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EDITORIAL

In 1927, the Austrian writer Stefan Zweig published *Sternstunden der Menschheit*, a book that tells the story of twelve major historical events in which, in the words of the author, "everything is condensed into a single moment that determines everything and decides everything." In its almost thirty years of existence, the European Audiovisual Observatory has been a privileged witness to the evolution of the European audiovisual sector and has therefore experienced first-hand some of these "determining" moments for the sector, in particular the advent of the Internet, VOD, social networks and the multiplication of portable screens.

The recent reform of the Audiovisual Media Services Directive (AVMSD) was a response to some of the regulatory challenges raised by those “determining” moments. Now the time has come for legislators and regulators to roll up their sleeves and work on its transposition into national law.

Germany and France seem to be the forerunners in the race to transpose the AVMSD. On 5 December 2019, the Ministerpräsidentenkonferenz (Conference of Minister-Presidents) of the *Bundesländer* agreed a draft inter-state agreement to modernise media regulation in Germany. These new regulations, which replace the Inter-State Broadcasting Agreement, are designed to ensure that the legislative framework takes into account media digitalisation, in particular platforms and streaming services. After the parliaments of the German *Länder* give their approval, the new rules will enter into force in September 2020. France is also discussing a wide-ranging new draft law on audiovisual communication and cultural sovereignty in the digital age which is expected to be examined by parliament from spring onwards.

While legislation on the AVMSD is being amended, the courts of justice continue to apply and interpret applicable law in this and other sectors. For example, we report on the Turkish Constitutional Court's judgment concerning the blocking of Wikipedia and on the opinion of the Advocate General of the CJEU concerning *Data Protection Commissioner v. Facebook Ireland Limited* (Schrems II), which concerns the use of standard contractual clauses to transfer and process personal data outside of the European Union.

You will find all this and much more in our electronic pages.

Enjoy your read!

Maja Cappello, editor

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INTERNATIONAL

COUNCIL OF EUROPE

AZERBAIJAN

European Court of Human Rights: *Tagiyev and Huseynov v. Azerbaijan*

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

The European Court of Human Rights (ECtHR) has delivered an important judgment about the conviction and imprisonment of a journalist and an editor for publishing an article critizing Islam. The judgment is to be situated in a series of judgments by the Strasbourg Court dealing with religious insult, religious hate speech or blasphemy, such as in *Otto-Preminger-Institut v. Austria* (IRIS 1995-1/1), *Wingrove v. the United Kingdom* (IRIS 1997-1/8), I.*A. v. Turkey* (IRIS 2005-10/3), *Klein v. Slovakia* (IRIS 2007-1/1) *Giniewski v. France* (2006-4/1), *Aydin Tatlav v. Turkey* (IRIS 2006-7/2), *Fouad Belkacem v. Belgium* (2017-9/1), *Mariya Alekhina and others (Pussy Riot) v. Russia* (IRIS 2018-8/2) and *E.S. v. Austria* (IRIS 2019-1/1). In *Tagiyev and Huseynov v. Azerbaijan*, the ECtHR found that the fact that some people can be offended in their religious beliefs cannot be a sufficient argument to interfere with the right to freedom of expression as part of a public debate on matters of religion. The crucial issue is whether the offensive or insulting statements about a religion incite to hatred or violence.

In Strasbourg, journalist Rafig Nazir oglu Tagiyev and editor Samir Sadagat oglu Huseynov argued that their criminal conviction for incitement to religious hatred violated their right to freedom of expression under Article 10 of the European Convention on Human Rights (ECHR). Both had spent over a year in an Azerbaijan prison, and following his release, Tagiyev was stabbed to death in an attack in Baku while his case was pending before the European Court. Tagiyev's wife has continued the proceedings over her husband's conviction and imprisonment, proceedings that took more than 11 years before the European Court. Mrs Tagiyev has also a separate case pending over her husband's killing, claiming that the Azerbaijani Government had failed to protect his right to life, and that he was targeted over his journalistic activities.

The case started in November 2006, when Tagiyev wrote an article headlined 'Europe and us', which was published in the Sanat Gazeti newspaper, where Huseynov was editor-in-chief. The bi-weekly newspaper focused on visual art, literature and theatre and the article at issue was part of a series on 'East-West studies', which discussed the role of religion in society, and the influence of Iran in Azerbaijan. The article contained comments on Islam, including the statements that 'Morality in Islam is a juggling act; its humanism is not convincing' and that

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‘in comparison with Jesus Christ, the father of war fatwas the Prophet Muhammad is simply a frightful creature’. The article also criticised Iran, referring to the oppressive and strict Shiite-Islamic regime of Iran and Persian chauvinism. These statements led to public protests against Tagiyev, as well as criticism by various Azerbaijani and Iranian religious groups. In particular, a religious leader of Iran issued a religious fatwa calling for Tagiyev’s death. Criminal proceedings were initiated against Tagiyev and Huseynov, and both were convicted of incitement to religious hatred. The district court relied on the conclusions of a report by the department at the State Committee for Work with Religious Organisations, that had concluded that the article ‘seeks to spread propaganda of hatred and hostility against Islam’, and that there were ‘sufficient grounds to conclude the existence of elements of actions leading to incitement to religious hatred and hostility’. Tagiyev and Huseynov appealed their convictions, claiming a violation of Article 10 ECHR. However, both the Court of Appeal and the Supreme Court rejected their appeals. In December 2007, Tagiyev and Huseynov were released from prison following a presidential pardon decree, having spent more than 13 months in prison. Both made applications to the ECtHR in 2008, claiming that their convictions and imprisonment violated their right to freedom of expression.

As the convictions were ‘prescribed by law’ and pursued the legitimate aims of ‘protection of the rights of others’ and ‘prevention of disorder’, the crucial question for the ECtHR was whether the convictions were ‘necessary in a democratic society’. First, the ECtHR found that the article was not to be examined ‘only’ in the context of religious beliefs, but also in the context of a debate on a matter of public interest, reiterating the principle that under Article 10, there is ‘little scope’ for restrictions on political speech and expression on matters of public interest. The Court then examined the impugned remarks characterised by the domestic courts as incitement to religious hatred, and noted that some of the remarks ‘may’ be seen by ‘certain religious people’ as an ‘abusive attack on the Prophet of Islam and Muslims living in Europe, capable of causing religious hatred’. Crucially, however, the ECtHR held that it could not accept the reasons provided by the Azerbaijan courts as ‘relevant and sufficient’ for imposing the convictions. The ECtHR held that the domestic courts had failed to carry out any assessment of the remarks by examining them within the general context of the article, and had failed to assess the author’s intention and the public interest of the matter discussed. The ECtHR also found it unacceptable that the domestic courts based their findings and the convictions solely on the conclusions of the State Committee’s report without striking the right balance between the rights protected under Articles 9 (freedom of religion) and 10 ECHR. The ECtHR recognises that a state may legitimately consider incitement to religious intolerance to be incompatible with respect for the freedom of religion and take proportionate restrictive measures, and that it may be considered necessary in democratic societies ‘to sanction or even prevent all forms of expression which spread, incite, promote or justify violence or hatred based on intolerance’. However, the ECtHR also reiterated that ‘a religious group must tolerate the denial by others of their religious beliefs and even the propagation by others of doctrines hostile to their faith, as long as the statements at issue do not incite to hatred or religious intolerance’. Finally, the ECtHR drew attention to the severity of the penalties imposed, namely criminal proceedings, three- and four-

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year prison sentences, and detention for more than 13 months. It held that the case did not present any justification for such severe sanctions, which were capable of producing a chilling effect on the exercise of freedom of expression in Azerbaijan and dissuading the press from openly discussing matters relating to religion, its role in society or other matters of public interest. The ECtHR concluded unanimously that Tagiyev and Huseynov's criminal convictions were disproportionate and not necessary in a democratic society, in violation of Article 10 ECHR.

ECtHR Fifth Section, Tagiyev and Huseynov v. Azerbaijan, Application no. 13274/08, 5 December 2019

https://hudoc.echr.coe.int/eng?i=001-198705

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COE: EURIMAGES

Eurimages: Amendment of current support regulations for 2020/21

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European Audiovisual Observatory

The Board of Management of Eurimages has made a number of changes to the current Eurimages support regulations, most of which will enter into force in 2020, with more to follow in 2021. Eurimages is the Council of Europe's cultural fund which, with an annual budget of EUR 26 million, runs five support programmes devoted to film co-production, theatrical distribution, exhibition, promotion and gender equality.

In 2020, a set of exclusion criteria will be included in a new declaration that production company owners and/or managers will be required to complete in order to apply for support. In particular, these criteria exclude any person or company that has been convicted by a final judgment, is bankrupt or is in a situation of conflict of interest, etc. Requests for a shooting derogation will be removed, so producers will simply have to provide the shooting dates and shooting plan in order to demonstrate that no more than 50% of total shooting days (80% for documentaries) take place before the Board of Management meeting. Co-production projects will need to comply with national legislation and with bilateral or multilateral treaties in force between the co-producing countries. "Adherence to the values and objectives of the Council of Europe" has been added to the existing selection criteria for co-production projects. The distribution support programme in its current form will end on 31 March 2020, and Eurimages will launch an independent study on the pertinence of distribution support. Co-production participations of 90%–10% will be eligible if they comply with the Council of Europe Convention on Cinematographic Co-production (revised) or a bilateral treaty (provided their budget is above EUR 5 million).

Meanwhile, from 2021, co-production support awards less than or equal to EUR 150 000 will be considered as grants rather than as conditionally repayable loans. Co-production support will be paid in two instalments instead of three. Markets hosting the Eurimages Co-production Development Awards will be selected through a call for proposals. Eurimages Lab Project Awards in their current form will end on 31 December 2020, and an independent study will be launched on the relevance of prizes awarded to non-conventional projects and the means by which they could be awarded at artistic and/or audiovisual events. Support to cinemas will also become automatic.

Modification des règles - une nouvelle déclaration pour les producteurs, L'actualité d'Eurimages, 20 Décembre 2019

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https://www.coe.int/fr/web/eurimages/-/changes-to-eurimages-regulations-in-2020-and-2021

Changes to regulations - new declartion for producers, Eurimages News, 20 December 2019

https://www.coe.int/en/web/eurimages/-/changes-to-eurimages-regulations-in-2020-and-2021

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COE: PARLIAMENTARY ASSEMBLY

Resolution on media education in the “new media” environment

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On 29 November 2019, the Parliamentary Assembly of the Council of Europe adopted a Resolution on media education in the new media environment. The Resolution firstly notes some of the benefits of digitisation, in particular emphasising that online media enables access to a wider range of information and thus facilitates open and participatory democracy. The Resolution goes on to note some of the risks associated with online media, citing issues such as hate speech, incitement to violence, disinformation and propaganda.

