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EDITORIAL

In a 1974 interview, philosopher Hannah Arendt stated the following: “If everybody always lies to you, the consequence is not that you believe the lies, but rather that nobody believes anything any longer [...] And a people that no longer can believe anything [...] is deprived not only of its capacity to act but also of its capacity to think and to judge.”

In the profound crisis we are going through now, these words ring truer (and scarier) than ever. It is already difficult enough for the layman to think about and judge complex medical information, with many citizens feeling overwhelmed by a plethora of divergent opinions about the nature, origins, effects and evolution of this pandemic. However, what can make it truly impossible for citizens and governments alike to handle this crisis is when disinformation is maliciously spread in order to stir informational chaos in our societies, with the result that nobody believes anything any longer. That is when public bodies do have to make a stand.

However, not all means are justified by the objective of countering disinformation, as explained by the Council of Europe’s Commissioner for Human Rights Dunja Mijatović in a recent statement. According to the Commissioner, introducing disproportionate restrictions on press freedom is a “counterproductive approach that must stop.” The Commissioner emphasised that measures to combat disinformation “must never prevent journalists and media actors from carrying out their work or lead to content being unduly blocked on the Internet.”

But enough about the virus. The fact that our newsletter covers many other important legal developments that are unrelated to the COVID-19 crisis is perhaps a sign that life goes on after all. Some examples of these developments include the recent ECHR judgment in the ATV Zrt v. Hungary case; the European Commission’s greenlighting of the new German State Media Treaty; the CJEU Advocate General’s opinion on information claims against YouTube; and the German Federal Court of Justice judgment on the illegality of phonogram samples.

Stay safe and enjoy your read!

Maja Cappello, editor

European Audiovisual Observatory

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INTERNATIONAL

COUNCIL OF EUROPE

COE: COMMISSIONER FOR HUMAN RIGHTS

Media freedom and measures to counter disinformation about COVID-19

Ronan Ó Fathaigh
Institute for Information Law (IViR)

On 3 April 2020, the Council of Europe's Commissioner for Human Rights, Dunja Mijatović, issued an important Statement concerning measures aimed at countering disinformation about the COVID-19 pandemic (for previous Statements, see IRIS 2017-7/3).

The Commissioner began by noting that some Council of Europe member states had used countering disinformation about COVID-19 as a "pretext to introduce disproportionate restrictions to press freedom," which is a "counterproductive approach that must stop." The Commissioner pointed to how these new measures "clearly risk hampering the work of journalists and media actors and restricting the public's right to receive information." The Commissioner then highlighted specific measures that had been implemented in some member states, including Armenia, Azerbaijan, Bosnia and Herzegovina, Hungary, Romania and the Russian Federation. For example, in Hungary and the Russian Federation, journalists reporting on the pandemic are "facing a variety of sanctions, including the risk, under new laws, of prison terms of up to five years for spreading 'false information.'"

Secondly, the Commissioner stated that access to information had also been a "collateral victim" of the measures certain member states had taken during the pandemic. The Commissioner pointed to the Czech Republic, Italy and Serbia, where there had been reports of cases of journalists "prevented from attending press conferences, obtaining information from health authorities or documenting the operations of law enforcement officials." However, the Commissioner emphasised that journalism served a "crucial function during a public health emergency," and that timely information was "essential for the public to understand the danger and adopt measures at a personal level to protect themselves."

Thirdly, the Commissioner reiterated that it was of "utmost importance" that journalists be able to work under safe conditions "without fear of being harassed or attacked," referring to Recommendation (2016)4 of the Committee of Ministers on the protection of journalism and safety of journalists and other media actors

(see IRIS 2016-5/3). However, the Commissioner then referred to Turkey, where several journalists were “detained in reprisal for their reporting on COVID-19”; and to Slovenia, where a journalist who had filed an information request about the measures adopted by the government had “been the target of a smear campaign by media close to the political party leading the government coalition.”

Finally, the Commissioner urged all Council of Europe member states to “preserve press and media freedom and ensure that measures to combat disinformation are necessary, proportionate and subject to regular oversight, including by parliament and national human rights institutions.” The Commissioner emphasised that measures to combat disinformation “must never prevent journalists and media actors from carrying out their work or lead to content being unduly blocked on the Internet,” and stated that “[t]hose countries which have introduced restrictions that do not meet these standards must repeal them as a matter of urgency.”

Council of Europe Commissioner for Human Rights, Press freedom must not be undermined by measures to counter disinformation about COVID-19, 3 April 2020

https://www.coe.int/en/web/commissioner/-/press-freedom-must-not-be-undermined-by-measures-to-counter-disinformation-about-covid-19

HUNGARY

ECtHR: *ATV Zrt v. Hungary*

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

The European Court of Human Rights (ECtHR) has delivered an important judgment on a politically controversial issue: since 2010, the Hungarian authorities have imposed an obligation on broadcasters to distinguish rigidly between facts and opinions in news and political reporting. In its unanimous judgment in the case of *ATV Zrt v. Hungary,* the ECtHR found that a ban on referring to the political party Jobbik as 'far right' was a violation of a TV station's right to freedom of expression as guaranteed under Article 10 of the European Convention on Human Rights (ECHR).

ATV is an independent broadcaster providing television and online services. Every evening, it broadcasts televised news programmes, including a series of news items introduced by a newsreader in a studio and subsequently presented by a different news reporter. In November 2012, ATV broadcast a news item on preparations for a demonstration under the title 'Mass demonstration against Nazism.' The demonstration was a protest against the political party Jobbik, after one of its members, during a plenary session of parliament, stated that it was time to make "an assessment of how many persons of Jewish origin, especially members of parliament and the government, there are who pose a risk to national security." The newsreader introducing the news item about the upcoming demonstration announced that an unprecedented alliance was about to materialise "against the biased remarks of the parliamentary far right."

Following a complaint from the press officer of Jobbik, the National Media and Infocommunications Authority (NMHH) initiated proceedings against ATV. The NMHH found that ATV had infringed Section 12(3) and (4) of the 2010 Act on Media Services and Mass Communication (Media Act) and prohibited it from repeating the statement. The NMHH declared that the expression 'parliamentary far right' went beyond a factual statement and amounted to a value judgment. It emphasised that the communication of any opinion by a newsreader was prohibited by Section 12 of the Media Act in order to ensure that the public received unbiased news and political information. ATV appealed, arguing that the term 'far right' was widely used in relation to Jobbik, that it had a scientific basis in political and social science, and that it reflected Jobbik's position in parliament. After ATV's appeal was dismissed by the Media Council of the NMHH, the TV company sought judicial review, maintaining that the impugned statement was part of a news item describing a certain parliamentary group. A Budapest court annulled the injunction against ATV, finding that the reference to 'far right' corresponded to Jobbik's nature as accepted by current social and political public understanding, and it referred the case back to the Media Council. This judgment

was, however, overturned by the Supreme Court (*Kúria*), again confirming the injunction against ATV. According to the *Kúria*, the term ‘far right’ in the news programme was an opinion, not a statement of fact. This approach was confirmed by the Constitutional Court, clarifying that any opinion or evaluative explanation "added to the news provided in a programme must be made in a form that distinguishes it from the news itself, indicates its nature as such, and identifies its author." A short time later, ATV Zrt complained before the ECtHR that the Hungarian courts’ decision finding that it had infringed the Media Act, in particular its provision prohibiting the expression of opinions in news programmes, had violated its right to freedom of expression under Article 10 ECHR.

