IRIS newsletter

IRIS 2020-3

A publication
of the European Audiovisual Observatory

European Audiovisual Observatory

COUNCIL OF EUROPE
CONSEIL DE L'EUROPE

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Coordination: Cyril Chaboisseau, European Audiovisual Observatory
ISSN 2078-6158

EDITORIAL

“I can do it, I have the right to do it, it is the right thing to do” - any adult person knows that these are three different things. And yet, the lines that divide these three sentences seem blurred when it comes to the online activities of Internet users. In theory, the law should provide answers to all those questions, but the application of the law to a concrete case is often a tricky business, and even the most obvious cases can become the subject matter of harsh judicial wrangling up to the highest courts. For example, a recent judgment of the ECtHR on hate speech and incitement to violence also had to deal with the failure on the part of public authorities to investigate the case. It is also true that the veil of anonymity that certain Internet platforms draw over their users does not lighten the courts’ burden. By way of example, a German court of law had to amend its own (heavily criticised by legal experts) decision in a defamation case concerning a well-known German politician’s request for information about anonymous users who had insulted her on Facebook.

It is understandable that regular citizens do not know every paragraph of every law applicable to a concrete case. However, even seasoned professionals in the media business happen to have difficulties in interpreting legal rules correctly. And even when they have the law on their side, very often, professionals have to go from court to court in order to ascertain their rights. This point is illustrated by the fact that the French INA had to go all the way to the CJEU and the national Cour de cassation to bring an end to a major dispute concerning the INA’s exploitation of performers’ performances.

Regulators can provide assistance in understanding applicable rules. For instance, the Belgian regulator CSA has published a guidance note on the fight against certain forms of illegal Internet content, in particular hate speech. But in the end, it is up to the legislator to find the rules that fight wrongs without impinging on citizen’s rights, an exercise that is not without its traps, as shown in Germany, where the Federal Ministry of Justice and Consumer Protection has announced a controversial bill designed to combat right-wing extremism and hate speech on the Internet, which, among other things, tightens certain provisions of the Network Enforcement Act.

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

Enjoy your read!

Maja Cappello, editor

European Audiovisual Observatory

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COUNCIL OF EUROPE

HUNGARY

European Court of Human Rights (Grand Chamber): *Magyar Kétfarkú Kutya Párt v. Hungary*

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

The Grand Chamber of the European Court of Human Rights (ECtHR) has confirmed the conclusion of the chamber judgment in the case *Magyar Kétfarkú Kutya Párt v. Hungary* (23 January 2018, see IRIS 2018-3/2). The case concerns the use and promotion by a political party of a mobile application (app) which allowed voters to anonymously share photographs of their ballot papers. The Grand Chamber found that a fine for distributing the app had violated the political party's right to freedom of expression because the interference with the applicant's right was not 'prescribed by law'. It emphasised that restrictions on the freedom of expression of political parties in the context of an election or a referendum call for rigorous supervision from the scope of Article 10 of the European Convention of Human Rights (ECHR).

The applicant is the Hungarian political party *Magyar Kétfarkú Kutya Párt* (MKKP). Its political stance is largely conveyed through satire directed at the political elite and governmental policies and disseminated through its website, campaigns, street art and performances. In the run-up to Hungary's 2016 referendum on the European Union's migrant relocation plan, the MKKP made a mobile app available to voters to enable them to upload and share anonymously photographs taken of their ballots, while encouraging them to cast an invalid ballot. The app also enabled voters to give the reasons for their voting. The National Election Commission (NEC) issued a decision finding that the app had infringed the principles of fairness of elections, voting secrecy and the proper exercise of rights. It ordered the MKKP to refrain from further breaches of section 2(1)(a) and (e) of the Act on Electoral Procedure (EPA) and Article 2(1) of the Fundamental Law and also imposed a fine of EUR 2 700. This decision was upheld by the *Kúria* (the Hungarian Supreme Court), albeit with a different motivation, and it reduced the fine to EUR 330. The MKKP made an application to the ECtHR, which found in its chamber judgment of 23 January 2018 a violation of the MKKP's right to freedom of expression under Article 10 ECHR (see IRIS 2018-3/2). In essence, the chamber found unanimously that the government had failed to demonstrate which interest or legitimate aim under Article 10, section 2 ECHR the ban had served.

In its judgment, the Grand Chamber confirmed that Article 10 applies not only to the content of information but also to the means of dissemination, since any restriction imposed on the latter necessarily interferes with the right to receive and impart information. It accepts that providing voters with a mobile application and calling on them to upload and publish photographs of ballot papers, as well as encouraging them to cast an invalid ballot, thus involved the exercise of the MKKP's right to freedom of expression in relation to both aspects. With regard to the question of whether the interference with the MKKP's rights fulfilled the conditions of Article 10, section 2, the Grand Chamber found that there was no sufficient foreseeability and hence that the interference by the NEC was not 'prescribed by law'. According to the ECtHR, rigorous supervision of this issue not only serves to protect democratic political parties from arbitrary interferences by the authorities, but also protects democracy itself. It emphasized that any restriction on freedom of expression in an electoral context without sufficiently foreseeable regulations could harm open political debate, the legitimacy of the voting process and its results and, ultimately, the confidence of citizens in the integrity of democratic institutions and their commitment to the rule of law. The Grand Chamber was of the opinion that the legal provisions in the EPA which the NEC had relied on, lacked clarity, while the potential risk inherent in its interpretation for the enjoyment of voting-related rights, including the free discussion of public affairs, called for particular caution by the domestic authorities. The ECtHR took note of the NEC's argument that the MKKP's conduct jeopardised the fairness of elections and the secrecy of the voting process, while the *Kúria* explicitly dismissed this line of argument. The *Kúria* found that the secrecy of the ballot had not been infringed as the mobile application had not allowed access to the personal data of the users and had thus been incapable of linking a cast ballot to a voter. Furthermore, the MKKP's conduct had had no material impact on the fairness of the national referendum and had not been capable of shaking public confidence in the work of the electoral bodies. Referring to the particular importance of the foreseeability of the law when it comes to restricting the freedom of expression of a political party in the context of an election or a referendum, the ECtHR found that 'considerable uncertainty existed about the potential effects of the impugned legal provisions' applied by the domestic authorities. Therefore, the Grand Chamber is not satisfied that the Hungarian law applicable in the present case, on the basis of which the MKKP's freedom to impart information and ideas was restricted, was formulated with sufficient precision, for the purposes of Article 10 section 2 ECHR, so as to rule out any arbitrariness and enable the MKKP to regulate its conduct accordingly.

The Grand Chamber found a violation of Article 10 ECHR by sixteen votes to one and ordered Hungary to pay damages to the MKKP and to reimburse its costs and expenses. The Russian judge Dedov dissented, arguing in essence that the MKKP's campaign was 'disrespectful in relation to the democratic institution designed for the purpose of decision-making by society'. He referred to the fact that the MKKP sought to influence voters to invalidate their ballots intentionally in order to express their disagreement with the whole idea of the referendum and to encourage voters to draw amusing pictures on ballot papers, while there were many other suitable opportunities for MKKP members, and for those voters who

invalidated their ballots, to express their views.

Große Kammer des EGMR, Magyar Kétfarkú Kutya Párt gegen Ungarn, Beschwerde Nr. 201/17, 20 Januar 2020

ECtHR Grand Chamber, Magyar Kétfarkú Kutya Párt v. Hungary, Application no. 201/17, 20 January 2020

https://hudoc.echr.coe.int/eng?i=001-200657

LITHUANIA

European Court of Human Rights: *Beizaras and Levickas v. Lithuania*

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In a case about hate speech against homosexuals on Facebook, the European Court of Human Rights (ECtHR) delivered an important and well-documented judgment (61 pages). The ECtHR found that the Lithuanian authorities have violated the European Convention on Human Rights (ECHR) because they had not fulfilled their positive obligations to protect the targeted persons against discrimination (Article 14) and against breach of their privacy (Article 8). The ECtHR also came to the conclusion that Lithuania has not effectively responded to the applicants' complaints of discrimination on account of their sexual orientation, and that this amounted to a violation of Article 13 ECHR (right to an effective remedy). In this case the Lithuanian authorities had refused to initiate pre-trial investigations into the reported messages inciting to hatred and violence based on sexual orientation. The ECtHR builds its findings on the positive obligation by state authorities to secure the effective enjoyment of the rights and freedoms guaranteed under the ECHR, this obligation being of particular importance for persons holding unpopular views or belonging to minorities, because they are more vulnerable to victimisation. According to the judgment, authorities are to combat hate speech and homophobic hate crimes by applying criminal law, considered in such cases as a justified and necessary interference with the right to freedom of expression.

In 2015, Pijus Beizaras posted a photograph on his Facebook page depicting a same-sex kiss between himself and his friend, Mangirdas Levickas. The picture, meant to announce the beginning of their relationship, went viral online, receiving more than 2 400 likes and more than 800 comments. The majority of the online comments incited to hatred and violence against LGBT people in general, while numerous comments directly threatened Beizaras and Levickas personally. Some of the comments stated that the kissing homosexuals 'should be castrated or burnt', while others expressed the hope that their heads would be 'smashed in and their brains shaken up' and that all 'faggots' would be shot, burned or exterminated. Beizaras and Levickas requested the Lithuanian Gay League (LGL), of which they were both members, to notify, in its own name, the Prosecutor General's Office of the hateful comments, as they considered that such comments were criminal and merited pre-trial investigation. They asked the LGL Association to act on their behalf, as this association was advocating for LGBT rights and because they feared retaliation by the authors of the online comments should they personally lodge a complaint with the prosecutor. A few days later, the LGL Association lodged a complaint with the Prosecutor General's Office, requesting

that criminal proceedings be initiated regarding thirty-one comments posted on Facebook. However, the public prosecutor refused to launch a pre-trial investigation for incitement to hatred and violence against homosexuals, and the national courts confirmed this decision on all levels. In essence, the Lithuanian authorities were of the opinion that the comments, although vulgar and unethical, did not constitute a crime and that the posting of a picture depicting a same-sex kiss was, in itself, a form of provocative and eccentric behaviour, which, furthermore, did not contribute to social cohesion, as Lithuanian society, on the whole, very much appreciated traditional family values.

Beizaras and Levickas complained before the ECtHR that they had been discriminated against on account of their sexual orientation, which had been the reason underlying the domestic authorities' refusal to open a pre-trial investigation regarding the hateful comments posted on Facebook. The European Court's task, in particular was to determine whether the decision by the prosecutor to discontinue the criminal investigation, subsequently confirmed by the national courts, was motivated by a discriminatory attitude and stereotypes related to sexual orientation.

The ECtHR left no doubt that the comments at issue affected Beizaras and Levickas' psychological well-being and dignity, falling within the sphere of their private life under Article 8 ECHR. Given some express references to Beizaras and Levickas' sexual orientation, it was clear to the ECtHR that the domestic courts' disapproval of the couple demonstrating their sexual orientation was one of the reasons why they had refused to open a pre-trial investigation. The ECtHR agreed that Beizaras and Levickas have made a *prima facie* case showing that their "homosexual orientation" played a role in the way they were treated by the Lithuanian authorities.

