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EDITORIAL

The Internet is very often compared to the printing press. Indeed, both revolutionised the way people accessed and distributed information. In the case of Gutenberg's invention, for the first time in the history of civilisation, anybody who owned a printing press could easily reproduce any written text and distribute it in great numbers. That was obviously not acceptable for the powers that be, so laws regulating "the press" were swiftly introduced all around Europe.

The same evolution can be observed in the case of the Internet. There is little left from the original idea of absolute freedom of expression dreamed by tech pioneers, and a growing number of rules apply nowadays to speech made available online. Is a new Inquisition thus in place? Nothing can be further from the truth. The legal standards applied today are very different (at least in liberal democracies) to those in place at the time of Gutenberg and aim principally at protecting the interests of the people, not at suppressing criticism of the rich and powerful. The circumstances are also completely different. For starters, the Internet has made national borders online practically irrelevant and has created a number of new jurisdictional issues, as one can see in the ECtHR's recent judgment in *Richard Williamson v. Germany*. And yet, there are countries that believe that locking the stable door is still possible (and a good idea); see, for example, the Russian Federation's new Federal Statute that aims at enabling the Russian sector of the Internet to operate independently from the World Wide Web in the event of an emergency or foreign threat. The Internet has also multiplied to infinity the printing press' reach, making any one of us a potential journalist, with rights and duties attached thereto. In this regard, an interesting judgment issued by the Strasbourg court highlights the role of bloggers as "public watchdogs".

But of course, in the same way as one can legitimately divulge valuable facts and opinions to the public, one can also choose to spread misinformation and fake news. In order to fight against this scourge, the French regulator CSA has adopted a draft recommendation with a view to accompanying online platforms in setting up a specific action plan to promote the circulation of reliable news and combatting fake news that is "likely to disturb public order or compromise the sincerity of voting". To do this, the collaboration of big US companies such as Facebook, Google and Twitter is indispensable, and judging by the actions they took during March 2019 to implement their commitments related to the Code of Practice on Disinformation, all three platforms appear to have stepped up their efforts to combat false and misleading information in the run-up to the European Parliament elections. On the subject of these and other US companies, the issue of market dominance is also a matter of concern for European public authorities, as we can see from the investigation started by the Dutch Authority for Consumers and Markets (ACM) into an alleged abuse of dominance by Apple in its App Store.

This newsletter also bears witness to the variety of interests and rights that have

to be put in the public authorities' balance when regulating speech on the Internet. Concerning the protection of minors on the Internet, we report on the Italian AGCOM's criteria for the categorisation of both audiovisual works delivered via the Web and video-games, and the position paper on the protection of children and young people in the media of the Rhineland-Palatinate Media and Communication Authority in Germany. With regard to protection against harmful content, the UK's Department for Digital, Culture and Media and Sport (DCMS) has launched a consultative Online Harms White Paper which deals with issues such as the misuse of online sites by terrorist groups and sex offenders, online bullying and the use of disinformation, all of which threaten to undermine democratic values and principles.

This and so much more awaits you inside this month's newsletter.

Enjoy your read!

Maja Cappello, editor
European Audiovisual Observatory

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COUNCIL OF EUROPE

COE: MEDIA DIVISION

Report on freedom of expression in 2018

Ronan Ó Fathaigh
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On 2 May 2019 - the eve of World Press Freedom Day - the Information Society department of the Council of Europe (COE) published a report on Freedom of Expression in 2018. The 22-page report assesses the state of freedom of expression in the COE member states on the basis of the findings of the Council of Europe's monitoring mechanisms and bodies, which include the COE's Platform for the Promotion of Journalism and the Safety of Journalists. The Platform compiles a record of alerts regarding serious concerns about media freedom and the safety of journalists in COE member states issued by certain partner organisations (see, for example, IRIS 2018-3/6).

The report examines five distinct issues, namely, legal guarantees of freedom of expression; the safety of journalists and other media actors; media independence; media pluralism and diversity; and freedom of expression on the Internet. It details a number of findings from 2018, and notes that consecutive assessments of the state of the freedom of expression in Europe over the past five years have shown that threats to this anchor of democratic societies are growing across the continent. In 2018, there were at least two assassinations of journalists in Europe for reasons related to their work. Furthermore, smear campaigns and inflammatory rhetoric on the part of senior politicians are also on the rise - such phenomena undermine the ability of journalists and other media actors and whistle-blowers to fulfil their function of keeping power holders accountable. Notably, long-standing threats to media freedom and independence persisted in 2018, with shutdowns of media outlets and criminal prosecutions of journalists - often under the guise of anti-terrorism operations. Crucially, oversight by the European Court of Human Rights (ECtHR) remains a critical tool for ensuring that national laws and practices are consistent with the standards set out in the European Convention on Human Rights. The Court issued more than 70 judgments in Article 10-related cases in the course of 2018, finding violations in about two thirds of them (see, for example, IRIS 2019-5/2).

The report also includes a number of proposals for action by COE member states. Firstly, Recommendation CM/Rec(2016)4 on the protection of journalism and safety of journalists and other media actors should be rigorously implemented (see IRIS 2016-5/3). Secondly, counter-terrorism measures should be adopted

only following scrupulous human rights impact assessments, as they may be counter-productive if poorly implemented or overly draconian. Anti-terror and security laws should not unduly interfere with the right of the media to impart information of public interest and the right of people to receive it. Thirdly, enhanced efforts are required to develop a clear framework with respect to the growing responsibilities and duties of intermediaries related to content moderation. Guidance should be developed on how effectively to counter offensive and undesirable speech that is not criminally punishable - including through effective self-regulatory and co-regulatory measures as a means of balancing rights and responsibilities. Fourthly, public-service media must be effectively shielded from the growing pressure being exerted by political and economic interests. Enhanced efforts are required (including on the part of member states) to increase the sustainability of the media and to support a high standard of independent and investigative journalism, while fully respecting the editorial and operational autonomy of the media. Lastly, the extensive jurisprudence of the ECtHR relating to Article 10 ought to be consistently integrated into national judicial and regulatory systems.

Information Society Department of the Council of Europe, Freedom of Expression in 2018, DGI(2019)3, 2 May 2019

https://rm.coe.int/freedom-of-expression-2018-/1680943557

GERMANY

European Court of Human Rights: Richard Williamson v. Germany

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The European Court of Human Rights (ECtHR) delivered a decision in a case of Holocaust denial expressed in an interview broadcast on Swedish television, published on YouTube and reported in German media. The ECtHR found that the statements in the interview at issue were not protected by the right to freedom of expression under Article 10 of the European Convention on Human Rights (ECHR). The applicant is Mr Richard Williamson, a British national and former member of the Society of Saint Pius X, opposing the ecclesiastical reforms of the Second Vatican Council. He was excommunicated under the Code of Canon Law, but in 2009 the Congregation for Bishops decided to lift the excommunication, a decision that attracted significant media coverage. In an interview with the Swedish television channel SVT-1 - recorded in Germany -, Williamson made some statements about the Holocaust, denying the existence of gas chambers and stating that about two to three hundred thousand Jews perished in Nazi concentration camps. He also said that the Germans had a guilt complex about the gas chambers and the killing of six million Jews. The broadcast with the interview was soon also available on the video website of SVT-1 and on the video-sharing Internet site YouTube. The German weekly magazine Der Spiegel published an article in which Williamson's statements about the gas chambers during the Nazi regime were quoted verbatim. Subsequently, a variety of major German newspapers, television, and radio stations reported on Williamson's statements.

Williamson applied for a preliminary injunction from the German civil courts, for an order for the removal of the recording of the interview from the Internet, but this request was rejected by the Nuremberg-Fürth Regional Court, mainly finding that the dissemination of his statements, including via the Internet, had been covered by Williamson's general consent to the interview. In 2012 the Regensburg District Court, at the public prosecutor's request, issued a penal order against Williamson, finding him guilty of incitement to hatred under Article 130 § 3 of the Criminal Code. This conviction was upheld by the Regensburg Regional Court in 2013, confirming that Williamson's statements in the interview had been capable of disturbing the public peace in Germany and constituted a criminal act. Williamson was sentenced to 90 day-fines of EUR 20 each. After the Nuremburg Court of Appeal rejected his appeal and the Federal Constitutional Court in 2017 declined his constitutional complaint, Williamson lodged an application before the ECtHR, complaining under Article 10 ECHR that his criminal conviction of incitement to hatred had breached his right to freedom of expression. In

particular, he argued that German law was not applicable to the statement at issue as the offence had not been committed in Germany: criminal liability for the offence of incitement to hatred could only be triggered once his statement became “public”; that is, once it had been broadcast in Sweden - where that statement was not subject to criminal liability - and when it was uploaded on the Internet. Williamson also argued that he had never intended that his statement be broadcast in Germany and that he had tried everything in his power to prevent its broadcast there.