As it was not contested that the injunction in question amounted to an interference with ATV’s right to freedom of expression, and as the restriction was intended to ensure the audience’s right to a balanced and unbiased coverage of matters of public interest in news programmes, and thus pursued the aim of the "protection of the rights of others," the question remained as to whether the interference was prescribed by law and was necessary in a democratic society. Although the ECtHR, with reference to a report by the Venice Commission and to the lack of any domestic case law on the matter, reflected on the vague character of Section 12 of the Hungarian Media Act and the very broad notion of ‘opinion’, it decided that it was not necessary to address the question of whether this provision could, *in abstracto*, constitute a foreseeable legal basis for the interference complained of (on this matter, there is an interesting concurring opinion by judge Pinto de Albuquerque in annex to the judgment). According to the ECtHR, the salient issue in this case was not whether Section 12 of the Media Act is in principle, sufficiently foreseeable, in particular in its use of the term ‘opinion’, but whether, when publishing the statement containing the term ‘far right’, ATV knew or ought to have known – if need be, after taking appropriate legal advice – that said expression would represent an ‘opinion’ in the context of the case. The Court acknowledged that the very fact that this case was the first of its kind does not, as such, make the interpretation of the law unforeseeable, as "there must come a day when a given legal norm is applied for the first time." Hence, the ECtHR chooses to focus on the question of whether the interference corresponded to any "pressing social need." It referred to the importance of pluralism in the audiovisual media, while reiterating that "there is little scope under Article 10, section 2 for restrictions on debates on questions of public interest. The margin is also narrowed by the strong interest of a democratic society in the press exercising its vital role as a public watchdog: freedom of the press and other news media affords the public one of the best means of discovering and forming an opinion on the ideas and attitudes of political leaders. It is incumbent on the press to impart information and ideas on subjects of public interest and the public also has a right to receive them." In the Court’s view, it was for the domestic courts to interpret the term ‘opinion’ in a manner that took into account the aim of the restriction and guaranteed the audience’s right to a balanced and impartial coverage of matters of public interest, as well as the media’s right to impart information and ideas. The ECtHR clarified that Section 12 should not turn into a tool for the suppression of free speech, encompassing activities and ideas which are protected by Article 10. The application of Section 12 indeed had to stay within the contours of its legitimate aim, which was "to

protect democratic public opinion from undue influence by media service providers and was in the interests of providing objective information". The Court noted the variety of approaches applied by the domestic courts in determining the nature of the notion ‘opinion' related to the adjective ‘far right' and it observed that the government did not demonstrated the existence of a common practice either. This state of affairs cast doubt on whether the interpretation given by the higher-level domestic courts in the present case – namely, that a statement containing the term ‘far right’ constituted an opinion – could reasonably have been expected. More importantly, there was no indication that the domestic courts sought to consider, when assessing the nature of the impugned notion, that Section 12 of the Media Act was supposed to promote balanced news reporting. The Court also referred to ATV’s argument that the labelling of Jobbik as a ‘far right’ party was sufficiently commonplace for the audience and was a generally accepted category in the media, scientific discourse and colloquial language in relation to Jobbik. Furthermore, the ECtHR found force in the argument that political parties were frequently defined with adjectives such as ‘green’ party or ‘conservative' party, which did not constitute an opinion or value judgment about them capable of creating bias in the audience. Moreover, the Court considered that the context and factual elements in this case were relevant for the contention that the term ‘far right’ did not concern an assessment of someone’s conduct in terms of its morality, or the speaker's personal feeling, but described the position of a party within the political spectrum in general, and in parliament in particular. The ECtHR also disagreed with the Constitutional Court finding irrelevant any defence by ATV based on the veracity and factual accuracy of the term employed. Having regard to the domestic courts’ divergent approaches to distinguishing facts from opinions, to the aim of the relevant provisions of the Media Act and to the circumstances of the present case, the ECtHR found that ATV could not have foreseen that the term ‘far right’ would qualify as an opinion. Nor could it have foreseen that the prohibition of its use in a news programme would be necessary in order to protect unbiased reporting. Therefore, the interference with ATV’s right to freedom of expression was disproportionate and not "necessary in a democratic society." There ha, accordingly, been a violation of Article 10 ECHR.

ECtHR, Fourth section, ATV Zrt v. Hungary, Application no. 61178/14, 28 April 2020

https://hudoc.echr.coe.int/eng?i=001-202391

EUROPEAN UNION

GERMANY

EU Commission gives green light to German State Media Treaty

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At the end of the notification procedure, the EU Commission has given the green light for the reform of media regulations in Germany. Despite raising a number of concerns, it said there were no procedural barriers to the adoption of the new *Medienstaatsvertrag* (State Media Treaty). However, it suggested some ways in which the draft treaty could be more closely aligned with common EU legislation.

The reform process is designed to adapt the state regulatory framework to the digitalised media world, especially with regard to online platforms and streaming services, and to replace Germany's existing *Rundfunkstaatsvertrag* (State Broadcasting Treaty). The changes include extending the supervisory activities of the *Landesmedienanstalten* (state media authorities) and aspects of the self-regulation of online services. As part of the implementation of the Audiovisual Media Services Directive (AVMSD), youth protection standards for linear and on-demand media services will be largely harmonised and new rules introduced for video-sharing platforms. The State Media Treaty will also apply to so-called media intermediaries, user interfaces and voice assistants. In particular, it includes rules on transparency and anti-discrimination. Intermediaries will be obliged to make clear the criteria under which editorial content is displayed. The adopted text also contains new rules on signal integrity and the labelling of so-called 'social bots'.

The Transparency Directive requires EU member states to notify draft technical provisions, including provisions on information society services. As soon as a member state has notified a draft law, the Commission and the other member states have three months in which to analyse it. Member states cannot adopt it before the end of this standstill period. If it contains measures that would restrict the free movement of services or the freedom of establishment, the standstill period can be extended. However, the standstill period for the State Media Treaty ended on 27 April 2020 and was not extended.

Thanks to the EU Commission's decision, the Bundesländer can now ratify the treaty. The new rules are expected to enter into force in September 2020, before the deadline for the implementation of the AVMSD.

Pressemitteilung der EU-Kommission vom 28. April 2020

https://ec.europa.eu/germany/news/20200428-medienstaatsvertrag_de

EU Commission press release of 28 April 2020

Pressemitteilung der Landesregierung Rheinland-Pfalz vom 28. April 2020

https://www.rlp.de/de/aktuelles/einzelansicht/news/News/detail/freigabe-des-medienstaatsvertrages-durch-eu-kommission-ist-wichtiges-etappenziel/

Rhineland-Palatinate regional government press release of 28 April 2020

ERGA

ERGA report on disinformation: assessment of the implementation of the European Code of Practice

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As part of the European Commission's efforts to combat online disinformation, the European Regulators Group for Audiovisual Media Services (ERGA) was asked to assess the implementation of the European Code of Practice on Disinformation ('the code'). On 5 December 2018, the European Commission and the High Representative of the Union for Foreign Affairs and Security Policy presented an Action Plan against Disinformation, which stated that "The Commission will, with the help of the European Regulators Group for Audiovisual Media Services (ERGA), monitor the implementation of the commitments by the signatories of the Code of Practice."

Adopted in September 2018 at the European Commission's initiative, the code was drafted and signed by platforms and representatives of the advertising industry and comprises 15 commitments split into five pillars:

- scrutiny of ad placements;

- political and issue-based advertising;

- integrity of services;

- empowering consumers;

- empowering the research community.

In this context, in June 2019, ERGA published a report designed to contribute to an interim evaluation of the code's implementation by the platforms, concentrating on measures relating to political and issue-based advertising, in particular in the context of the European elections.

A final report was then published on 4 May 2020, evaluating the implementation of the commitments under each pillar and drawing conclusions on their implementation and on the code's effectiveness before proposing recommendations designed to improve the fight against online disinformation.

The report's authors highlight the code's uniqueness and the progress made by the platforms, suggesting that the instrument is a step in the right direction. Nevertheless, they identify some significant weaknesses that limit, for example, the possibility of properly monitoring the implementation of the code and its effectiveness. ERGA refers, in particular, to the lack of access to the raw data provided by the platforms, especially for the first three pillars of the code. With

regard to media literacy, ERGA highlights the platforms' efforts, but qualifies this by pointing out that initiatives vary hugely from one country or territory to another. Finally, it criticises the lack of access to the platforms' data for the research community.

In other words, ERGA emphasises the need for greater transparency in the way in which the signatories implement the code and for more concrete measures than those adopted to date. It also regrets the fact that only a small number of platforms have signed the code (so far, only Facebook, Google, Twitter, Microsoft and Mozilla have signed it).

In order to tackle the dissemination of online disinformation more effectively, the report contains some recommendations with varying implications. Some of these are mentioned below.

Firstly, the report sets out a series of recommendations aimed at improving the monitoring of the existing code's commitments. For example, for reasons of clarity, ERGA recommends defining a number of key notions (for example, the notion of fake news or political ads) and adopting guidelines on various subjects (such as media literacy campaigns or the relationship between the platforms and researchers) to ensure a more consistent approach among the online platforms. The document also proposes ways of improving the communication of information and data by the code's signatories.

Secondly, the report lists some recommendations aimed at expanding the existing code's commitments. These would require the agreement of the platforms and of the European Commission. They are mainly aimed at harmonising the implementation of the code's commitments and increasing the number of signatories in order to avoid asymmetries between the platforms in the sector.

Finally, ERGA goes further by making recommendations aimed at exploring new tools to counter online disinformation more effectively. For example, it suggests shifting to a more co-regulatory approach supported by a legislative instrument, stating that the EU's forthcoming work with platforms could provide an opportunity in this context.