Next, the ECtHR disagreed with the finding by the Lithuanian authorities that the offensive and hateful comments at issue did not reach the threshold for being qualified as hate crimes. It recalled that comments that amount to hate speech and incitement to violence, and are thus clearly unlawful on the face of it, may in principle, require states to take certain positive measures. Furthermore, inciting hatred does not necessarily entail a call for an act of violence or other criminal acts (see also *Vejdeland a.o. v. Sweden*, IRIS 2012-5/2). The ECtHR stated that if comments such as those uttered in this case did not amount to inciting not only hatred but even violence on the basis of sexual orientation, it was hard to conceive what statements would. It found that the attitudes or stereotypes prevailing over a certain period of time among the majority of the members of society may not serve as justifiable grounds for discriminating against persons solely on the basis of their sexual orientation, or for limiting the right to the protection of private life. Therefore, the assessment made by the Lithuanian authorities, which had served as a basis for refusing a pre-trial investigation, was not in conformity with the fundamental principles in a democratic state governed by the rule of law.

The ECtHR also disagreed with the Lithuanian authorities' argument that the comments lacked a 'systematic character', since most of the negative comments had been written by different people. The ECtHR held that even the posting of a single hateful comment, inciting to violence against homosexuals on a Facebook page was sufficient to be taken seriously, while in reality the case was about more than just single hateful comments. Indeed, the photograph had gone viral online and had received more than 800 comments. The ECtHR also referred to a report by the European Commission against Racism and Intolerance (ECRI) on Lithuania which indicated that the country had a problem in this domain and that most of the hate speech took place on the Internet and on social networks.

Finally the ECtHR clarified that criminal sanctions, including those against the individuals responsible for the most serious expressions of hatred, that is, inciting others to violence, are justifiable or even necessary, and that this equally applies to hate speech against persons' sexual orientation and sex life. The Court observed that the case at hand concerns undisguised calls for an attack on the applicants' physical and mental integrity, which require protection by criminal law. However, due to the Lithuanian authorities' discriminatory attitude, the relevant provisions in the Lithuanian criminal law were not employed in the instant case, and the requisite protection was not granted to the victims.

For all these reasons, the ECtHR found it established, firstly, that the hateful comments, including undisguised calls for violence by private individuals directed against the applicants and the homosexual community in general, were instigated by a bigoted attitude towards that community and, secondly, that the very same discriminatory state of mind was at the core of the failure on the part of the relevant public authorities to discharge their positive obligation to investigate in an effective manner whether those comments regarding the applicants' sexual orientation constituted incitement to hatred and violence. The ECtHR came to the conclusion that Beizaras and Levickas suffered discrimination on the grounds of their sexual orientation. Accordingly, it held, unanimously, that there has been a violation of Article 14, taken in conjunction with Article 8 ECHR. The ECtHR also found that Beizaras and Levickas have been denied an effective domestic remedy as guaranteed by Article 13 ECHR, in respect of their complaint concerning a breach of their right to private life, on account of their having been discriminated against because of their sexual orientation. Lithuania is ordered to pay a total of EUR 15 000 to Beizaras and Levickas as a form of just satisfaction.

ECtHR Second Section, Beizaras and Levickas v. Lithuania, Application no. 41288/15, 14 January 2020

https://hudoc.echr.coe.int/eng?i=001-200344

UKRAINE

European Court of Human Rights: Agentstvo televideniya Novosti, OOO v. Ukraine

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The European Court of Human Rights (ECtHR) has clarified some characteristics of what is to be considered as 'responsible journalism' and it has explained the reasons for limiting the right to freedom of expression and journalistic reporting on the occasion of a series of news stories covering an incident where a police officer fell out of a moving trolleybus while on his way to work. The ECtHR found that some parts of the reporting on TV by a Ukrainian broadcasting company failed to act in line with the tenets of responsible journalism, while other parts of the TV-coverage of the incident did not justify an interference with the broadcasters' right to freedom of expression as guaranteed by Article 10 of the European Convention on Human Rights (ECHR).

In 2006, the Ukrainian broadcasting company, Agentstvo televideniya Novosti, OOO (ATN OOO), in four news stories, reported on a trolleybus incident involving a police officer in Kharkiv (Officer G). The man suffered from brain trauma and remained in a coma for some time. The news coverage mentioned that Officer G had intentionally jumped out of the trolleybus, namely that he had grabbed the handles on the trolleybus doors, pried them open and jumped out of the moving trolleybus (further: retraction A), and that he was possibly under the influence of alcohol or drugs (further: retraction B). Officer G's mother lodged a claim against ATN OOO, seeking that this information disseminated about her son be retracted as untrue. She also sought compensation for non-pecuniary damage. In her claim before the domestic courts, Ms G stated that the above information had damaged her son's honour, dignity and professional reputation. The District court of Kharkiv allowed the claim, ordered the retraction of both statements, and awarded Ms G EUR 730 for non-pecuniary damage and EUR 12 for court costs. The court of appeal endorsed the finding of the district court, and added that the media had no right to collect and report rumours, presenting them as corroborated by witnesses. The Supreme Court refused ATN OOO leave to appeal on points of law.

ATN OOO lodged an application with the ECtHR, complaining that the decisions of the domestic courts ordering it to retract the information in question and awarding compensation to Ms G. had violated its freedom of expression under Article 10 ECHR. As the interference with ATN OOO's right were prescribed by law and pursued the legitimate aim of protecting the reputation of Officer G, the crucial question remained whether the interference at issue was necessary in a democratic society.

The ECtHR was of the opinion that the broadcasting of the impugned information related to the role of the media in a democratic society to participate in debates over matters of legitimate public concern, and that, accordingly, freedom of the press was at stake. Therefore the margin of appreciation available to the authorities in establishing the “need” for the interference was narrow.

Next, the ECtHR observed that the domestic courts based the interference with ATN OOO’s right under Article 10 ECHR on the finding that the broadcasting company had not proved that the information which it had disseminated was factually accurate and had been sufficiently verified. It confirmed that such a finding is not, as such, contrary to Article 10 ECHR, as the statements broadcast by ATN OOO were allegations of facts rather than value judgments. Hence, the statement was susceptible of proof. The ECtHR also reiterated that the protection afforded by Article 10 ECHR was subject to the proviso that ATN OOO acted in good faith in order to provide accurate and reliable information in accordance with the tenets of responsible journalism. The ECtHR clarified that its assessment was different with respect to retraction A and retraction B.

With regard to retraction A, that Officer G had intentionally jumped out of the trolleybus, the ECtHR agrees with the findings by the Ukraine courts that ATN OOO had failed to verify this statement. Indeed, this statement was only based on a declaration by a representative of the company (L.) that operated the trolleybus and was, moreover, responsible for that company’s traffic safety service. The company could have been found liable if it had been shown that a technical malfunction or negligence on its part had led to the incident. Indeed, under certain circumstances, L. himself, as a person responsible for the traffic safety service of the company, could conceivably have faced liability. As such, he may well have had a vested interest in presenting the incident as being entirely the victim’s fault. Nevertheless, the ATN OOO presented this version of events as a matter of established fact, moreover, using a dismissive sensationalist language in respect of Officer G. There was no indication that ATN OOO has attempted to verify that aspect of the declaration and that it has informed the viewers that that part of the declaration came from an interested party and could not be verified. Also, in the subsequent reporting about the case, ATN OOO omitted to verify and nuance its reporting. Even worse, it turned what could initially be seen as merely a lack of precision in the coverage of the incident into a misleading representation of the facts, combined with gratuitous mockery of the report’s subject. The ECtHR concluded that the domestic courts legitimately found that in making the statements subject to retraction A, ATN OOO’s journalists failed to act in line with the tenets of responsible journalism.

By contrast, the ECtHR is not convinced that the reasons relied on by the domestic courts to justify retraction B were relevant and sufficient. The domestic courts found that ATN OOO had wrongfully declared that Officer G had been under the influence of alcohol or drugs, while the ECtHR observed that the impugned broadcasts did not contain such a statement. Indeed, the ATN OOO broadcast only indicated that two possibilities were being investigated, including the possibility that Officer G “could have been under the influence of alcohol or drugs”. The domestic courts also failed to explain why, despite the literal language used in the

broadcast, which explicitly presented Officer G's intoxication as only one of the versions of events being investigated, they interpreted that statement as a positive affirmation that Officer G had been intoxicated. Nor did had they take into account the context, namely a subsequent broadcast, in which ATN OOO had clarified the situation and has reported that the criminal investigation unit has stated that it had definitely been established that Officer G had not been under the influence of alcohol or drugs. Therefore, the ECtHR held that the interference with ATN OOO's right to freedom of expression was not based on relevant and sufficient reasons. Despite the relatively modest nature of the civil sanction imposed on ATN OOO, it has not been shown that the interference at issue was necessary in a democratic society. There has, accordingly, been a violation of Article 10 ECHR on account of the domestic courts' decisions in respect of retraction B.

ECtHR, Fifth section (sitting as a Committee), Agentstvo televideniya Novosti, OOO v. Ukraine, Application no. 34155/08, 16 January 2020

https://hudoc.echr.coe.int/eng?i=001-200313

EUROPEAN UNION

EU: EUROPEAN COMMISSION

Report of consultation on the exercise of rights of performers and producers in the audiovisual sector

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On 31 January 2020, the European Commission published a Summary Report of a targeted consultation that was conducted concerning the exercise of rights of performers and producers in the audiovisual sector. The purpose of the consultation was to gather relevant information and data on the exploitation of rights in the audiovisual market in relation to the term of protection, including on the exploitation of audiovisual works over time. The consultation was held from 29 July to 31 December 2019, and was addressed to those engaged in the management of rights in the audiovisual sector.

The Report first sets out those who replied to the consultation, with the "overwhelming majority" of contributions coming from Germany, and most of them from audiovisual performers or their representative organisations. There were contributions from other member states, including from audiovisual producers, distributors, sales agents, and providers of audiovisual content (broadcasters, video-on-demand platforms, cultural heritage institutions) or their representative organisations.

Notably, the Report sets out some preliminary trends that were observed from the consultation: first, the audiovisual performers who replied indicated that their rights were generally transferred through an employment contract or through a combination of a contract of transfer of rights and an employment contract. A slight majority of them considered that only a small proportion of the audiovisual works in which they had performed were still exploited after 50 years, while others reported that some of the films in which they had performed were still exploited after 50 years. Secondly, most of the producers that replied obtained rights from authors and performers through contracts of transfers of rights while others mentioned that they also benefited from legal presumptions. The Report stated that "they generally reported that their films generate most revenues during the first 5-10 years of exploitation and cease to generate significant revenues after 20 years." Thirdly, the Report noted that providers of audiovisual content (such as broadcasters and online platforms) explained that their offers included different types of audiovisual content (old or more recent films, for example) depending on their respective business models. Respondents in this category highlighted difficulties regarding the clearance of rights for films. They also stressed that there was a lack of information on the ownership of rights.

Finally, the Commission stated that it would carry out a “deeper analysis” of the replies received to the targeted consultation, and that the results would be analysed in preparation of a report assessing the possible need for an extension of the term of protection of the rights of performers and producers in this sector, as required by Directive 2011/77/EU on the term of protection of copyright and certain related rights (see IRIS 2011-9/6).

