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EDITORIAL

From Boccaccio's *Decameron* to Albert Camus' *The Plague* and Thomas Mann's *Death in Venice* (beautifully brought to the silver screen by Luchino Visconti) up to Steven Soderbergh's *Contagion* or Terry Gilliam's *12 Monkeys*, literature, cinema and TV have always been fond of narratives in which an epidemic crisis afflicts the world. Unfortunately, we are now living a dystopian virus story for real. The global health crisis induced by the COVID-19 pandemic risks becoming an economic disaster with a dramatic impact on the audiovisual sector if nothing is done to prevent it.

Fortunately, both the public and the private sector in Europe are stepping in in order to provide support measures that aim at allowing the audiovisual industry to bridge the crisis. The European Audiovisual Observatory wants to make its own small contribution to this effort by providing a tool to monitor the audiovisual sector-specific measures taken in the context of the COVID-19 crisis. This tool is available here: https://www.obs.coe.int/en/web/observatoire/covid-19-audiovisual-sector-measures

The tool in question will be updated regularly on an ongoing basis until this crisis is resolved.

Over and above this concrete project, the Observatory will, through its usual channels, continue to provide you with timely information on the audiovisual sector during this crisis. In the case at hand, the present IRIS newsletter offers you, as usual, a long list of articles related to legal developments in the sector that will surely raise your interest.

Stay safe and enjoy your read!

Maja Cappello, editor

European Audiovisual Observatory

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INTERNATIONAL

COUNCIL OF EUROPE

GEORGIA

Studio Monitori and Others v. Georgia

Dirk Voorhoof
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In a case about access to information, the European Court of Human Rights (ECtHR) clarified that the right to freedom of expression and information, as guaranteed by Article 10 of the European Convention on Human Rights (ECHR), is only applicable when a set of conditions are fulfilled. The case of *Studio Monitori and Others v. Georgia* is one of the cases following the judgment of the Grand Chamber in *Magyar Helsinki Bizottság v. Hungary* (IRIS 2017-1/1) to test the limits of the right of access to public documents and the applicability of Article 10 ECHR (see also *Bubon v. Russia*, 7 February, 2017, and *Cangi v. Turkey*, 29 January, 2019 and the decisions in *Dimitris Sioutis v. Greece*, 29 August, 2017 and *Gennadiy Vladimirovich Tokarev v. Ukraine*, 21 January, 2020). The most important consequence of the judgment in *Studio Monitori and Others v. Georgia* is that NGOs, journalists or other public watchdogs requesting access to public documents have to motivate and clarify that access to the documents they are applying for is instrumental for their journalistic reporting and that the requested documents contain information of public interest. If these conditions are not fulfilled, Article 10 ECHR does not cover a right of access to information, which leaves the national authorities the discretionary power to determine at domestic level the scope and limits of the right of access to public documents, without scrutiny by the ECtHR.

In *Studio Monitori and Others v. Georgia,* the first applicant is a non-governmental organisation (NGO) established with the aim of conducting journalistic investigations into matters of public interest. The second applicant is a journalist and one of the founding members of the organisation. The third applicant is a lawyer. They all complained that the domestic judicial authorities had denied them access to specific criminal case files and court decisions, which amounted to a violation of their right of access to public documents under Article 10 ECHR. The initial and crucial question before the ECtHR was whether there had been an interference with the applicants' rights under Article 10 ECHR.

In a general consideration, the ECtHR reiterated that Article 10 ECHR "does not confer on the individual a right of access to information held by a public authority nor oblige the government to impart such information to the individual. However, such a right or obligation may arise, [...] in circumstances where access to the information is instrumental for the individual's exercise of his or her right to

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freedom of expression." Referring to its Grand Chamber judgment in the *Magyar Helsinki Bizottság* case, the ECtHR considered that whether and to what extent the denial of access to information constitutes an interference with an applicant's right to freedom of expression under Article 10 "must be assessed in each individual case and in the light of its particular circumstances." This assessment includes the following criteria: (a) the purpose of the information request; (b) the nature of the information sought; (c) the particular role of the seeker of the information in receiving and imparting it to the public; and (d) whether the information was ready and available.

With regard to the NGO and the journalist, the ECtHR confirmed that their journalistic role "was undeniably compatible with the scope of the right to solicit access to state-held information", but it observed that "the purpose of their information request cannot be said to have satisfied the relevant criterion under Article 10 ECHR." The ECtHR found that, in the relevant domestic proceedings, both applicants had failed to specify the purpose of their request for permission to consult the criminal case file. They had never explained to the relevant court registry why the documents were necessary for the exercise of their freedom to receive and impart information to others. Noting that omission, the domestic authority explicitly invited the applicants to address that gap by clarifying the purpose of their request, while the authority expressed its readiness to reconsider its initial refusal upon receipt of the requisite information from the applicants. However, the NGO and the journalist ignored that opportunity and instead decided to sue the authority for breaching their alleged right to have unrestricted access to state-held information of public interest. The ECtHR further observed that, even in the absence of the information sought, the NGO and the journalist were able to proceed with their journalistic investigation. Indeed, even without waiting for the outcome of the relevant proceedings which they themselves had initiated against the domestic judicial authority, they finalised the investigation and made its results accessible to the public. Therefore, the ECtHR concluded that the access sought by the NGO and the journalist to the relevant criminal case material "was not instrumental for the effective exercise of their right to freedom of expression."

With regard to the application by the lawyer, the ECtHR also observed that he did not explain to the court registry the purpose of his request to obtain a full copy of the relevant court decisions. Therefore, the ECtHR could not accept that the information sought was instrumental for the exercise of the lawyer's right to freedom of expression. Furthermore, it was also unclear how the lawyer's role in society was supposed to satisfy the relevant criterion under Article 10 of the Convention, as he was neither a journalist nor a representative of a "public watchdog". There was no indication of how the lawyer could enhance the public's access to news or facilitate the dissemination of information in the interest of public governance by receiving a copy of detention orders in six criminal cases totally unrelated to him. In addition, the ECtHR was not persuaded either that the information solicited from the domestic judicial authority by the lawyer met the relevant public interest test under Article 10 ECHR. The ECtHR did acknowledge explicitly "the significance of the principle that court decisions are to be

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pronounced publicly and should be, in some form, made accessible to the public in the interest of the good administration of justice and transparency." Nonetheless, it emphasised that the requirement that the information sought meet a public interest test in order to prompt a need for disclosure under Article 10 ECHR is different, as it refers to the specific subject matter of the document, in this case, of the judicial orders. The lawyer limited his arguments to mentioning that the solicited judicial decisions concerned high-profile criminal cases instituted against former high-ranking state officials for corruption offences. The ECtHR, however, found that the reference to the involvement of "well-known public figures" was not in itself sufficient to justify, under Article 10 ECHR, disclosure of a full copy of the relevant judicial orders concerning the ongoing criminal proceedings, adding the consideration that "the public interest is hardly the same as an audience's curiosity."

On the basis of these findings and considerations concerning the question of the applicability of Article 10 ECHR and the existence of an interference under this provision, the ECtHR came to the conclusion that there has been no violation of the applicants' right to freedom of expression and information under Article 10 ECHR.

ECtHR, Fifth section, Studio Monitori and others v. Georgia, Application nos. 44920/09 and 8942/10, 30 January 2020

https://hudoc.echr.coe.int/eng?i=001-200435

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EUROPEAN UNION

Communication on Shaping Europe's digital future

Ronan Ó Fathaigh
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On 19 February 2020, the European Commission published its important Communication on Shaping Europe's digital future, which sets out the Commission's focus for the next five years (2020-2025) on "Creating a Europe fit for the digital age", including a specific action plan for the media and audiovisual sector.

The Communication begins with the Commission noting that it would focus on three key objectives to ensure that digital solutions help Europe towards a digital transformation, namely: (a) technology that works for people, (b) a fair and competitive economy, and (c) an open, democratic and sustainable society. The Communication then proceeds to elaborate upon these three key objectives, and the key actions that will be implemented.

Firstly, in relation to technology that works for people, the Commission sets out a number of key actions it will adopt. These include accelerating investments in Europe's Gigabit connectivity, through a revision of the Broadband Cost Reduction Directive; an updated Action Plan on 5G and 6G; and a new Radio Spectrum Policy Programme. There will also be a Digital Education Action Plan to boost digital literacy and competences at all levels of education.

Secondly, regarding a fair and competitive economy, the Communication focuses on online platforms, and states that some platforms have "acquired significant scale, which effectively allows them to act as private gatekeepers to markets, customers and information." As such, the Commission states that "[w]e must ensure that the systemic role of certain online platforms and the market power they acquire will not put in danger the fairness and openness of our market." In this regard, the key actions under this theme will include: a European Data Strategy to make Europe a global leader in the data-agile economy; a legislative framework for data governance (in Q4 2020); and a possible Data Act (in 2021). In addition, there will be an evaluation and review of the fitness of EU competition rules for the digital age (over the period 2020-2023), and the launch of a sector inquiry (in 2020). Notably, the Commission will further explore, in the context of the Digital Services Act package, ex ante rules to ensure that markets characterised by large platforms with significant network effects, acting as gatekeepers, remain fair and contestable for innovators, businesses and new market entrants (in Q4 2020).

