of the regional courts, as determined by regulations".

In the case at hand, a production company accused the company that had granted it the right to produce the television programme "Tout le monde en parle" of breaching its contractual obligations. It therefore referred the matter to the Paris Commercial Court in order to obtain access to financial records and the payment of half the income generated through the exploitation of the programme format abroad. The accused company submitted that jurisdiction was held by the Paris Regional Court rather than the Commercial Court. The Commercial Court held that the dispute did not fall under its jurisdiction. The production company lodged an appeal against the appeal court's decision dismissing its objection to the judgment.

The Court of Cassation, referring to Article L. 331-1, paragraph 1 of the CPI, concluded that actions instigated on the basis of general contractual liability fell under the jurisdiction of the regional courts "when, in order to determine the obligations of each of the contracting parties and the infringements they may have committed, the court concerned is required to rule on matters involving the specific provisions of literary and artistic property law".

In the case at hand, the appeal court noted that, while the plaintiff was claiming that the co-ownership of the rights relating to the format of the disputed programme was not in question and was only asking the court to confirm its joint ownership of those rights, the defendant was arguing, on the contrary, that it was the sole owner of the exploitation rights for the programme format and title. Therefore, before ruling on the applications, the court needed to decide who owned the rights that were being claimed by the plaintiff. The Court of Cassation ruled that the appeal court had correctly decided that the dispute fell under the exclusive jurisdiction of the Paris Regional Court.

• *Cour de cassation (1re ch. civ.), 28 juin 2018 - Tout sur l'écran production c/ Ardis* (Court of Cassation (1st civil chamber), 28 June 2018 - Tout Sur l'Ecran Productions v Ardis) FR

Amélie Blocman
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CSA warning letter cannot be appealed

On 26 July, the Conseil d'Etat issued a judgment that sheds some light on the means of contesting a warning letter sent to a television channel by the French national audiovisual regulatory authority (Conseil Supérieur de l'Audiovisuel - the CSA). In the case concerned, the president of the CSA had been asked by anti-homophobia organisations to examine a sequence broadcast on the television channel Canal Plus during which someone had repeated a homophobic chant performed by Olympique de Marseille supporters. The CSA accordingly sent a letter to the chairman of the Canal Plus group informing it that it considered the sequence inappropriate and that it was "warning [it] against the repetition of such practices". The Canal Plus group asked the Conseil d'Etat to revoke the "CSA's decision to issue a warning" concerning the disputed sequence.

In its decision of 26 July 2018, the Conseil d'Etat ruled that the letter in question, which merely drew the recipient's attention to the improper nature of the incident, did not constitute a formal notice in the sense of Article 42 of the Law of 30 September 1986. It had no legal effect in itself and could not be regarded as

an instrument likely to have a significant impact on or substantially influence the addressee's conduct. Concluding that the letter did not constitute a decision that could give rise to an appeal in respect of an alleged misuse of power, the administrative court therefore dismissed the Canal Plus group's request for the CSA's decision to be revoked.

• *Conseil d'État (5e ch.), 26 juillet 2018 - Groupe Canal Plus* (Conseil d'Etat (5th chamber), 26 July 2018 - Canal Plus group) FR

Amélie Blocman
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Paris Première warned by CSA following incitement to racial and religious hatred

Writer and journalist Eric Zemmour, who presents a weekly programme on the television channel Paris Première, continues to create controversy in his television broadcasts, despite several court convictions for inciting religious hatred. On 12 September 2018 the French national audiovisual regulatory authority (Conseil Supérieur de l'Audiovisuel - the CSA), which had previously warned the channels Canal Plus and RTL following appearances by the journalist, was asked for its opinion on a sequence broadcast during the programme Zemmour et Naulleau on Paris Première on 20 January 2018, in which the topic of asylum and immigration law had been discussed.

After examining the disputed footage, the CSA noted that one of the programme's presenters, Eric Zemmour, had systematically used stigmatising language concerning Muslim migrants. In particular, he had suggested that they should be denied the right to asylum on the grounds that, because of their religion (unlike other religions), they were a source "of enormous problems" and would contribute to the "large-scale replacement" of the French population.

The CSA considered that these comments were likely to encourage discrimination and provoke hatred or violence against a specific group of people for religious reasons. They therefore clearly infringed the provisions of the final paragraph of Article 15 of Law no. 86-1067 of 30 September 1986 on freedom of communication, which requires that the CSA "ensure 04046 that programmes made available to the public by an audiovisual communication service do not contain any incitement to hatred or violence for reasons of race, sex, morality, religion or nationality." The CSA therefore issued a formal notice to Paris Première, requiring it to respect these provisions in future.

A few days after this notice was issued, the person concerned once again sparked huge controversy after claiming in the programme Les Terriens du Dimanche, on which he was a guest, that the first name of the commentator Hapsatou Sy was an "insult to France". Even though the disputed comments were edited out of the broadcast, the commentator shared them on social networks and launched a petition calling for Zemmour to be banned from appearing on television.

• *Décision du CSA, "Emission « Zemmour et Naulleau » du 20 janvier 2018 : Paris Première mise en demeure, 21 septembre 2018* (CSA decision, "Emission Zemmour et Naulleau" of 20 January 2018: Paris Première given notice, 21 September 2018)
http://merlin.obs.coe.int/redirect.php?id=19269 FR

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First steps towards parity in the film industry

As announced at the latest Cannes Film Festival, the first conference on parity, equality and diversity in the film industry was held in Paris on 20 September. Following consultation with the industry, the Minister for Culture, Françoise Nyssen, presented an initial series of practical measures designed to promote gender equality.

Firstly, a 15% bonus applicable to financial subsidies for films in which the main roles are equally distributed between men and women will be trialled. An eight-point scale will be used to measure female representation in key positions. "Today, fewer than one out of six films would be eligible", said the minister, who added that she "believed in financial incentives". Under the second part of the plan, it will be compulsory to include statistics relating to gender, technical teams and wage bills in applications submitted to the National Centre for Cinema (Centre national du cinéma - CNC). Information will need to include the number of men and women involved, how they are distributed across the various roles, differences in salary, etc. A charter of good practices for equality will also be adopted by the start of 2019 for all film companies in France, with stringent requirements concerning access to senior positions, salaries, the fight against harassment, etc. The minister also announced that partnerships with local authorities would be reinforced with the aim of including strong measures to promote equality in their agreements with the CNC: male/female parity will be required as regards the composition of aid-granting committees; statistics concerning supported films should include gender-related data; and there must be greater support for female directors and improved access for women to film creation and production subsidies. The minister also wants to ensure that more films featured in visual image education programmes are produced by women: "Today, only 7% of applications to the CNC for film restoration and digitisation subsidies concern films produced by women," said Françoise Nyssen.

These initial measures "won't be the last," said the minister, who announced that other plans were already in place to extend the measures to cover film distribution and exploitation, as well as audiovisual production ("04046 television channels also share some of the responsibility 04046"), and to take the concept of diversity in all its facets into account, rather than gender equality alone.