After stressing the need to protect the right to be properly informed, the Assembly recognises media education as “a key tool for strengthening media pluralism and the quality of media content”, which are prerequisites of democracy. According to the Resolution, the purpose of media education should be to enable all members of the public to develop digital skills and a critical approach to media so that they can effectively distinguish facts from false news and recognise attempts at online manipulation and radicalisation. The Assembly further promotes coordination between relevant actors with regard to media education. Additionally, the Assembly notes that funding of media education projects should be based on structured and transparent schemes of non-commercial origin.

The Resolution goes on to refers to earlier Recommendations of the Committee of Ministers, including on media pluralism and transparency of media ownership (see IRIS 2018-5/4), and makes recommendations to various relevant actors. Member states are called upon to embed media literacy projects in all levels of education. Furthermore, member states should facilitate appropriate training for both teachers and journalists in this regard. The Resolution also recommends that member states coordinate their respective national media literacy policy by, for example, setting up of a media literacy network, and participate in international forums in order to share best practices in relation to media education. The Assembly also calls on member states to incorporate the duty to facilitate media literacy into the public-service media remit.

The Assembly also recommends that public service media organisations create media literacy projects based on the guidelines developed by the European Broadcasting Union. Public service media organisations are furthermore called upon to devise appropriate educational content for young audiences, as well as training programmes for teachers and journalists. The Resolution also addresses the European Broadcasting Union, advising it to promote its guidelines on media

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literacy, and to encourage public service media to implement those guidelines.

The Assembly furthermore recommends that the Association of Commercial Television in Europe coordinate with public service media regarding efforts regarding media literacy. The Assembly also states that professionals and organisations in the media sector should develop for journalists training materials that address legal, ethical and security aspects of online media, and that such materials should remain at the disposal of journalists permanently. Lastly, the Resolution calls on Internet intermediaries to cooperate with other actors to promote media literacy and to facilitate independent fact-checking so as to contribute to the goals of media education.

Parliamentary Assembly of the Council of Europe, Resolution 2314 (2019) Media education in the new media environment, 29 November 2019

http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=28302&lang=en

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LITHUANIA

European Court of Human Rights: Pavel Zarubin a.o. v. Lithuania

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A recent decision of the European Court of Human Rights (ECtHR) deals with the complaint of a team of four Russian TV journalists who were expelled from Lithuania and banned from re-entering it because they posed a danger to national security. The ECtHR came to the conclusion that the Lithuanian authorities credibly demonstrated that the expulsion and re-entry ban imposed on the Russian journalists were proportionate and necessary in the interests of Lithuania's national security. Both measures were held not to be in breach of the journalists' right to freedom of expression as guaranteed under Article 10 of the European Convention on Human Rights (ECHR).

The case goes back to March 2016, when a reporter, a sound operator, a cameraman and a chief editor working for the Russian State Television 'All-Russia State Television and Radio Broadcasting Company' came to Lithuania on the occasion of the Vilnius Russia Forum. At the Forum, topical issues relating to Russia were discussed: its internal and external affairs, economic and political developments, the human rights situation in the country, and future perspectives for its relations with the West. The team of Russian TV journalists arrived in Lithuania with an assignment to cover the events of the Forum and to interview its participants. They were not, however, authorised to attend the Forum. When they appeared at the Forum venues, the four Russian journalists, according to media and police reports, were engaged in 'provocations' and 'hooliganism' and had sought to 'psychologically terrorise' members of the Russian political opposition participating in the event. On the same day, the Migration Department of the Ministry of the Interior issued decisions to expel the four journalists from Lithuania and to ban them from re-entering Lithuania for one year. The journalists appealed against these decisions to the Vilnius Regional Administrative Court. They submitted that they had arrived at the Forum as journalists and had approached its participants in a polite and peaceful manner, seeking to interview and film them, but that some of the organisers and participants had attacked them and their equipment. The administrative court dismissed the appeals, considering that the Russian journalists had not been authorised to attend the Forum and that there was reliable evidence that they had behaved violently at the Forum venues. Based on partly classified and partly declassified information from the State Security Department (SSD), the administrative court found that the journalists' presence in Lithuania had constituted a real and evident threat to national security. This decision was later confirmed by the Supreme Administrative Court, which found that the real purpose had not been to obtain

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information and prepare a video report about the Vilnius Russia Forum, but to carry out provocative actions. It also referred to the strong link between the Russian Government and the Russian State media. Moreover, the television network for which the four Russian journalists worked was owned by the same company as another Russian television network that had been previously suspended in Lithuania on the grounds of incitement to war, discord and national hatred. The Supreme Administrative Court found that there were sufficient grounds for the Lithuanian authorities to consider that the Russian team of journalists had posed a threat to national security.

The four journalists lodged applications before the ECtHR arguing that they had been expelled from Lithuania and banned from re-entering it because of their activities as journalists. They submitted that their actions during the Forum had been respectful and had not overstepped the acceptable limits of journalistic activity, and that they thus could not have posed a threat to the national security of Lithuania. They also complained about other violations of the ECHR, but these complaints were all dismissed for obvious reasons. With regard to the complaint of a violation of their rights under Article 10 ECHR (freedom of expression and information), the ECtHR accepted that there could be some doubt as to whether Article 10 ECHR was applicable, as the expulsion order was based on the team's aggressive and provocative actions during a high-level political event rather than any opinions, statements or publications. The ECtHR however was prepared to proceed on the assumption that the expulsion of the four journalists from Lithuania and the ban on their re-entering for one year constituted an interference with their right to freedom of expression. As the ECtHR was satisfied that those measures were prescribed by law, and that they were carried out in the interests of national security, it remained to be assessed whether the interference was necessary in a democratic society.

As it is not for the ECtHR to take the place of the States Parties to the Convention in defining their national interests, a sphere which traditionally forms part of the inner core of state sovereignty, the ECtHR was satisfied with the way the domestic authorities had produced evidence that the four Russian journalists posed a threat to national security. The ECtHR accepted that some of the evidence included classified information provided by the SSD. It observed that, in accordance with the domestic law, the courts had full access to the classified information and were therefore able to exercise their power of scrutiny, while the classified information had not been of decisive value in the proceedings and had been corroborated by publicly available data. In such circumstances, the ECtHR is satisfied that the domestic courts did not rely to a decisive extent on classified information and that the applicants had adequate opportunity to challenge the factual grounds for the decisions against them. The ECtHR furthermore noted that there was nothing in the case file to suggest that the domestic courts erred in their assessment of the relevant facts or applied domestic law in an arbitrary or manifestly unreasonable manner. It therefore sees no grounds to disagree with the conclusion that the expulsion and entry ban were necessary in the interests of national security.

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The ECtHR saw no reason to depart from the conclusion reached by the domestic courts that the measures imposed on the four Russian journalists had been proportionate, as the expulsion and entry ban had been ordered not because of the dissemination of any ideas or their journalistic activities, but because of their aggressive and provocative actions. The ECtHR also found that their conduct was not compatible with the concept of responsible journalism, albeit reiterated, that 'the fact that a journalist has breached the law is a relevant, albeit not decisive, consideration when determining whether he or she has acted responsibly.' Finally, the ECtHR took into account that the Russian journalists did not have any family, social or economic ties in Lithuania, as an additional justification of the length of the entry ban for a period of one year. As the interference with the four Russian journalists' right to freedom of expression was necessary and proportionate, the ECtHR found the complaint under Article 10 ECHR manifestly ill-founded and declared it therefore inadmissible.

ECtHR Second Section (Decision), Pavel Zarubin v. Lithuania, Application no. 69111/17 and three other applications, Decision of 26 November 2019, notified in writing on 19 December 2019.

https://hudoc.echr.coe.int/eng?i=001-200110

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RUSSIAN FEDERATION

European Court of Human Rights: Savenko (Limonov) v. Russia

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In a case concerning the defamation of the Mayor of Moscow, *Savenko (Limonov) v. Russia*, the European Court of Human Rights (ECtHR) found that the Russian Federation has violated the applicant's freedom of expression as guaranteed by Article 10 of the European Convention on Human Rights (ECHR). The (alleged) defamatory statements where uttered during a debate on radio and published on the radio station's website. The ECtHR disagreed with the assessment by the Moscow courts that in a case of defamation the suffering of the elected head of the executive had a much greater value than that of an ordinary citizen. Instead, the ECtHR found that prominent political figures, such as the Mayor of Moscow, should be prepared to accept strongly worded criticism and may not claim the same level of protection as a private individual unknown to the public, especially when the statement did not concern their private life or intrude on their intimacy.

The applicant in this case was Eduard Veniaminovich Savenko, better known in Russia under his writer's name Eduard Limonov. At the material time, he was a founding member of the National Bolshevik Party and one of the leaders of Another Russia, an umbrella coalition which was organising opposition rallies against the government under the name of Dissenters' March. In April 2007, Radio Free Europe/Radio Liberty (RFE/RL) hosted a debate in the wake of the Moscow court's decision upholding the Moscow Government's refusal to authorise the Dissenters' March in 2006. Savenko took part in that debate and stated that it was certainly to be expected that the Moscow court would issue a negative decision, as all Moscow courts were controlled by the Mayor of Moscow, Mr. Luzhkov. He added: 'You cannot expect a miracle [...]. Generally speaking, Moscow courts have never ruled against Luzhkov. Anyone in our position would have insisted on a lawful decision, knowing full well that unlawfulness was to be expected'. The transcript of the debate was also published on the radio station's website. A few weeks later, the Mayor of Moscow lodged a defamation claim against Savenko and RFE/RL. He claimed that the sentence 'Moscow courts are controlled by Luzhkov' was false and also damaging to his honour, dignity and professional reputation, and sought RUB 500 000 (EUR 28 000) in respect of non-pecuniary damage. The Moscow District Court found that Savenko had not produced any evidence proving the truth of the statement. The district court ordered Savenko and RFE/RL to broadcast a rectification and publish it on the website, and to pay RUB 500 000 each to the Mayor of Moscow. After unsuccessfully exhausting all national remedies, Savenko lodged an application with the ECtHR, complaining that the judgments in the defamation claim and the excessive award against him had violated his right to freedom of expression

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under Article 10 ECHR. The Russian Government argued before the ECtHR that the defamatory allegations by Savenko had not been founded on verified or verifiable information and that the domestic courts had regard to the fact that the statement had undermined public trust in the authorities, that it had been broadcast to the unlimited audience of the radio station and been published on the website, and that the mayor had suffered extraordinary anguish in that connection.

