IRIS newsletter

IRIS 2019-10

A publication
of the European Audiovisual Observatory

European Audiovisual Observatory

COUNCIL OF EUROPE
CONSEIL DE L'EUROPE

Publisher:

European Audiovisual Observatory
76, allée de la Robertsau
F-67000 STRASBOURG

Tel. : +33 (0) 3 90 21 60 00
Fax : +33 (0) 3 90 21 60 19
E-mail: obs@obs.coe.int
www.obs.coe.int

Comments and Contributions to: iris@obs.coe.int

Executive Director: Susanne Nikoltchev

E-mail: nathalie.fundone@coe.int

Web Design:

Coordination: Cyril Chaboisseau, European Audiovisual Observatory • Development and Integration: www.logidee.com • Layout: www.acom-europe.com and www.logidee.com
ISSN 2078-6158

EDITORIAL

"*Information is the oxygen of the modern age. It seeps through the walls topped by barbed wire, it wafts across the electrified borders. The Goliath of totalitarianism will be brought down by the David of the microchip*." This sentence, pronounced in June 1989 by former US President Ronald Reagan, is full of the cyberoptimism prevalent in the early days of the Internet.

Thirty years later, we have become soberingly aware that the microchip is not only controlled by other giants at Silicon Valley, but also that the information freely flowing through our borders may be toxic in some cases. Certainly, nobody believes anymore that there should be no speech restrictions on the Internet. However, any judge trying to remove illegal content available online stumbles into a seemingly unsurmountable hurdle: the Internet is global, but jurisdiction is only national.

Now, the Court of Justice of the European Union (CJEU) seems to have, for the first time, shaken this apparently unmovable principle. In a judgment handed down on 3 October 2019, it ruled that EU law does not preclude a court of a member state from "*ordering a host provider to remove information covered by [an] injunction or to block access to that information worldwide within the framework of the relevant international law*". Is this a first attempt at creating a worldwide cyber-jurisdiction? Probably not, but in any event, this judgment has stirred up quite a controversy about the reach of the EU's jurisdictional grasp. Which is all the more surprising in view of the fact that in another judgment concerning the so-called "right to be forgotten", the CJEU ruled that where a search engine operator "*grants a request for de-referencing [...] that operator is not required to carry out that de-referencing on all versions of its search engine, but on the versions of that search engine corresponding to all the Member States [...]*". So, no jumping EU borders here. These two apparently contradictory judgments, reported hereunder, will certainly provide food for thought and debate in legal and tech circles in the months to come.

With these and many other news items, we round up the year with this last issue of the European Audiovisual Observatory's legal newsletter.

On behalf of our team, let me wish you a good end to 2019 and an enjoyable read of our many reports!

Maja Cappello, Editor
European Audiovisual Observatory

Table of content

INTERNATIONAL

COUNCIL OF EUROPE

HUNGARY

European Court of Human Rights: Szurovecz v. Hungary

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

In the case *Szurovecz v. Hungary,* the European Court of Human Rights (ECtHR) has held that a refusal to grant a journalist access to a reception centre for asylum seekers in Hungary violated his right to freedom of expression under Article 10 of the European Convention on Human Rights (ECHR). The ECtHR emphasised that newsgathering, including first-hand observation by a journalist reporting on a matter of significant public interest, was an essential part of journalistic research and press freedom.

In 2015, the Hungarian journalist Illes Szurovecz, working for the Internet newsportal abcug.hu, requested access to the Debrecen Reception Centre, a major housing centre for asylum seekers entering Hungary. Szurovecz sought permission to visit the centre in order to interview asylum seekers and take photographs after serious concerns had been raised about their treatment. Indeed, the Commissioner for Fundamental Rights had issued a report condemning the living conditions in the centre, which amounted to inhuman and degrading treatment. Furthermore, the reception centre was constantly presented in the state-owned media as part of the government's anti-immigration campaign. The Office of Immigration and Nationality (OIN), however, rejected Szurovecz's request, noting that there was constant media interest in asylum seekers and that regular visits to the reception centre would infringe their private lives. Moreover, many people accommodated in the reception centre had fled from some form of persecution, and information about them appearing in the press could endanger both their own security and that of their families. Szurovecz appealed, but his action was declared inadmissible, as the OIN's decision was not subject to judicial review.

Before the Strasbourg Court, Szurovecz complained that the Hungarian authorities had violated his right to impart information under Article 10 ECHR by refusing his request to enter the premises of the Debrecen Reception Centre with a view to writing a report on the living conditions of asylum seekers. A coalition of international organisations, including the Media Legal Defence Initiative, Index on Censorship and the European Centre for Press and Media Freedom, supported Szurovecz's complaint. The third-party intervention emphasised that newsgathering, including physical access to the places where important events are developing, is an essential component of investigative journalism (see also

Butkevich v. Russia, IRIS 2018-4/2 and compare with *Endy Gęsina-Torres v. Poland,* IRIS 2018-5/1).

The Hungarian Government argued that the complaint was based on a claim to a right of access to information which did not fall within the scope of Article 10 ECHR. Furthermore, the government submitted that should the ECtHR find that Article 10 was applicable, access to the reception centre had not been necessary for Szurovecz to express his opinion on an issue of public interest, since he had had access to information provided by international organisations and NGOs, as well as other alternative sources. Furthermore, he could have interviewed refugees outside the premises of the reception centre and he could have obtained photographs taken by others. Finally, the government argued that the interference with the right to receive information under Article 10 was justified by referring to the asylum seekers' right to respect for private life under Article 8, as well as their right to life, physical integrity and personal liberty (Articles 2, 3 and 5 ECHR).

The ECtHR disagreed with the Hungarian Government on all points. First, it referred to its earlier case law according to which the gathering of information is an essential preparatory step in journalism and an inherent and protected part of press freedom. The Court reiterated that 'obstacles created in order to hinder access to information which is of public interest may discourage those working in the media or related fields from pursuing such matters. As a result, they may no longer be able to play their vital role as "public watchdogs", and their ability to provide accurate and reliable information may be adversely affected'. The Court found that the Hungarian authorities had prevented Szurovecz from gathering information first hand and from verifying the information about the conditions of detention provided by other sources. This constituted an interference with the exercise of his right to freedom of expression in that it hindered a preparatory step prior to publication, that is to say, journalistic research (see *Dammann v. Switzerland,* IRIS 2006-6/3, *Társaság a Szabadságjogokért v. Hungary*, IRIS 2009/7-1 and *Schweizerische Radio- und Fernseh gesellschaft SRG v. Switzerland*, IRIS 2012-8/3).The ECtHR accepted that the interference at issue was prescribed by law and pursued the legitimate aim of protecting the private lives of asylum seekers and camp residents. However, in view of the importance of the media in a democratic society and of reporting on matters of considerable public interest, the ECtHR considered that the rather summary reasoning put forward by the OIN and the absence in its decision of any real balancing of the interests at issue, failed to demonstrate convincingly that the refusal of permission to enter and conduct research in the reception centre was necessary in a democratic society. Above all, the fact that the refusal was absolute rendered it disproportionate to the aims pursued and did not meet a "pressing social need".

The ECtHR considered that the matter of how residents were accommodated in state-run reception centres, whether the state fulfilled its international obligations towards asylum seekers and whether this vulnerable group had the ability to fully enjoy their human rights, was 'undisputedly newsworthy and of great public significance'. It emphasised that 'the public interest in reporting from certain

locations is especially relevant where the authorities' handling of vulnerable groups is at stake'. The watchdog role of the media assumes particular importance in such contexts, since their presence is a guarantee that the authorities can be held to account for their conduct (see *Pentikäinen v. Finland*, IRIS 2016-1/2). The ECtHR found that the conclusion of the OIN in refusing access to the reception centre was reached without any sensible consideration of Szurovecz's interest as a journalist in conducting his research or of the interest of the public in receiving information on a matter of public interest.

Although the ECtHR ultimately agreed that the reasons adduced by the OIN, relying on the safety and private lives of refugees and asylum seekers, were undoubtedly "relevant", it did not find them "sufficient" in the light of the necessity test under Article 10, section 2 ECHR. The ECtHR referred to the fact that Szurovecz explained that he would only take photos of individuals who had given their prior consent and, if needed, also obtain written authorisation from them, while the OIN has not taken any notice of this argument. Furthermore, neither the OIN nor the government have indicated in what respect the safety of asylum seekers would have been jeopardised in practice by the proposed research, especially if it had taken place only with the consent of the individuals involved. The Court was also of the opinion that the existence of other alternatives to direct newsgathering within the reception centre did not extinguish Szurovecz's interest in having face-to-face discussions on and gaining first-hand impressions of living conditions there. Hence, the availability of other forms and tools of research were not sufficient reasons to justify the interference complained of or to remedy the prejudice caused by the refusal to grant authorisation to enter the reception centre. Finally, there was no legal possibility or judicial review open to Szurovecz to allow him to argue for the need to gain access to the reception centre in order to exercise his right to impart information. The Court unanimously concluded that Article 10 ECHR has been violated.

