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EDITORIAL

As the saying goes, *there is a first time for everything*. And one could add, *exceptional times call for exceptional measures*. COVID-19 forbidding, this year the Cannes Film Festival did not roll out the red carpet for its distinguished guests. Even if this is not a première (remember 1968!), it is certainly the first time that the parallel-running Cannes Film Market has taken place online. This unique circumstance made it impossible for the European Audiovisual Observatory to organise its customary Cannes conference *in situ*. The obvious solution to this problem was to organise an online event on the Cannes Film Market platform instead. And we did just that.

With a twist.

For the first time in its history, during the online Cannes Film Market the Observatory proudly presented a documentary film on the effects of COVID-19 on the film, TV, and VOD industries in Europe. It was made possible thanks to the insights shared by members of the Observatory's Advisory Committee and includes interviews with major industry players from all sectors. You can watch the film and the ensuing live expert chat session here.

And there is more. Two months have passed since we announced the publication of our tracking tool to follow the measures taken to support and guide the audiovisual sector in the context of the COVID-19 crisis. This Tracker is a useful tool for anybody wanting to find concrete measures taken at the national or international level. It does not, however, provide an overview or an analysis of all the measures applied in Europe. This is a gap that we aim to fill with an IRIS *Plus*, which organises the information contained in the Tracker in a comparative manner, helping the reader to understand the diversity of approaches, interests, and measures taken, but also the diversity of the bodies taking them. Moreover, this IRIS Plus makes some preliminary observations on the crisis and advances some hypotheses regarding its consequences.

And if all that is not enough, the present newsletter provides an interesting read, as per usual.

Stay safe and enjoy your read!

Maja Cappello, editor

European Audiovisual Observatory

Table of content

INTERNATIONAL

COUNCIL OF EUROPE

AZERBAIJAN

ECtHR: *Khadija Ismayilova (no. 3) v. Azerbaijan*

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

After finding various violations of the European Convention on Human Rights (ECHR) in the case of *Khadija Ismayilova (no. 1) v. Azerbaijan* (see Iris 2019-3/1) and in *Khadija Ismayilova (no. 2) v. Azerbaijan*, the European Court of Human Rights (ECtHR) has found a new violation of the ECHR by the Azerbaijani authorities, of which Khadija Ismayilova, a well-known investigative journalist, was the victim. The ECtHR is of the opinion that the domestic courts have not sufficiently protect Ismayilova against a smear campaign by a newspaper which exploited a breach of her private life using offensive and derogatory language.

The case goes back to the problems Ismayilova experienced as a journalist reporting mainly on the website of Radio Free Europe/Radio Liberty about corruption and human rights violations in her country. After publishing a series of articles on government corruption involving the president of Azerbaijan and his family, she began receiving threats and intimidations designed to prevent her from pursuing her journalistic work. In particular, a video recorded with a hidden camera featuring bedroom scenes of a sexual nature involving her and her then boyfriend was posted on the Internet. In its judgment of 10 January 2019 (IRIS 2019-3/1), the ECtHR found that the Azerbaijani authorities had failed to conduct an effective criminal investigation into such a serious, flagrant and extraordinarily intense invasion of her private life. The ECtHR also found that the state authorities had breached their obligations under Article 10 ECHR to guarantee the right to freedom of expression, emphasising that the acts of a criminal nature committed against Ismayilova were apparently linked to her journalistic activity and that the authorities have acted “contrary to the spirit of an environment protective of journalism.” Ismayilova has also been arrested, detained, and charged with a series of criminal offences, such as tax evasion and abuse of power in connection with her activity as the director of a radio station. The events relating to this arrest and detention were the subject of the Court’s judgment of 27 February 2020 in *Khadija Ismayilova (no. 2) v. Azerbaijan*, in which the ECtHR found violations of Article 5 (unlawful deprivation of her liberty, lack of judicial review), Article 6, section 2 (breach of presumption of innocence) and Article 18 ECHR (misuse of power). The ECtHR concluded that the authorities’ actions were driven by “improper reasons” and that the purpose of the impugned measures was to silence and punish Ismayilova for her journalistic activities.

In its judgment of 7 May 2020, the ECtHR reached a decision on another complaint filed by Ismayilova in connection with the hidden camera recordings and a smear campaign against her. The complaint more specifically concerned an article in the newspaper Səs that associated Ismayilova with a porn star; it mockingly hinted that various opposition-oriented journalists should engage in sexual acts with her or had already done so and gave examples of various hypothetical newspaper headlines that could be written on the subject, all of them clearly suggestive of various sexual acts. Ismayilova brought an action against the newspaper before the civil court, claiming that the article was insulting and damaging to her honour and dignity, her right to respect for her private and family life, and her right to freedom of expression. She also alleged that the article had caused her to experience significant mental suffering and had tarnished her reputation in the eyes of her colleagues, friends, relatives and readers. Her claim was dismissed by a district court, which, in essence, referred to the newspaper's freedom of thought and expression and the Səs journalist's independent opinion. The district court also took into account the fact that Ismayilova had not provided any evidence of the alleged physical and mental suffering she had experienced. This approach was confirmed by the Baku Court of Appeal and finally by the Supreme Court.

The ECtHR accepted Ismayilova's submissions that the article at issue commented on a series of events relating to a breach of her privacy, and that it had caused her serious moral distress and harm to her personal relationships and social reputation. Therefore, the Court considered Article 8 (right to privacy) applicable, while this right had to be balanced against the right of the newspaper to critically comment on issues of public interest, as guaranteed by Article 10 ECHR (right to freedom of expression). The ECtHR referred to some of its earlier judgments (such as *Von Hannover (no. 2) v. Germany* and *Axel Springer AG v. Germany,* IRIS 2012/3-1), reiterating that the balancing of the rights provided for under Articles 8 and 10 is based on a number of relevant criteria, such as: a contribution to a debate of general interest; the degree to which the person affected was well known and the subject of the report; the prior conduct of the person concerned; and the content, form and consequences of the publication. According to the Court, there is a fundamental distinction to be drawn between reporting facts – even if controversial – capable of contributing to a debate of general public interest in a democratic society, and making tawdry allegations about an individual's private life. Although Article 10 offers a degree of protection to the publication of news about the private life of public figures, such protection may cede to the requirements of Article 8, where the information at stake is of a private and intimate nature and there is no public interest in its dissemination. Moreover, offensive language may fall outside the protection of freedom of expression if it amounts to wanton denigration, for example, where the sole intent of the offensive statement is to insult someone.

Applying these principles and standards to the present case, the ECtHR was of the opinion that the article did not contribute to any issue of legitimate public interest. The article contained a series of allegations and insinuations, but it did not amount to the reporting of topical news or current events, and neither did it appear to be intended as part of a genuine historical or political debate. While responsible reporting on matters of public interest in accordance with the ethics

of journalism is protected by Article 10 ECHR, there can be no legitimate public interest in exploiting an existing breach of a person's privacy for the purpose of satisfying the prurient curiosity of a certain readership, publicly ridiculing the victim and causing them further harm. Furthermore, it could not be argued that the discussion of Ismayilova's private life was the result of her previous conduct, as her privacy had been invaded without her knowledge and against her will. As to the content, form and consequences of the publication, the ECtHR noted that Ismayilova's portrayal in the article was not a joke made in a satirical, playful and irreverent style without any intent to criticise, but that it was published by a newspaper that positioned itself as a serious socio-political newspaper and was a self-professed "media trumpet" of the ruling party. The only discernible intent behind the statements made in respect of Ismayilova was to attack her or set her up for attack on grounds of morality. By further exploiting the previous breach of her privacy, the article in question sought, by using offensive and derogatory language, to attribute to Ismayilova characteristics and behaviour in a manner calculated to negatively and radically influence how she was viewed in society. Finally, the ECtHR was of the opinion that the domestic courts had not duly examined whether the statements made about Ismayilova were compatible with the ethics of journalism and whether they had overstepped the permissible bounds of freedom of expression. The domestic courts had neither carried out an adequate assessment of all the relevant factual circumstances, nor had they duly considered the importance and scope of Ismayilova's right to respect for her private life. As the domestic courts had not conducted an adequate balancing exercise between Ismayilova's rights under Article 8 and the newspaper's right to freedom of expression, the ECtHR concluded that the respondent state had not complied with its positive obligation to take adequate measures to secure the protection of Ismayilova's right to respect for her private life and her reputation. Accordingly, there has been a violation of Article 8 of the Convention.