The ECtHR agreed with the Russian Government that the interference with Savenko's right to freedom of expression had a lawful basis and pursued the legitimate aim of protecting the reputation or rights of others, within the meaning of Article 10 §2. Hence, it remained to be established whether the interference was 'necessary in a democratic society', taking the following elements into account: the position of the applicant, the position of the person against whom his criticism was directed, the context and object of the impugned statement, its characterisation by the domestic courts, and the sanction imposed. The ECtHR refers to Savenko as one of the leaders of a broad coalition of opposition groups which sought to vindicate the right to freedom of assembly in Moscow by holding rallies and demonstrations known as Dissenters' Marches. His statements during the radio debate were made in the general context of a discussion about restrictions imposed by the government and the judiciary on the citizens' right to freedom of peaceful assembly. The ECtHR clarified that 'both the exercise of political rights and the functioning of the justice system constitute matters of public interest, which are accorded the high level of protection under Article 10, leaving the State authorities a particularly narrow margin of appreciation for suppressing such speech.' While the requirements of the protection of a politician's reputation have to be weighed against the interests of the open discussion of political issues, the ECtHR observed that the domestic courts did not perform any such balancing exercise in the case at hand. As regards the form and contents of the statement, the Court noted that Savenko's reaction was uttered in the context of an oral exchange during a live radio broadcast, so that he had no possibility of reformulating, refining or retracting it before it was made public. Such forms of expression allow for a greater degree of exaggeration and cannot be held to the same standard of accuracy as written assertions. The ECtHR also found that Savenko's statement reflected his own experience of unsuccessful attempts to vindicate the right to freedom of peaceful assembly in Moscow as well as the experience of others who had lost judicial proceedings involving the Mayor of Moscow . As the information produced by the Russian Government, at the request of the ECtHR, showed that the Moscow courts indeed had not found against the Mayor of Moscow in any of the defamation claims, the ECtHR was of the opinion that there was a certain factual basis to Savenko's strong reaction. This led to the ECtHR concluding that Savenko was entitled to state his opinion in a public forum on a matter of public interest, and that the district and city courts in Moscow did not carry out a balancing exercise or taken into account the mayor's position as a professional politician. Hence, the standards according to which the national authorities examined the defamation claim against Savenko were not in conformity with the principles embodied in Article 10 ECHR.

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The ECtHR also found the amount of damages awarded disproportionate, reiterating that unpredictably large awards in defamation cases are capable of having a chilling effect on the freedom of expression and therefore require the most careful scrutiny, and that an award of damages must also have a reasonable relationship of proportionality to the injury to reputation suffered. The ECtHR subsequently assessed the impact of the award on Savenko, referring to the fact that he struggled to pay it in full because it represented many years' income for him. The Moscow courts denied his request to pay by instalments, which resulted in a further punitive sanction being imposed on him in the form of a permanent restriction on his right to leave Russia. The severity of that additional sanction, which must have considerably affected Savenko's life, further reinforces the Court's view that the award of damages in the present case was disproportionate to the legitimate aim pursued and was not necessary in a democratic society. Having regard to the Moscow courts' failure to apply the principles embodied in Article 10 ECHR and the excessive amount of the award, the Third Section of the ECtHR, sitting as a Committee composed of three judges, came to the conclusion that Article 10 ECHR has been violated.

ECtHR Third Section (Committee), Savenko (Limonov) v. Russia, Application no. 29088/08, 26 November 2019

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EUROPEAN UNION

IRELAND

Advocate General delivers Opinion in *Schrems II*

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On 19 December 2019, Advocate General Saugmandsgaard Øe (AG) delivered his opinion in the high-profile case *Data Protection Commissioner v. Facebook Ireland Limited* (*Schrems II*), on whether the use of standard contractual clauses can constitute a valid legal basis for transferring and processing personal data outside of the European Union. The AG opined that the Court of Justice of the European Union (CJEU) should consider standard contractual clauses as a valid mechanism for the transfer of personal data abroad.

Previously, in *Schrems*, the CJEU had declared the Commission's 'safe harbour' decision, which had found that the United States offered 'adequate' protection for personal data', as invalid (see IRIS 2015-10/2). Adequacy decisions constitute one of the legal basis for which personal data may be transferred to a third country under the General Data Protection Regulation (GDPR) as well as the Data Protection Directive, which it replaced (see IRIS 2018-6/7). Another legal basis for the transfer of personal data to third countries may take the form of a contract between the importer and the exporter of the personal data containing the standard protection clauses set out in Commission Decision 2010/87/EU.

Following *Schrems*, the Irish Data Protection Commissioner ('DPC') opened an investigation and Mr Schrems, the applicant in both proceedings, re-formulated his complaint with the Irish DPC. Asking the Irish DPC to suspend the transfer of data in application of standard contractual clauses, Mr Schrems had argued that the agreement between Facebook Ireland and Facebook, Inc. was not consistent with clauses set out in Decision 2010/87 and, secondly, that those standard contractual clauses did not justify the transfer of the personal data relating to him to the United States. The Irish High Court referred preliminary questions to the CJEU on whether the use of standard contractual clauses offered sufficient safeguards for the protection of the personal data of EU citizens (see IRIS 2017-10/22).

According to the AG, the sole issue in the proceedings was whether Decision 2010/87 was valid. The AG further clarified that the EU law applies to data transfers that are part of a commercial activity, notwithstanding that the transferred data might be processed for the purposes of national security by the public authorities of the third country.

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The AG further made explicit that the purpose of the provisions of the GDPR on transfers of personal data to third countries is to ensure the continuity of a high level of protection of personal data. But in his view, the way in which this purpose may be realised differs according to the legal basis of the transfer. In that regard, for example, an adequacy decision aims to find that a third country ensures a level of protection of personal data and fundamental rights essentially equivalent to that provided in the GDPR, read in the light of the EU Charter of Fundamental Rights ('the Charter'). However, where personal data are transferred abroad by contractual means, the terms of the contract must ensure the desired level of protection. Put differently, the standard contractual clauses adopted by the Commission function as a general mechanism to facilitate data transfers, independent of where the personal data are transferred to or the level of protection there.

Importantly, as regards the validity of Decision 2010/87 in the light of the Charter, the AG was of the opinion that the fact that Decision 2010/87 and the standard contractual clauses which it sets out are not binding on the authorities of the third country of destination 'does not in itself render that decision invalid'. Instead, where personal data are transferred on the basis of standard contractual clauses as per Decision 2010/87, the compatibility of the Decision with the Charter depends on the presence of appropriate mechanisms to ensure the suspension or the prohibition of data transfers, where the exporter of the personal data fails to comply with the contractual clauses.

Crucially, the AG held that standard contractual clauses as legal mechanisms for data transfers of personal data impose 'an obligation' on the data controllers to comply with those clauses, and on the supervisory authorities to 'suspend or prohibit a transfer when, because of a conflict between the obligations arising under the standard clauses and those imposed by the law of the third country of destination, those clauses cannot be complied with.' The AG concluded that his analysis disclosed nothing to affect the validity of Commission Decision 2010/87/EU. The AG's Opinion is not binding on the CJEU, and the judgment of the Court will be given at a later date.

Advocate General's Opinion in Case C-311/18 Data Protection Commissioner v Facebook Ireland Limited, Maximillian Schrems, 19 December 2019

http://curia.europa.eu/juris/document/document.jsf;jsessionid=D5154DA40E37D38AB4ACA08FF5B8EB8C?text=&docid=221826&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=680393

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NATIONAL

CZECHIA

Broadcasting Council punished misleading advertising

Jan Fučík
Česká televize

The Council for Radio and TV Broadcasting of the Czech Republic issued this decision: The company BILLA, Limited, is guilty of committing an offence in violation of section 5d (2) of Act No. 40/1995 Coll., pursuant to Article (a), Regulation (EU) No. 1169/2011/EU of the European Parliament and of the Council, by making the BILLA advertisement aired on TV NOVA on 18 March 2019, from 16:16:11, as the advertisement contains misleading information on the characteristics and the nature of the 'apricot pocket' bakery product sold in the BILLA stores.

The advertisement begins with the statement that freshness comes first in pastry, which is accompanied by a close-up of the golden pastry that is being baked in the oven (the baking process is clearly visible, the pastry is bubbling on the surface). Such a connection is intended to give the consumer the impression that since the freshness of the bread in Billa comes first, of course, fresh bread is naturally available to buy. Everything is crowned with a glimpse of a clock that reads "Freshly baked every 30 minutes". Pursuant to section 11a (a) g) of Decree No. 333/1997 Coll. of the Ministry of Agriculture, fresh pastry is defined as unpackaged, fine pastry whose whole technological process of production, from a dough preparation to baking or similar heat treatment, including its distribution, was not interrupted by freezing or any other technological treatment, and which has also been put on sale to consumers within 24 hours of being baked or of having undergone any similar heat treatment. Thus, the advertisement gives consumers the impression that fresh delicacies of 'apricot pockets' are sold in BILLA stores, when in fact it is a defrosted (toasted), semi-finished product that does not meet the definition of fresh pastry for this reason. According to the Council, the advertisement thus misleads consumers as to the nature and characteristics of the bakery products on offer.

On the basis of the above, the Council therefore found the accused guilty of committing an offence in violation of section 5d (2) of Act No. 40/1995 Coll., pursuant to Article (a), Regulation (EU) No. 1169/2011/EU of the European Parliament and of the Council, by making the BILLA advertisement broadcast on 18 March 2019 from 16:16:11 on the TV NOVA programme.

For this offence, the Council decided to impose an administrative penalty in the form of an admonishment for the offender, as the consumer's disappointment in the advertisement was caused by a single product: apricot pockets.

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Rozhodnutí Rady pro rozhlasové a televizní vysílání č.j. RRTV/2019/317/rud ze dne 5.11.2019

https://www.rrtv.cz/files/Pokuty/eb27c996-8ec3-4072-a38a-a1daf223e8b3.pdf

Decision of the Broadcasting Council RRTV/2019/317 of 5.11.2019

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GERMANY

Bundesländer adopt Inter-State Media Agreement with new rules for digital platforms

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On 5 December 2019, the Ministerpräsidentenkonferenz (Conference of Minister-Presidents) of the Bundesländer agreed a draft inter-state agreement to modernise media regulation in Germany, where media legislation is the responsibility of the Bundesländer. The new regulations are designed to ensure that the legislative framework takes into account media digitalisation, in particular platforms and streaming services, and replace the Inter-State Broadcasting Agreement. The new agreement puts Germany in a pioneering role in terms of the implementation of the EU Audiovisual Media Services Directive (AVMSD).

One of the reforms contained in the new Inter-State Media Agreement concerns the licensing obligations of broadcasters. Media providers such as live streaming services will not need a licence in future if, on average, they have fewer than 20 000 simultaneous users. Previously, live Internet-based services were treated as broadcasters under German legislation, and therefore needed a licence, if they could be watched simultaneously by more than 500 viewers, were arranged on the basis of a schedule and were editorially produced.

The supervisory activities of the Landesmedienanstalten (regional media authorities) and elements of the self-regulation of online services will also be extended under the new agreement. As part of the implementation of the AVMSD, youth protection rules for linear services and on-demand media services will be largely standardised, while additional provisions have been introduced for video-sharing platforms. The platforms concerned will, for example, need to take appropriate measures to protect children and young people from content that may hinder their development. Examples of such measures include age verification and evaluation systems.