European Commission, Summary Report of the targeted consultation on the exercise of rights of performers and producers in the audiovisual sector

https://ec.europa.eu/digital-single-market/en/news/summary-report-targeted-consultation-exercise-rights-performers-and-producers-audiovisual

WTO/WIPO

WIPO

WIPO: Entry into force of Beijing Treaty on Audiovisual Performances

Léa Chochon
European Audiovisual Observatory

On 28 January 2020, Indonesia became the 30th contracting party to ratify the Beijing Treaty on Audiovisual Performances, allowing the Treaty to enter into force on 28 April 2020, in accordance with Article 26. It has been signed by 88 states, including 22 EU member states and the European Union (to date, Slovakia is the only EU member state to ratify it).

The Treaty was adopted in Beijing at a Diplomatic Conference of the World Intellectual Property Organisation (WIPO) (see IRIS 2012-8/1), after more than ten years of negotiations (see IRIS 2001-2/1 and IRIS 2011-8/1), notably during the WIPO Diplomatic Conference on the Protection of Audiovisual Performances held in Geneva in December 2000. It addresses intellectual property rights, in particular the rights of actors and performers in respect of their audiovisual performances.

The intellectual property rights of artists and performers are protected at international level under the 1961 Rome Convention and the 1996 WIPO Phonograms and Performances Treaty (WPPT). However, this international protection did not previously include audiovisual performances.

The Beijing Treaty therefore aims to modernise and adapt international rules on these rights in the digital age, recognising in its preamble “the profound impact of the development and convergence of information and communication technologies on the production and use of audiovisual performances.”

This modernisation process involves, first of all, strengthening the five types of exclusive economic rights granted to beneficiaries for their performances fixed in audiovisual format: the rights of reproduction (Article 7), distribution (Article 8), rental (Article 9), making available (Article 10) and broadcasting and communication to the public (Article 11). Unfixed performances are also protected, with performers granted the right to authorise, or not, their fixation, broadcasting and communication to the public (Article 6). The Treaty also grants performers two forms of moral rights (Article 5): firstly, the right to claim to be identified as the performer of a performance, and secondly, the right to object to any distortion or mutilation of their performances that would be prejudicial to their reputation.

Communiqué de presse de l'OMPI PR/2020/845, Genève, 28 janvier 2020

https://www.wipo.int/pressroom/fr/articles/2020/article_0002.html?utm_source=WIPO+Newsletters&utm_campaign=9ffee9e93a-EMAIL_CAMPAIGN_2020_01_29_11_49&utm_medium=email&utm_term=0_bcb3de19b4-9ffee9e93a-256793657

WIPO press release PR/2020/845, Geneva, 28 January 2020

https://www.wipo.int/pressroom/en/articles/2020/article_0002.html?utm_source=WIPO+Newsletters&utm_campaign=9ffee9e93a-EMAIL_CAMPAIGN_2020_01_29_11_49&utm_medium=email&utm_term=0_bcb3de19b4-9ffee9e93a-256793657

Traité de Beijing sur les interprétations et exécutions audiovisuelles, TRT/BEIJING/001, 24 juin 2012

https://wipolex.wipo.int/fr/treaties/textdetails/12213

Beijing Treaty on Audiovisual Performances, TRT/BEIJING/001, 24 June 2012

NATIONAL

BELGIUM

Proposals for co-regulation in the fight against illegal content on online content-sharing platforms

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On 6 February 2020, the audiovisual regulator of the French-speaking community of Belgium (Conseil supérieur de l'audiovisuel – CSA) published a guidance note on the fight against certain forms of illegal Internet content, in particular hate speech. This note is designed to open a public debate on the measures that could be taken at national level to lay the foundation for co-regulation with online content-sharing platforms and cooperation with the other Belgian authorities concerned.

In the note, the CSA begins by summarising the current situation, highlighting the important role played by content-sharing platforms and their limited responsibility. It emphasises that some content can be harmful to young people in particular, whether they are the authors or victims of the content. It recognises that regulation, in its current form, is inappropriate and creates an imbalance between the regulation of online content-sharing platform operators, including social networks, and traditional players in the audiovisual sector. It supports its analysis by taking into account legislation already in force or under discussion in other EU member states, Commission Recommendation (EU) 2018/334 of 1 March 2018 on measures to effectively tackle illegal content online, and the Code of Conduct on Countering Illegal Hate Speech Online, adopted in 2016 under the auspices of the European Commission.

The CSA then proposes some practical public measures which it considers urgent. For example, it suggests that the legislative body of the French-speaking community of Belgium (the federated entity of the Belgian State to which it is answerable) should take its own legislative measures without waiting for work to start on an EU directive on the subject.

The CSA recommends that various obligations be imposed on the largest content-sharing platform operators, that is, any natural or legal person offering, on a professional basis, whether for remuneration or not, an online content-sharing platform, wherever it is based, used by at least 20% of the population of the French-speaking region of Belgium or the bilingual Brussels-Capital region.

Such operators would be legally obliged to remove or block content notified to them that is 'clearly illegal' within 24 hours. The CSA proposes classifying content as illegal if it advocates crimes against humanity; incites or advocates terrorist

acts; or incites hatred, violence, discrimination or insults against a person or a group of people on grounds of origin, alleged race, religion, ethnic background, nationality, gender, sexual orientation, gender identity or disability, whether real or alleged.

Platform operators would also need to put in place reporting procedures as well as processes for contesting their decisions. They would also be required to use all necessary means to meet their obligations, provide information and act with transparency towards users, especially minors.

In terms of their relations with the regulator, platform operators would have to appoint an official contact person, follow the CSA's recommendations and provide the latter with a half-yearly report on compliance with their obligations. The CSA would thus become their main point of contact, ensuring that they meet their obligations and, after issuing a formal notice requiring them to comply with their obligations or recommendations, would be able to fine them up to 4% of their total global annual turnover for the previous financial year, depending on the seriousness and any repetition of their infringements. The CSA would not be able to report individual content or punish an operator for an individual case.

Finally, the CSA suggests that the legislative body of the French-speaking community of Belgium should cooperate with the other competent Belgian authorities and set up an information-sharing mechanism as part of an efficient, coherent system that respects the various partners.

The CSA guidance note has been distributed to all interested parties, who now have the opportunity to discuss it and decide whether or not to implement its recommendations.

Note d'orientation du CSA sur la lutte contre certaines formes de contenus illicites sur Internet, en particulier le discours de haine

https://www.csa.be/wp-content/uploads/2020/02/Note-dorientation-contenus-illicites_f%C3%A9vrier-2020.pdf

CSA guidance note on the fight against certain forms of illegal Internet content, in particular hate speech

GERMANY

Bill to combat right-wing extremism and hate crime

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In October 2019, the *Bundesministerium der Justiz und für Verbraucherschutz* (Federal Ministry of Justice and Consumer Protection) announced a bill designed to combat right-wing extremism and hate speech on the Internet (IRIS 2020-1:1/9). The *Entwurf für ein Gesetz zur Bekämpfung des Rechtsextremismus und der Hasskriminalität* (Draft Act to combat right-wing extremism and hate crime) was published on 18 December 2019. Among other things, the bill tightens the provisions of the *Netzwerkdurchsetzungsgesetz* (Network Enforcement Act – NetzDG) that require social networks to proactively provide access to user data or transmit such data to the authorities. The bill includes amendments to the *Strafgesetzbuch* (Criminal Code – StGB), *Strafprozessordnung* (Code of Criminal Procedure – StPO), *Bundeskriminalamt-Gesetz* (Federal Criminal Police Office Act – BKAG), *Telemediengesetz* (Telemedia Act – TMG) and *NetzDG* in order to combat the growth of extreme right-wing and illegal online content. As regards changes to criminal law, insults made in public or through the dissemination of written texts will, in future, be subject to heavier punishments, while courts will be able to impose harsher sentences for offences with anti-Semitic motives. The bill also explains that the special protection afforded to politicians against defamation and slander also applies at local level. The amendments to the StPO, BKAG and TMG, on the other hand, are aimed at improving law enforcement in the online sector. Providers of commercial telemedia services and associated contributors and intermediaries will, in future, be subject to the same information obligations as telecommunications services. A new Article 15a TMG obliges them to disclose information about their users' inventory data if requested by the Federal Office for the Protection of the Constitution, law enforcement or police authorities, the *Militärische Abschirmdienst* (Military Counterintelligence Service), the *Bundesnachrichtendienst* (Federal Intelligence Service) or customs authorities. To this end, they are required, at their own expense, to make arrangements for the disclosure of such information within their field of responsibility. Services with over 100 000 customers must also provide a secure electronic interface for this purpose. Social network providers, meanwhile, are subject to proactive reporting obligations. They are already required under existing law to provide users with an effective, transparent complaints procedure for reporting illegal content. In a new Article 3a NetzDG, the bill now obliges them to forward such complaints to the *Bundeskriminalamt* (Federal Criminal Police Office – BKA) via an electronic interface if they have removed or blocked such content and if there are concrete indications that a specific crime has been committed (Articles 86, 86a, 89a, 91, 126, 129 to 129b, 130, 131, 140, 184b, 184d, 241 StGB), such as the dissemination of propaganda or the use of symbols of unconstitutional organisations. The provider must check whether this is the case and report the content immediately, as well as provide the IP address and port number of the

person responsible. The user “on whose behalf the content was stored” should be informed that the information has been passed on to the BKA, unless the BKA orders otherwise. The latter provision in particular has attracted criticism that had previously been directed at the NetzDG in relation to the fact that the platforms’ obligations to check content require them to carry out tasks that are closely associated with basic rights and which are a fundamental responsibility of the state.

Entwurf für ein Gesetz zur Bekämpfung des Rechtsextremismus und der Hasskriminalität

https://www.bmjv.de/SharedDocs/Gesetzgebungsverfahren/Dokumente/RefE_BekaempfungHatespeech.pdf;jsessionid=89F4BD0FFB182DE2C5F3DE2630A6C2F3.2_cid334?__blob=publicationFile&v=1

Draft Act to combat right-wing extremism and hate crime

First German bill implementing EU copyright reform published

Jan Henrich
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On 15 January 2020, the *Bundesministerium der Justiz und für Verbraucherschutz* (Federal Ministry of Justice and Consumer Protection) tabled a bill implementing Directive (EU) 2019/790 on copyright and related rights in the Digital Single Market, which was adopted on 17 April last year. The bill begins by addressing the protection of press publications with regard to online uses and the contribution of publishers, which form part of the EU copyright reforms. It explains the rights of publishers of press publications, as described in Article 15 of the Directive; contains rules on text and data mining; and entitles publishers to a share of compensation for the use of their works.

Last September, the European Court of Justice had ruled that a right to protection for press publishers, enshrined in German copyright law since 2013, was inapplicable. It had found a formal breach of notification requirements. The new bill is structurally similar to the existing regulations, with a few changes based on the Directive.

