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of the European Audiovisual Observatory

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INTERNATIONAL

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INTERNATIONAL

COUNCIL OF EUROPE

European Court of Human Rights: Big Brother Watch and Others v. the United Kingdom

A short time after the judgment in Centrum för Rättvisa v. Sweden (see IRIS 2018-8/3), the European Court of Human Rights (ECtHR) has delivered a new judgment on the bulk interception of communications and intelligence sharing. This time, the ECtHR has found several violations of the European Convention on Human Rights (ECHR) in the United Kingdom's regime for bulk interception of communications, including a violation of the right of journalists to protect their sources. It is important, however, to underscore that the UK has updated its surveillance rules under new legislation, the Investigatory Powers Act 2016 (IPA 2016), which has not yet fully come into force. The ECtHR did not examine the new legislation in its judgment of 13 September 2018.

The judgment in the case of Big Brother Watch and Others v. the United Kingdom deals with a complex set of statutory laws, codes of conduct, procedures and monitoring instruments on the bulk interception of communications, intelligence sharing and requesting data from communications service providers. The judgment counts 204 pages, including separate opinions, though with a very helpful structure produced by the ECtHR itself, accompanied by an instructive press release and even an explanatory Q&A-document as "a tool for the press".

The applications with the Strasbourg Court were lodged by organisations and individuals who actively campaign on issues of civil liberties; by a newsgathering organisation; and by a journalist complaining about the scope and magnitude of the electronic surveillance programmes operated by the UK Government. The applications were lodged after Edward Snowden, a former US National Security Agency (NSA) contractor, revealed the existence of surveillance and intelligence-sharing programmes operated by the intelligence services of the United States and the UK. The applicants believed that the nature of their activities meant that their electronic communications and/or communications data were likely to have been intercepted or obtained by the UK intelligence services.

The ECtHR expressly recognised the severity of the threats currently facing many contracting states, including the scourge of global terrorism and other serious crime, such as drug trafficking, human trafficking, the sexual exploitation of children and cybercrime. It also recognised that advancements in technology have made it easier for terrorists and criminals to evade detection on the Internet. It therefore held that states should enjoy broad discretion in choosing how best to protect national security. Consequently, a state may operate a bulk interception regime if it considers it necessary in the interests of national security. However, the ECtHR does not ignore the fact that surveillance regimes have the potential to be abused, with serious consequences for individual privacy. In order to minimise this risk, the ECtHR reiterated that six minimum safeguards must exist. These safeguards are that the national law must clearly indicate: the nature of offences which may give rise to an interception order; a definition of the categories of people liable to have their communications intercepted; a limit on the duration of interception; the procedure to be followed for examining, using and storing the data obtained; the precautions to be taken when communicating the data to other parties; and the circumstances in which intercepted data may or must be erased or destroyed.

With regard to the bulk interception of communications, the ECtHR came to the conclusion that the UK intelligence services take their Convention obligations seriously and do not abuse their powers; however, it considered that there was inadequate independent oversight of the selection and search processes involved in the operation, in particular when it came to selecting the Internet bearers for interception and choosing the selectors and search criteria used to filter and select intercepted communications for examination. Furthermore, there were no real safeguards applicable to the selection of related communications data for examination, even though this data could reveal a great deal about a person's habits and contacts. The ECtHR also referred to a wide range of possibilities for public bodies to request access to communications data from communications companies in various ill-defined circumstances. According to the ECtHR, the legal regime in the UK allowing access to data held by communications service providers was not limited to the purpose of combatting "serious crime", and there were no sufficient guarantees to prior review by a court or independent administrative body. Therefore, the ECtHR came to the conclusion that Article 8 of the ECHR was being breached.

On the issue of requesting intelligence from foreign intelligence agencies, the ECtHR found that the regulatory provisions in the UK were formulated with sufficient clarity in the domestic law and in the relevant code of practice. As there was no evidence of any significant shortcomings in the application and operation of the regime, or evidence of any abuse, the ECtHR found no violation of Article 8 of the ECHR on this matter.

The specific complaint with regard to Article 10 of the ECHR by the Bureau of Investigative Journalism and the journalist Alice Ross, supported by third party in-

terventions submitted by the National Union of Journalists, the International Federation of Journalists, the Media Lawyers' Association and the Helsinki Foundation for Human Rights, led to the finding that the bulk surveillance regimes in the UK did not provide sufficient protection for journalistic sources or confidential journalistic material. The ECtHR reiterated that the protection of journalistic sources is one of the cornerstones of freedom of the press, and that interference cannot be compatible with Article 10 of the ECHR unless it is justified by an overriding requirement in the public interest. Carrying out searches at a journalist's home and workplace with a view to uncovering his or her sources, even if unproductive, constitutes a more drastic measure than an order to divulge the source's identity, since investigators who raid a journalist's workplace have access to all the documentation held by the journalist. Therefore special consideration is to be given to the interception of communications that involve confidential journalistic material and confidential personal information. The ECtHR expressed particular concern about the absence of any published safeguards in the UK relating both to the circumstances in which confidential journalistic material could be selected intentionally for examination, and to the protection of confidentiality where it had been selected, either intentionally or otherwise, for examination. In view of the potential chilling effect that any perceived interference with the confidentiality of their communications and, in particular, their sources might have on the freedom of the press and, in the absence of any published arrangements limiting the intelligence services' ability to search and examine such material other than where "it was justified by an overriding requirement in the public interest", the ECtHR found the bulk interception regime in violation of Article 10 of the ECHR. With regard to the requests for data from communications service providers, yet again, the ECtHR did not find sufficient guarantees to protect journalists' sources: the relevant safeguards do not apply in every case where there is a request for a journalist's communications data, or where collateral intrusion is likely. In addition, there are no special provisions restricting access for the purpose of combatting "serious crime". As a consequence, the ECtHR also found a violation of journalists' rights under Article 10 of the ECHR in respect of the regime for data requests from communication service providers.

• Judgment by the European Court of Human Rights, First Section, case of Big Brother Watch and Others v. the United Kingdom, Application Nos. 58170/13, 62322/14 and 24960/15, 13 September 2018
http://merlin.obs.coe.int/redirect.php?id=19272 EN

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European Court of Human Rights: Annen (No. 2 and 5) v. Germany

Yet again, the European Court of Human Rights (ECtHR) has been requested to balance the right to reputation and the right to freedom of expression with regard to Internet content. The cases of Annen v. Germany are about a series of interferences with the right to freedom of expression of Klaus Günter Annen, a campaigner against abortion who also operates an anti-abortion website. While the other cases deal with distributing leaflets and campaigning in the immediate vicinity of medical practices and clinics where abortions are performed, two of the cases concern injunctions against Annen, as well as a judicial order to pay damages for the violation of the personality rights of doctors performing abortions who had been accused by Annen of "aggravated murder". Annen's website had also associated one of the medical doctors with the Third Reich, equating abortions with the crimes of the Third Reich and stigmatising the doctor as a murderer.

Annen lodged a complaint with the ECtHR, arguing that the injunctions and the order to pay damages had violated his freedom of expression as provided in Article 10 of the European Convention on Human Rights (ECHR). At the outset, the ECtHR considered that it was not in dispute that the injunction and the order to pay damages interfered with Annen's right to freedom of expression, that the interferences were prescribed by German law (Articles 823 and 1004 of the Civil Code), and that they pursued the legitimate aim of protecting the rights of others. Therefore, it remained to be determined whether the interferences by the German judicial authorities were 'necessary in a democratic society'. The ECtHR reiterated that when examining whether there is a need for an interference with freedom of expression in a democratic society in the interests of the "protection of the reputation or rights of others", it may be required to ascertain whether the domestic authorities have struck a fair balance when protecting two values guaranteed by the ECHR which may come into conflict with one another in certain cases, namely on the one hand freedom of expression protected by Article 10, and on the other the right to respect for private life and the right to reputation enshrined in Article 8.

The ECtHR referred to the wording on Annen's website and agreed with the findings by the domestic courts that the website contained the general statement that abortions, as performed by the named doctors, were acts of aggravated murder. According to the ECtHR, these accusations had no factual basis, as Article 218A of the Criminal Code exempts doctors from criminal liability and there is no domestic case law or other evidence in domestic law supporting Annen's claim. The ECtHR also noted that these accusations were not only very serious, something reflected in the fact that

a conviction for aggravated murder would carry a life sentence, but that they might also incite to hatred and aggression. The ECtHR, in Annen No. 5, further observed that the domestic courts additionally justified the injunction and the order to pay damages by Annen's comparison of abortion with the Holocaust and the atrocities under the Nazi regime. It agreed with the findings of the domestic courts that Annen had equated the medical activities of the named doctor to the utterly unjustifiable atrocities inflicted on Jews under the Nazi regime. It reiterated that the impact an expression of opinion has on another person's personality rights cannot be detached from the historical and social context in which the statement was made and that references to the Holocaust must be seen in the specific context of German history.

Lastly, the ECtHR observed that Annen had not been criminally prosecuted or convicted for slander and that he had not been prevented from campaigning against abortions in general. Indeed, Annen had only been prohibited from describing abortions, as performed by the named doctors, as aggravated murder, and therefore from implying that they were committing that criminal offence. As far as damages were concerned, the ECtHR observed that the domestic courts had elaborated in detail why the violations of the doctor's personality rights had been particularly serious and why they had considered damages appropriate. On these grounds, the ECtHR concluded that the injunction and the order to pay damages were not disproportionate to the legitimate aim pursued, and that the reasons given by the domestic courts were relevant and sufficient. The interference with Annen's right to freedom of expression could therefore reasonably be regarded as necessary in a democratic society for the protection of the reputation and rights of the named doctors. Accordingly, in both judgments, the ECtHR found no violation of Article 10 of the ECHR.