In the case of media platforms, the new agreement contains must-carry obligations for regional and local radio stations and requires that high-quality services (for example, those that contain news or are barrier-free) be easy to find.

The Inter-State Media Agreement will also apply to so-called media intermediaries, user interfaces and voice assistants and includes provisions on transparency and discrimination, for example. Intermediaries will be obliged to make clear the criteria under which journalistic content is provided. They will also be required to appoint a representative in Germany, to whom concerned parties and the Landesmedienanstalten can notify any infringements.

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The adopted text also contains new rules on signal integrity and requires so-called ‘social bots’ to be labelled.

The parliaments of the German Länder must now give their approval, after which the Inter-State Media Agreement will be signed in spring 2020. The new rules are due to enter into force in September 2020, that is, before the deadline set out in the AVMSD.

Pressemitteilung der Staatskanzlei Rheinland-Pfalz vom 05.12.2019

https://www.rlp.de/fileadmin/rlp-stk/pdf-Dateien/Medienpolitik/PrM_Medienstaatsvertrag.pdf

Press release of the Rhineland-Palatinate State Chancellery, 5 December 2019

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German regulator opens proceedings against Twitter over pornographic content

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At the end of last year, the Medienanstalt Hamburg/Schleswig-Holstein (Hamburg/Schleswig-Holstein Media Authority – MA HSH), one of the 14 media regulators of the German Bundesländer, announced that it had instigated proceedings against social networking platform Twitter on account of breaches of provisions on the protection of minors in the media. According to the MA HSH, the US-based company, whose European headquarters are in Ireland, had already been asked to improve its youth protection procedures and the MA HSH had threatened further measures, possibly involving the Irish regulator, if Twitter failed to act.

Twitter is a social microblogging service in which registered users create a profile in order to post short, telegram-style messages in the form of images and text. Under standard settings, these so-called 'tweets' are visible to the public, that is, they can be viewed by users who are not registered with Twitter themselves. The MA HSH said that it had found freely accessible pornographic content within a number of profiles and tweets, including profiles advertising sexual services and products (sexcams, porn films), some of which contained photographs and videos clearly depicting sexual acts.

According to German legislation on the protection of minors in the media, telemedia content is illegal if it is pornographic and if the provider has not ensured through appropriate mechanisms, such as closed user groups, that it is only accessible to adults (Articles 4(2)(1) and 24(2) of the Jugendmedienschutzstaatsvertrag – Inter-State Agreement on the protection of minors in the media). However, the MA HSH did not believe Twitter had taken such measures. It was true that Twitter's 'sensitive media policy' required users who wanted to share content that was unsuitable for minors in live video or in profile or header images to mark their account as 'sensitive', which meant that a warning message would appear before the content was displayed. However, this warning could easily be dismissed and also relied on the active cooperation of the user who posted the content. In the MA HSH's opinion, the age verification process was therefore inadequate.

The MA HSH reported the profiles concerned to Twitter so they could be deleted or suspended – a measure that, according to Twitter's sensitive media policy, is expressly reserved for "accounts dedicated to posting sensitive media" and "sending someone unsolicited [...] adult content". However, the MA HSH claimed that Twitter, referring to Irish law, had failed to comply with its request. The regulator therefore announced that, unless Twitter complied swiftly, it would, with the help of the Kommission für Jugendmedienschutz (Committee for the protection of minors in the media), take further steps to ensure that Twitter received a fine and a prohibition notice, and, if necessary, consult the Irish

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regulators through the European Regulators Group for Audiovisual Media Services (ERGA).

Pressemitteilung der MA HSH

https://www.ma-hsh.de/infothek/pressemitteilung/pornografie-auf-twitter-ma-hsh-leitet-verfahren-gegen-plattform-ein.html

MA HSH press release

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KJM approves new Internet age verification method

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The *Kommission für Jugendmedienschutz* (Committee for the protection of minors in the media – KJM) has adopted a revised version of its criteria for evaluating age verification systems. The KJM is an organ of the German regional media authorities and comprises experts from national government and the Länder. It is Germany's central supervisory body for the protection of minors in private broadcasting and on the Internet. According to Article 4(2) of the *Jugendmedienschutzstaatsvertrag* (Inter-State Agreement on the protection of minors in the media – JMStV), content that is pornographic, listed or clearly harmful to minors can only be transmitted if the provider ensures that only adults can access it by creating closed user groups. So-called age verification systems are used to control such closed user groups. The JMStV does not lay down a procedure for the approval of age verification systems. The KJM has therefore devised an evaluation procedure and, at the request of companies or providers, assesses relevant concepts for whole or partial solutions. This helps to improve youth protection on the Internet and, at the same time, gives the providers greater legal and planning certainty. According to the key points adopted by the KJM, age verification for closed user groups must involve two inter-related steps, that is, identification and authentication. Identification (proof of age) must take place at least once through face-to-face contact, while authentication is required each time access is requested. Authentication ensures that only the person who has been identified and whose age has been verified can access closed user groups, and is designed to make it more difficult to transfer access rights to unauthorised third parties. Following the KJM's adoption of the revised evaluation criteria, providers of age verification systems can now incorporate automatic identification technology into their systems. Under this method, users can be identified thanks to an automatic comparison of a photograph with biometric and other data contained in an identity document. Such machine learning technology can be used instead of the face-to-face checks that were previously necessary for age verification. The KJM believes that this method is as secure as video identification, for example. In the context of the amended Audiovisual Media Services Directive and the implementation of the recently adopted inter-state agreement modernising media regulation in Germany, which amends the JMStV, age verification systems are becoming increasingly important for the protection of minors in the media. The KJM believes that automatic identity technology has the potential to reduce users' misgivings about the identification procedure and therefore increase public acceptance of age verification systems.

Pressemitteilung der KJM

https://www.die-medienanstalten.de/service/pressemitteilungen/meldung/news/jugendmedienschutz-neue-methode-fuer-altersverifikation-im-internet/

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KJM press release

AVS-Raster der KJM

https://www.kjm-online.de/aufsicht/technischer-jugendmedienschutz/unzulaessige-angebote/altersverifikationssysteme/

Criteria for evaluating age verification systems

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Netflix series Skylines does not infringe personality rights

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In a ruling of 21 November 2019, the *Oberlandesgericht Frankfurt am Main* (Frankfurt am Main Regional Appeal Court) decided that the broadcasting of the series 'Skylines' was protected by artistic freedom. The series, which is produced in Germany, did not infringe the individual or corporate personality rights of the owner of a real-life music label called 'Skyline Records'. The artistic depiction of the main characters' lives and the company's business activities was deemed to be sufficiently removed from reality.

The Netflix streaming service launched the first season of the series with six episodes at the end of September 2019. The series tells the story of a Frankfurt music label called 'Skyline Records' and features talented hip-hop artist and producer 'Jinn', who is discovered by 'Skyline Records' and signed up by its boss, 'Kalifa'.

Even before the series started, the rapper and owner of the real-life music label, who is known by his stage name, 'Cousin JMF', had applied for a temporary injunction to prevent it from being broadcast. However, the *Landgericht Frankfurt am Main* (Frankfurt am Main Regional Court) rejected the application. The appeal that was immediately lodged against this decision with the appeal court has now also been dismissed. According to the court, the interest in broadcasting the series outweighed the applicant's personality rights. The artistic depiction and the original story were sufficiently distinguishable. There were clear similarities between the careers of the applicant and the main characters of the series. However, they were not such that the characteristics of the individuals portrayed could be ascribed to the real-life music label and its owner. The average viewer would be able to tell the difference between fiction and reality. Moreover, the similarities with the applicant's life did not extend beyond the typical circumstances of an artist's career. Also, the music used in the series was not particularly similar to that produced by the real-life company.

The judges also decided that the series contained such excessive violence, extreme brutality and serious crime that the average viewer would recognise the high level of exaggeration often found in films of this genre. It would be obvious that the story told in the series did not depict the business practices of a real-life Frankfurt-based company of the same name.

Pressemitteilung des Oberlandesgerichts Frankfurt am Main vom 04.12.2019 zum Beschluss vom 21.11.2019, Az. 16 W 56/19

https://ordentliche-gerichtsbarkeit.hessen.de/pressemitteilungen/Netflix-Serie

Press release of the Frankfurt am Main Regional Appeal Court of 4 December 2019 on the ruling of 21 November 2019, case no. 16 W 56/19

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No copyright protection for famous Loriot film quote

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The iconic phrase 'Früher war mehr Lametta', coined by German comedian Loriot, is not protected under copyright according to a recently published decision of the *Landgericht München* (Munich Regional Court – LG) of 18 July 2019, which was upheld by the *Oberlandesgericht München* (Munich Regional Appeal Court – OLG) on 14 August 2019.

The heirs of the artist Bernhard-Viktor Christoph-Carl von Bülow, known by the pseudonym Loriot, who died in 2011, had applied for interim legal protection to prevent the sale of T-shirts and other products with the quote printed on them. They claimed that the unauthorised use of the quote entitled them to injunctive relief against a T-shirt manufacturer. The phrase 'Früher war mehr Lametta' comes from the film 'Weihnachten bei Hoppenstedts', which was first screened in 1978 and is still regularly shown on German television at Christmas. The iconic words, originally spoken by the character 'Opa Hoppenstedt', who was played by Loriot himself, has now become part of everyday German language. It is used as a pointed expression meaning that everything used to be better than it is now.

The comedian's heirs referred to a judgment by the European Court of Justice (Case C-5/08), according to which the reproduction of an extract of a protected work, which comprises 11 consecutive words thereof, can constitute reproduction in part within the meaning of copyright law if the extract contains an element of the work which, as such, expresses the author's own intellectual creation. They claimed that the quote from the film constituted such a protected sequence of words.

The judges of the 33rd civil chamber of the LG München disagreed and decided that the phrase did not constitute a work in itself. In isolation, it did not reach the threshold of originality to be protected under copyright law. Its uniqueness and originality relied on the fact that it formed part of a film scene and the associated situation comedy. The use of the word 'Lametta' as a metaphor at the end of an everyday, frequently heard sequence of words was not sufficiently original or unique to constitute anything more than a common form of expression. The OLG München confirmed the decision that the quote did not constitute a protected work, bringing an end to the interim legal proceedings. No further legal action is currently pending.

Pressemitteilung des Oberlandesgerichts München vom 20.12.2019, Az: 6 W 927/19

https://www.justiz.bayern.de/gerichte-und-behoerden/oberlandesgerichte/muenchen/presse/2019/55.php

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Press release of the Munich Regional Appeal Court, 20 December 2019, case no. 6 W 927/19

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SPAIN

Spanish regulator CNMC fines RTVE for violating the Audiovisual Law

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RTVE, the Spanish public service media corporation, has been fined by the regulator, the National Markets and Competition Commission (*Comision Nacional de los Mercados y la Competencia – CNMC*), for an infringement of Spanish Audiovisual Law 7/2010 (*Ley General de la Comunicación Audiovisual*). The illegal conduct infringed Article 43.2, which regulates the financing of public service broadcasters and stipulates that state-owned media may not engage in any form of commercial activity except as provided for by their own legal framework. In the case of RTVE, Law 8/2009 (*Ley de financiación de la Corporación de Radio y Televisión Española*) specifies the abolition of advertising, with some exceptions such as self-promotion and sports & cultural sponsorships (Article 7.1).