ECtHR Fourth Section, Szurovecz v. Hungary, Application no. 15428/16, 8 October 2019

https://hudoc.echr.coe.int/eng?i=001-196418

EUROPEAN UNION

AUSTRIA

Court of Justice of the European Union: Facebook can be compelled to track illegal content worldwide

Léa Chochon
European Audiovisual Observatory

In a judgment issued on Thursday 3 October 2019, the Court of Justice of the European Union (CJEU) decided that EU law does not prevent Facebook from being ordered to monitor and remove, at worldwide level, content that is declared to be illegal in an EU member state, or content that is identical or deemed equivalent. The judgment follows a request for a preliminary ruling from the Austrian Supreme Court concerning the interpretation of Article 15(1) of Directive 2000/31/EC on electronic commerce, which prohibits member states from imposing a general obligation on providers to monitor the information which they transmit or store, or to actively seek facts indicating illegal activity.

The request was submitted as part of a dispute between the former Austrian Green MP Eva Glawischnig-Piesczek and Facebook Ireland Limited concerning a comment posted by a Facebook user that insulted and defamed the applicant in relation to the publication of a press article containing a photograph of her. The applicant had previously written to Facebook asking it to delete the comment, before turning to the Austrian courts when her request was not met. The dispute revolved around whether a cease-and-desist order made against a host provider that operates a social network may be extended to statements whose wording is identical to a statement previously declared unlawful and/or having equivalent content of which it is not aware, and if so, at what geographical level.

The CJEU stated first of all that the exemption from liability provided in Article 14(1) of the Directive is without prejudice to the power of a national court to require a host provider to terminate or prevent an infringement. In this case, Facebook could not have benefited from such an exemption because it had been informed of the infringement and had failed to respond expeditiously. The Court then explained that the prohibition against imposing a general obligation enshrined in Article 15 did not concern the monitoring obligations in a specific case. A specific case was defined as a case similar to the one at hand, that is, a particular piece of information stored by a host provider that was the subject of a complaint by a user of the social network concerned and declared illegal by a court in a member state. Regarding the extension of an injunction to include identical content, the Court noted that the very nature of a social network was the swift flow of information on a large scale, which created “a genuine risk that information which was held to be illegal is subsequently reproduced and shared”. Concerning equivalent content, the Court stressed that this was “information

conveying a message the content of which remains essentially unchanged". In other words, it was the content of the conveyed message that had, in itself, been declared illegal, so the inclusion of such information was justified when the message conveyed was unchanged, provided that the search for the equivalent content did not "require the host provider to carry out an independent assessment of that content", although the latter could have recourse to automated search tools and technologies. Finally, the Court stated that such an injunction could produce effects worldwide because the directive did not impose any territorial limitation, as long as the directive was consistent with the rules applicable at international level.

Facebook and digital rights activists have heavily criticised this decision, especially its inclusion of equivalent content, which they consider "a vague concept" that may lead to severe restrictions of freedom of expression. Others have welcomed the judgment because it does not oblige host providers to actively search and monitor all content, but requires them to take greater responsibility, as a minimum, for illegal information and content that is brought to their attention.

CJEU, judgment of 3 October 2019, Eva Glawischnig-Piesczek v Facebook Ireland Limited, C-18/18

http://curia.europa.eu/juris/document/document.jsf;jsessionid=C9327F03E00B7EBB32C5157AAD2F219F?text=&docid=218621&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=1637144

GERMANY

Court of Justice of the European Union: Users must actively consent to cookies

Christina Etteldorf

In a judgment of 1 October 2019 in Case C-673/17, the Court of Justice of the European Union decided that the consent necessary for storing and accessing cookies on a website user's device was not validly constituted by way of a pre-checked checkbox that the user had to deselect to refuse his or her consent. Rather, consent must be given clearly and unambiguously in relation to the specific circumstances and with the necessary information provided.

The CJEU ruling follows a dispute in Germany between the Bundesverband der Verbraucherzentralen und Verbraucherverbände – Verbraucherzentrale Bundesverband e. V. (Federal Union of Consumer Organisations and Associations — Federation of Consumer Organisations – vzbv) and Planet49 GmbH, an online gaming company. In 2013, Planet49 organised a lottery in which users had to enter their names and addresses in order to take part. The online form provided for this purpose included a checkbox with a preselected tick, even though the box did not need to be ticked for the user to take part. Unless they deselected the tick in the checkbox, participants agreed that cookies could be set on their device, enabling Planet49 to evaluate their surfing and user behaviour on the websites of advertising partners and thereby enabling advertising based on their interests. The vzbv brought an action before the German national courts, arguing, *inter alia,* that the aforementioned method of giving consent did not satisfy the requirements of German law. While the lower-instance courts upheld the action at least in part, the Bundesgerichtshof (Federal Supreme Court) referred the case to the CJEU, along with questions about the requirements of the ePrivacy Directive (Directive 2002/58/EC as amended by Directive 2009/136/EC) and the Data Protection Directive (Directive 95/46/EC) concerning effective consent and the information obligations of parties that process data.

In its judgment, the CJEU stressed firstly that, under Article 5(3) of the ePrivacy Directive, the storing of information, or the gaining of access to information already stored in a user's terminal equipment was only permitted if the user concerned had given his or her consent on the basis of clear and comprehensive information in accordance with Article 2 of the Data Protection Directive. Effective consent in this context, however, required active behaviour, and consent given in the form of a preselected checkbox which users had to deselect to refuse their consent was inadequate. It also made no difference whether the information stored in or accessed from the user's device was personal data or not. This provision of EU law was designed to protect users' privacy and, in particular, to prevent hidden identifiers or other similar devices entering their terminal equipment. However, the CJEU did not describe in detail what kind of cookies

were covered by the provision.

Regarding the clear and comprehensive information that was required for effective consent, the CJEU explained that this must put the user in a position to be able to determine easily the consequences of any consent he or she might give and ensure that the consent given was well informed. It must therefore be clearly comprehensible and sufficiently detailed so as to enable the user to comprehend the functioning of the cookies employed. According to the CJEU, this information includes the identity of the controller and the purposes of the processing, as well as the duration of the operation of the cookies and whether third parties may have access to them.

In principle, the CJEU's judgment concerns the 'old' legal situation under the Data Protection Directive, which has since been replaced by the General Data Protection Regulation (GDPR). However, in relation to the GDPR, the CJEU specifically commented on the judgment's future relevance, stating that its interpretation was borne out by the GDPR, which expressly laid down the need for active consent. Under the proposal for an ePrivacy Regulation (COM/2017/010 final), which is designed to reform the ePrivacy Directive, the restructuring of the rules on cookies is currently being debated. Rather than relaxing these rules, current discussions suggest that they will be tightened under the new provisions. However, the current trilogue procedure looks unlikely to result in an agreement in the near future.

Judgment of the CJEU of 1 October 2019 in case C-673/17

http://curia.europa.eu/juris/document/document.jsf?text=&docid=218462&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=1490926

FRANCE

Court of Justice of the European Union: Search engines must accede to requests for the de-referencing of certain sensitive data

Gionata Bouchè

In its judgment of 24 September 2019, the Court of Justice of the European Union ("CJEU") extended the prohibition to process special categories of personal data under EU data protection legislation to search engine operators acting as controllers. Building on its previous decision in *Google Spain* (see IRIS 2014-6/3), the CJEU ruled that operators of search engines are, in principle, required to accede to de-referencing requests regarding links to websites displaying sensitive data (for example, information related to religious or philosophical beliefs, sex life, criminal convictions, etc.), subject to certain exceptions.

In the main dispute, Google refused to comply with GC, AF, BH and ED's requests to de-reference a series of links leading to third-party websites, displayed in response to the online searches for their individual names. In particular, the content of these websites consisted of a vignette satirically depicting the first applicant (a French politician) that was pseudonymously uploaded on YouTube, and several articles which reported on AF's previous involvement with the Church of Scientology, the judicial proceedings brought against BH, and ED's past criminal conviction.

The applicants requested the French data protection authority (*Commission nationale de l'informatique et des libertés,* CNIL) to take action against Google. After the CNIL had dismissed their claims, an appeal was brought before the Conseil d'État, which chose to refer a series of questions to the CJEU concerning the applicability of the general prohibition to process sensitive data to search engine operators and the conditions under which the latter would be required to de-reference links to websites containing sensitive data.

The CJEU reiterated that search engine operators needed to conduct their activities in compliance with the Data Protection Directive, which was replaced by Regulation 2016/679 (see IRIS 2018-6/7) only after the dispute at hand had already arisen. The CJEU therefore stressed that they remained subject to the prohibition and restrictions imposed under Article 8 (1) and (5) of Directive 95/46, which requires search engine operators to abstain from the processing of personal data disclosing sensitive information related to religious, philosophical and sexual orientation, etc., while allowing the processing of information concerning criminal convictions only under the supervision of a public authority. The reasoning behind this decision was that referencing to third-party websites displayed to users of search engines amounted to an act of verification capable of impacting the fundamental rights to privacy and data protection of users.

However, the CJEU acknowledged that although the fundamental rights of data subjects generally overrode the public interest, this may vary on the basis of the nature of the information, the sensitivity for the data subject's private life and the interest of the public, also considering the data subject's role in public life. For that reason, it found that before deciding on a request for the de-referencing of links to websites that expose sensitive data, search engine operators must determine whether a refusal to de-reference is strictly necessary in order to protect the freedom of potentially interested users in searching and gaining access to such information, while taking into account the relevant factors of the case and the seriousness of the interference.