The ECtHR observes that Williamson in essence argues that the German courts wrongfully applied domestic law and that the exercise of his right to freedom of expression, which had been lawful in one member Sstate, had been restricted by another member State where it was not lawful. The ECtHR however is of the opinion that Williamson agreed to provide the interview in Germany, while knowing that the statements he made were subject to criminal liability in Germany, and that he did not make a statement during the interview to insist that it not be broadcast in Germany. All he had done was to tell the interviewer to “be careful” as the statements were subject to criminal liability in Germany. The ECtHR accepts the findings by the German courts that the offence was committed in Germany, because the key feature of the offence, the interview, was carried out there and that his statements had been made “publicly” also with respect to Germany. The ECtHR is also satisfied that Williamson’s conviction was prescribed by law, and that it pursued the legitimate aim of preventing a disturbance of the public peace in Germany and thus the prevention of disorder and crime.

On the question of whether the interference with Williamson’s right to freedom of expression was necessary in a democratic society, the ECtHR refers to its Grand Chamber judgment in the case of Perinçek v. Switzerland (see IRIS 2016-1/1). In this decision, it confirms the findings by the German courts that Williamson explicitly denied the existence of gas chambers and the killing of Jews in those gas chambers under the Nazi regime and explicitly stated that not more than two or three hundred thousand Jews had perished in Nazi concentration camps. Williamson thus had downplayed acts of genocide. The ECtHR concludes that Williamson sought to use his right to freedom of expression with the aim of promoting ideas contrary to the text and spirit of the Convention and this circumstance weighs heavily in the assessment of the necessity of the interference. Referring to the findings by the German courts that Williamson had acted with intent, and with the awareness that his statements were subject to criminal liability in Germany, the ECtHR sees no reason to depart from that assessment and reiterates that it has always been sensitive to the national historical context when reviewing whether there exists a pressing social need for interference with rights under the ECHR. It reiterates that, in the light of their historical role and experience, States which have experienced the Nazi horrors may be regarded as having a special moral responsibility to distance themselves from the mass atrocities perpetrated by the Nazis.

The ECtHR finally observes that the sentence of 90 day-fines of EUR 20 each was very lenient and that the domestic authorities have justified the interference with Williamson’s right to freedom of expression with relevant and sufficient reasons,

not overstepping their margin of appreciation. As the interference at issue was proportionate to the legitimate aim pursued and was “necessary in a democratic society”, Williamson’s complaint is declared manifestly ill-founded and therefore inadmissible in accordance with Article 35 § 4 ECHR.

Decision by the European Court of Human Rights, Fifth Section, case of Richard Williamson v. Germany, Application no. 64496/17, 8 January 2019 and notified in writing on 31 January 2019

https://hudoc.echr.coe.int/eng?i=001-189777

RUSSIAN FEDERATION

European Court of Human Rights: Rebechenko v. Russia

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Human Rights Centre, Ghent University and Legal Human Academy

The European Court of Human Rights (ECtHR) delivered an interesting judgment on the freedom of expression of a blogger (see also Egill Einarsson v. Iceland (No. 2), IRIS 2018-9/2 and Savva Terentyev v. Russia, IRIS 2018-9/3). The ECtHR values the statements of the blogger as those of a "public watchdog" and finds that his conviction for defamation violated Article 10 of the European Convention on Human Rights (ECHR).

In 2015 Mr Maksim Sergeyevich Rebechenko published on YouTube a video with the title "Kolkhoz TV on Ukrainian crisis". In the video he made a series of critical comments about a speech by Ms F, the head of the Ust-Labinsky District and of the non-governmental organisation Human Rights Defender. In that speech on television Ms F had commented on the situation in the eastern region of Ukraine and relations between Russia and Ukraine. On the basis of Article 152 of the Russian Civil Code Ms F brought an action against Rebechenko, stating that he had offended her and had harmed her reputation. The Russian courts found that Rebechenko in an abusive and obscene language had disseminated untrue statements about Ms F which damaged her honour, dignity and reputation. The courts found that Ms F has sustained damage of a non-pecuniary nature due to emotional distress caused by the defamatory and discrediting statements and allusions to her unethical conduct. In accordance with the principle of reasonableness, taking into account the seriousness of the wrongful acts, the nature of the offence, and the contents of the publication, the degree of suffering involved, and that the information concerned a public activist and was available for the general public, Ms F was awarded 50,000 roubles (about 714 EUR) for non-pecuniary damages. Rebechenko was also ordered to delete the video from the Internet and to publish a retraction. After exhaustion of all national remedies, Rebechenko lodged an application before the ECtHR, complaining about a violation of his right to impart information under Article 10 ECHR.

The ECtHR first reiterates that freedom of expression has paramount importance as an essential foundation of a democratic society and a basic condition for its progress and the development of every person. It also confirms that this right applies not only to information or ideas that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock, or disturb the State or any sector of the population. The ECtHR refers to its practice recognising the essential role played by the press in a democratic society, while it has previously established that the press, as well as NGOs, exercise watchdog functions, and that the function of bloggers and popular users of social media may be also assimilated to that of "public watchdogs" as far as the protection afforded by Article 10 is concerned. As it was not disputed that the

interference Rebechenko complained of was prescribed by law and pursued a legitimate aim to protect the reputation or rights of others, the ECtHR examines whether the interference was necessary in a democratic society, and specifically whether it was proportionate to the aim pursued. In this regard the ECtHR recalls that whether an interference is necessary in a democratic society will depend on who spoke, about whom, on what subject of debate, whether the expressions used were facts or value judgments, and on procedural guarantees in the domestic courts, including reasoning of decisions and the nature and seriousness of penalties. The ECtHR emphasises that in the present case, the applicant was a blogger who uploaded his video to a YouTube channel with more than 2,000 subscribers, while more than 80,000 visitors viewed the video. In such circumstances the interference must be examined on the basis of the same principles applied when assessing the role of a free press in ensuring the proper functioning of a democratic society. The ECtHR observes that Ms F had a profile similar to that of professional politicians, who should be prepared to tolerate a more demanding public scrutiny, while the issues raised in the video were undeniably part of a political debate on a matter of general and public concern: relations between Russia and Ukraine, Russia's position in the international arena, and the impact of its foreign policy. The ECtHR reiterates in this connection that its approach has been consistently to require very strong reasons for justifying restrictions on political speech. Furthermore, Rebechenko has acted in good faith and in pursuit of the legitimate aim of protecting the democratic development of, and contributing to free political debate, while his statements were value judgments, the truth of which cannot be proven. Moreover, as far as the reasoning of the domestic decisions is concerned, the ECtHR notes that the Russian courts failed to analyse the contents of the video; they did not even use any extracts from the video to support their position on the case and did not perform a balancing exercise between the need to protect Ms F's reputation and Rebechenko's right to impart information on issues of general interest. As to the sanctions imposed, the order to delete the video, publish a retraction, and pay about EUR 714 in non-pecuniary damages, the ECtHR notes that these sanctions could discourage the participation of the press in debates on matters of legitimate public concern. The ECtHR concludes that the domestic courts failed to strike a fair balance between the relevant interests and to establish a "pressing social need" for putting the protection of Ms F's reputation above Rebechenko's right to freedom of expression. Therefore, the Court considers that the domestic courts overstepped the narrow margin of appreciation afforded to them in matters of debate of public interest and that the interference was not necessary in a democratic society. Accordingly there has been a violation of Article 10 ECHR. Russia is ordered to pay Rebechenko EUR 714 in respect of pecuniary damage; EUR 500 in respect of non-pecuniary damages; and EUR 71 in respect of costs and expenses.

Judgment by the European Court of Human Rights, Third Section, sitting as a Committee of three judges, case of Rebechenko v. Russia, Application no. 10257/17, 16 April 2019

https://hudoc.echr.coe.int/eng?i=001-192468

EUROPEAN UNION

EU: EUROPEAN COMMISSION

European Commission: March 2019 monthly reports from Facebook, Google and Twitter

Christina Etteldorf

On 23 April 2019, the European Commission published the monthly reports from Facebook, Google and Twitter concerning actions taken during March 2019 to implement their commitments related to the Code of Practice on Disinformation. The reports demonstrate that all three platforms appear to have stepped up their efforts to combat false and misleading information in the run-up to the European Parliament elections. In particular, measures have been taken to ensure the findability and labelling of political advertising.

The Code of Practice on Disinformation, drawn up last year by the working group of the Multi-Stakeholder Forum on Disinformation, has been signed by all three platforms. As signatories, they are required to submit reports detailing the measures they have taken to combat disinformation. These reports, which form the basis for the Commission's recently published summary and evaluation, describe a host of measures designed to combat false and misleading information, especially in the political sphere.

All three networks already have publicly accessible libraries in which political ads are collected, although Google's ad library remains in the test phase. Data from these libraries can be used to search for political and issue-based ads, and thus to carry out independent assessments. The libraries are therefore a decisive tool for promoting transparency. However, the Commission regrets that Google and Twitter, unlike Facebook, have not adjusted their policies on issue-based advertising to ensure the findability and transparency of such ads.

All three reports state that ads are scrutinised in order to exclude misrepresentation or spammy behaviour, including ads with political content or politically relevant themes. While Facebook and Twitter failed to provide any concrete figures, Google reported that in March 2019, 10 234 actions had been taken against EU-based Google Ads advertisers for violating the company's policies on misrepresentation. Not all of these violations had necessarily been associated with disinformation campaigns. However, the Commission stressed that a deeper analysis would help elucidate the extent to which the enforcement of the platforms' policies helped to de-monetise imposter websites and websites that persistently purveyed disinformation.