The sanctioned events took place on 23 and 26 March 2019 during the broadcasting of two soccer matches of the Spanish National team held within the framework of the UEFA European Championship. Specifically, RTVE broadcast up to 40 advertising overlays of various commercial brands during the transmission of the matches. Despite the fact that RTVE stated in its submissions that such advertising constituted an inseparable part of the acquisition of broadcasting rights for sports competitions and that it was covered by the exceptions specified in its financing law, the regulator concluded that the conditions for such an exception had not been met.

RTVE was handed a fine of EUR 100 000 for an "ongoing administrative offence of a minor nature" – the maximum amount for this type of infringement, taking into account the fact that this was a repeat offence (RTVE had already been sanctioned three times regarding this matter), its ongoing nature and its social repercussions.

In the event that RTVE wishes to lodge an appeal against this decision, it must do so with the National High Court (*Audiencia Nacional*) within two months.

Resolución Expte. SNC/DTSA/058/19 CORPORACIÓN RADIO TELEVISIÓN ESPAÑOLA S.A

https://www.cnmc.es/expedientes/sncdtsa05819

Decision on file SNC/DTSA/058/19 Televisión Española corporation (PLC)

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Supreme Court settles battle over short extracts of football matches

Francisco Javier Cabrera Blázquez
European Audiovisual Observatory

On 20 December 2019, the Spanish Supreme Court settled the longstanding legal conflict between Mediaset and the National Professional Football League (LNFP) concerning their different interpretation of the right of access to football stadiums and the broadcasting of short news summaries of the matches.

In September 2015, Mediaset had denounced before the Comisión Nacional de los Mercados y la Competencia (National Commission of Markets and Competition - CNMC) that the LNFP was violating its right to information by limiting its access to the stadiums. A few days later, the CNMC issued precautionary measures whereby the LNFP had to guarantee Mediaset's access to the stadiums until the conflict presented by the audiovisual group had been resolved.

In January 2016, a CNMC resolution established that according to the provisions of Article 19.3 of the General Law of Audiovisual Communication (LGCA), the LNFP had to allow Mediaset access to the stadiums (see IRIS 2017-8/15). Furthermore, Mediaset would have the right to broadcast 90-second summaries of each League match in its general news programmes, and not a maximum of 90 seconds in total of images per game day, as the LNFP had contended. The CNMC also ruled that the right to use these short extracts would expire 24 hours after the end of the match, and the media could only use the images of the matches in two general news programmes. The LNFP appealed the CNMC’s resolution before the courts of justice.

In its judgment, the Supreme Court explained that, were the 90 seconds to refer to all matches per game day, it would be insufficient to conform to the minimum content of the information to the public, since it would mean dedicating to each one of the individual matches about 15 seconds. Recalling its previous case law and the jurisprudence of the Spanish Constitutional Court, the Supreme Court explained that Article 19.3 of the LGCA does not disproportionately affect the right to property and freedom of enterprise enshrined in Articles 33 and 38 of the Constitution. The broadcasting of 90-second summaries per match without remuneration would not prevent the LNFP’s marketing of the League exploitation rights. Taking also into consideration the social relevance of professional football, the Supreme Court concluded that the interpretation made by the CNMC in 2016 had been in line with the guidelines of the AVMS Directive and the interpretation made by the Court of Justice of the European Union.

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Judgment of the Supreme Court, Roj: STS 4151/2019 - ECLI: ES:TS:2019:4151, 20 December 2019

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FRANCE

Validation of the remuneration scale for private copying by users of remote personal recording services

Amélie Blocman
Légipresse

Molotov TV is a television distribution platform that provides an OTT service enabling users to copy programmes and store them in their personal 'cloud'. Article L. 311-4 of the Intellectual Property Code, in the version adopted under the Act of 7 July 2016, states that remuneration for private copying is "paid by the broadcaster or distributor of a radio or television service [...] that provides a physical person, through remote access, with a reproduction, for private use, of works based on a programme that forms part of a linear broadcast by the broadcaster or distributor concerned, provided such reproduction is requested by the physical person before the programme is broadcast or during the broadcast for the remainder of the programme." The French legislator mentioned more specifically the possibility of privately copying television programmes on digital media such as Molotov. Article L 331-9 of the Intellectual Property Code, in the version adopted under Act No. 2009-669 of 12 June 2009, stipulates that "broadcasters and distributors of television services may not use technical measures that would prevent the public from benefitting from the private copying exemption, including on digital media and in a digital format, under the conditions mentioned in paragraph 2 of Article L 122-5 and paragraph 2 of Article L 211-3." On 3 July 2018, the so-called 'private copying commission' adopted the definitive scales of remuneration for online services that, like Molotov TV, enable individual users, through remote access, to reproduce, for private use, works based on a programme that forms part of a linear broadcast. The new scales replace those adopted in June 2017 which, in the absence of any ad hoc studies of the use of such copying methods, were based on the scale applicable to boxes provided by Internet access providers.

Molotov asked the *Conseil d'Etat* to annul the commission's decision of 3 July 2018 on the grounds that the commission had exceeded its powers.

Discussion particularly focused on the consideration given to technical protection measures when determining the disputed scale of remuneration. Article L. 311-4 of the Intellectual Property Code states that the level of remuneration should take into account the degree to which the technical measures defined in Article L. 331-5 of the same code are used, and their impact on people's use of the private copying exemption. In this case, the Molotov company claimed that technical protection measures, which it thought were imposed contrary to Article L. 331-5 by certain television channels, restricted the possibility for users of its remote personal recording service to make private copies. However, in the opinion of the *Conseil d'État*, the case file did not show that the effect of these measures had not been taken into account by the usage survey that had been carried out in

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order to evaluate the actual use of the private copying facility offered by the remote personal recording service. Furthermore, the 'private copying commission' was not responsible for deciding whether such protection measures were lawful.

The *Conseil d'État* also noted that the level of remuneration for private copying depended, for each type of media, on how much it was used for private copying, measured on the basis of surveys. The case file showed that remote personal recording services were used for private copying to a much greater extent than recording devices integrated into television sets, video recorders or decoders, in view of their unique technical features. Molotov had no grounds to claim that the commission had infringed the equality principle and taken its decision on the basis of a clear misjudgement by adopting a scale of remuneration for private copying that was twice as high, with the equivalent storage capacity, for remote personal recording services. The application was therefore rejected.

CE, 10e et 9e ch. réunies, 27 novembre 2019, n° 424398, Molotov

https://www.legifrance.gouv.fr/affichJuriAdmin.do?oldAction=rechJuriAdmin&idTexte=CETATEXT000039426787&fastReqId=872771996&fastPos=19

Conseil d'Etat, 10th and 9th chambers combined, 27 November 2019, no. 424398, Molotov

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CSA classification of documentary programmes

Amélie Blocman
Légipresse

The company RMC Découverte, broadcaster of the terrestrial television service of the same name, signed an agreement with the *Conseil supérieur de l'audiovisuel* (French national audiovisual regulatory authority – CSA) on 3 July 2012 which stipulated in Article 3-1-1 that "documentaries shall represent at least 75% of the total airtime each year and shall cover a wide variety of subjects." Having decided that 27 programmes broadcast in 2016 did not qualify as documentaries within the meaning of its agreement, the CSA notified the company in September 2017 that it had rejected the eligibility applications for these 27 programmes. Considering that the company had therefore breached its obligations regarding documentaries in 2016, the CSA issued it with a formal notice requiring it to comply with the obligation laid down in Article 3-1-1 of its agreement. The channel asked the *Conseil d'Etat* to annul these two decisions.

In its decision of 19 December 2019, France's highest administrative court clarified the criteria used to determine whether a programme with the character of an audiovisual work could be classified as a documentary. In this case, the CSA had made a general assessment of all the programmes in question, examining the existence of an author's point of view, as well as various other criteria used to distinguish them from fictional or entertainment programmes, in particular: firstly, whether they were informative for the viewer; secondly, whether they presented facts or situations that had existed before the programme was made; and thirdly, whether they contained any artificially staged scenes (without excluding all reconstructions). Finally, if the programme was eligible, the CSA considered whether it had received support from the *Centre National du Cinéma et de l'Image Animée* (National Centre of Cinematography and the Moving Image – CNC) for documentaries.

In view of these criteria, the *Conseil d'Etat* considered that the CSA had not erred in law. The channel was therefore not entitled to request the annulment of the decisions to deny the programmes' eligibility, nor of the formal notice it had received.

CE, 5e et 6e ch. réunies, 19 décembre 2019, n° 419682, RMC Découverte

https://www.legifrance.gouv.fr/affichJuriAdmin.do;jsessionid=119B8E833A896A9B1E6BA84F185B9353.tplgfr36s_2?oldAction=rechJuriAdmin&idTexte=CETATEXT000039648624&fastReqId=785660457&fastPos=58

Conseil d'Etat, 5th and 6th chambers combined, 19 December 2019, no. 419682, RMC Découverte

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Extensive audiovisual reform bill unveiled

Amélie Blocman
Légipresse

The wide-ranging new draft law on audiovisual communication and cultural sovereignty in the digital age, which was announced several months ago, was tabled by the Minister of Culture on 5 December. The government has applied the expedited procedure for the document, which is expected to be examined by parliament from spring onwards.

The draft contains far-reaching amendments to the Freedom of Communication Act of 30 September 1986, designed to take into account the rapidly changing nature of this sector. Firstly, it sets out a series of measures to support audiovisual creation, in particular by including digital platforms in the financing and dissemination of French and European films and audiovisual works. This support involves making foreign on-demand television and audiovisual media services targeted at French viewers subject to the contribution scheme for the production of films and audiovisual works, which currently only applies to French-based providers. The draft also simplifies current legislative provisions concerning service providers' contribution to the development of the production of cinematographic and audiovisual works, especially independent productions.

The reforms also endeavour to loosen the legal constraints on television companies in the fields of advertising and the transmission of cinematographic works. The draft law permits split-screen television advertising during sports broadcasts, giving the regulator delegated regulatory powers for this purpose. Three commercial breaks will be allowed during the broadcast of a cinematographic or audiovisual work lasting longer than two hours. The draft also aims to transpose the provisions of Audiovisual Media Services Directive 2018/1808 concerning product placement, taking into account changes in the market. However, the relaxing of advertising rules should take place first, without delay and by regulatory means, through the amendment of the decree of 27 March 1992. The government has proposed including measures to allow targeted television advertising and advertising for cinema films, as well as relaxing various other regulations. It also hopes to relax the rules on the televising of cinema films, starting with the lifting of certain restrictions on the days on which films can be broadcast and the annual limit on the number of films that can be shown per channel, by amending the decree of 17 January 1990.