In concrete terms, press publishers will, in future, have the exclusive right to disseminate and copy their press publications in full or in part via online services such as search engines. Exceptions include the private or non-commercial use of a press publication by individual users, the setting of hyperlinks, and the use of individual words or very short extracts. The bill contains a detailed definition of such ‘short extracts’.

The bill also implements EU provisions concerning text and data mining, digital and cross-border teaching activities and the preservation of cultural heritage specifically in relation to the protection right of press publishers.

As far as claims to remuneration are concerned, the bill provides for publishers to receive a greater share in appropriate compensation for permitted uses, such as private copying or reproduction for scientific or academic purposes. The rules will apply to compensation claims made by collecting societies jointly representing the rights of authors and publishers. However, the bill states that at least two-thirds of the revenue should be paid to authors.

The EU Directive must be transposed into domestic law by 7 June 2021. However, the Federal Ministry of Justice and Consumer Protection has said that the proposed rights for press publishers would enter into force before that.

Diskussionsentwurfdes Bundesministeriums der Justiz und für Verbraucherschutz: Entwurf eines Ersten Gesetzes zur Anpassung des Urheberrechts an die Erfordernisse des digitalen Binnenmarkts

https://www.bmjv.de/SharedDocs/Gesetzgebungsverfahren/Dokumente/DiskE_Anpa

ssung%20Urheberrecht_digitaler_Binnenmarkt.pdf?__blob=publicationFile&v=1

Draft discussion paper of the Federal Ministry of Justice and Consumer Protection: first bill on adapting copyright law to the requirements of the Digital Single Market

Questions submitted to ECJ in ‘StreamOn’ procedure

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In a decision of 20 January 2020, the *Verwaltungsgericht Köln* (Cologne Administrative Court) submitted a number of questions to the European Court of Justice concerning the interpretation of Regulation (EU) 2015/2120 and its provisions on net neutrality. The case concerns the ‘StreamOn’ service offered by the German mobile operator Telekom Deutschland GmbH in which the data transmission rates of some video streams are throttled.

‘StreamOn’ is a so-called zero-rating service that can be added to some of the mobile operator’s tariffs free of charge. The data used to stream audio and video content from specific content partners is not deducted from the data allowance included in the customer’s mobile contract. Partners include video streaming services such as Netflix or YouTube, as well as the media libraries of the German public service broadcasters. However, customers who activate ‘StreamOn’ agree to a limited broadband speed of 1.7 Mbit/s for video streaming.

In December 2017, the *Bundesnetzagentur* (Federal Networks Agency), which regulates the telecommunications market in Germany, had prohibited parts of the service. It had decided that, although a zero-rating service was admissible in principle, the bandwidth for ‘StreamOn’ should be unthrottled in order to comply with net neutrality, which protected the fundamental functional principle of the Internet for all users. This principle was violated if video streaming speeds were deliberately throttled.

The telecommunications provider had appealed against this decision. In temporary relief proceedings, the *Oberverwaltungsgericht* (Higher Administrative Court) had already provisionally confirmed the decision to ban parts of the ‘StreamOn’ service. The Cologne Administrative Court, which is responsible for the main proceedings, has now referred the case to the European Court of Justice.

The European Court of Justice will clarify whether agreements between Internet access service providers and end-users concerning price, data volumes or speeds need to conform to the equal treatment principle enshrined in Article 3(3) of Regulation (EU) 2015/2120. The Administrative Court also submitted various questions on the scope of the traffic management measures that are permitted under the Regulation.

Pressemitteilung des Verwaltungsgerichts Köln vom 21.01.2020 - Az.: 9 K 4632/18

https://www.vg-koeln.nrw.de/behoerde/presse/Pressemitteilungen/03_200121/index.php

Press release of Cologne Adminstrative Court, 21 January 2020, case no. 9 K 4632/18

Prominent politician partially successful in dispute over social network insults

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Following an appeal by a politician and on the basis of her new submissions in the appeal proceedings and the court's additional findings, the Landgericht Berlin (Berlin District Court), in a new ruling of 21 January 2020, partly amended its original decision of 9 September 2019 (see IRIS 2019-10:1/11) on the politician's claim against the Facebook social media platform for the publication of user data. In its original decision, the Landgericht Berlin had rejected the well-known German politician's request for information about users who had insulted her on the grounds that the verbal attacks launched by the users concerned did not constitute defamation and were therefore not libellous. This decision had been heavily criticised not only by the general public but also by legal experts.

Referring to the original Facebook post, which was revealed in full for the first time in the appeal procedure, the Landgericht Berlin re-examined the 22 user comments concerned in the light of Supreme Court and Constitutional Court case law on freedom of expression. It found in the applicant's favour in six cases. In essence, the court changed its decision because it no longer assumed that the opinion quoted in the original post was fully attributable to the applicant, but considered it as a partial misquote. The court decided that doubts over the authenticity of the quote should be taken into account when evaluating the individual comments.

In this context, the judges thought that six users' comments were unlawful because of libellous content that could not be justified under freedom of expression. The disparaging nature of the comments was such that they would appear to an impartial average reader as a deliberate attack on the applicant's honour and were therefore defamatory. In these six cases, Facebook was therefore required to disclose the user's name and e-mail address, the IP address from which the comment was uploaded, and the time it was uploaded.

On the other hand, the court held that the other 16 comments did not constitute any of the offences listed in Article 1(3) of the Netzwerkdurchsetzungsgesetz (Network Enforcement Act – NetzDG) because, as already mentioned in the original decision of 9 September 2019, they concerned factual issues relating to a comment made by the politician in the Berlin regional parliament in 1986 about the criminal sanctions applicable to sexual acts with children. Since they did not defame the applicant, the civil chamber decided that they were not libellous.

The applicant's claim that Facebook's guidelines had been breached was considered as irrelevant as a claim for injunctive relief under civil law pursuant to Articles 823 and 1004 of the Bürgerliches Gesetzbuch (Civil Code) in connection with Articles 1 and 2 of the Grundgesetz (Basic Law). The right to information

claimed by the applicant in this case was regulated by the legislator in Article 14 of the Telemediengesetz (Telemedia Act – TMG) and limited to cases in which the criminal offences listed in Article 1(3) NetzDG had been committed.

Since the court has not rectified the decision, this ruling is not yet legally binding.

Pressemitteilung des Landgerichts Berlin

https://www.berlin.de/gerichte/presse/pressemitteilungen-der-ordentlichen-gerichtsbarkeit/2020/pressemitteilung.885539.php

Press release of the Berlin District Court

SPAIN

Central Electoral Commission fines acting President of the Government and Government Spokesperson

Francisco Javier Cabrera Blázquez
European Audiovisual Observatory

On 23 January 2020, the *Junta Electoral Central* (Central Electoral Commission – JEC) decided that the acting president of the government, in the exercise of his responsibilities as such, had also infringed Article 153.1 of the Organic Law of the General Electoral System, through the realisation and diffusion of a TV interview by taking advantage of the public means at his disposal, in his capacity as acting president of the government. The JEC also decided that the minister acting as government spokesperson, in the exercise of her responsibilities, had infringed Article 153.1 of the Organic Law on the General Electoral System (LOREG) for holding demonstrations with evaluative and electoralist content, taking advantage of the public resources available to her in her capacity as acting government spokesperson, on the occasion of a press conference called on 30 October 2019 to report on the agreements of the Council of Ministers, held that day (see IRIS 2019-10:1/12). The LEC imposed a fine of EUR 2 200 on the minister and, in view of his low degree of culpability, a fine of EUR 500 on the acting prime minister. Concerning the latter, a dissenting vote by some of the members of the JEC even requested that the file be closed without imposing any sanctions.

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

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

Expediente sancionador incoado por la Junta Electoral Central, en sesión de 30 de octubre de 2019, contra el Presidente del Gobierno en funciones, por su Declaración Institucional con motivo de la exhumación de don Francisco Franco el 24 de octubre de 2019, así como por su entrevista en el programa "Al Rojo Vivo" del viernes 25 de octubre (Expte. 293/1140)

http://www.juntaelectoralcentral.es/cs/jec/doctrina/acuerdos?anyosesion=2020&idacuerdoinstruccion=72044&idsesion=965&template=Doctrina/JEC_Detalle

Sanctioning file initiated by the Central Electoral Board, in session of 30 October 2019, against the acting President of the Government, for his Institutional Declaration on the occasion of the exhumation of Don Francisco Franco on 24 October 2019, as well as for his interview in the programme "Al Rojo Vivo" on Friday 25 October (Expte. 293/1140)

Expediente sancionador incoado por la Junta Electoral Central, en sesión de 30 de octubre de 2019, contra la Ministra de Educación y Formación Profesional en funciones, por las declaraciones realizadas en la rueda de prensa posterior al Consejo de Ministros del día 25 de octubre de 2019 (Expte. 293/1140)

http://www.juntaelectoralcentral.es/cs/jec/doctrina/acuerdos?anyosesion=2020&idacuerdoinstruccion=72042&idsesion=965&template=Doctrina/JEC_Detalle

Sanctioning proceedings initiated by the Central Electoral Board, in session of 30 October 2019, against the acting Minister of Education and Vocational Training, for statements made at the press conference following the Council of Ministers on 25 October 2019 (Expte. 293/1140)

Spanish war over football moves ahead: Mediapro defeats RFEF

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Audiovisual Diversity/ University Carlos III of Madrid

What has been referred to in Spain as 'the war over football', a conflict between media corporations regarding football broadcasting rights that started in 2007 (see IRIS 2011-10:1/13), moves ahead with a new episode. On this occasion, the players are Mediapro, the company that owned those rights for many years, and the *Real Federación Española de Fútbol* (RFEF), the governing body of football in Spain.

The Provincial Court of Madrid (*Audiencia Provincial de Madrid*) has sanctioned the RFEF for abuse of a dominant position. The dispute that has been taking place concerns the broadcasting rights to the 2019 final of the Copa del Rey, an important competition in Spain. According to Royal Decree-Law 5/2015 (*Real Decreto-Ley 5/2015*), the organiser of the competition, in this case the RFEF, is responsible for the commercialisation of the associated rights.

Since Mediapro considered that it was being excluded and marginalised by the RFEF from its tenders and contracts after being left out of the process of acquiring the rights to the above-mentioned match, the company requested that precautionary measures be applied to the procedure. These were admitted by a Commercial Court in May 2019 and led to the actual admission of Mediapro into the process. Soon afterwards, the RFEF filed an appeal against the inclusion of Mediapro in the process, which the Commercial Court dismissed. In the end, Mediapro’s bid was unsuccessful because the RFEF directly assigned the rights to another player, even though its offer did not reach the reserve price, nor did the process have a second round.

The decision of the Provincial Court of Madrid came to confirm what had already been ruled by the Commercial Court: that Mediapro had been excluded without valid grounds and that it had been entitled to take part in any bid issued by the RFEF or any other sporting body. Since this is the second time that a court has ruled on these facts with the same results, the RFEF has been sentenced to pay the costs incurred in this second instance. No appeal can be made against this decision.