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Thirdly, in relation to an open and democratic society, the Communication notes that it is essential that the rules applicable to digital services across the European Union be strengthened and modernised, and that the roles and responsibilities of online platforms be clarified. Furthermore, in a "world where much of the public debate and political advertising has moved online, we must also be prepared to act to forcefully defend our democracies." Crucially, the Communication states that trustworthy, quality media is a key element for democracy as well as for cultural diversity, and "with these in mind, the Commission will present a European Democracy Action Plan and a specific action plan for the media and audiovisual sector." In this regard, key actions will include: (a) new and revised rules to deepen the Internal Market for Digital Services, by increasing and harmonising the responsibilities of online platforms and information service providers and reinforcing the oversight over platforms' content policies in the European Union (in Q4 2020, as part of the Digital Services Act package); (b) a media and audiovisual Action Plan to support the digital transformation and competitiveness of the audiovisual and media sector, to stimulate access to quality content and media pluralism (in Q4 2020); and (c) a European Democracy Action Plan to improve the resilience of our democratic systems, support media pluralism and address the threats of external intervention in European elections (Q4 2020).

Finally, the Communication concludes by addressing the international dimension of the issue, maintaining that it would use all instruments at its disposal to ensure that everyone respects EU legislation and international rules in order to maintain a level playing field in the digital sector.

European Commission, Shaping Europe's Digital Future, 19 February 2020

https://ec.europa.eu/info/sites/info/files/communication-shaping-europes-digital-future-feb2020_en_4.pdf

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GERMANY

CJEU: EUIPO must issue new ‘Fack Ju Göthe’ decision

Christina Etteldorf
Institute of European Media Law

In a judgment of 27 February 2020 (Case C-240/18), the Court of Justice of the European Union (CJEU) decided that the European Union Intellectual Property Office (EUIPO) should issue a new decision on the application for registration of the word sign ‘Fack Ju Göthe’ as an EU trademark, which it had originally rejected. The Court ruled that the classification of the word sign as contrary to accepted principles of morality and therefore unsuitable for registration had been erroneous because insufficient account had been taken of the fact that this comedy film title would not be perceived as morally unacceptable by the German-speaking public at large. The case concerned a legal dispute dating back to 2015, when Constantin Film Produktion GmbH, as the owner of the licensing rights to the eponymous comedy film, which had been very successful in German-speaking countries, filed an application with the EUIPO for registration of the word sign ‘Fack Ju Göthe’ as an EU trademark for various goods and services. The EUIPO refused the application partly on the basis of Article 7(1)(f) of Regulation No. 207/2009, which states that trademarks contrary to public policy or to accepted principles of morality must not be registered. The German-speaking public would recognise in the words ‘Fack Ju’ the vulgar and offensive English phrase ‘Fuck you’, of which it was a phonetic transcription in German. The addition of the word ‘Göthe’ in reference to the famous German author Johann Wolfgang von Goethe did not alter this perception. After Constantin Film’s appeal against this decision was dismissed by the General Court of the European Union, the film production company took the case to the CJEU. The CJEU annulled the decisions of the EUIPO and the General Court because they had not taken sufficient account of the fact that, notwithstanding the assimilation of ‘Fack Ju’ to ‘Fuck you’, the title of the comedy film concerned was not perceived by the German-speaking public as morally unacceptable. Although a film’s success did not automatically prove that its title and a word sign of the same name were socially acceptable, it was at least an indication of such acceptance which must be assessed in the light of all the relevant factors in the case in order to establish, in concrete terms, how the sign would be perceived if it were used as a trademark. However, in the CJEU’s opinion, this assessment had not been adequately carried out. In particular, for example, insufficient account had been taken of the fact that the title had not stirred up public controversy despite its high visibility, and that the film had even been authorised for young audiences. The EUIPO had also ignored the fact that the films had received funding from various organisations and had been used by the Goethe Institute for educational purposes. Finally, the term ‘Fuck you’, especially its phonetic transcription in German accompanied by an extra word, did not necessarily carry the same meaning for the German-speaking public as for an

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English-speaking audience. Furthermore, no concrete evidence had been put forward to plausibly explain why the German-speaking public at large would perceive the word sign 'Fack Ju Göhte' as going against the fundamental moral values and standards of society when it was used as a trademark, even though that same public did not appear to have considered the title of the eponymous comedies to be contrary to accepted principles of morality. The EUIPO must therefore issue a new decision on the registration application.

EuGH, Urteil vom 27.02.2020, C-240/18 P

http://curia.europa.eu/juris/document/document.jsf?text=&docid=223843&pageIndex=0&doclang=de&mode=lst&dir=&occ=first&part=1&cid=593049

CJEU, judgment of 27.02.2020, C-240/18 P

http://curia.europa.eu/juris/document/document.jsf?text=&docid=223843&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=593049

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NATIONAL

AUSTRIA

[AT] Ibiza scandal: recording was unlawful but its publication was justified

Gianna Iacino
Legal expert

On 23 January 2020, the *Österreichische Oberste Gerichtshof* (Austrian Supreme Court) decided in a preliminary procedure that, although the secret filming of the so-called 'Ibiza video' had been unlawful, the act of sharing and publishing it had been justified (Case no. 6 Ob 236/19b).

In July 2017, two Austrian politicians from the Freiheitliche Partei Österreichs (Austrian Freedom Party – FPÖ), Heinz-Christian Strache and Johann Gudenus, were secretly filmed at a meeting in Ibiza. An actress pretending to be the niece of a Russian oligarch and her companion were also at the meeting. The meeting had been arranged by the defendant, who asked the actress's companion to film it so he could then sell the footage for profit. Both politicians were deliberately given the impression that the conversation was private, out of the public eye, and that nobody was either watching or making video or audio recordings of it. During the discussion, which lasted between six and seven hours, the participants talked about matters including the privatisation of the ORF; the covert financing of the FPÖ in exchange for public contracts; and the hidden takeover of the Austrian Kronenzeitung newspaper by the supposedly rich foreigner in order to exercise control over the content of the newspaper, which would then favour the two politicians. A few minutes of the video footage were published on the Internet in May 2019 by two German media companies, Süddeutsche Zeitung and Spiegel Online.

In the preliminary proceedings, the plaintiff asked the court for an injunction prohibiting the publication of the footage. After the court of first instance issued the injunction, appeals against its decision were dismissed by the appeal court, which nevertheless allowed an appeal on a point of law to the Supreme Court.

The Supreme Court confirmed the lower-instance rulings with regard to the recordings, which had been made illegally. It concluded that the plaintiff's general right to privacy prevailed over the defendant's right to freedom of expression because the recordings had been made through deception and the plan to sell them did not, at that stage, contribute to a debate in the public interest. Passing them on to a very limited number of people in return for payment was also not yet in the public interest.

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The court recognised that, in the Haldimann case, the European Court of Human Rights had previously applied the guarantees laid down in Article 10 of the European Convention on Human Rights to the secret recording of a conversation because it had treated the making of the recording and its publication as a single act, and had therefore considered it a contribution to a debate in the public interest. However, the court viewed this case as different in so far as the hidden audio recording in the Haldimann case had been used to expose, in a pre-planned TV consumer protection programme, malpractice that had already been known about and documented. In the case at hand, however, an atypical conversation had been set up under false pretences in order to obtain incriminating, commercially exploitable recordings.

As regards the sharing and publication of the recordings, the court overturned the lower-instance decisions on the grounds that this had been justified. The publication of the recordings, which the defendant had made possible, had contributed greatly to a debate in the public interest. It had given the public an insight into the plaintiff's personal integrity and therefore his suitability to hold a high political office. The publication of the audio and video recordings was also the mildest way of achieving this purpose. Conclusions about the plaintiff's integrity and sense of responsibility could be drawn not only from the content of the conversation, which could have been published in the form of a transcript, but also from the fact that matters relating to the public administration had been the subject of an alcohol-fuelled discussion in a holiday resort.

Die Entscheidung des Obersten Gerichtshofs vom 23.01.2020 - Az.: 6 Ob 236/19b

https://www.ris.bka.gv.at/Dokument.wxe?Abfrage=Justiz&Gericht=&Rechtssatznummer=&Rechtssatz=&Fundstelle=&AenderungenSeit=Undefined&SucheNachRechtssatz=False&SucheNachText=True&GZ=6Ob236%2f19b&VonDatum=&BisDatum=09.03.2020&Norm=&ImRisSeitVonDatum=&ImRisSeitBisDatum=&ImRisSeit=Undefined&ResultPageSize=100&Suchworte=&Position=1&SkipToDocumentPage=true&ResultFunctionToken=1f68af9d-ff21-44c6-89e5-9c53b47975af&Dokumentnummer=JJT_20200123_OGH0002_0060OB00236_19B0000_000

Decision of the Supreme Court of 23 January 2020 - case no. 6 Ob 236/19b

Pressemitteilung vom 09.03.2020 zur Entscheidung des Obersten Gerichtshofs vom 23.01.2020 - Az.: 6 Ob 236/19b

https://www.ogh.gv.at/entscheidungen/entscheidungen-ogh/ibiza-video-aufnahme-unzulaessig-veroeffentlichung-gerechtfertigt/

Press release of 9 March 2020 on the Supreme Court's decision of 23 January 2020 - case no. 6 Ob 236/19b

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GERMANY

[DE] Supreme Court decides on appropriate remuneration for 'Das Boot' chief cameraman

Tobia Raab
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In a decision of 20 February 2020, the *Bundesgerichtshof* (Federal Supreme Court – BGH) determined how much revenue from television broadcasts should be paid to the chief cameraman of the film 'Das Boot' (Case no. I ZR 176/18).