This report, alongside other sources, will assist the European Commission in its overall assessment of the code's effectiveness, to be published in 2020. It should be noted that the Commission does not discount the possibility of taking measures, including regulatory steps, if it considers the signatories' efforts inadequate.

ERGA Report on disinformation: Assessment of the implementation of the Code of Practice

http://erga-online.eu/wp-content/uploads/2020/05/ERGA-2019-report-published-2020-LQ.pdf

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

(ERGA Report)

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

EU: COURT OF JUSTICE OF THE EUROPEAN UNION

CJEU Advocate General on information claims against YouTube

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In his opinion of 2 April 2020 (Case C-264/19), CJEU Advocate General Henrik Saugmandsgaard Øe suggested that the right to information about users who infringe copyright on video-sharing platforms does not cover the email address, the telephone number, the IP address used to upload the files or the IP address used when the user's account was last accessed. He was referring to the concept of 'names and addresses' set out in Directive 2004/48/EC on the enforcement of intellectual property rights.

A request for a preliminary ruling had been submitted by a German court in a legal dispute between German film distributor Constantin Film Verleih GmbH and the YouTube video-sharing platform and its parent company, Google. YouTube and Google had refused to provide certain information about users who had infringed Constantin Film Verleih's exclusive exploitation rights by uploading a number of films on their platform. The films "Parker" and "Scary Movie 5", for example, had been uploaded on the platform several times and been viewed more than 50 000 times in total before they were blocked.

Ruling at first instance, the *Landgericht Frankfurt am Main* (Frankfurt am Main Regional Court) rejected Constantin Film Verleih's request for detailed information about the users concerned. On appeal, the *Oberlandesgericht Frankfurt am Main* (Frankfurt am Main Higher Regional Court) ordered YouTube and Google to provide the email addresses of the users concerned. The *Bundesgerichtshof* (Federal Court of Justice) stayed the subsequent appeal proceedings and referred questions to the CJEU concerning the interpretation of the concept of 'addresses' contained in Article 8(2)(a) of Directive 2004/48. According to the same article, member states must ensure that, in the context of proceedings concerning an infringement of an intellectual property right and in response to a justified and proportionate request of the claimant, the competent judicial authorities may order that information on the origin and distribution networks of the goods or services which infringe an intellectual property right be provided. This information includes "the names and addresses of the producers, manufacturers, distributors, suppliers".

In his opinion, Advocate General Saugmandsgaard Øe refers to the literal interpretation of the provision, where the word 'address' covers only a postal address, but not a telephone number. Where the EU legislature had intended for email or IP addresses to be included, it had expressly mentioned this. In accordance with the prohibition of *contra legem* interpretation and the principle of the separation of powers, a dynamic or teleological interpretation was only

possible where the text of the provision itself was open to different interpretations, which was not the case here.

Schlussanträge des Generalanwalts Henrik Saugmandsgaard Øe vom 2. April 2020 in der Rechtssache C-264/19

http://curia.europa.eu/juris/document/document.jsf?text=&docid=224899&pageIndex=0&doclang=de&mode=lst&dir=&occ=first&part=1&cid=2807779

Opinion of Advocate General Henrik Saugmandsgaard Øe of 2 April 2020 in case C-264/19

http://curia.europa.eu/juris/document/document.jsf?docid=224899&text=&dir=&doclang=EN&part=1&occ=first&mode=DOC&pageIndex=0&cid=1809529

NATIONAL

ARMENIA

[AM] Restrictions on access to COVID-19 information adopted, then amended

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The Armenian Government's Decree “On declaring a state of emergency in the Republic of Armenia” was adopted on 16 March 2020. It provided, in particular, new rules in relation to information on the COVID-19 infection. The public dissemination of information that leads to or is capable of causing panic would only be made possible by making reference to the official source, namely the Commandant’s Office, headed by the deputy prime minister. The Office was established the same day.

Article 182-3, paragraph 8 (Violations of the rules of an emergency situation) of the 1985 Code on Administrative Offences of Armenia already provided a penalty for mass media outlets who violate this restriction: a fine of between 500 and 800 times the legal minimum wage. The government explained the measure by referring to the need to prevent “panic-mongering” during the emergency period, declaring that it would slow down and contain the spread of the virus.

On 24 March, following the concerns expressed by national and intergovernmental organisations regarding the need for these harsh measures, the government, by way of Decree No. 345-N, decided to amend its Decree of 16 March and allow alternative and foreign sources to be used in reporting under certain conditions.

The amended provisions still allow the public dissemination of publications, news, interviews and reports on the Coronavirus in the Republic of Armenia, including through posts on Internet websites and on social networks, only if they come from the Commandant’s Office, reflect the official information in full and contain clear references to the official source.

At the same time, mass media outlets under Armenian jurisdiction may report on the topic from other sources upon condition that they publish a refutation or clarification of such reports, as (if) provided by the Commandant’s Office, within two hours of these reports being received or published. The mass media outlet shall ensure that the refutation or clarification is disseminated via the same platforms used to disseminate the related reports (paragraphs 23, 24 and 24.1 of the Decree).

Mass media outlets are now also allowed to reprint or retransmit, in full or in part, information or analytical materials on the Coronavirus from foreign media upon condition that they cite the source of the material in the headline of their own stories.

On 23 March 2020, relevant amendments were made to paragraph 8 of Article 182.3 of the Code of Administrative Offences. The fines were decreased to between 100 and 300 times the minimum wage for violation of the rules governing the publication and dissemination of information by a media actor during the state of emergency.

A new Article 8.1 was added to the Code, establishing the requirement that within a day of paragraph 8 being violated, the disseminated illegal information be removed, otherwise, the offender would face a fine amounting to between 500 and 1 000 times the official minimum wage.

On 13 April, the state of national emergency was extended for another 28 days, though the Coronavirus-related media coverage provisions were completely dropped from the list of restrictions. The government will, however, monitor all publications and in the event of risks being noted, the original provisions will be reinstated.

Վարչական Իրավախախտումների Վերաբերյալ Հայաստանի Հանրապետության Օրենսգիրք

https://www.arlis.am/DocumentView.aspx?docid=73129

Code on Administrative Offences of Armenia

ՀՀ Կառավարության որոշում N 298 - Կոհայաստանի Հանրապետությունում Արտակարգ Դրություն Հայտարարելու Մասին

https://www.e-gov.am/gov-decrees/item/33564/

Decision of the Government of the Republic of Armenia No 298-N of 16 March 2020 “On declaring a state of emergency in the Republic of Armenia”

https://covid19.gov.am/en/v1

GERMANY

[DE] Berlin Regional Court bans surreptitious advertising on BuzzFeed

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Under German law, online product recommendations must be clearly labelled as advertising if news portals receive commission from the sale of the related products. The *Landgericht Berlin* (Berlin Regional Court) stated this in its ruling of 11 February 2020 in Case no. 52 O 194/18 after Germany's *Verbraucherzentrale Bundesverband* (Federation of Consumer Organisations – vzbv) launched proceedings against the media company BuzzFeed.

On its news portal's home page, the company had listed several articles, including one entitled "18 geniale Dinge, die du dir 2018 mit deinem Amazon-Gutschein gönnen musst" ("18 amazing things you should treat yourself to with your Amazon voucher in 2018"). The article, in which various products were described, had the same visual format as editorial articles published elsewhere on the portal. However, a small notice above the text indicated that BuzzFeed would receive a "small share of the sales revenue" of the linked products. Each of the products had an Amazon Affiliate link through which BuzzFeed received commission. The vzbv, a qualified entity pursuant to Article 4 of the *Unterlassungsklagengesetz* (Injunctions Act – UKlaG), asked the portal operator to stop this practice before finally complaining to the *Landgericht Berlin*. Under German competition law, consumer organisations that are registered as qualified entities can ask the courts to rule on unlawful competitive practices.

The court decided that the format of the articles constituted an unfair business practice because their commercial purpose had not been identified and they were liable to cause consumers to make transactional decisions that they would not otherwise have made. Although consumers were, in principle, aware that freely accessible websites were funded through advertising, they would not assume that editorial articles themselves were used to generate income via links to partner websites. It needed to be made clearly apparent that the website operator would receive payment if a user bought a recommended product via the link provided. The commercial purpose of the product recommendation should be immediately obvious. An inconspicuous notice was insufficient. The court ordered BuzzFeed to stop referring to products in online articles for advertising purposes without indicating the promotional nature of the reference. The judgment is not yet final.