• Judgment by the European Court of Human Rights, Fifth Section, case of Annen (No. 2) v. Germany, Application no. 3682/10, 20 September 2018
http://merlin.obs.coe.int/redirect.php?id=19273 EN

• Judgment by the European Court of Human Rights, Fifth Section, case of Annen (No. 5) v. Germany, Application no. 70693/11, 20 September 2018
http://merlin.obs.coe.int/redirect.php?id=19294 EN

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EUROPEAN UNION

Court of Justice of the European Union: Judgment on the processing of personal data and the protection of privacy in the electronic communications sector

On 2 October 2018, the Grand Chamber of the Court of Justice of the European Union (CJEU) delivered a judgment in the Ministerio Fiscal case (C-207/16) concerning the processing of personal data and the protection of privacy in the electronic communications sector. This judgment concerned the interpretation of Article 15(1) of Directive 2002/58/EC (the e-Privacy Directive) - which allows member states to introduce exceptions to the principles of the confidentiality of personal data - read in light of Articles 7 (respect for private life) and 8 (protection of personal data) of the Charter of Fundamental Rights of the European Union (the Charter).

The judgment addressed a request for a preliminary ruling from the Ministerio Fiscal (Spanish Public Prosecutor's Office) against the decision of a local court of preliminary investigation which had refused to grant the police access to personal data retained by providers of electronic communications services. The investigation concerned the theft of a mobile phone, which had prompted the police to request that the investigating magistrate order electronic communications service providers to reveal telephone numbers that had been activated with the International Mobile Equipment Identity (IMEI) code of the stolen mobile, as well as personal data relating to the identity of the owners or users of such numbers. The magistrate had refused on the grounds that Spanish law at that time limited the communication of the data retained by the providers of electronic communications services to serious offences. The Public Prosecutor's Office appealed this decision before the referring court, which requested a preliminary ruling by the CJEU on whether Article 15(1) of the e-Privacy Directive, read in light of Articles 7 and 8 of the Charter, must be interpreted as meaning that public authorities' access to data for the purpose of identifying the owners of SIM cards activated with a stolen mobile telephone entails a sufficiently serious interference with their fundamental rights so as to limit that access to the objective of fighting serious crime and, if so, by which criteria the seriousness of the offence must be assessed.

The case was stayed pending delivery of the Tele2 Sverige and Watson and Others judgment (C-203/15 and C-698/15 - see IRIS 2017-2/3), in which the CJEU held that Article 15 of the e-Privacy Directive could justify national legislation requiring targeted retention of traffic and location data for the purpose of fighting serious crime, but proceeded once the referring court

stated that the Tele2 Sverige and Watson and Others judgment did not enable it to assess with a sufficient degree of certainty the national legislation in light of EU law.

Based on its case law, with special reference being made to the Tele2 Sverige and Watson and Others judgment, the CJEU clarified that the access by public authorities to personal data retained by providers of electronic communications services constitutes an interference with the fundamental rights of Articles 7 and 8 of the Charter, even if the interference is not serious; and that such access must correspond strictly to one of the objectives set out in Article 15(1) of the e-Privacy Directive. While Article 15(1) of the e-Privacy Directive refers to criminal offenses in general and not only serious crimes, the CJEU held that, due to the principle of proportionality, serious interference can be justified only by the objective of fighting crimes that can qualify as serious as well.

However, seemingly in contrast to the judgment on Tele2 Sverige and Watson and Others, the CJEU decided that, when the interference that such access entails is not serious, access can be justified by the objective of preventing, investigating, detecting and prosecuting criminal offences generally. Therefore, since the data requested by the Public Prosecutor's Office would not allow precise conclusions to be drawn concerning the private lives of the persons whose data is concerned, access to the data requested cannot be defined as a serious interference with the fundamental rights of such persons - even though it does constitute an interference - and is justifiable by the objective of preventing, investigating, detecting and prosecuting criminal offences generally, without it being necessary that those offences be defined as serious.

• Judgment of the Grand Chamber of the Court of Justice of the European Union in Case C-207/16 Ministerio Fiscal, 2 October 2018
http://merlin.obs.coe.int/redirect.php?id=19276 DE EN FR
CS DA EL ES ET FI HU IT LT LV MT
NL PL PT SK SL SV HR

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European Parliament: Amendments adopted to the proposed copyright reform

After a period of strong controversy regarding certain provisions in particular included by the EU Commission in the proposed copyright reform for the Digital Single Market (see IRIS 2016-9/4), on 12 September 2018, the plenary session of the EU Parliament agreed on a new proposal for the final round of negotiations (trilogue) with the EU Commission and the Council of the European Union.

On 20 June 2018, the Legal Affairs Committee of the European Parliament (JURI) voted in favour of the key provisions of the proposed Draft Directive on Copyright in the Digital Single Market. The vote gave a mandate to the Rapporteur MEP Axel Voss (EPP) to start trilogue negotiations on the draft Directive with the Council and Commission.

However, on 5 July 2018, during a plenary session, the European Parliament challenged the JURI committee vote. As certain provisions contained in the JURI report raised much criticism, the report was rejected by 318 to 278 votes, with 31 abstentions.

The new proposal has tried to deal with that criticism and find some compromise solutions. For instance, in Article 11 on the protection of press publications concerning digital uses, the new proposal points out the need for "fair and proportionate remuneration for the digital use" of publishers' contents and it furthermore includes specific protection for authors regarding the distribution of revenues received for the use of a press publication by information society service providers. Moreover, the new proposal envisages an explicit exclusion for hyperlinks which are accompanied by individual words, as well as a reduction of the term of this right from 8 to 5 years.

Article 13 on the use of protected content by information society service providers storing and giving access to large amounts of works and other subject matter uploaded by their users, immediately - and more clearly - prescribes the duty for online content-sharing service providers to conclude fair and appropriate licensing agreements with rightsholders. Moreover, it adds a specific reference to the General Data Protection Regulation as far as it concerns the identification of individual users uploading protected work. This provision is consistent with a more general concentration of digital platforms' liabilities. Nonetheless, the new proposal highlights the need to ensure respect for fundamental rights, avoiding the automatic blocking of uploaded contents, as well as to ensure "that the burden on SMEs remains appropriate".

On 12 September 2018, the Parliament finally adopted this new proposal on the Copyright Directive, with 438 votes in favour, 226 against, and 39 abstentions.

After the Parliament voted, trilogue negotiations started and a final vote is envisaged to take place in the early months of 2019.

• European Parliament, Report on the proposal for a directive of the European Parliament and of the Council on copyright in the Digital Single Market A8-0245/2018, 29 June 2018
http://merlin.obs.coe.int/redirect.php?id=19274 DE EN FR
CS DA EL ES ET FI HR HU IT LT LV
MT NL PL PT SK SL SV

• European Parliament, Amendments adopted by the European Parliament on 12 September 2018 on the proposal for a directive of the European Parliament and of the Council on copyright in the Digital Single Market, P8_TA-PROV(2018)0337, 12 September 2018
http://merlin.obs.coe.int/redirect.php?id=19275 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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Advocate General: German broadcasting fee is not unlawful state aid

In his opinion delivered on 26 September 2018 in Case C-492/17, Advocate General Manuel Campos Sánchez-Bordona proposed that the Court of Justice declare that the amendment of the event triggering the chargeability of the broadcasting fee used to finance public service broadcasting in Germany does not constitute unlawful state aid.

In a 2007 ruling, the Commission had stated that the method for financing public service broadcasting in Germany - then known as the 'Rundfunkgebühr' (broadcasting fee) - could be classified as 'existing aid' within the meaning of EU law. This means that the aid existed before the Treaty entered into force and remained applicable thereafter.

In 2013, the financing model for public service broadcasting was changed from one based on the possession of a receiver to one based on the possession of a dwelling or of business premises.

The referring court, Landgericht Tübingen (Tübingen regional court), thought the legislative change amounted to a substantial amendment that should have been notified to the Commission and that the aid resulting from the amendment was incompatible with the internal market. It also considered that the change had generated a significant increase in revenue and that public service broadcasters benefited from further state aid in the form of access to simpler and less expensive enforcement procedures.

In his opinion, the Advocate General explained that the German law changing the event triggering the chargeability of the broadcasting fee did not constitute an alteration of existing aid and therefore did not create new aid that should have been notified to and approved by the Commission. The new broadcasting fee did not amount to a substantial change to the existing scheme since the beneficiaries and objective features of the aid, such as the purpose of the measure, remained unaltered. Furthermore, the amount received by the public service broadcasters did not depend on a change to the event triggering the chargeability of the fee. In addition, the mechanism for using administrative enforcement in order to recover unpaid fees was not incompatible with EU law. The Commission had already evaluated this mechanism in its 2007 decision.

• Opinion of 26 September 2018 in Case C-492/17
http://merlin.obs.coe.int/redirect.php?id=19305 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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NATIONAL

BG-Bulgaria

Amendments in the Radio and Television Act related to administrative jurisdiction

In June 2017, the Bulgarian Parliament initiated amendments in the Administrative Procedure Code with the aim of relieving the Supreme Administrative Court of the many cases it has to deal with. The amendments were passed in July 2018 and they affected the consolidation of proceedings, including those filed against decisions of the Council for Electronic Media (CEM). The President of the Republic of Bulgaria vetoed some of the texts of the law in August 2018. The veto was overruled by the National Assembly at the beginning of September 2018. The Act on Amendments to the Administrative Procedure Code introduced two changes in the Radio and Television Act (RTA). The amendments were published in the State Gazette, issue 77 dated 18 September 2018 and shall be enforced on 1 October 2019.

A new paragraph 5 was inserted in Article 28460 of the RTA, which states that an affected party and anybody interested can request that the Administrative Court in Sofia annul decisions taken by the CEM in cases where a member of the media regulator participated in the discussions and voted for a decision while having a personal interest in the outcome of the decision. Formerly, such an appeal had to be lodged with the Supreme Administrative Court.

Article 38, paragraph 1 of the RTA laid down that the decisions of the CEM had to be challenged before a jury of three members of the Supreme Administrative Court. The cassation appeal against the decisions of the Supreme Administrative Court had to take place before a jury of five members of the Supreme Administrative Court. Through the amendments, the legislator has followed the proposals that the decisions of

the CEM had to be appealed against before the Administrative Court - Sofia District. The appeals against the decisions of this court will, in future, be brought before a jury of three members of the Supreme Administrative Court.