Judgment by the European Court of Human Rights, Fifth Section, case of Khadija Ismayilova (no. 3) v. Azerbaijan, Application no. 35283/14.

https://hudoc.echr.coe.int/eng?i=001-202423

COE - COUNCIL OF EUROPE (ALL)

Council of Europe issues toolkit for member states during COVID-19 crisis

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On 8 April 2020, the Secretary General of the Council of Europe (COE) issued an important Information Document (toolkit) for member states entitled “Respecting democracy, rule of law and human rights in the framework of the COVID-19 sanitary crisis.” The purpose of the Information Document is to provide member states with a toolkit for dealing with the COVID-19 crisis in a way that respects the fundamental values of democracy, rule of law and human rights. Notably, the document contains important guidance relating to freedom of expression, media freedom, and public broadcasting. It follows previous guidance issued by both the COE Committee of Experts on Media Environment and Reform and the COE Commissioner for Human Rights (see IRIS 2020-5/17 and IRIS 2020-6/11).

The document first sets out the applicable rules under Article 15 of the European Convention on Human Rights (ECHR), which permit certain measures of an exceptional nature which require derogations from members states’ obligations under the ECHR. It then explains the principles relating to states of emergency and emergency measures in light of European Court of Human Rights (ECtHR) case law. Furthermore, the document elaborates upon permissible restrictions on a number of rights and freedoms under the ECHR, including the right to life (Article 2), the right to liberty and security (Article 5), the right to a fair trial (Article 6), the right to private life (Article 8), freedom of conscience (Article 9), and freedom of association and assembly (Article 11).

Notably, in relation to freedom of expression and information, media freedom, and journalism, the document sets out some important principles. First, freedom of expression, including the free and timely flow of information, is a “critical factor for the ability of the media to report on issues related to the pandemic.” Secondly, in relation to journalists, the document emphasises that media and professional journalists, in particular public broadcasters, have a “key role and special responsibility for providing timely, accurate and reliable information to the public, but also for preventing panic and fostering people’s co-operation.” Importantly, journalists should “adhere to the highest professional and ethical standards of responsible journalism, and thus convey authoritative messages regarding the crisis and refrain from publishing or amplifying unverified stories, let alone implausible or sensationalist materials.”

Thirdly, it is reiterated that journalists, media, medical professionals, civil society activists and the public “must be able to criticise the authorities and scrutinise their response to the crisis.” Importantly, any (a) prior restrictions on certain

topics, (b) closure of media outlets or (c) outright blocking of access to online communication platforms "call for the most careful scrutiny and are justified only in the most exceptional circumstances." Finally, in relation to disinformation, it is stated that "malicious spreading of disinformation may be tackled with ex post sanctions, and with governmental information campaigns." In this regard, states should work together with online platforms and the media to prevent the "manipulation of public opinion, as well as to give greater prominence to generally trusted sources of news and information, notably those communicated by public health authorities."

The Information Document was sent to all 47 COE member states on 7 April 2020.

Council of Europe, "Coronavirus: guidance to governments on respecting human rights, democracy and the rule of law", 8 April 2020

https://www.coe.int/en/web/portal/-/coronavirus-guidance-to-governments-on-respecting-human-rights-democracy-and-the-rule-of-law

Council of Europe, Respecting democracy, rule of law and human rights in the framework of the COVID-19 sanitary crisis: A toolkit for member states, SG/Inf(2020)11, 7 April 2020

https://rm.coe.int/sg-inf-2020-11-respecting-democracy-rule-of-law-and-human-rights-in-th/16809e1f40

LATVIA

ECtHR: *Rodina v. Latvia*

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A lack of respect for the right to privacy, combined with an apparent negligence of the tenets of responsible journalism, can be pertinent reasons to justify an interference with journalistic reporting, as protected by Article 10 of the European Convention on Human Rights (ECHR). In the case of *Rodina v. Latvia*, the European Court of Human Rights (ECtHR) found a violation of Article 8 (right to privacy) ECHR because the Latvian courts had not sufficiently protected a doctor's family life and her good name and reputation after she had been exposed by a newspaper and a TV station as being part of a family scandal devoid of public interest.

In 2005, the Russian-language newspaper Čas (*Час*) published an article under the headline "A family drama". The article reported on a family dispute about the sale, by a doctor, Mrs Rodina, of an apartment that belonged to her mentally ill 74-year-old mother, and the alleged lack of caretaking and support that Mrs Rodina had given her mother while in hospital. The article was also published on the newspaper's Internet site, accompanied by a family photograph which had been provided by Mrs Rodina's mother. Mrs Rodina, together with her husband and son, brought proceedings before Riga City Court against the publisher and against two family members who had made some of the contested statements in the article. Mrs Rodina requested that fourteen statements in the article be declared false and that the publication of her family's photograph be declared unlawful. She further sought an order requiring the publisher to retract the false information, to publish a written apology for having published it, and to be compensated for non-pecuniary damage. Riga City Court found a violation of Mrs Rodina's right to privacy and reputation by the newspaper, but this decision was subsequently quashed by Riga Regional Court. The regional court fully dismissed Mrs Rodina's claim, including with regard to the family portrait, as the photograph had been published with the authorisation of her mother, and the portrait itself was neutral, thus not damaging to Mrs Rodina's honour and dignity. An appeal on points of law filed by Mrs Rodina was dismissed by the Senate of the Supreme Court.

In the meantime, in addition, a commercial TV station, TV3, broadcast a programme with a feature that portrayed a similar story to the one which had been published in the newspaper. Again, Mrs Rodina's claims were dismissed by the Latvian courts, the Supreme Court of the Senate mainly referring to the rights of the media and journalists to report and express value judgments about these kind of matters, based upon interviews and with a sufficient factual basis. Furthermore, it was found that there was no evidence that Mrs Rodina's honour

and dignity had been offended.

Mrs Rodina complained before the ECtHR about the publication of her family story in the newspaper and its subsequent broadcast on television. She also alleged that the domestic courts had failed to protect her rights in both sets of civil proceedings. The ECtHR reiterated that in such cases, it is for the Court to determine whether the state, in fulfilling its positive obligations under Article 8 ECHR, has struck a fair balance between the applicant's right to respect for her private life and the right of the opposing party to freedom of expression, as protected by Article 10 ECHR. Moreover, Article 10, section 2 ECHR recognises that freedom of expression may be subject to certain restrictions which are necessary to protect the reputation or rights of others. The ECtHR referred to the relevant criteria for balancing the right to respect for private life against the right to freedom of expression, as developed in its earlier landmark judgments of 7 February 2012: *Von Hannover (no. 2) v. Germany* and *Axel Springer AG v. Germany* (IRIS 2012/3-1). These criteria are: the contribution to a debate of public interest; the degree of notoriety of the person affected; the subject of the news report; the prior conduct of the person concerned; the content, form and consequences of the publication; and, where appropriate, the circumstances in which the information or photograph was obtained.

The Court clarified what might constitute a subject of public interest: "The public interest relates to matters which affect the public to such an extent that it may legitimately take an interest in them, which attract its attention or which concern it to a significant degree, especially in that they affect the well-being of citizens or the life of the community. This is also the case with regard to matters which are capable of giving rise to considerable controversy, which concern an important social issue, or which involve a problem that the public would have an interest in being informed about." The ECtHR also reiterated that the protection afforded by Article 10 ECHR to journalists "is subject to the proviso that they act in good faith in order to provide accurate and reliable information in accordance with the tenets of responsible journalism."

With regard to the degree of notoriety of Mrs Rodina and her prior conduct, the ECtHR found that she had not appeared in or been the subject of any prior publications in the mass media, and that, accordingly, as a private individual unknown to the public, Mrs Rodina could claim particular protection of her private life. With regard to the content of the article and TV feature, the Court observed that the disputed statements gave the impression that Mrs Rodina had acted in a morally reproachable manner by not providing sufficient support to her mother, and that they constituted serious intrusion into her private life. The ECtHR noted several factors which raised doubts as to whether the journalists had acted in good faith, in accordance with the tenets of responsible journalism, when reporting the story of the family dispute. The ECtHR emphasised "that special diligence should be exercised when dealing with matters which, albeit indirectly, relate to mental health, such as establishing of facts or disclosure of sensitive data. This applies, in particular, to journalists when exercising their freedom of expression and also to the domestic courts when carrying out their assessment in the balancing of the rights at stake." The ECtHR expressed its doubts as to

whether the journalists in this case had strived to provide accurate and reliable information or to find out what had happened, as the notion of responsible journalism would require. Furthermore, the Court accepted that a private dispute may be connected to an issue that is of importance for the general public, but that in this case, the journalists did not refer to any broader social issues when reporting on this family dispute, and the Court itself did not discern any contribution to a debate of public interest. With regard to the publication of the family portrait photograph, the ECtHR agreed with Mrs Rodina that the consent given by her mother could only relate to the publication of her mother's photograph, not to that of Mrs Rodina. Although it concerned a neutral family portrait, the Court found that when such a photograph accompanied a story portraying an individual in a negative light, it constituted a serious intrusion into the private life of a person who does not seek publicity. The ECtHR was of the opinion that there were no particular reasons related to public interest behind the decision to publish the photograph without taking any particular precautions, such as masking or blurring her face. There was indeed nothing to suggest that the said photograph had any inherent informative value or was used for a good cause, apart from merely showing Mrs Rodina to the public. Therefore, the publishing of Mrs Rodina's family photograph without taking any precautions could not be regarded as "contributing to any debate of general interest to society." Finally, the ECtHR found unanimously that the domestic courts in both sets of civil proceedings had failed to strike a fair balance between Mrs Rodina's right to respect for her private life under Article 8 ECHR and her relatives' right to freedom of expression, as reported by the mass media, under Article 10 ECHR. Therefore, there has been a violation of Article 8 ECHR. Mrs Rodina was awarded a sum of EUR 9 800, partly for non-pecuniary damage, and partly for costs and expenses incurred before the domestic courts and the ECtHR.