The plaintiff in the case at hand had worked as chief cameraman on the film 'Das Boot' in the early 1980s, for which he had been paid a fee equivalent to EUR 104 303.54 by the production company. The film was exploited internationally in cinemas and on television, as well as on video and DVD. The plaintiff claimed additional remuneration of at least EUR 521 446.96 from Westdeutscher Rundfunk (WDR) and the broadcasting institutions that make up the consortium of German public service broadcasters (ARD) for the broadcast of the film on the 'Das Erste' channel and several regional and digital channels between 29 March 2002 and 12 March 2016. He also asked the court to grant him additional remuneration for broadcasts from 13 March 2016 onwards.

The plaintiff's claim was only partly successful in the lower-instance courts. The *Landgericht Stuttgart* (Stuttgart District Court) partially granted the action for payment of EUR 77 333.79 and the application for a declaratory finding (judgment of 28 November 2017, Case no. 17 O 127/11), while the *Oberlandesgericht Stuttgart* (Stuttgart Appeal Court – OLG) granted a claim for EUR 315 018.29 and confirmed that the plaintiff was entitled to a further reasonable share of revenue generated from 13 March 2016 onwards (judgment of 26 September 2018, Case no. 4 U 2/18). The BGH set aside these rulings and referred the case back to the OLG Stuttgart. The judges thought the plaintiff's claim to reasonable additional remuneration could not be granted on the grounds mentioned by the OLG Stuttgart.

The BGH began by stating that the plaintiff could only demand reasonable additional remuneration from the defendants on the basis of Article 32a(2)(1) of the German *Urheberrechtsgesetz* (Copyright Act – UrhG) if there was a noticeable disproportion between the previously agreed remuneration and the proceeds and benefits derived by the defendants from the exploitation of the film. However, since the judges believed that the OLG Stuttgart had made several calculation errors in its examination of the claim, they thought there was insufficient evidence that such a disproportion existed. For example, the OLG Stuttgart had based its calculations on the full one-off payment that the cameraman had received and had ignored the fact that the dispute only concerned the proceeds from the television exploitation of the film. When analysing the disproportion, according to the BGH, only the part of the payment that was relevant to television

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broadcasting should have been taken into account. The appeal court had also failed to take into account the fact that the agreed one-off payment had been designed to cover not only the initial exploitation of the film, but also all subsequent types of exploitation. This also had an impact when calculating the disproportion.

The OLG Stuttgart, which has been asked to review the case and issue a new decision, will now, in the reopened appeal proceedings, be required to check whether the agreed one-off payment is noticeably disproportionate to the proceeds earned by the defendants, taking into account the BGH's findings.

Pressemitteilung Nr. 20/2020 des Bundesgerichtshofs

http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&Datum=Aktuell&Sort=3&anz=473&pos=0&nr=103848&linked=pm&Blank=1

Federal Supreme Court press release no. 20/2020

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[DE] Bundesländer agree new gambling regulations in Germany

Christina Etteldorf
Institute of European Media Law

In January 2020, after lengthy negotiations, the German Bundesländer reached an agreement on a new system of regulation for gambling in Germany, reflected in a draft *Staatsvertrag zur Neuregulierung des Glücksspielwesens in Deutschland* (Inter-State Agreement on a New System of Regulation for Gambling in Germany – Glücksspielneuregulierungsstaatsvertrag, GlüNeuRStV). The reforms particularly address the admissibility of various types of Internet-based gambling and the related fields of advertising, the protection of minors and the protection of gamblers. Under current German law, gambling on the Internet is, in principle, prohibited under Article 4 of the *Glücksspielstaatsvertrag* (Inter-State Gambling Agreement), although there are exceptions for sports betting, for example, which is permissible. This situation will change under the GlüNeuRStV. The draft states that virtual slot machines, online casinos and online poker are also permissible. This measure is designed to mitigate the high level and further growth of black-market Internet gambling. In order to prevent addiction and protect children and consumers, the draft GlüNeuRStV requires providers to demonstrate their compliance with various regulatory and technical requirements, both when applying for a licence and while they are operating. These requirements include the establishment of technical systems for the early identification of gambling addiction; respect for certain stake limits; and the provision of a panic button that gamblers can press in order to immediately block their activity for a short time. The sharing of information between providers should also stop players who are barred or who have exceeded their limit from simply switching from one provider to another. The changes to advertising rules contained in the GlüNeuRStV are particularly relevant for the audiovisual sector. Advertising and sponsorship for authorised gambling services will, in future, be permitted in Germany, and will be able to highlight individual features such as the size of the jackpot or the fact that profits will be used for good causes. However, advertising for gambling services on the Internet and on radio or television will only be allowed between 9 p.m. and 6 a.m. The same will apply to advertising for virtual slot machines, online casinos and online poker. Regarding the supervision of online gambling, the draft makes provision for the creation of a public-law institution under whose umbrella the Länder will be able to jointly monitor compliance. The GlüNeuRStV also strengthens administrative procedures by introducing new rules on IP blocking, payment blocking, gaming and purchasing tests, and cooperation between the regulators, for example. On 19 February, the Düsseldorf State Chancellery hosted a consultation meeting on the draft, which was addressed by experts from more than 50 associations and institutions. The Minister-Presidents will discuss the draft again on 12 March, the aim being that the agreement enters into force on 1 July 2021.

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Entwurf des GlüNeuRStV

http://www.landtag.ltsh.de/infothek/wahl19/unterrichtungen/00200/unterrichtung-19-00204.pdf

Draft Inter-State Agreement on a New System of Regulation for Gambling in Germany

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[DE] German Federal Justice Ministry plans clear rules for influencers

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On 13 February 2020, the German Bundesministerium der Justiz und für Verbraucherschutz (Federal Ministry of Justice and Consumer Protection) published a draft law designed to create a legal framework for free recommendations by influencers and bloggers. The ministry intends to make it clear that comments on products made by influencers on social media free of charge and primarily for information and opinion-forming purposes do not need to be labelled as advertising.

The proposed regulations were drafted following several court decisions in recent years in which the commercial nature of influencer activities had been assessed in different ways. In particular, the courts had disagreed on whether recommendations for products and services made free of charge represented a commercial practice whose commercial nature must be identified under Article 5a(6) of the Gesetz gegen den unlauteren Wettbewerb (Unfair Competition Act – UWG). As a result, in order to prevent uncertainty, some influencers have labelled all their social media posts as advertising. In the explanatory memorandum to the draft regulations, the Federal Ministry refers to the fact that such excessive labelling means that consumers can no longer reliably identify posts that do actually constitute advertising.

The draft law amends the Unfair Competition Act. For example, Article 5a(6) UWG will, in future, specify that a commercial practice should generally not be considered to have a commercial intent if its primary purpose is to provide information and shape public opinion and if it is not carried out in return for payment or any similar reward. According to the Federal Ministry, the proposed amendment is in line with case law concerning print media, and since it is designed as a presumptive example, it also permits a different assessment of a concrete case in special circumstances. The Ministry stressed that such a rule needed to be discussed in detail with the European Commission, since the German legislator's freedom to amend the Unfair Competition Act was limited by the fact that it was designed to implement the Unfair Commercial Practices Directive (2005/29/EC).

Interested parties such as associations, companies, academics, influencers and journalists were invited to submit their views on the proposed regulations by 13 March 2020. Their submissions are currently being analysed.

Pressemitteilung des Bundesministeriums der Justiz und für Verbraucherschutz vom 13. Februar 2020

https://www.bmjv.de/SharedDocs/Pressemitteilungen/DE/2020/021320_Influencer.ht

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Press release of the Federal Ministry of Justice and Consumer Protection of 13 February 2020

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[DE] Key points of amended German Film Support Act published

Christina Etteldorf
Institute of European Media Law

The culture and media working groups of the German Parliament's CDU/CSU and SPD coalition partners have published the key points of their joint proposal to amend the German *Filmförderungsgesetz* (Film Support Act – FFG). The reforms are primarily designed to protect the long-term future of the German film industry and strengthen German filmmaking as an economic and cultural asset. The cinema sector is at the heart of the envisaged changes.

The reforms will be based on changes to eligibility criteria, the distribution of support, funding mechanisms and the structure of the *Filmförderanstalt* (Film Support Agency – FFA), which are designed to strengthen the German film industry firstly in terms of the quality of German filmmaking (cultural component) and secondly from a financial point of view (economic component).

With regard to the funding and stabilisation of the tax income received by the FFA, which is responsible for distributing film support in Germany, the key issues paper provides first and foremost for a consistent, moderate rise in the film levies that cinemas, video distributors, VOD operators, television broadcasters and programme providers are required to pay. As a guideline for the increase, which will be tiered depending on the provider, the basic levy, which currently stands at 3% for cinemas above a certain annual turnover, will rise to 3.6%. In addition, the proportion of the levy that television broadcasters can pay in the form of airtime for film advertising will be reduced from 40% to just 25%. Further key points that the parties want to discuss with the industry concern the future granting of reference film funding, with 50% as a subsidy and 50% as a conditionally repayable loan (currently 100% subsidy), the abolition of short film funding and the transfer of funding for sequels from project funding to reference film funding.