Pressemitteilung des vzbv vom 7.4.2020 sowie das dort veröffentlichte Urteil des Landgericht Berlin vom 11.2.2020

https://www.vzbv.de/urteil/gericht-verbietet-schleichwerbung-auf-buzzfeed

vzvb press release of 7 April 2020 and the Berlin Regional Court's ruling of 11 February 2020

[DE] Federal Cartels Office closes proceedings against Sky and DAZN

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Institute of European Media Law

On 15 April 2020, the German *Bundeskartellamt* (Federal Cartels Office) closed its proceedings against the London-based DAZN Group Ltd. and Sky Ltd., who had been suspected of signing anti-competitive agreements for the purchase of football broadcasting rights.

Pay-TV broadcaster Sky had bought the full broadcasting rights for the UEFA Champions League for the 2018/19 to 2020/21 seasons before selling some of the matches to the DAZN streaming service under a sublicensing contract. The deal meant that no Champions League matches were broadcast live on free TV. According to the cartels authority, it had been alleged that the two companies had agreed in advance to share the broadcasting rights for Germany. The *Bundeskartellamt* had therefore launched administrative proceedings against Sky and DAZN.

The companies denied reaching any agreement before Sky's purchase of the rights and said they had only started discussing plans to work together afterwards. They claimed that this was compatible with competition law under certain circumstances and that, if there had been any doubt, the competition authorities should have conducted an investigation before their cooperation began.

The *Bundeskartellamt* explained that, although the two companies' behaviour initially appeared problematic, there were several reasons for closing the proceedings against them. Firstly, the sale of broadcasting rights from 2021 onwards had shown that the market was changing very quickly, with new players competing for the rights. It was also impossible to estimate the extent of the impact that the coronavirus pandemic might have on the current football season at both national and international levels and on the companies involved, and to predict how the market would develop. There was therefore no way of knowing how serious the consequences of intervention under cartel law might be. Along with the uncertainty of the evidence, this had tipped the scales in favour of closing the proceedings on a discretionary basis.

Pressemitteilung des Bundeskartellamtes

https://www.bundeskartellamt.de/SharedDocs/Publikation/DE/Pressemitteilungen/2020/15_04_2020_CL.pdf?__blob=publicationFile&v=2

Federal Cartels Office press release

[DE] Metall auf Metall – Federal Court of Justice rules on illegality of phonogram samples

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In a judgment of 30 April 2020, the *Bundesgerichtshof* (Federal Court of Justice – BGH), Germany's highest civil court, in a longstanding dispute between music producer Moses Pelham and members of the group Kraftwerk, decided in what circumstances a phonogram producer's rights are infringed. The BGH explained that the use of a short sequence from a song can violate a producer's right of reproduction in accordance with the principles laid down by the CJEU (Case no. C-476/17). However, the judges referred the matter back to the *Oberlandesgericht* (higher regional court) for clarification.

The case, which began almost 22 years ago, concerns the use of two excerpts from the song 'Metall auf Metall' by the group Kraftwerk. In 1997, hip-hop producer Moses Pelham had electronically copied (sampled) two seconds of a rhythm sequence from the song and used the sample in a continuous loop in the song 'Nur mir'. The Kraftwerk members claimed that their copyright had been infringed and brought an action against Pelham seeking a prohibitory injunction, damages, the disclosure of information and the surrender of the phonograms for the purposes of their destruction.

After the original action was upheld by the regional court, numerous appeals followed. Finally, in 2016, the German *Bundesverfassungsgericht* (Federal Constitutional Court) overturned several appeal judgments and referred the case back to the Bundesgerichtshof. The latter then referred to the Court of Justice of the European Union (CJEU) some questions on the interpretation of Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society and Directive 2006/115/EC on rental right and lending right and on certain rights related to copyright in the field of intellectual property. In a judgment of 29 July 2019, the CJEU decided that the use of short sound samples does not constitute reproduction for copyright purposes if they are used in a new work in a modified form unrecognisable to the ear.

The BGH explained that a distinction should be made between activities prior to 22 December 2002 and those subsequent to the entry into force of Directive 2001/29/EC. A breach of the plaintiffs' reproduction rights could only be considered a possibility since 2002. In the case at hand, the rhythm sequence had been recognisable. Under the criteria established by the CJEU, the hip-hop producer could not rely on the 'right to free use' laid down in Article 24(1) of the German *Urheberrechtsgesetz* (Copyright Act). In addition, there was no relevant exception and the sample did not constitute a quotation. Nevertheless, the appeal court now needed to check whether the music producer had carried out reproduction or distribution activities after 22 December 2002 or had been seriously expected to do so. The case was therefore referred back to the

Oberlandesgericht Hamburg (Hamburg Higher Regional Court).

Pressemitteilung des Bundesgerichtshofs zum Urteil vom 30. April 2020 - I ZR 115/16 - Metall auf Metall IV

https://www.bundesgerichtshof.de/SharedDocs/Pressemitteilungen/DE/2020/2020046.html?nn=10690868

Federal Court of Justice press release on the judgment of 30 April 2020 - I ZR 115/16 - Metall auf Metall IV

FRANCE

Competition authority rejects Molotov platform's complaint about TF1 and M6

Amélie Blocman
Légipresse

Molotov, a television channel and service distribution platform, streams French audiovisual programmes over the top (OTT) under a 'freemium' model that enables users to access some channels free of charge and pay to subscribe to additional channels and services. It complained to the French competition authority about certain practices used by the TF1 and M6 groups in the television distribution and marketing sector which it considered incompatible with national and EU competition rules.

According to Molotov, TF1 and M6 suddenly and abusively broke the experimental agreements they had each concluded with Molotov for the distribution of their channels and services on its platform. It accused M6, for example, of adopting new general distribution conditions in an effort to force Molotov to only distribute its channels and services to consumers as part of a pay-TV offer, which Molotov felt was incompatible with its 'freemium' business model. TF1 was alleged to have tried to impose on Molotov the conditions of its TF1 Premium service and consequently to have broken the existing distribution agreement between the parties. Molotov suspected that this behaviour was linked to the launch of the joint venture Salto, a subscription-based TV and video-on-demand platform created by TF1, M6 and France Télévisions which the competition authority had authorised on 12 August 2019, with the TF1, M6 and France Télévisions groups as its parent companies. Salto was therefore a future competitor of Molotov, it claimed.

Molotov therefore thought it had been the victim of attempted exclusionary abuse and anticompetitive collusion between TF1 and M6. The platform claimed that it was also in a situation of economic dependency on TF1 and M6, a situation that they had abused through their behaviour.

After analysing the disputed practices, the competition authority considered that Molotov had failed to provide sufficient evidence to support its allegations.

Firstly, regarding the alleged abuse of a collectively held dominant position, neither the letter of referral nor the case file contained any proof that such a position was held collectively by the France Télévisions, TF1 and M6 groups.

Secondly, as regards the alleged abuse of economic dependency, Molotov had failed to analyse, as required under case law, the situation of economic dependency in which it found itself vis-à-vis TF1 and M6. It had also provided no evidence of the proportion of its total turnover that was represented by TF1 and

M6 channels and services respectively.

Thirdly, in terms of the allegations of a horizontal agreement, neither the letter of referral nor the case file contained evidence of the existence of an explicit or tacit agreement between TF1 and M6 having the intention or effect of restricting competition by excluding Molotov from the market.

Finally, regarding the alleged vertical restraint, since the existence of an agreement between M6 and Molotov had not been proven, any analysis with reference to Articles L. 420-1 of the Commercial Code and 101(1) of the Treaty on the Functioning of the European Union was, by definition, excluded.

The competition authority therefore rejected Molotov's complaint for lack of evidence and consequently dismissed the related request for interim measures.

Autorité de la concurrence, 30 avril 2020, décision n° 20-D-08 du 30 avril 2020 relative à des pratiques mises en œuvre dans le secteur de l'édition et de la commercialisation de chaînes de télévision

https://www.autoritedelaconcurrence.fr/fr/article/rejet-pour-absence-delements-probants-de-la-plainte-de-molotov-visant-des-pratiques-de-tf1

Competition authority decision no. 20-D-08 of 30 April 2020 concerning practices in the television distribution and marketing sector

[FR] COVID-19: Emmanuel Macron’s plan for culture

Amélie Blocman
Légipresse

On 6 May, Emmanuel Macron announced a ‘plan for culture’, with measures designed to complement those adopted at the start of the health crisis. Eight days earlier, personalities from the world of art and culture, who said they felt ‘forgotten’ even though they had been severely affected by the lockdown, had written an open letter to the French President in a national newspaper.