Judgment by the European Court of Human Rights, Fifth Section, case of Rodina v. Latvia, Applications nos. 48534/10 and 19532/15, 14 May 2020.

https://hudoc.echr.coe.int/eng?i=001-202437

EUROPEAN UNION

EU: EUROPEAN COMMISSION

Public consultation on Digital Services Act package

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On 2 June 2020, the European Commission launched a public consultation on proposals for a Digital Services Act (DSA) package, which will be designed to modernise the current EU legal framework for digital services. This follows the Commission's Communication in February 2020 on "Shaping Europe's digital future", where it was announced that there would be new and revised rules to deepen the internal market for digital services (see IRIS 2020-4/14).

The Commission notes that the legal framework for digital services has "remained unchanged" since the adoption of e-Commerce Directive 2000/31 (see IRIS 1999-9/2), which harmonised the basic principles allowing the cross-border provision of services and which is a "foundational cornerstone for regulating digital services in the EU." However, the Commission argues that Europe needs a "modernised regulatory framework to reduce the ever-increasing regulatory fragmentation across Member States, to better ensure that everyone across Europe is protected online as they are offline and to offer to all European businesses a level playing field to innovate, grow and compete globally." As such, the DSA package would be comprised of two main pillars: (a) new rules framing the responsibilities of digital services to address the risks faced by their users and to protect their users' rights; increasing and harmonising the responsibilities of online platforms and information service providers; and reinforcing the oversight over platforms' content policies in the European Union; and (b) *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.

The purpose of the public consultation is to support the Commission's work in analysing and collecting evidence for scoping the specific issues that may require an EU-level intervention. As such, the 59-page consultation document is divided into a number of main themes, including (1) how to effectively keep users safer online, with the gathering of experiences and data on illegal activities online; (2) what responsibilities should be legally required from online platforms, and under what conditions; (3) what issues derive from the gatekeeper power of digital platforms; (4) questions on the regulation of large online platform companies acting as gatekeepers; (5) questions relating to online advertising, including online political advertising; (6) the situation of self-employed individuals providing services through platforms; and (7) the governance of digital services and various

aspects of enforcement. The consultation will be open until 8 September 2020, and both European and non-European individuals and organisations may contribute to the consultation. Following the consultation, the Commission is scheduled to present proposals for the DSA package in the fourth quarter (Q4) of 2020.

Finally, alongside the public consultation, the Commission also provided further details of possible legislative proposals under the DSA package, and published two important documents called Inception Impact Assessments, which also provide the "initial range of possible options to regulate large online platforms." The first impact assessment clarifies the responsibilities of digital services, while the second concerns the *ex ante* regulatory instrument of very large online platforms acting as gatekeepers. Stakeholders have four weeks, until 30 June 2020, to provide feedback on the impact assessments.

The Digital Services Act package, European Commission

https://ec.europa.eu/digital-single-market/en/digital-services-act-package

"Commission launches consultation to seek views on Digital Services Act package", European Commission

https://ec.europa.eu/commission/presscorner/detail/en/ip_20_962

Inception Impact Assessment - Digital Services Act package: deepening the Internal Market and clarifying responsibilities for digital services, European Commission.

https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12417-Digital-Services-Act-deepening-the-Internal-Market-and-clarifying-responsibilities-for-digital-services

Initial Impact Assessment - Digital Services Act package: ex ante regulatory instrument of very large online platforms acting as gatekeepers, Ares(2020)287764, European Commission.

https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12418-Digital-Services-Act-package-ex-ante-regulatory-instrument-of-very-large-online-platforms-acting-as-gatekeepers

NATIONAL

AUSTRIA

[AT] Cease and desist order against hosting provider

Gianna Iacino
Legal expert

On 30 March 2020, Austria's *Oberster Gerichtshof* (Supreme Court – OGH) decided in preliminary proceedings that cease and desist orders against hosting providers could apply to content with identical words or meaning, but only within Austria (Case no. 4Ob36/20b).

A politician from the Freiheitliche Partei Österreichs (Freedom Party of Austria – FPÖ) had published on his Facebook page an edited photo of a well-known ORF newsreader, the rights to which were owned by the ORF. The following text had been added to the image in clearly visible lettering: "There's a place where lies become news. It's the ORF." The following words had appeared in smaller lettering: "The best fake news, lies and propaganda, pseudo-culture and a compulsory fee. Regional and international. On television, on the radio and on the Facebook profile of Armin Wolf". A picture of Pinocchio with a long nose had also been shown.

The ORF asked Facebook several times to delete the post, but without success. In the preliminary proceedings, it demanded that Facebook prevent third parties from distributing the photo and alleging that it spread fake news or making any similar claims. Its action was based on its right to injunctive relief under Article 81 of the *Urhebergesetz* (Copyright Act – UrhG) and the infringement of its personality rights under Article 1330 of the *Allgemeines Bürgerliches Gesetzbuch* (General Civil Code – ABGB).

The court of first instance granted the preliminary injunction, a decision that was upheld by the court of appeal and the Supreme Court.

The Supreme Court explained that the cease and desist order was compatible with European law. In the case at hand, the behaviour that the defendant had been asked to cease had been clearly specified. The order had therefore been sufficiently specific and non-excessive, and had not created a disproportionate obligation for the defendant. Although Article 15 of EU Directive 2000/31/EC did not prevent member states from imposing a general obligation on hosting providers to monitor the information that they stored, this did not apply to "specific cases". Such a case existed, for example, if a domestic civil court ordered targeted surveillance measures. Such orders could, for example, cover future rights infringements and rights infringements by third parties. A cease and desist order could cover content with identical words or meaning, with content

deemed to have an “identical meaning” if it was immediately obvious to a non-expert or could be determined by technical means that it was “essentially the same” as content that had been considered unlawful.

However, the cease and desist order only applied in Austria in relation to the alleged breaches of both copyright and personality rights. Although a cease and desist order could, in principle, have worldwide effect, internationally recognised legal principles had to be respected. Copyright was subject to the territoriality principle. Since the protection claimed by the plaintiff under Austrian copyright law only applied in Austria, the claim for injunctive relief was limited to Austria. As regards the personality rights infringement, the plaintiff needed to clearly define the geographical scope of protection if it extended beyond Austria, since the territoriality principle did not apply. As the plaintiff had not provided such a definition, it should be assumed that protection was only being sought in Austria.

Entscheidung des Obersten Gerichtshof Österreichs vom 30.03.2020 - Az.: 4Ob36/20b

https://www.ris.bka.gv.at/Dokumente/Justiz/JJT_20200330_OGH0002_0040OB00036_20B0000_000/JJT_20200330_OGH0002_0040OB00036_20B0000_000.html

Decision of the Austrian Supreme Court of 30 March 2020, case no. 4Ob36/20b

BELGIUM

[BE] CSA report on the pandemic's impact on the audiovisual sector in French-speaking Belgium

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As elsewhere in Europe, traditional media in French-speaking Belgium saw a sharp rise in audience figures during the health crisis linked to the COVID-19 pandemic. But what other consequences has the crisis had for the audiovisual sector? On 8 May 2020, the *Conseil supérieur de l'audiovisuel* (the audiovisual regulatory authority for the French-speaking Community of Belgium – CSA) published a report on this subject. The report lists the main challenges and difficulties facing audiovisual media in French-speaking Belgium at the height of the lockdown period. It also describes the various initiatives taken by different stakeholders.

The report, which follows an information request from the European Regulators Group for Audiovisual Media Services (ERGA), attracted the attention of both the press and politicians in French-speaking Belgium. In particular, it was submitted to the Government of the French-speaking Community of Belgium, the political body responsible for issues relating to the audiovisual media in French-speaking Belgium.