Regarding the distribution of funding, various measures will be taken to strengthen, in particular, distribution and marketing funding, project and reference film funding, script funding and additional script development, as well as media education film projects. The reforms should also promote fairer distribution of revenue between distributors and producers. The parties want to maintain the exclusive cinema exploitation window for funded films, which currently involves blackout periods of between 6 and 18 months depending on the type of broadcast, although the blackout periods could be shortened to between 4 and 5 months.

The key points concerning possible changes to the conditions under which funding is granted include the improvement and/or introduction of gender equality, diversity, inclusion, fair working conditions, the promotion of further education and youth development, and the environmental and sustainability aspects of film production.

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The parties have announced that they want to discuss the key points further with industry representatives. However, the legislative process will begin soon, in the hope that the amended FFG will enter into force by 1 January 2022 at the latest.

Pressemitteilung der CDU/CSU-Bundestagsfraktion

https://www.cducsu.de/presse/pressemitteilungen/kulturpolitiker-der-koalition-vereinbaren-eckpunkte-zur-novellierung-des-filmfoerderungsgesetzes

Press release of the CDU/CSU parliamentary group

Pressemitteilung der SPD-Bundestagsfraktion

https://www.spdfraktion.de/themen/mehr-filmfoerderung

Press release of the SPD parliamentary group

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[DE] Legislative proposal to introduce compulsory ID checks on social networks and gaming platforms

Christina Etteldorf
Institute of European Media Law

On 7 February 2020, the German Bundesländer of Lower Saxony and Mecklenburg-Vorpommern jointly submitted an "Entwurf eines Gesetzes zur Änderung des Netzwerkdurchsetzungsgesetzes zum Zweck der Erleichterung der Identifizierbarkeit im Internet für eine effektivere Bekämpfung und Verfolgung von Hasskriminalität" (Draft act amending the Network Enforcement Act in order to facilitate identification on the Internet to combat and prosecute hate crime more effectively) to the German *Bundesrat* (upper house of parliament). Their main objective is to make it easier to investigate offences committed on social networks and gaming platforms. In particular, the draft obliges platform operators to check the identity of their users when they register, so that this data can be provided to law enforcement and, if necessary, other authorities during investigations. The proposals are based on the idea that the rise in the spread of online hatred and propaganda is promoted by the anonymity of Internet users. By using pseudonyms, anyone can post whatever comments they like without fear of being identified (without a great deal of investigative effort) and punished. The two Bundesländer are therefore proposing an amendment to the *Netzwerkdurchsetzungsgesetz* (Network Enforcement Act – NetzDG) that would force both social networks and gaming platforms to collect their users' names, addresses and dates of birth when they register to use their services. To this end, the draft not only establishes such an obligation in a newly added Article 3a, but also provides for the introduction of certain verification procedures. These include the presentation of an official proof of identity or electronic proof of identity; use of a qualified electronic signature or notified electronic identification system; and other procedures that may be specified by the *Bundesamt für Justiz* (Federal Office of Justice). With regard to the existing registered users, the draft states that the aforementioned identification process should be completed within two years of the act's entry into force. Whereas social networks have been subject to the Network Enforcement Act and its obligations since it came into force in 2018, this is the first time gaming platforms have fallen under its provisions. The draft defines gaming platforms as profit-making Internet platforms whose users take part in gaming. It requires those gaming platforms with more than 2 million users in Germany to report illegal content and meet the obligations on dealing with complaints that have previously only applied to social networks under the Network Enforcement Act. The proposals were presented in plenary on 14 February 2020 and sent to the expert committees of the *Bundesrat*. These committees will advise on how to proceed with the draft, which was submitted in parallel with other proposals to amend the Network Enforcement Act.

Entwurf eines Gesetzes zur Änderung des Netzwerkdurchsetzungsgesetzes zum Zweck der Erleichterung der

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Identifizierbarkeit im Internet für eine effektivere Bekämpfung und Verfolgung von Hasskriminalität (Bundesrat-Drucksache 70/20 vom 7.2.2020)

https://www.bundesrat.de/SharedDocs/drucksachen/2020/0001-0100/70-20.pdf?__blob=publicationFile&v=1

Draft act amending the Network Enforcement Act in order to facilitate identification on the Internet to combat and prosecute hate crime more effectively (Bundesrat publication no. 70/20 of 7 February 2020)

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SPAIN

[ES] Constitutional Court overturns Supreme Court´s ruling due to violation of freedom of expression

Miguel Recio
CMS Albiñana & Suárez de Lezo

In 2017, the Supreme Court convicted an artist of the crime of glorifying terrorism and humiliating its victims because of several comments he posted on the social network Twitter between November 2013 and January 2014. Specifically, it found that the messages posted were humiliating and that they fed hate speech by legitimising terrorism.

Now, the Plenary of the Constitutional Court has upheld the appeal for protection filed by the convicted person and has annulled the sentence of the Criminal Chamber of the Supreme Court. In its ruling, the Constitutional Court considered that the appellant´s right to freedom of expression had been violated. Although it was not unaware of the reprehensible aspects of the tweets, the Constitutional Court considered that the published tweets were likely to be interpreted as the product of critical intent in the political and social field of people who were public figures. That is, according to the Constitutional Court, the communicative intention of the appellant prevailed in relation to the authorship, context and circumstances of the messages issued, and by omitting this assessment, the fundamental right to freedom of expression had been violated.

It should be noted that the judgement prompted a dissenting opinion; one judge concluded that there had been a second victimisation of those offended by the crime of terrorism, which multiplied their suffering by forcing them to recall such painful episodes. In his opinion, therefore, the appeal on the grounds of unconstitutionality should have been rejected.

Sentencia del Pleno del Tribunal Constitucional en el recurso de amparo núm. 2476-2017

https://www.tribunalconstitucional.es/NotasDePrensaDocumentos/NP_2020_035/2017-2476STC.pdf

Ruling of the Plenary of the Constitutional Court on Appeal No. 2476-2017

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[ES] Modifications for the promotion of cinematographic activity and for the improvement of technical aspects

Enric Enrich
Enrich Advocats, Barcelona

The Institute of Cinematography and Audiovisual Arts (ICAA), which is attached to the Ministry of Culture and Sports, is in the process of modifying Royal Decree 1084/2015 of December 4, which developed Law 55/2007, of December 28, on the cinema.

The modifications fall into two categories: on the one hand, those that affect the promotion of cinematographic and audiovisual activity and, on the other, those of a procedural nature aimed at improving the technical aspects of the decree.

The former consist in making the approval regime for international co-productions more flexible, with the provision of a new definition of what should be understood as a "difficult work" for the purpose of calculating the maximum intensity of the aid that such works may receive.

In international co-productions, the participation of personnel from non-EU countries or countries not belonging to the co-producing countries will be facilitated, with special attention being given to animation works, and the approval of financial co-productions will be made more flexible, so that it can be requested once filming has started or finished, and not necessarily before. These measures, elaborated in view of international market practices, will allow Spain to co-produce projects with international potential and prestige on equal terms with other countries.

The maximum limit for works defined under the "difficult audiovisual work" categories included in the EU regulations will be increased. This aims at alleviating the difficulties projects directed exclusively by women encounter when trying to enter the market and consolidating their presence once they are in it; this also includes those audiovisual works with special cultural and artistic value that need exceptional public funding support. There is also greater support for projects directed by filmmakers with disabilities. Grant levels may vary between 70% and 80% of the recognised cost.

The modifications of a technical nature are related to the electronic process of contacting the administration, the sanctioning regime, the criteria for qualifying by age group and other modifications which translate into an increase in the legal security of citizens.

Proyecto de Real Decreto

http://www.culturaydeporte.gob.es/dam/jcr:43986cae-0931-4a0d-a1d0-1edc7db2c199/rd-desarrollo-ley-cine.pdf

Royal Decree Draft

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[ES] Supreme Court confirms that Catalan public service broadcaster violated principles of neutrality and pluralism during elections

Francisco Javier Cabrera Blázquez
European Audiovisual Observatory

On 6 March 2020, the Third Chamber of the Spanish Supreme Court (*Tribunal Supremo*) dismissed the appeal of the *Corporació Catalana de Mitjans Audiovisuals,* CCMA (a regional public service broadcaster), against resolutions of the Central Electoral Board (*Junta Electoral Central* - JEC) issued in December 2017. In these decisions, which were taken in the context of the elections to the Parliament of Catalonia called for on 21 December of that year, the JEC had ruled that TV3 and Catalunya Radio, both part of the CCMA, had violated the principles of news neutrality and political pluralism on four occasions (see also IRIS 2018-1:1/16, IRIS 2019-5:1/11 and IRIS 2019-6:1/10).

In its decision, the Supreme Court confirmed that the content was indeed partisan and that the programmes in question were not compatible with the principles of information neutrality or with the requirement of respect for pluralism in the programming of publicly-owned media during an election period, as required by Article 66.1 of the Organic Law on the General Electoral System (LOREG).