• *Communiqué de presse, « Le cinema se mobilise en faveur de l'égalité femmes-hommes », 19 septembre 2018, Ministère de la Culture* (Ministry of Culture press release, "Film industry moves towards gender equality", 19 September 2018)
http://merlin.obs.coe.int/redirect.php?id=19241 FR

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CSA adopts 20 proposals to reform audiovisual regulation

Reforming audiovisual regulation is one of the Ministry of Culture's main priorities after the summer break. According to insiders, Minister for Culture Françoise Nyssen is hoping, in the next few months, to finalise a text for discussion by Parliament in the first half of 2019. On 11 September, the French national audiovisual regulatory authority (the Conseil Supérieur de l'Audiovisuel - the CSA) unveiled its "twenty proposals for reforming audiovisual regulation". The first task, according to the CSA, is to broaden the scope of the regulations by incorporating video-sharing platforms, social media and streaming platforms as part of the transposition of the Audiovisual Media Services Directive (AVMSD). The CSA's proposals to expand the regulations also include measures to strengthen the protection of minors, step up the fight against discrimination and hate speech, increase support for creative processes and establish a regulatory framework for the data economy, ensuring fair and equitable conditions in respect of access to programme audience data so that the revenue generated by its use is better distributed among the different stakeholders (publishers, distributors and platforms).

The second major area of reform concerns support measures to further the digital transition of the audiovisual industry: the modernisation of terrestrial broadcasting, the affirmation of the specificity of the public sector, the easing of constraints on television broadcasters by abolishing the ban on showing films on certain days, redefining production obligations, and encouraging free channels to acquire the rights to broadcast films on catch-up TV, in line with new technologies. The CSA is also calling for the relaxation of advertising rules, especially those concerning prohibited advertising sectors (cinema, literary publishing, distribution), and a review of anti-concentration rules. Lastly, the CSA wishes to promote new methods of regulation in collaboration with industry stakeholders (co-regulation, supra-regulation, participatory regulation). The law should be "refocused on core principles" and the principle of "limited recourse to the regulations" should be respected.

On 4 October, it will be the turn of the Mission d'information sur une nouvelle régulation de la communication audiovisuelle à l'ère numérique (the Fact-finding Task Force for the New Regulation of Audiovisual Communication in the Digital Era), on which MP Aurore Bergé serves as rapporteur, to present its conclusions with a view to outlining the planned audiovisual reforms. The CSA recommends that, once they are adopted, all the legislative and regulatory provisions should be codified.

• *Communiqué de presse, "Le CSA appelle à une refonte globale de la régulation », 11 septembre 2018* (CSA press release, "CSA calls for global regulatory reform2, 11 September 2018)
http://merlin.obs.coe.int/redirect.php?id=19270 FR

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GB-United Kingdom

Ofcom decision regarding the undue product placement of two broadcasters during coverage of F1 Singapore GP

Ofcom, the UK communications regulator, in separate decisions concerning the prominent display of the Rolex logo during the coverage of the qualifying laps for the Formula One (F1) 2016 Singapore Grand Prix, held that Sky Sports FI HD (Sky) was not in breach of Rule 9.5 Code of Conduct concerning the prominent display of a product, service or trade mark during a programme; however, Ofcom held Channel 4 in breach for the undue prominent display of the Rolex logo during their edited highlights programme.

Sky and Channel 4 were licensees of the F1 coverage with Formula One Management Limited (FOM) being the licensor of the F1 TV rights and producers of the televised broadcast.

During the broadcast, there were shots of a large image of a Rolex clock face which was superimposed onto a large ferris wheel at the track. Additionally, during coverage, a small graphic of the Rolex featured briefly when race information such as the driver's name and race data was displayed.

Neither Sky nor Channel 4 had a legal relationship with Rolex, nor did they receive payment from the watch company who sponsor F1.

Ofcom accepted representations from both parties that the appearance of the Rolex did not meet the definition of product placement. However, the inclusion

of the logo gave rise to potential issues under rule 9.5 of the Code of Conduct which says: "No undue prominence may be given in programming to a product, service or trade mark. Undue prominence may result from: the presence of, or reference to, a product, service or trade mark in programming where there is no editorial justification; or the manner in which a product, service or trade mark appears or is referred to in programming."

Sky had a contractual obligation to FOM to show the practice, qualifying and race feeds as supplied by the licensor; although the broadcaster is not bound to transmit if to do so would result in a breach of Ofcom's Broadcasting Code.

Sky had no immediate control over the images shown, save for addressing issues such as bad language or live scenes of a horrific accident. Channel 4's contract with FOM was under similar terms.

Channel 4 and Sky said in their respective representations to Ofcom that the broadcasting of some sports events had changed over the last 20 years whereby broadcasters had to accept live content from a third party producer. Furthermore, they stated that sponsorship and the display of logos had become more prolific. Ofcom acknowledged that some latitude had to be applied in the implementation of Ofcom's Rule 9 and section 9 of the Communications Act 2003 concerning the extent to which commercial references can feature within a television programme. There has to be a clear distinction between editorial and advertising content.

Product references are not to be given undue prominence. There is no prescriptive list, but factors include the nature of the programme; likely audience expectations; and the suitability of the commercial reference. These factors needed to be balanced against the editorial parameters of the programme, including how much control a broadcaster has over the coverage.

Sky was obliged to transmit an unaltered live feed from five minutes before the start of the qualifying laps until its conclusion. Even so, Sky still had an obligation to comply with the Ofcom Code.

In the case of Sky and Channel 4, Ofcom considered that the images of the Rolex logo added to the ferris wheel were unduly prominent. As concerns the smaller logo, Ofcom did not consider the Rolex image unduly prominent, deeming it to be incidental to the race information being flagged on screen. Also, Ofcom acknowledged that Rolex was an official sponsor of F1.

Since the Singapore race, Sky and Channel 4 have spoken with FOM to ensure that sponsorship logos are not given undue prominence during transmission and this has not reoccurred. In the case of Sky, Ofcom considered that there was some justification for giving prominent reference to a commercial product in a live broadcast, even though it had no editorial relevance; nevertheless, the display was a cause for concern. However, given the steps Sky had taken to address the issue and the fact that there had been no reoccurrence, Ofcom considered the matter resolved.

Although Channel 4 had taken the same remedial action, Ofcom considered that there was no justification for the breach of Rule 9.5 as far as the edited highlights programme was concerned. Channel 4 contended that time constraints meant it was difficult to remove the offending images of the large Rolex image on the ferris wheel. Ofcom did not accept this argument and the inclusion of the images was considered unjustified. The commercial references to Rolex were unduly prominent and in breach of Rule 9.5.