The President of the Republic began by granting the key demand put forward by the letter’s signatories, namely that the unemployment benefits paid to so-called ‘intermittents du spectacle’ (people who work on short-term contracts in the performing arts sector) be extended for a year beyond the initial six-month period in which their work was “impossible or severely impaired”, that is, until the end of August 2021. This should come as a relief to the 100 000 ‘intermittents’ who have been unable to work since mid-March, since they normally need to have worked for 507 hours in a 12-month period to qualify for unemployment benefits.

With regard to artists and writers, the French President announced that social security contributions would be waived for four months and that it would be made easier to access the national solidarity fund, which had already paid out EUR 80 million of aid to the cultural sector by the end of April. He added that EUR 50 million would be spent on the Centre national de la musique (National Music Centre), which opened at the start of the year and which is normally funded through taxes levied on show tickets, and that a ‘festival fund’ would be created for all cultural sectors in partnership with the regions.

Emmanuel Macron admitted that the resumption of filming, which was the other key demand from audiovisual producers, would be “very difficult before the end of May”. Since insurance companies could not pay out under traditional policies, the French President announced the creation of a compensation fund with “significant resources” that were currently being finalised with the Centre National du Cinéma et de l’Image Animée (National Centre of Cinematography and the Moving Image – CNC). The fund, which is financed by the regions, insurance companies, the Société pour le Financement du Cinéma et de l’Audiovisuel (company for the financing of films and audiovisual works – SOFICA), banks and other private sector partners, is designed to compensate filmmakers for shoots that were postponed or cancelled.

The head of state emphasised the need to protect cultural diversity, saying he wanted to encourage and re-launch European co-productions threatened by “big predators” from the United States and China. To this end, he promised to transpose the AVMS Directive by the end of the year so that foreign platforms could be forced to invest in French and European audiovisual production “from 1 January 2021”. The parliamentary examination of the audiovisual reform bill, which includes measures to transpose the AVMS Directive, should have begun at

the end of March, but has been postponed indefinitely because of the health crisis. The president also stressed the need to protect cultural assets and businesses (especially the catalogues of films and TV series) from being sold to non-European buyers. The aim is to structure and strengthen financing in a way that develops "the financial capacity of our cultural and creative industries."

The president therefore promised to "speed up and strengthen" the transposition of the directive, which must in any case be transposed by the member states by 19 September 2020. With this in mind, he announced the creation of a task force to negotiate with the CNC and the Minister of Culture in order to "resolve the outstanding issues". It is therefore unclear whether it will be possible to transpose the AVMS Directive – and the Copyright Directive, which is also supposed to be implemented by the end of the year – by means of an order.

Conclusion par le président de la République d'un échange, en visioconférence, avec des artistes de différents champs de la création

https://www.elysee.fr/front/pdf/elysee-module-15592-fr.pdf

Conclusion by the President of the Republic of a video-conference discussion with artists from various creative fields

[FR] Fight against piracy: bill establishing plea agreement tabled

Amélie Blocman
Légipresse

The French Parliament's examination of the audiovisual reform bill was due to begin at the end of March. On 28 April, following the indefinite postponement of this process on account of the health crisis, opposition MPs tabled a draft law "designed to strengthen instruments to combat piracy of copyrighted works and establish a plea agreement measure." Under the plea agreement system, a fine would be paid in order to avoid court proceedings for certain offences.

It is worth recalling that the government's audiovisual reform bill makes provision, in particular, for the *Conseil Supérieur de l'Audiovisuel* (the national audiovisual regulatory authority – CSA) to merge with the Hadopi (High Authority for the Dissemination of Works and the Protection of Rights on the Internet) to become the *Autorité de régulation de la communication audiovisuelle et numérique* (Regulatory Authority for Audiovisual and Digital Communication – ARCOM), and for the strengthening of the fight against sports piracy. At the end of February, several rightsholder organisations, including the *Association de Lutte contre la Piraterie Audiovisuelle* (Association to Combat Audiovisual Piracy – ALPA), the *Société des Auteurs et Compositeurs Dramatiques* (Society of Drama Authors and Composers – SACD), the *Société Civile des Auteurs Multimédias* (Civil Society of Multimedia Authors – SCAM) and the *Société des Auteurs, Compositeurs et Editeurs de Musique* (Society of Authors, Composers and Editors of Music – SACEM), had argued for the creation of a plea agreement system as part of the reforms, as well as the immediate blocking of pirate sites. However, the Minister of Culture, Franck Riester, had refused their request, saying, "The government does not want to alter the balance of the current graduated response, which focuses on prevention and education. It is true that the graduated response can lead to court proceedings, but these fall under a judge's authority. We don't want to punish Internet users any further in this part of our efforts to combat piracy through the graduated response."

According to the latest Hadopi survey, which was published on 29 April 2020, 89% of French Internet users have consumed cultural content digitally during the lockdown (up 5% over a two-week period). Of these, 28% do so illegally, compared with 21% at the start of the lockdown (up 7% in two weeks).

The graduated response established under the 2009 law is the system currently used to ensure compliance with copyright on the Internet. Initially, the Hadopi issues warnings to users whose Internet connections have been used for the peer-to-peer sharing of cultural content in breach of copyright. If this has no effect, a file containing evidence of the offence is then sent to the court authorities. After three unsuccessful warnings, the Hadopi's rights protection committee can decide to refer the matter to the courts on the grounds of gross negligence, following

which, the Internet account holder is punished for failing to prevent their Internet connection from being used for piracy in spite of the warnings received. A fine of up to EUR 1 500 can be imposed (or EUR 7 500 for corporate entities).

Despite the efforts that have been made, the bill's explanatory memorandum states that "around three million Internet users continue to use peer-to-peer services every month to watch protected works illegally." The limitations of the judicial phase of the graduated response are therefore clear: in more than 85% of cases, the offender goes unpunished.

With a view to significantly stepping up efforts to combat streaming and direct downloading, the bill's authors therefore think it is vital to make the graduated response procedure more effective. For example, depending on whether the current measures continue to be led by the Hadopi or are transferred to the ARCOM, the competent authority would, if the educational phase of the graduated response procedure failed, be able to offer the offender the option of bringing an end to the proceedings by paying a fine capped at one-third of the maximum penalty that currently applies (that is, a maximum of EUR 500 compared to the current maximum of EUR 1 500 for private individuals, and EUR 2 500 instead of EUR 7 500 for companies). If the Internet subscriber were to refuse the plea bargain offer made by the authority in charge of protecting copyrighted works and objects, the authority would be able to commence proceedings before the police court.

It remains to be seen whether these proposals will one day be examined by the French Parliament.

Proposition de loi « visant à renforcer les instruments de lutte contre le piratage des œuvres protégées par le droit d'auteur, et instituant un dispositif de transaction pénale »

http://www.assemblee-nationale.fr/dyn/15/dossiers/lutte_piratage_oeuvres_droit_auteur

Draft law "designed to strengthen instruments to combat piracy of copyrighted works and establish a plea agreement measure

UNITED KINGDOM

[GB] ITV's Good Morning programme given guidance by Ofcom after comments about Coronavirus and 5G technology

Julian Wilkins
Wordley Partnership

Ofcom determined that it was not necessary to investigate further complaints against ITV's *Good Morning* programme pursuant to Rule 2.1, about remarks made by one of its presenters, Eamonn Holmes, concerning the causal link between the onset of coronavirus and 5G connectivity. However, Ofcom did issue guidance to ITV and its presenters on how they should rightfully challenge public authorities during the current serious health crisis.

Good Morning is a daily magazine programme covering topical issues produced by ITV Broadcasting Limited (ITV). On 13 April 2020, the programme's Consumer Editor, Alice Beer, was discussing fake news stories relating to coronavirus and their causal effect, including allegations that 5G is a main link to the pandemic. Anna Beer mentioned that endorsements of this false story by some celebrities and influencers had had the consequence of causing some 30 acts of vandalism to essential telephone equipment in the UK.

Anna Beer concluded by saying that the allegations linking 5G to coronavirus were not true and acts of vandalism were "incredibly stupid." Eamonn Holmes responded, saying, amongst other things: "No one should attack or damage or do anything like that. But it is very easy to say it is not true because it suits the state narrative. That's all I would say as someone with an enquiring mind." Alice Beer, whilst agreeing with Mr Holmes about enquiring minds, concluded by saying that there should not be the reaction of violence or arson.

The following day, Eamonn Holmes gave an on air statement clarifying his earlier remarks which may have been misinterpreted. He confirmed that there was no connection between 5G and coronavirus by stating: "there's no scientific evidence to substantiate any of those 5G theories."