The second major element of the bill, covered in section II, is an extensive overhaul of how the sector is regulated. The key change here is the merger between the *Conseil Supérieur de l'Audiovisuel* (the national audiovisual regulatory authority – CSA) and the *Hadopi* (High Authority for the Dissemination of Works and the Protection of Rights on the Internet) to become the *Autorité de régulation de la communication audiovisuelle et numérique* (Regulatory Authority for Audiovisual and Digital Communication – ARCOM). The newly created ARCOM will carry out new tasks assigned to it under the law of 22 December 2018 on the

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fight against the manipulation of information and the future law on the fight against hatred on the Internet, which is currently being adopted by parliament. One chapter, implementing the revised AVMS Directive, contains provisions specific to video-sharing platforms. The draft law also aims to bolster the fight against Internet piracy. The Hadopi's former powers to combat piracy have been strengthened and transferred to the ARCOM. In view of the urgency inherent in the live audiovisual transmissions of sports events (live streaming), the draft makes provision for a specific interim procedure to combat sports piracy in the Sport Code. Section III of the draft law is devoted to the transformation of the public audiovisual sector in the digital age, with the governance of the sector being revamped through the creation of a group of companies led by a single parent company, France Médias, which will define an overall strategy. The composition of the respective boards and the method of appointing board members have also been revised.

Finally, the draft law will also implement Articles 17 to 22 of Directive 2019/790 on copyright and related rights in the Digital Single Market. It also authorises the government to transpose the so-called Cable and Satellite Directive (2019/789) by way of an ordinance.

Projet de loi relatif à la communication audiovisuelle et à la souveraineté culturelle à l'ère numérique

http://www.assemblee-nationale.fr/15/projets/pl2488.asp

Draft law on audiovisual communication and cultural sovereignty in the digital age

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Television channel met its obligations in rape complaint reports

Amélie Blocman
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On 14 June 2018, the television channel BFM TV broadcast two news items, each several minutes long, in which a journalist reported that a rape complaint had been filed against a lawyer and former French MP, who was an MEP at the time, as well as an interview with the complainant, who remained anonymous, and the captions “Laetitia, plaignante contre Gilbert C...” (“Laetitia, complainant against Gilbert C...”) and “C... accusé de viol, il dément” (“C...accused of rape, he denies it”).

Following the broadcast, the accused asked the *Conseil supérieur de l’audiovisuel* (French national audiovisual regulatory authority – CSA) to suspend BFM TV’s broadcasting licence for three months, to issue a formal notice requiring the channel to respect its obligations under Articles 2-3-4, 2-3-8 and 2-3-10 of its agreement with the CSA, to refer to the public prosecutor facts relating to concealment, violation of professional secrecy and violation of the secrecy of an investigation, and to publish its decision in the official gazette. After the CSA refused his request, he asked the *Conseil d’Etat* to annul its refusal decision.

The applicant claimed, firstly, that the channel had breached the terms of its agreement by failing to indicate the source of the information concerning the rape claim against him.

The Conseil d’Etat noted that, under Article 2-3-8 of the agreement, “The honesty requirement applies to all programmes. / The broadcaster must verify the validity and sources of all news stories. As far as possible, the source should be indicated. Information that is unconfirmed should be reported in the conditional tense. / The broadcaster must demonstrate rigour in the presentation and processing of information.” In view of the provisions of Article 2 of the Act of 29 July 1881 on the freedom of the press, which states that “the confidentiality of journalists’ sources is protected in the exercise of their public information remit”, it ruled that the aforementioned stipulations of the agreement did not, in this case, oblige BFM TV to indicate the source of the information concerning the rape allegation made against the applicant.

Moreover, contrary to the applicant’s claim, the journalists’ refusal to inform him of the complainant’s identity had not prevented him from defending himself against the accusations, as demonstrated by the arguments put forward in his defence during the television programme. Finally, the channel had invited the applicant to give his observations before each of the disputed reports was broadcast.

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Secondly, the applicant argued, in support of his request, that the channel had breached the terms of its agreement concerning the broadcast of programmes, images or words concerning court proceedings or facts likely to give rise to a judicial investigation. However, according to the Conseil d'Etat, the documents in the case file showed that the disputed reports had described the rape claim in a restrained and neutral manner, showing prudence when describing the facts that could constitute a criminal offence and presenting the points of view of the accused and the complainant in a balanced way. The journalist had also stressed the need to treat the information with caution, since the preliminary investigation had only just been opened and the alleged offence dated back more than ten years.

By refusing to issue a formal notice to BFM TV because it had not breached its obligations, the CSA had therefore acted correctly and the applicant was therefore not entitled to ask for the disputed decision to be annulled.

Conseil d'État, 5e et 6e ch. réunies, 13 novembre 2019, n° 425933, M. C.

https://www.legifrance.gouv.fr/affichJuriAdmin.do?oldAction=rechJuriAdmin&idTexte=CETATEXT000039379825&fastReqId=486437976&fastPos=18

Conseil d'État, 5th and 6th chambers combined, 13 November 2019, no. 425933, M. C.

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UNITED KINGDOM

ITV's "Good Morning Britain" breached Ofcom rules by promoting a travel company during an interview

Julian Wilkins
Wordley Partnership

ITV's "Good Morning Britain" programme has been held in breach of Ofcom's Rules 9.4 and 9.5 owing to an interviewee giving undue prominence to the services of a travel company with whom she had a commercial relationship. ITV Broadcasting Limited (ITV) is responsible for compliance with Ofcom's Code of Conduct on behalf of the licensee, ITV Breakfast Broadcasting Limited.

Rule 9.4 states: "Products, services and trade marks must not be promoted in programming." Rule 9.5 states: "No undue prominence may be given in programming to a product, service or trade mark. Undue prominence may result from: the presence of, or reference to, a product, service or trade mark in programming where there is no editorial justification; or the manner in which a product, service or trade mark is referred to in programming."

On the 30th July 2019 edition of "Good Morning Britain" Judith Chalmers appeared as an interviewee, having for many years presented ITV's travel show "Wish You Were Here". Recently, Chalmers had been voted the nation's all-time leading TV travel icon; the poll had been commissioned by travel company Travel Republic, which had also commissioned a survey in order to identify changing trends in travel. Chalmers had a commercial relationship with Travel Republic.

However, when asked about the survey's findings about changing trends Chalmers started to speak about a video she had presented for Travel Republic and the services offered by the holiday company. The presenter, Ben Shepherd, politely changed the subject, but towards the end of the approximately four-minute interview Chalmers again mentioned her promotional video for Travel Republic – including the alleged advantages of their holiday package. Shepherd quickly concluded the interview.

ITV's representations to Ofcom stated that at all times it had maintained editorial control and that no commercial arrangement existed between it and Travel Republic, and nor had it been agreed that Chalmers would refer to the services offered by Travel Republic. The broadcaster's editorial decision to include Chalmers had been taken because of her considerable experience and reputation as a presenter of travel programmes and to hear her comments on Travel Republic's survey and its findings regarding how people's travelling habits were changing. It had been intended that any references to Travel Republic would be within the context of the survey – not their services as a holiday company. ITV stated to Ofcom that it had not anticipated that Chalmers would make such detailed references to Travel Republic's services. ITV did not make clear to Ofcom

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the extent to which Chalmers had been briefed, prior to going on air, not to use promotional language when referring to Travel Republic.

Furthermore, ITV submitted that Chalmers's representations about Travel Republic had been brief and that her comments about the travel company's services had been intended to illustrate the survey's findings about changing consumer demands.

Ofcom said that the purpose of Section 9 of their Code was to maintain a distinction between programmes and advertising (so that the two would be easily distinguishable by viewers), as well as to restrict the amount of advertising broadcasters could transmit.

Guidance for Rule 9.4 states, "Where a reference to a product or service features in a programme, the extent to which a reference will be considered promotional will be judged by the context in which it appears. In general, products or services should not be referred to using favourable or superlative language and prices and availability should not be discussed." Chalmers described how Travel Republic's travel offering included "a hundred sort of holiday hotels, which are for people who now want a slightly quieter time", and described Travel Republic as a "wonderful company". Ofcom considered such wording was akin to promotional language and as such had breached Rule 9.4.

Further, Ofcom decided that ITV had been in breach of Rule 9.5, as references to Travel Republic and its services had been unduly prominent. Although Ofcom accepted the editorial justification for including Chalmers and references to Travel Republic within the context of the consumer survey, the programme's statements about Travel Republic's products and services had lacked editorial justification and had gone beyond a discussion of the consumer trends survey. A particular remark made by Shepherd – "I'm sure lots of people will go and find it, 'cause it's obviously got some great stuff in there as well" – had drawn attention to the online promotional video for Travel Republic, thus increasing the undue prominence given to the company by the programme.

Issue 393 Ofcom's Broadcast and On Demand Bulletin.

https://www.ofcom.org.uk/__data/assets/pdf_file/0025/185551/Issue-393-broadcast-and-on-demand-bulletin.pdf

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Community radio station found in breach of Ofcom’s offensiveness rules

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On 16 December 2019, Ofcom, the United Kingdom's communications regulator, found that Radio Caroline had breached Section Two of its Code, which outlines standards for broadcast content so as to provide members of the public with adequate protection from harmful and offensive material.

Radio Caroline, which was founded in 1964 and broadcast from international waters, had been rendered an illegal (pirate) station by the Marine Broadcasting Offences Act 1967, but 50 years later, in June 2017, Caroline was granted a community radio licence by Ofcom. Community radio services are provided on a not-for-profit basis and focus on the delivery of “specific social benefits to a particular geographical community."

Radio Caroline AM Broadcasting Ltd now holds the licence for Radio Caroline. The station was given the medium wave frequency of 648kHz (which was once used by the BBC World Service) and now broadcasts in Suffolk and northern parts of Essex. It plays a wide range of album music from the 1960s to the present day, with an audience consisting primarily of individuals aged 45 and over.

On 13 September 2019, Ofcom received a complaint concerning Caroline’s Top Fifteens programme which is broadcast every weekday morning from 9 a.m. to 10 a.m. In particular, the complaint related to the broadcast of the English rock band Radiohead's track “Creep”, which contained three instances of the word “fucking”.

Rule 2.3 of the Ofcom Broadcasting Code stipulates that broadcasters, in applying generally accepted standards, must ensure that potentially offensive language is justified by the context. Context includes, but is not limited to, the service on which the material is broadcast, the time of broadcast as well as the size, composition and likely audience expectations. The same rule also states that “appropriate information should also be broadcast where it would assist in avoiding or minimising offence”.