• Ofcom Broadcast and On Demand Bulletin, Issue number 359, 'Live Singapore GP: Qualifying, Sky Sports F1 HD' & 'Singapore GP: Qualifying highlights, Channel 4', 6 August 2018
http://merlin.obs.coe.int/redirect.php?id=19250 EN

Julian Wilkins
Smithfield Partners Ltd

Ofcom decision that undercover report at a young offenders institution breaches privacy

The BBC breached Rule 1.28 of Ofcom's Code of Conduct for broadcasting undercover footage using the real name of an under-eighteen-year-old during an edition of their Panorama current affairs programme. However, the BBC was not considered in breach for not taking immediate intervening action as neither of them were considered to be at immediate risk of substantial harm.

In January 2016, the BBC's Panorama programme examined evidence of young people in the Medway Secure Training Centre (MSTC) - then being operated by the private security company G4S - being allegedly mistreated, bullied and hurt by G4S staff. The programme included material filmed by an undercover BBC reporter posing as a member of G4S's MSTC staff.

The episode was due to be broadcast on 18 January 2016, but transmission was advanced to 11 January 2016 because G4S had issued a press release dated 8 January 2016 stating that it had referred a number of serious allegations of inappropriate staff conduct at MSTC to the appropriate investigating authorities. However, the BBC considered that the press release and subsequent G4S statements had not stated that the security company's action was a direct response to the evidence gathered by Panorama. Accordingly, the BBC considered that there was editorial justification for broadcasting evidence of G4S staff malpractice into the public domain as quickly as possible and moved the screening to 11 January.

A BBC reporter had filmed covertly from early October until December 2015 and their filming included two young persons, a 14-year-old known as "Billy" and a 16-year-old boy, "Lee". In the broadcast, their faces were disguised but not their voices; in Billy's case, his real name was identified on three occasions.

Each day, the footage was examined by the programme's producer or deputy producer. The BBC took advice from an internationally recognised expert on managing challenging young people's behaviour and from a specialist in child protection. Both professionals considered that neither Billy nor Lee were at immediate risk of substantial harm and that there was no requirement for the BBC to take any "pre-emptive action".

In December, the BBC spoke with the local authorities responsible for Billy and Lee. There were at least three conversations about Billy with the responsible Director of Children's Services in order to discuss steps to protect Billy's physical and emotional needs. The BBC agreed to blur Billy's face and use a pseudonym. It was considered unnecessary to disguise Billy's voice, as doing so may have misrepresented the seriousness of the events filmed.

In Lee's case, the BBC contacted the relevant local authority on a number of occasions about Lee's inclusion, but the broadcaster was unaware of any concerns until after the 11 January 2016 broadcast.

During the broadcast of 11 January 2016, Billy's real name was revealed. The BBC said that this was a mistake caused by the screening being rushed forward from 18 January; this had resulted in the oversight not being noticed. Immediately after the error had been identified, the BBC reedited further versions for broadcasting, such as used for their "iPlayer" service. The BBC contacted the local authority and made contact with Billy's mother. She confirmed that, to the best of her knowledge, "her son had not been identified by anyone who did not already know him."

The relevant local authority expressed concern that Lee could have been identified from the footage, thus causing him harm as a vulnerable young person.

Ofcom had to consider whether there had been any breach of rule 1.28 of the Code: "Due care must be taken over the physical and emotional welfare and the dignity of people under eighteen who take part or are otherwise involved in programmes. This is irrespective of any consent given by the participant or by a parent, guardian or other person over the age of eighteen in loco parentis."

Ofcom determined that there had been no breach in respect of Billy or Lee during filming, with the broadcaster taking sufficient steps to monitor the filmed content to determine whether the BBC should immediately intervene and report the conduct towards the young offenders. The BBC was not in breach by waiting until December 2015 before notifying the appropriate authorities, as neither Lee nor Billy were at immediate risk of serious harm. The BBC was in breach for disclosing Billy's true name, although Ofcom acknowledged the time pressures. Otherwise, the steps taken to disguise Billy and Lee were deemed sufficient, and it was considered unnecessary to change their voices. It was thought to be in the public interest that the footage be broadcast.

• Ofcom Broadcast and On Demand Bulletin, Issue number 359, 'Panorama, BBC1', 6 August 2018
http://merlin.obs.coe.int/redirect.php?id=19250 EN

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Ofcom publishes research on online news consumption

On 13 July 2018, Ofcom, the UK communications regulator, published two qualitative research reports on people's attitudes towards online news consumption.

The purpose of the research was to acquire a more detailed understanding of the behaviours sitting behind the increase in the number of people accessing the news via online platforms in order to inform policy considerations. Respondents, who were selected to represent a cross-section of the United Kingdom, were asked to complete a combination of online pre-tasks as well as a set of activities on their media use. The data captured was followed by in-depth interviews and group discussions, exploring participants' views on their own news intake and their engagement with such content.

Although news plays a significant role in people's everyday lives in several ways, some respondents reported that they felt overwhelmed by the sheer volume of news in circulation and increasingly stretched across a wide range of sources and content. In some instances, a feeling of social pressure to keep up-to-date with the latest news was expressed. Feelings of negativity and fatigue featured strongly in the participants' characterisation of the news, with some respondents claiming to have become 'news avoiders.' An important consequence of this overloaded news landscape appeared to be increased levels of faster and less critical processing of news, with participants often engaging with multiple sources only at a superficial level. Ubiquitous newsfeeds and features like push notifications were shown to drive further passive consumption.

The majority of the respondents' news consumption occurred via news-aggregators or social media, which remain largely unregulated. The 'blurred' boundaries between news and other content (for instance, advertising and entertainment) on these platforms made it difficult for participants to discern what 'counts' as

news and identify its original source. Most respondents had a general awareness of 'buzzwords' associated with current concerns around online news, for example 'fake news', but demonstrated varying levels of understanding of their meaning, whilst few of them adopted effective mechanisms to counteract these types of issues. In order to assess the accuracy, importance and reliability of online news, most individuals relied on shortcuts and their own heuristics, such as the number of times an article was shared, liked or retweeted. Some younger respondents used the rule of thumb that if an article had an embedded still or moving image, it was probably true.

The research also revealed a mis-match between the number of online stories participants said they looked at and those they actually saw, showing that people tend to underestimate how much news they consume online. This finding also suggests that the extent of online news consumption is essentially unknown. Unconscious processing of news, encouraged at times by smartphone user interfaces, might account, to some degree, for its under-reporting.

The studies also highlight that concerns about online news should be set against a backdrop of distrust in media, public figures, politicians and other institutions. Although some participants recognised the role of news media in exposing wrongdoing, others expressed uncertainty over what the news is actually telling them. Finally, the research acknowledges that the rapid and significant changes to the current news landscape have given rise to complex challenges in relation to how people understand and navigate news today, thereby strengthening the argument in favour of independent regulatory oversight of the activities of online companies.