The amendments in the Administrative Procedure Code have affected the government fees paid for appealing against sanctions incurred by administrative authorities and of courts. According to the changes in Article 227460, paragraph 1 of the Administrative Procedure Code, a cassation plaintiff should pay a government fee to the amount of BGN 70 (about EUR 35) for citizens. Sole-owner traders, governmental and municipal authorities and other entities that exert public functions and organisations rendering municipal services shall pay a fee to the amount of BGN 370 (about EUR 185) for legal entities. If there is an identifiable material interest in the case, such fees are not to be paid, but a fee calculated as a percentage of the interest shall be paid. Not long ago, the government charges collected by the courts for appealing against administrative fines were only up to BGN 10 (about EUR 5) for citizens and non-governmental organisations and BGN 50 (approximately EUR 25) for traders, while the fee for a cassation appeal was up to half of these amounts.

• Президентското вето (President's veto of 31 July 2018)
http://merlin.obs.coe.int/redirect.php?id=19302 BG

• Закон за изменение и допълнение на Административнопроцесуалния кодекс (Act amending and supplementing the Administrative Procedure Act)
http://merlin.obs.coe.int/redirect.php?id=19278 BG

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Decision of the Broadcasting Council on unlawful advertising practices

The Rady pro rozhlasové a televizní vysílání (Council for Radio and Television Broadcasting, RRTV) as the central administrative authority for radio and television broadcasting, decided on 18 September 2018 to fine the advertiser Vetrisol for breach of duty pursuant to section 5d(2) of Act No. 40/1995 on the Regulation of Advertising and on Amendments to Act No. 468/1991 on radio and television broadcasting pursuant to Article 7 (3) and (4) (a), Regulation (EU) No. 1169/2011 of the European Parliament and of the Council.

The aforementioned provisions provide that food information may not attribute to any food the characteristics which make it possible to prevent, mitigate or cure a particular human disease. The RRTV's decision concerned an advertisement for the product 'Happy Imun' (a food supplement), which was broadcast on 3 November 2017 on TV Prima. According to the RRTV, the commercial communication indicated that the product was intended to cure a disease, possibly help in its prevention, and therefore did not comply with Article 5d(2) of Act No. 40/1995. In the commercial statement, the girl shown is afflicted with the symptoms of a disease (taking a handkerchief while sneezing). The threat of disease is symbolically portrayed by the character of a sprite attacking the girl. The advertised product, Happy Imun, again rendered symbolically, offers a "shield", which is used to help the girl fight the disease, leading to the visual representation of the girl cured, throwing her handkerchief away and rejoicing with her mother. The process of relief and cure was represented by a symbolically blooming tree over the characters. This presentation, together with the statement "Happy Imun. Immunity shield for the whole family" adds to the image and verbal expression which would have viewers believe that the food can prevent, mitigate or cure a particular human disease. For this offence, the Council imposed a fine of Kč 20 000 (approximately EUR 775).

• *Rozhodnutí Rady pro rozhlasové a telvizní vysílání č.j. RRTV/16991/2018-had ze dne* (Decision of the Council for Radio and Television Broadcasting of 18 September 2018)
http://merlin.obs.coe.int/redirect.php?id=19303 CS

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Federal Supreme Court: broadcaster not obliged to search YouTube for illegal content

In a decision of 12 July 2018 (Case no. I ZB 86/17), which was published on 28 September 2018, the Bundesgerichtshof (Federal Supreme Court - BGH) ruled that a broadcaster had fulfilled its obligations by removing a TV programme from its online media library and taking steps to ensure that it could not be retrieved from the cache of common search engines, and in particular from Google.

The case concerned a television programme broadcast in April 2017 by public service broadcaster Norddeutscher Rundfunk (NDR) which had been the subject of a preliminary injunction on account of infringements of the right to free speech. NDR had removed the programme from its online media library and asked common search engines, in particular Google, to delete it. However, the programme had been uploaded to the YouTube video platform by a third party without NDR's involvement and was therefore

still available to the public. As a result, the person concerned by the programme filed legal proceedings against NDR, claiming that it had breached the injunction.

However, the BGH rejected the application. It was true that NDR, under the injunction, had been obliged to delete the programme from its online media library and ask search engines to do the same. The BGH explained that it was in the economic interest of companies that used the Internet as part of their commercial activity that search engines help users find the content that they had made available on the Internet. In NDR's case, the fact that search engines referred users to television programmes in its online media library was, in any case, likely to raise and maintain the public profile of the media library and of previously broadcast programmes. NDR therefore stood to benefit financially if programmes available in its media library could be accessed via Internet search engines. NDR must also have been aware that the programme deleted from its media library would remain accessible via the search engine cache until it was updated and that it would continue to be viewed illegally as a result.

However, NDR was not obliged to search other websites to see if the programme was available, as might be the case if, for example, a third party from whose activity the broadcaster did not benefit financially had independently published it on an Internet video portal. It was only obliged to take action with regard to third parties if it benefited financially from their activities. This system of liability was based on the notion that an obligor helped by a third party to expand its activities must assume responsibility for the resulting increased risk of rights infringements.

NDR did not benefit financially from the publication of the programme by the YouTube user. It was true that its publication on an Internet video portal meant that more viewers might become aware of it. However, this expansion of its potential audience did not, on its own, give NDR a relevant economic benefit. On the contrary, it could actually be detrimental to NDR's online media library, which might seem less attractive than the competing service. It was also important to note, when evaluating the overall situation, that the publication of the programme by a third party without NDR's consent infringed the copyright of the broadcaster, which had the exclusive right to decide how its works should be used and to benefit from them financially.

• *Beschluss des BGH vom 12. Juli 2018 (Az. I ZB 86/17)* (Decision of the Federal Supreme Court (BGH) of 12 July 2018 (Case no. I ZB 86/17))
http://merlin.obs.coe.int/redirect.php?id=19285 DE

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Federal Supreme Court refers 'Uploaded' to ECJ

On 20 September 2018, a week after issuing its YouTube decision (IRIS 2018-9/10), the Bundesgerichtshof (Federal Supreme Court – BGH) decided to refer a similar set of questions to the European Court of Justice (ECJ) concerning the liability of a shared web hosting service for copyright infringements (Case no. I ZR 53/17 – Uploaded).

The case follows a dispute between book and music publishers and the shared hosting service Uploaded, which offers free storage space for anyone to upload files that can, in principle, be downloaded free of charge by other users. Registered users can pay for higher download speeds and a larger download quota. The defendant automatically creates and gives to the user an electronic download link to each uploaded file, but does not provide access to an index or search function for uploaded content. The download links are often found with a description of their content on other websites, although these are operated by third parties. The defendant pays uploaders a form of bonus based on a certain number of downloads (up to EUR 40 for 1 000 downloads). Although prohibited under its terms and conditions, much of the platform's content infringes copyright, a matter that has repeatedly been brought to the defendant's attention. On 2 March 2017, following a complaint by several music and book publishers claiming exclusive usage rights to works made available on the platform, the OLG München (Munich court of appeal, Case no. 29 U 1797/16) ordered the operator, as a so-called 'interferer', to desist (Article 97(1) of the Copyright Act - UrhG), but did not award damages or require user data to be disclosed. It based its decision on the fact that the defendant was neither fully nor partially responsible for the copyright infringements, since it had only provided technical means and had therefore not made the works available to the public itself (Article 19a UrhG).

Now, however, the BGH has decided to suspend the proceedings and refer questions to the ECJ on the interpretation of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market, and Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights.

The following questions were submitted:

- "Does the operator of a shared web hosting service, on which users make available to the public data con-

taining copyright-protected content without the rightsholder's permission, carry out 'communication to the public' within the meaning of Article 3(1) of Directive 2001/29/EC if

- the uploading process is automatic, requiring no prior approval or control by the operator,

- the operator points out in its terms of use that copyright-infringing content may not be uploaded,

- it generates revenue by operating the service,

- the service is used for lawful purposes, although the operator is aware that a substantial quantity of copyright-infringing content (more than 9 500 works) is available,

- the operator does not provide an index or search function, although the unrestricted download links that it creates are listed on the Internet by third parties, together with information on the files' content and a search function,

- it creates an incentive to upload copyright-protected content that users would otherwise have to pay for by awarding a bonus based on the number of downloads, and

- it decreases the likelihood of users being held to account for copyright infringements by enabling them to upload files anonymously?

- Is the answer to the above question different if between 90 and 96% of the content made available via the shared hosting service infringes copyright

- Does the activity of the operator of such a shared hosting service 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 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 a shared hosting service in the circumstances described in the first question be considered an 'infringer' within the meaning 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 commit actual copyright infringements?"

These questions are very similar to those contained in the decision to refer the question of YouTube's liability for copyright-infringing content (decision of 13 September 2018 – Case no. I ZR 140/15, IRIS 2018-9/10). However, the two platforms are very different in terms of their structure and business model. It remains to be seen whether and how the ECJ will distinguish between the different types of service and the different ways in which the providers contribute to copyright infringements.

• *Pressemitteilung Nr. 156/18 des BGH vom 20. September 2018* (BGH press release no. 156/18 of 20 September 2018)
http://merlin.obs.coe.int/redirect.php?id=19307 DE

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ES-Spain

RTL wins case against NH Hotels in Spain concerning illegal TV use

In a ruling of 16 January 2018 (Case no. 446 (M-175) 17, decision no. 21/18), the Audiencia Provincial de Alicante (Alicante provincial court) decided that the use of the RTL media group's broadcast signals in hotel rooms by the Spanish hotel group NH was illegal.