Ofcom received 755 complaints asserting that Eamonn Holmes' original remarks were potentially harmful. The regulator had to decide whether to investigate pursuant to Section Two of its Code, which requires broadcasters to apply generally accepted standards in order to provide adequate protection for the audience from the inclusion of harmful material in programmes. Ofcom acknowledged that it was for the broadcaster to decide how to comply with this rule. Furthermore, Ofcom took into account Article 10 of the European Convention on Human Rights allowing the right to freedom of expression, including editorial freedom to analyse, discuss and challenge the approach of public authorities in relation to coronavirus.

Ofcom said that relevant factors included context, the severity of the situation and whether the material was targeted at a particularly vulnerable audience, and if claims were made by a speaker with authority. ITV contended that several times during the conversation between Alice Beer and Eamonn Holmes it had been stated that there was no connection between 5G and coronavirus. Taking into account the whole programme, ITV had not misled their audience, and the following day, Mr Holmes' remarks were clarified.

Ofcom considered Mr Holmes' remarks ambiguous and stated: “his statement overall potentially risked fuelling a volatile situation surrounding 5G claims.” It further commented that Mr Holmes was a very well known presenter and that his intervention was “particularly ill-judged.” However, taking account of the overall programme, including Alice Beer’s strong rejection of the 5G conspiracy theory, Ofcom concluded that the viewers had been adequately protected from potentially harmful material. Therefore, Ofcom determined that no further investigation was required but provided ITV and its presenters with three guidance points.

First, unproven claims and theories can be included and discussed, but they carry a high risk of potential harm to the audience in the current sensitive times. Therefore, broadcasters must ensure that they provide adequate protection for the audience, such as significant challenge and more context.

Secondly, presenters must take particular care and act responsibly, taking account of their impact upon viewers when articulating views which could undermine viewers' trust in official public health information given during a national health crisis.

Finally, the presenter’s role is important during a live programme at a time when ongoing events, such as attacks on telephone equipment, are occurring, and what they say raises the risk of significant harm to the public.

Ofcom’s Broadcast and On Demand Bulletin

https://www.ofcom.org.uk/_data/assets/pdf_file/0021/1914403/sanction-decision-this-morning-itv-13-apr-2020.pdf

[GB] London Live sanctioned by Ofcom for broadcasting “potentially harmful” interview on coronavirus

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On 20 April 2020, the UK communications regulator Ofcom ruled that ESTV Ltd had breached its Broadcasting Code by airing an interview on the Coronavirus pandemic which risked causing “significant harm to viewers.”

ESTV Ltd, the licensee, is the owner of the local TV channel London Live, which serves the London area. On 8 April 2020, London Live broadcast an 80-minute interview with the former footballer and sports broadcaster David Icke, who was introduced by the presenter Brian Rose at the start of the programme as “a writer and public speaker known since the 1990s as a professional conspiracy theorist.” At the time of the broadcast, it was estimated that approximately 1.4 million people had been infected globally and the UK Government had introduced its lockdown policy to curb the spread of the virus.

Given the global Coronavirus crisis, the regulator expressed particular concern over the broadcast of Icke’s opinions which “cast doubt on the motives behind the official health advice aimed at reducing the spread of the virus.” The interviewee repeatedly suggested in the programme that the measures taken by the UK Government, other national governments and international health bodies such as the WHO were being implemented to further the malevolent ambitions of a “clandestine cult,” rather than to protect public health. While not expressly mentioning 5G technology, Icke referred, among other things, to an "electromagnetic, technologically generated soup of radiation toxicity" which, he claimed, had compromised the immune system of elderly people. Icke also expressed doubts over the use of vaccines (which are widely accepted by scientific communities as important mechanisms in controlling infectious disease outbreaks and part of a long-term solution to COVID-19), describing them as a “tidal wave of toxic shite” and any decision to make them mandatory as a form of “fascism.”

ESTV Ltd acknowledged that the programme included “controversial” and “unorthodox” material that challenged mainstream thinking, but considered it to be an exploration of Icke’s “extraordinary” views about the origins of the virus and governments’ responses within the limits of Article 10 of the European Convention on Human Rights. The regulator stated that the licensee was not, in principle, prohibited from broadcasting opinions which diverged from, or challenged official authorities on public health information and that Icke had a right to hold and express these views. However, Ofcom queried whether in the current unprecedented circumstances the programme had ensured that members of the public were “adequately protected” from the inclusion of potentially harmful material in compliance with Rule 2.1 of the Broadcasting Code.

The regulator stated that some viewers might well have expected that Icke's opinions would not necessarily be scientifically or otherwise empirically supported, but they had also been likely to be "particularly vulnerable" during a global public health emergency. The extended nature of the interview, its sensitive subject matter, the severity of the situation and the degree of challenge (or the inclusion of opposing views) were factors that weighed significantly in the decision-making. Ofcom found that for some 80 minutes, ESTV Ltd had provided David Icke with a platform to set out highly controversial and unsubstantiated claims (which the licensee itself considered "may be absurd") with minimal challenge within the programme. Moreover, the impact of the limited challenge that was present was minimised by the presenter's final comments to the interviewee: after shaking hands, Brian Rose said that David Icke had "amazing knowledge and amazing perspectives about what's going on here." The regulator concluded that the licensee had failed to adequately protect viewers from potential harm and considered the breach of Rule 2.1 to be serious.

Ofcom directed ESTV Ltd to broadcast a summary of its ruling. Its Sanctions Panel will consider the matter further. Ofcom's decision was delivered within just two weeks, as the regulator prioritises cases linked to Coronavirus whereby programmes may have helped spread misinformation or included material of a misleading nature about the illness and public policy in relation to it.

Ofcom Broadcast and On Demand Bulletin, London Real: Covid-19

https://www.ofcom.org.uk/__data/assets/pdf_file/0020/194402/sanction-decision-estv.pdf

[GB] News programme and live sermon include potential harmful claims about COVID-19

David Goldberg
deeJgee Research/Consultancy

On 18 May, Ofcom imposed a sanction on Loveworld Limited, which broadcasts a religious television channel called Loveworld, because a news programme and live sermon included potentially harmful claims about COVID-19.

Specifically, an item on the news programme included "unsubstantiated claims" that 5G was the cause of the pandemic; another suggested that hydroxychloroquine was a "cure" for the virus, with no mention made of the fact that this claim was clinically unproven or that the drug has potentially serious side effects. In addition, a sermon was broadcast on *Your LoveWorld* which included claims - unsubstantiated - about 5G, asserted that lockdown was not necessary, and cast doubt on official health advice as well as on possible vaccinations.

Ofcom stated that there was no general ban on broadcasting controversial views which differ from or challenge official authorities on public health information. However, it found that the unsubstantiated claims in both programmes had not been sufficiently put into context. Consequently, there was a risk of undermining audience trust in official health advice, with potentially severe consequences for public health.

Ofcom found that the potentially harmful content and inaccuracies in the news broadcasts and sermon (in breach of Rules 2.1 and 5.1 of the Broadcasting Code) meant that Loveworld Limited had not adequately protected its audience. These are described as serious failings. Ofcom ordered Loveworld to broadcast its findings and it is considering imposing a further sanction.

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https://www.ofcom.org.uk/__data/assets/pdf_file/0024/195621/Loveworld-Sanction.pdf

IRELAND

[IE] Report on tackling disinformation across digital platforms published

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On 28 April 2020, a new research report on tackling disinformation across digital platforms was published. The report, CodeCheck 2020: A Review of Platform Compliance with the EC Code of Practice on Disinformation, was commissioned by the Broadcasting Authority of Ireland (BAI) and undertaken by the Institute for Future Media and Journalism (FuJo) at Dublin City University, Ireland. The CodeCheck 2020 report examines and reviews the progress of the actions carried out by digital platforms Facebook, Twitter, Google and Microsoft in Ireland over a 12-month period to November 2019 in support of their commitments to the EC Code of Practice on Disinformation 2018 (EC Code).

The EC Code sets out a number of self-regulatory standards, including a wide range of commitments, ranging from transparency in political advertising and the closure of fake accounts to the demonetisation of purveyors of disinformation. Signatories to the EC Code have committed to addressing five key areas, including; a) scrutiny of advertising placements; b) political advertising and issue - based advertising; c) integrity of services; d) empowering consumers and e) empowering the research community. The CodeCheck 2020 report specifically reviewed Facebook, Twitter, Google and Microsoft's commitments and actions in the areas of "empowering consumers" and "empowering the research community."