• Scrolling news: The changing face of online news consumption
http://merlin.obs.coe.int/redirect.php?id=19248 EN
• The Changing World of News: Qualitative Research (13 July 2018)
http://merlin.obs.coe.int/redirect.php?id=19249 EN

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Licensing of national DTT providers completed

The National Council for Radio and Television (NCRT) is expected to complete the tender for licensing seven companies providing national free-to-air DTT content by the end of October 2018. Ultimately, five of the six companies that participated on 11 January 2018 met the legal requirements. According to the NCRT's decision of 27 June 2018, one company should not be accepted for the principal reason that its sole ultimate shareholder had failed to fully establish its actual connection with the financial means used for the formation of the capital of the candidate company. It was underlined that this gave rise to uncertainty about the transparency of the ownership regime of this company, contrary to the relevant constitutional requirements.

As the number of participants in the procedure was less than the number of licences to be granted, no auction was conducted and, according to a new decision by NCRT dating from 5 September 2018, the licences will be issued against payment of the price stipulated in the Ministerial Decision: the entry price was fixed at EUR 3 500 000 (see IRIS 2017-9/21). All 5 licensees must pay the amount of EUR 3 500 000 before 20 September 2018; this represents the first of 10 installments of the ten-year licence.

After this tender, the NCRT has to organise tenders for licensing national free-to-air DTT providers with no informative content and regional providers.

• Απόφαση ΕΣΡ *65/2018* σχετικά με την απόρριψη της αίτησης της εταιρείας ΤΗΛΕΟΠΤΙΚΗ ΕΛΛΗΝΙΚΗ ΑΝΩΝΥΜΗ ΕΤΑΙΡΕΙΑ (Rejection of the application of Tileoptiki Elliniki SA 65/2018, 27 June 2018)
http://merlin.obs.coe.int/redirect.php?id=19251 EL
• Απόφαση ΕΣΡ *101/2018* για την οριστική επιλογή υποψηφίων παρόχων της Προκήρυξης *1/2017* (Designation of licensees of the Tender 1/2017, 101/2018)
http://merlin.obs.coe.int/redirect.php?id=19252 EL

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HR-Croatia

Constitutional Court decision on CRTA's conformity with the Constitution

The Constitutional Court of the Republic of Croatia has not accepted six proposals for initiating the procedure for assessing the conformity of Articles 33 (2), 34, 35 and 36 (1) of the Croatian Radio-Television Act (CRTA) with the Croatian Constitution.

All the submitters, in essence, contested the obligation (stipulated under the CRTA) for owners of broadcast receivers without exception to pay the radio and television licence fee in a standard amount of 80 Kuna per month and regardless of their financial capabilities. They complained that the fee therefore contravenes Article 51 (1) of the Croatian Constitution, which stipulates that everyone shall participate in the covering of public expenses in accordance with their economic capabilities. The applicants claimed that the fee is a public expense - a kind of parafiscal tax

- which (just like any other public expense, such as regular taxes, fees, or duties) must be based on the principles of equality and fairness laid down in Article 51 (2) of the Constitution. Moreover, this "parafiscal tax" is not paid in respect of a product or service (i.e. watching and listening to radio and television channels according to the principle of "pay per view"), but on the basis of their ownership of a receiving device. They also submitted that setting the fee at the amount of 1.5% of average monthly net salary in the Republic of Croatia (according to recent data) represents an abuse of the "monopoly and dominant position" enjoyed by Croatian Radio-Television (HRT) - the public broadcaster financed by these funds - on the market, given that device-owners are obliged (i.e. forced) to participate in settling public costs. Furthermore, the applicants considered that, owing to the monopoly position of Croatian Radio-Television, private commercial radio and television broadcasters, which do not accumulate revenue from the collection of the fees, are disadvantaged compared to the public broadcasters and are therefore discriminated against. Thus, the disputed provisions of the CRTA would also contravene Article 49 of the Constitution, which requires the State to ensure that all entrepreneurs enjoy equal legal status on the market and prohibits the abuse of monopoly positions. Some applicants also submitted that the fact that some persons (natural and legal) are allowed to pay only one fee even though they own two or more receivers, while others are charged one fee per receiver owned contravenes Article 51 (2) of the Constitution as well.

The Constitutional Court took the view that the CRTA was adopted (inter alia) with the aim of aligning the status, activity and financing of Croatian Radio-Television as a public service, in accordance with the acquis communautaire and the legal acts of the European Union undertaken during the process of the accession of the Republic of Croatia to the EU. The Court emphasised that the CRTA is part of the implementation legislation under which the national legal order was aligned with the requirements arising for Member States from the European Union legal order. In line with the general principles of State Aid Rules (as well as other relevant EU documents concerning PSBs), the CRTA establishes Croatian Radio-Television as a public service broadcaster aimed at providing as many citizens as possible with objective information. Hence, the sources and mode of financing Croatian Radio-Television must be considered in the light of its special public role. Accomplishing that role, with a view to maintaining the autonomous and independent position of a public service broadcaster, implies special forms of financing, as arising from the relevant parts of the State Aid Rules. In the present case, the fee as a form of public-service financing constitutes (previously existing) State aid that was already in place in the Republic of Croatia before the entry into force of the Treaty on the European Union for Croatia.

The Constitutional Court found that the monthly fee cannot be classified as a tax or other public fee (as the applicants had argued) and that accordingly, Article 51 of the Constitution did not apply. The monthly fee is a specific financial obligation (which has the nature of State aid) payable by anyone who owns or possesses a radio and television receiver or other radio or audio-visual programme reception device on the territory of the Republic of Croatia covered by a transmission signal. The monthly fee is not (directly) linked to the ownership of radio-television receivers, as argued by some applicants, but rather the possibility to access public broadcasting services. The obligation to make a monthly fee payment refers, or "is imposed", only on those citizens who, by purchasing a receiver, gain the possibility of access to those broadcasting services undertaken in the public interest (namely services of general economic interest).

If products and services of Croatian Radio-Television (as a public service broadcaster) and the obligation to pay a fee in order to finance that service are regarded in this light, it is obvious that the position of its products and services on the market is different to the position and services of commercial providers; the Court therefore rules that the reference to an abuse of the monopoly position of Croatian Radio-Television or to the allegedly unlawful and unconstitutional standing of Croatian Radio-Television compared to commercial providers has to be rejected.

Lastly, the Constitutional Court also emphasised that discussing (in)equality requires two comparable parties in similar situations; unequal treatment or discrimination only occurs if parties in equal situations are treated unequally or if parties in unequal situations are treated equally. According to the Court, Article 34 (8) CRTA stipulates an exemption for companies in the gastronomy sector from the general obligation to pay per receiver owned as stated in Article 34 (4) CRTA; however, this applies to a separate group of legal and natural persons (those in the gastronomy industry), which are not comparable to other groups of legal and natural persons to which Article 34 (4) of the CRTA applies.