According to the decision, "the concept of informative neutrality is [...] the expression in electoral periods of the reinforced demand for the public media to be objective, as required of all public administrations by Article 103.1 of the Constitution and of the one that imposes its Article 20.3 to respect at all times political and social pluralism. The bias in information that translates into an advantage for those who see their candidates accepted and a disadvantage for the others is radically incompatible with these principles." The Supreme Court emphasised that, among other things, the regional broadcaster had become “the spokesperson for party initiatives” and had done so “in a way that is disproportionate to the treatment given to the other participants in the elections.” Moreover, it affirmed that there was no doubt that there had been reiteration in the performance of the regional broadcaster.

The Supreme Court explained that the elections of 21 December 2017 were called and held under exceptional circumstances, which had led to the application of Article 155 of the Constitution, an exceptional legal mechanism whereby the state may coerce Autonomous Communities that fail to comply with the obligations imposed by the Spanish Constitution of 1978 or other laws, or that seriously undermine the general interest of Spain, to comply with such obligations or to protect the aforementioned general interest. In the Supreme Court’s view, the gravity of the situation should have led the Catalan public service broadcaster to be extremely zealous in making an effort to maintain its informational neutrality in the elections of 21 December 2017, and to respect the principle of political pluralism.

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El Tribunal Supremo confirma que hubo infracciones a los principios de neutralidad informativa de TV3 y Catalunya Radio en proceso electoral 21-D de 2017

http://www.poderjudicial.es/cgpj/es/Poder-Judicial/Tribunal-Supremo/Noticias-Judiciales/El-Tribunal-Supremo-confirma-que-hubo-infracciones-a-los-principios-de-neutralidad-informativa-de-TV3-y-Catalunya-Radio-en-proceso-electoral-21-D-de-2017

The Supreme Court confirms that there were violations of the principles of news neutrality of TV3 and Catalunya Radio in the electoral process 21-D 2017

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FRANCE

[FR] CSA sends platforms a questionnaire to combat manipulation of information

Amélie Blocman
Légipresse

The main innovation of the law against the manipulation of information of 22 December 2018 was to extend the powers of the French national audiovisual regulatory authority (*Conseil supérieur de l'audiovisuel* – CSA) to include services that do not necessarily fall under audiovisual laws, especially large social networks. For example, the law requires the main online platform operators to take measures to fight against the dissemination of false information "likely to disrupt public order or affect the integrity of a vote." The CSA is responsible for monitoring compliance with these measures (Article 17-2 of the amended law of 30 September 1986) and the operators have a "duty of cooperation" with the regulator which requires them to submit an annual report explaining how they have implemented the measures in question.

On 15 May 2019, the CSA therefore made a recommendation inviting the platform operators to put in place a number of practical measures designed to improve the fight against the dissemination of fake news. It also set up an internal committee of experts on online misinformation. On 27 February 2020, in order to help the platforms to prepare their annual report, the CSA published a very detailed questionnaire on steps taken to combat false information: reporting systems; the processing of information; quantitative aspects; the transparency of algorithms; existing fact-checking partnerships or initiatives; how to deal with sponsored content, etc. In particular, the CSA asked the operators how they defined the content of information linked to discussions of general public interest. The platforms were also asked how they "ensure that the measures are applied in conformity with the freedom of expression and communication."

The answers provided, which will be made public (apart from those aspects protected by business secrecy), will enable the CSA to draw up a comparative summary of the application and effectiveness of the measures taken. The CSA said it would take into account the diversity of the systems used by the platforms and the appropriateness of the methods used by each of them in view of the extent and impact of the manipulation of information.

These reports must be submitted to the CSA by 31 March of the year following the year that they cover. The 2019 reports must therefore be sent to the CSA by 31 March 2020.

Questionnaire aux opérateurs de plateformes en ligne soumis au titre III de la loi du 22 décembre 2018 relative à la lutte contre la manipulation

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de l'information

https://www.csa.fr/Mes-services/Mes-outils-pro/Lutte-contre-la-manipulation-de-l-information-Questionnaire-aux-operateurs-de-plateformes-en-ligne

Questionnaire for online platform operators subject to section III of the law of 22 December 2018 on the fight against the manipulation of information

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[FR] Honesty of information: no CSA sanction for RT France

Amélie Blocman
Légipresse

On 29 and 30 March 2019, the TV channel RT France, the French-language outlet of the Russian international news channel RT, broadcast information suggesting that, according to official Russian sources, France and Belgium were planning to simulate a chemical attack in Syria with the help of 'terrorist leaders'. Three days later, in an item entitled 'Attaque ou intox?' ('Attack or disinformation?'), a studio-based journalist repeated these accusations, giving more detail and criticising the response of the French authorities, before giving the floor to an analyst who alleged, in particular, that the western media were reporting the story in a biased way. After the broadcast was notified to the French national audiovisual regulatory authority (*Conseil supérieur de l'audiovisuel* – CSA), the latter, under its standard procedure, appointed a rapporteur, who informed the channel last July that he intended to instigate sanction proceedings. Under Article 42 of the 1986 law, RT France was liable to be fined or have its broadcasting licence suspended or even revoked.

The channel had already been officially cautioned by the audiovisual watchdog. In June 2018, following the broadcast of a report during a TV news bulletin devoted to the situation in Syria following chemical attacks against the civilian population, the channel had been warned by the CSA to respect its agreement with the CSA, the terms of which were set out in Article 1 of the CSA's decision No. 2018-11 of 18 April 2018 concerning the honesty and independence of information. The channel had disputed this decision with the *Conseil d'Etat* which, on 22 November 2019, rejected its request for the warning to be annulled and pointed out that the agreement required the channel to distinguish between the presentation of facts and commentary on those facts, and to ensure that different points of view were expressed when dealing with controversial topics.

After questioning the rapporteur and representatives of the channel, the CSA issued its decision on the disputed news item broadcast in spring 2019. It noted that, since the investigation had shown, firstly, that the source of the information broadcast had been mentioned and that the conditional tense had been used, the channel had not infringed the provisions of Article 1 of the decision of 18 April 2018 concerning honesty and rigour in the presentation and processing of information. Secondly, the presentation of different points of view had not been sufficiently imbalanced to constitute a breach of the requirement contained in the same article for controversial issues to be presented honestly. In these circumstances, the CSA decided that, in this case, no sanction should be imposed against the Russian channel.

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Décision n° 2020-227 du 26 février 2020 relative à la procédure de sanction engagée à l'encontre de la société RT FRANCE le 17 juillet 2019

https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000041654781&categorieLien=id

Decision no. 2020-227 of 26 February 2020 on the sanction proceedings opened against RT France on 17 July 2019

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UNITED KINGDOM

[GB] ICO publishes its Age Appropriate Design Code of Practice

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On 21 January 2020, the Information Commissioner's Office (ICO), the United Kingdom's independent body established to uphold information rights, published its Code of Practice which should be followed by online services to protect children's privacy.

The Age Appropriate Design Code of Practice, the first of its kind, is a statutory code required under Section 123 of the Data Protection Act 2018. It seeks to address the increasing concern about the position of children in the modern digital world and to create a safe online space for them in which they can explore, learn and play. The Code shall apply to information society services which are likely to be accessed by under-18s in the United Kingdom; this covers providers of online products or services such as apps, social media platforms, search engines, online games, educational websites and streaming services, as well as children's toys and other devices which are supported by functionality provided through an Internet connection. The Code is not, however, restricted to services specifically targeting children.

The Code adopts a risk-based approach and sets out standards of age appropriate design which aim to ensure built-in data protection for children when they are playing or learning online. In recognition of the fact that varying services require different technical solutions, these standards represent "a set of technology-neutral design principles and practical privacy features" that set a benchmark for the protection of children's data. This means that privacy settings should be set to high by default and nudge techniques should not be used to prompt children to turn off privacy protection or provide unnecessary personal data. Privacy information provided to users (including terms, policies and community standards) must be concise, displayed clearly and prominently in a child-friendly way and tailored to the age of the user.

Moreover, geolocation options which indicate the geographical location of the user's device (for example, GPS data or data concerning connections with local Wi-Fi equipment) should be switched off by default and an "obvious sign" should alert children when location tracking is active. Only the minimum amount of data needed to provide elements of the service should be collected and retained, and children should be given separate choices over the elements of the service they wish to use. The use of data to determine children's personal preferences and interests in order to deliver targeted content (also known as profiling) should only be permitted if sufficient measures are in place to protect children from content that is detrimental to their health or well-being. Finally, the Code emphasises that

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the best interests of children should be a primary consideration when online services likely to be accessed by them are designed and developed, and that "prominent and accessible" online tools should be provided to assist them in exercising their data protection rights and reporting concerns.

The Code will be notified to the European Commission and laid before Parliament for approval. Businesses will subsequently be given a 12-month transition period from the date the Code takes effect to implement any necessary changes. It is anticipated that the Code will come into force in Autumn 2021 and will be enforced by the ICO. The regulator has warned that online service providers who fail to conform to the standards in the Code are likely to encounter difficulties in demonstrating that their processing was fair and in compliance with the Privacy and Electronic Communications Regulations (PECR) and/or General Data Protection Regulation (GDPR), potentially triggering regulatory action.