The CodeCheck 2020 report found that Facebook, Twitter, Google and Microsoft had introduced various actions aimed at empowering Irish consumers, including "mechanisms to report fake news, providing greater information on the content visible on the platforms, greater control and transparency in relation to advertising and user preferences and the promotion of authentic and authoritative information sources." However, the report also indicated that the level at which Facebook, Twitter, Google and Microsoft had engaged in these actions was both "mixed and inconsistent." The CodeCheck 2020 report found, *inter alia,* that "although all four platforms provide tools for consumers to report or give feedback on content, it is unclear what the uptake of these tools is in Ireland and also what procedures are in place to address this content once a complaint has been received." Moreover, the report indicated that "the most significant shortcoming in the empowering of consumers" identified in the report was in relation to "the labelling of trustworthy content." The CodeCheck 2020 report found that researchers "could not identify any news items across any of the four platforms which had been labelled as fact-checked with the corresponding verdict on its authenticity," which "represents a substantial

obstacle in assisting consumers to make informed decisions when they encounter news online."

In relation to the area of "empowering the research community," the CodeCheck 2020 report found that "specific organised events/discussions and partnerships with Irish research and academic institutions remain episodic and largely inadequate to support any rigorous analysis and monitoring of online disinformation trends in Ireland." The report makes a number of recommendations to address all of the issues identified in it. Chief Executive of the BAI, Michael O' Keefe stated that "the report is timely, considering the harmful effect that disinformation has had across society during the COVID-19 crisis," adding that it has "brought into sharp focus the urgency at which digital platforms must engage more meaningfully with the Code."

BAI, FuJo, 'CodeCheck 2020: A Review of Platform Compliance with the EC Code of Practice on Disinformation' 28 April 2020

http://www.bai.ie/en/download/134886/

BAI, 'New report highlights inconsistencies across digital platforms in tackling disinformation'

https://www.bai.ie/en/new-report-highlights-inconsistencies-across-digital-platforms-in-tackling-disinformation/

European Commission, 'Code of Practice on Disinformation'

https://ec.europa.eu/newsroom/dae/document.cfm?doc_id=54454

ITALY

[IT] AGCOM orders six-month suspension for two broadcasters delivering programmes dangerous to customers' health

Ernesto Apa& Marco Bassini
Portolano Cavallo

By way of two separate but related resolutions issued on 7 April 2020 (namely Resolutions Nos. 152/20/CONS and 153/20/CONS) in the so-called ‘Panzironi saga’, the Italian Communications Authority (AGCOM) ascertained the violation of Articles 3 and 36-bis, paragraph 1, lit. c), No. 3 of the AVMS Code (Legislative Decree No. 177/2005) by two small-sized television broadcasters (namely Italian Broadcasting Srl and Mediacom Srl, respectively the Life TV Network and Life 120 Channel services) and, accordingly, ordered their suspension. Such provisions respectively prohibit the delivery of audiovisual commercial communications which encourage behaviours prejudicial to health and safety (Article 36-bis) and require the completeness, fairness and impartiality of information, in addition to the respect of human dignity and the promotion and protection of health.

More specifically, the programmes aired by the two broadcasters were found to potentially endanger consumers’ health by urging them to underestimate the risks inherent to COVID-19 on the unsubstantiated assumption that the disease could be prevented and treated by resorting to non-therapeutic measures such as nutritional supplements (namely vitamins C and D).

AGCOM dismissed the broadcasters’ argument that the programmes at issue had merely provided a scientific comparison between different scientific opinions and, as such, were covered by the Constitution. In AGCOM's view, the relevant content lacked any kind of scientific substance. Furthermore, the Authority observed that the broadcasters had delivered the programmes on the basis of a commercial intent; accordingly, they could not be deemed to fall within the protection that the Constitution grants to certain expressions of communication.

In light of the foregoing, AGCOM adopted a six-month suspension having regard to the practices at hand as particularly serious. However, both orders were appealed. On 20 April 2020, the Regional Administrative Tribunal of Lazio issued an interim decision to suspend one of the two resolutions on an urgency basis.

Delibera N. 152/20/CONS

https://www.agcom.it/documents/10179/18199222/Delibera+152-20-CONS/915a2a64-695e-4391-9a47-70d389b09293?version=1.1

Resolution N. 152/20/CONS

Delibera N. 153/20 /CONS

https://www.agcom.it/documents/10179/18199222/Delibera+153-20-CONS/ab7087e7-41c6-4db9-b395-497ec9a518ea?version=1.1

Resolution N. 153/20 /CONS

Tribunale Amministrativo Regionale del Lazio, sez. III-ter, decreto 20 aprile 2020, n. 2916

https://www.giustizia-amministrativa.it/portale/pages/istituzionale/visualizza/?nodeRef=&schema=tar_rm&nrg=202002791&nomeFile=202002916_06.html&subDir=Provvedimenti

Regional Administrative Court of Lazio, section III-ter, decree 20 April 2020, n. 2916

[IT] Telegram channels removed after urgent application filed by FIEG before AGCOM

Ernesto Apa and Chiara Marchisotti
Portolano Cavallo

On 6 April 2020, the Italian Federation of Newspaper Publishers (FIEG) filed an urgent application with the Italian Communications Authority (AGCOM) requesting the removal of all digital editions of newspapers published on a few channels of the instant messaging platform Telegram, as well as the suspension of access to the entire platform. This application was filed under the regulation for the online enforcement of copyright (adopted by Resolution No. 680/13/CONS, as subsequently amended).

After the investigation started, Telegram partially complied on its own initiative. As a result, AGCOM found that—following Telegram's intervention—practically all of the digital editions of newspapers on which FIEG's application had been based were no longer accessible (the illicit contents were removed from 7 out of the 8 channels reported by FIEG), and that, overall, the number of users subscribed to these channels had decreased sharply.

In the decision adopted on 23 April by Resolution No. 164/20/CONS (text published on 27 April 2020), AGCOM clarified that it was aware of the dissemination of illicit content on Telegram channels and of the serious damage this causes to the entire newspaper industry. According to the resolution in question, Telegram offers an instant messaging service that is accessible from the web and that allows for the creation of private chats as well as public channels where users' access is free and contents can be shared. In association with this service, Telegram offers a hosting service that allows for such public content sharing activities by users. This is the context in which the illicit content was shared. AGCOM held, however, that a possible indiscriminate blocking of access to all Telegram channels appeared disproportionate. For this reason, FIEG's application was ultimately dismissed.

In its press release, AGCOM felt the need to clarify that under the applicable legislative and regulatory framework (namely under the national provisions implementing the E-Commerce Directive, that is, Legislative Decree No. 70/2003) and the regulation for the online enforcement of copyright, it currently lacked the power to order selective removals of content against operators that are based abroad. When a violation occurs outside national borders, as in the Telegram case, AGCOM can only order the Italian access providers that allow access to the website to disable access to the whole website.

In fact, AGCOM has called for amendments to the current legislation that would extend AGCOM's powers and allow its effective intervention in cases where orders to selectively remove infringing content should be issued directly against operators such as Telegram. Specifically, AGCOM urged that changes be made to Article 4(1)(a) of the E-Commerce Decree, with the aim of considering operators

who offer information society services in Italy using national numbering plans as being established in Italy. Such an amendment would allow AGCOM to directly order operators like Telegram to selectively remove user-generated content.

Delibera n. 164/20/CONS

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=18496688&_101_INSTANCE_FnOw5lVOIXoE_type=document

Resolution n. 164/20/CONS

NETHERLANDS

[NL] Minister establishes funding scheme for local public broadcasters during COVID-19

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On 7 April 2020, Dutch Minister of Education, Culture and Science Arie Slob allocated EUR 11 million to help local public broadcasters and local newspapers left in need because of the COVID-19 crisis. To prevent people from being deprived of information, local broadcasters and newspapers will receive between EUR 4 000 and EUR 10 000 from a temporary support fund. The amount received will depend on their circulation and outreach.

Local media is often dependent on advertising revenues, which, due to the COVID-19 pandemic, have been significantly reduced. For local media, this is difficult to absorb since they often have limited reserves. The contribution from the support fund will therefore help to keep the local information supply going.

For the funding, the Dutch Government has joined forces with the Association of Dutch municipalities (Vereniging van Nederlandse Gemeenten). Minister Slob stated that municipalities were primarily responsible for the local media and should therefore contribute; for example, purchasing advertisements can be a veiled contribution by municipalities.