Between 15 April and 4 May 2020, the CSA conducted a survey of public and private radio and television stations, regional TV stations and a number of Internet-based video ('Youtubers' and 'vloggers') and television services under its jurisdiction. The respondents were asked to complete an online questionnaire on a voluntary basis, with anonymity guaranteed.

The CSA reports that, at the peak of the crisis, viewing figures were extraordinarily high among audiovisual media in French-speaking Belgium, especially for news programmes. In general terms, the providers indicated that audiences had been 16% to 24% larger than would normally have been the case.

At the same time, the regulator notes some of the difficulties faced by these providers: a drop in advertising revenue, a higher workload for editorial staff coinciding with staff shortages and teleworking, and the interruption of most audiovisual production activities, especially international co-productions. The providers are worried that their financial problems will jeopardise their very survival, which could lead to a reduction in media pluralism. According to the CSA's analysis, the average fall in turnover between March and April 2020 was 66%, while 25% of respondents said they were in financial trouble and had gone into debt. News-based television channels have been particularly badly affected. Finally, radio stations that are not yet being broadcast digitally (DAB+) are afraid of making the transition: "69% [of them] are expecting to either delay or simply

abandon their digitalisation plans".

The regulator also reports an increase in interaction between the public and the providers, including information and fact-checking requests, distress calls and complaints. It also notes "a significant rise in the number of repeats", even though new television formats inspired by the Internet or video conferencing have emerged. Local Internet video producers have also adapted their work, helping to raise awareness of the measures taken by the public authorities to address the health crisis.

As far as programming is concerned, the CSA mentions a serious negative impact on cultural promotion. Television providers have also focused on live broadcasts, fictional and children's programmes, and continuous learning programmes.

Providers are asking the public authorities for various types of support measures: higher public subsidies; new sources of state aid; the relaxation of legal obligations linked to their own productions; broadcasting and advertising quotas; lower distribution costs; the rescheduling of royalty payments; fiscal measures such as the taxation of 'GAFAN' (Google, Apple, Facebook, Amazon and Netflix); etc.

In conclusion, it should be noted that the CSA is planning to conduct another evaluation at the end of the health crisis. This would also make it possible to measure the impact of the steps that the public authorities have taken in the meantime.

Impact de la crise sanitaire sur le secteur audiovisuel (Rapport), CSA

https://www.csa.be/wp-content/uploads/2020/05/CSA_sondage_COVID_mai_2020-2.pdf

CSA report on the impact of the health crisis on the audiovisual sector

SWITZERLAND

[CH] Short- and long-term assistance for journalism

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The Swiss Government (*Bundesrat*) has launched a package of short- and long-term measures to support the media industry. On 20 May 2020, it decided to provide a total of CHF 57.5 million in immediate emergency aid for various types of media. The Bundesrat was acting under the authority of the Swiss Parliament, which is concerned about the future of the media and the formation of public opinion (for example, with motions entitled “Independent and effective media are the backbone of our democracy”). The coronavirus pandemic has aggravated the longstanding problems faced by printed and electronic mass media in Switzerland because it has resulted in a dramatic fall in advertising revenue.

As well as one-off payments to private radio and television broadcasters, who are receiving an additional CHF 30 million in licence fee revenue under the *Verordnung über Übergangsmassnahmen zugunsten der elektronischen Medien im Zusammenhang mit dem Coronavirus* (Ordinance on interim measures to support electronic media in relation to the coronavirus), the *Bundesrat* is giving up to CHF 10 million to the Keystone-SDA news agency. In return, the agency will reduce the amount it charges electronic media providers. One-off emergency assistance is also available for the press under the government’s *Verordnung zu Übergangsmaßnahmen zugunsten der Printmedien* (Ordinance on interim measures to support printed media), which provides additional indirect support for subscription-based daily and weekly newspapers. The state is spending CHF 12.5 million to subsidise production costs.

In the longer term, the *Bundesrat* wants to support professional journalism through a series of different legislative amendments. On 29 April 2020, it submitted a package of media support measures to the Swiss Parliament which not only strengthens the existing support for radio, television and the press, but also, for the first time, offers financial support to certain online media that offer paid journalistic content to the public (for instance, through digital subscriptions, individual downloads or voluntary contributions). However, free services will not receive any support.

In August 2019, the *Bundesrat* had abandoned a more comprehensive body of new legislation when it dropped its plans for a *Bundesgesetz über elektronische Medien* (Electronic Media Act – BGeM) after a less than enthusiastic response from the relevant stakeholders. Instead, the government announced a package of rapidly implementable one-off measures (see IRIS 2019-09:1/7).

Medienmitteilung der Schweizer Regierung (Bundesrat) vom 20.05.2020: "Coronavirus: Befristete Soforthilfe zugunsten der Medien"

https://www.bakom.admin.ch/bakom/de/home/das-bakom/medieninformationen/medienmitteilungen.msg-id-79184.html

Swiss government press release of 20 May 2020: "Coronavirus: short-term assistance for the media"

Medienmitteilung der Schweizer Regierung (Bundesrat) vom 29.04.2020: «Bundesrat verabschiedet Massnahmenpaket zugunsten der Medien» [deutschsprachig]

https://www.bakom.admin.ch/bakom/de/home/das-bakom/medieninformationen/medienmitteilungen.msg-id-78941.html

Swiss government press release of 29 April 2020: "Government adopts package of measures for the media"

Botschaft des Bundesrates zum Massnahmenpaket zugunsten der Medien vom 29.04.2020

https://www.admin.ch/opc/de/federal-gazette/2020/4485.pdf

Federal government communication on the package of measures for the media, 29 April 2020

Manuel Puppis/Etienne Bürdel, Ländervergleich Onlinemedienförderung - Bericht zuhanden des Bundesamts für Kommunikation, Dezember 2019

https://www.newsd.admin.ch/newsd/message/attachments/61118.pdf

Manuel Puppis/Etienne Bürdel, International comparison of support for online media - Report for the Federal Communication Office, December 2019

GERMANY

[DE] Coronavirus crisis: German Bundesländer launch initiatives to support local broadcasters

Jan Henrich
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Several German Bundesländer have launched programmes to support local and regional broadcasters during the coronavirus crisis, including subsidies for their technical infrastructure costs.

In North Rhine-Westphalia, the state government, local radio representatives, infrastructure providers and the *Landesanstalt für Medien NRW* (North-Rhine Westphalia media authority) agreed the '*Solidarpakt Lokalfunk*' (local radio solidarity pact) to cover the distribution costs for local radio stations for a three-month period. This is funded mainly by the state government and the *Landesanstalt für Medien NRW*. In return, the *Verband Lokaler Rundfunk* (local broadcasters' union – VLR) and the Verband der Betriebsgesellschaften (union of operating companies) promised to guarantee the jobs of editorial staff until 30 September 2020.

In Baden-Württemberg, the *Landesanstalt für Kommunikation Baden-Württemberg* (Baden-Württemberg communication authority – LFK) has made nearly EUR 1 million in funding available to support the radio sector. In a press release, the LFK stressed that this was only a temporary measure. It also announced additional support measures for non-commercial radio broadcasters, with further details to be announced soon.

The *Sächsische Landesmedienanstalt* (Saxony media authority – SLM) also promised to pay the distribution costs of all Saxony's local TV stations providing news coverage of the crisis for the duration of the pandemic. It also decided to award a special prize worth a total of EUR 100 000 in recognition of the services offered by local and regional broadcasters during the crisis.

In Thüringen, local TV broadcasters can apply for a one-off state-funded grant of up to EUR 20 000. The *Thüringer Landesmedienanstalt* (Thüringen media authority – TLM), as an independent public law institution, will distribute the grants to private local television companies that find themselves in desperate need as a result of the pandemic.

All the Bundesländer concerned said they hoped the measures would protect the jobs of journalists and editorial staff because local and regional broadcasters in particular had been hit by a sharp fall in advertising revenue during the coronavirus crisis. The main legal basis for the support they are providing is Article 40(1)(2) of the *Rundfunkstaatsvertrag* (Inter-State Broadcasting Treaty – RStV). Under this provision, the state media authorities' share of licence fee revenues can be used to finance the technical infrastructure required under state

law for private broadcasting.