With regard to the transparency of political ads, the platforms also report a series of measures. Google and Twitter, for example, have begun implementing their new election ads policy, which includes a compulsory verification process for advertisers wishing to run election ads for the European Parliament elections. Facebook also reports better labelling of political ads and how they are financed and, in relation to service integrity, the deletion of spam and fake accounts.

The reports also describe a raft of other measures that the platforms are taking to combat disinformation. Google, for example, is investing in media literacy, including training for journalists on countering disinformation, and training and security tools for election professionals. Like Facebook, Google is also backing so-called fact-checking by financially supporting FactCheck EU and providing new tools for checking and labelling content, which should enable search engines to easily recognise fact-checked articles and thus increase their visibility in search results.

Commission's analysis and platform reports

https://ec.europa.eu/digital-single-market/en/news/third-monthly-intermediate-results-eu-code-practice-against-disinformation

NATIONAL

GERMANY

[DE] BLM media council adopts digital ethics guidelines

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At its meeting on 11 April 2019, the media council of the Bayerische Landeszentrale für neue Medien (Bavarian New Media Authority - BLM) adopted a set of digital ethics guidelines. Its position paper, focusing on the ethical and socio-political aspects of digitisation, is designed to stimulate debate on the consequences of the increasing use of technology in the media and on future approaches to regulation. It forms part of the media council's efforts to identify how social rules on the use of new technologies can be established. The BLM is the regulatory body for broadcasting and telemedia services in Bavaria. Its media council adopted a total of seven digital ethics guidelines.

The first guidelines state that digitisation processes must build on the non-negotiable fundamental values of freedom, democracy, the rule of law and human rights. Transparency towards users is therefore an essential requirement. The aim must be to harness the potential of new technologies and keep pace with other countries while remaining aware of possible problems and taking appropriate counter-measures in good time.

A modern legal framework should also be created in order to ensure fair competition and prevent monopolies by promoting diversity. In order to foster diversity, smaller services must not be discriminated against in relation to open access and equal opportunities on platforms, for example.

Efforts must also be made to promote each individual's right to decide for themselves and to teach people how to set limits in relation to social media, online shopping or personal data, for example. Meanwhile, high-quality journalism and media research should continue to be supported. Since in-depth research, the comparison of opposing views and the separation of news and comments are more important than ever, media education must evolve as digitisation progresses. In research projects, the role played by intermediaries in opinion-forming processes, for example, should be investigated.

The paper also addresses the issue of artificial intelligence (AI). Nowadays, machine learning applications can be developed and used with minimal outlay. However, not every application is wanted by society. It may even be the fear of losing control in the face of intelligent digital solutions that is creating increasing uncertainty in western society and strengthening the position of populists with simple messages. The media council is therefore calling for a more interdisciplinary approach in AI research so that, in addition to economic and

technical factors, attention is paid to the human perspective.

At the beginning of April, the independent European High-Level Expert Group on Artificial Intelligence (HLEG AI) presented its final ethics guidelines for trustworthy AI, which deal mainly with the issues of control, security, data protection, non-discrimination, sustainability, accountability and transparency.

The BLM hopes to continue dialogue on ethical and socio-political issues related to digitisation at local and global levels. It believes the digital transformation also requires media authorities to act beyond their traditional remit and support broadcasters and viewers on the path to a multi-channel digital world.

Leitlinien des Medienrats der Bayerischen Landeszentrale für neue Medien

https://www.blm.de/infothek/positionen_und_reden/2019-04-11-positionspapier-leitlinien-digitale-ethik-11258

Guidelines of the Bavarian New Media Authority media council

[DE] Administrative appeal court confirms that Bild.de live streams can still be broadcast without a licence

Christina Etteldorf

In a ruling of 2 April 2019 (Case no. OVG 11 S 72.18), the Oberverwaltungsgericht Berlin-Brandenburg (Berlin-Brandenburg Administrative Appeal Court - OVG) decided that live streams available on the website of the Bild newspaper could continue to be broadcast for the time being without the need for a broadcasting licence. It therefore rejected a complaint from the Medienanstalt Berlin-Brandenburg (Berlin-Brandenburg media authority - mabb) about a decision taken by the Verwaltungsgericht Berlin (Berlin Administrative Court - VG) in 2018 (see IRIS 2019-1/13).

The case at hand concerned various Internet video services streamed live on the Bild website and various social media such as Facebook and YouTube. In July 2018, the mabb decided that this constituted broadcasting without a licence (which is required in Germany) because the services were linear audiovisual information and communication services aimed at the general public and designed for simultaneous reception. It therefore prohibited the live video streams (see IRIS 2018-7/15).

The publisher lodged an action against this decision and, at the same time, requested that the action be given suspensive effect under a summary procedure.The VG Berlin granted this request on the grounds that it was highly debatable whether the videos were provided “within a schedule”, which is a necessary part of the German concept of broadcasting. This aspect had not yet been conclusively clarified by the courts. Since such a complex question could not be answered in a summary procedure, it was decided that the effects of the decision should at least be postponed, as otherwise the publisher might lose audience reach and its activity, which was protected under the Basic Law, could be temporarily restricted, and this carried more weight than the mabb’s interest in the enforcement of the law.

The OVG Berlin-Brandenburg rejected the mabb’s appeal against this decision, essentially on the same grounds as those set out in the VG Berlin ruling. The mabb had complained in particular that the VG Berlin could have decided in the summary procedure whether the streams were provided “within a schedule” and whether they should therefore be classified as broadcasting. However, the OVG disagreed: although legal questions could, in principle, be answered in summary proceedings, this was not the case if the questions were so complex that there was not sufficient time to review all the evidence, in which case they must be answered in the main proceedings. The latter applied here since, in the digital world, the distinction between broadcasting, for which a licence was required, and telemedia, for which it was not, was not defined in either the Rundfunkstaatsvertrag (Inter-State Broadcasting Agreement) or the AVMSD, and was also highly contentious among legal experts. In the case at hand, it could be particularly relevant that, since the streams were not shown in a fixed time slot,

that is, systematically or regularly in terms of time of day or sequence, a summary examination could not determine whether they formed a cohesive sequence of programmes, as was generally required in order to be classified as broadcasting.

Finally, the appeal court ruled that the VG Berlin had correctly weighed up the relevant interests. The mabb had claimed that, since the content was received simultaneously, live transmissions had a much higher potential to influence the public through mass communication. Since this influence was difficult to control, prior checks of the broadcaster and its programming concept were necessary. However, the OVG rejected this argument on the grounds that the mabb had not expressed any concern about the actual content of the streams, but had in fact stated that there was no apparent reason why the necessary licences would have been refused. As a result, the public interest in the immediate enforcement of the mabb's prohibition order was reduced to a general interest in enforcement, which carried much less weight than the publisher's interests. In this respect, the OVG emphasised that features such as the comments functions that accompanied the live streams were very attractive to users.

Although the OVG's decision cannot be appealed, it is only provisional. A definitive verdict will only be reached in the parallel main proceedings, which may take some time.

Beschluss des OVG Berlin-Brandenburg vom 2. April 2019 (Az.: OVG 11 S 72.18)

http://www.gerichtsentscheidungen.berlin-brandenburg.de/jportal/?quelle=jlink&docid=MWRE190001247&psml=sammlung.psml&max=true&bs=10

[DE] Question on copyright breach by framing submitted to CJEU

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In a decision of 25 April 2019, the Bundesgerichtshof (Federal Supreme Court - BGH) submitted the following question to the Court of Justice of the European Union (CJEU): does embedding on a third-party website a work that, with the consent of the rightsholder, is available on a freely accessible website ("framing") constitute communication to the public in the sense of Article 3(1) of Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society if the work is embedded in a way that circumvents protective measures taken or ordered by the rightsholder?

In the related proceedings, the BGH must decide whether a collecting society is entitled to make the granting of a licence to use digitised, copyright-protected works on the Internet conditional on the user taking effective technical measures to prevent so-called "framing". Framing is the embedding of content provided on one website on a different, third-party website.

The Stiftung Preußischer Kulturbesitz (Prussian Cultural Heritage Foundation), which supports the German Digital Library, offers an online culture and knowledge platform containing links to digital content owned by partner cultural and academic institutions. Since the library stores thumbnail images of this digital content, some of which are copyright-protected, the foundation wanted, on its behalf, to obtain the necessary licences from the Verwertungsgesellschaft (VG) Bild-Kunst collecting society, which is responsible for managing the relevant rights. However, the VG Bild-Kunst said it would only grant the licences if the library agreed to take technical measures to prevent the content being framed. The foundation, which refused to make such a commitment, therefore asked the courts to rule that such a clause was unnecessary.

The lower-instance courts had taken different decisions on the matter. While the district court had rejected the action as inadmissible, the appeal court had ruled that the VG Bild-Kunst should grant the licences without the disputed clause. The Bundesgerichtshof has now suspended the proceedings pending clarification of the preliminary question.