• *Ustavni sud Republike Hrvatske, 10.07.2018, U-I - 662 / 2011* (Decision of the Constitutional Court of the Republic of Croatia (10.07.2018, U-I - 662 / 2011))
http://merlin.obs.coe.int/redirect.php?id=19258 HR

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New law on audiovisual activities

The Croatian Parliament has recently adopted the new Law on Audiovisual Activities (Zakon o audiovizualnim djelatnostima). This Law concerns the promotion of the production of audiovisual works. The Law, published in the Official Gazette No. 61 of 11 July 2017, amends the definitions of audiovisual activities and

audiovisual works so that they include video games, thus creating the legal framework for the further development of one of the most fast-moving segments of the audiovisual industry. Specifically, the Law:

- introduces mechanisms of self-regulation and co-regulation to address certain issues by agreement of interested parties for the purpose of harmonising their application in practice;

- defines the deadlines and procedure for adopting the National Programme for the Promotion of Audiovisual Creativity, adopted as a four-year strategic document of national significance by the Government of the Republic of Croatia following a proposal made by the Ministry of Culture (and drafted by the Croatian Audiovisual Council), as well as addressing the adoption procedure and ensuring the compliance of the Annual Implementation Plan of the National Programme with the Financial Plan of the Croatian Audiovisual Centre;

- specifies the method of issuance and the compliance of any public call made by the Croatian Audiovisual Centre with the annual implementation plan of the National Programme for the Promotion of Audiovisual Creativity, as well as the criteria for the evaluation of projects;

- increases financial incentives for the production of audiovisual works from 20% to 25% of the total budget cost (for the production of audiovisual works in municipalities and regions, the financial incentives are increased to 30%);

- introduces a new structure for the Croatian Audiovisual Centre's Managing Board -one economic/financial expert, one legal expert, and two experts on audiovisual activities are to be appointed, together with one employees' representative;

- introduces a new structure for the Croatian Audiovisual Council (which is responsible for the Centre's programme activities) - namely, it stipulates that a representative of the Ministry of Culture is to be appointed and defines the requirements and professional qualifications for appointing members, as well as introducing a deputy member for each Council member (to avoid a situation in which a quorum is not reached in cases of the absence of members and/or a potential conflict of interest on the part of any member); it defines the procedure for the confirmation of appointed members and deputy members by the minister responsible for culture (the minister is obliged to confirm the appointment of every member and deputy member who fulfills the requirements defined by Law - namely, a university degree and five years' experience in the audiovisual field); and it shortens the mandate of the members from four to two years;

- defines and regulates in more detail issues concerning conflicts of interests on the part of the Centre bodies and artistic advisors.

• *Zakon o audiovizualnim djelatnostima* (Law on Audiovisual Activities, Official gazette 61 - 11 July 2018)
http://merlin.obs.coe.int/redirect.php?id=19257 HR

Nives Zvonarić
Ministry of Culture

HAKOM monitors interference to domestic TV and radio signals

The Croatian Regulatory Authority for Network Industries (HAKOM) has begun to investigate interference to Croatian radio and television signals which has its origins in Italy.

The authority had announced that it would be measuring interference in the VHF and UHF frequency bands between July and September 2018 in order to examine the effect on FM, DAB-T and DVB-T services. The investigation would cover the Adriatic coast and islands. HAKOM pointed out that the conditions for the distribution of electromagnetic waves were favourable in the summer months on account of the weather, which meant that the problem of interference from Italy was exacerbated during that period. As well as carrying out measurements, the authority was conducting bilateral talks and international negotiations, which had resulted in the most problematic transmitters in some Italian regions being switched off in the previous year. This had put a stop to most of the Italian interference and had significantly improved the reception of Croatian channels in digital regions D5, D7, D8 and D9.

However, the interference had not been completely eliminated by the closure of these transmitters. In order to facilitate the future reorganisation of digital television in Croatia and create the possibility of new mobile communications networks in the 700 MHz band, HAKOM thought that the remaining interference should be stopped. However, no agreement had yet been reached with Italy regarding this matter. It was true that, at a multilateral meeting held in October 2017 under the auspices of the International Telecommunication Union (ITU), Italian representatives had agreed to draft a plan and submit it to the ITU and neighbouring countries. In June 2018, however, it transpired that they had not yet taken any action.

According to Croatian figures, over the previous nine years, more than 4 500 complaints had been made to the Italian authorities from the Republic of Croatia. The ITU, which is responsible for the implementation of international agreements in the field of electronic communications, was also notified of the current situation. Although HAKOM has committed itself to eliminating the remaining interference by carrying out measuring procedures and international activities, its power to act is limited because the signals in question originate in other countries.

• HAKOM press release of 9 July 2018
http://merlin.obs.coe.int/redirect.php?id=19262 EN

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IE-Ireland

Jury determines public broadcaster 35% liable for defamatory comments made during programme

On 21 June 2018, the important High Court judgment in Kehoe v. RTÉ was published, which held that a jury in a defamation trial may apportion liability between a broadcaster and a programme contributor, even where the contributor is not a party to the case.

The case concerned Nicky Kehoe, a member of the Irish political party Sinn Féin, and a former elected local official. The case centred on an October 2015 edition of the current affairs programme 'Saturday with Claire Byrne' broadcast live by the public broadcaster RTÉ. The edition at issue featured the presenter and two contributors, namely Joe Costello, a Labour Party member of parliament, and Eoin Ó Broin, a Sinn Féin elected local official. During the programme, the Labour Party politician, Mr Costello, claimed that a member of an illegal organisation, the IRA army council, was directing Sinn Féin councillors on Dublin City Council on how to vote. Mr Costello did not name Mr Kehoe, but the Sinn Féin politician, Mr Ó Broin, named Mr Kehoe as the person to whom Mr Costello was referring, and challenged Mr Costello about his remarks, describing them as outrageous and bizarre.

Following the broadcast, Mr Kehoe initiated defamation proceedings against RTÉ, but not against the Labour Party politician. The defamation action was heard by a High Court judge and jury in early 2018. Notably, as it was now over two years since the broadcast, any action against the Labour Party politician became "statute barred" under section 38(1) of the Defamation Act 2009, which puts a two-year limit on initiating defamation actions. Before the question was put to the jury of whether the programme was defamatory, and if any damages should be awarded, RTÉ put forward a novel submission in the High Court. RTÉ argued that the Labour Party politician should be considered a "concurrent wrongdoer" under section 35(1)(i) of the Civil Liability Act 1963, which allows the apportionment of liability to concurrent wrongdoers, even where a claim against one wrongdoer is "statute barred". In other words, even though the plaintiff had not sued the Labour Party politician, and such a claim could no longer be initiated, he should be considered a concurrent wrongdoer along with RTÉ, as he had made the comments at issue. As such, it should be open to the jury to determine whether RTÉ was liable for only a certain percentage of any damages that may be awarded.

In the High Court judgment delivered on 21 February 2018, Mr Justice Barton agreed with RTÉ's submission, and held that the Labour Party politician "could have been joined as a co-defendant in these proceedings as an alleged concurrent wrongdoer and that if the statements are found to be defamatory his would have been a liability as such". Thus, RTÉ was entitled to plead "contributory negligence" in reduction of any award of damages made by the jury. Following this judgment, the jury delivered its verdict on 26 February 2018, and found that the programme had been defamatory, and assessed damages at EUR 10 000. However, the jury also held that RTÉ should only be held liable for 35% of the damages, which meant RTÉ was liable for EUR 3 500 in damages.