In addition, the CJEU specified that where the sensitive data displayed corresponds to information about criminal proceedings no longer reflecting the current legal status, operators need to consider (a) the nature and seriousness of the offence, (b) the progress and the outcome of the proceedings, (c) the time elapsed, (d) the data subject's public role and past conduct, (e) the public's interest at the time of the request, (f) the content and form of the publication and (h) the consequences of publication for the data subject. To conclude, the CJEU held that search engine operators were obliged to provide an "overall picture" of data subjects closely reflecting the current legal situation by adjusting the list of search results associated with their names.

Judgment of the CJEU (Grand Chamber), Case C-136/17, 24 September 2019

http://curia.europa.eu/juris/document/document.jsf?text=&docid=218106&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=1534347

Court of Justice of the European Union: Territorial scope of the “right to erasure” limited to the EU

Melinda Rucz
Institute for Information Law (IViR)

On 24 September 2019, the Court of Justice of the European Union (CJEU) delivered its judgment in the case of Google v. CNIL. The case builds on the Google Spain decision, in which the CJEU recognised search engine operators’ obligation to remove certain links upon request (see IRIS 2014-6/3). In the present case, the CJEU clarified the territorial scope of this obligation. Specifically, the CJEU held that EU law does not require search engine operators to remove links from all domain name extensions when granting an “erasure request”.

The case concerned a dispute between Google and the French data protection authority (Commission nationale de l’informatique et des libertés – CNIL). In 2015, the CNIL ordered Google to remove links from all of its search engine’s domain name extensions when acting on a request for erasure. Google refused to comply with the order, and it removed links only from those domain names of its search engine that corresponded with EU member states’ versions of Google (such as google.fr). In response, the CNIL issued a decision imposing a fine of EUR 100 000 on Google for failing to comply with its order (see IRIS 2016-5/13). Google challenged the decision of the CNIL before the Council of State of France, arguing that the right to erasure (also known as the “right to be forgotten”) does not require search engine operators to carry out the removal of links on a global basis. The Council of State decided to refer the matter to the CJEU, essentially asking the European court to clarify the territorial scope of the right to erasure, as enshrined in Article 12 of the Data Protection Directive (DPD), which has been replaced by Article 17 of the General Data Protection Regulation (GDPR) since the initiation of the case (see IRIS 2018-6/7).

In its judgment, the CJEU emphasised that the aim of the DPD and the GDPR is to ensure a high level of protection for personal data throughout the EU, and that to require search engines to carry out the removal of links globally would certainly meet this objective. Nonetheless, the CJEU emphasised that the right to the protection of personal data is not an absolute right and that it needs to be balanced against other rights – including Internet users’ right to freedom of information. The CJEU reasoned that in view of the fact that the right to erasure does not exist in several non-EU states , the balancing of the right to data protection with the right to freedom of information is likely to produce different results around the world.

The CJEU furthermore noted that the EU legislature has not set up any mechanism facilitating cooperation between EU and third states regarding the balancing exercise, whereas such a mechanism clearly exists to facilitate cooperation between EU member states. Consequently, the CJEU held that the EU legislature had not intended the scope of the right to erasure to extend beyond the territory of the EU. As a result, the CJEU found that no obligation exists under EU law to

carry out the removal of links on a global basis. Instead, search engine operators are only required to remove links from the EU member states' respective domain-name versions of the search engine. The CJEU furthermore stated that search engine operators must implement effective measures that prevent or seriously discourage Internet users in the EU from accessing removed links that appear on non-EU versions of the search engine. Lastly, the CJEU held that while EU law does not require the removal of links on a global basis, it does not actually prohibit this. Supervisory authorities in member states retain the authority to impose such an obligation, but only after careful balancing the right to the protection of personal data and the right to freedom of information.

Judgment of the CJEU (Grand Chamber), Case C-507/17, 24 September 2019

http://curia.europa.eu/juris/document/document.jsf?text=&docid=218105&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=1536535

ERGA

ERGA: Report on the implementation of the European Code of Practice on Disinformation

Raphaël Honoré
Conseil supérieur de l'audiovisuel (CSA)

As part of the fight against disinformation, and at the request of the European Commission – which adopted a communication entitled "Tackling online disinformation: a European approach" on 26 April 2018 – online platforms and advertising industry representatives drew up a self-regulatory European Code of Practice on Disinformation. This document comprises 15 separate commitments organised under five fields: scrutiny of ad placements; political advertising and issue-based advertising; integrity of services; empowering consumers; and empowering the research community.

The Action Plan against Disinformation jointly adopted by the EC and the High Representative of the Union for Foreign Affairs and Security Policy on 5 December 2018, states that "the Commission will, with the help of the European Regulators Group for Audio-visual Media Services (ERGA), monitor the implementation of the commitments [made] by the signatories of the Code of Practice". This was confirmed in the report assessing progress made in the implementation of the April Communication, which was published on the same day.

In this regard, in June 2019 ERGA published a report intended to provide an interim assessment of the implementation of the Code of Practice. Before turning to ERGA's conclusions on the subject, it is worth describing the method used by the European Regulators Group.

The report focuses on the first six months of 2019. In view of the high political stakes at the start of the year in respect of the European elections, the monitoring process focused mainly on the transparency of political advertising on three signatory platforms: Facebook, Google and Twitter. ERGA set up a sub-group to carry out this work. The members participating in the monitoring exercise had to answer nine questions, the results of which are summarised in the report (e.g. What is the degree of transparency of political and issue-based advertising? Are the amounts spent on political ads publicly disclosed?). A total of 16 regulatory authorities took part in the exercise, 13 of which answered all the questions. They based their answers on (i) the information published in the platforms' monthly reports (all three platforms involved had to send monthly reports on the implementation of the code between January and May 2018) and (ii) the various public databases, which were filtered and managed by the platforms; the platforms also carried out searches and directly checked advertisements that they

ran and. It should be noted that, according to its report, ERGA asked the platforms to provide raw, unfiltered data over a short period of time. However, the platforms did not provide access to this data.

In its conclusions, ERGA stressed that Facebook, Google and Twitter had made evident progress in the implementation of the code – in particular by creating public databases of political advertisements and procedures aimed at identifying political ads and their sponsors. However, it added that the databases could be developed further, that some information was inaccurate or incomplete, and that it regretted the platforms' failure to provide raw data (which was necessary in order to conduct an autonomous and effective monitoring process). It also noted that Facebook was the only platform during the course of the exercise to have tackled the question of issue-based advertisements by making them more transparent within its databases. Lastly, ERGA stated that “in general terms, these archives do not provide a clear, comprehensive and fully credible picture of the nature and scale of political advertising on these platforms during the monitoring period.”

The European Commission will continue to evaluate the implementation of the code by platforms (with ERGA’s help) during the second half of 2019. At the end of 2019, it will provide an overall assessment, and it does not rule out the possibility of taking further measures (including measures of a regulatory nature) if the signatories’ efforts are unsatisfactory.

Report of the activities carried out to assist the European Commission in the intermediate monitoring of the Code of practice on disinformation (ERGA)

http://erga-online.eu/wp-content/uploads/2019/06/ERGA-2019-06_Report-intermediate-monitoring-Code-of-Practice-on-disinformation.pdf

NATIONAL

CZECHIA

[CZ] Constitutional Court rejection on data retention

Jan Fučík
Česká televize

A group of 58 deputies sought the annulment of certain provisions of the Electronic Communications Act, the Criminal Procedure Act and the Police Act before the Constitutional Court. The proposal challenged certain provisions of the legislation on the preventive storage of traffic and location data in electronic communications with telecommunications service providers (hereinafter referred to as “data retention”) and the possibility of their subsequent provision to law enforcement services, secret services and the police. The contested legislation requires obligated entities (providers of electronic communications services, hereinafter referred to as 'operators') to keep 'data packets' retrospectively of all clients, users of telecommunications services, for a period of six months. This includes information about the telephone numbers of the calling and called party; the date and time of commencement and termination of the communication; and the location and movement of the user of the given service. In the case of using Internet services and e-mail communication, operators are also obliged to collect, in particular, user accounts; computer and search server ID (IP address, port number); information about the e-mail addresses of the communication participants; and the e-mail protocol.

The group of Members of Parliament proposes to repeal the contested legislation as it infringes the Constitution's guaranteed right to privacy under the protection against unauthorised interference in private and family life, the right to prevent the unauthorised collection, disclosure or other misuse of personal data under it, and the right to preserve the secrets of messages from a phone or other similar device.

Restrictions on personal integrity and privacy by public authorities are permitted only in exceptional cases - where necessary in a democratic society, unless the purpose pursued by the public interest can be achieved otherwise and if it is acceptable from the point of view of lawful existence and observance of effective and concrete safeguards against arbitrariness.

The Constitutional Court rejected the petition by the group of deputies. The requirement of the proportionality of interference with the right to privacy in the light of the Constitution and the related case law of the Constitutional Court fulfils the legislation in the context of today's social and technological developments and can be interpreted in a constitutionally conforming manner. Any request and the justification of its submission must be carefully considered by the competent

authority and carefully examined by the court in the light of the particular circumstances of the case under consideration and not limited to assessing the fulfilment of the formal requirements of the application as required by current legislation and Constitutional Court case law.