From 11 April up until 19 April 2020, local public broadcasters and local newspapers can apply for a one-off contribution from the Dutch Journalism Fund's support fund (Stimuleringsfonds voor de Journalistiek).

This funding scheme is on top of the generic measures already taken by the Dutch Government to support companies. Both national media organisations and journalists can benefit from them. These measures include extra support for freelancers and the postponement of the payment of various taxes. In addition, EUR 2 million will be made available from Regional Public Broadcasting (Regionale Publieke Omroep) (see IRIS 2016-5/25) in order to boost regional and local journalism.

Ministerie van Onderwijs, Cultuur en Wetenschap, Extra ondersteuning voor getroffen lokale en regionale media omroepen, 7 april 2020

https://www.rijksoverheid.nl/regering/bewindspersonen/arie-slob/nieuws/2020/04/07/extra-ondersteuning-voor-getroffen-lokale-en-regionale-media

Ministry of Education, Culture and Science, Additional support for affected Dutch local and regional media broadcasters, 7 April 2020

[NL] Netflix and the Netherlands Film Fund establish EUR 1 million relief fund during COVID crisis

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On 17 April 2020, the Netherlands Film Fund (Nederlands Filmfonds), which is the national agency responsible for supporting film production and film-related activities in the Netherlands, and Netflix, which is the world's largest Internet streaming service, established a EUR 1 million relief fund for Dutch film and television production to help employees who have been acutely affected by the COVID-19 pandemic.

The production of films and series in the Netherlands has been heavily affected by the COVID-19 pandemic. Productions are at a standstill and the film and TV industry are under great pressure. The additional contribution of Netflix and the Netherlands Film Fund contributes to helping the affected employees involved in the execution of productions. This also includes freelancers, cast and crew, filmmakers and other film professionals. Thanks to the public-private partnership with Netflix, a joint support relief fund can support acutely affected productions without putting pressure on contributions to future film projects.

The cooperation falls within the frameworks announced by the Netherlands Film Fund (see IRIS 2020-5/18). A production company which is supported by the Netherlands Film Fund in the realisation of a film production or the pre-production, production or post-production of a high-end series that is directly affected by the effects of COVID-19 is eligible for the relief fund.

The costs that are reimbursed include, for example, the hold days of cast and crew members, helping to absorve the acute costs of production. Furthermore, the costs for additional technical provisions for the post-production track are eligible for reimbursement. The relief fund is an extension of the previously announced measures. However, if the consequences of and possible preconditions for a restart of the production or post-production are not foreseeable, an additional realisation application can be made at a later stage.

Depending on the project and the production phase, the additional production costs vary. The Netherlands Film Fund will therefore consider to what extent an extra effort can be made within the available resources for each individual project. The amounts quoted are therefore only given as an indication. For example, for feature films (including feature animation films) and high-end series, the estimated amount varies from EUR 50 000 to EUR 100 000. When granting the supplementary contribution, the Netherlands Film Fund will consider the size and complexity of the production and to what extent it is co-produced internationally.

The relief fund is a temporary measure applicable from 1 March to 1 December 2020. The creation of this fund is part of Netflix's wider efforts to help TV and film

professionals worldwide. Since 2015, the main establishment of Netflix International B.V. has been located in the Netherlands (see IRIS 2015/4:1-21).

Nederlands Filmfonds: Netflix en Nederlands Filmfonds richten een steunfonds op voor getroffen producties

https://www.filmfonds.nl/page/8647/netflix-en-nederlands-filmfonds-richten-een-steunfonds-op-voor

Netherlands Film Fund: Netflix and the Netherlands Film Fund set up relief fund for affected productions.

ROMANIA

[RO] More money from gambling for the National Film Fund

Eugen Cojocariu
Radio Romania International

On 27 April 2020, the President of Romania, Klaus Iohannis, promulgated a law by which 4% of the amounts collected for the state budget from economic operators carrying out activities in the field of gambling are directed annually to the Film Fund. Law No. 50 of 2020 was published in the Official Gazette of Romania No. 340 of 27 April 2020 (see, *inter alia*, IRIS 2014-2/32, IRIS 2014-7/32, IRIS 2016-2/23, IRIS 2016-10/23, IRIS 2017-2/27, IRIS 2018-2/29, IRIS 2018-10/23, IRIS 2019-2/22 and IRIS 2020-3/2).

The act modifies Article 13, paragraph (1), lit. e[1]) of Government Ordinance No. 39/2005 on cinematography in the sense that it increases from 2% to 4% the percentage of the amounts collected for the state budget from economic operators carrying out activities in the field of gambling, which are directed annually to the Film Fund. The new law provisions as follows:

Four per cent of the amounts collected for the state budget from economic operators carrying out activities in the field of gambling will be directed annually to the Film Fund for the encouragement and support of the film industry. The amount shall be transferred to the Film Fund by the National Agency for Fiscal Administration before 31 May of the current year for the previous year; it is not subject to regularisation according to the provisions of Article 66, paragraph (1) of Law No. 500/2002 on public finances, with subsequent amendments and completions.

Within 10 days from the entry into force of the provisions of this law, the Ministry of Public Finance will elaborate the procedure for applying the provisions provided in Government Ordinance No. 39/2005 on cinematography, with subsequent completions and modifications.

Proiect de Lege pentru modificarea art.13 din Ordonanţa Guvernului nr. 39/2005 privind cinematografia - forma pentru promulgare

http://cdep.ro/pls/proiecte/docs/2019/pr595_19.pdf

Draft Law amending art. 13 of Government Ordinance no. 39/2005 on cinematography - form for promulgation

RUSSIAN FEDERATION

[RU] Parliament and Supreme Court on false news in the context of COVID-19

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On 31 March 2020, both the lower and upper houses of the Russian Parliament adopted amendments to the Criminal Code of the Russian Federation; these amendments were immediately promulgated by the president and entered into force on 1 April. They introduce two new articles generally associated with the COVID-19 pandemic: Article 207.1 "Public dissemination of knowingly false information about circumstances that pose a threat to the life and safety of citizens" and Article 207.2 "Public dissemination of knowingly false socially significant information, entailing grave consequences." They penalise such actions with fines of up to 2 million Russian rubles (RUB) (about EUR 25 000), or imprisonment of up to 5 years.

These developments have occurred on top of last year's amendments to the Russian Code on Administrative Offences, which established fines for all media outlets and online authors that spread "untruthful socially significant information": up to RUB 1 million if no harm was done, and RUB 1.5 million in cases where harm was indeed inflicted (IRIS 2019-5:1/24).

On 30 April 2020, the Presidium of the Supreme Court of the Russian Federation issued its review of the case law related to countering the COVID-19 infection in the Russian territory, along with recommendations on best practices. The review was published in a Q&A format. Some questions relate to the issues of the media and information regulation and address the way judicial conflicts on the public dissemination of disinformation about COVID-19 should be treated by Russian courts.

In particular, the Supreme Court explained that the public dissemination of knowingly false information may take place principally "in the mass media, on information-telecommunication networks, including messengers (WhatsApp, Viber, etc.) and in the mass mailing of electronic messages to mobile phone users" (Question 13).

The Supreme Court stated that to be able to prosecute for the crimes as specified in the new articles of the Criminal Code, the false information must necessarily have been disseminated "under the guise of truthful information." The indicators of being under this guise are the forms and means used to present the false information, such as references therein to competent sources, references to the authority of public figures and the like, the use of fake documents and fake video and audio recordings, or the use of documents or recordings that are actually unrelated to the reported events (Question 12). The Supreme Court clarified that only individuals who had disseminated misinformation intentionally, with the

knowledge that the information was false and with the purpose of it reaching others, could be prosecuted under the new law (Question 12).

О внесении изменений в Уголовный кодекс Российской Федерации и статьи 31 и 151 Уголовно-процессуального кодекса Российской Федерации.

http://www.consultant.ru/cons/cgi/online.cgi?req=doc&base=LAW&n=349082&fld=134&dst=100008,0&rnd=0.7926891428947068#014248363196562475

Federal Statute of 1 April 2020 N 100-FZ "On amendments to the Criminal Code of the Russian Federation and articles 31 and 151 of the Criminal Procedure Code of the Russian Federation".

Обзор по отдельным вопросам судебной практики, связанным с применением законодательства и мер по противодействию распространению на территории Российской Федерации новой коронавирусной инфекции (COVID-19).

http://www.supcourt.ru/files/28881/

Presidium of the Supreme Court of the Russian Federation's "Review of selected issues of judicial practice related to the application of legislation and measures to counteract the spread of the new coronavirus infection COVID-19 in the territory of the Russian Federation"

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