This was one of the lowest defamation awards made against a media defendant in Ireland.

• Kehoe v. Raidió Teilifís Éireann [2018] IEHC 340, 21 June 2018
http://merlin.obs.coe.int/redirect.php?id=19253 EN

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IT-Italy

Roadmap for the release of the 700 Mhz Band frequencies

On 8 August 2018, the Italian Ministry of Economic Development (MISE) issued a decree with a view to defining a timeline for the release of the 700 Mhz Band frequencies. Such a roadmap constitutes a necessary step in the context of the 700 Mhz Band repurposing in accordance with EU law.

In fact, as required by Decision (EU) 2017/899, between September and December 2017, Italy executed frequency coordination agreements with several countries, with the purpose of: (a) allowing the relevant countries to make available the 700 MHz Band for telecom mobile services and (b) establishing the frequencies that can be used by the relevant countries for digital terrestrial television (DTT) broadcasting services within the sub-700 MHz Band. Then, in December 2017, the Italian Parliament passed the 2018 Budget Law, which laid down the legislative framework for actions to be taken to implement Decision (EU) 2017/899 and delegated the Italian Communication Authority (AGCOM) and MISE to adopt the

resolutions defining the criteria and the modalities for the implementation of this process.

According to the 2018 Budget Law, the cornerstones of the spectrum reallocation process are the following:

(a) national and local DTT network operators must free the 700 MHz Band frequencies within the period between 1 January 2020 and 30 June 2022 (transition period), according to the roadmap defined by MISE;

(b) for DTT nationwide network operators: the conversion of their current use rights to frequencies in the 700 MHz Band to use rights to bandwidth capacity in new nationwide multiplexes operated in DVB-T2 technology; the criteria used to convert use rights to the frequencies in broadcasting capacity will be defined by an AGCOM's resolution to be issued by 30 September 2018; the relevant procedure for the definition of the said criteria was launched by Resolution No. 182/18/CONS, adopted on 11 April 2018; the reallocation of the sub-700 MHz Band, according to the Frequency Plan issued by AGCOM through Resolution No. 290/18/CONS of 27 June 2018; the right to get compensation for the costs borne to adapt their repeaters.

(c) the provision of a transition period, between 1 January 2020 and 30 June 2022, to switch to the new frequencies and, at the same time, for the DVB-T switch off and transition to DVB-T2.

On 4 April 2018, MISE launched a public consultation on the draft roadmap. According to the consultation document, the national territory had to be divided into four geographical areas, also for the purpose of avoiding interferences with the neighbouring countries that could start using 700 MHz Band for mobile services before Italy. The MISE decree adopted on 7 August 2018 confirmed this categorisation.

The MISE decree also distinguishes, respectively, four phases in the timeframe between 1 January 2020 and 31 December 2021 and three phases within the period from 1 September 2021 and 30 June 2022. These different phases will govern the process of releasing the relevant frequencies and bringing into operation the new frequencies in each of the geographic areas, in accordance with the plan adopted by AGCOM in Resolution No. 290/18/CONS.

• *Decreto del Ministero dello Sviluppo Economico, 8 agosto 2018 - Suddivisione del territorio nazionale in quattro aree geografiche, coerente con il Piano nazionale assegnazione frequenze televisive - anno 2018. (18A05860) (GU Serie Generale n.212 del 12-09-2018)*
(Decreto del Ministero dello Sviluppo Economico, 8 Agosto 2018)
http://merlin.obs.coe.int/redirect.php?id=19233 IT

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MK-"the Former Yugoslav Republic Of Macedonia"

Study of the media landscape

A study entitled "Media Regulatory Framework and the Online Media - the Macedonian Case", which was supported by the European Union and the Council of Europe, showed that no additional media regulation of new media is needed in that country. This outcome highlights the need to maintain freedom of the media as the main public policy objective and therefore avoid any type of content regulation, supporting instead, where necessary, self-regulation.

Current discussions concerning reform of the media regulatory framework in Macedonia is intended to ensure professional standards of media reporting and freedom of expression after a decade of enormous pressure on journalists, state-controlled media outlets, hate speech, massive state advertising in favour of the ruling parties and the hyper-production of fake news. During the discussion many interested parties have proposed additional regulation of web content and online services.

The recently published study, by contrast, recommends a decrease in the regulatory level in the country and does not support an increase in online media regulation: "In this regard, it should be stressed that not being subject to statutory media regulation does not mean that online media operate in a legal vacuum. On the contrary, media outlets are already subject to an important set of laws such as the body of corporate law (if they engage in commercial activities) or the Law on Associations and Foundations (if they operate on a non-profit basis). Besides, several public policy objectives in terms of content published by online media (such as, for example, the fight against hate speech and discrimination and respect for copyright) can be safeguarded by an important set of laws other than the media law, such as the Criminal Code, the Law on Civil Liability for Insult and Defamation, the Law on the Prevention of and Protection against Discrimination, the Law on Copyright and Related Rights, and the Law on Protection of Personal Data 04046".

The Country's Progress Report, which was published by the European Union in April 2018, noted an improved media climate; however, it noted that "[i]t is essential that the authorities demonstrate zero tolerance towards all incidents of physical and verbal abuse or threats against journalists and that these are effectively followed up by the relevant authorities", and urged the authorities to keep working on the democratisation and professionalisation of the public broadcasting service and of the media regulatory authority

• Study Media Regulatory Framework and the Online Media - the Macedonian Case
http://merlin.obs.coe.int/redirect.php?id=19259 EN

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Publishing of secretly taped conversation with members of Dutch political party was lawful

On 15 August 2018, the District Court of Amsterdam ruled that BNNVARA, a Dutch broadcasting association, had not acted unlawfully by broadcasting on its website a secretly taped conversation with a Dutch member of parliament (MP) of the political party called DENK. The conversation took place in a private meeting room of the party. The recording related to a political election campaign banner (which the party was contemplating publishing on the Internet) containing a provocative message in the name of another Dutch political party the Party for Freedom (Partij voor de Vrijheid): "After 15 March we are going to cleanse the Netherlands." Publicly DENK, the party denied having any such intention, accusing BNNVARA of spreading "fake news". In the taped conversation however, the MP admits that the party actually had considered publishing the campaign banner, but that it had eventually dropped the idea. The House of Representatives' press regulations explicitly prohibits journalists from secretly taping MPs inside their private meeting rooms. Consequently, the party lodged an application for interim injunction proceedings, alleging a violation of the privacy rights of its members under Article 8 of the ECHR.