Nález Ústavního soudu č. 161/2019 Sb.

https://www.epravo.cz/_dataPublic/sbirky/2019/sb0069-2019.pdf

Decision of the Constitutional Court Nr. 161/2019. Coll.

GERMANY

[DE] BILD live streams require broadcasting licence

Jörg Ukrow
Institute of European Media Law (EMR), Saarbrücken/Brussels

In a ruling of 26 September 2019 (VG 27 K 365.18), the Verwaltungsgericht Berlin (Berlin Administrative Court) decided that BILD, Germany's best-selling daily newspaper, could no longer operate at least some of its live streams without a licence.In April 2018, BILD began organising and distributing online videos entitled "Die richtigen Fragen", "BILD live" and "BILD-Sport – Talk mit Thorsten Kinhöfer", which can be streamed live. In July 2018, the Medienanstalt Berlin-Brandenburg (Berlin-Brandenburg media authority – mabb), applying a decision of the Kommission für Zulassung und Aufsicht (Commission on Licensing and Supervision – ZAK) of the Landesmedienanstalten (regional media authorities), held that BILD was therefore broadcasting without a licence and filed an objection. It ruled that the live streams should be classified as broadcasting because they were linear audiovisual information and communication services aimed at the general public and designed for simultaneous reception. Since they were the result of negligent practice at the very least, they could be punished as administrative offences. The mabb also prohibited the organisation and distribution of the disputed live streams unless a licence application was submitted before 3 September 2018. BILD lodged an appeal against this decision with the Verwaltungsgericht Berlin (Berlin Administrative Court), arguing in particular that its live streams should not be classified as broadcasting and therefore did not require a licence because they were not provided within a schedule.The Verwaltungsgericht Berlin largely rejected the appeal. It ruled that the decision was lawful in substance and did not infringe the rights of the appellant. The mabb had correctly classified the live streams as broadcasting, for which a licence was required. The services were aimed at the general public and designed for simultaneous reception. They were also provided within a schedule, not least on account of their regularity or frequency. However, the court quashed the part of the disputed decision relating to the defendant's claim that broadcasting negligently without a licence could be punished as an administrative offence, since the defendant was not authorised to issue such an administrative decision.On account of the case's fundamental importance, the Verwaltungsgericht allowed an appeal to the Oberverwaltungsgericht Berlin-Brandenburg (Berlin-Brandenburg Administrative Appeal Court).

Pressemitteilung des Verwaltungsgerichts Berlin vom 26. September 2019

https://www.berlin.de/gerichte/verwaltungsgericht/presse/pressemitteilungen/2019/pressemitteilung.850121.php

Press release of the Berlin Administrative Court, 26 September 2019

[DE] Joyn and Prime Video streaming services classified as platforms subject to broadcasting law

Jörg Ukrow
Institute of European Media Law (EMR), Saarbrücken/Brussels

The Kommission für Zulassung und Aufsicht (Commission on Licensing and Supervision – ZAK) of the Landesmedienanstalten (regional media authorities), Germany's national media regulator whose responsibilities include regulating national media platforms, has classified the Joyn and Prime Video streaming services as platforms within the meaning of Article 52 of the Rundfunkstaatsvertrag (Inter-State Broadcasting Agreement – RStV). Munich-based Joyn GmbH is a joint venture of ProSiebenSat.1 Digital GmbH (50%) and Discovery Communications Europe Ltd. (50%). Amazon Instant Video Germany GmbH also has its headquarters in Munich. Both companies registered their services with the Bayerische Landeszentrale für neue Medien (Bavarian New Media Authority – BLM).

Joyn recently launched a new streaming platform that bundles content from over 50 television channels and is only available via the Internet. It includes channels operated by ProSiebenSat.1, the Discovery group, public service broadcasters and other content partners. RTL Group channels are not included. The content can be watched on demand or live on various devices, from smartphones to smart TVs. According to the ZAK, Joyn GmbH chooses the content and makes it freely available to users through the Joyn platform. Joyn is therefore a platform in the sense of the RStV and is distributed over the top via the Internet (OTT) – users only need Internet access to watch it.

Prime Video, on the other hand, is a Subscription-Video-on-Demand (SVOD) catalogue through which Amazon offers its customers access to a large selection of digital video content, especially films and box sets. All Amazon Prime subscribers in Germany can access the content of the Prime Video SVOD catalogue as part of their paid Amazon Prime subscription at no additional cost.

According to the ZAK, neither Joyn nor Prime Video currently have a dominant market position in the sense of Article 52(1)(2)(1) of the RStV. They are both therefore categorised as so-called 'privileged platforms'. Both platforms must therefore comply with general legal requirements and can be the subject of supervisory measures taken by the responsible regional media authority. However, the RStV's provisions concerning technical freedom of access and price regulation do not apply to such privileged platforms. The ZAK nevertheless reserves the right to reassess these services and the regulatory situation if there are any changes to the relevant market conditions or legal framework.

Pressemitteilung der ZAK vom 17. September 2019

https://www.die-medienanstalten.de/service/pressemitteilungen/meldung/news/streamingdienste-

joyn-und-prime-video-als-rundfunkrechtliche-plattformen-klassifiziert/

ZAK press release of 17 September 2019

[DE] Berlin District Court rules on verbal attacks on Green Party politician

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

In a ruling of 9 September 2019, the Landgericht Berlin (Berlin District Court) rejected an application from a prominent German politician for information about the data of a number of users of the Facebook social media platform who had insulted her in the comments section below a post. However, the court decided that the verbal attacks did not constitute defamation and were therefore not libellous. In the controversial ruling, the judges discussed the circumstances under which the public expression of opinions about politicians constituted libel, an offence punishable under civil and criminal law.

The case concerned a controversial comment made by the politician in the Berlin regional parliament in 1986 on the subject of paedophilia. She had been accused of supporting the idea that sex with children should not be treated as a punishable offence. The politician had rejected this accusation. In 2015, a distorted version of what she had said had been reproduced in a Facebook post in order to recreate the impression that she thought people who had sex with children should not be prosecuted. Numerous users had then posted insulting comments beneath this post.

The politician wanted to be given access to the data of the Facebook users concerned so she could take civil court action against them. Under German law, a service provider such as Facebook can share user data if it is relevant to unlawful content and necessary for the enforcement of civil law claims.

However, the court decided that none of the comments had been libellous in any of the 22 cases. Although some of them had been highly controversial and exaggerated, they were justified expressions of opinion because they concerned factual issues. Moreover, it considered that politicians needed to accept a higher level of criticism, including defamatory comments, if it was relevant to political issues.

The court’s decision was heavily criticised in some quarters because the judges ruled that not only clearly sexist insults but also comments that would usually be considered libellous were justified. For example, they thought the comment “Drecks Fotze” (dirty cunt) was legitimate criticism that the politician had to accept.

It is not yet clear whether the decision will become legally binding. The politician is reported to have appealed.

Landgericht Berlin, Beschluss vom 09. September 2019 - 27 AR 17/19

https://openjur.de/u/2180445.html

Berlin District Court ruling of 9 September 2019 – 27 AR 17/19

SPAIN

[ES] Central Electoral Commission opens sanctioning proceedings against the acting President of the Government

Francisco Javier Cabrera Blázquez
European Audiovisual Observatory

On 30 October 2019, the Junta Electoral Central (Central Electoral Commission – JEC) opened sanctioning proceedings against the Acting President of the Government for statements made during a TV programme and against the Acting Minister of Education and Government Spokesperson for statements made during a press conference. According to the JEC, although the statements made in the programme Al Rojo Vivo by the Acting President of the Government and candidate in the general elections of 10 November 2019 did not violate Article 53 of the LOREG concerning the prohibition on disseminating advertising or electoral propaganda through posters, commercial media or advertisements in the press, radio or other digital media from the calling of the elections to the legal start of the campaign, they did violate the prohibition contained in Article 50.2 LOREG concerning "acts organised or financed, directly or indirectly, by the public authorities that contain allusions to achievements or achievements obtained, or that use images or expressions coincident with or similar to those used in their own campaigns by any of the political entities competing for the elections" when these acts have been made from the time the elections are called until they are held. In the case at hand, the incriminated acts were commited using institutional means because the interview took place in one of the rooms of the Moncloa Palace, the seat of the Spanish Government, and particularly because they were disseminated on the official website of the Presidency of the Government. The JEC ordered that the interview must not appear on the official page mentioned, at least until the end of the electoral process.

The JEC also ruled that statements made during a press conference by the Acting Minister of Education and Government Spokesperson violated the same prohibition contained in Article 50.2 of the LOREG by having made allusions to the achievements or achievements allegedly obtained by the government, and therefore sanctioning proceedings were also initiated against her.

In both cases, the JEC took into account the circumstances surrounding the interviews in question, as well as the fact that a recent warning had been issued to all members of the government instructing them to refrain from violating the principle of neutrality that the public authorities are obliged to respect during the electoral process, in application of Article 50.2 of the LOREG.