The licensee acknowledged that there was “no justification for the use of explicit language”. It also stated that it would not have “knowingly play[ed] such a track”, which was aired due to a “simple error” between two volunteers who shared the tasks of scheduling the tracks and voicing links. In order to mitigate the risk of recurrence of this problem, Radio Caroline responded that they were planning to devise a single database of music so that tracks would not be selected from external sources. Moreover, listener suggestions for tracks would be examined by a staff member and only added to the available list if the content was deemed “acceptable”. The licensee further explained that it had not broadcast an apology “because the problem was not identified until it was brought to [its] notice many

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days later".

Ofcom noted the steps Radio Caroline said it was taking and the fact that the language had been broadcast live in error. However, bearing in mind its research, which indicates that the word "fuck" is considered by audiences to be among the strongest and most offensive terms, the regulator held that the majority of listeners at this time of day were "unlikely to have expected to hear the most offensive language". It took particular note of the fact that the broadcaster had failed to apologise and concluded that Top Fifteens had breached Rule 2.3 of its Code.

Ofcom Broadcast and On Demand Bulletin Issue Number 393

https://www.ofcom.org.uk/__data/assets/pdf_file/0025/185551/Issue-393-broadcast-and-on-demand-bulletin.pdf

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Ofcom determines Sky UK to be in breach for offensive language broadcast during cricket coverage

Julian Wilkins
Wordley Partnership

Sky UK Limited was held to have breached Ofcom rules 1.14 and 2.3 for the broadcast of offensive language during their cricket coverage on their temporary Sky Sports Ashes channel during the summer of 2019. There were three incidents of which two Sky was held in breach, but the third matter was deemed resolved by the regulator given the circumstances and Sky's broadcast of an immediate apology.

Ofcom's Code of Conduct Rule 1.14 states that in the case of television "the most offensive language must not be broadcast between the watershed [...]"

Rule 2.3 of the Code states, "In applying generally accepted standards broadcasters must ensure that material which may cause offence is justified by the context. [...] Such material may include offensive language." Further Rule 2.3 considers the context in which offensive language was broadcast, such as time and likely audience expectations.

There were three Sky broadcasts which led to complaints: at 1.50 p.m. on 24 August 2019; at 8.10 p.m. on 4 September 2019; and at 1.40 p.m. on 14 September 2019 p.m. The first two incidents occurred during coverage of the The Ashes and T20 between England and Australia and the last event was during an Ashes test match.

The first two incidents concerned Sky's wicket microphones picking up offensive language used by players who had just been bowled out. The language included the "F" word. The third incident was when one of Sky's commentators, David Gower, said, "they haven't a f***ing clue."

Regarding the first two incidents, Sky said that the player remarks had been picked up by the onboard microphones and that, subsequently, they had taken steps for more careful monitoring, including switching off some microphones at key points. On the occasions subject to complaint, there had been a lapse in their monitoring of speech and Sky assured Ofcom that future coverage would have continuous monitoring of language.

Sky said that in the case of the 24 August incident, the player was swearing at himself since he was angry at his own performance, rather than directing his comments at a third party. Ofcom considered that this would not have been apparent to the viewers. Ofcom observed that Sky's position would have been mitigated if they had immediately apologised to viewers, but they had failed to do so on both occasions. Sky has assured Ofcom that broadcast directors have instructions to ensure that if there is inadvertent swearing or use of offensive language, an apology is immediately issued.

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Regarding the third incident involving David Gower, Sky explained that the commentator had handed over to another commentator, Shane Warne, believing his microphone was muted and his comments would not be picked up. When the mistake was realised, Gower's microphone was muted and Shane Warne immediately broadcast an apology.

Ofcom accepted that the broadcast of offensive language had been inadvertent and noted the steps Sky had since taken to avoid recurrence. However, the language transmitted would be deemed offensive and given the times of day, considered audiences would not have expected such language to be broadcast.

Ofcom determined that there had been a breach of Rules 1.14 and 2.3 for the incidents on 24 August and 4 September, but regarding the commentator's comments on 14 September, Ofcom accepted that this had occurred in error whilst there had been an immediate apology, so that matter was determined as resolved.

Issue 393 of Ofcom's Broadcast and On Demand Bulletin, 16th December 2019.

https://www.ofcom.org.uk/_data/assets/pdf_file/0025/18551/issue_393_broadcast-and-on-demand-bulletin.pdf

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ITALY

Italian Communications Authority releases report on online platforms

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Portolano Cavallo

On 12 December 2019, the Economic and Statistical Division (*Servizio Economico Statistico*) of the Italian Communications Authority released the Observatory on Digital Platforms for 2019.

The document provides a comprehensive overview of the value of the digital market and of the main actors operating within it. It shows the rising role of digital platforms which hold seven out of the ten top seats of the world ranking (Microsoft, Apple, Amazon, Google, Facebook, Alibaba, Tencent).

The research consists of four sections, devoted respectively to: general information; markets and services; data economy; ROE (return on equity) and ROI (return on investment) indexes.

The report focuses on the main platforms in Italy, drawing an analysis in comparison to the other TLC & Media companies which operate in the Italian territory. It highlights the growing trend of “platformization” of the world economy. The report points out that the worldwide amount of revenues generated by digital platforms amounts to EUR 692 billion. Apple is the company which ranks first, while Google generates the highest amount of revenues within the so-called SIC (Integrated System of Communications). The globalisation index (that is, the percentage of revenues generated outside Europe) of digital platforms amounts to 46% and is significantly higher compared to the 15% rate of TLC & Media companies. The document also provides statistics on key indexes such as workforce, workforce productivity and operational profitability.

In the second part, the report crafts a map of where digital platforms operate their activities and services, categorising them into three clusters of the production chain, namely infrastructures, enabling technologies and online services. The study also offers some remarks concerning the type of business model adopted by digital platforms. It highlights three possible models: a model where end users constitute the exclusive or prevailing source of revenues, a model where the only source of revenues lies with advertising and a more heterogeneous model.

The third part of the research delves into the data economy. It first analyses the types of data gathered by digital platforms (that is, search, social network, instant messaging, email, maps, app store, voice assistant, entertainment, health, payments and analytics) while providing the respective service.

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The fourth and last part of the research provides information relating to the ROE and ROI indexes. The average value of ROE for digital platforms amounts to 32%, while that of TLC & Media companies is 10% (and major Italian companies reach 7%).

When it comes to the ROI index, the annual average rate is 15%. The value increased by 11% over the period 2016-2018. In the TLC & Media industry, the rate is 3%, while in the case of major Italian companies it amounts to 7%.

AGCOM, Economic and Statistical Service, Online Platforms Observatory

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NETHERLANDS

Court of Appeal rules that news outlet can name individual in #MeToo reporting

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In its judgment of 17 December 2019, the Court of Appeal of Arnhem-Leeuwarden (*Gerechtshof Arnhem-Leeuwarden*) delivered an important judgment on #MeToo reporting in the Netherlands, ruling that Dutch news outlet NRC could name an individual in an investigative report on that individual's alleged "sexually transgressive behaviour" (*seksueel grensoverschrijdend gedrag*). The Court of Appeal held that given the circumstances in question, the news outlet's freedom of expression, as guaranteed by Article 10 of the European Convention on Human Rights (ECHR), outweighed the individual's right to privacy, as enshrined in Article 8 of the ECHR.

On 14 May 2019, the news outlet published an investigative report on the alleged sexually transgressive behaviour of a former professor of the University of Amsterdam and former deputy justice of the Court of Appeal of Amsterdam on that university's initially inadequate response to complaints about that individual. The report should be seen against the backdrop of the larger #MeToo movement, which was referred in the Court of Appeal's judgment.

Initially, the investigative report was to have cited the individual's name. Interim injunction proceedings before the District Court of Amsterdam (*Rechtbank Amsterdam*), however, prohibited the news outlet from doing so. The District Court ruled that the public debate regarding the #MeToo movement did not necessitate the inclusion of the individual's name, among other things, in the report. Most notably, the District Court held that the news outlet had not sufficiently substantiated its most serious accusations of assault and of engaging sexual contact with a vulnerable student, and it emphasised the adverse effects that naming the individual would have on him and his family.

Subsequently, the news outlet challenged the District Court's judgment in the interim injunction proceedings before the Court of Appeal. The Court of Appeal firstly noted that the injunction concerned a preventative measure, which was subject to stricter requirements than "repressive measures" such as compensation awards – namely careful examination and exceptional circumstances. Additionally, it emphasised that journalists enjoyed editorial freedom as long as they acted in compliance with applicable ethical standards and with the relevant codes of conduct. The Court of Appeal then considered how six jurisprudential (ECHR) criteria related to the circumstances in question. Most notably, the Court of Appeal held that the aforementioned accusations were sufficiently substantiated by the cited facts: the news outlet had relied on thirty-five sources and had accessed confidential documents, and the university's dean

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had affirmed the accusations in a television show. Additionally, the Court of Appeal emphasised the seriousness of the individual's conduct. By and large, the Court of Appeal concluded that the news outlet had contributed substantially to the public debate regarding the #MeToo movement with its investigative report.

In the light of the foregoing, the Court of Appeal held that the news outlet could name the individual in its investigative report on that individual's alleged sexually transgressive behaviour, thereby reversing the District Court's judgment delivered in the interim injunction proceedings.

Gerechtshof Arnhem-Leeuwarden 17 december 2019, ECLI:NL:GHARL:2019:10757

https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:GHARL:2019:10757

District Court of Arnhem-Leeuwarden 17 december 2019, ECLI:NL:GHARL:2019:10757

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Minister informs Parliament of proposed amendments to Media Act

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On 19 December 2019, the Dutch Minister of Education, Culture and Science wrote a letter to parliament regarding a proposed law that would change the applicable rules for regional public broadcasters. In the letter, the minister declared that he would not submit the legislative proposal to the Dutch Parliament.

In 2016, the Dutch Media Act was changed in order to create a body representing regional public broadcasters, referred to as *Regionale Publieke Omroep* (RPO) (see IRIS 2016-5/25). The RPO is the umbrella organisation for the 13 regional public broadcasters and is intended to function as a coordinator and a representative for the local broadcasters. After the creation of the RPO, subsequent draft legislation, which was written to further specify the task and the organisational structure of this new body and to achieve a budget cut of EUR 17 million, was sent to parliament on 22 April 2016.

However, after the initial proposal, the minister informed parliament that the proposed change could not count on support from the regional broadcasters. The legislative process has been put on hold ever since. In his letter of 19 December 2019, the minister pointed out that this situation had not changed since 2016. In addition, he considered the proposal no longer fitting in the current media landscape. His policy focusses on collaboration between regional and national public broadcasters, with the aim of increasing quality, reducing costs and expanding the broadcasters' audiences. According to the letter, there has already been more coherence between the national public broadcasters and the regional public broadcasters. The minister will not submit the proposal for a vote in Parliament.