In response, BNNVARA claimed the recording had been published solely to refute the accusations of spreading fake news. Prior to dismissing the application, the District Court weighed the right to privacy (as embodied in Article 8 of the ECHR) and the right to freedom of expression (as protected by Article 10 ECHR). Balancing these interests, the District Court took into account all relevant circumstances of the case. The District Court firstly observed that Article 8 of the ECHR aims to protect private affairs and that the interview concerned the actions of the claimant in a professional capacity. With regard to the breached press regulations, the District Court noted that, owing to its nature, the conversation did not require the same level of confidentiality as is commonly adhered to. The District Court furthermore viewed the idea of a fake banner to constitute such severe wrongdoing that it required the public to be informed. BNNVARA had successfully demonstrated that the preparations for publication of the banner to a large audience had been well advanced. The District Court also considered of great importance the fact that the recordings were published only after the accusations had been made by the party.

In conclusion, the District Court found that the recordings had exposed serious wrongdoing and that the interests of the public in transparency, therefore, outweighed the interests of the party.

• *Rechtbank Amsterdam 15 August 2018, ECLI:NL:RBAMS:2018:5852* (District Court of Amsterdam, 15 August 2018, ECLI:NL:RBAMS:2018:5852)
http://merlin.obs.coe.int/redirect.php?id=19255 NL

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Study on digitization and fake news

In July 2018, the Dutch Media Authority (CvdM) and the Netherlands Authority for Consumers and Markets (ACM) published a joint study on digitization and fake news. The ACM and CvdM both monitor the media. The ACM ensures that consumers are well informed and fights unfair competition, and the CvdM's primary task is to protect the freedom of information by ensuring pluralism, accessibility and the independence of the Dutch media. The study was prompted by the rapidly changing media landscape and the increasing number of possibilities to disseminate fake news. Combining their expertise, the two organisations assessed the conditions conducive to the dissemination of fake news and its possible effects.

According to the study, there are several risks to the Dutch media landscape. It is vulnerable because income from advertising is increasingly shifting towards other online services. If the number of consumers who pay for quality news drops and the financing of high quality news comes under pressure, fake news then gets more opportunities to spread. Consequently, the quality of news may dwindle if traditional news providers focus more on quick ways of generating attention by offering "sensational news stories". The study also underlines the importance of maintaining media diversity. Since competition between news providers allows for variety in news sources, it boosts the resilience against fake news. However, the number of mergers and acquisitions in the media sector over the past few years has increased. Due to the strong competitive pressure from other online services, this trend of media concentration is also expected to persist.

In response to these dangers, the study identifies a number of possible measures. News providers have to continue to invest in innovation and new business

models in order to maintain a high level of news quality. Since online platforms play an important part in the dissemination of fake news, they too can contribute a great deal. They could take measures aimed at filtering out fake news and improving the findability of good information. In spite of all efforts, fake news will, in all likelihood, still reach consumers. According to the study, this is why it is also important to invest in improving digital literacy. In collaboration with others, the ACM and CvdM aim to raise awareness of the methods of recognising and dealing with fake news.

All in all, as the study underlines, the impact of fake news in the Netherlands is currently limited. However, in order to prevent fake news from gaining a foothold, the ACM and CvdM warn all stakeholders to remain alert.

• *Digitalisering en Nepnieuws - Een gezamenlijke verkenning van de Autoriteit Consument & Markt en het Commissariaat voor de Media* (Joint study by the Dutch Media Authority and the Authority for Consumers & Markets)
http://merlin.obs.coe.int/redirect.php?id=19254 NL

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RO-Romania

Public consultations on the licence fees for terrestrial digital audio broadcasting multiplexes and a tariff for spectrum use

The Autoritatea Naţională pentru Administrare şi Reglementare în Comunicaţii (the National Authority for Management and Regulation in Communications - ANCOM) published for public consultation on 5 September 2018 the Draft Government Decision on awarding licences for the use of radio frequencies in the terrestrial digital audio broadcasting system (see, inter alia, regarding developments leading to this decision see IRIS 2011-41/33, IRIS 2012-2/34, IRIS 2012-10/24, IRIS 2013-6/30, IRIS 2014-4/26, IRIS 2014-5/29, IRIS 2014-9/27, IRIS 2015-5/33, IRIS 2015-7/28, IRIS 2017-1/29, IRIS 2017-2/28, IRIS 2017-4/32, IRIS 2018-5/29, and IRIS 2018-7/28). The Draft Government Decision on awarding licences for the use of radio frequencies in the terrestrial digital audio broadcasting system is available for public consultation until 5 October 2018.

The document sets out the manner of carrying out the selection procedure, the conditions for awarding licences for the use of radio frequencies, and the minimum licence fees for the T-DAB+ terrestrial digital audio broadcasting multiplexes that are to be auctioned. The minimum licence fee for a national multiplex is set at EUR 75 000. The minimum licence fee for a regional multiplex ranges, depending on the allotment area, between EUR 1 050 for a multiplex in a small city and EUR 5 500 for a multiplex in the capital city, Bucharest.

On 23 August 2018, ANCOM launched a public consultation on the Draft Decision for organising the auction and the terms of reference for awarding one national T-DAB+ terrestrial digital audio broadcasting multiplex in the 223-230 MHz band (television channel 12) and one national T-DAB+ terrestrial digital audio broadcasting multiplex - or, alternatively, 36 regional multiplexes in the 216-223 MHz band (television channel 11). Regional multiplexes may be awarded only where no valid bids have been submitted for the national multiplex in the 216-223 MHz band in the selection procedure. These multiplexes will be awarded through a competitive selection procedure for ten years.

The competitive selection procedure requires each bidder to submit an initial bid indicating the multiplexes that it wishes to acquire. If the demand exceeds the number of available multiplexes, primary bidding rounds will be organised until the demand no longer exceeds the offer.

The auction will be launched by publishing an announcement once the documentation has been finalised. The entities interested in participating in the procedure will have four weeks from the date of the announcement in which to submit an application file. ANCOM will announce the qualifying applicants no later than two days after the submission date; the actual auction stages will then follow. The Authority will announce the auction results within three days of its completion and the winners must pay the licence fee within 90 calendar days of the announcement of the results.

The winners of the national multiplexes will have to put into operation at least ten transmitters and to launch their respective services upon the installation and authorisation of at least two transmitters in Bucharest, for each multiplex, within two years of the date of obtaining the respective licences. Winners of regional multiplexes will have the obligation to put into operation at least one transmitter in each allotment within 18 months of the date of their obtaining their respective licence.

On the other hand, ANCOM issued a draft decision on 7 September 2018 establishing a tariff for the use of the spectrum dedicated to terrestrial digital broadcasting, with a view in particular to improving the pricing principles.

The Authority is obliged to organise a selection procedure for the allocation of the VHF (174-230 MHz) spectrum for digital terrestrial broadcasting services (T-DAB) this year. Therefore, the procedure - which is also subject to a public consultation process - envisages the setting of a tariff for the use of the spec-

trum, which will have to be paid by the holders of the authorisation to use the radio frequencies intended to provide these services. The proposed tariff takes into account the nature of the service to be provided, and also the fact that 4 T-DAB blocks can fit in a 7 MHz television channel. In addition, ANCOM proposes a 20% reduction on the current level of use of the spectrum allotted to the temporary/occasional broadcasting of satellite programmes made by foreign natural or legal persons.