Acuerdo de la Junta Electoral Central, Número 646/2019, (Núm. Expediente: 293/1140), 30 de octubre de 2019

http://www.juntaelectoralcentral.es/cs/jec/doctrina/acuerdos?anyosesion=2019&idacuerdoinstruccion=71001&idsesion=956&template=Doctrina/JEC_Detalle

Resolution of the Central Electoral Commission, No. 646/2019, (case no.: 293/1140), 30 October 2019

[ES] DPA fines a supermarket EUR 150 000 for data protection infringement

Miguel Recio
CMS Albiñana & Suárez de Lezo

On 2 September 2019, the *Agencia Española de Protección de Datos* (Spanish Data Protection Authority, AEPD) fined a supermarket EUR 150 000 for two infringements of the Spanish data protection legislation. On 25 April 2018, the AEPD initiated an investigation after the publication in several newspapers of images recorded by a CCTV system installed in a supermarket corresponding to events which had occurred in May 2011. The images showed the then President of the Community of Madrid supposedly putting some cosmetic products in her bag. The publication of those images was considered an infringement of the security measures, punishable by a fine of EUR 100 000, and of the minimisation principle on data protection, punishable by a fine of EUR 50 000.

Both infringements were considered equally serious under Organic Law 15/1999 of 13 December 1999 on the Protection of Personal Data, which was repealed by Organic Law 3/2018 of 5 December 2018 on the Protection of Personal Data and Guarantee of Digital Rights, currently in force. In particular, the supermarket had stored the images, infringing its obligation to adopt and implement security measures and to respect the data protection principles, as those images, relating to the investigation of a possible theft, had been kept and published without a legal basis for the processing.

The AEPD's resolution might be appealed through a contentious-administrative appeal submitted to the *Audiencia Nacional* (National Court) .

Resolución R/00423/2019 de la Agencia Española de Protección de Datos en el Procedimiento Sancionador Nº PS/00336/2018

https://www.aepd.es/resoluciones/PS-00336-2018_ORI.pdf

Resolution R/00423/2019 of the Spanish Data Protection Authority in the sanctioning procedure number PS/00336/2018

FRANCE

[FR] Invasion of an executive's privacy in television reporting legitimated by the right to information

Amélie Blocman
Légipresse

In 2016, during its "Envoyé Spécial" programme, France Télévisions broadcast a report on the crisis in milk production entitled "Sérieusement?! Lactalis: le beurre et l'argent du beurre" ("Really?! Lactalis – having its cake and eating it"). The CEO of Lactalis claimed that a sequence in the report mentioned the name of his holiday home, giving its exact location and showing aerial views of the property. Invoking invasion of privacy, he brought a claim against France Télévisions on the basis of Article 8 of the European Convention on Human Rights and Article 9 of the French Civil Code, seeking compensation for the harm caused; he also sought banning measures and the publication of the court's decision. After the court of appeal rejected his claim, he took the matter to the court of cassation.

In support of the cassation appeal, the party concerned submitted that the court of appeal had based its decision on the first three of the six criteria – which he considered to be cumulative – determined by the European Court of Human Rights for balancing interests in cases of conflict between the rights guaranteed by Articles 8 (the right to privacy) and 10 (the right to freedom of expression). He therefore argued that the court had not examined the repercussions of publishing the details regarding the CEO's country cottage, the circumstances of the images taken, and the sanction merited. He also observed that he felt the court of appeal had merely affirmed that the elements at issue had already been in the public domain (without any protest on the part of the CEO); however, he maintained that the freedom to divulge information concerning a person's private life that was already in the public domain was not an absolute principle. Lastly, he submitted that the court dealing with the merits of the case had not specifically acknowledged that there was ever any need to invade a person's privacy that could supposedly be justified by the right to freedom of expression, since he argued that there was a general debate in progress on the "milk crisis".

The court of cassation reiterated that, in balancing the rights involved in the case, it was necessary to take into consideration (i) the contribution made by the publication at issue to a debate of general interest, (ii) the prominence of the person in question, (iii) the purpose of the report, (iv) the previous behaviour of the person concerned, (v) the content, form and repercussions of publication, and (vi) if appropriate, the circumstances in which the photographs were taken. It was therefore for the court to carry out a specific examination of each of these criteria.

In the case at issue, the court of appeal found that the accompanying commentary provided in the disputed footage, which made it possible to locate

precisely the home of the person concerned, were characteristic of an invasion of privacy. It noted firstly that the report at issue referred specifically to the mobilisation of milk producers against Lactalis (the world's leading milk group, which they accused of setting prices that were too low) and compared the financial situation of milk producers with that of the group's CEO. The court added that the applicant's property holdings were not set out in detail: the information provided referred only to the property he owned in Mayenne, where the farmers depicted in the report also lived; this meant that the information fell within the debate of general interest initiated by the broadcast. The decision went on to state (citing the reasons set out by the judge of the court of cassation) that the person concerned, in his capacity as CEO of the Lactalis group, was a public figure, and the name and location of his second home had been divulged on several occasions in the printed press, but he had not in the past protested against the divulging of that information. The court also found that it was possible to consult an overall view of his property using the Google Maps on-line map service and that, in producing the report at issue, the journalist concerned had not set foot on the private property in question.

The court of cassation found that the court of appeal had indeed specifically examined each of the criteria to be applied when balancing the right to have one's privacy protected and the right to exercise freedom of expression, and had not been required to carry out any further investigation. The court had justified its decision to uphold that the invasion of the person's privacy had been legitimated by the public's entitlement to be informed.

Civ. 1re, 10 oct. 2019, n° 18-21.871, M. E. Besnier

https://www.courdecassation.fr/jurisprudence_2/premiere_chambre_civile_568/822_10_43725.html

Civ. 1re, 10 oct. 2019, n° 18-21.871, M. E. Besnier

[FR] Le Zapping/Vu: Canal Plus claims of “parasitism” by France Télévisions are dismissed

Amélie Blocman
Légipresse

Canal Plus, which began broadcasting the programme “Le Zapping” in 1989, announced on 27 June 2016 that it would be pulling the plug on the programme after a total of 27 years on the air. Seven months later, France Télévisions launched “Vu”, a programme based on a series of very short clips from French television programmes. The programme was co-produced by the former producer of the Canal Plus programme, who had worked on “Le Zapping” from day one and had been dismissed by the pay-TV channel a few months before the programme was taken off the air. After writing to France Télévisions, warning it not to copy the characteristics of “Le Zapping”, Canal Plus sued the public audiovisual group for parasitism and demanded EUR 42 million in compensation for financial, reputational and non-material damage.

Canal Plus accused the makers of the “Vu” programme of following in the footsteps of its former programme by using exactly the same concept, structure, spirit and format. It also accused them of asking its former director, whose name was deliberately shown, to produce the programme. Referring to the freedom of creation and the freedom to conduct a business, the public broadcasting group denied following in the footsteps of Canal Plus and engaging in unfair practices, and pointed out that the similarities were attributable to the fact that the two programmes were of the same genre. It claimed that “Le Zapping”-type programmes were television’s equivalent of press reviews in the printed press.

The commercial court pointed out that the term “parasitism” comprises all the ways in which one economic operator can interfere in the wake of another in order to benefit from its work and know-how at no cost to itself.

Having initially warned France Télévisions in writing not to copy the four “principal characteristics” of its programme “Le Zapping”, Canal Plus, in its complaint to the court, only referred to the programme’s 5-6 minute format, which was similar to that of its own former programme, and the fact that the programme’s logo also comprised white letters on a black background.

The court ruled that “Le Zapping”-type programmes were now part of a sufficiently established genre and that similarities between different programmes – especially with regard to their structure, spirit and format – were inevitable. Moreover, there were numerous differences between the two programmes at issue, such as their titles, the placement of their respective logos, the interlude between sequences, and the sound and visual presentation.

At the very least, the court ruled, it had not been proved that the characteristics of the Canal Plus programme had been copied. In particular, neither the length of the daily episode of “Vu”, nor the presence of a logo comprising white letters on a

black background could give credence to the accusation of parasitism. Finally, Canal Plus had not shown that these aspects were the result of specific investments on its part, from which France Télévisions had sought to benefit at no cost to itself.

Lastly, the court ruled that there was no reason why France Télévisions should not have asked a team of experienced professionals who were available on the job market to produce a “Le Zapping”-type programme. Case law recognises that everyone is entitled to use the skills and professional experience they have acquired in previous jobs. In this case, the programme’s producer and his former colleagues had been free of any obligation or non-competition clause vis-à-vis Canal Plus, and the channel had failed to prove that France Télévisions had tried to recruit the producer prior to his dismissal by Canal Plus.

Since France Télévisions was not guilty of parasitism, the Canal Plus application was dismissed.

Trib. Com. Paris, 21 octobre 2019, n° 2017004105, Groupe Canal + c/ France Télévisions

Paris Commercial Court, 21 October 2019, case no. 2017004105, Groupe Canal + v France Télévisions

[FR] Will there be a follow-up to Conseil d'Etat proposals for promoting access to audiovisual sports programmes?

Amélie Blocman
Légipresse

With view to preparing for the 2024 Olympic Games, the Conseil d'État, in its annual report entitled ‘Le sport, quelle politique publique?’ (public policy on sport), makes twenty-one proposals for drawing up a more decisive and ambitious policy on sport, focusing on three priority areas: bringing together public stakeholders and associations, making access to sport more democratic, and regulating the sport economy.