Pressemitteilung der Landesanstalt für Medien NRW (LfM)

https://www.medienanstalt-nrw.de/presse/pressemitteilungen/pressemitteilungen-2020/2020/mai/solidarpakt-lokalfunk-nrw.html

Press release of the North-Rhine Westphalia media authority (LfM)

Pressemitteilung der Landesanstalt für Kommunikation Baden-Württemberg (LFK)

https://www.lfk.de/aktuelles/pressecenter/pressemitteilungen/detail/artikel/foerdermittel-fuer-baden-wuerttembergische-rundfunkveranstalter.html

Press release of the Baden-Württemberg communication authority (LFK)

Pressemitteilung der Sächsische Landesmedienanstalt (SLM)

https://www.slm-online.de/2020_pressemitteilungen-a-5288.html

Press release of the Saxony media authority (SLM)

Pressemitteilung der Thüringer Landesmedienanstalt (TLM)

https://www.tlm.de/infothek/pressemitteilungen/pm-einzelansicht/article/soforthilfe-fuer-thueringer-lokal-tv-veranstalter-staatskanzlei-und-landesmedienanstalt-ermoeglichen-bi/

Press release of the Thüringen media authority (TLM)

[DE] Federal Constitutional Court upholds journalists' complaint: foreign surveillance by Federal Intelligence Service infringes fundamental rights

Christina Etteldorf
Institute of European Media Law

In a judgment of 19 May 2020 (1 BvR 2835/17), the German *Bundesverfassungsgericht* (Federal Constitutional Court – BVerfG) decided that, in its current form, the surveillance of foreigners' telecommunications abroad by the *Bundesnachrichtendienst* (Federal Intelligence Service – BND) violated the privacy of telecommunications (Article 10(1) of the *Grundgesetz* (Basic Law – GG)) and the freedom of the press (Article 5(1)(2) GG). It also ruled that the processing and transmission of the data obtained through this practice and cooperation with foreign intelligence services were unlawful.

A number of journalists, most of whom were foreigners reporting abroad on human rights breaches in crisis regions or authoritarian countries, had filed a complaint about the *Gesetz über den Bundesnachrichtendienst* (Federal Intelligence Service Act – BNDG), which has provided the legal basis for the aforementioned foreign telecommunications surveillance activities since 2016. The journalists feared that their basic rights would be infringed by the rule under which the BND could access telecommunications channels or networks in order to analyse telecommunications data by searching for keywords and using other analytical tools as part of a manual evaluation process, and filter out any data that was significant from an intelligence point of view. According to the BNDG, the capture and analysis of such data is not limited to specific investigations, but can be part of general intelligence-gathering activities. Traffic data can also be stored for six months and analysed independently of keywords.

The BVerfG held that these provisions of the Act, which merely laid down in law the BND's existing practice, breached fundamental rights. It found, in particular, that the German state's obligation to respect fundamental rights was not limited to German national territory, at least in relation to the privacy of telecommunications and the freedom of the press. It therefore criticised the formal legality of the BNDG on the grounds that the German legislator had assumed that fundamental rights did not apply in relation to events that took place exclusively abroad and had therefore taken insufficient account of such rights. However, there were also material shortcomings in the Act. In particular, no limits were laid down in terms of the purpose of surveillance and there were insufficient protection mechanisms for journalists in relation to both information-gathering and cooperation with other intelligence services. As regards the freedom of the press, the BVerfG emphasised that deliberate intrusion into confidential communications that were worthy of special protection, such as those of journalists, was only admissible if a qualified interference threshold was in place and that, if the sensitive nature of information was only noticed when it was analysed, a weighing-up process should be conducted to determine whether or not the communication could be analysed and used. Such surveillance

authorisation also required independent, continuous monitoring under objective law, which was not provided for under the Act.

However, the BVerfG did not rule that strategic foreign telecommunications surveillance was incompatible with fundamental rights per se. Rather, it should, "as a power that is not tied to a specific occasion but that is essentially used only as a last resort and in a limited way [...], remain an exceptional power limited to foreign intelligence-gathering by an authority that has no operational powers of its own and is only justified by its specific remit." The disputed provisions will continue to apply until the end of 2021 so that the legislator can devise a new set of rules that take fundamental rights into account.

Urteil des Bundesverfassungsgerichts vom 19. Mai 2020 (1 BvR 2835/17)

https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2020/05/rs20200519_1bvr283517.html

Judgment of the Federal Constitutional Court, 19 May 2020 (1 BvR 2835/17)

[DE] New age verification system approved for protection of minors

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On 19 May 2020, Germany's *Kommission für Jugendmedienschutz* (Committee for the protection of minors in the media – KJM) announced that it had approved another age verification system (AVS module). The 'Robo-Ident' module developed by Nect GmbH is a so-called partial solution for the age verification of closed user groups. It identifies people using an automated biometric data comparison process. Such partial age verification solutions can be built into the general youth protection concepts used by different content providers.

In practical terms, the system enables users to identify themselves on portals and apps using software designed by Nect GmbH, which guides the user through the necessary stages. In the first step, the user creates a video showing their identity document from several different angles. They must then record a video of their face, during which they have to read out two randomly generated words that appear on the screen. The system checks whether their lip and facial movements match the words. Finally, it compares the photo on their identity document with their face in the video. Once all these steps have been successfully completed, the user is sent back to the relevant portal or app.

The KJM is the central supervisory body for youth protection in private broadcasting and telemedia in Germany. As an organ of the *Landesmedienanstalten* (state media authorities), it monitors compliance with the provisions of the *Jugendmedienschutz-Staatsvertrag* (Inter-State Treaty on the protection of minors in the media – JMStV). Under the treaty, content that is, for example, pornographic, listed or clearly harmful to minors can only be transmitted if the provider ensures that only adults can access it, namely by creating closed user groups. So-called age verification systems are used to control such closed user groups. Content that may impair child development can be distributed if, for example, the provider ensures through a technical system that it cannot normally be accessed by children and young people in the relevant age groups. The KJM checks in advance, on behalf of companies, whether such technical systems meet the legal requirements.

Pressemitteilung der KJM vom 19.05.2020

https://www.die-medienanstalten.de/service/pressemitteilungen/meldung/news/robo-ident-kjm-bewertet-weiteres-konzept-zur-altersverifikation-positiv/

KJM press release of 19 May 2020

SPAIN

[ES] COVID-19 Guidelines for safety in film productions issued by ICAA

Enric Enrich / Elena Pagés
Croma-Copyrait - Barcelona / Lawyer - Barcelona

On 14 May 2020, the Institute of Cinematography of Audiovisual Arts (ICAA) issued its Guidelines of good practices on special measures for the prevention of risks at work in the audiovisual sector, a series of preventive measures against the coronavirus approved by the Spanish Government and applicable when shooting in Spain in the initial phase of the process of deconfinement.

With the publication of the aforementioned guidelines, the ICAA has provided the Spanish film industry with some basic, non-binding guidelines and recommendations on the prevention and protection measures to be followed in order to work safely in audiovisual productions, all of which are in compliance with the current occupational health and safety regulations.

Both the Association of Audiovisual Production Professionals (APPA) and the National Institute of Safety and Health at Work (INSST) were involved in the elaboration of the guidelines by providing generic measures which are well known to the general public at this stage (keeping the minimum distance (2 m); washing one's hands frequently; covering one's mouth and nose when coughing or sneezing; avoiding touching one's eyes, nose and mouth; disinfecting frequently touched surfaces, etc.) as well as more specific measures for each of the departments involved in the production and post-production of an audiovisual work (production, direction, art, make-up, lighting, post-production, etc.).

Furthermore, all the agents involved in an audiovisual production are encouraged to act jointly in order to mitigate all potential risks. To this end, the ICAA encourages the implementation of a Contingency Plan for Occupational Health and Safety on the COVID-19 that will force production companies to carry out more thorough planning in pre-production and to even review or adjust the scripts in order to guarantee greater safety during filming.

These guidelines are intended to be adapted to the changes and needs that will be required in the light of the evolution and experience of the pandemic after evaluating the impact of the measures that have been adopted so far. Therefore, issues such as travelling abroad to make audiovisual productions have not yet been covered by these guidelines.

Guía de buenas prácticas de medidas especiales para la prevención de riesgos laborales del sector audiovisual

https://www.culturaydeporte.gob.es/dam/jcr:223c5bc7-ee65-4759-a99f-7f052c187366/gui-a-de-buenas-practicas-producciones-rodajes.pdf

Guidelines of good practices on special measures for the prevention of risks at work in the audiovisual sector

[ES] Pre-financing obligation regulated by the Spanish Audiovisual Law boosts the production of TV series

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Audiovisual Diversity/ University Carlos III of Madrid

The Spanish regulator (*Comisión Nacional de los Mercados y la Competencia*, CNMC) has published a report about compliance with the obligations to pre-finance European audiovisual productions during 2018, which, in line with the Audiovisual Media Services Directive, are mandated by Spanish Audiovisual Law 7/2010 (*Ley General de la Comunicación Audiovisual*, Article 5.3).