The Draft Decision for amending and completing the Decision no. 551/2012 on the setting of the tariff for use of the spectrum is available for public consultation until 7 October 2018.

• *The Proiect de decizie pentru modificarea şi completarea Deciziei preşedintelui Autorităţii Naţionale pentru Administrare şi Reglementare în Comunicaţii nr. 551/2012 privind stabilirea tarifului de utilizare a spectrului* (Draft decision for amending and completing the Decision of the President of the National Authority for Administration and Regulation in Communications no. 551/2012 on the setting of the tariff for the use of the spectrum)
http://merlin.obs.coe.int/redirect.php?id=19235 RO

• *The Proiect de hotărâre privind acordarea licenţelor de utilizare a frecvenţelor radio în sistem digital terestru de radiodifuziune* (Draft decision on the granting of licenses for the use of radio frequencies in digital terrestrial broadcasting system)
http://merlin.obs.coe.int/redirect.php?id=19237 RO

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TR-Turkey

Law gives new powers to the Turkish Radio and Television Supreme Council

Article 82 of Law No. 7103 on Amendments to Tax Laws and to Some Laws and Executive Decrees amending the Law on Radio and Television Establishment and Broadcasting Services (Radyo ve Televizyonların Kuruluş ve Yayın Hizmetleri Hakkında Kanuna) gives new powers to the Turkish Radio and Television Supreme Council (RTÜK). Under this article, RTÜK will become responsible for the licensing of providers offering online broadcasting services. The broadcasting service providers who already have a licence for their television or radio broadcasting activities may now use their licences for the Internet broadcasting activities, provided that those activities are in conformity with Law No. 5651 on the Regulation of Broadcasting on the Internet and Fighting Against Crimes Committed through Internet Broadcasting. Broadcasting service providers and platform owners offering their services only via Internet must obtain a broadcasting transmission licence authorising them to undertake online broadcasting. Upon a request from RTÜK, the criminal courts of peace may decide to remove the online content of or to block the broadcasting services provided by legal or natural persons who do not possess such a licence. In such cases, the Information Technologies and Communications Authority is the responsible institution to execute the Court's decision in line with Law No. 5651 - in particular Articles 8/A(3) - (5).

Content and hosting providers who are located abroad but broadcasting to Turkey in the Turkish language or using other languages for targeting commercial activities in Turkey are also required to obtain a broadcasting transmission licence.

The Article excludes from its scope forms of individual communications (as well as platforms) - operated or undertaken by either legal or natural persons - that are not specifically designed to disseminate radio and television broadcasting and comparable broadcasting services on the Internet. Web hosting providers for radio and television broadcasting and comparable broadcasting services on the Internet are also excluded from this regulation.

In the following six months, RTÜK will announce a regulation regarding delivering media services (radio, television, and optional services) over the Internet, as well as stipulating the procedures for service providers to obtain a broadcasting licence, the procedures for platform owners to be given broadcasting permission and the monitoring the broadcasts.

• *7103 Sayılı "Vergi Kanunları ile Bazı Kanun ve Kanun Hükmünde Kararnamelerde Değişiklik Yapılması Hakkında Kanun" Yayımlandı.* (Article 82 of Law No. 7103 on Amendments to Tax Laws and to Some Laws and Executive Decrees amending the Law on Radio and Television Establishment and Broadcasting Services)
http://merlin.obs.coe.int/redirect.php?id=19239 TR

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A Media Communication Department has been established under the Turkish Presidency

Under Presidential Decree No.14 published in the Official Gazette on 24 July 2018, a new department under the Turkish Presidency has been established. The department holds duties related to the publicising of Turkish government policies and the activities of the President, both within the country and abroad. The department is responsible for disseminating precise information about activities concerning events in or related to Turkey.

The department's duties consist of:

- Ensuring cooperation and coordination between public institutions and NGOs regarding the publicisation of activities in Turkey and abroad,

- Organising and taking action to facilitate national and foreign press activities

Establishing a platform whereby the citizens could easily put forward their opinions and suggestions, as well as give feedback, and could make a request related to the activities of public institutions and organisations,

- Reporting on publication activities related to its duties, and collecting publications in a database to be called the Turkish Media Database,

- Organising professional media training for both the national and foreign press,

- Giving financial and administrative support to NGOs that (i) engage in capacity building, (ii) developing projects and programmes, and (iii) carry out activities similar to those undertaken by the department.

• *İletişim Başkanlığı Teşkilatı Hakkında Cumhurbaşkanlığı Kararnamesi* (Presidential Decree No. 14 of 24 July 2018)
http://merlin.obs.coe.int/redirect.php?id=19261 TR

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Summary of Recent Decisions and Current Developments regarding the Turkish Data Protection Authority

The Turkish Data Protection Authority (DPA) was established in 2016 as a result of a referendum held in 2010, known as the "2010 Constitutional Amendments Package."

Since 2016, the Turkish DPA has been developing both organisational and legal frameworks to ensure the effective safeguarding of data protection rights in the country. In the course of this, the DPA has ruled on several cases, and those rulings have been now published in a summary on the official DPA website, as follows:

- A data subject applied to the DPA requesting that his/her name be removed from an online newspaper's opinion column section where his/her name was mentioned. The DPA rejected the request in the light of the public role of the data subject, newspapers' right to freedom of expression, and freedom of the media.

- An ex officio procedure was launched by the DPA concerning a case regarding a picture - shared on the Internet and on social media platforms - that depicted the health report of a data subject. The data controller was fined because of its failure to ensure the data protection rights of the data subject in question.

- A data controller was fined by the DPA for obliging data subjects to give their consent to receiving certain services, even though such consent was not necessary for the performance of the relationship between data subjects and the controller.

The Turkish DPA furthermore announced the establishment of a system called the "Data Controllers' Registry Information System", for which data controllers will have to register. The process will start in October 2018 and will last until 30 June 2020. In respect of this procedure, four types of data controllers were specified: The first category of data controllers are companies whose number of employees amounts to more than 50 annually or whose financial balance is more than 25 million Turkish Liras (TRL - approximately EUR 3 million). The second category is composed of data controllers located outside the country. The third category covers data controllers with less than 50 employees and whose annual turnover is less than TRL 25 million, but whose main field of operation consists of processing special categories of personal data. The final category of data controllers comprises public institutions. Of these categories, the first two should complete their registration process within 12 months, and the last two categories should complete their registration within 15 months of the establishment of the Data Controllers' Registry.

• *"Sicile Kayıt Yükümlülüğünün Başlama Tarihleri" ile ilgili Kişisel Verileri Koruma Kurulunun 19/07/2018 Tarihli ve 2018/88 Sayılı Kararı* (Press releases of the DPA of 19 July 2018)
http://merlin.obs.coe.int/redirect.php?id=19260 TR

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