On this last point in particular, the Conseil d'État recalls that the broadcasting of sports events is a central feature of the funding of sport and a key issue for the audiovisual sector. It therefore recommends ensuring accessibility to audiovisual sports programmes. However, providing the largest possible audience with access to the broadcasting of the main sports events and to the diversity of sporting disciplines presupposes that the public-sector audiovisual service has sufficient resources to be able to acquire rights, and that the public authority ensures regulation so that it is not only the pay channels that are in a position to broadcast such programmes. The Conseil d'État warns that “increasing the cost of broadcasting rights might in the long term put them beyond the scope of public-service broadcasting”, highlighting the “constant decrease” in the budget France Télévisions has allocated to sport in the past four years (from 230 million euros in 2016 to 192 million euros in 2019). The Conseil d’Etat therefore finds it advisable to waive the ban on advertising on public channels after 8 p.m. when sports events are being broadcast in full in order to fund the purchase of broadcasting rights for sports competitions (proposal 19 in the report). In addition, the list of events of major importance defined by decree should be extended in order to ensure greater visibility for both women’s sports and Paralympic events. The CSA's area of competence should also be reinforced in order to ensure that the public has access to these events.

The Conseil d'État points out that preserving the financial resources generated by entertainment sport also calls for tools for combatting piracy (proposal 20), which can only be effective if competition organisers are granted specific neighbouring rights, and if regulatory arrangements in line with the specific features of entertainment sport are set up.

Will these recommendations be taken up in the draft legislation to reform the audiovisual sector which is scheduled for presentation to the Government’s Ministerial Council at the end of November? Nothing could be less certain. “We want to maintain the balance we have achieved today for advertising on public-sector radio and television, so we do not want to start advertising on public-sector television after 8 p.m.”, said the Minister for Culture. “In the case of sport, there are sponsorship arrangements that make it possible to promote sport on

television after 8 p.m. on the public-sector channels without having to resort to advertising", Franck Riester pointed out. The future legislation also provides for the creation of 'split screens' for broadcasting advertising without actually interrupting the broadcasting of sports events.

Étude annuelle du Conseil d'État, 2019, "Le sport, quelle politique publique" ?, La Documentation française

https://www.vie-publique.fr/rapport/271258-etude-2019-du-conseil-detat-le-sport-quelle-politique-publique

Annual study of the Conseil d'Etat 2019, "Le sport, quelle politique publique" ?, La Documentation française

UNITED KINGDOM

[GB] Conversational exchange between two BBC Breakfast presenters during a broadcast did not breach Ofcom's impartiality rules

Julian Wilkins
Wordley Partnership

Ofcom determined that an exchange between two BBC Breakfast Time presenters about President Trump's remarks over four female Democratic congresswomen had not breached impartiality rules. The BBC Executive Complaints Unit (ECU) had partially upheld that comments made by presenter Naga Munchetty (NM) had breached the broadcaster's impartiality requirements. However, that decision was overturned by the BBC's Director-General after a public outcry. Ofcom received two complaints that the Director-General's decision to overturn the ECU's finding had breached Ofcom's rules on due impartiality and accuracy in news and current affairs programmes.

BBC Breakfast is a daily magazine show broadcast on BBC1 which reports on and discusses current daily events. Its presenters are Dan Walker (DW) and NM. On 17 July 2019, there was a feature concerning comments made by US President Trump that four female Democratic congresswomen should return home to their countries of origin. The four congresswomen are US citizens and three of them were born in the United States. Some regarded President Trump's comments as racist.

DW conducted a video interview with Jan Harper-Hayes (JHH) of Trump Victory 2020. During the interview, JHH admitted that President Trump could "clean up the way he says things" but that he was not a racist, adding: "I know how he [Trump] manipulates the press to get things going."

After the interview, DW and NM conversed about the JHH interview and during the brief exchange NM said: "[E]very time I have been told as a woman of colour, to 'go home', to go back to where I've come from', that was embedded in racism. Now, I'm not accusing anyone of anything here, but there is, you know what certain phrases mean." Quizzed further by DW, NW said: "It's not enough to do it just to get attention. He's in a responsible position. Anyway, look I'm not here to give my opinion. The lady gave her opinion and it was a good interview. So I hope you enjoyed that." The conversation then turned to the next item.

Ofcom considered Rule 5.1 which states: "News, in whatever form, must be reported with due accuracy and presented with due impartiality."

Further Rule 5.9 says: "Presenters and reporters (with the exception of news presenters and reporters in news programmes), presenters of 'personal view' or 'authored' programmes or items, and chairs of discussion programmes may

express their own views on matters of political or industrial controversy or matters relating to current public policy. However, alternative viewpoints must be adequately represented either in the programme, or in a series of programmes taken as a whole." Rules 5.1 and 5.9 had to be balanced against the broadcaster's freedom of expression and that of the audience, pursuant to Article 10 of the European Convention on Human Rights.

Due accuracy and impartiality did not mean that every argument and every facet of every argument had to be represented in a programme. Furthermore, the context is important, including the type of programme, channel and likely audience expectations. BBC Breakfast is not a traditional news bulletin; it has an informal magazine style, which, in the case at hand, included analysis and discussion between the presenters in response to an interviewee's comments. Ofcom considered that this was a legitimate editorial device which helped preserve impartiality.

Ofcom determined that Rule 5.1 had not been breached, given that a clip of President Trump including his controversial remark and him giving more details about his remarks had been aired, along with the JHH interview in his defence.

Regarding NM's remarks, Ofcom determined that there had been no breach of Rule 5.9, given the conversational and informal format of the programme; the discussion had been in reaction to the JHH interview, with NM speaking of her own experience of racism, which was not a matter of political controversy. Furthermore, NM had limited her comments and brought the conversation to a close.

Ofcom was critical of both the BBC's ECU and the BBC for not fully disclosing their respective reasoning relating to the finding of a partial breach of impartiality standards and then to the Director-General's ruling to overturn that decision. Ofcom said that transparency was important for public confidence, reversing the BBC's complaints process, and that it would urgently address the broadcaster's lack of transparency.

Issue 388 of Ofcom's Broadcast and On Demand Bulletin - 7th October 2019

https://www.ofcom.org.uk/_data/assets/pdf-file/0026/170882/388-broadcast-and-on-demand-bulletin.pdf

[GB] Ofcom extends the remit of the Advertising Advisory Committee

Alexandros K. Antoniou
University of Essex

On 3 October 2019, Ofcom, the UK's communications regulator, announced that the remit of the Advertising Advisory Committee (AAC) will be expanded so that the Committee can bring a consumer voice to both broadcast and *non-broadcast advertising* policy issues.

In the UK, advertising is regulated through a combination of "co-regulation" and "self-regulation" systems. Co-regulation sees the Broadcast Committee of Advertising Practice (BCAP) of the Advertising Standards Authority (ASA) given responsibility for regulating the content of broadcast adverts (television and radio), under contract from Ofcom. Self-regulation means that the ASA and the Committee of Advertising Practice (CAP) are responsible for regulating *non-broadcast advertisement*s (for example, advertisements run by newspapers and on websites and social media) through a system that the advertising industry has voluntarily established and paid for.

The AAC was established in 2004 with the aim of providing independent, third-party advice to the BCAP. Since its inception, the Committee has ensured in particular that a consumer perspective is taken into account in relation to issues affecting broadcast advertising – including the drafting and interpretation of the UK Code of Broadcast Advertising. Following a request from the BCAP and the CAP, Ofcom agreed that it was in consumers' interest to include non-broadcast advertising in the AAC's remit. As a result, the Committee will now be able to provide advice on issues affecting both broadcast and *non-broadcast advertising*.

To facilitate this change, amendments were introduced into the Memorandum of Understanding (MoU) between Ofcom, the BCAP, the Advertising Standards Authority (Broadcast) Limited and the Broadcast Advertising Standards Board of Finance Limited. These amendments concern the AAC's access to relevant research resources relating not only to broadcast but also *non-broadcast advertising*; the Committee's composition and notification of new appointments to it; the repeal of Ofcom's status as an observer at AAC meetings (to reflect the fact that the Committee will discuss issues beyond the Ofcom's remit); and finally, issues concerning transparency.

With the increasing convergence between broadcast and *non-broadcast advertising* issues, the expansion of the AAC's remit constitutes an important step towards ensuring the representation of consumers' perspective and interests across all media and forms of advertising.

Ofcom, Extension of the remit of the Advertising Advisory Committee

https://www.ofcom.org.uk/__data/assets/pdf_file/0034/169864/statement-extension-

of-the-remit-of-the-aac.pdf

Memorandum of Understanding between the Office of Communications, the Advertising Standards Authority (Broadcast) Limited, the Broadcast Committee of Advertising Practice and the Broadcast Advertising Standards Board of Finance Limited

https://www.ofcom.org.uk/__data/assets/pdf_file/0037/169858/memorandum-of-understanding-october-2019.pdf

IRELAND

[IE] Current Affairs programme on Transgender did not breach Broadcasting Codes

Ingrid Cunningham
School of Law, National University of Ireland, Galway

On 24 September 2019, the Broadcasting Authority of Ireland (BAI) issued a decision rejecting three complaints relating a programme on the issue of transgender. The BAI's Compliance Committee (unanimously) found that the public service broadcaster, RTÉ, had not infringed the requirements of the Broadcasting Act 2009 the BAI Code of Fairness, Objectivity and Impartiality in News and Current Affairs, or the Code of Programme Standards in the broadcast.