Mediapro’s press release

FRANCE

BFM TV’s broadcast of Champions League final contravened its licence

Amélie Blocman
Légipresse

In March 2019, the Altice media group, which holds the exclusive rights to broadcast football’s UEFA Champions League final, announced its intention to transmit the match live on 1 June 2019 not on RMC sport, which had shown the other matches in the competition, but free-to-air on BFM TV, which it also owned. On 3 April 2019, the national audiovisual regulatory authority (*Conseil Supérieur de l’Audiovisuel* - CSA) warned the group that such a broadcast would not fall under any of the programme categories that the channel was authorised to show and would breach its agreement with the CSA. Article 3-1-1 of the agreement stated that BFM TV, which was “dedicated to news”, “provides programmes that are updated in real time and cover all areas of current affairs”, and that “its programmes may include, on Saturday and Sunday, broadcasts of major sports events no more than 3 hours 30 minutes in duration between 6am and 10pm.” Such broadcasts should not constitute a total of more than 10% of the channel’s weekly airtime. Since BFM TV nevertheless broadcast the match live, the CSA, on 5 June 2019, issued a formal notice requiring it to comply with the provisions of its agreement in future. BFM TV requested the annulment of both these CSA decisions.

The *Conseil d’Etat* began by examining the CSA’s decision to dismiss the request for the annulment of its first decision of 3 April 2019, which was notified to BFM TV in a letter from the CSA president. It ruled that, although this decision had not taken the form of a formal notice or a general, binding provision, it had reflected the CSA’s view, prior to the event, that the broadcast planned by BFM TV was incompatible with the provisions of its agreement. This statement of the CSA’s position, which had also appeared on its website, must be regarded, in this case, as having been intended to significantly influence the channel’s conduct. In view of its scope and the circumstances in which it had been taken, the decision in question was an act that could be appealed against on grounds of abuse of authority. The CSA’s refusal to consider the request was therefore quashed.

The Conseil d’Etat then noted that, according to Article 20-2 of the Law of 30 September 1986, “Events of major importance may not be broadcast on an exclusive basis if a large proportion of the public is denied the opportunity to watch them live or delayed on a freely accessible television service. The list of events of major importance is fixed by decree by the Conseil d'État (…).” The Champions League final is an event of major importance under Article 3(6) of the decree of 22 December 2004, issued in application of the aforementioned Article 20-2.

Furthermore, while Article 3-1-1 of the agreement, which stated that the news channel offered “programmes that are updated in real time and cover all areas of current affairs”, entitled the channel to cover sports news of any kind, it could not, contrary to the company’s claim, be interpreted as meaning that it could broadcast sports events in their entirety. Therefore, even though it was an event of major importance and fell within the scope of news categories covered by BFM TV, the Champions League final could not be broadcast by the channel in this way without infringing Articles 1-1 and 3-1-1 of the agreement of 19 July 2005. On these grounds, the applicant could not reasonably argue that the decision to stop it showing the match had violated its editorial freedom.

Beschlüsse Nr.°431164 und Nr.°432634 des Staatsrats, 5. und 6. Kammer, 31. Dezember 2019

Conseil d'Etat, 5th and 6th chambers combined, decision nos. 431164 and 432634, 31 December 2019

INA’s exploitation of performances approved by CJEU and Court of Cassation

Amélie Blocman
Légipresse

The *Institut national de l’audiovisuel* (National Audiovisual Institute – INA) was created to protect and promote the archives of French public radio and television companies. Its role was later broadened when, in 1992, it became the legal deposit library for radio and television, and then for media websites in 2006.

In a ruling of 22 January 2020, the Cour de cassation (Court of Cassation) brought an end to a major dispute concerning the INA’s exploitation of performers’ performances.

In the case at hand, the holders of the rights of a musician who had died in 1985 discovered in 2009 that the INA was marketing, in its online shop and without their authorisation, video recordings and phonograms produced and then broadcast by national broadcasting companies reproducing the musician’s performances between 1959 and 1978. In order to obtain compensation for the alleged infringement of the performer’s rights which they hold, they then brought an action against the INA on the basis of Article L. 212-3 of the Intellectual Property Code, which states that “The fixation of his performance, its reproduction and communication to the public, as well as any separate use of the sound and image of the performance when it has been fixed for both sound and image, shall be subject to the written authorisation of the performer.”

The amended Article 49 of Law No. 86-1067 of 30 September 1986, which gives the INA the right to exploit the audiovisual archives of national broadcasting companies, establishes a derogation under which the conditions for the exploitation of performers’ performances and the remuneration for that exploitation are governed by agreements concluded between the performers themselves or the employee organisations representing performers and the INA. Those agreements must specify in particular the scale of remuneration and the arrangements for payment of that remuneration.

In a judgment of 10 March 2017, the court of appeal before which the case was brought back dismissed the rightsholders’ claims. The court considered that Article 49 establishes, for the sole benefit of the INA, a simple presumption of the performer’s prior consent, which could be challenged, and thus did not call into question the performer’s exclusive right. The agreements with the trade union organisations referred to in that article did not confer on them the right to ‘authorise and prohibit’, which was vested in the performer, but had the sole purpose of fixing the performer’s remuneration. The appellants and Spedidam (a collecting society for performers’ rights), which had intervened voluntarily, brought an appeal against the judgment. The Court of Cassation decided to stay the proceedings and refer to the Court of Justice of the European Union (CJEU) the question of the compatibility of the legal rules set out in Article 49 of the

aforementioned 1986 law with Articles 2, 3 and 5 of Directive 2001/29 on copyright in the information society.

In a judgment of 14 November 2019 (Case C-484/18), the CJEU ruled that the provisions of the Directive must be interpreted as not precluding national legislation which established, as regards the exploitation of audiovisual archives by a body set up for that purpose, a rebuttable presumption that the performer had authorised the fixation and exploitation of his performances, where that performer was involved in the recording of an audiovisual work so that it may be broadcast.

In this case, and in view of the CJEU's response, the Court of Cassation, in a decision of 22 January 2020, pointed out that the INA had a specific mission, enshrined in successive laws, to conserve and promote the national audiovisual heritage, that it preserved the audiovisual archives of national broadcasting companies and assisted with their exploitation, and that it was the sole owner of the said archives and held the exclusive right to exploit them. It added that the disputed video recordings and phonograms were covered by the derogation in favour of the INA. Therefore, the performer in this case had been involved in the making of these works knowing that they would be broadcast by national broadcasting companies and had given his performance for the purposes of such use.

The Court of Cassation therefore decided that the appeal court had correctly stated that, by exempting the INA from proving that the performer had given written authorisation, Article 49, as amended, of the Law of 30 September 1986 did not remove the requirement to obtain consent, but established a simple, rebuttable presumption that authorisation had been given, and did not call into question the exclusive right for performers to authorise or prohibit the reproduction, communication or making available to the public of fixations of their performances.

Civ. 1re, 22 janvier 2020, n° 17-18.177, SPEDIDAM et a. c/ INA

https://www.courdecassation.fr/jurisprudence_2/premiere_chambre_civile_568/47_22_44292.html

1st civil chamber of the Court of Cassation, 22 January 2020, judgment no. 17-18.177, Spedidam at al. v INA

The CSA was not entitled to punish Radio Courtoisie for broadcasting racist comments

Amélie Blocman
Légipresse

The company that produces the terrestrial analogue radio station Radio Courtoisie asked the Caen regional audiovisual committee to renew, without a call for tender, its broadcasting licence for a specific geographical area, which was due to expire on 3 December 2018. On 27 November 2017, the regional committee rejected its request on the grounds that the company had been fined EUR 25 000 by the national audiovisual regulatory authority (Conseil Supérieur de l'Audiovisuel - CSA) on 4 October 2017. The company therefore lodged an administrative appeal with the CSA, which rejected it, firstly implicitly and then explicitly, in a decision of 25 April 2018 for the same reason as that given by the regional audiovisual committee. On 17 December 2018, the Conseil d'Etat, ruling on the dispute, ordered that execution of the latter decision should be stayed on the basis of Article L. 521-1 of the Code of Administrative Justice. The company requested the annulment of both CSA decisions on grounds of abuse of authority.

The Conseil d'Etat noted that the sanction imposed by the CSA on 4 October 2017, the existence of which formed the basis of the CSA's disputed decision, had concerned repeated racist, xenophobic comments that incited discrimination based on religion, made by the company's president or his guests during the programme *Le libre journal d'Henry de Lesquen*. However, the case file also showed that the steps taken by the company since July 2017, which included relieving the person concerned of his responsibilities within the company and taking him off air, showed the applicant's willingness to learn lessons from the sanction imposed against it and to avoid repeating the infringements.

In these circumstances, the Conseil d'Etat considered that the CSA had incorrectly applied the provisions of Article 28-1 of the Law of 30 September 1986 by refusing to renew the company's broadcasting licence without a call for tender on the grounds of the aforementioned sanction. The CSA was ordered to pay the company EUR 3 000 on the basis of Article L. 761-1 of the Code of Administrative Justice.

Decision n° 425747 du 5 février 2020 du Conseil d'État

https://www.conseil-etat.fr/fr/arianeweb/CE/decision/2020-02-05/425747

Conseil d'Etat decision no. 425747 of 5 February 2020

UNITED KINGDOM

Independent Advisors on AI and data driven technology publish recommendations to Government on social media targeting.

Julian Wilkins
Wordley Partnership

The Centre for Data Ethics and Innovation (CDEI) has produced its final report recommending what regulatory steps the UK Government should take to prevent harm from online targeting yet allow ethical innovation in this area. The CDEI is an independent expert committee led by a board of specialists established and tasked by the UK Government to investigate and advise on how to maximise the benefits of data-driven technologies as well as address any potential negative aspects. Data-driven online targeting is a new and powerful application of technology whereby its systems predict which content would be most likely to interest people and influence them to behave in a particular way.

The focus of the CDEI's report and recommendations is on online targeting directed at personalised advertising and content recommendations systems. Furthermore, the report considers the role of online targeting in three areas: autonomy and vulnerability, democracy and society, and discriminations.

The CDEI set themselves three sets of questions. The first concerned the extent to which technology is out of line with public values: what is the right balance of responsibility between individuals, companies and the government?

The second question set asked: are current regulatory mechanisms able to deliver their intended outcomes? How well do they align with public expectations? Is the use of online targeting consistent with principles applied through legislation and regulation offline?

The third set of questions addressed solutions. What technical, legal or other mechanisms could help ensure that the use of online targeting is consistent with the law and public values?

The report's enquiry revealed that the public wanted online targeting but for such systems to operate to higher standards of accountability and transparency, and people wanted to have meaningful control over how they are targeted. Both the industry and the public recognised that the current self-regulation status quo was unsustainable and that proportionate regulation was required to ensure accountability, transparency and user empowerment.

The report identified that the use of online targeting systems failed to meet the OECD (Organisation for Economic Co-operation and Development) human-centred principles on Artificial Intelligence (AI) which set standards for the ethical use of technology.

As a consequence, the CDEI recommends principle-led regulation, whereby the regulator anticipates and responds to changes in technology and seeks to guide its positive development to ensure it is in alignment with people's interests.

An online harms regulator working closely with other regulators, such as the Information Commissioner's Office (ICO), would increase accountability through codes of practice requiring organisations to adopt standards of risk management, transparency and the protection of vulnerable people.The regulator should have a statutory duty to promote privacy and freedom of expression.