Age Appropriate Design: A Code of Practice for Online Services (Information Commissioner's Office, 21 January 2020)

https://ico.org.uk/for-organisations/guide-to-data-protection/key-data-protection-themes/age-appropriate-design-a-code-of-practice-for-online-services/

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[GB] Ofcom imposes GBP 75 000 fine against Talksport Ltd for breaches of impartiality rules

Julian Wilkins
Wordley Partnership

Talk Radio, whose licence is held by Talksport Ltd (the Licensee) has been fined GBP 75 000 by Ofcom and directed to broadcast a statement of the regulator's findings, on dates and in words to be determined by Ofcom. The fine arises from three episodes of the George Galloway programme which breached Ofcom's Broadcasting Code rules 5.11 and 5.12 by failing to maintain due impartiality on matters of major political or industrial controversy and major matters relating to public policy. The breaches occurred on 16 March, 27 July and 6 August 2018. Talk Radio is a national digital speech radio show and the George Galloway programme was normally broadcast on Fridays between 7 p.m.and 10 p.m..

Ofcom's decisions about the breaches were published on 28 January and 25 March 2019 respectively in issues 371 and 375 of the Broadcast and On Demand Bulletin. The breaches related to episodes of the George Galloway programme which dealt with the poisoning of Yulia and Sergei Skripal in Salisbury on 4 March 2018 and allegations of anti-Semitism in the Labour Party.

Ofcom Rule 5.11 states that " due impartiality must be preserved on matters of major political and industrial controversy and major matters relating to current public policy by the person providing a service [...] in each programme or in clearly linked and timely programmes."

Ofcom Rule 5.12 states that "[i]n dealing with matters of major political and industrial controversy and major matters relating to current public policy an appropriately wide range of significant views must be included and given due weight in each programme or in clearly linked and timely programmes. View and facts must not be misrepresented."

Ofcom has powers to punish those who act unlawfully or in breach of the relevant regulatory requirements. Section 392 of the Communications Act 2003 (the Act) requires Ofcom to prepare and publish a statement containing the guidelines it proposes to follow in determining the amount of penalties imposed by Ofcom under the Act or any other enactment, apart from the Competition Act 1998. By virtue of section 392(6) of the Act, Ofcom must have regard to the statement for the time being in force when setting the amount of any penalty under the Act or any other enactment (apart from the Competition Act 1998). Ofcom relied upon its current Penalty Guidelines published on 14 September 2017 to determine the fine to impose upon Talk Radio.

The regulator took into account Article 10 of the European Convention on Human Rights concerning the right to freedom of expression. Moreover, Ofcom could not find evidence that further breaches had occurred since their original decisions.

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Additionally, there was no evidence that the conduct had been undertaken deliberately or recklessly.

As set out in Ofcom's Penalty Guidelines, the central objective of imposing a penalty is deterrence. Ofcom shall impose a penalty which is appropriate and proportionate in the circumstances, and which will act as a deterrent, taking into account the size and turnover of the Licensee. Revocation of a licence is the ultimate enforcement action available to Ofcom. A decision to revoke a licence may occur if Ofcom is satisfied that it is a proportionate response to the Licensee's failure to comply with its licence conditions. A relevant factor for Ofcom to consider is whether any sanction short of revocation could ensure that the Licensee would ensure future compliance with the Broadcasting Code.

Ofcom recognised that Talksport had taken a significant number of steps to prevent further breaches from reoccurring. No breaches of the due impartiality requirements (or the Code more generally) had been recorded against the Licensee since the breaches being considered for the imposition of a penalty.

The regulator's main objective was deterrence, and it considered matters taking into account the seriousness of the breaches, the Licensee's representations, the Licensee's size and financial position, and any relevant precedent cases. Ofcom had regard to its legal duties, including the need to ensure that any sanction imposed is proportionate, consistent and targeted only at cases where action is needed.

Ofcom considered that it was appropriate to impose a statutory sanction and that it would be proportionate to impose a financial penalty of GBP 75 000 and to direct Talksport to broadcast a statement regarding Ofcom's findings in a form and on date(s) to be determined by Ofcom.

In Ofcom's view, their sanction was appropriate and proportionate, and should send a clear message of deterrence, both to the Licensee and also to other broadcasters, against any future breaches of a similar nature.

Issue 397 of Ofcom's Broadcast and On Demand Bulletin 24th February 2020.

https://www.ofcom.org.uk/__data/assets/pdf_file/0016/192004/Broadcast-and-On-Demand-Bulletin-Talksport-Ltd-Notice-of-Sanction.pdf

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ITALY

[IT] Agcom sanctions RAI for violating the public service broadcasting contract

Francesco Di Giorgi
Autorità per le garanzie nelle comunicazioni (AGCOM)

On 14 February 2020, the Italian Communications Authority (Agcom) came to a decision regarding a proceeding initiated against Rai for its alleged failure to fulfill the general radio and television public service obligations and the National Service Contract - 2018-2022.

This proceeding was initiated on 23 July 2019, pursuant to Article 48, paragraph 2 of the Consolidated Act on Audiovisual Media Services, recognising in the public service broadcaster's programming potential violations of the "principles of balance, pluralism, completeness, objectivity, impartiality, independence and openness to the various political and social positions" as well as in relation to the need "to ensure an adequate, effective and fair debate" on which RAI's information offer must be based.

During the investigation period, the results of the programme monitoring were observed, with particular attention being given to the television offering of the generalist channels; this monitoring was carried out as part of the investigation into a possible violation of the general radio and television public service obligations, pursuant to Articles 2, 3, 6, 8 of the 2018-2022 National Service Contract. In addition, the data obtained from the monitoring of political and institutional pluralism on television between January 2019 and January 2020 were also taken into consideration, with reference to news and current affairs programmes on RAI’s generalist channels, as well as the ranking of the presence of political leaders.

Agcom established that the balance between the various opinions, especially in the news, had not been fully guaranteed. Either the discussion on a certain topic echoed the position of only one party, or the journalist, presenter or operator conveyed their own interpretation of the facts, without providing the viewers with the tools - such as contextualisation - to distinguish an opinion from a truthful and verifiable story, or they constructed an unequivocal narrative on a specific, relevant theme using suggestions and images.

In addition, the quantitative analysis of the news showed that in the period between August 2019 and January 2020 – a non-election period at national level – there had been a constant, repeated and systematic under-representation of the political party that holds the majority in parliament. Agcom also found a very small, in some cases zero, presence of political minorities, both those that have representatives in parliament, and those that, although not represented in parliament, are of historical relevance.

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Having carried out the investigation and taking into account RAI's response to the alleged breach, Agcom established a grave violation of the obligations and tasks referred to in Article 48, paragraph 2 of the Consolidated Law, having in mind its effects on civil society and the community which the public service not only addresses, but to which it has a specific responsibility.

Therefore, RAI has been called to immediately eliminate the violations and their effects by declaring that it would adopt within 30 days:

a system for programme detecting and monitoring that, according to the indicators established by the Authority, allows the assessment of compliance with the principles of impartiality, independence and pluralism referred to in Article 2, paragraph 1, point a) of the Service Contract. measures aimed at raising the awareness of programme providers and their employees and collaborators, also through specific training actions, so that they scrupulously comply with the principles of respect for the integrity and dignity of a person and the principle of non-discrimination; measures aimed at raising the awareness of programme providers and their employees and collaborators, also through specific training actions, so that they scrupulously comply with the principles of impartiality, independence and pluralism; tools aimed at countering the dissemination of untruthful or incomplete information, not least through organisational coordination, that is, editorial responsibility intended to ensure the raising of critical, civil and ethical awareness in the national community;
Furthermore, considering the gravity of the violation, Agcom sanctioned RAI with a fine corresponding to 0.062% of its turnover, which amounts to EUR 1.5 million.

Resolution n 69/20/cons: "Conclusion of the proceedings initiated against Rai persuant to Art. 48 of the consolidated act for the alleged breach of general radio and television public service obligations and of the national service contract 2018/2022"

https://www.agcom.it/documentazione/documento?p_p_auth=fLw7zRht&p_p_id=101_INSTANCE_FnOw5lVOIXoE&p_p_lifecycle=0&p_p_col_id=column-1&p_p_col_count=1&_101_INSTANCE_FnOw5lVOIXoE_struts_action=%2Fasset_publisher%2Fview_content&_101_INSTANCE_FnOw5lVOIXoE_assetEntryId=17807954&_101_INSTANCE_FnOw5lVOIXoE_type=document

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[IT] Agcom: Violation of Regulation on respect for human dignity and the principle of non-discrimination and countering hate speech

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On 27 February 2020, the Council of the Italian Authority for Communications found the violation of the Regulation on respect for human dignity and the principle of non-discrimination and countering hate speech - Resolution No. 157/19/CONS (see IRIS 2019-4:1/25 and 2017-1:1/24) - by a national television programme, *Fuori del coro,* broadcast by Rete 4 of the Mediaset group.

This is one of the first cases of a violation of the aforementioned Regulation adopted in 2019 which contains provisions aimed at countering the use of hate speech in audiovisual media services and establishes the principles with which audiovisual and radio media service providers must comply in terms of respect for human dignity and the principle of non-discrimination. More specifically, media service providers are required to observe a series of warnings and guidelines which help to identify the specific context of reference with respect to possible stereotyped representations and generalisations that, through the use of hate speech, could generate prejudice towards people who are associated with a specific category or group subject to discrimination, thus offending human dignity and violating the rights of the person. To this end, the Authority also assesses whether graphic elements present in the programme are likely to generate "discriminatory" effects (titles, news tickers, quoted statements) as they aim to generalise or attach systematic meaning to specific facts and individual occurrences, as well as, in the absence of clarifications regarding the context of reference, to generate doubts about their episodic nature.