The decision concerned an episode of "Prime Time", a well-known current affairs programme broadcast twice weekly by the public broadcaster RTÉ on its RTÉ One television channel at 9.35pm. The programme in question was broadcast on the evening of 22 January 2019 and focused on the topic of young people who sought to change gender; it featured ten contributors representing a range of views on transgender rights.

A total of three complaints were made to the BAI about the programme, arguing, inter alia, that the programme "lacked objectivity based on the mix of contributors and how the discussion was framed" and that "some of the contributors did not have any relevant expertise or experience on the subject matter." Another complainant argued that the programme "mispresented facts, failed to be fair and was harmful to transgender people."

In response to the complaints the broadcaster RTÉ asserted that the programme had aimed to examine two issues: firstly, the implications of Ireland having passed the 2015 Gender Recognition Act, and secondly, the proposals to allow minors to change gender. Having regard to the complaint in relation to the choice of contributors, RTÉ emphasised "the important role commentators play in public debate" and asserted that it considered "it wrong to limit contributions to people with personal experience or expertise", adding that the "contributors represented a range of views on the issues being examined in the programme."

The complaint was lodged under section 48(1)(a) of the Broadcasting Act 2009 and Rules 4.1 and 4.2 of the BAI Code of Fairness, Objectivity and Impartiality in News and Current Affairs, which provide that broadcasts concerning current affairs – including matters that are either the subject of public controversy or the subject of current public debate – must be fair to all interests concerned and that the broadcast matter must be presented in an objective and impartial manner and without any expression of the presenter's own views. In addition, the BAI also considered the complaints with a view to Principle 5 of the BAI Code of

Programme Standards, which requires that “the manner in which persons and groups in society are represented shall be appropriate and justifiable and shall not prejudice respect for human dignity.”

In reaching its decision, the BAI Compliance Committee acknowledged the “sensitive nature” of the subject explored in the programme; however, in considering the programme “in whole and in context”, the Committee noted that “the topic was explored through interviews with a variety of contributors and that a range of views were presented”; accordingly, the Committee “considered that the subject matter was treated fairly.”

The Compliance Committee also acknowledged that while some comments made by contributors had been “controversial”, the presenter had provided adequate context for the topic and had outlined the nature of the discussion at the outset of the programme. Moreover, the Compliance Committee noted that the presenter had also issued an oral warning, stating that “some viewers may find the content difficult or distressing.” Consequently, the Committee considered that “audiences were likely to expect the inclusion of some contentious views.” The Committee did not find evidence to support the view that the programme had supported discrimination against transgender people.

In light of those considerations, the BAI Compliance Committee concluded that there had been no infringement of the requirements of the 2009 Broadcasting Act, the BAI Code of Fairness, Objectivity and Impartiality in News and Current Affairs, or the Code of Programme Standards.

Broadcasting Authority of Ireland, Broadcasting Complaints Decisions, 24 September 2019, pp 4-9

https://www.bai.ie/en/latest-broadcasting-complaints-decisions-published-36/

ITALY

[IT] New Culture Decree results in new content and investment quotas for AVMS providers

Marco Bassini & Donata Cordone

A variety of amendments have been introduced by Law Decree No. 59/2019, the so-called Culture Decree, which later became Law No. 81/2019 in the legal framework governing audiovisual media services in Italy (the so-called TUSMAR, that is, Legislative Decree No. 177/2005). The new legislation will come into force on 1 January 2020. The main quota provisions are summarised below; different quota obligations apply to the public service broadcaster.

Content quotas for broadcasters:

The content quota for broadcasters would be calculated on an annual basis and would amount to a minimum of 50.01% for European works for all years;The Culture Decree also provides for a sub-quota of one-third for works of Italian original expression produced anywhere (this amount would be temporarily reduced to one fifth in 2020).

Investment quotas for broadcasters:

The quota requirements for European works made by independent producers amount to:In 2020: 11.5% of annual net revenues; From 2021 onwards: 12.5% of annual net revenues.

A 50% sub-quota of the main European quota above (for example, as of 2021, 6.25% of the annual net revenues) applies for works of Italian original expression produced anywhere by independent producers within the last five years;An additional sub-quota for cinematographic films of Italian original expression produced anywhere by independent producers would be imposed as follows: Before 2020: 3.2% of annual net revenues; As of 2020: 3.5% of annual net revenues (75% for works of Italian original expression produced anywhere by independent producers within the last five years).

Content quotas for on-demand service providers:

The quota requirements would be different for subscription video-on-demand service providers (SVOD) and transactional video-on-demand service providers (TVOD):from January 2020, the SVOD quota would amount to 30% of the catalogue for European works produced within the last five years. When it comes to TVOD, the quota for EU works (30% of the catalogue) is calculated on the titles available in the catalogue, and the requirement for European works to have been produced within the last five years shall not apply.From January 2020, the Culture Decree provides for an additional 50% sub-quota of the main European quota

(that is, 15% of the catalogue) for works of Italian original expression produced anywhere by independent producers within the last five years.

Investment quotas for on-demand service providers:

As of January 2020, investment obligations shall be binding on providers having the editorial responsibility for offers targeting Italian consumers, even if based abroad;As of January 2020: (i) up until the adoption of the relevant implementing regulation by the Italian Communications Authority (AGCOM): 15% of the annual net revenues gathered in Italy for European works produced by independent producers; and (ii) as of the implementation of the new AGCOM regulation: 12.5% of the annual net revenues gathered in Italy for European works produced by independent producers;The 12.5% investment obligation may be subject to increase if the following conditions occur: The lack of an operational office on the Italian territory and the recruitment of less than 20 employees, to be assessed within 12 months as of the entry into force of the relevant AGCOM regulation, would trigger an additional penalty of up to 3 percentage points; The absence of a quota of secondary rights for independent producers proportional to the financial contribution of each producer in the work in which investments are made, or the implementation of contractual schemes resulting in independent producers being vested in a merely executional role would result in an additional penalty of up to 4.5 percentage points.A 50% sub-quota of the main European quota shall be reserved for works of Italian original expression produced anywhere by independent producers within the last five years (that is, the sub-quota ranges between 6.25% and 10% of the net revenues made in Italy);10% of the sub-quota above shall be reserved for cinematographic works of Italian original expression produced anywhere by independent producers, 75% of which for works produced within the last five years.

Legge 8 agosto 2019, n. 81 - Conversione in legge, con modificazioni, del decreto-legge 28 giugno 2019, n. 59, recante misure urgenti in materia di personale delle fondazioni lirico sinfoniche, di sostegno del settore del cinema e audiovisivo e finanziamento delle attivita' del Ministero per i beni e le attivita' culturali e per lo svolgimento della manifestazione UEFA Euro 2020

https://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:legge:2019-08-08;81

Law of 8 August 2019, n. 81 - Conversion into law, with amendments, of the decree-law of 28 June 2019, n. 59, containing urgent measures regarding personnel of the symphonic lyric foundations, support for the cinema and audiovisual sector and financing of the activities of the Ministry of Cultural Heritage and Activities and for the conduct of the UEFA Euro 2020 event

NETHERLANDS

[NL] Court allows broadcast of documentary on police shooting of young man, despite family's objections

Agata Witkowska
Patpol

On 10 September 2019, the Amsterdam District Court delivered a notable judgment on the broadcasting of an investigative documentary concerning the death of a young man after a police shooting, despite objections of the deceased's family to the broadcast. The Court rejected an application for the broadcast to be prohibited, holding that the broadcast's interference with the family's private life – in the light of various considerations, including the fact that the deceased's mother had not given permission for the use of certain information – did not outweigh the public interest in the documentary being shown.

The case involved tragic circumstances that arose in summer 2016, when a 21-year-old man was shot dead by police in the province of South Holland. There were a number of public protests against police violence after the shooting. However, an investigation concluded that the police had acted lawfully in fatally shooting the man, and that the incident had constituted an instance of "suicide by cop". Following considerable news coverage of the shooting, the public broadcaster BNNVARA produced a documentary on the circumstances of the man's death. The documentary was scheduled to premiere in September 2019 in various cinemas, and to be broadcast on the NPO 3 channel on 25 September 2019. However, on 5 September 2019, the deceased's mother and sister (as plaintiffs) initiated legal proceeding against the documentary-maker and BNNVARA, seeking a court order preventing the broadcast

The order sought was based on a number of grounds: (a) the documentary unlawfully interfered with the plaintiffs' private life, (b) the documentary damaged the deceased's honour and good name; and (c) the documentary's use of the deceased's final letter before his death violated copyright. The court firstly noted that the documentary maker had spent over two years interviewing the deceased's family and friends; moreover, the documentary explicitly stated that the first plaintiff (without citing her name) did not wish to take part in the documentary.