Under Article 34(1), sentence 1 of the Verwertungsgesellschaftengesetz (Collecting Societies Act), the defendant, as a collecting society, is obliged, on the basis of the rights it manages, to grant any person, upon request, rights of use under reasonable conditions. However, it is also obliged to safeguard and enforce the rights of the authors that it represents. In the BGH's opinion, the defendant might therefore be entitled to demand that the plaintiff take technical measures to prevent framing. However, this was only the case if the authors' right to communicate their works to the public were violated if such protective measures were circumvented in order to embed the thumbnail images, which were freely

accessible to all Internet users on the plaintiff's website, on another website by means of framing. Since the BGH was unsure whether, in such a case, the right to communicate to the public, enshrined in Article 3(1) of Directive 2001/29/EC and transposed into German law by Article 15(2) of the Urhebergesetz (Copyright Act - UrhG) would be violated, it submitted the question to the CJEU.

In 2014, the CJEU decided, in the BestWater case (decision of 21 October 2014, Case no. C 348/13) that framing did not constitute communication to the public within the meaning of Article 3(1) of Directive 2001/29/EC if the work was not communicated to a new public and no new technical means were used. In the case at hand, however, the focus was on Article 34(1), sentence 1 of the Collecting Societies Act: whereas VG Bild-Kunst considered technical measures to prevent framing necessary in order to adequately safeguard and enforce the authors' rights, the foundation did not think the required measures were reasonable conditions in the sense of the Act because implementing them would be an expensive process.

Pressemitteilung des BGH vom 25. April 2019

https://www.bundesgerichtshof.de/SharedDocs/Pressemitteilungen/DE/2019/2019054.html?nn=10690868

[DE] Regional media authority publishes position paper on youth protection on the Internet

Jan Henrich
Institute of European Media Law (EMR), Saarbrücken/Brussels

At its closed meeting on 22 March 2019, the assembly of the Landeszentrale für Medien und Kommunikation Rheinland-Pfalz (Rhineland-Palatinate Media and Communication Authority - LMK) adopted a position paper on the protection of children and young people in the media. The LMK is the regulatory body for broadcasting and telemedia services in Rhineland-Palatinate.

The paper talks in particular about a technical paradigm shift. Despite legislation and the involvement of numerous actors, protection from content and the risks of Internet use is still inadequate. Children and young people are now only a mouse click away from extremely disturbing content. According to the LMK, recent findings have shown that protection systems are unable to keep up with the risks and dangers associated with technical progress and new, sometimes global forms of use. It refers to the JIM study published in November 2018 and the progress report entitled “Jugendliche sicher in Social Media” (Keeping young people safe on social media) published by jugendschutz.net. Both of these studies investigate the modern media consumption habits of young people and the complaints and protection mechanisms on social media platforms.

The LMK believes that action is required at several levels. Teaching media literacy is not enough, since content and service providers also need to be more accountable. The most common operating systems should be equipped with filter software interfaces and configuration options. Service providers whose users provide content should also offer a content classification system and require users to categorise their content. Network filters could be activated as standard on routers or service provider infrastructure.

The LMK also calls for greater use of the potential offered by automatic content recognition systems for the protection of children and young people. Freedom of opinion and the protection of children and young people in the media, which are both protected under constitutional law, are in a state of constant tension that must be repeatedly re-evaluated.

The LMK now plans to involve other organisations in the discussion in order to find allies to help implement their list of measures, which it hopes will be supported by the boards of all the regional media authorities.

Positionspapier der Landeszentrale für Medien und Kommunikation vom 22. März 2019

https://lmk-online.de/fileadmin/user_upload/Bilder/02_Aktuelles/02_Presse/2019/20190325_Positionspapier.pdf

[DE] TV broadcaster tm3 must cease broadcasting after licence is withdrawn

Jan Henrich
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In a decision of 12 February 2019, the Verwaltungsgericht Stuttgart (Stuttgart administrative court) rejected a request from TV broadcaster tm3 for a temporary injunction against the suspension of its broadcasting licence. The court therefore confirmed the immediate enforceability of the decision to withdraw the broadcaster's licence to organise and distribute the channel, which had been broadcast under the name "Family TV" until January.

In July 2017, the Landesanstalt für Kommunikation (LFK), the regulatory body for broadcasting and telemedia services in Baden-Württemberg, had withdrawn tm3's licence on the basis of a unanimous ruling of the Kommission für Zulassung und Aufsicht (Commission on Licensing and Supervision - ZAK) of the regional media authorities. It was the first time it had ever withdrawn the licence of an operating broadcaster. Its decision had been based on the unreliabilityof the broadcaster which, according to the LFK, had repeatedly breached copyright and media law provisions. For example, it had broadcast the film "Grand Hotel Budapest" or parts of it without a licence. As well as the licence for the channel "Family TV", the company's licence for its second channel, "blizz", was withdrawn.

After the regulator's ruling that the licence should be withdrawn with immediate effect, the broadcaster had appealed to the courts for emergency legal protection. In January 2019, it had celebrated its 10th anniversary and changed its name. After a temporary injunction was refused, the broadcaster had initially taken further legal action before finally ceasing its broadcasting operations on 31 March 2019. At the beginning of March, the broadcaster's CEO had been convicted in a separate criminal procedure. However, the company claimed that this case had nothing to do with the decision to cease broadcasting, which had been taken primarily because of the CEO's health problems. According to media reports, the broadcaster is also deeply in debt.

Pressemitteilung der Landesanstalt für Kommunikation (LFK), 18. Februar 2019

https://www.lfk.de/aktuelles/pressecenter/pressemitteilungen/detail/artikel/tm3-vormals-family-tv-muss-sendebetrieb-einstellen.html

SPAIN

[ES] Decision concerning information neutrality during election campaigns

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On 25 April 2019, a decision from the Junta Electoral Central (Central Electoral Commission - JEC) upheld an action brought by Ciutadans-Partido de la Ciudadanía against a decision of the Junta Electoral Provincial de Barcelona (Barcelona Electoral Commission - JEPB) of 15 April 2019, rejecting its complaint lodged against the Corporació Catalana de Mitjans Audiovisuals (Catalan Audiovisual Media Corporation - CCMA), for the broadcast of the programme 'Sense Ficció: Un procés dins el procés' on TV3 on 9 April 2019.

According to Article 66.1 of the Ley Orgánica del régimen electoral general (Representation of the People Institutional Act - LOREG), which regulates the use of mass media for electoral campaigning, "respect for political and social pluralism, as well as equality, proportionality and informational neutrality in the programming of publicly-owned media during the electoral period, shall be guaranteed by the organisation of said media and their control as provided for in legislation."

The documentary "Un procès dins el Procès" aimed to show the psychological and emotional process experienced by the families of politicians in pre-trial detention who are currently being tried by the Supreme Court. However, according to the JEC, it offered an image of victimization of a sector of Catalan society that is openly favourable to political positions that coincide with those defended by a part of the formations standing in the general elections of 28 April 2019. The documentary as a whole conveyed a message legitimising the separatist cause, which is described in the film as a just cause whose defenders are thus victims of abusive and unfounded oppression. Accordingly, the image of politicians in pre-trial detention (candidates in the current general elections) was presented in a favourable light, and the theses that these candidates held were portrayed as good and certain.

Although the documentary and its broadcasting were in principle covered by Article 20 of the Spanish Constitution (which protects freedom of expression and communication), from the moment in which the electoral process had begun, public-service media must have respected the principles of equality, proportionality, pluralism and political neutrality when elaborating their programming. The broadcasting of the documentary created an imbalance that violated those principles due to the absence of any kind of compensatory measure, either through information, interviews, or a documentary of similar characteristics that highlighted the ideological positions of other political formations. The JEC also explained that the fact that it is not always the

candidates directly, but their families who expressed opinions in favour of a certain political position, did not deprive the documentary of its advertising effectiveness and, consequently, of its capacity to violate the principles of proportionality and neutrality that the CCMA should respect throughout the electoral process.

Acuerdo de la Junta Electoral Central número 249/2019, 25 abril 2019

http://www.juntaelectoralcentral.es/cs/jec/doctrina/acuerdos?packedargs=anyosesion=2019&idacuerdoinstruccion=67567&idsesion=934&template=Doctrina%252FJEC_Detalle

FRANCE

[FR] Combatting the manipulation of news - CSA adopts draft recommendation directed at platforms

Amélie Blocman
Légipresse

The Act of 22 December 2018 on combatting the manipulation of news imposed a duty of cooperation on the principle on-line platform operators in a bid to combat the circulation of “fake news”. Under the Act, the national audiovisual regulatory authority (Conseil Supérieur de l’Audiovisuel - CSA) may make recommendations to operators with a view to aiding them in implementing specific actions aimed at promoting the circulation of reliable news and combatting fake news that is “likely to disturb public order or compromise the integrity of any poll”. Following a series of hearings involving representatives of the main platforms, the CSA drew up a draft recommendation, which it adopted on 25 April 2019. It then launched a public consultation process regarding the text in order to ascertain the opinions of the parties involved; the consultation will remain open until 10 May.

The recommendation, in keeping with the logic of stepping up the level of responsibility incumbent on the platforms, also takes account of the relevant European Union initiatives. It recommends that operators implement several types of measures: first and foremost, an accessible and visible reporting system, with a conspicuous heading, to be placed in close proximity to the content or account which someone may wish to report. The CSA recommends that (i) platforms should be able to harmonise their respective arrangements, (ii) users should have to click on no more than three hyperlinks, and (iii) all possible reasons for lodging a report (hate content, fake news, etc.) should be listed in a single dialogue box. It recommends enabling users to follow the progress of their report and the attention that it receives.