The dispute concerned the provision of access to RTL channels in the rooms at various hotels operated by the companies NH Hoteles Group S.A. and NH Hoteles España S.A. (hereafter 'NH'), which the plaintiffs, RTL Television GmbH and RTL Disney Fernsehen GmbH & Co. KG (hereafter 'RTL'), considered unlawful. In its first-instance decision of 24 March 2017, amended on 2 June 2017 (Case no. 487/2015), the Juzgado de lo Mercantil Número 2 de Alicante (Alicante commercial court no. 2) had stated that the plaintiffs had the exclusive right to approve the retransmission of RTL and RTL SUPER broadcast signals through any technical means, ordered the defendants to cease this illegal practice in future and held them jointly and severally liable to pay damages. Both parties had appealed to the Alicante provincial court against this decision.

The appeal court largely followed the arguments of the lower court and the plaintiff, and upheld the complaint in full.

Along with provisions on the burden of proof and judicial presumption, and the calculation of the damages owed, the appeal court proceedings mainly concerned the interpretation of the concept of retransmission of broadcast signals in the sense of Article

126(1)(d) of the Spanish Ley de Propiedad Intelectual (Copyright Act - LPI). The defendants, who disputed that RTL channels had been made available in the hotel rooms concerned but admitted that they may have been inadvertently broadcast, argued with reference to Article 126(1) LPI that a one-off broadcast did not constitute retransmission in the sense of the Act. The appeal court disagreed. Firstly, this was not a one-off act, since it had been committed at multiple hotels on multiple occasions. Regardless of that, however, neither the wording of Article 126(1) LPI ("Broadcasters have an exclusive right to approve the (04046) d) retransmission of their programmes and broadcasts through any technical means") nor any teleological or systematic interpretation thereof suggested that an infringement must be based on a multiple, recurring, large-scale, repeated or redundant act. Rather, an infringement was committed when a company, via cable or another broadcasting or transmission technology, provided its guests with access to protected content on television sets provided by the company at more than one company location. The appeal court also rejected the defendants' argument that they had merely received the images and not redistributed them because the hotel had not retransmitted the broadcast signals but only received them and distributed them to the connection points in the hotel rooms.

According to the appeal court, the ECJ judgment of 27 February 2014 (Case C-351/12) stated that the operator of an establishment carried out 'communication to the public' if it transmitted protected works by intentionally distributing a signal by means of television or radio sets in the bedrooms of the establishment's patients. Article 126(2) LPI stated that the concept of "retransmission includes public distribution by a company that transmits or distributes another company's broadcasts", while Article 126(1)(d) stated that the right included the "retransmission of their programmes and broadcasts through any technical means". In the appeal court's view, this meant that retransmission amounted to the distribution of third-party broadcasts, as was the case here. Copyright-holders needed extensive protection in the form of appropriate remuneration. Retransmission, whether via radio waves or cable, comprised the repetition of the received output signal (reception via NH aerials) by a company other than the original broadcaster (distribution of RTL channels to television sets in NH hotel rooms) for the benefit of the public. Referring to recent decisions by higher Spanish courts, the appeal court concluded that retransmission could take place via any technical means, wired or wireless, and that hotel rooms were not private in a way that could give rise to an exclusion under copyright law.

However, the Spanish court did not deal with the ECJ judgment of 16 February 2017 (Case C-641/15, Verwertungsgesellschaft Rundfunk GmbH v Hettegger Hotel Edelweiss GmbH), in which the ECJ considered the interpretation of Article 8(3) of Directive 2006/115. This provision requires member states to provide for broadcasting organisations the exclusive right "to authorise or prohibit the rebroadcasting of their broadcasts by wireless means, as well as the communication to the public of their broadcasts if such communication is made in places accessible to the public against payment of an entrance fee." In this judgment, however, the ECJ only examined whether Article 8(3) of Directive 2006/115 should be interpreted as meaning that the communication of television and radio broadcasts by means of TV sets installed in hotel rooms constituted a communication made in a place accessible to the public against payment of an entrance fee. The Spanish appeal court, however, focused on the other alternative mentioned in Article 8(3), that is to say, rebroadcasting.

The decision is final.

• *Decisión de la Audiencia Provincial de Alicante de 16 de enero de 2018 (Caso no. 446 (M-175) 17, decisión no. 21/18)* (Decision of the Alicante provincial court of 16 January 2018 (Case no. 446 (M-175) 17, decision no. 21/18)) ES

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FR-France

EUR 1 million fine imposed on a radio station for broadcasting sexist comments is lawful

The company that runs the NRJ radio station lodged an appeal with the Conseil d'Etat seeking the cancellation of the decision of the Conseil Supérieur de l'Audiovisuel (the national audiovisual regulatory authority - CSA) of 22 November 2017 ordering it to pay a fine of EUR 1 million following the broadcasting of the programme "C'Cauet" on 9 December 2016. The disputed sequence was the result of a practical joke conducted over the telephone lasting about ten minutes, during which one of the programme's (female) commentators and an accomplice listener, presented as the sister-in-law of the person being tricked, led the latter to believe that they had had sexual relations with her partner.

The Conseil d'Etat found that the aim of broadcasting the telephone call had been to place a woman in a distressing situation by giving her to believe that her partner was habitually unfaithful to her - supposedly because of her weight problem. The sequence was based on the repetition, for nearly ten minutes, of statements implying that the woman should be judged solely on her physical appearance and should make every effort to maintain her appearance in order to satisfy her partner. Thus, the CSA had not been wrong in noting that the disputed sequence had been

based on sexist stereotypes and a view of women that tended to reduce them to the role of sexual objects, in disregard of the provisions of Article 3-1 of the 30 September 1986 Freedom of Communication Act . The court also noted that, throughout the sequence, the women talking to the victim humiliated her with insults and unpleasant comments about her physical appearance. Furthermore, even though after several minutes the victim, in tears, was in a state of manifest distress and vulnerability, the programme's presenter allowed the situation to continue and delayed revealing the trick to her. By considering, in the light of these circumstances, that the disputed sequence had been humiliating for the victim and that its broadcasting had constituted a failure to observe the provisions of Article 2-6 of the radio station's broadcasting agreement, the CSA interpreted the facts of the matter correctly. It also noted that the fact that the victim had agreed to the sequence being broadcast was irrelevant to whether or not the CSA's view of the matter had been correct. Similarly, the fact that the comments at issue had been made by women and with humorous intent was also irrelevant. Lastly, the court found that the fine of EUR 1 million imposed on NRJ should not be considered excessive, given the gravity of the failings committed. There were therefore no grounds for calling for the cancellation of the decision at issue, and the appeal was rejected.

• *Conseil d'État (5e et 6e ch.), 15 octobre 2018 - SAS NRJ https://www.legifrance.gouv.fr/affichJuriAdmin.do;jsessionid=3DDF8BA96CE2E[illegible]tplgfr36s_1?oldAction=rechJuriAdmin&idTexte=CETATEXT000037499788&fastReqId=705971700&fastPos=8*
(Conseil d'Etat (5th and 6th chambers), 15 October 2018 - NRJ S.A.S.)
FR

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Cancellation of a formal order by CSA to the RTL radio station

On 15 October the highest administrative tribunal in France, the Conseil d'Etat, received a request from the company v France Radio for the cancellation of a formal order imposed on it by the national audiovisual regulatory authority (Conseil Supérieur de l'Audiovisuel - CSA). The CSA had reached its decision after the broadcast on 2 February 2017 of a sequence during which the polemist Eric Zemmour made critical comments regarding what he considered to be the US Supreme Court's misapplication of the "principle of non-discrimination", and denounced the influence of this jurisprudence on the European Court of Human Rights, the Constitutional Council, and the Conseil d'Etat, all which he accused of perpetrating a "judicial putsch".

The station was issued a formal order to comply in future with its obligations under Article 2-4 of its broadcasting authorisation agreement, according to which "the license holder shall ensure that its programmes ... promote the values of integration and solidarity, as upheld by the [French] Republic. ... The holder shall contribute to action promoting social cohesion and combating all forms of discrimination".

In response to RTL's request for the decision to be cancelled, the Conseil d'Etat said that the Republic's principles, particularly the principle of equality before the law, prohibited all forms of discrimination and conferred considerable importance on both the values of integration and solidarity and the aim of achieving social cohesion. Moreover, the undertaking ä in Article 2-4 of the above-mentioned agreement with regard to the service provided by RTL should be viewed in conjunction with the principle of freedom of expression of thoughts and opinions. This undertaking could not be interpreted as requiring the editor of a programme to ban all criticism of the French Republic's principles and values on its airwaves.

The Conseil d'Etat noted that, during the sequence at issue, Eric Zemmour expressed in polemic fashion his point of view on the banning of all types of discrimination, as interpreted - broadly, in his opinion - by the courts of both the United States and France, which he claimed made any difference in treatment impossible. He expressed this opinion during a daily three-minute broadcast entitled "On n'est pas forcément d'accord" ("We don't necessarily agree"), during which commentators holding different opinions are invited to speak; the very title of the broadcast invites listeners to take its polemical nature into account. The Conseil d'Etat found that in these circumstances the CSA had been wrong in judging itself in a position to consider that the obligations resulting from Article 2-4 of the radio station's broadcasting agreement had been disregarded and accordingly sending a formal notice to the applicant company; the formal notice was therefore cancelled.

On 12 September, the CSA sent formal notice to the television channel Paris had been Première after receiving complaints regarding a sequence broadcast early in the year involving Zemmour and Naulleau, during which the subject of the legislation on asylum and immigration was raised (see Iris 2018-9). The M6 Group has made it known that it "reserves the right to take the matter up with the CSA and the Conseil d'Etat" regarding the formal notice it was served, because it "raises comparable issues".