The court then set out the relevant legal framework, noting that the requested order could only be given if it was demonstrated that the resultant restriction on freedom of expression was "necessary in a democratic society". Firstly, the court examined whether the documentary interfered with the plaintiffs' private lives. It noted that it included images of the plaintiffs at a memorial service. However, the court held that the plaintiffs had not been mentioned by name, the images had already been made public on YouTube, and the plaintiffs were only recognisable by a limited circle of people. The court also noted that the mother's divorce had

been mentioned and that the documentary may have affected the grieving process of the plaintiffs. However, the court held that the plaintiffs' interests did not outweigh the right of the documentary-maker and broadcaster to freedom of expression in making a documentary on a matter of public interest.

The second question was whether the documentary caused damage to the honour of the deceased. The plaintiffs had asserted that the documentary contained factual inaccuracies, such as the assertion that he had been detained for nine months in juvenile detention; they also claimed that the documentary amounted to "racist voyeurism" ("racistisch voyeurisme") as it sought to portray the man as violent. However, the court also rejected this assertion. It held that the documentary was not intended to find out the truth about anything but rather that "any judgment is left to the viewer". Furthermore, the court held that statements by the interviewees were not presented as facts and that the documentary-maker "had no obligation to verify every claim made".

Lastly, the court examined whether there had been an infringement of copyright in publishing images of the deceased's handwritten letter. However, the court rejected that allegation, holding that the letter was only shown for a short duration and that the plaintiffs had not established all the necessary elements for the assertion of copyright.

Rechtbank Amsterdam, ECLI:NL:RBAMS:2019:7357, 10 september 2019

http://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:RBAMS:2019:7357

Amsterdam District Court, ECLI:NL:RBAMS:2019:7357, 10 September 2019

[NL] Judgment on posting violent content on Facebook

Sarah Stapel
Institute for Information Law (IViR), University of Amsterdam

On 2 September 2019, the Court of North Holland found an anti-racism activist guilty of publishing threatening posts on Facebook in the form of altered images targeting a well-known actor during Sinterklaas (Saint Nicholas), an annual Dutch holiday.

The case arose during October 2018, when the activist posted a threat of aggravated assault by means of “sharing” two posts on his Facebook profile. The first photo depicted the accused wearing a hat reading “Sinterklaas Sniper”. The second post was a photo taken of J.F. Kennedy moments before his assassination, photo-shopped to replace the former U.S. president with Sinterklaas. The post was captioned “for all the fragile colonisers, here is a version without children”. The caption was a reference to a post the accused had made on Twitter in October 2017 in which he had suggested “putting a price on the head” of Sinterklaas, and doubling that price if the proposed act were to take place during the national parade in order that “all the children” could bear witness.

The defence cited the right to freedom of expression, arguing that it was the accused’s right to express his opinion on an issue of political controversy. In addition, the defence claimed that the social media posts had had a satirical purpose, which should not have been taken seriously and whose humorous nature could not have posed a reasonable threat to safety. There was no real intention to incite violence against the person performing the role of Sinterklaas. Moreover, the posts had only been intended to be shared among the accused’s private network and had not been meant for wider circulation. The defence argued that right-wing media had been responsible for manipulating the accused’s social media activity in order to enlarge the intended audience and to depict him as a would-be murderer.

The court rejected the argument concerning freedom of expression and found that the posts had in fact constituted, under Article 285 of the Dutch Criminal Code, a considerable threat to the life and safety of the person playing the role of Sinterklaas. The court reasoned that (a) the person playing Sinterklaas had been made aware of the threat (viewable either as direct or indirect), (b) the threat had been formulated in such a way as to invoke justifiable fear in a reasonably-minded person, and (c) there had been the intention of invoking such fear, given that the act of posting it on a popular social media platform expanded its visibility.

Another important consideration in the reasoning of the court was the fact that the posts had had a significant “polarising effect” and could therefore not be construed as promoting a space for democratic discussion. This impact on democratic society was relied upon as a key reason for rejecting the defence’s invocation of the right to freedom of expression. The court ruled the accused

guilty of transgressive behaviour – which in this case meant actions of an aggressive or intimidating nature, regardless of intent – and sentenced him to a one-week suspended prison sentence and a fine of EUR 500.

Rechtbank Noord-Holland, 24 oktober 2019, ECLI:NL:RBNHO:2019:7996

https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBNHO:2019:7996

Regional Court of North-Holland, 24 October 2019, ECLI:NL:RBNHO:2019:7996

PORTUGAL

[PT] Court decision runs against the media regulatory body

Mariana Lameiras
Universidade do Minho

On 26 September 2019, the Portuguese Supreme Administrative Court overturned the state media regulatory body's decision on the exercise of the right of reply by a religious organisation. The court retained previous decisions from lower courts and maintained that the regulator had to force the private television broadcaster (TVI) to disseminate the organisation’s right of reply.

The episode stemmed from a set of news items entitled “The secret of Gods”, in which the Universal Church of the Kingdom of God (UCKG) was accused of having created an illegal network of child adoptions between Portugal and Brazil. These items were broadcast on TVI's prime time news bulletin of December 2017 and the Church requested of the broadcaster that it be allowed to exercise its right of reply.

Having no record of the broadcaster's compliance with its request, the Church complained to the state media regulatory body (*Entidade Reguladora para a Comunicação Social* - ERC), who recognised as legitimate TVI’s refusal to broadcast the requested right of reply. The applicant's next step was judicial complaint .

Thus, the Church filed an urgent procedure with the Administrative Court of Lisbon (*Tribunal Administrativo do Círculo de Lisboa*) against the regulator and the television broadcaster, which resulted in a decision favourable to the applicant. This decision, issued in October 2018, stated that the right of reply had to be respected and the reply broadcast as many times as the reference leading to the incident (Article 69, number 3, a) of the Television Act).

Subsequently, the regulator appealed, based on the argument that “administrative jurisdiction is not competent to hear requests that have as object the deliberations of the regulator refusing the publication of rights of reply” (Decision of the South Administrative Court, 21 February 2019). This appeal did not proceed, as another decision, this time from the South Administrative Court (*Tribunal Central Administrativo Sul*), reinforced the previous one. The court once again ordered the regulator to recognise the right of reply of the Universal Church of the Kingdom of God.

Tribunal Central Administrativo Sul, Acórdão de 21 Fevereiro 2019, Processo 1005/18

http://www.dgsi.pt/jtca.nsf/170589492546a7fb802575c3004c6d7d/362463804bb77

31f802583a9003dfc95?OpenDocument&Highlight=0,IURD

Decision from the South Administrative Court, 21 February 2019, Process no. 1005/18

SLOVENIA

[SI] Ministry of Culture carries out a consultation on a new draft media law

Deirdre Kevin
COMMSOL

In June 2019, the Slovenian Ministry of Culture published a draft media law for consultation. The consultation concluded at the end of August and the responses are currently under review by the ministry.

The Slovenian media sector is governed by several pieces of legislation and a range of secondary statutes and decisions. The main legislation includes: the Media Law of 2001 (last amended on 3 June 2016, the last major update being in 2006); the Law on Radio Television Slovenia of 2005 (last amended on 5 February 2014); the Audiovisual Media Services Act of 2011 (last amended on 6 November 2015); and the Electronic Communications Act of 2012 (last amended on 21 July 2017).

In 2011, major proposed updates to the Media Law were rejected by parliament. Due to the obligation to transpose the European Audiovisual Media Services Directive (AVMSD), the Ministry of Culture then prepared a proposal for the Audiovisual Act under an expedited procedure in 2011. The new draft law represents a first step in carrying out a broad and comprehensive update of the relevant laws governing the media sector. In parallel, the ministry is drafting an update to the Audiovisual Media Services Act in order to implement the revised Audiovisual Media Services Directive. While the draft media law does not implement the Directive, there are several proposals in the draft which address broad issues of regulation in the audiovisual landscape.

Proposals of interest include the following, in brief:

Changes in the approach to media concentration, which include the proposal to introduce a “public interest test” in the case of media mergers. This is similar to the approaches taken in Germany, Ireland and the United Kingdom and allows for assessments of the impact on public interest alongside the economic impact of media concentration. Media mergers that fall within a specific economic threshold (based on combined turnovers) should be notified to the regulator: the Agency for Communication Networks and Services of the Republic of Slovenia (AKOS). The Competition Authority will provide an assessment on the economic impact of a merger, while the Ministry of Culture will assess the public interest impact.

At the same time, rules restricting cross-media ownership have been removed, as the draft law states that the convergence of media platforms or digital convergence require a different approach and a technologically neutral media regulation.

The law proposes that the nature of the provision of funding for media production and content of public interest be widened. It also proposes support for the development of quality journalism, including economic support. In addition, it places a strong emphasis on supporting actions for the development of media literacy, and continues to provide support for the development of content that is accessible to persons with disabilities.

According to the draft law, the prohibition of the dissemination of content that promotes national, racial, religious, sexual, or other hatred and intolerance, should be strengthened by widening the possibility of imposing criminal sanctions and fines.

There is a proposal to remove advertising restrictions on local radio stations, with the aim of allowing them to be more competitive in accessing the advertising market, as it provides independent financial resources that enable them to survive and develop new business models.

Predstavitev prenovljenega Zakona o medijih

https://www.gov.si/novice/2019-06-28-predstavitev-prenovljenega-zakona-o-medijih/

Presentation of the revised Media Act

A publication
of the European Audiovisual Observatory

European Audiovisual Observatory

COUNCIL OF EUROPE
CONSEIL DE L'EUROPE