The CSA is also calling for transparency in the algorithms governing the organisation, selection and arrangement of content offered. To achieve this, the CSA is encouraging platforms to make sure that each user is able to trace all of his/her personal data used in recommending and prioritising content, and to provide clear, precise information on changes made to the algorithms applied.

Content created by press companies and agencies and audiovisual communication services needs to be promoted. To achieve this, the CSA recommends giving priority to information from sources identified as being reliable (particularly “fact-checking” content) in the results provided by search engines and news threads.

The CSA also recommends combatting accounts that propagate massive amounts of fake news by setting up appropriate procedures for detecting and blocking actions (such as warnings, deletions, quarantines, or restrictions on user rights,)

initiated by such accounts. The CSA also recommends setting up appropriate arrangements to enable users to be informed of the nature, origin and broadcasting methods of sponsored news content (regardless of whether or not it is generated by automated means). This type of content should be clearly differentiated from other content. Similarly, the CSA urges that an obligation of transparency be incumbent on sponsors of news content that relates to a debate of general interest (the identity of the person or company responsible should be identified, together with - in the case of a company - its registered office and the nature of its business activity). Lastly, the CSA invites platform operators to increase users' awareness of the influence exerted by their own content (particularly over younger people). To achieve this, the CSA recommends that platforms develop suitable tools (video modules, guides, etc.) for analysing the reliability of sources of information and encourage partnerships with people involved in providing education on information and the media.

In the light of this recommendation, platforms will be required to send to the CSA an annual declaration, before 31 March of the following year, specifying the methods they have used to implement each of the measures listed under Article 11 of the Act of 22 December 2018. The CSA also reserves the right to request information of any kind in the event of any actual or attempted manipulation of information that is likely to disturb the public order or compromise the integrity of any voting. It also invites platform operators to inform their users promptly should any such incident occur. Lastly, the CSA invites platforms to send in the name of the legal representative whom they have authorised to act as their contact person in France; they are required to nominate this person under Article 13 of the Act.

Communiqué de presse du CSA, « Projet de recommandation sur la lutte contre la diffusion de fausses informations: lancement d'une consultation publique », 25 avril 2019

https://www.csa.fr/Informer/Espace-presse/Communiques-de-presse/Projet-de-recommandation-sur-la-lutte-contre-la-diffusion-de-fausses-informations-lancement-d-une-consultation-publique

[FR] Freedom of information affects documentary classification

Amélie Blocman
Légipresse

On 5 April 2019, the Conseil d'Etat (Council of State) issued an interesting decision concerning the age rating of a documentary film containing violent images.

Previously, the company that produced the documentary "Salafistes" had asked the administrative court, on the grounds of misuse of power, to annul the Minister of Culture's decision to grant the film an "18" certificate, at the same time ordering that the following warning be given: "This film contains extremely violent and intolerant language and images that viewers may find upsetting". The administrative court had overturned that decision, but the appeal court had quashed the administrative court's ruling and refused the request lodged by the production company, which had then appealed to the Conseil d'Etat.

In its judgment, France's supreme administrative court pointed out that, when a film contains violent scenes, in order to decide whether any of the classification measures listed under Article R. 211-12 of the French Film and Animated Images Code (such as an "18" rating) are justified in order to protect children and respect for human dignity, it is necessary to take into account the way in which the scenes were filmed, whether the violence in question is presented in a positive light or trivialised, and any technique used to create a distance between the viewer and the violence.

In the most telling part of its decision, the court added that the evaluation of documentary films (carried out by the Ministry of Culture, subject to the court's assessment of any possible misuse of power) portraying real-life situations for educational purposes should take into account the need to guarantee respect for the freedom of information, which is protected in particular by Article 10 of the European Convention on Human Rights. Different approaches therefore seem to apply when it comes to the assessment of fictional cinematographic works (as opposed to documentary films).

The Conseil d'Etat observed that, in this case, the film in question contained violent scenes involving numerous instances of abuse, assassinations and acts of torture committed by groups claiming to belong to, in particular, ISIS or Al-Qaïda. It also showed the protagonists justifying their actions, with no counterbalancing critical commentary condemning the violence. However, the scenes formed a coherent part of the documentary, the purpose of which was to inform the public about the reality of Salafist violence. The Conseil d'Etat also noted that the warning at the start of the film and its dedication to the victims of the attacks of 13 November 2015 were likely to help viewers, including those aged under 18, understand the film's objective of denouncing violence.

As a result, the Conseil d'Etat ruled that, in order to protect freedom of information, the scenes should not be classified as "extremely violent" within the meaning of Article R. 211-12 4° of the French Film and Animated Images Code. Therefore, the appeal court had wrongly assessed the facts of the case by ruling that the Minister of Culture had correctly awarded an "18" rating for the film "Salafistes". The company's request for the decision to be lifted was therefore justified because the film's "18" rating was not necessary to protect young people and human dignity.

[FR] Hyperlinks to a video containing death threats

Amélie Blocman
Légipresse

The criminal chamber of the Court of Cassation has issued an important decision concerning the use of hyperlinks to criminally punishable content - in this case, a video. The case was brought after a police officer in charge of a regional département's public security lodged a claim for damages after discovering a video containing death threats against him on the Internet. Under Article 433-3(1) and (4) of the Penal Code, the penalty for making such threats is three years' imprisonment and a fine of EUR 45,000. The defendant, who had created a direct link to the disputed video on his own website, was referred to a criminal court for making death threats against a person holding a public post. The first-instance and appeal courts both found him guilty of the offence and fined him EUR 300.

The court found that, in a blog for which he was fully responsible and the nature of which he described as libertarian, the defendant had posted a hyperlink to a video containing explicit death threats against a named police officer. The video referred to events that had taken place a year and a half previously and in which the defendant himself had been involved. The court held that, by simply publishing the video without any critical comments in order to contribute to a debate involving the exchange of ideas, the defendant had not just supported its message, but had made it his own in an effort to direct it towards its intended recipient and to promote its dissemination. The court added that the video had originally been published on the dailymotion.com website (which was accessible to a huge audience) and then been posted online by the defendant via a hyperlink contained in a blog for which he accepted full responsibility and which was also widely accessible. Therefore, the author of the initial publication, and consequently the defendant, must have been aware that the threats would become known to their intended target.

The defendant lodged an appeal with the Court of Cassation, arguing in particular that the simple act of providing a hyperlink to a video containing death threats made by third parties was not the same as committing the offence. He also claimed that simply posting, in a blog, a hyperlink to a video containing death threats made by third parties that had already been published by someone else on another website, without it being part of any written content, did not constitute "publication". In his opinion, he had merely created an additional means of accessing the video, which did not amount to him making the threats himself.

However, in a succinct judgment, the Court of Cassation ruled that the appeal court's decision had been justified and that the offence in question had indeed been committed by the defendant in all respects, both factual and intentional. The appeal was therefore dismissed.

[FR] More relaxed rules for scheduling cinematographic works on television?

Amélie Blocman
Légipresse

As part of plans to reform the audiovisual sector (whose implementation - initially scheduled to begin before the summer but now likely to be delayed in view of the need to "make room in the legislative calendar"), the Minister for Culture announced on 26 April the launch of a public consultation process regarding the possibility of relaxing the rules for broadcasting cinematographic works on television.

The rules covered by the consultation are a product of Decree No. 90-66 of 17 January 1990 ("the Broadcasting Decree"). This text limits total broadcasting time for cinematographic works - imposing a ceiling of 192 films on "non-cinema" channels (plus an extra 52 in respect of art-house works and a ceiling of 500 films for cinema channels - and the broadcasting of such works on days and at times of day most likely to be damaging to cinemas (taking into account their schedules); it does this on the basis of a system differentiating between the various categories of relevant services (unencrypted channels, cinema channels, etc.). The cinema schedule has been relaxed over the years to take account of agreements concluded between editors and professionals in the cinema sector; this continuous relaxation has rendered the system increasingly complex. In return, editors have given undertakings to make a special effort in favour of the cinema sector.

As part of its proposals for revising the regulation of the audiovisual sector presented in September 2018, the national audiovisual regulatory authority (Conseil Supérieur de l'Audiovisuel - CSA) has suggested the relaxation of this arrangement. In an opinion delivered on 21 February 2019, the French national competition authority (Autorité de la Concurrence) stated that, for its part, it was considering advocating abolition or relaxation. The matter is therefore all the more acute.

As observed during the consultation process, relaxing the arrangement currently in force would make it possible firstly to improve access to cinematographic works free of charge if they are to be broadcast on unencrypted channels, thereby offering the public a wider choice (since members of the public do not necessarily have ready access to cinemas or to pay-TV and VOD offers). Secondly, it would make it possible to respond to the criticism that the arrangements currently in force are obsolete. To date, the 'delinearised' consultation of works (including catch-up TV offered by cinema services) that throws off all constraints regarding time of day and scheduling restrictions has not been accompanied by a corresponding drop in ticket sales.