• *Conseil d'État (5e et 6e ch. réunies), 15 octobre 2018 - RTL France Radio* (Conseil d'Etat (5th and 6th chambers combined), 15 October 2018 - RTL France Radio)
http://merlin.obs.coe.int/redirect.php?id=19308 FR

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Audiovisual reform - the 40 proposals in the Bergé report

On 4 October, French Member of Parliament Aurore Bergé submitted to the National Assembly forty proposals for "a new regulation on audiovisual communication in the digital era". The proposals are the result of a fact-finding mission conducted since February by MPs on the Cultural Affairs Committee. The first major section of the report is devoted to combating piracy. It proposes that the competence to impose fines be given to the Haute Autorité pour la Diffusion des Œuvres et la Protection de la Création sur Internet (High Authority for the Broadcasting of Works and the Protection of rights on the Internet - HADOPI) in the context of the "graduated response" procedure. It also suggests combining the national audiovisual regulatory authority (Conseil Supérieur de l'Audiovisuel - CSA) and the HADOPI in order to "create a single authority regulating audiovisual content". The second main section aims at ensuring financing for French works not only by "reaffirming the present financing model" (which the Committee considers "pertinent") but also by "aligning the rate of taxation applicable to the incumbent players in the audiovisual sector with that applicable to the new digital services" such as Netflix, Amazon and Apple. A further aim is to "liberate the growth of the audiovisual stakeholders". The report proposes "authorising segmented, geo-localised advertising on television as part of an eighteen-month experiment" and abolishing advertising on Radio France and France 5, as well as "extending the basis for taxation contributing to the audiovisual sector to all households". These proposals are to be used as the basis for a bill that the Minister for Culture has announced will be tabled at the end of March 2019. The new Act would be divided into four sections. Aimed at: strengthening the public audiovisual sector (including the matter of governance); better financing and exposure of works (with the transposition of the European Union's AMS Directive, which requires platforms to observe a broadcasting quota of 30% for European works), thereby ensuring diversity; extending the protection afforded to the public to encompass video platforms; and a relaxing and modernisation of the regulations.

• *Rapport d'information de la commission des affaires culturelles déposé en application de l'article 145 du règlement, par la commission des affaires culturelles et de l'éducation, en conclusion des travaux d'une mission d'information sur une nouvelle régulation de la communication audiovisuelle à l'ère numérique (Mme Aurore Bergé)* (Information report by the Cultural Affairs Committee submitted in application of Article 145 of the regulation of the Cultural Affairs and Education Committee on concluding the work of an information mission on new regulations for audiovisual communication in the digital era (Ms Aurore Bergé))

http://merlin.obs.coe.int/redirect.php?id=19288 FR

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GB-United Kingdom

The High Court issues blocking injunction for boxing matches

On 20 September 2018, the High Court granted an order aimed at tackling illicit streams of professional boxing matches. The application was made by Matchroom Boxing Ltd against the UK's main retail Internet service providers, including Sky UK Ltd, British Telecommunications Plc, Virgin Media Ltd and others. The company stages more than 20 boxing events yearly, several of which feature the British boxer Anthony Joshua who currently holds three of the four major world championships in the sport. In the UK, the boxing matches are broadcast by Sky under exclusive agreements with Matchroom. Matchroom owns the copyrights in broadcasts in the case of events featuring Mr. Joshua and Sky owns the copyrights in the case of other events, but assigned the right to bring these proceedings to Matchroom. Sky broadcasts boxing matches on either a standard or pay-per-view (PPV) basis. PPV events are of most interest to boxing fans and can attract millions of viewers. Sky shares the revenue accrued from the PPV events with Matchroom and pays a substantial fee for the broadcasting rights too. It is for this reason that Sky supported the application. The remaining defendants did not oppose it either.

In this case, an order was sought in respect of streaming servers to tackle the 'growing problem' of live boxing matches being delivered in violation of Matchroom's and Sky's rights. Mr Justice Arnold emphasised the evidence of 'very large numbers of infringing streams having been watched for Mr Joshua's most recent fights,' causing Matchroom and Sky a significant loss of revenue. In July 2018, similar orders were made in favour of the Football Association Premier League Ltd (FAPL) and the Union of European Football Associations (UEFA), requiring the defendants to block their customers' access to streaming servers which deliver infringing live streams of Premier League and UEFA matches footage to UK consumers.

However, the blocking injunction in the present case differed from those granted in the cases of the FAPL and UEFA in two aspects. Firstly, target servers cannot be easily identified in the same way, because of the irregular timing of the boxing matches. Hence, Arnold J. granted the order for a seven-day monitoring period prior to each event. The details of the particular form of monitoring were kept confidential to prevent circumvention. Secondly, whereas the FAPL and UEFA orders covered a season, or part of it, this was not possible in the present case, considering that boxing events are not fixed well in advance; thus, the order was made for two years but required Matchroom to

notify the defendants 'at least four weeks in advance' of the scheduling of a match.

Having considered the evidence and the terms of the order, Arnold J. took the view that such an order did not impair the defendants' rights to carry on business. He concluded that the interference with the Internet users' rights to receive information was justified by the legitimate aim of preventing the infringement of Matchroom's and Sky's rights on a large scale and was proportionate to that aim: 'it [was] effective and dissuasive; no equally effective but less onerous measures [were] available to Matchroom, it [avoided] creating barriers to legitimate trade, it [was] not unduly complicated or costly and [contained] safeguards against misuse.' Finally, it was agreed that there should be no order in relation to costs.

• Matchroom Boxing Ltd & Anor v BT Plc & Ors [2018] EWHC 2443 (Ch) (20 September 2018)
http://merlin.obs.coe.int/redirect.php?id=19298 EN

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Broadcasting licence revoked because of hate speech in newspaper linked to broadcaster

Ofcom, the UK communications regulator, has revoked the broadcasting licence of Ausaf UK Limited even before its broadcasting has begun. Ofcom did so because of content in a newspaper (the Daily Asaf) closely linked to the holder of the licence and produced in London and Pakistan.

Ofcom is obliged by the Communications Act 1990 not to grant a licence to any person unless satisfied that the applicant is a fit and proper person to hold it, and, if they cease to be so satisfied, to secure that the person does not remain holder of the licence. It recognises that revocation represents a serious interference with freedom of expression and so adopts a high threshold for finding that the licence holder is not a fit and proper person. In particular, it considers whether the licence holder can be expected to be a responsible broadcaster, and whether there will be compliance with regulatory standards and the conditions of the licence.

Asaf TV was granted a licence on 24 January 2017; its major audience was to be people from Kashmir, but it had not yet started broadcasting. In October 2017, Ofcom opened an investigation relating to links between the broadcaster and the Daily Ausaf newspaper after a BBC investigation had alleged that the newspaper had published articles promoting intolerance of the Ahmadiyya community, celebrating militant groups and individuals proscribed in the UK, and promoting a violent interpretation of Jihad. This had included endorsing the former militant commander of a terrorist group proscribed in the UK, endorsing Osama bin Laden, and claiming that members of the Ahmadiyya community were working against the interests of the Muslim world and Pakistan. There had also been material which was anti-Semitic. There was evidence that material from the Pakistan version of the newspaper had been published in the UK edition without being checked.

The sole director and shareholder of Ausaf UK Limited controlled the licensed broadcaster, and also had responsibility for the publication and distribution of the Pakistan edition of the newspaper. He denied being the same person as the editor of the Daily Asaf Pakistan, but Ofcom rejected his evidence, which was contradicted by other evidence, including his Facebook page and his LinkedIn profile; his name appeared as editor on the masthead of the Pakistan editions.

Ofcom concluded that the licence holder had responsibility for and control over the newspaper. It was also seriously concerned that he had given false and misleading information about his role. This called into question the licence holder's ability and commitment to comply with the regulatory regime. There was a material risk that the licensee might fail to comply with the Broadcasting Code and so a clear risk of substantial harm to audiences if the licensee was allowed to broadcast. The licence was thus revoked with immediate effect.

• Ofcom, 'Notice of Revocation of Licence Number TLCS101719 Held by Ausaf UK Limited', 4 September 2018
http://merlin.obs.coe.int/redirect.php?id=19296 EN

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Saudi advert infringed Broadcast Advertising Code though it was not a "political" advertisement but a "restrained" advertisement

The new ruler of Saudi Arabia, Mohammed Bin Salman, visited the United Kingdom in March 2018. The Saudi Centre for International Communication, an agency of the Ministry of Culture, thought it would be a good idea to project his Vision 2030 around the time of his visit. To do so, it bought time on Sky 1 to broadcast a message. The script referred to women being allowed to drive; the reopening of cinemas; the promotion of concerts and cultural events; and the aim to drop the country's reliance on oil and invest in various projects, thus turning Saudi Arabia into a hub connecting three continents.

As usual, the broadcaster submitted the one-minute script to the pre-broadcast clearance agency,

Clearcast. It was shown 56 times over three days after Clearcast had made a few changes. Ofcom subsequently received three complaints from viewers who considered the advertisement to be "political advertising".

The statutory position is set out in the 2003 Communications Act, Sections 321 (2) and (3) as reflected in Rules 7.2.1. and 7.2.2 of the UK Code of Broadcast Advertising. There is, it should be noted, an exemption under Section 321(7)(a) which disapplies the prohibitions in relation to advertising of a "public service nature" placed by or on behalf of a government department. Generally, Ofcom's position is that it must consider each message on a case-by-case basis, assessing the particular circumstances and content at the time. In this regard, context is crucial in each case.

In first determining whether that exemption applied to this advertisement, Ofcom took the view that the primary determinant of such an advert is that its purpose is to inform and educate the public by providing information that is in the public interest. Furthermore, Ofcom will so decide on a case-by-case basis. In this case, Ofcom took the view that the message was designed to present Saudi Arabia in a positive light. Accordingly, its decision was that the advertisement did not fall within the class of the exception to the general rule.

Was it a "political advertisement" more narrowly? Ofcom took the view that the purpose was intended to influence public opinion on a matter of public controversy. Thus, Ofcom ruled that the advertisement did infringe the core statutory provisions outlawing political advertising. The fact that it had been slightly modified and cleared by Clearcast was not relevant in that Ofcom is firmly of the view that, even if the material is cleared for broadcast, the primary responsibility for conforming to the law and regulations is the broadcaster's.