Following the monitoring of some episodes of the aforementioned programme broadcast during September and October 2019, the Authority found that, through the use of graphic elements and the ways in which presenters referred to immigration issues, the broadcaster had spread inaccurate, condensed, misleading and biased information. Furthermore, elements were found that undermine the principles of fairness, objectivity and good faith in the reconstruction of events, for example, by improperly associating news or facts in a way which is taken out of context or is generalised and not related to the topic being discussed, with the intention of establishing links between specific events and specific groups of people, thus running the risk of spreading instrumental, stereotyped representations which could potentially encourage discrimination and intolerance.

The broadcaster has been sent a specific communication on non-compliance with the provisions of the Regulation, with the hope that such a solicitation could represent a positive move towards ensuring compliance with the principles contained therein.

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Agcom: Violazione Del Regolamento In Materia Di Rispetto Della Dignità Umana E Del Principio Di Non Discriminazione E Di Contrasto All'hate Speech Da Parte Della Trasmissione "fuori Dal Coro" (Rete 4)

https://www.agcom.it/documentazione/documento?p_p_auth=fLw7zRht&p_p_id=101_INSTANCE_FnOw5lVOIXoE&p_p_lifecycle=0&p_p_col_id=column-1&p_p_col_count=1&_101_INSTANCE_FnOw5lVOIXoE_struts_action=%2Fasset_publisher%2Fview_content&_101_INSTANCE_FnOw5lVOIXoE_assetEntryId=17976245&_101_INSTANCE_FnOw5lVOIXoE_type=document

Agcom: Violation Of The Regulation Regarding Respect For Human Dignity And The Principle Of Non-discrimination And Of Contrast To Hate Speech By The National Television Program "Fuori Dal Coro" (Rete 4)

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[IT] First instance court annuls the decision by which the Italian competition authority imposed measures to remove the anti-competitive effects of Sky's acquisition of R2 from Mediaset

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Portolano Cavallo

On 5 March 2020, the Regional Administrative Tribunal of Lazio (TAR Lazio) annulled a decision by which, on 20 May 2019, the Italian Competition Authority (ICA) imposed measures on Sky Italian Holding SpA (Sky) to remove the anti-competitive effects created by its partially abandoned acquisition of the technical platform R2 Srl (R2) from Mediaset Premium S.p.A (MP) (Transaction). R2 provides technical platform services enabling broadcasters to retail a pay-TV offer on DTT.

Sky filed the Transaction with the ICA on 28 November 2018, and the ICA opened a Phase II investigation in March 2019. The parties had agreed to terminate the Transaction should the ICA deem it anti-competitive. When Sky was informed of the ICA's preliminary objections, it activated the termination clause, which provided for the returning of R2's assets to MP, along with certain DTT channel numbers (LCNs). However, the ICA found that these steps were insufficient to effectively undo the merger: in its view, the merger had generated certain "irreversible" effects which, pursuant to Article 18(3) of Law 287/90, required measures to remove competitive distortions caused by the implementation of a notified concentration. The ICA held that the Transaction was economically and functionally intertwined with commercial agreements concluded by the parties in March 2018, which, overall, constituted a single concentration, equivalent, in substance, to the suppression of MP as a competitor in the pay-TV market in Italy. Allegedly, these agreements included the exclusive sub-licensing of MP's DTT pay-TV channels to Sky and the transfer to Sky of the rights to use certain LCNs, in addition to exclusive arrangements for the provision of R2's technical platform services to Sky. The restitution of R2's assets to MP was deemed "partial" and the other arrangements concerning LCNs ineffective in light of the exclusive licensing of MP's pay-TV channels to Sky. Given the dominance of Sky in the markets for retail pay TV in Italy, the ICA prohibited Sky from purchasing audiovisual content from third parties on an exclusive basis for three years and imposed obligations to ensure third-party access to DTT's technical platform services, where the entity post-merger was dominant too. Sky challenged the decision before TAR Lazio, claiming procedural and substantive errors of law and assessment, which the TAR Lazio upheld on the following grounds.

First, the ICA had breached Sky's rights of defence by acting against its own established practice on procedures applicable to the control of concentrations, ultimately depriving Sky of the opportunity to counter the substantive allegations in the decision. The court noted that while ICA's preliminary objections concerned the Transaction and only briefly speculated on the situation entailed by the hypothetical termination of the contract, the final decision was based on the

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effects on competition allegedly caused by the factual situation occurred after implementing the termination clause, which was significantly different from the Transaction and was not subject to full investigation. Furthermore, Sky was not given the opportunity to submit observations regarding these different facts and allegations. The ICA should have started new proceedings to correctly investigate the new situation.

Secondly, the decision was vitiated by lack of reasoning and errors in the factual assessment because the ICA: (a) did not sufficiently consider that the sub-licensing of MP's DTT channels to Sky was not exclusive, as MP retained the right to transmit on its remaining pay-TV platform "Infinity", and the duration of the agreement (two years) conflicted with the established principle that a concentration produces a non-transitory change of control and of the market's structure; (b) did not analyse in detail whether the activities and agreements connected to the Transaction constituted "the activities of an autonomous undertaking to which a market turnover could be attributed", as established by consolidated EU and national principles on the control of concentrations; (c) did not make a new assessment of the existence and amount of the turnovers attributable to the Transaction's remaining assets following the termination of the contract; and (d) found that separate operations constituted a single concentration despite not being completed simultaneously and without identifying a bond of interdependence between them, thus acting against the self-imposed criteria set out in the European Commission's consolidated notice (paragraphs 43-44) and which the ICA cannot disregard without stating the reasons. The judgment can be appealed before the Council of State.

TAR Lazio, Sez. I, del 5 marzo 2020 n. 7694/2019

https://www.giustizia-amministrativa.it/portale/pages/istituzionale/visualizza/?nodeRef=&schema=tar_rm&nrg=201907694&nomeFile=202002932_01.html&subDir=Provvedimenti

Sky Italy Srl and Sky Italian Holding SPA c. AGCM (Judgment of the Regional Administrative Court of Lazio, Section I, of 5 March 2020 N. 7694/2019).

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MALTA

[MT] Applying a Procedural Rule to Violate Freedom of Expression

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Digi B Network Ltd. is the sole digital radio platform operating in Malta. It applied to the Broadcasting Authority by means of two separate broadcasting licence applications, in June 2018 and in August 2018, to be permitted to carry two additional digital radio stations on its platform. Although this should have been a very straightforward procedure, the broadcasting regulator never got back to the platform operator with any decision, either within or beyond the statutory four-month period allowed by law; in the meantime, the platform operator was left unaware of the outcome of its applications.

Several months beyond the statutory time limit of four months for the determination of both applications, and after having made several submissions with the broadcasting regulator and filed a judicial protest requesting the Broadcasting Authority to take a decision on the two applications pending before it, the digital radio operator was inevitably constrained to appeal by way of deemed refusal to the Court of Appeal for redress.

However, the Court of Appeal, instead of granting the requested remedy, raised *ex officio* the issue of the invalidity of the appeal, considering such an appeal to have been lodged outside the time limit required by law. The Court of Appeal referred to the Broadcasting Act provision in Article 11(3) which states that:

(3) An applicant whose application has been refused by the [Broadcasting] Authority and who feels that the Authority has not acted in conformity with the rules of natural justice, or that it has acted in a manner which is grossly unreasonable or with undue discrimination, or whose application has been pending for at least four months, may appeal against such a decision or delay to the Court of Appeal in accordance with the procedures laid down in Article 16(5), (6), (7), (9) and (10).

By means of a Court of Appeal judgment of 16 December 2019, the court concluded that, in terms of the Broadcasting Act, the appeal had to be lodged within fifteen days after a period of four months from the lodging of both applications had elapsed. This is because section 16(5) of the Broadcasting Act provides that:

(5) Any broadcasting licensee who feels aggrieved by a decision of the Authority to suspend or determine his or her licence ..., may appeal against such a decision to the Court of Appeal by filing an application within fifteen days from the date of

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service upon him or her of the decision of the Authority.

This is a case where a procedural rule was applied by the Court of Appeal to violate freedom of expression. First, the Court of Appeal raised a procedural point itself in its judgment whilst applying it in its decision, rather than being a party that raises such a plea. Indeed, it was not stated in the judgment that the parties were given adequate opportunity to make written and/or oral submissions on the plea raised by the court. How can the court be considered impartial when it took the side of one party to the appeal?

Secondly, the court allowed the Broadcasting Authority, without sanctioning it, to delay deciding on a broadcasting licence application beyond the four months statutory time limit where a period of fifteen days had elapsed beyond those four months. In this case, an applicant for a broadcasting licence's deemed refusal was brought to a judicial naught.

Finally, although the Broadcasting Act mandates the Broadcasting Authority and, on appeal, the Court of Appeal, to be guided by the considerations 'that the principles of freedom of expression and pluralism shall be the basic principles that regulate the provision of broadcasting services in Malta' and, in addition, 'in granting licences to different persons, it shall also take into account the possibility of broadcasting by ... digital radio', the court resorted to a literal interpretation of the law that ignored such principles.