If this relaxation were to lead to the total abolition of the film scheduling restrictions and broadcasting ceilings provided in the Broadcasting Decree, then the Act of 30 September 1986, which governs the laying down of such rules, could be amended as part of the draft legislation on the audiovisual sector.

The stakeholders are therefore being asked for their opinion on whether the regulations regarding the schedule for programming cinematographic works on television and the ceilings on the broadcasting of such works are still appropriate. In particular, they are asked whether the regulations make it possible to contribute to protecting the use made of films in cinemas, whether this is a good time to relax these rules, and especially whether a relaxation of the ceilings on broadcasting films should still retain different categories according to whether the service is a “cinema service” or not, or another distinguishing criterion should be introduced. The parties concerned are invited to submit their replies by 31 May.

Consultation publique sur l’assouplissement des règles relatives à la diffusion des oeuvres cinématographiques sur les services de télévision, 26 avril 2019

http://www.culture.gouv.fr/Thematiques/Audiovisuel/Actualites/Consultation-publique-sur-l-assouplissement-des-regles-relatives-a-la-diffusion-des-oeuvres-cinematographiques-sur-les-services-de-television

UNITED KINGDOM

[GB] DCMS launches Online Harms White Paper - consultation period ends 1 July 2019

Julian Wilkins
Wordley Partnership and Q Chambers

On 8 April 2019, the Department for Digital, Culture and Media and Sport (DCMS) launched its consultative Online Harms White Paper, which sets out the United Kingdom's proposals for regulations that would enable the UK to be the safest place in the world to go online, as well as the best place to start and grow a digital business.

The main online problems concern the misuse of online sites by terrorist groups and sex offenders, online bullying, and the use of disinformation that risks undermining democratic values and principles. Social media platforms use algorithms, which lead to "echo chambers" or "filter bubbles", where a user is presented with only one type of content instead of a diverse range of opinions. Rival criminal gangs use social media to promote and incite violence, as has seen by the recent rise in the UK of knife crime.

DCMS considers that current regulatory and voluntary initiatives have not gone far enough to tackle the various online problems; international partners are developing various regulations, but not a regulatory framework that would address a range of harms in a holistic manner. The UK wishes to lead the way in developing a proportionate and effective approach to enhancing a free, open and secure Internet.

Part of the solution lies in technology that is designed to help build a safe online environment. However, the wider goal is to develop rules and norms for the Internet, including protecting personal data, supporting competition in digital markets, and promoting sensible and secure digital design.

The large social media platforms have significant power and influence and are akin to publishers; some of these companies recognise their responsibility to comply with norms and rules.

DCMS wishes to create clear regulatory standards that balance the protection of freedom of expression without transgressing criminality such as content and activities that are damaging to children.

The UK will establish a new statutory duty of care to make companies take more responsibility for the safety of their users and address harm caused by content or activities on their services. Compliance with this duty of care will be overseen and enforced by an independent regulator. Companies will have to demonstrate their compliance with their duty of care; for instance, relevant terms and conditions will be required to be sufficiently clear and accessible to everyone - including children

and vulnerable users.

The regulator will measure the effectiveness of companies in enforcing their terms and conditions. It is proposed that the regulator's powers of enforcement will include substantial fines and even holding senior management personally responsible.

The regulator will provide a code of practice, but companies can also develop their own principles, provided that they explain and justify any alternative approach. Codes of practice regarding tackling terrorist activity or child sexual exploitation and abuse (CSEA) online must be approved by the Home Secretary.

The regulators will expect companies to address the magnitude of different threats. A culture of transparency, trust and accountability will be vital to the regulatory framework; as such, the regulator will be able to require from companies annual transparency reports on the prevalence of harmful material on their respective sites and counteraction being undertaken.

The regulator will work on a risk-based approach, with priority to be given to terrorist threats and child abuse. The regulator will have a legal duty to pay due regard to innovation while ensuring the preservation of privacy and freedom of expression. However, the regulator will aim to tackle a comprehensive set of online harms, ranging from illegal activity and content to behaviour that is harmful but not necessarily illegal.

The White Paper consultation process includes a series of questions designed to help to develop a range of practical but effective regulations. Also, the government will work with industry and other regulators to innovate technologies that support online safety, with such systems being embedded in new products and services.

The consultation will be open to the public but particularly encourage responses from stakeholders with relevant views, insights or evidence - including broadcasters, media organisations and the education sector. The White Paper regards online media literacy and awareness on the part of children, young people and adults as necessary for ensuring safe online use.

The consultation's aim is to gather opinions on various aspects of the proposed regulatory framework including the online services; options for appointing an independent regulatory body to implement, oversee and enforce the new regulatory framework; the enforcement powers of an independent regulatory body; potential redress mechanisms for online users; and measures to ensure that any regulation is targeted and proportionate. The consultation process closes on 1 July 2019.

Online Harms White Paper

https://www.gov.uk/government/consultations/online-harms-white-paper

[GB] Ofcom imposes fine of GBP 75 000 for failing to provide adequate protection for viewers

David Goldberg
deeJgee Research/Consultancy

The service in question is an Urdu-language news and current affairs channel, UK44 - the United Kingdom's first and only news and current affairs channel for the Pakistani and South Asian diaspora - which is licensed by City News Network. The issue concerned the broadcasting of abusive content amounting to "hate speech" against members of the Ahmadiyya Muslim community.

Two episodes of the current affairs discussion show, Point of View, were broadcast in December 2017. According to the UK's communications regulator, Ofcom, a guest - the same one in each programme, columnist Umar Riaz Abbas - made "repeated, serious and unsubstantiated allegations" about Ahmadi people, including that Ahmadi people had committed acts of murder, terrorism and treason, as well as undertaking political assassinations. Abbas also attributed conspiratorial intent to the actions of the Pakistani authorities towards the Ahmadiyya community, stating that they were being favoured in Pakistani society at the expense of orthodox Muslims.

Ofcom found that these programmes had contained uncontextualised hate speech and had breached Rules 2.3, 3.2 and 3.3 of the Broadcasting Code. Under the Code, licensees must not broadcast material that contains uncontextualised hate speech and abusive treatment of groups, religions or communities: Section 3 of the Code defines hate speech as: "all forms of expression which spread, incite, promote or justify hatred based on intolerance on the grounds of disability, ethnicity, gender, gender reassignment, nationality, race, religion, or sexual orientation."

Ofcom concluded that the serious nature of the breaches of the Broadcasting Code warranted the imposition of statutory sanctions. These include a financial penalty and a direction to the broadcaster to broadcast a statement of Ofcom's findings on a date and in a form to be determined by Ofcom.

The fine of GBP 75,000 will be paid by City News Network (SMC) Pvt Ltd to the HM Paymaster General. The station did not lose its licence because the network stated that since the breaches took place, it has discontinued the Point of View programme presenter's contract and taken disciplinary action against another staff member; it said that it had also introduced a 15-second delay for live programming; increased liaison between staff; increased monitoring of its live output; and provided company-wide compliance training. Ofcom decided not to strip City News Network of its licence in the light of these changes.

The notion of "context" is set out in the Guidance Note to Section 3.1. Thus far, including this decision, Ofcom has found five recorded breaches under Section 3 - all against Rule 3.1. According to the regulator, certain elements can affect the

likelihood that broadcast material could incite crime or disorder; these include the editorial purpose of a programme; the status or position of anyone featured in the material in question; whether a sufficient challenge was made to the material in question; unambiguous statements of religious nature; providing a platform for unchallenged views; and risk assessments and monitoring live output.

Point of View Channel 44, 4 and 11 December 2017, 17:00

https://www.ofcom.org.uk/__data/assets/pdf_file/0021/115509/Issue-357-Broadcast-On-Demand-Bulletin.pdf

Sanction Decision - Sanction (111)19 City News Network (SMC) Pvt Ltd

https://www.ofcom.org.uk/__data/assets/pdf_file/0017/144332/city-news-network-sanction-decision.pdf

ITALY

[IT] AGCOM sets forth criteria for the categorization of audiovisual works delivered via the Internet and video-games for the protection of minors

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Portolano Cavallo & Bocconi University

On 6 March 2019, the Italian Communication Authority (AGCOM) adopted resolution no. 74/19/CONS, by which, in accordance with Law no. 220/2016 (so-called Franceschini Law), it established the criteria to categorize audiovisual works delivered via the Internet and video-games in order to protect minors from inappropriate content. The notion of audiovisual content delivered via the Internet includes all the works that are primarily distributed via electronic communication services and networks. Video-games are defined as interactive multimedia works having recreational nature that users can enjoy via any media.

Pursuant to the Franceschini Law, categorization is a prerequisite for the audiovisual works delivered via the Internet and video-games to be distributed through electronic communication services and networks. It the responsibility of the relevant providers to ensure that audiovisual works delivered via the Internet and video-games conform to the categorization and to the relevant criteria established by AGCOM.

The categorization of audiovisual works primarily delivered via the Internet is based on two factors, namely the definition of different age groups and the adoption of thematic descriptions.

As to the first criterion, audiovisual works can be categorized as follows:

-works suitable for all audiences;

-works not suitable for minors under the age of 6;

-works not suitable for minors under the age of 12;

-works not suitable for minors under the age of 15;

-works not suitable for minors under the age of 18 (including subject to restricted circulation).