• Ofcom, Broadcast and On Demand Bulletin, Issue 360, 28 August 2018, p. 9
http://merlin.obs.coe.int/redirect.php?id=19295 EN

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Ofcom paper "Addressing Harmful Online Content"

On 18 September 2018, Ofcom launched its discussion paper entitled "Addressing Harmful Online Content" (the report) which considers ways to regulate social media, especially in the context of children and young people, whilst respecting freedom of expression. The report follows the DCMS's (Department for Digital, Culture, Media & Sport) July 2018 interim report entitled "Disinformation and Fake News" (see IRIS 2018-8:1/27). Furthermore, this coming winter, the UK Government will publish a White Paper setting out its intention to legislate in order to improve online safety. Ofcom's report flagged other UK parliamentary activity concerning the Internet, including the House of Lords Communications Committee enquiry entitled "The Internet: to regulate or not to regulate?" Whilst the House of Commons Science and Technology Committee is conducting an inquiry into the impact of social media and screen use on young people's health.

Ofcom's report offers policy and legislation makers an insight into the current regulation of content standards for broadcast and on-demand video services and how these could be adapted to prevent harmful online content.

The report recognised that traditional broadcasting and online services were converging, but various aspects of online content were either partially regulated or not regulated at all. Joint research between Ofcom and the Information Commissioner's Office (IFO) revealed that seven out of ten UK adult Internet users report concerns about harmful content or conduct online, and a quarter say they have directly experienced some harm.

The report recognised that the sheer scale of text, audio and video generated or shared online far exceeded the output of broadcast TV and radio, which made pre-publication regulation more difficult. Online content encouraged a variety of voices and opinions. The public did not necessarily seek impartial online content as compared to traditional broadcasters.

Regulation in news and comment content may center on transparency so that platforms are clear on where content comes from and whether it can be trusted. Online platforms do not commission or create content, whilst the quantity of content may lead to regulation focusing on how quickly an online platform addresses a complaint. Online viewers expect protection in areas such as the protection of minors and protection from illegal content.

Ofcom considered that certain principles would assist policymakers as they determined online protection, such as freedom of expression, allowing the rules to adapt over time to reflect changing technology as well as evolving consumer behaviour and expectations. Public expectations of protection or freedom of expression relating to conversations between individuals may be very different from their expectation of traditional broadcasters and publishers. Careful consideration of the content's context is likely to be critical for an effective, proportionate online regulatory regime including the application of sanctions.

The regulator needs to be independent to build trust and credibility with the public. Ofcom needs to build a close relationship and common standards with regulators in other jurisdictions, especially given the power and global influence of Internet platforms. Ofcom

works with European regulators such as EPRA (European Platform of Regulatory Authorities) and ERGA (The European Regulators Group for Audiovisual Media Services) to monitor developments and promote coordination and co-operation concerning online content.

Regulation will need to be flexible to cater for changing technology and services. Media literacy or people's understanding and awareness of online issues can assist with preventing harmful content. Ofcom has organised a conference in early 2019 for UK and international regulators. Ofcom will work closely with the UK Government, ICO, the Competitions and Markets Authority and the Advertising Standards Authority.

Ofcom's report identified current initiatives such as the revised AVMS Directive (Audiovisual Media Services Directive) to apply some regulatory standards to video-sharing platforms such as YouTube and other social media services. Germany and Australia have introduced legislation requiring platform providers to remove certain types of illegal content within a specified period after being identified by users and sanctions will apply for repeated compliance failure. France has introduced steps to target mass disinformation during general elections. The Trust Project is an initiative of 75 news organisations to kitemark trusted sites and for platforms to intervene, including to verify content, if a site is being manipulative or deceptive with content, including highly visible trending. This scheme involves Google, Bing, Facebook and Twitter.

Ofcom recognised that the scope and design of new legislation is a matter for government and parliament but hopes their discussion paper helps policy makers to curtail harmful aspects of the Internet whilst preserving the Internet's benefits to society, culture, trade and freedom of expression.

• Ofcom, Addressing harmful online content. A perspective from broadcasting and on-demand standards regulation, 18 september 2018
http://merlin.obs.coe.int/redirect.php?id=19297 EN

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IE-Ireland

Updated guidelines on election coverage

On 20 September 2018, the Broadcasting Authority of Ireland (BAI) published updated Guidelines for Coverage of General, Presidential, Seanad (Senate), Local and European Elections (for previous guidelines, see IRIS 2016-1/19 and IRIS 2014-5/23). The purpose of the Guidelines is to set out requirements for broadcasters in terms of their coverage of elections, and to provide guidance on how fairness, objectivity and impartiality may be achieved. The Guidelines were published in advance of the Irish presidential election in late October 2018, and upcoming local and European Parliament elections in early 2019.

The Guidelines cover a number of important issues, including achieving fairness, objectivity and impartiality; how to address any conflicts of interest; reporting opinion polls; handling on-air contributions via social media and on-air references to social media; political advertising; party political broadcasts; and applying the moratorium on election coverage during the pre-poll silence period. Notably, the updated Guidelines contain a new section not included in the previous Guidelines (see IRIS 2016-1/19) on diversity. Section 12 of the Guidelines states that a strategic objective of the BAI is to foster a media landscape that is representative of, and accessible to, the diversity of Irish society. In this context, broadcasters are encouraged to include a mix of voices and opinions in their coverage, including a mix of voices representing gender, cultural and social diversity. Furthermore, while the BAI Access Rules (see IRIS 2018-7/22) do not include obligations about providing accessible coverage in respect of news and current affairs, the BAI encourages television broadcasters to provide coverage of an election that is accessible to those who are hard of hearing or deaf, partially sighted or blind and those who are hard of hearing and partially sighted.

Section 8 of the Guidelines on social media should also be mentioned. It provides that broadcasters are required to have in place appropriate policies and procedures for handling on-air contributions via social media, for example by developing and applying social media guidelines. Given the importance of the broadcast coverage of elections, additional steps should be implemented by broadcasters to ensure that on-air references to social media are accurate, fair, objective and impartial.

Finally, it should be noted that on-air references to social media generated significant controversy during the last Irish presidential election in 2011. In particular, one candidate took legal proceedings against the public broadcaster RTÉ over a 2011 televised election debate when the presenter questioned the candidate about a statement concerning him that had just been made on the supposed official Twitter account of another candidate. It later turned out that the tweet had been attributed, in error, to the official Twitter account of the other candidate. The BAI later held that the programme had been in breach of section 39(1)(b) of the Broadcasting Act 2009, being "unfair" to the candidate (see IRIS 2012-5/27). Indeed, in December 2017, RTÉ settled the legal proceedings, issued an apology to the candidate, and paid undisclosed damages (see IRIS 2018-2/11 and IRIS 2017-6/21).

The updated Guidelines came into effect on 27 September 2018, and apply to broadcasters within

the jurisdiction of the Republic of Ireland, and do not apply to other services commonly received in Ireland but licensed in Great Britain and Northern Ireland or in other jurisdictions.

• Broadcasting Authority of Ireland, Rule 27 Guidelines - Guidelines for Coverage of General, Presidential, Seanad, Local & European Elections, September 2018
http://merlin.obs.coe.int/redirect.php?id=19277 EN

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IT-Italy

AGCOM launches public consultation on criteria for converting rights to use the spectrum in the context of the 700 Mhz Band frequencies reframing

As required by Decision (EU) 2017/899, Italy is taking the necessary steps to reallocate the sub-700 MHz Band. In fact, in December 2017, the Italian Parliament passed the 2018 Budget Law, which laid down the legislative framework for the necessary actions to implement Decision (EU) 2017/899 and delegated the Italian Communication Authority (AGCOM) and the Ministry of Economic Development (MISE) to adopt the resolutions establishing the criteria and the modalities for the implementation of this process.

This spectrum reallocation process is based on two pillars: on the one hand, the release of the 700 MHz Band frequencies by 30 June 2022; on the other hand, the conversion of the current use rights to frequencies in the 700 MHz Band into use rights to bandwidth capacity in new nationwide multiplexes operated in DVB-T2 technology.

As to the first pillar, as we noted in our previous entry (see IRIS 2018-9/26) on 8 August 2018, MISE issued a decree setting a timeline for the release of the 700 MHz Band frequencies. With respect to the conversion of use rights, the Budget Law expressly delegated AGCOM to define the relevant criteria through a resolution to be approved by 30 September 2018. Accordingly, by means of Resolution No. 474/18/CONS, AGCOM launched a public consultation on the matter.

The resolution first focuses on the conversion criteria set by the Budget Law (Article 1, paragraph 1031); rights to use the spectrum held by national network operators will be converted into use rights amounting to 50% of the overall transmission capacity available on a national multiplex operated in DVB-T2 technology. The public consultation aims at determining which criteria, if any, should apply.

As to the assignment of use rights to frequencies in the 470-694 MHz UHF Band, AGCOM observed that at the entry into force of the Budget Law, all the operators that held use rights to frequencies for the digital terrestrial broadcasting in the national territory (in DVB-T technology) are eligible as recipients. More precisely, operators entitled to the assignment include:

-national network operators that individually hold use rights corresponding to the entire transmission capacity of a national multiplex in DVB-T technology, as planned in the 2018 National Frequency Distribution Plan (NFDP) (that is, holding two use rights amounting to 50% of the overall transmission capacity available on a national multiplex in DVB-T2);

-national network operators that jointly hold, by virtue of a commercial agreement, use rights corresponding to the entire transmission capacity of a national multiplex in DVB-T2 technology, as planned in the 2018 NFDP (that is, each one holding use rights to frequencies amounting to 50% of the overall transmission capacity available on a national multiplex in DVB-T2 technology).

As to the specific criteria for the assignment of the use rights to frequencies in the 470-694 MHz Band, AGCOM noted that the 2018 NFDP ensures equal performances in terms of the coverage, power and capacity of the networks in DVB-T2 technology. Accordingly, the relevant use rights for the new networks are deemed equivalent. In this regard, AGCOM shall also take into account circumstances such as the containment of network transformation or construction costs; the reduction of the transition period from 1 January 2020 to 30 June 2022; and the minimisation of the costs and the impact on end-users. These criteria, in the view of AGCOM, provide clear, complete and exhaustive guidelines for the reallocation process. With respect to the assessment of the relevant costs, an AGCOM resolution has established that the entitled operators, when applying for each single network in the UHF Band planned in the 2018 NFDP, shall provide MISE with a business plan relating to the transformation and construction thereof. In addition to specifying the relevant costs for the transformation and construction of, respectively, existing networks and new networks in DVB-T2 technology, the business plan shall include a description of the technical project and of the timeline for the transformation and/or construction of networks.