Additionally, the regulator should have powers to collate information to see if online platforms are complying with the prescribed codes of practice.This would include empowering independent experts to assess a platform's data to test for compliance with the implemented code of conduct.

The regulator must exercise these powers proportionately and be subject to due process, as well as coordinate with other regulators such as the ICO and the Competition and Markets Authority to ensure consistency and avoid duplication.

Online targeting systems could have a negative effect, for instance Internet addiction that, in certain instances, leads to radicalisation and the polarisation of political views.

The CDEI recommends that the regulator facilitate independent academic research into issues of significant public interest and assist such work, which would require online platforms to provide secure access to their data.

Furthermore, platforms should maintain online advertising archives to provide transparency with respect to personalised advertising that posed a particular societal risk, for instance, political claims that needed to be challenged to ensure that elections are fair. This would complement the government's plans for labels on online electoral adverts so as to make paid-for content easier to identify and give users some basic information to show that the content was targeted at them. Whilst in other arenas, it would ensure that data was used fairly and not in a discriminatory way, such as in the domain of recruitment.

The CDEI recommends that new markets be created to support the public's wish for more meaningful control, such as third-party safety apps and third-party intermediaries. Clear ethical standards would help encourage public sector bodies to use online targeting in an effective way.

The report flagged that "Societies are in the early years of developing policy and regulatory responses to data-driven technologies like online targeting [...] By focusing on building the evidence base for informed policymaking and creating the right incentives, the UK will be able to govern online targeting in a way that is both trustworthy and allows responsible, sustainable innovation to thrive."

Review on online targeting: Final report and recommendations

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/864167/CDEJ7836-Review-of-Online-Targeting-05022020.pdf

Television cameras to be allowed to film in Crown Court in England and Wales

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On 16 January 2020, the Ministry of Justice announced plans to allow for the first time in England and Wales recordings and broadcasts from the Crown Court with the aim of increasing public engagement with the justice system.

Filming is already permitted in the Supreme Court and has been since it was set up in 2009 (although this is carried out by the court itself) and the television broadcasting of Court of Appeal proceedings has been possible in specified circumstances since 2013 under the Court of Appeal (Recording and Broadcasting) Order 2013. The Crown Court (Recording and Broadcasting) Order 2020 will extend this to the Crown Court (which deals with serious criminal cases like murder and sexual offences) and allow cameras to broadcast the sentencing remarks of High Court and Senior Circuit judges when sitting in open court. No other court user will be filmed, however, and normal reporting restrictions will continue to apply to protect victims or witnesses involved in the case.

The policy aim of this legislative move is to ensure that courts “remain open and transparent and allow people to see justice being delivered to the most serious of offenders.” The legislation has been welcomed by broadcasters such as ITN, Sky and the BBC, and follows a not-for-broadcast pilot run between July 2016 and February 2017 to enable assessment of the practical and technical challenges of filming in the Crown Court.

The 2020 Order prescribes the conditions to be satisfied for the visual and sound recording and broadcast of sentencing remarks in the Crown Court. When these conditions are satisfied, section 41 of the Criminal Justice Act 1925 (which bans photography and filming in courts and their precincts) and section 9 of the Contempt of Court Act 1981 (which makes it illegal to record sound in court and broadcast any audio-recording of court proceedings except with the permission of the court) will not apply.

The legislation comes with safeguards. Whole trials will not be televised and filming will be restricted to the judge alone who will be seen on camera as he or she delivers their sentencing remarks. Moreover, recording or live broadcast can only be carried out by persons who have been given specific permission by the Lord Chancellor. Filming will also be appropriately edited before leaving the courtroom. Where filming is to be broadcast live, there will be a short delay before broadcast to avoid breaches of reporting restrictions or any other error. Whilst concerns may be expressed that particular sections of lengthy remarks may be broadcast out of context to create a false impression, the full sentencing remarks of any case broadcast will be hosted on a website to which the public will have access. Her Majesty’s Courts and Tribunals Service will retain copyright of the footage and will be able to access any footage taken by broadcasters.

Cameras to broadcast from the Crown Court for first time

https://www.gov.uk/government/news/cameras-to-broadcast-from-the-crown-court-for-first-time

Explanatory Memorandum to The Crown Court (Recording and Broadcasting) Order 2020

https://www.legislation.gov.uk/ukdsi/2020/9780111192054/pdfs/ukdsiem_9780111192054_en.pdf

UK Government accepts eight of the Cairncross Review proposals

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The UK Government has responded positively to the Cairncross Review, which was published in February 2019 (see IRIS 2019-4:1/21), concerning the necessary steps to be taken in order to secure independent journalism in the wake of a shift from traditional media outlets to digital media and the proliferation of content that spreads disinformation. Eight of the nine Cairncross proposals have been accepted. Furthermore, the Secretary of State for Digital, Culture, Media and Sport (DCMS) said that the government would consider the Cairncross proposals in the context of other initiatives, including the Competition and Markets Authority's (CMA) review of competition policy relating to digital platform markets, to be published in July 2020, and the Online Harms White Paper, based upon which the government will publish its strategy in summer 2020.

The government has accepted the proposal for a rebalance between the commercial expectations of an online platform and the relationship with publishers. The collecting of data and the use of search engines to drive traffic to a site has to be balanced against the needs of news publishers. The recommendation calls for regulation by an independent regulator to guard against digital news aggregators and advertising which diverts attention to certain news stories or, alternatively, news stories that contain disinformation to attract traffic and advertising revenue, otherwise known as "click baiting".

This complements the acceptance of the second proposal to investigate the workings of the online advertising market in order to ensure fair competition. This would be considered in conjunction with the CMA's forthcoming July report and would include measures to promote transparency and enhance data sharing,

The third proposal adopted concerns the obligation to regulate the quality of online news in order to enhance user experience, including the identification of reliable and trustworthy sources. The regulation would apply to platforms such as Google, Facebook and Apple; for instance,their algorithms could favour high-quality, well sourced material over disinformation and clickbait material, thus ensuring a more proactive role for them. It would be a statutory duty of care to take reasonable steps in the provision of services to ensure user safety and prevent illegal and harmful content, albeit upholding and promoting freedom of expression.

The government would develop a media literacy strategy to complement the fourth proposal so that the public could discern between fact and opinion. This would dovetail with the following initiatives, namely the Online Harms White Paper, the Department of Education school curriculum proposals to ensure impartial teaching, and Ofcom's statutory duty to promote media literacy.

The fifth proposal that was favoured recommends that Ofcom assess whether BBC News Online is striking the right balance between aiming for the widest reach for its own content and driving traffic from its online site to commercial publishers, including the corporation sharing its technological and digital expertise.

The Cairncross Review's sixth recommendation was for funding focused on innovations to improve the supply of public interest news. DCMS has so far given GBP 2m to NESTA - an independent charitable body that distributes innovation funding for the development of technological prototypes, start-ups and innovation business models to explore ways to tackle the challenges facing news publishers. The first nineteen grants have been allocated, with more to follow, including working with Nesta and other partners to evaluate the possible implementation of a full innovation fund.

The government supported the seventh proposal to introduce tax reliefs, such as extending zero-rated value added tax in a bid to encourage online publishers and to ensure parity with non-digital publishers. It would also support more publishers in adopting charitable status where journalism promotes charitable purposes such as education, the arts, culture and the advancement of human rights. However, the government recognised that charitable status would not suit all journalistic entities, for instance, those wanting to campaign for or support a particular political party (such activities are forbidden under existing UK charity laws). The government was not open to such modifications, unlike the steps taken in the United States that allow news organisations with charitable status to lobby and campaign.

The Local Democracy Reporting Service administered by the BBC has already filed over 50 000 stories and recruited 150 journalists since its inception in 2017. The government supported the further development of this service, whilst the BBC announced proposals to establish a new body to run the scheme in order to harness funding which was external to the BBC.

The ninth recommendation, which proposed the establishment of an Institute for Public Interest News to ensure the future sustainability of public interest news, was rejected by the government, who considered that there were sufficient bodies such as Nesta and Ofcom to oversee such principles.

The government flagged that it supported any initiatives to increase diversity in journalism, including court reporting, and that the government's considerable advertising spend was distributed fairly amongst all publishers.

The Cairncross Review- A Sustainable Future for Journalism

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/779882/021919_DCMS_Cairncross_Review_.pdf

Government Response to the Cairncross Review:a sustainable future for journalism

https://www.gov.uk/government/publications/the-cairncross-review-a-sustainable-

future-for-journalism/government-response-to-the-cairncross-review-a-sustainable-future-for-journalism

GREECE

Gender stereotypes and discrimination in infotainment programmes through an important decision of the Greek Regulatory Authority

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A meeting of the "Working Group on Gender and Media" representing nine MNRA (Mediterranean Network of Regulatory Authorities) members was held in Lisbon in February 2018, during which the author represented the Greek Regulatory Authority (NCRTV). During this session, it was agreed that all participants would adopt a common three-month period of monitoring and analysing news reports and other current affairs programmes in at least two television channels (one public and the other one commercial with a high level of viewership). The scope of this study, articulated in both qualitative and quantitative parameters, was to elaborate the informative treatment of the gender violence issues in the above-mentioned programmes in order to draw significant conclusions about the attitude of media and journalists towards verbal or physical violence against women and therefore contribute to increasing public awareness. The study was completed by a questionnaire-based mapping of the current national legal framework on gender violence in every MNRA member.

The three-month monitoring period of the Greek media landscape proved that steps should be taken, particularly in the field of public awareness. Gender violence issues are more present in current affairs programmes or magazines than in news broadcasts. Even though public television often refers to gender violence using dramatisation, private television channels put more emphasis on the description of such issues using sophisticated techniques (such as zooming in) in a discriminatory manner. Additionally, in order to capture the audience's attention, private television channels avoid either an in-depth analysis of the facts or a presentation of any statistical evidence that could help the audience to identify gender violence as a social problem. On the contrary, public television takes care of informing the audience about counseling offices and helplines dealing with gender violence issues.

Until recently, the Greek legal framework did not contain specific rules on broadcasting gender-violence-related issues. According to Article 4, section 2 of Presidential Decree No. 77/2003 (Code of Conduct for Radio and Television News and Current Affairs Programmes), journalists reporting on news or current affair programmes should avoid any use of demeaning, racist, xenophobic or sexist vocabulary. Similar provisions related to sexual discrimination or derogatory remarks are included in Article 2 (a) and (f) of the 1998 Journalist's Union of Athens Daily Newpapers Code of Ethics, as well as in Article 5.1. of the 2016 Code

of Ethics for Digital Media. Under the same scope, according to Article 10, section 1(d) of Presidential Decree No. 109/2010 on audiovisual media services, any gender discrimination in the context of an audiovisual commercial communication is prohibited.

The very recent Law No. 4604/2019 on promoting gender equality, preventing and combating gender-based violence expanded its scope of application to all categories of media or programmes, whether informative or not. It is specifically provided for that printed or electronic media, as well as advertising, should promote gender equality by reflecting a free-from-gender-stereotypes image of all individuals. Public or private television channels and radio stations are encouraged to include specific rules on gender equality and the elimination of stereotypes into their self-regulation or co-regulation codes of conduct. It is also prohibited to broadcast advertising that contains discrimination speech, as well as any reference to corresponding verbal or other behaviour. Most importantly, all media should elaborate and broadcast topics that contribute to promoting gender equality and fighting against discrimination and stereotypes.