The obligations are stipulated differently depending on the type of operator: public service broadcasters must invest 6% of their profits from the previous year, whilst commercial players contribute 5%. Moreover, the law establishes a minimum percentage of funding depending on the nature of the audiovisual production: 60% of such an investment must be assigned to pre-financing films, 60% of which has to be allocated to films shot in any of Spain's official languages. These percentages are 75% and 60% respectively, for public service broadcasters.

In 2018, 36 services providers – of which 24 had national coverage and 12 were regional – were audited by the CNMC. The investment in pre-funding obligations by national providers amounted to EUR 389.5 million - a 5% decrease in relation to the previous year. Only two companies did not fulfil this requirement (Rakuten and Vodafone/ONO) and 63% of all the funding was provided by the five national free-to-air DTT operators obliged to do so, who, in fact, exceeded the mandated quotas. As mandated by law, the public service broadcaster RTVE made the largest investment.

Regarding financing by type of production, the most important news is the ongoing supremacy of investment in the pre-funding of TV series over cinema. With a slight increase over the previous year, investment in the former concentrated 78.3% of the total calculation. Moreover, 16.24% of this increase was dedicated to productions in one of the Spanish official languages and originated from 11 different providers. Among these, Telefónica invested the most (28.34%), followed by RTVE (28.25%; a significant reduction compared to the 42.17% invested in 2017) and Atresmedia (24.29%). On the other hand, investment in TV series in other European languages suffered a notable decrease (-48.93%).

Investment in films was slightly reduced in comparison to 2017, the two main free-to-air DTT operators Atresmedia and Mediaset being the biggest investors, also for films in co-official languages. They were followed by RTVE. According to the country of origin, investment in Spanish cinema decreased in favour of that of other European countries. However, that investment was concentrated in only five players; of these, Mediaset stood out with 56.42% of the total investment. RTVE’s

commitment to independent film production is noted too.

RTVE is a special case since the corporation has a specific obligation to finance TV productions, of which half must be devoted to TV films and mini-series. Even though RTVE significantly reduced its investment in TV productions in 2018, it is still the largest investor in this type of production. The only provider that invested in non-national European TV films and mini-series was FILMIN.

The pre-funding obligations of regional providers were completely fulfilled and, as was also the case with national players, investment in Spanish and European TV surpassed that of cinema (75.2% of the total investment). Regional broadcasters from Galicia (TVG) and Catalonia (CCMA) lead the way, followed by the Basque EITB, which is in fact the largest investor in cinema from both Spain and the other European countries. Looking specifically into the case of films in any of the Spanish official languages, there was a slight decrease compared to 2017, which also applies to TV films in all Spanish languages. In general terms, investment in the former represented 19.78% of the total, whereas it was just over 5% for the latter.

To sum up, the report highlights that the percentage of investment in Spanish cinema decreased while that in TV series took over; this is the case for both national and regional operators. Moreover, the main type of production that benefited from investment was that in the official languages of Spain. Above all, investment in TV series in the Spanish official languages increased, reaching a new maximum level.

Informe sobre el cumplimiento en el ejercicio 2018, de la obligación de financiación anticipada de la producción europea de películas cinematográficas, películas y series para televisión, documentales y series de animación (FOE/DTSA/026/19).

https://www.cnmc.es/expedientes/foedtsa02619anual2018

Report on the compliance with pre-financing obligations of European audiovisual productions during 2018 (FOE/DTSA/026/19)

FRANCE

[FR] Annulment of CNIL’s demand that Google apply de-referencing to all its geographical extensions

Amélie Blocman
Légipresse

After the *Conseil d'Etat* (Council of State) issued a series of judgments on 6 December clarifying the implementation of the right to de-referencing (right to be forgotten), in particular where ‘sensitive data’ is concerned, France’s highest administrative court issued a decision on the geographical scope of this right.

In the case at hand, Google Inc. had applied for the annulment of the decision of the French data protection authority (*Commission nationale de l’informatique et des libertés* – CNIL) of 10 March 2016 to fine it EUR 100 000 for refusing, when granting a de-referencing request, to apply it to all its search engine’s domain name extensions, and for only removing the links in question from the results displayed following searches conducted from the domain names corresponding to the versions of its search engine in the EU member states. The CNIL also regarded as insufficient Google’s further ‘geo-blocking’ proposal, made after expiry of the time limit laid down in the formal notice, whereby Internet users would be prevented from accessing the results at issue from an IP address deemed to be located in the state of residence of a data subject after conducting a search on the basis of that data subject’s name, irrespective of the version of the search engine they used.

The Conseil d’Etat pointed out that, in its judgment of 24 September 2019 (*Google LLC v CNIL*, Case C-507/17), the CJEU had ruled that “where a search engine operator grants a request for de-referencing pursuant to those provisions, that operator is not required to carry out that de-referencing on all versions of its search engine, but on the versions of that search engine corresponding to all the Member States, using, where necessary, measures which, while meeting the legal requirements, effectively prevent or, at the very least, seriously discourage an internet user conducting a search from one of the Member States on the basis of a data subject’s name from gaining access, via the list of results displayed following that search, to the links which are the subject of that request.”

According to the *Conseil d’Etat*, this meant that, by sanctioning the appellant company on the grounds that only a measure that applied to all uses of its search engine, regardless of the extensions used and the geographical location of the Internet user conducting a search, was sufficient to meet the protection requirement established by the CJEU, the select panel of the CNIL had made an error of law in the disputed decision.

Moreover, although the CNIL argued, as the defendant, that the disputed sanction had been based on the Court of Justice’s view that the supervisory authorities could order the de-referencing of all versions of a search engine, there was no

legislative provision in current applicable law that meant that such de-referencing could extend beyond the area covered by EU law and apply outside the territory of the member states. The authorities could only issue such an order after weighing the data subject's right to privacy and the protection of personal data concerning him or her against the right to freedom of information. The very wording of the disputed decision showed that, before finding Google Inc. guilty of ongoing infringements and failing to meet its obligation to apply de-referencing to all versions of a search engine, the CNIL select panel had not weighed these rights against each other. There was therefore no reason to accept the legal basis given for the CNIL's decision, which was annulled.

Conseil d'État, 27 mars 2020, N° 399922, Google Inc.

https://www.legifrance.gouv.fr/affichJuriAdmin.do?oldAction=rechJuriAdmin&idTexte=CETATEXT000041782236&fastReqId=1464542000&fastPos=1

Council of State, 27 March 2020, no. 399922, Google Inc.

[FR] Constitutional Council rules that Hadopi's access to all documents, to combat piracy is unlawful

Amélie Blocman
Légipresse

On 13 February 2020, the Conseil d'État (Council of State) submitted to the Conseil constitutionnel (Constitutional Council) an application for a priority preliminary ruling concerning the constitutionality of the final three paragraphs of Article L. 331-21 of the Intellectual Property Code. This provision forms the legal basis for the Hadopi's implementation of the graduated response procedure established under Act No. 2009-669 of 12 June 2009.

According to Article L. 336-3 of the Intellectual Property Code, the owner of a connection to online public communication services is obliged to ensure that such a connection is not used for piracy. When a failure to meet this obligation is reported, the Hadopi's rights protection committee is responsible for taking measures to ensure it is respected. It issues a recommendation to the offending account holders, reminding them of their obligation, urging them to meet it and telling them what sanctions will be imposed if they fail to do so. Under the disputed provisions of the Code, Hadopi officials can obtain, on the one hand, information from electronic communication operators about the identity, postal address, e-mail address and telephone number of subscribers whose connection to online public communication services has been used in violation of the obligation set out in Article L. 336-3 and, on the other, a copy of "all documents, whatever their medium, including login data held by electronic communication operators". These documents are listed in Decree No. 2010-236 of 5 March 2010 on the automatic processing of personal data authorised by Article L. 331-29 of the Intellectual Property Code.

According to the requesting associations, the disputed provisions of the Intellectual Property Code infringed the right to privacy, the protection of personal data and the confidentiality of correspondence. They claimed that they gave Hadopi staff access to all documents, whatever their medium, including login data, without any limitation or adequate guarantees.

The Constitutional Council began by considering the admissibility of the application, because this was not the first time it had been asked to address this issue. Indeed, it had previously ruled, after examining the law of 12 June 2009, that the final three paragraphs of Article L. 331-21 were compatible with the right to privacy. However, since declaring them compatible, the Council had, in a decision of 5 August 2015, ruled that provisions giving Competition Authority officials a similar right to obtain login data breached the right to privacy. This decision constituted a change of circumstances that justified the re-examination of the disputed provisions.