• *Delibera n. 474/18/CONS, Consultazione pubblica concernente la definizione dei criteri per la conversione dei diritti d'uso delle frequenze in ambito nazionale per il servizio digitale terrestre in diritti d'uso di capacità trasmissiva e per l'assegnazione in ambito nazionale dei diritti d'uso delle frequenze pianificate, ai sensi dell'articolo 1, comma 1031 della legge 27 dicembre 2017, n. 205* (AGCOM, Resolution No. 474/18/CONS)
http://merlin.obs.coe.int/redirect.php?id=19299 IT

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NL-Netherlands

Dutch telecommunications providers KPN and VodafoneZiggo must grant competitors access to their fixed telecommunications networks

On 27 September 2018, the Dutch Authority for Consumers and Markets (ACM) adopted the market analysis decision on Wholesale Fixed Access (WFA). Under the Decision, Dutch telecommunications providers KPN and VodafoneZiggo must grant competitors access to their fixed telecommunications networks in order to mitigate the potential effects of their collective significant market power (Article 14(2) Directive 2002/21/EC - SMP). The Decision is effective as of 1 October 2018.

Prior to the Decision of 27 September 2018, the ACM's market analysis decision of 17 December 2015 already imposed the obligation on KPN to grant competitors access to its fixed networks. On 1 January 2016, Vodafone and Ziggo launched their joint venture VodafoneZiggo. As a result of that joint venture, a unique situation exists in the Netherlands, in which two telecommunications providers with their own fixed and mobile networks are active simultaneously: KPN with its copper and glass fibre network, and VodafoneZiggo with its cable network. The establishment of the joint venture gave rise to the question of whether the market analysis decision of 17 December 2015 should be revised. Ultimately, the ACM answered that question in the affirmative, and conducted a new market analysis.

In its 2018 market analysis, the ACM considers that neither KPN nor VodafoneZiggo enjoys individual significant market power (SMP) in an unregulated market for fixed telecommunications networks. However, the ACM establishes that KPN and VodafoneZiggo enjoy collective SMP in such a market (ex Article 6a.1(5)(a) of the Telecommunications Act - Telecommunicatiewet - Tw). The ACM attributes that to the incentive and opportunity both parties have to agree tacitly to refuse access to competitors. Subsequently, should they exclude alternative providers, KPN and VodafoneZiggo can gradually begin to charge excessively high retail prices for end-users. Moreover, the ACM does not foresee any new providers with the capability to roll-out their own telecommunications infrastructure entering the market. Considering all these aspects, the ACM concludes that KPN and VodafoneZiggo can potentially cause competition problems. Consequently, in order to mitigate such competition issues, the ACM imposes obligations on both KPN and VodafoneZiggo (ex Article 6a.2(1) Tw). Among those obligations is the obligation that both parties must grant their competitors access to their fixed telecommunications networks (ex Article 6a.6(1) Tw).

In preparation of its Decision, the ACM conducted research from January 2017 to February 2018. After that preparatory research, the ACM published the draft Decision on 27 February 2018. Subsequently, market participants were invited for consultation (ex Article 6b.1(1) Tw) and Article 3:15 General Administrative Law Act (Algemene wet bestuursrecht). On 31 July 2018, the ACM notified the European Commission of the draft Decision, including the opinions of the market participants (ex Article 6b.2(1) Tw). On 30 August 2018, the European Commission approved the Decision with some comments.

- *Autoriteit Consument en Markt, Marktanalysebesluit Wholesale Fixed Access, 27 september 2018* (Dutch Authority for Consumers and Markets, Market analysis decision Wholesale Fixed Access, 27 September 2018)
http://merlin.obs.coe.int/redirect.php?id=19300 NL
- *Europese Commissie, C(2018) 5848 final, 30 augustus 2018* (European Commission, C(2018) 5848 final, 30 August 2018)
http://merlin.obs.coe.int/redirect.php?id=19301 NL

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PL-Poland

Results of consultation on decree on measures for TV viewers with visual or hearing disabilities

On 20 September 2018, Poland's National Broadcasting Council (KRRiT) presented the results of a consultation on its draft decree on accessible television for viewers with visual or hearing disabilities (projektu rozporządzenia w sprawie udogodnień dla osób niepełnosprawnych z powodu dysfunkcji narządu wzroku i osób niepełnosprawnych z powodu dysfunkcji narządu słuchu w programach telewizyjnych), which was published in June. It had been obliged to issue such a decree after an amendment to the Polish Radio and Television Act was proposed in March 2018, requiring television providers to offer accessible programmes for people with visual and hearing disabilities. The proportion of programmes with access services such as subtitles, audio description or sign language should gradually increase to 50% by 2024. In the first draft decree, the KRRiT provided precise quotas for individual access services according to different programme types. For example, 40% of general programmes should have subtitles, 7% audio description and 3% sign language. This was criticised in the consultation process, in which the views of various associations, broadcasters and operators of disabled facilities were sought between 11 July and 31 August.

Broadcasters and industry bodies demanded greater freedom with regard to the provision of access services, claiming that the 50% target by 2024 was ambitious in comparison with models in other countries. Additional exemptions for regional channels with a catchment of under 100 000 people were also called for. Some broadcasters also expressed concern about the extent of the information obligations contained in the Act.

Social associations, on the other hand, called for a higher proportion of audio description and sign language in various programme categories. They also argued that at least one information programme and one news programme should be broadcast with sign language on national channels during prime-time hours.

The KRRiT thanked the participants and will now prepare a new draft decree that takes into account the results of the consultation procedure.

• *Projektu rozporządzenia w sprawie udogodnień dla osób niepełnosprawnych z powodu dysfunkcji narządu wzroku i osób niepełnosprawnych z powodu dysfunkcji narządu słuchu w programach telewizyjnych* (Results of the consultation on the draft decree concerning accessible television for viewers with visual or hearing disabilities)
http://merlin.obs.coe.int/redirect.php?id=19287 PL

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RO-Romania

Modification of the Audiovisual Law with regard to audiovisual communication of an educational character

The Chamber of Deputies (the lower chamber of the Romanian Parliament) adopted on 26 September 2018 a draft law that modifies and completes Audiovisual Law no. 504/2002, with further modifications and completions, with regard to audiovisual communication of an educational character (see, inter alia, IRIS 2013-6/27, IRIS 2014-1/37, IRIS 2014-2/31, IRIS 2014-7/29, IRIS 2014-9/26, IRIS 2015-10/27, IRIS 2016-2/26, IRIS 2016-10/24, IRIS 2017-7/28, 2017-1/30, IRIS 2018-6/30, IRIS 2018-6/31, and IRIS 2018-8/36).

The law awaits the final approval of the Senate (upper chamber), but no deadline for this has been set yet. The draft law was tabled by 40 Romanian MPs and aims to introduce the concept of "audiovisual communication of an educational character" into the Audiovisual Law. Owing to the fact that the book market in Romania is among the most underdeveloped in the European Union and Romanians have barely been in the habit of reading books in recent years, the initiators of the draft law hope that the amendments will lead to a doubling of the consumption of books in Romania.

Paragraph 16 of Article 1 of the draft law defines "audiovisual communication of an educational character" relating to the importance and promotion of reading in the public space as "sound [messages] or video messages, with or without sound, which are meant to inform and educate the population. They will run for free and will be marked as such."

The draft law also introduces a new Article 17(d)(10) on the powers of the National Audiovisual Council to issue regulatory decisions in order to carry out those of its tasks that are expressly provided for in Audiovisual Law no. 504/2002 - in particular, its responsibilities in respect of educational audiovisual communication in public areas regarding the importance and promotion of reading.

Furthermore, a new Article 30 stipulates that: "Educational Audiovisual Communications on the importance and promotion of reading in public areas must observe the following conditions:

"a. to inform and educate the population about the importance of reading;

b. to inform and educate the public so as to promote reading;

c. to run for free;

d. not to contain any commercial references or promote an institution or person;

e. the development of content and messages should be undertaken by the Ministry of Culture, in collaboration with the National Audiovisual Council;

f. in the case of television programmes and services, audiovisual media communication [measures] regarding the importance and promotion of reading [04046] are to be undertaken in the form of campaigns four times a year (each campaign lasting one month), at least three times a day between 6 p.m. and 10 p.m., [and at least once] during the main news programme. In the case of each campaign, the form of the message should be distinct."

Under Article 90 h) of the Audiovisual Law, breaches of the above provisions will be sanctioned as offences.

• *Propunere legislativă pentru modificarea şi completarea Legii audiovizualului nr. 504/2002 cu modificările şi completările ulterioare - forma adoptată de Camera Deputaţilor* (Draft Law for the modification and completion of the Audiovisual Law no. 504/2002, with further modifications and completions - the form adopted by the Chamber of Deputies)
http://merlin.obs.coe.int/redirect.php?id=19282 RO

• *Propunere legislativă pentru modificarea şi completarea Legii audiovizualului nr. 504/2002 cu modificările şi completările ulterioare - expunere de motive Deputaţilor* (Draft Law for the modification and completion of the Audiovisual Law no. 504/2002, with further modifications and completions - statement of reasons)
http://merlin.obs.coe.int/redirect.php?id=19283 RO

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Project for a new cinematography and film industry law

On 28 September 2018, the Centrul Naţional al Cinematografiei (National Centre for Cinematography - CNC) submitted for public consultation a draft law on cinematography and the film industry aimed at replacing the current Government Ordinance no. 39/2005 (GO no. 39/2005) (see, inter alia, IRIS 2013-3/26, IRIS 2014-1/37, IRIS 2014-7/29, IRIS 2014-9/26, IRIS 2015-10/27, IRIS 2016-2/26, IRIS 2016-10/24, IRIS 2017-1/30, IRIS 2017-7/28 and IRIS 2018-3/29).