The thematic descriptions for categorizing audiovisual works include the following: discrimination and incitement to hatred, drugs, dangerous and easily imitable conducts, language, nudity, sex, threats, violence.

In addition to the above, AGCOM resolution provides for different pictograms to be featured in correspondence of the works falling within the said categories:

- in the case of works suitable for all audiences, the relevant pictogram consists of a green circle, which is featured for the entire duration of the works;

- in the case of works not suitable for audiences under the age of 6, 12, and 15, the relevant pictogram consists of an orange circle featuring, respectively, the number 6, 12, and 15 in white plus the wording Programma non adatto ai minori di anni 6/12/15 (Content not suitable for audiences under the age of 6/12/15); the symbol is featured for the entire duration of the works, whereas the wording must appear in full screen format for at least 12 seconds prior to the beginning of the transmission;

- in the case of works not suitable for audiences under the age of 18, the relevant pictogram consists of a red circle featuring the number 18 in white, plus the wording Programma non adatto ai minori di anni 18 (Content not suitable for audiences under the age of 18); the symbol is featured for the entire duration of the works, while the wording appears in full screen format prior to the beginning of the transmission and is displayed at the bottom of the screen for the entire duration of the works;

- in the case of works not suitable for audiences under the age of 18 subject to restricted circulation, the relevant pictogram consists of a red circle featuring the number 18 and the letter “R” in white, plus the wording Programma non adatto ai minori di anni 18 R (Content not suitable for audiences under the age of 18 - restricted); the symbol is featured for the entire duration of the works, while the wording appears in full screen format prior to the beginning of the transmission and is displayed at the bottom of the screen for the entire duration of the works.

The resolution also requires operators providing audiovisual media service by electronic communication means, and hosting service providers that make available to the public duly categorized works, to take the appropriate technical measures to restrict or prevent the circulation of content in accordance with the categorization thereof. Such measures include, among others: technical identifying devices suitable for recognition by parental control mechanisms; technical devices creating barriers to entry; time restrictions on the transmission of content; implementation of security software; and age verification systems.

Furthermore, video-games are subject to categorization depending on different age groups, namely:

-AGCom 3: video-games suitable for all audiences;

-AGCom 4-6: video-games suitable for audiences from the age of 4 to the age of 6;

-AGCom 7: video-games suitable for audiences from the age of 7;

-AGCom 12: video-games suitable for audiences from the age of 12;

-AGCom 16: video-games suitable for audiences from the age of 16;

-AGCom 18: video-games suitable for adults only.

Like audiovisual works, video-games are categorized on the basis of a variety of thematic descriptions, including: profanity, discrimination and incitement to hatred; drugs; fear; gambling; sex; violence; and purchases as part of the video-game.

All the video-games already subject to categorization pursuant to the Pan European Game Information's (PEGI) procedure are considered to comply with the requirements set forth in the resolution.

For the categorization of both audiovisual works distributed via electronic communication services and networks, and video-games, AGCOM will establish an ad-hoc co-regulation technical committee (Tavolo tecnico di co-regalamentazione). It will also release guidelines specifying the criteria for categorizing audiovisual works and video-games respectively within 90 days as of the adoption of the resolution.

Autorità per le garanzie nelle comunicazioni, All. A, Regolamento sulla classificazione delle opere audiovisive destinate al web e dei videogiochi di cui all'art. 10, commi 1 e 2, del decreto legislativo 7 dicembre 2017, n. 203, recante "Riforma delle disposizioni legislative in materia di tutela dei minori nel settore cinematografico e audiovisivo, a norma dell'art. 33 della legge 14 novembre 2016, n. 220"

https://www.agcom.it/documents/10179/14174217/Allegato+17-4-2019/c8e379cb-2849-46fc-ba39-78784a273e56?version=1.0

[IT] New guidelines concerning the processing of personal data for purposes of electoral propaganda and political communication

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Portolano Cavallo

On 18 April 2019, the Italian Data Protection Authority (Garante per la protezione dei dati personali, Garante) issued the Resolution on Electoral Propaganda and Political Communication. The Resolution, in view of the imminent 2019 European elections, provides rules that data controllers (including political parties, organizations, promoters' and supporters' committees as well as candidates) shall follow when processing personal data for electoral propaganda or political communication purposes.

Firstly, the Resolution clarifies the point at which data controllers must obtain data subjects' consent and, instead, when they can rely on other legal bases (such as legitimate interest). For instance, political parties and other political organizations shall not obtain data subjects' consent to process personal data included in electoral lists, other public lists, and registers kept for electoral purposes. In addition, consent is not required where the data controller is a foundation, organization, or any other entity having as a corporate purpose the pursuit of political propaganda purposes and the data subjects are associates of the foundation, organization, or entity, or individuals with whom they have regular contact. Conversely, consent shall be required to process occasional supporters' personal data or the personal data of participants to non-political associations, entities, and organizations. More generally, consent is necessary in a number of situations where, in accordance with the purpose limitation principle, the political propaganda purpose is not compatible with the purposes for which the data was originally collected/published. For instance, consent is also required to process contact details available on public directories or on the Internet (including social networks) as well as to process, with political propaganda purposes, personal data obtained in the context of professional, business. and/or healthcare activities. In any case, data controllers shall not process personal data for propaganda purposes when the personal data is collected or processed by public entities for institutional purposes, such as personal data included in the civil registry or state archives, data on non-voting individuals included in electoral lists, data annotated by scrutinizers during elections, data included in the public directories of professional associations, or data collected by public institutions as a part of the assessment as to the activities carried out in the course of the office.

Secondly, subject to the principle of accountability, the Resolution clarifies that the decisions issued in the past and exempting data controllers from the duty to provide the information notice could be useful for data controllers to determine whether they may be exempted under Article 14 (4) GDPR and the measures to protect the data subjects' rights and freedoms. For instance, political subjects (such as political parties, candidates, etc.) may be exempted from the duty to

provide individuals with the information notice where they collect personal data from electoral lists, and for the sole duration of the relevant elections. In this context, publication of the information notice on national/local newspapers or on the data controller's website (instead of provision of the information notice to each concerned individual), together with the insertion of the contact details in the propaganda materials, could be an acceptable measure to protect the data subjects' rights.

Finally, the Resolution contains provisions regarding the role of third parties involved in the processing (in particular, when data controllers purchase databases of third parties to send political/electoral propaganda, they shall verify that the selling third parties obtained data subjects' consent), the data subjects' rights (data controllers shall grant the rights provided under Articles 15-22 GDPR), and the applicable sanctions. In particular, as far as European elections are concerned, the sanctions provided for by Regulation (EU, Euratom) no. 1141/2041 (as last amended in 2019) on the statute and funding of European political parties and European political foundations shall apply in addition to the sanctions provided under GDPR.

Autorità garante per la protezione dei dati personali, provvedimento in materia di propaganda elettorale e comunicazione politica - provvedimento del 18 aprile 2019

https://www.garanteprivacy.it/web/guest/home/docweb/-/docweb-display/docweb/9105201

NETHERLANDS

[NL] Authority for Consumers and Markets (ACM) starts investigation into abuse of dominance by Apple in its App Store

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On 11 April 2019, in response to its market study into mobile-app stores, the Netherlands Authority for Consumers and Markets (Autoriteit Consument & Markt, ACM), announced that it will investigate whether Apple abuses its dominant position in its App Store. Under competition law, if a business enjoys a dominant position, this should not undermine competition, and businesses should be able to compete fairly with each other.

ACM's remit is to ensure that markets work well for businesses and their consumers. Since Apple and Google have attained strong positions in the market of mobile app stores, ACM resolved to gain greater insight into this market. Accordingly, ACM launched its market study into mobile app stores on 25 June 2018 and published its findings in a report dated 11 April 2019. In it, ACM analysed the relationship between the mobile app stores of Apple and Google on the one hand and app providers on the other. As a result, ACM was able to understand better how app providers get their apps into the Google Play Store and the App Store, and what influence these tech companies have on the availability and functioning of apps.

ACM received several reports from app providers that appear to indicate that Apple was abusing its dominant position in its App Store. These app providers indicated that they did not always have a fair chance to compete, because Apple and Google are able to determine and control what apps are available in their mobile app stores. In this way, they favour their own apps or apps that are pre-installed on smartphones. Nor can app providers always use the technical facilities of an iPhone.

Furthermore, the study demonstrated that there is a lack of realistic alternatives available for numerous app providers to offer their apps to Dutch consumers. In order to reach consumers, it is almost inevitable that a company's app is present in the App Store or Google Play Store. Since app providers are largely dependent on Apple and Google, the latter companies are, at least in theory, able to set unfair terms and conditions for their app stores. For example, app providers are obliged to use the in-app purchases payment system of Apple and Google. These app providers are not allowed to link to other payment systems, and this could deter consumers from purchasing an app. According to app providers, which sell digital content or services, another example of the unfair terms and conditions is that they are obliged to pay a 30% commission to Apple and Google during the first year in which they offer an app. In addition to these "unfair" terms and

conditions, several app providers stated that it is difficult to communicate with Apple and Google about these terms and conditions. In the light of all the findings of the market study, ACM decided that it is necessary to conduct further research regarding the question of whether Apple abuses its dominant position in its App Store.