In substance, it ruled that, by extending the right to obtain data to "all documents, whatever the medium" and failing to define who the data subjects

were, the legislator had not limited the scope of the exercise of this right or ensured that the documents concerned were directly linked to the breach of the obligation set out in Article L. 336-3 of the Code of Intellectual Property, which justified the procedure implemented by the Hadopi. Furthermore, this right could cover all login data held by electronic communication operators. In view of its nature and how it might be processed, such data provided a large quantity of specific information about the individuals concerned, violating their right to privacy. Moreover, not all of it was necessarily linked directly to the breach of the obligation set out in Article L. 336-3 of the Code of Intellectual Property.

However, concerning the communication to Hadopi officials of the identity, postal address, e-mail address and telephone number of subscribers whose connection to online public communication services had been used illegally, the Council pointed out that the legislator had wanted to step up the fight against Internet piracy in order to protect intellectual property. It noted that this right to information was not accompanied by compulsory enforcement powers, and was only granted to Hadopi public officials who were duly qualified, certified and bound by professional secrecy in relation to the use of such data. In addition, the Hadopi needed this information in order to remind the account holders concerned of their legal obligations and, if they continued to breach them, refer them to the public prosecutor's office. The data was therefore directly linked to the procedure. For these reasons, the Constitutional Council ruled that the final paragraph of Article L. 331-21 of the Intellectual Property Code was in conformity with the constitution, apart from the word "notamment" ("especially").

The Constitutional Council therefore decided that the third and fourth paragraphs of Article L. 331-21 of the Intellectual Property Code, as well as the word "notamment" in the final paragraph of the same article, were unconstitutional. In a press release, the Hadopi said "that the possibility" in question "has never been used by the rights protection committee to implement the graduated response", and that "through this declaration of conformity, the Constitutional Council has approved the current functioning of the graduated response procedure and its continuing implementation."

Whatever the Hadopi says, the Council believes that the immediate revocation of the provisions deemed unconstitutional would probably have "manifestly excessive" consequences. It therefore delayed their revocation until 31 December 2020. In the meantime, the audiovisual reform bill under which the CSA and the Hadopi will merge to become the ARCOM may be put to the vote and the relevant provisions of the Intellectual Property Code amended in order to take this decision into account and improve the graduated response mechanism that was created under the law of 12 June 2009.

Conseil constitutionnel, Décision n° 2020-841 QPC du 20 mai 2020, La Quadrature du net et a.

https://www.conseil-constitutionnel.fr/decision/2020/2020841QPC.htm

Constitutional Council, decision no. 2020-841 QPC of 20 May 2020, La Quadrature du net et al

[FR] Council for Ethical Journalism issues its first opinions and condemns BFM TV

Amélie Blocman
Légipresse

The new (and controversial) C*onseil de déontologie journalistique et de médiation* (Council for Ethical Journalism and Mediation – CDJM), created at the end of 2019, has published its first three opinions, which were adopted at a plenary meeting on 18 May 2020.

The CDJM is a body for mediation between journalists, the media, news agencies and the public on all matters linked to ethical journalism. Any citizen can ask the CDJM for its opinion on journalistic activity that is considered problematic. The CDJM's members come from three groups, each one equally represented in its management bodies: journalists, the media and the public. As a self-regulatory body, the CDJM issues its decisions alone, fully independent of political or economic authorities. It has been accepted as a member of the Alliance of Independent Press Councils of Europe, an informal network of independent content regulators for both press and broadcast media. According to its president, Patrick Eveno, "The CDJM is neither a professional union nor a 'thought tribunal', it only gives opinions on issues linked to ethical journalism, but never on matters relating to the editorial freedom of all media. France is therefore the 18th European Union member state to establish such a body for mediation between journalists, publishers and the public in order to promote high-quality news services."

In its first opinion, the CDJM dealt with an interview broadcast on BFM TV on 17 February 2020 involving one of its reporters and Juan Branco, the lawyer of Russian activist Piotr Pavlenski, who had been accused of publishing intimate videos of a former government spokesman. The CDJM had concluded that certain rules of ethical journalism had been breached and had written to BFM, but had not received a reply. In particular, the opinion states that: "The interview shows a bias against the interviewee that goes beyond the freedom of investigative journalism. Journalists who make a serious accusation against a person must back it up with evidence and give the person concerned the right to reply." This had not been the case in the interview concerned. In particular, the CDJM thought the reporter's final comments, "The more we hear from you, the more we wonder if Piotr Pavlenski is only acting under your instructions," breached ethical standards concerning unsubstantiated accusations and the right to reply.

Meanwhile, the CDJM dismissed a complaint about the 20 February 2020 edition of the weekly magazine Paris Match, which contained a photo of Piotr Pavlenski's arrest. It felt that ethical standards had not been breached in this case. It also decided that ethical rules had been respected in the broadcast of reports about animal rights activists during the news programme *Journal 19/20* on France 3 Pays de la Loire on 5 February 2020, which had been the subject of several complaints.

The CDJM says it has received 63 referrals since the start of the year in relation to 31 articles or broadcasts. Twenty of these were declared inadmissible.

CDJM, Avis sur les saisines no 20-014 à 20-036, no 20-044, et no 20-007

https://cdjm.org/2020/05/19/le-cdjm-rend-ses-premiers-avis/

CDJM, opinions on referral nos. 20-014 to 20-036, 20-044 and 20-007

UNITED KINGDOM

[GB] Christian TV Network sanctioned by Ofcom for broadcasting “potentially harmful statements” about Coronavirus

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On 18 May 2020, the UK communications regulator Ofcom ruled that Loveworld Limited, which broadcasts the religious television service Loveworld, breached its Broadcasting Code after a news programme and a live sermon featured potentially harmful claims about the causes of and treatments for COVID-19.

The Ofcom investigation found that a report on *Loveworld News*, a programme featuring news from studios around the world, included a number of uncorroborated claims that the source of the risk to health was the effect of 5G Wi-Fi networks rather than the viral transmission of COVID-19. The report also contained several assertions that there was a “global cover-up” about the cause of the pandemic. Another report during the programme “repeatedly and unequivocally” presented the anti-malarial drug hydroxychloroquine as a “cure” for the virus without clearly recognising that this was a clinically unproven claim about the effectiveness of the drug for coronavirus treatment and without acknowledging the drug’s potentially serious side effects.

In relation to both reports, the regulator found that Loveworld Limited had not preserved “due accuracy” (in breach of Rule 5.1 of the Code) and had failed to adequately protect viewers from potential harm (in breach of Rule 2.1) by presenting content of this nature as unequivocal facts rather than views placed in an appropriate context. Ofcom underlined that it did not seek to curb the broadcaster’s ability to present programmes covering current affairs from a religious perspective, but it did not consider that the religious nature of the channel justified a departure from the established application of these rules.

In addition, a sermon broadcast on *Your Loveworld* was also found to have included “unchallenged and unevidenced” claims casting doubt on the necessity and effectiveness of the social distancing policies adopted by governments (including the United Kingdom) as well as assertions questioning the motives behind official health advice in relation to the coronavirus and 5G technology. In particular, Pastor Chris Oyakhilome (the founder and president of the megachurch Christian denomination known as Christ Embassy) preached that the lockdown measures, the roll-out of 5G and potential future vaccines were part of a plan to reach “the final union between man and machines” because “Satan wants to create a new man”. Ofcom considered that these statements risked “undermining viewers’ confidence in the motives of public authorities and leading them to disregard current and future advice (including on any future vaccine) intended to protect public health.” An exacerbating factor in this case was that these views

were set out - without challenge - by a person who was portrayed to viewers as a figure of knowledge and particular authority.

The regulator held that the sermon broadcast provided “a platform for uncontextualized views” that had the potential to cause significant harm to viewers (in breach of Rule 2.1) and that Loveworld Limited had not taken any measures to provide its audience with adequate protection from such material, for example, by challenging the conspiracy theory or including the views of others and making it clear that other explanations could exist.

Ofcom recognised the Licensee’s right to hold and broadcast controversial views which diverge from, or challenge, official authorities on public health information. However, the inclusion of unsubstantiated assertions in both programmes had not been sufficiently contextualised and risked undermining viewers’ trust in official public health advice, with potentially serious consequences for their own and others’ health. In light of the serious failings in these cases, Ofcom directed Loveworld Limited to broadcast summaries of its decisions and will consider imposing further sanctions.

Ofcom Broadcast and On Demand Bulletin, Loveworld Limited

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

[GB] Ofcom fines broadcaster for infringing broadcasting rules

David Goldberg
deeJgee Research/Consultancy

On 5 May 2020, Ofcom, the UK broadcasting regulator, announced its decision to fine a broadcast licensee, Club TV Limited, in respect of a programme published by its Peace TV Urdu service.