Finally, the minister also presented a new proposal for legislation to amend the Dutch Media Act in order to implement the revised Audiovisual Media Services Directive (AVMSD) (see IRIS 2019-1/3). The proposal addresses technological developments and changes among providers and consumers. As a result, the regulation of linear television and on-demand media services is being adapted and the Dutch Media Act will cover a new subject: video-sharing platform services. The proposal includes rules relating to the protection of minors, the regulation of access to services for people with disabilities, more flexible regulation of broadcasting time for advertising, the promotion of European works, the independence of the media regulator, the promotion of media literacy, and the self- and co-regulation of various issues in video-sharing platform services. The letter was sent to the Dutch Parliament on 17 December 2019.

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Minister van Onderwijs, Cultuur en Wetenschap, Kamerbrief over voornemen niet indienen wetsvoorstel wijziging Mediawet 2008, 19 december 2019

https://www.rijksoverheid.nl/regering/bewindspersonen/arie-slob/documenten/kamerstukken/2019/12/19/brief-aan-ek-inzake-voornemen-wetsvoorstel-wijziging-mediawet-2008-ivm-modernisering-van-regionale-publieke-omroep-definitief-niet-in-te-dienen

Minister of Education, Culture and Science, Letter to Parliament about the proposed amendment to the 2008 Media Act, 19 December 2019

https://www.rijksoverheid.nl/regering/bewindspersonen/arie-slob/documenten/kamerstukken/2019/12/19/brief-aan-ek-inzake-voornemen-wetsvoorstel-wijziging-mediawet-2008-ivm-modernisering-van-regionale-publieke-omroep-definitief-niet-in-te-dienen

Wijziging van de Mediawet in verband met de implementatie moderniseering audiovisuele mediadienstenrichtlijn, no. 35361, 17 december 2019

https://www.tweedekamer.nl/kamerstukken/wetsvoorstellen/detail?id=2019Z25676&dossier=35361

Amendment of the Media Act in connection with the implementation of the modernisation of the Audiovisual Media Services Directive, no. 35361, 17 December 2019

https://www.tweedekamer.nl/kamerstukken/wetsvoorstellen/detail?id=2019Z25676&dossier=35361

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ROMANIA

Modification of Romania’s Copyright Law

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Radio Romania International

Romanian President Klaus Iohannis promulgated on 9 January 2020 the Law for the modification and completion of Law no. 8/1996 on copyright and related rights (*Legea nr. 8/1996 privind dreptul de autor şi drepturile conexe*). The new Law no. 8/2020 was published in the Official Journal of Romania no. 14/2020, part I (see, inter alia, IRIS 2006-8/27, IRIS 2012-4/38, IRIS 2015-5/30, IRIS 2015-7/27, and IRIS 2015-8/28).

The draft Law had been adopted by the Romanian Senate (the Upper Chamber of the Parliament) on 18 February 2019 and by the Chamber of Deputies (the Lower Chamber) on 11 December 2019.

A new paragraph (21), was subsequently inserted into Art. 170, after paragraph (2). The new paragraph reads as follows:

“(21) The bodies of collective management have the obligation, from 1 January, to publish quarterly [...] the amounts collected [sorted] by categories of users or other payers, the amounts withheld, the [total] management costs sorted by categories of rightsholders, their provenance, the way of calculating the rights as well as the retentions applied.”

Any breach of the provision shall be sanctioned by a fine of between RON 3 000 and RON 30 000 (approx. EUR 627 to EUR 6 270), in accordance with the amended Art. 190 e) of the Law no. 8/1996.

The aim of the amendment was to increase the transparency of the activities of companies engaged in the collective management of copyright with regard to the collection of revenues deriving from copyright (and especially the distribution to rightsholders of collected amounts), in view of the large number of complaints lodged in this field.

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Legea nr. 8/2020 pentru modificarea şi completarea Legii nr. 8/1996 privind dreptul de autor şi drepturile conexe - forma pentru promulgare

http://www.cdep.ro/pls/proiecte/docs/2019/pr068_19.pdf

Law no. 8/2020 for the modification and completion of the Law no. 8/1996 on copyright and related rights - Form for promulgation

Legea nr. 8/2020 pentru modificarea şi completarea Legii nr. 8/1996 privind dreptul de autor şi drepturile conexe - expunerea de motive

http://www.cdep.ro/proiecte/2019/000/60/8/em71.pdf

Law no. 8/2020 for the modification and completion of the Law no. 8/1996 on copyright and related rights – Explanatory reason

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RUSSIAN FEDERATION

RF Government sets the Commission on the ownership of audiovisual services

Ekaterina Semenova
Confederation of Rightholders societies of Europe and Asia

A Commission has been created in accordance with the Law on the regulation of online cinema services, adopted in 2017.

The Russian Government has approved the composition of the Commission for the coordination of the ownership, management or control in relation to the owner of audiovisual services. The Vice Prime Minister Konstantin Chuichenko was appointed as Chairman of the Commission; the order was published on the Internet portal for legal information.

The task of the Commission, as stated in the document, is to make decisions on the approval of the ownership, management or direct or indirect control over more than 20% of the authorised capital of the ownership of the audiovisual service by a foreign state, international organisation or foreign company that collectively or individually own the information resource.

The Commission will have the right to request materials and information from state agencies and organisations on the issues within its competence; to involve officials and the representatives of organisations in its work, in accordance with the established procedure, in order to study issues submitted for its consideration; and to create working groups.

It may be recalled that the Law on the regulation of online cinema services, which came into force in July 2017, has not yet been implemented. The reason for this is the lack of a legal framework: it should have been developed by the Ministry of Communications.

The law provides that an online cinema service with a foreign ownership share of more than 20% can operate on the territory of the Russian Federation provided that more than half of its audience live in Russia. If the audience is less than 50%, then the presence of an online cinema service on the Russian market is subject to the approval of the governmental Commission.

Besides that, the law provides that all online cinema services with a daily attendance of more than one hundred thousand users and operating in Russia must be included in a special register of audiovisual services.

The Federal Service for the Supervision of Communications, Information Technology and Mass Media (Roskomnadzor) is in charge of maintaining the register. Services included in the register must change the ownership structure:

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the share of foreign participation in the authorised capital must not exceed 20%.

Roskomnadzor stated that they do not keep a register of online cinemas, despite the fact that the necessary technical infrastructure is in place.

РБК: Закон об онлайн-кинотеатрах не заработал спустя год после вступления в силу

https://vc.ru/legal/43979-rbk-zakon-ob-onlayn-kinoteatrah-ne-zarabotal-spustya-god-posle-vstupleniya-v-silu

The Law on online cinemas does not work after a year since the adoption

Кабмин утвердил состав комиссии по владению аудиовизуальными сервисами

https://ria.ru/20191227/1562955191.html

Government creates the comission to coordinate the work of foreign video services in Russia

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REPUBLIC OF TÜRKIYE

Turkish Constitutional Court's Wikipedia decision

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Wikipedia has not been accessible in Turkey since 2017 upon a decision given by the Information Technologies and Communication Authority (*Bilgi Teknolojileri ve İletişim Kurumu* - BTK) based on Article 8/A of Law No. 5651 on Regulating Broadcasting on the Internet and Fighting Against Crimes Committed through Internet Broadcasting. The procedure was initiated by the General Directorate of Security Affairs of the Prime Ministry on 28 July 2017 when it requested BTK to order Wikimedia Inc. to remove two Wikipedia articles entitled “State-Sponsored Terrorism” and “Foreign involvement in the Syrian Civil War”, based on a statement that these articles were kept online against the said law.

According to the General Directorate, the two articles contained information that was either taken from unverified sources - with several political claims without supporting evidence - or written using offensive language against the Republic of Turkey.

BTK, by law, has the competence to remove URLs containing illegal content in cases where the broadcaster does not remove the content which has been found to be illegal. It also has the competence to fully block any website containing such illegal contents in case it is technically impossible to remove only the URLs. After the 14 hours given to Wikimedia to remove the content had elapsed, BTK blocked acces to Wikipedia in Turkey.

Wikimedia Inc. filed a plea against BTK'sdecision with two Ankara Criminal Courts of Peace, who adopted the General Directorate's position. Besides Wikimedia Inc., three more applicants (an NGO and two academics) applied to the court, presenting themselves as victims, but their applications were also rejected.

In 2017, the Turkish Constitutional Court received four individual applications (the owner of Wikimedia Inc. and the three applicants mentioned above) requesting a revision of the Ankara Court’s decision. Although the applicants had filed separate cases, they mutually claimed that IBTK's decision represented a breach of freedom of expression. On 26 December 2019, the General Council of the Turkish Constitutional Court made its decision on the case, which takes legal precedence.

In its reasoning released on 15 January 2020, the Constitutional Court gave a detailed explanation of the method it had followed to analyse the case. Firstly, the court stated that the decision to block the site could not be evaluated as it was a wrongly made decision taken in the context of the state of emergency situation (announced after the coup attempt in July 2016 and removed in July 2018). The court made this statement based on the point that blockage was related neither

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to one of those reasons requiring a declaration nor to the elimination of the causes of the state of emergency. Secondly, the court rejected the NGO's application based on the ground that it had failed to prove its victim status within the application. The court further explained its decision on the applications of the owner of Wikimedia Inc. and the two academics in which they claimed that the blockage was contrary to freedom of expression. In the analysis of the two academics' applications, the question of whether they were victims was raised. In order to clarify that point, the court applied a victim status test consisting of several criteria and stated that their status should be evaluated under the victim status since they used Wikipedia in their professional activities and they therefore lacked Wikipedia as such a unique information resource after the blockage. Furthermore, the court made a principal evaluation and decided that there had been an interference with the freedoms of the owner of the Wikimedia Inc. as a content provider, and on the freedoms of the two academics as users. The question of the legality of this interference was also analysed and conceptualised with several elements such as testing the compliance of the interference with the requirements of a democratic society. In this sense, the court evaluated the freedom of expression and the Internet's role as a safeguard of freedom of expression, and referred to Wikipedia's content as an encyclopedia created by individual users. By blocking those users' access to Wikipedia, their freedom of expression and right to access information had been interfered with. The court also pointed out that the platform was blocked for an unlimited amount of time, which is not a proportionate decision.

It was noted that independent and voluntary Wikipedia users had updated and modified the content concerned in a more objective way before the case was ongoing.

Following a legal analysis in addition to the points reported above, the court decided to send the case back to the Ankara Criminal Court of Peace for revision. The decision was accepted by 10 out of 16 votes of the Council members.

Wikimedia Foundation Inc. ve Diğerleri, Başvuru No: 2017/22355, Karar Tarihi: 26/12/2019 R.G. Tarih ve Sayı: 15/1/2020 - 31009

https://kararlarbilgibankasi.anayasa.gov.tr/BB/2017/22355

Wikimedia Foundation Inc. and Others, Application No: 2017/22355, Decision Date: 26/12/2019 R.G. Date and Issue: 15/1/2020 - 31009

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