A recent case examined by the Greek Regulatory Authority (NCRTV) proved that steps should also be taken in the field of self-regulation, as Law No. 4604/2019 suggests. A sexual assault took place in broad daylight at a university library; a young student assaulted a girl, who reacted instantly. The incident was reported during an infotainment programme broadcast on a private television channel with a high audience. This programme, usually on air at noon, contains news, as well as short interviews, music and entertainment issues. Instead of commenting on the assault in a context that could help mostly young viewers to identify the different aspects of gender violence and realise the impact that such behaviour can have on both the victim and on society, the panelists took a sarcastic approach which consisted in making humorous remarks on the sexual behaviour of the perpetrator, belittling the incident and demeaning the victim's reaction and feelings. Most of all, they never referred to the girl in question as being the victim of an assault; instead they presented the incident as being a funny instance of quirky student antics.

The NCRTV examined the case *ex officio* and imposed an administrative fine of EUR 150 000 for having violated the rules on human dignity and gender discrimination. It also ordered a week-long suspension of the transmission of the above-mentioned programme, a period during which the channel was charged with the obligation of informing its audience about the suspension by using a special window on the sreen (moral sanction). Decision No. 192/2019 (partially amended by Decision No. 5/2020 as regards the application of the moral sanction) was widely reported in the press and drew popular attention.This decision signals a proactive and strict attitude of the NCRTV and highlights that gender discrimination or derogatory speech consist a multi-aspect problem involving human dignity. Therefore, all kinds of programmes, including infotainment ones, should respect the legislation on gender discrimination. Moral sanctions costitute a nessecary measure to that effect, as they contribute to public awareness.

This case proved that the issues identified in the aforementioned three-month survey not only are present but they are actually exacerbated in infotainment programmes. The sensationalisation of gender violence issues may boost viewer ratings but at the same time belittles the impact of the problem and offends the personality of the victim. The existing Greek legal framework must be reinforced with self-regulation or co-regulation rules “in order to effectively fight against gender stereotypes in programmes” as the 2012 Lisbon Declaration on the fight against gender stereotyping in the audiovisual media suggests.

National Council of Radio and Television v. SKAI TV- Decision n. 192/2019 and Amending Decision n. 5/2020

IRELAND

Broadcasting Authority rejects complaints regarding investigative programme on Ireland's Greyhound Industry

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On 30 January 2020, the Broadcasting Authority of Ireland (BAI) rejected nine complaints regarding *RTÉ Investigates: Running for their Lives*, a current affairs programme broadcast on RTÉ One on 26 June 2019. The investigative programme focused on welfare issues within the Irish greyhound industry and examined, in detail, the implications of an expert report, commissioned by the governing body for greyhound racing in Ireland, the Irish Greyhound Board (IGB). The programme reported that the expert report detailed that up to 6 000 dogs may be culled per year because they do not perform on the racetrack, and that ten times more dogs are bred each year than are needed to sustain the industry. The programme also featured undercover footage recorded at "knackeries", and revealed how these facilities were willing to put down/euthanise greyhounds for between EUR 10 and EUR 35.

The complaints were submitted under the Broadcasting Act 2009, section 48(1)(a) fairness, objectivity and impartiality in current affairs) and various sections of the BAI Code of Fairness, Objectivity and Impartiality in News and Current Affairs (section 4, rules 4.1, 4.2). The complaints, including one submitted on behalf of the IGB, centred on a number of concerns including that the programme "was neither objective nor impartial and constituted an attack on the Irish greyhound industry." One complainant claimed that the programme "contained several inaccuracies, including accusations regarding the number of greyhounds culled each year, the racing lifetime of greyhounds, the use of the performance-enhancing drug Erythropoietin (EPO) and the number of countries which still support greyhound racing."

In response to the complaints, the broadcaster, RTÉ, asserted that the programme was "a comprehensive, factual investigation into practices in the greyhound industry" and was of the view that the programme was in the "public interest", which was evident from the fact that "the programme had led to follow-up investigations by the IGB, the Department of Agriculture and the Marine and National Parks and Wildlife Service."

The BAI's Compliance Committee, having considered the broadcast and submissions from the complainants and the broadcaster, noted that sections 4.1 and 4.2 of the BAI Code of Fairness, Objectivity and Impartiality in News and Current Affairs require that content is "fair to all interests concerned and that the broadcast matter is presented in an objective and impartial manner and without any expression of the broadcaster's own views." The Committee noted that "a

wide variety of sources were cited throughout the programme" such as the report commissioned by the IGB and the footage obtained through undisclosed recording. The Committee was of the view "that the information and footage were presented in a factual manner, and that the sources were clearly identified" and in this regard, the Committee found "that information was presented with due accuracy and did not consider that the programme was misleading to viewers."

The Committee also had regard to some complainant's views that the programme "omitted some key information and failed to refer to many of the positive elements of greyhound racing." The Committee noted that there is no requirement in the Code of Fairness, Objectivity and Impartiality in News and Current Affairs for a broadcaster to include all possible viewpoints on a matter, and the principle of fairness does not require the broadcaster to achieve an artificial balance or give equal airtime to all views. In the Committee's view, "the programme contained a variety of contributors and the audience was given access to a wide range of viewpoints" and accordingly, "the subject matter was explored in a fair and impartial manner."

The Compliance Committee did not find evidence in the programme to support the complainant's views that greyhound racing was presented solely in a negative manner or that the content could be considered as an attack on the industry. Moreover, the Committee found that "the programme was a comprehensive exploration of the topic in a factual manner which was fair, objective and impartial." Accordingly, the Committee did not consider that the programme infringed the Code in the manner outlined by the complainants and therefore rejected all the complaints.

Broadcasting Authority of Ireland, Broadcasting Complaint Decisions,30th January 2020, pp. 14 -40

http://www.bai.ie/en/download/134721/

Communications Minister publishes general scheme of the Online Safety and Media Regulation Bill

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On 10 January 2020, the Minister for Communications, Climate Action and Environment, Richard Bruton TD, published the general scheme of the Online Safety and Media Regulation Bill 2019 (hereinafter 'the Bill'). The purpose of the Bill is to create new online safety laws to bring legislation up to date with the EU Audiovisual Media Services Directive (AVMSD) which governs the EU-wide coordination of national legislation on all audiovisual media, which concerns both traditional TV broadcasts and on-demand services.

The proposed Bill will establish an Online Safety Commissioner as part of a wider "Media Commission", which will replace the Broadcasting Authority of Ireland, to oversee the new regulatory framework for online safety. The Online Safety Commissioner will govern the new framework through legally binding online safety codes relating to a wide range of matters, including harmful online content (cyberbullying, material promoting eating disorders, self-harm and suicide and "material which it is a criminal offence to disseminate", including "child sexual abuse material" and "content containing or comprising incitement to violence or hatred"); commercial communications; risk and impact assessments; and complaints handling. The Online Safety Commissioner will be responsible for designating which online services will be covered under the new law and to decide which codes apply to each designated service. Each Online Safety Code will set out the steps the designated service provider must take to keep their users safe online and will depend on the type of service that is being offered.

The proposed Bill authorises the Online Safety Commissioner with robust compliance, enforcement and sanction powers including: reporting requirements of compliance with online safety codes by designated online services; the auditing of complaints or issues relating to handling mechanisms operated by online services; and the appointment of authorised officers to assess compliance and carry out audits. The proposed Bill empowers the Online Safety Commissioner to issue a "compliance notice" to an online service where it is considered that the online service is not in compliance with an online safety code. The compliance notice will set out what an online service must do to bring itself into compliance and may include changing a system or policy, or the removal or restoration of content and the timeframe in which to take such actions. If an online service fails to take action following a compliance notice, the proposed bill also grants the Online Safety Commissioner the authority to issue a "warning notice" to a service provider, detailing what the service must do to bring itself into compliance and the sanction the Commissioner will take if the online service fails to comply. The proposed Bill provides that any sanctions to be imposed on a designated online service be sought by the whole Media Commission, following the failure of a service provider to comply with a warning notice. Under the proposed Bill, such

sanctions include an “administrative financial sanction”, “compelling compliance” or the blocking of access to the offending designated online service in Ireland. The proposed Bill provides that “the application of each of these sanctions requires court approval whereupon the designated online service in question will have the opportunity to dispute its application.”

The government has referred the general scheme of the proposed Bill to the Office of the Attorney General for review and to the Joint Oireachtas Committee on Communications, Climate Action and Environment for examination. In addition, the Department of Communications, Climate Action and Environment will hold a number of stakeholder engagement sessions on key issues arisng from the general scheme of the proposed Online Safety and Media Regulation Bill.

Department of Communications, Climate Action and Environment, ‘General Scheme Online Safety Media Regulation Bill 2019’

https://www.dccae.gov.ie/enie/communications/legislation/Documents/154/General_Scheme_Online_Safety_Media_Regulation_Bill.pdf

Department of Communications, Climate Action and Environment, ‘Minister Bruton Publishes Draft Scheme of New Online Safety Law’

https://www.dccae.gov.ie/en-ie/news-and-media/press-releases/Pages/Minister-Bruton-Publishes-Draft-Scheme-of-New-Online-Safety-Law.aspx

ITALY

Draft bill regulating ambush marketing approved by the Council of Ministers

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Portolano Cavallo

On 17 January 2020, the Italian Council of Ministers approved a draft bill specifically prohibiting ambush marketing which was introduced following a proposal by the Minister of Justice, Alfonso Bonafede. The bill aims at strengthening the protection of the economic interests of companies that sponsor sports events and exhibitions of national and international relevance. The bill should introduce appropriate measures, particularly in light of the upcoming 2020 UEFA European Football Championship, with a view to preventing unauthorised economic players from associating their trademarks or products with any symbol or logo of the relevant events.

The provisions provided for in the bill, however, have a general scope of application, given the absence of a specific legal framework regulating ambush marketing. The bill illustrates three possible subject categories which are affected by the threats posed by ambush marketing.

On the one hand, ambush marketing may be dangerous for the general public, insofar as misleading advertising leads the general public to believe that the sponsored product is covered by a sponsorship agreement which does not actually exist.

Secondly, it negatively affects the operators who have legitimately entered into sponsorship agreements and who fail to obtain the expected revenues in return because of the misleading effects of ambush marketing and the sidetracking of consumers which it brings about.

Lastly, the bill assumes that the relevant event organisers also suffer damages from ambush marketing, as the value of the licences for the relevant logos and image rights decreases.

The bill prohibits any form of parasitic advertising practised on the occasion of sports events, exhibitions of national and international relevance or shows in which internationally or nationally renowned artists participate. In order to qualify as parasitic, such forms of advertising have to meet two requirements: they are not authorised by the event organisers and they pursue an economic or competitive advantage.

Since ambush marketing is inherently connected to events of limited duration, the draft bill provides for a temporarily-limited protection which extends from 90 days before the official beginning of the event until the 90th day following the end

thereof.