As for the investigation, given the great importance of app stores for app providers, ACM stated in its market study report that Apple and Google are required to enable fair competition and to be transparent, for instance in procedures by which they approve and select apps to be displayed in their stores. ACM will, therefore, investigate whether Apple has violated article 102 of the Treaty on the Functioning of the European Union (which prohibits the abuse of a dominant position) by, for example, favouring their own apps over apps made by competing companies.

The investigation will initially focus on Apple, because ACM received the most concrete reports from app providers (in particular Dutch news media companies) about the conduct of Apple in its App Store. Therefore, the investigation will focus on Dutch apps that offer news through Apple's App Store. According to ACM, the received reports could indicate a violation of antitrust legislation. Furthermore, ACM calls on app providers to report whether they experience problems in Apple's App Store. They also have the option of anonymously reporting issues or problems in Google's Play Store. ACM will use any such data received during the course of the investigation.

ACM start onderzoek misbruik machtspositie Apple in App Store, Autoriteit Consument & Markt, 11 april 2019

https://www.acm.nl/nl/publicaties/acm-start-onderzoek-misbruik-machtspositie-apple-app-store

Authoriteit Consument en Markt, "Marktstudie appstores", 11 april 2019

https://www.acm.nl/sites/default/files/documents/market-study-into-mobile-app-stores.pdf

[NL] Two Dutch public service broadcasters fined by the Dutch Media Authority for prohibited communications

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In two decisions of 26 February 2019 and 12 March 2019, the Dutch Media Authority (Commissariaat voor de Media - CvdM) fined two Dutch public service broadcasters for infringing the Dutch Media Act (Mediawet 2008). According to the CvdM, the public broadcasters are both liable for prohibited forms of expression in one of their television shows.

Under the Dutch Media Act, media offered by public service broadcasters are not allowed to contain avoidable expressions (vermijdbare uitingen) that clearly have the effect of promoting the purchase of certain products or services (article 2.89). This provision is specified in a general administrative decree (Mediabesluit 2008). The decree stipulates that avoidable expressions are allowed in television shows with an informative or educational nature if the expression in question (1) fits within the context of the offered media, (2) does not affect the formula or integrity of the media (3) is not broadcast in an exaggerated or excessive manner, and (4) does not involve the specific promotion of the product or services mentioned.

The first fine was imposed by the CvdM on a public service broadcaster with regard to an informative television show in which a variety of questions from the audience about wines are answered. In one of the shows, the host is wearing a T-shirt from his own merchandise line. At the same time that the programme in question was re-broadcast, the t-shirt was also available for sale in the online store of the host. According to the CvdM, the explicit and excessive display of the T-shirt in the show while it was on sale constituted a form of expression that is prohibited under the Dutch Media Act. The CvdM did take into account the fact that the trademark on the T-shirt had been covered and that the public broadcaster did order the removal of the T-shirt from the online store immediately after finding out that it was being offered for sale. In the light of these circumstances, the fine was lowered to EUR 10 000.

The CvdM imposed a second fine on a different public service broadcaster for showing in a talk show a movie clip that had been taken from the social media webpage of one of the talk show’s guests. In the clip, the guest was using and promoting fitness equipment. In response to a question asked by the talk show host, the equipment and its brand were discussed during the show. The CvdM states that the showing of the movie clip during the talk show also constituted a form of prohibited communication. The public service broadcaster argued in its own defence that the clip had been merely illustrative. Moreover, the comments made in respect of the product had been unavoidable due to the fact that the show had been broadcast live. The CvdM rejected these arguments, stating that the movie clip had been selected in advance and that a different picture or clip could have been used for illustrative purposes. The broadcaster also argued that

reasonable measures had been taken by the host, who had intervened and switched topics once it had become clear that the fitness equipment in question was a commercial product. The CvdM ruled that the fact that the talk show host had intervened was irrelevant in this case since the topic had not been introduced by the talk show guest. Since the public service broadcaster had already received a warning for an earlier infringement of the same provision in November 2017, the imposed fine was set at EUR 20 000.

Commissariaat voor de Media, "Sanctiebeschikking 712584/716346 AVROTROS in verband met het programma Gorts Wijnkwartier", 26 februari 2019

https://www.cvdm.nl/wp-content/uploads/2019/03/2019-sanctiebeschikking-AVRO-TROS_Gorts-Wijnkwartier_CLEANED.pdf

Commissariaat voor de Media, 'Sanctiebeschikking 712585/716769 KRO-NCRV in verband met het programma Jinek', 12 maart 2019

https://www.cvdm.nl/wp-content/uploads/2019/03/Sanctiebeschikking-KRO-NCRV-voor-Jinek.pdf

ROMANIA

[RO] Audiovisual requirements for the European elections

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The Consiliul Naţional al Audiovizualului (National Audiovisual Council, CNA) reminded on 9 April 2019 all the audiovisual broadcasters involved in the editorial coverage of the electoral campaign for the 26 May European elections to be held in Romania that they have the obligation to observe the legislation in the field (see IRIS 2009-6/28, IRIS 2011-3/29, IRIS 2014-5/27).

Considering that in the audiovisual area between 27 April 2019, from 00:00 to 25 May 2019 to 7:00, the electoral campaign for the European elections is underway, the CNA reminded the public and private radio and television stations wishing to serve the public interest by organizing the editorial coverage of the electoral campaign through the audiovisual program services, that they have the obligation to observe the provisions of the legislation in the field, including the recently adopted Decision no. 308/2019 with regard to the rules of the audiovisual electoral campaign for the election of the members from Romania in the European Parliament.

The CNA members decided on 9 April 2019 to draw the attention of moderators of electoral debates to observe the principle of impartiality, to ensure the necessary balance for conducting such broadcasts, and to intervene if the guests of the programs do not observe the provisions of the audiovisual legislation.

The presence of candidates and their supporters on public and commercial radio and television stations may take place in electoral programs in accordance with the principles of fairness, equilibrium, and impartiality designed to contribute to the transmission of undistorted messages to the public, ensuring that it is properly informed on the basis of expressing a pluralism of opinions, the Council recalled.

As a guarantor of the public interest in the field of audiovisual communication, the National Audiovisual Council has warned that it will carefully monitor all broadcasts intended to cover the electoral campaign on radio and television stations and will apply sanctions if it finds breaches of the legal provisions.

Consiliul Naţional al Audiovizualului - Comunicat de presă 9 aprilie 2019

http://www.cna.ro/In-aten-ia-radiodifuzorilor,9500.html

RUSSIAN FEDERATION

[RU] Sovereign Internet Law adopted

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The wording of the Federal Statutes "On amendments to the Federal Statutes 'On Communications' and 'On Information, Information Technologies and the Protection of Information'" states its aim to be that of enabling the Russian sector of the Internet to operate independently of the World Wide Web in the event of an emergency or foreign threat.

On 16 April 2019, the Russian State Duma approved the bill in its third reading, and on 22 April, the Federation Council (the upper house of the Russian Parliament) approved it. It was signed by President Vladimir Putin on 1 May 2019 and enters into force on 1 November 2019 (with the exception of some provisions).

The Statute adds a new chapter (7-1) to the Federal Statute "On Communications" giving control over Internet network routing either to the state regulator, Roskomnadzor, or the Federal Service for the Supervision of Communications, Information Technology and Mass Media (see IRIS 2012-8/36). It provides that Internet Service Providers (ISPs) should connect with other ISPs (or peers), at Internet exchange points (IXes) approved by Roskomnadzor and listed in a special register, and that these IXes should not allow unapproved ISPs to peer. The Statute also establishes a centralised system of devices capable of blocking Internet traffic. It requires ISPs to install devices enabling DPI ("Deep Packet Inspection") - which the government would provide free of charge - in their networks. The Statute also details Russian ISPs' existing obligations, under Russian law, to filter and block content using other methods.

Under the new system, Roskomnadzor will monitor threats to Russia's Internet access and transmit (via special devices) instructions to ISPs about the countering of such threats. Cross-border Internet traffic will be kept under rigid state control. Any blocking will result from direct interaction between the Government and the ISP in question and will be extra-judicial and non-transparent for third parties.

The Statute states that the new measures will be activated in the event of a potential threat to the "stability, security and integrity" of the Internet. It does not define a "threat to security", although it does differentiate it from an emergency situation or a state of emergency. The Statute gives the Government full discretion to decide what will constitute a security threat and what range of measures and procedures will be activated in order to put networks under the "centralised control" of Roskomnadzor. Technical support to Roskomnadzor shall be provided by a new department, to be established at the Government-owned General Radio Frequency Centre.

Furthermore, the Statute creates a national domain name system (DNS) and requires Internet providers to start using it from 2021. Roskomnadzor will found an NGO that will provide, register and store domain names in the national domain zone (.ru, .su, .рф) and serve as the national coordinator.

О внесении изменений в Федеральный закон «О связи» и Федеральный закон «Об информации, информационных технологиях и о защите информации», 01/05/2019, N 90-FZ

http://publication.pravo.gov.ru/Document/View/0001201905010025?index=0&rangeSize=1

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