Yet, if the platform operator were to apply before the Civil Court, First Hall, for judicial review of the Authority's inaction, the latter would plead that the platform operator had already exhausted its ordinary legal remedies once the Court of Appeal had refused the operator's appeal in terms of the Broadcasting Act, thereby provoking a catch-22 situation. This is a case where a statutory procedural rule was applied to deny freedom of expression.

Court of Appeal judgment, Digi B Network Ltd. v Broadcasting Authority, 16 December 2019

https://ecourts.gov.mt/onlineservices/Judgements/Details?JudgementId=0&CaseJudgementId=119681

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NETHERLANDS

[NL] Appeal Court refuses to order removal of article from online media archive

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On 3 March 2020, the Gerechtshof Amsterdam (Amsterdam Court of Appeal) delivered a notable judgment on online news media archives, and whether media should be required to remove certain old articles which continue to appear in Google Search results from their online archives.

The case centred on an article published in 1999 by the Dutch media outlet *de Volkskrant*, which reported on the claimant's involvement with a "pyramid-scheme" company that had gone bankrupt. In 2011, the claimant sent a request to the media outlet to remove the article from its online archive, which is freely accessible on its website, and requested that Google remove the article from its cache. The claimant claimed that when his name is entered in a search query on Google's search engine, the article appears in the search results. Following the media outlet's refusal to remove the article from its archive, the claimant initiated legal proceedings. However, on 8 August 2018, the Rechtbank Amsterdam (Amsterdam District Court) rejected the application. Now, in its judgment of 3 March 2020, the Amsterdam Court of Appeal has upheld the earlier judgment, also holding that the application should be rejected.

The claimant had argued that publication was unlawful because the article contained factual inaccuracies; he had not been given the opportunity at that time to comment on the content of the article; and due to the Internet and search engines such as Google Search, he was still suffering because of the publication, after almost twenty years. In answer to the question of whether the publication was unlawful vis-à-vis the claimant, the Court began by noting that *de Volkskrant* 's right to freedom of expression under Article 10 of the European Convention on Human Rights (ECHR) could only be restricted if it was "provided by law", and "necessary in a democratic society."

The Court then examined the circumstances of the case, and first rejected the claimant's argument that the article wrongly gave the impression that he had taken millions from members of the pyramid scheme. The Court held that the article did not make this explicit claim, and that the article was supported by the facts, in that third parties had transferred five million Dutch guilders to the company. Secondly, the Court held that the fact that no rebuttal had been offered to the claimant was not determinative, as it would not have led to different content in the article, given that the claimant would not have been able to deny that he had been involved in organising the pyramid scheme. Thirdly, the Court held that the article's publication had served the "public interest" at the time, and continued to do so in the online archive. Fourthly, the Court agreed with *de Volkskrant* that the claimant was a public figure, given his business activities,

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although the Court did state that it would take into account the fact that he did not “actively seek publicity”. Having regard to all these considerations, the Court held that the freedom of expression on the part of *de Volkskrant* should prevail in the light of its task of discussing “socially relevant facts” in its publications, and as such, the publication was not unlawful, nor was its continued availability in the online archive. The Court considered that any negative consequences for the claimant did not outweigh the interest of *de Volkskrant* and the public interest in the article. Finally, the Court held that the claimant had failed to demonstrate any “special reason” why the article should be made accessible only in “anonymised form” in the archive.

Gerechtshof Amsterdam, 3 maart 2020, ECLI:NL:GHAMS:2020:624

https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:GHAMS:2020:624

Court of Appeal of Amsterdam, 3 March 2020, ECLI:NL:GHAMS:2020:624

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[NL] Judgment on request for removal and rectification of investigative TV programme

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On 30 January 2020, the Rechtbank Midden-Nederland (Midden-Nederland District Court) delivered an important judgment, refusing to order the removal or rectification of an investigative TV programme broadcast by a Dutch public broadcaster. The litigation received a great deal of coverage in Dutch media, and the judgment set out the principles the Court will apply when determining whether there is a sufficient factual basis for investigative reporting.

The case arose on 26 November 2019, when the Dutch public broadcaster AVROTROS broadcast an episode of its long-running *Opgelicht* investigative programme. The episode concerned the Kluivert Dog Rescue Foundation in Curaçao, which was founded in 2018 by a well-known public figure from the Netherlands, and the programme raised a number of questions relating to the fate of donation funds to the Foundation. Following the broadcast, the Foundation and its founder initiated legal proceedings, claiming that the programme was "factually inaccurate", and made unlawful accusations against the Foundation and its founder, which were "biased", "one-sided and very damaging". Before the Midden-Nederland District Court, the Foundation listed 16 different accusations from the programme which it claimed were unlawful allegations, and asked the Court to order the broadcaster to remove the programme from its website, publish a rectification as a pop-up window on its website whenever the accompanying article is accessed, and write to the Google search engine with a request to urgently remove the programme from its cache memory.

The Court first held that the case involved a conflict between the claimants' right to protection of reputation under Article 8 of the European Convention on Human Rights (ECHR), and the broadcaster's right to freedom of expression under Article 10 ECHR. Notably, in rejecting the broadcaster's argument on the point, the Court held that the Foundation also enjoyed a right to protection of reputation under Article 8 ECHR, since violation of the personality rights of a legal person through damage to good name and reputation directly results in violation of the economic rights of that legal person. The Court then stated that in order to answer the question of whether Article 8 or Article 10 outweighed the other in a specific case, there must be a weighing of all the relevant circumstances of the case, namely: (i) the nature of the statements and the severity of the expected consequences for the person to whom those statements relate, (ii) the seriousness - viewed from the public interest - of the abuse that is denounced, (iii) the extent to which the statements are supported by the factual material available at the time of publication, (iv) the creation and presentation of the statements, (v) the authority enjoyed by the medium on which the statements are published, and (vi) the social position of the person involved.

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The Court then proceeded to methodically address each of the allegations made in the programme, and dismissed all the arguments by the claimants that the programme was unlawful. Notably, the Court held that where there may be minor inaccurate statements by interviewees or third parties, "[i]n general, AVROTROS may be expected to investigate the facts, but not everything that is said to it by third parties must be checked for accuracy." Furthermore, the statements deemed incorrect were "not essential", in the sense that they "did not form the core of the broadcast." Crucially, the Court held that the "vast majority" of what had been put forward in the programme had "sufficient support in the factual material available to AVROTROS at the time of the broadcast." In particular, the Court found that questions relating to the use of certain donations were factually correct, and that nowhere did the programme explicitly make an allegation that the Foundation had engaged in "deception". The Court concluded that discussing what happened to donation funds fell within the freedom of expression of AVROTROS, rejected the claimants' application in full, and awarded costs to the broadcaster.

Rechtbank Midden-Nederland, 30 januari 2020, ECLI:NL:RBMNE:2020:304

https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBMNE:2020:304

District Court of Midden-Nederlands, 30 January 2020, ECLI:NL:RBMNE:2020:304

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ROMANIA

[RO] Recommendations about the Covid-19 media coverage

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On 25 February 2020, the National Audiovisual Council (*Consiliul Naţional al Audiovizualului*, CNA), the audiovisual regulator of Romania, issued a press release regarding the obligation for broadcasters to treat any new topic regarding the coronavirus (Covid-19) epidemic responsibly. Further to this press release, on 27 February 2020, the Council issued two recommedations for audiovisual broadcasters, both public and commercial, to air the audio and TV advertising spots launched by the Romanian Government as part of the information campaign on the prevention of infection with the new type of coronavirus (see related articles in IRIS 2007-1/29, IRIS 2007-8/30, IRIS 2011-10/37, IRIS 2012-3/31, and 2014-1/40).

Following the appearance on some Romanian TV channels of alarmist and insufficiently verified information regarding the new coronavirus epidemic, on 25 February 2020, the National Audiovisual Council reminded broadcasters that they are obliged to deal with the news and debates related to this topic rigorously and responsibly. In this regard, the official positions communicated by the Romanian authorities managing this situation should have priority, the purpose of all those involved being to minimise the spread of this virus.

The CNA has announced that it would monitor the audiovisual programmes for the way information is transmitted on this subject, the approach based on official communications being the only one able to really help the population in such cases.

Through two recommedations issued on 27 February, it asked the audiovisual mass media responsible for broadcasting public and commercial programmes at local, regional and national level, to broadcast, under public notice, the audiovisual advertising spots included in the information campaign intended for the Romanian population on how to reduce the risks of being infected by and spreading diseases with the new type of coronavirus .

The advertising spots have to be broadcast every hour, before the first group of advertisements. The information campaign is carried out by the Ministry of Internal Affairs through the Department for Emergency situations.

According to Article 6, paragraph (2) of Audiovisual Law No. 504/2002, with further modifications and completions, in the case of commercial media, the editorial decision to broadcast over the radio or on TV lies exclusively with the broadcaster.

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As for public broadcasters, according to Article 9 of Law No. 41/1994 regarding the organisation and functioning of the Romanian Radio Broadcasting Society and of the Romanian Television Society, republished with amendments and completions, the public broadcasting services are obliged to transmit, as a top priority and free of charge, communications or messages of public interest received from the Romanian Parliament, the President of Romania, the Supreme Defence Council of the Country or from the Romanian Government.

Press release regarding broadcasters' obligation to treat any coronavirus topic responsibly – 25 February 2020

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