Finally, the draft bill entrusts the Italian Competition Authority with the power to impose administrative penalties ranging from EUR 500 000 to EUR 2 500 000. Such penalties should be imposed with a view to balancing, on the one hand, the protection of the economic expectations of events organisers and official sponsor operators and, on the other hand, the desire to engage in advertising for third-party operators on the occasion of events of significant resonance.

Comunicato stampa del Consiglio dei Ministri n. 23 - 17 gennaio 2020

http://www.governo.it/it/articolo/comunicato-stampa-del-consiglio-dei-ministri-n-23/13761

Council of Ministers press release no. 23 - 17 January 2020

NETHERLANDS

Broadcaster prohibited from making recordings in court during high-profile case

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On 24 January 2020, the District Court of Noord-Nederlands announced that the Dutch broadcaster RTL was no longer permitted to make recordings in the court during an ongoing high-profile case. Furthermore, the court announced that RTL, with the exception of its news programme *RTL Nieuws*, was prohibited from making recordings for other broadcasters in the court for the next three months. The court stated that the measures were being imposed due to a programme broadcast by RTL on 21 January 2020.

The issue arose in a case currently before the court, known as the Ruinerwold case, which made headlines around the world. In October 2019, police discovered a family of six in a farmhouse near the village of Ruinerwold, in the north-eastern province of Drenthe. Two suspects are currently before the District Court of Noord-Nederlands, with one having been arrested on suspicion of deprivation of liberty and sexual abuse. On 21 January 2020, a hearing in the case took place in the district court. The television programme *RTL Boulevard* had asked to film the hearing, including the voice of the suspects. The court granted certain permissions for recordings in the courtroom by *RTL Boulevard*. However, the court imposed a number of reporting restrictions during the hearing, including if suspects appeared at trial, no video or audio recordings could be made. Furthermore, the name and personal details of suspects and victims who were mentioned by others during the proceedings had to be removed during editing. This was to ensure the privacy of the suspects.

However, on 21 January 2020, during another well-known programme on RTL, *Jinek*, the voice of one of the suspects during the hearing was broadcast. This led the Court to issue its announcement on 24 January 2020, prohibiting RTL from making furher recordings in the Ruinerwold case. The court stated that it was imposing the restriction as a result of the *Jinek* broadcast on 21 January 2020. The court stated that *RTL Boulevard* was responsible for the recordings in the courtroom, and that the violation of the recording ban was “not acceptable to the Court.” The court also stated that it had “made its dissatisfaction known to representatives of both *Jinek* and *RTL Boulevard* and has communicated the measures it has taken to the management of RTL.” Finally, the *Jinek* programme-makers informed the court that the fragment had been now removed from the broadcast.

Rechtbank neemt maatregelen richting RTL na uitzending Jinek, 24 januari 2020

https://www.rechtspraak.nl/Organisatie-en-contact/Organisatie/Rechtbanken/Rechtbank-Noord-Nederland/Nieuws/Paginas/Rechtbank-neemt-maatregelen-richting-RTL-na-uitzending-Jinek.aspx

Court takes measures towards RTL after Jinek broadcast, 24 January 2020

Motivering afwijzing opnamen Alles uitklappen, 21 januari 2020, strafzaak 'Ruinerwold', rechtbank Noord-Nederland, 21 januari 2020

https://www.rechtspraak.nl/Persinformatie/Paginas/Opnamen-in-de-rechtszaal.aspx#e28c0a02-d3e8-408c-b252-079be5804ee93ac3b2ca-02cd-449d-b600-44132ccdd62186

Justification for rejecting recordings, 21 January 2020, Ruinerwold case, District Court of Noord-Nederlands

Court dismissed TV presenter's application to have online article removed

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In its judgment of 20 December 2019, the *Rechtbank Amsterdam* (District Court of Amsterdam) delivered an important judgment on tabloid journalism in the Netherlands, ruling that media outlet TMG did not have to remove a sensationalist, online article on a well-known singer's alleged adultery with a television host – the claimant – in 2014. The district court held that the media outlet's freedom of expression, as guaranteed by Article 10 of the European Convention on Human Rights (ECHR), outweighed the television host's right to privacy, as enshrined in Article 8 ECHR in the given circumstances.

On 11 November 2019, TMG published an article on the alleged romantic encounter between a television presenter and a singer in its newspaper *De Telegraaf*, and on that newspaper's corresponding website. According to the media outlet, the singer committed adultery with the television host at a wedding in 2014. TMG concluded that the celebrities had had their own wedding night. The television presenter and singer are now in a relationship.

The television host's lawyer requested the media outlet to remove the online article, and to publish a rectification. TMG did not honour that request, which led to the interim injunction proceedings before the district court. By and large, the television host argued that the publication intolerably violated her right to privacy. The television host argued that the media outlet's anonymous and partial sources did not support the article. According to her, impartial sources, such as staff members present at the wedding location, could invalidate the allegations. Besides, the television host argued that TMG had not conducted a journalistic investigation, and she stated that it had not asked her for a statement. Furthermore, the television host argued that the article did not serve the public interest because it reported on an event that had occurred years ago. Moreover, she argued that the article had gone too far, whilst still acknowledging her status as a public figure. In addition to the removal of the online article and the publication of a rectification, the television presenter claimed EUR 7 500 in damages. The media outlet opposed the claims.

Balancing the right to freedom of expression and the right to privacy, the district court first noted that TMG had to make its accusations plausible; but it did not have to provide conclusive evidence. It then held that the media outlet's sources had sufficiently substantiated the allegations. Furthermore, the district court considered whether a rectification offered a meaningful measure in the given circumstances. It held that it did not because the article at issue was essentially true. With respect to the right to be heard, the district court considered that not hearing the television host did not necessarily render the article tortious. Besides, it noted that the presenter had already spoken out about

the matter in the media; her statement was, therefore, already known. Moreover, the district court held that the television host qualified as a public figure, and it noted that the story was newsworthy because of the new-found relationship between the celebrities concerned.

In the light of the foregoing, the district court concluded that TMG's right to freedom of expression, which also extended to "(hurtful) expression in the entertainment press" ("*(kwetsende) uitingen in de entertainmentpers*"), outweighed the host's right to privacy, thereby rejecting the latter's claims to have the online article removed, among other things.

Rechtbank Amsterdam 20 december 2019, ECLI:NL:RBAMS:2019:9541

http://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:RBAMS:2019:9541

District Court of Amsterdam 20 December 2019, ECLI:NL:RBAMS:2019:9541

ROMANIA

[RO] 2020-2021 Aid schemes for film industry

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The Romanian Government has allocated EUR 1.58 million to four *de minimis* aid schemes in the field of cinema. On 20 January 2020, the government approved a memorandum extending the validity of the *de minimis* aid schemes, which are administered by the *Centrul Naţional al Cinematografiei* (National Cinematography Center – CNC) (see IRIS 2004-2/35, IRIS 2011-2/5 and IRIS 2018-2/29).

The memorandum includes a *de minimis* aid scheme for participation in domestic and international film festivals and fairs; a *de minimis* aid scheme for the distribution and exploitation of Romanian films of all kinds; a *de minimis* aid scheme for supporting cultural programmes, film education, the organising of cultural film events, as well as the publication of specialised publications; and a *de minimis* aid scheme to encourage art-house cinema and the programming of the films therein, in application of the provisions of Government Ordinance No. 39/2005 on cinematography, approved with modifications and completions by Law No. 328/2006, as subsequently amended and completed.

In addition to extending the validity period, the memorandum also covers changes targeting the estimated number of beneficiaries, the budget allocated to the *de minimis* aid schemes, as well as the duration of the grant. The period of validity of the new schemes is until December 2020, respectively one year from their approval, and the period within which *de minimis* aid payments will be made is 2020-2021. The money allocated for the four *de minimis* aid schemes comes from the CNC.

De minimis aid schemes were developed in their initial form with a validity period from 2014/2015 to 2018/2019. According to the provisions of Emergency Ordinance No. 77/2014 regarding national procedures in the field of state aid as well as amending and completing Competition Law No. 21/1996, with the subsequent modifications and completions, any draft measure likely to represent state aid or *de minimis* aid must be accompanied by a memorandum approved by the government regarding the management of these measures in the economic-budgetary and financial policies of the Romanian State.

The amount proposed for the *de minimis* aid scheme for participating in both domestic and international film festivals and fairs is EUR 300 000, and the estimated number of beneficiaries is 60. According to the document, 58 Romanian films were presented with a total of 157 awards between 2015 and 2018 .

The total budget allocated to the *de minimis* aid scheme for the distribution and exploitation of Romanian films of all kinds is EUR 375 000, and the estimated number of beneficiaries is 55. Out of a total of 13.2 million spectators who went to the cinema in 2018, only 389 172 of them (2.95%) watched Romanian films. American films obtained the highest attendance, with 10.7 million viewers (81.12%), followed by European films, with 1.5 million viewers (11.43%).

The total budget allocated to the *de minimis* aid scheme for supporting cultural programmes, film education, organising cultural events and publishing specialised publications is EUR 850 000, and the total estimated number of beneficiaries for the entire duration of the scheme is 80.

Lastly, the total budget allocated to the *de minimis* aid scheme to encourage art-house cinema and the programming of the films therein is EUR 63 000, and the estimated number of beneficiaries is four.

Memorandum cu tema: Schema de ajutor de minimis pentru participarea la festivaluri şi târguri de filme, interne şi internaţionale, Schema de ajutor de minimis pentru distribuirea şi exploatarea filmelor româneşti de toate genurile, Schema de ajutor de minimis pentru susţinerea programelor de cultură, educaţie cinematografică, organizare de evenimente culturale cinematografice precum şi pentru editarea de publicaţii de specialitate şi Schema de ajutor de minimis pentru încurajarea funcţionării cinematografului de artă şi a programării filmelor în acestea în aplicarea prevederilor Ordonanţei Guvernului nr. 39/2005 privind cinematografia, aprobată cu modificări şi completări prin Legea nr. 328/2006, cu modificările şi completările ulterioare

https://sgg.gov.ro/new/wp-content/uploads/2020/01/MEMO-6.pdf

Memorandum with the theme: De minimis aid scheme for participation in film festivals and fairs, domestic and international, De minimis aid scheme for distribution and exploitation of Romanian films of all kinds, De minimis aid scheme for supporting cultural programs, film education , organization of cultural cultural events as well as for the publication of specialized publications and the De minimis aid scheme to encourage the functioning of the art cinema and the programming of the films therein in application of the provisions of the Government Ordinance no. 39/2005 on the cinematography, approved with modifications and completions by Law no. 328/2006, as subsequently amended and completed)

Comunicat de presă - Ministerul Culturii: Memorandumul pentru prelungirea valabilităţii schemelor de ajutor de minimis administrate de Centrul Naţional al Cinematografiei, 20.01.2020

https://www.agerpres.ro/stiri/2020/01/20/comunicat-de-presa-ministerul-culturii--435279

Press release - Ministry of Culture: Memorandum for extending the validity of de minimis aid schemes administered by the National Center of Cinematography, 20.01.2020

A publication
of the European Audiovisual Observatory

European Audiovisual Observatory

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