According to the CNC, the system established by Government Ordinance no. 39/2005 has demonstrated, after more than 12 years of application, both the positive effects and the limits highlighted by domestic and European developments in cinematography. Professionals in the field - as well as official bodies of the Romanian State, such as the Court of Accounts and the Competition Council - have pointed out the necessity of aligning the regulatory framework with the European one and of including other audiovisual formats and players in the Cinematographic Fund. This calls for a redesign of the support model for cinema creation, the CNC added.

The CNC project advocates for the replacement of the repayable loan model with a non-reimbursable financial support model for film development and production (in line with European Union's practice in the field of State aid) in order to increase the collection base for the Cinematographic Fund, bringing it up to date with technological developments. It furthermore proposes ending anonymous applications (not showing the title of the project, the name of the director and the name of the scriptwriter).

The CNC also advocates introducing increased support measures for Romanian film by implementing certain EU provisions concerning, inter alia, the definition of the various categories of supported films in order to clarify the tasks of the Board of Directors with regard to the activities of the Cinematographic Fund and setting up a steering board within the CNC that would have operational and administrative functions.

The draft law also aims to introduce two continuous funding sessions over a one-year period; it also (i) sets deadlines for streamlining and rendering more transparent the funding process, clarifying and differentiating the duties of the members of the selection boards, (ii) stipulates the length of the period for which they hold this function, and (iii) addresses any possible incompatibility that have thus far arisen. Furthermore the draft law introduces new measures for providing support in order to help ensure large audiences and high artistic quality. Such measures include the financing of new independent productions and earmarking a portion of available funds for micro-budget film and minority co-productions (facilitating the fulfilment of reciprocal obligations in respect of other States with which there is close cooperation). The draft law also clearly defines the types of projects eligible for funding under each category of the funding sessions. The law also broadens the support categories in respect of various cinematographic activities (including the refurbishment of cinema theatres), in line with the European Union's policy.

• *Proiect de lege privind cinematografia şi industria filmului* (Draft Law with regard to cinematography and film industry of 28 September 2018)
http://merlin.obs.coe.int/redirect.php?id=19281 RO

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CNA Decisions for the referendum on redefining the family

On 20 September 2018, the Consiliul Naţional al Audiovizualului (National Audiovisual Council, CNA) adopted Decision No. 441/2018 on the rules for the audiovisual coverage of the campaign for the national referendum on the revision of the Constitution concerning Article 48 (1) of the Romanian Constitution, scheduled in Romania for 6 and 7 October 2018. On 2 October 2018, the CNA adopted Decision No. 454/2018 for the modification of Decision No. 441/2018 (see inter alia IRIS 2004-3/33, IRIS 2005-1/34, IRIS 2008-10/27, IRIS 2009-1/29, IRIS 2009-6/28, IRIS 2009-10/24, IRIS 2011-3/29, IRIS 2011-9/31, IRIS 2012-6/30, IRIS 2014-5/27, IRIS 2014-10/30, and IRIS 2016-10/25).

The Law on the Review of the Constitution and the corresponding campaign in audiovisual media concerned an amendment of Article 48 (1) of the Romanian Constitution, which shall be amended to read as follows: "The family is founded on the freely agreed marriage between a man and a woman, on their equality and on the right and duty of parents to ensure the raising, education and institutionalization of children". The actual form of Article 48 rules that "The family is based on a freely agreed marriage between spouses." The modification of the Constitution was demanded through a citizens' initiative, signed by 3 million people. The subject of marriage between persons of the same sex is very sensitive in Romania, a country with

a Christian Orthodox majority which has a rather conservative view on this matter. The very idea of the modification of the Constitution in this respect, after a national referendum, triggered huge polemics and contradictory debates.

The campaign in audiovisual media for the national referendum ended on 5 October 2018 at 7.00 a.m. local time, 24 hours before voting started. In its decision prior to the referendum, the CNA had made some general statements about the requirements such campaigns in audiovisual media have to comply with.

The CNA stated first of all that the questions at the heart of the campaign for the national referendum could be addressed through informative programmes and debates, with due respect for the rules of correct information and pluralism of opinions. In this regard, broadcasters are obliged to reflect equally divergent views and, during debates, must ensure equal chances for partisans and opponents of the subject of the referendum. If one of the persons invited does not participate, broadcasters are obliged to mention this fact. Furthermore, the CNA stated that the absence of the point of view of one of the parties did not exonerate the moderator from ensuring impartiality.

In cases where criminal or moral allegations are made in the informative programmes and debates, the point of view of the persons concerned should also be disseminated, as a rule, within the same programme or, exceptionally, in subsequent broadcasts. In addition, broadcasters have to grant persons involved their right to reply and right of rectification.

According to the decision, broadcasters may not air opinion polls, debates and comments or any public consultations on the subject of the referendum from the end of the referendum campaign until the closing of the polls. The opinion polls carried out by the specialised institutions must be broadcast in compliance with the rules laid down in the Audiovisual Code. Voice interviews conducted by broadcasters cannot be presented as representative of public opinion or of a particular social or ethnic group and are obliged to reflect divergent views. Within the aforementioned period of time, it is also forbidden to present and broadcast invitations to vote for or against the subject of the referendum, or inducements to vote or not to vote. Concerning the last point, a modification was adopted on 2 October 2018, through Decision No. 454/2018, which changed the wording of Decision No. 441/2018 only to „inducements to vote for or against the proposed subject of the referendum". In other words, this means that from now on, it is forbidden to invite someone to vote for or against the question raised by the referendum, but it is allowed to invite people to go and cast their votes, which could boost the participation rate.

According to Decision No. 441/2018, broadcasters are obliged to record the broadcasts for the referendum under the conditions established by Decision No. 412/2007 of the CNA on the obligations of radio broadcasters to record radio and television programmes, as subsequently amended and supplemented. These records shall be retained for 30 days after the official communication of the results of the referendum and shall be made available to the CNA at its request. Furthermore, according to the CNA, broadcasters are obliged to provide the data requested by the control personnel of the CNA on the conduct of the campaign for the national referendum, within the terms and conditions communicated.

Finally, the CNA stated that failures to comply with the provisions of the Audiovisual Law, the Audiovisual Code and the corresponding CNA Decision shall trigger the application of the sanctions provided for by the Audiovisual Law No. 504/2002, with further modifications and completions.

• *Decizia C.N.A. nr. 441 din 20.09.2018 privind reflectarea pe posturile de radio şi de televiziune a referendumului naţional pentru revizuirea Constituţiei din 6 şi 7 octombrie 2018* (C.N.A. Decision No. 441 of 20.09.2018 with regard to the coverage on the radio and television stations of the national referendum for the revision of the Constitution of 6 and 7 October 2018)
http://merlin.obs.coe.int/redirect.php?id=19279 RO

• *Decizia C.N.A. nr. 454 din 02.10.2018 pentru modificarea Deciziei C.N.A. nr. 441 din 20.09.2018 privind reflectarea pe posturile de radio şi de televiziune a referendumului naţional pentru revizuirea Constituţiei din 6 şi 7 octombrie 2018* (C.N.A. Decision No. 454/2018 of 02.10.2018 for the modification of the C.N.A. Decision No. 441 of 20.09.2018 with regard to the coverage on the radio and television stations of the national referendum for the revision of the Constitution of 6 and 7 October 2018)
http://merlin.obs.coe.int/redirect.php?id=19280 RO

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TR-Turkey

Turkish Radio and Television Supreme Council Releases Draft Regulation

Under 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 of 27 March 2018 (Sayılı Vergi Kanunları İle Bazı Kanun Ve Kanun Hükmünde Kararnamelerde Değişiklik Yapılması Hakkında Kanun) new powers have been given to the Turkish Radio and Television Supreme Council - the RTUK), as reported in the last issue of IRIS Newsletter (see IRIS 2018-9/31). This regulation established the RTUK as the institution responsible for licensing broadcasting-service providers who offer online broadcasting services. Building on this legislative amendment, a draft Regulation on Radio, Television, and Optional Broadcasting Services Provided on the Internet (Radyo, Televizyon ve İsteğe Bağlı Yayınların İnternet Ortamından Sunumu Hakkında Yönetmelik

Taslağı) has just been prepared in order to clarify how to determine the principles and procedures regarding the broadcasting of radio, television and on-demand broadcast services via the Internet, the transmission of such services, the issuance of broadcast licences to Internet service providers and the supervision of broadcasting by platform operators. The draft has been published on RTUK's website.

The draft provides three types of licences for which media services providers would be able to apply; these cover, respectively, the following purposes:

- INTERNET-RD - radio broadcasting

- INTERNET-TV - television broadcasting

- INTERNET-IBYH - designed for providers that offer optional broadcasting services via the Internet.

Under the draft regulation, a media service provider would have to apply for each licence separately when offering broadcasting services falling under all of these three categories. The RTUK could detect unlicensed broadcasting activities either on its own initiative or upon receiving a complaint. In such cases, the RTUK would announce its findings on the RTUK official website and send a notification to the service providers concerned, informing them of the need to lodge an application for the relevant licence within three months. If the service providers did not apply for the necessary licence(s), the RTUK would ask a justice of the peace to order the removal of the unlicensed content or blockthe broadcasting activity in question.

Fees for the licences are envisaged as follows: radio license fee - TRY 10 000 (approx. EUR 1 420; television licence and licence for optional broadcasting services TRY 100 000 Turkish Lira (approx. EUR 14 .200).

• *Radyo, Televizyon ve İsteğe Bağlı Yayınların İnternet Ortamından Sunumu Hakkında Yönetmelik Taslağı* (Draft Regulation on Radio, Television, and Optional Broadcasting Services Provided on the Internet)
http://merlin.obs.coe.int/redirect.php?id=19304 TR

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Agenda

Book List