The offending programme was broadcast on 22 November 2017. It was an episode of the series *Kitaab-ut-Tawheed* about the Islamic punishment of magicians. Ofcom's breach decision was published on 22 July 2019. It found that the licensee had failed to provide adequate protection to members of the public from the inclusion of offensive and harmful material and had thus breached Rules 3.1, 3.2, 3.3 and 2.3 of the Ofcom Broadcasting Code.

Ofcom has imposed a fine of GBP 200 000 on Club TV Limited. The financial penalty will be payable to HM Paymaster General.

Sanction 128 (19) Club TV Limited, Ofcom.

https://www.ofcom.org.uk/__data/assets/pdf_file/0035/194984/sanction-decision-club-tv-limited.pdf

HUNGARY

[HU] Implementation of the AVMSD’s rules on video sharing platforms in Hungary

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The Hungarian Parliament implemented the AVMSD’s new rules on video-sharing platform services in May. The new rules were incorporated into the e-Commerce Act through Hungarian legislation, thus the rules were not embedded in media regulation, but in the act which implemented the e-Commerce Directive in 2001. In fact, a hybrid solution was created, since the definitions, such as the definition of a video-sharing service platform, were incorporated into the Hungarian Media Act. In the future, the legal framework surrounding video-sharing services is going to be determined by both the Hungarian media acts - Act CIV of 2010 (Smtv.) and Act CLXXXV of 2010 (Mttv.) - and the e-Commerce Act, however the latter will be more significant.

The definition of a video-sharing service, as determined by the Mttv., complies with the definition in the AVMSD. The rules in terms of jurisdiction were incorporated into the e-Commerce Act and these rules implemented the detailed provisions of the AVMSD. Hungarian law requires video-sharing service providers to be registered and it defines the required information which should be submitted by the services during the registration process. Other requirements regarding registration were not determined by law. The competent authority, the Office of the National Media and Infocommunication Authority (NMHH), is mandated to impose a fine of up to 10 million Hungarian forint (HUF), (approximately EUR 30 000), in the case of a violation of the rules in terms of registration.

The law obliges video-sharing platform providers to ensure the protection of interests, as described in 28b. (1) (a)-(c) of the AVMSD, by taking appropriate measures and providing technical solutions, and these have to be included in the service providers' terms and conditions. The most detailed rules from the abovementioned issues are the child protection provisions. Service providers are obliged to establish and operate age verification systems and parental control systems with respect to content which may impair the physical, mental or moral development of minors. The provision is defined in general terms, which gives service providers wide-ranging opportunities to make decisions on the measures to adopt. The Authority has the power to publish a recommendation on best practices in order to orientate the services. The act also obliges services to establish functions which provide appropriate information on content which may impair the physical, mental or moral development of minors. Another obligation imposed on services is to establish transparent and user-friendly mechanisms to allow users to report or flag content which may impair the physical, mental or

moral development of minors to the video-sharing platform provider concerned. Video-sharing platforms have to establish procedures for the handling and resolution of users' complaints. The legislation extended the scope of protected issues, as defined in 28b. 1 (a)-(c), by adding human dignity and criminal offences, in accordance with Hungarian law. Nevertheless, fewer rules were introduced concerning contents which contain hate speech, the violation of human dignity or criminal offence. Besides including these provisions in their terms and conditions, service providers have to introduce mechanisms that allow users to report or flag such content to the video-sharing platform provider. Video-sharing platform services are obliged to provide transparent information on procedures for the handling and resolution of users' complaints.

As for audiovisual commercial communication on the platforms, the general media law provisions of the Smtv. must be followed. These rules should be included in the service providers' terms and conditions, and services have to provide users who upload user-generated videos with the opportunity to declare whether such videos contain audiovisual commercial communications. Regarding this issue, platforms have to ensure a reporting system on injurious content and operate a transparent compliance process system. The law did not lay down further rules concerning the enforcement of the provisions of the media regulation, which means there are no special rules for a stricter enforcement of the provider's responsibility. Detailed rules were not defined for the media literacy measures and tools which platforms have to provide for users. Interestingly, the legislation did not mandate the Hungarian media authority, *Médiatanács* (Media Council), to enforce the new rules, but the Hivatal (Office) of the integrated regulatory authority, *Nemzeti Média és Hírközlési Hatóság* (National Media and Infocommunications Authority). The problem with this solution is that requirements which could ensure a regulatory body being functionally and effectively independent from the governmentare applied to the Media Council and not the Office. The Office is a traditional administrative body which does not have the appropriate guarantees for the level of independence required by the AVMSD. In the case of an infringement committed by a platform, the Office may use similar sanctions to those used by the Media Council in other cases, including imposing a fine of up to HUF 100 million (approximately EUR 300 000).

The AVMSD's provisions for forcing co-regulation are positioned in the framework of the co-regulation system of the Hungarian media regulation, which was installed in 2010. The law provides very detailed regulations on the framework of cooperation between the Office and the self-regulatory bodies or alternative dispute resolution forums of the video-sharing platforms. This solution seems to reflect the intent of the AVMSD, but many questions arise in the light of the fact that the efficiency of the existing co-regulation system in the media landscape has generated serious doubts over the last 10 years. In sum, the new Hungarian regulation on video-sharing platform services defines stricter rules than the AVMSD on a small scale and provides an open space for video-sharing services to create appropriate measures to comply with the rules. However, it widely authorises the Office to evaluate the legality of the measures taken by platforms. The law did not detail the necessary mechanisms to assess the

appropriateness of the platforms' measures.

2020. évi XXIV. törvény az elektronikus kereskedelmi szolgáltatások, valamint az információs társadalommal összefüggő szolgáltatások egyes kérdéseiről szóló 2001. évi CVIII. törvény módosításáról

http://njt.hu/cgi_bin/njt_doc.cgi?docid=219480.382963

Act XXIV of 2020 on the Amendement of the E-Commerce Act CVIII 2001.

ICELAND

[IS] The Icelandic Media Commission’s awareness campaign on disinformation

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Fjölmiðlanefnd (the Icelandic Media Commission) has started an awareness campaign in order to help people detect fake news and disinformation. The campaign is called *Stoppa, hugsa, athuga* (Stop, think, check), and is a collaboration between the Icelandic Media Commission, Embætti landlæknis (the Directorate of Health in Iceland) and Vísindavefurinn (the University of Iceland’s Web of Science), with support from Facebook.

The focus of the campaign is to increase people’s awareness of and ability to detect fake news. The aim is to enhance critical thinking and media literacy and to highlight the importance of professional media and journalism. In the campaign, attention is drawn to the fact that false and misleading information is often intentionally disseminated on social media. Therefore, it is important to be able to spot the difference between fake news and real news. The campaign focuses specifically on misstatements and misleading information on social media relating to the coronavirus pandemic (COVID-19).

The awareness campaign is based on a Norwegian campaign by Medietilsynet (the Norwegian Media Authority), which was translated and adapted for Icelandic audiences. Similar campaigns have been conducted or are running in other states, for example, *STOP, THINK, CHECK* in Ireland and *SHARE* in the United Kingdom.

Currently, fake news and disinformation on the coronavirus flows on the Internet. This wrong and misleading information masquerades as real news, and it can affect people’s opinions, ideas and even public health. The results from newly conducted research, for example, from the Norwegian Media Authority, indicate that four out of ten individuals have difficulty detecting fake news from real information, and individuals who are 60 years of age or older find it more difficult than other age groups.

The message of the campaign is simple: Stop, think for a moment and check more sources when you look for information. The awareness campaign is based on the various questions about COVID-19 which the University of Iceland’s Web of Science has answered on their website. One element of the campaign is a video highlighting the catchphrase of the campaign (*Stop, think, check*) and the importance of critical thinking. People can also do a quiz to learn more about the difference between disinformation and news from professional media. There is also extensive information on the matter available on the Icelandic Media Commission's website.

The awareness campaign is a temporary initiative and is only being conducted on Facebook and Instagram, with the aim of reaching every Icelandic user of both these social platforms. Users are encouraged to do the quiz and read more about the matter on the Icelandic Media Commission's website. Facebook is supporting the awareness campaign by posting all material and ads free of charge, in line with the support granted to other states' awareness campaigns in Europe.

Árvekniátakið Stoppa, hugsa, athuga á vefsíðu fjölmiðlanefndar

https://fjolmidlanefnd.is/stoppa-hugsa-athuga/

The awareness campaign Stop, think, check, Icelandic Media Commission

ITALY

[IT] AGCOM landmark resolution on press reviews and copyright infringements

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Portolano Cavallo

By Resolution No. 169/20/CONS adopted on 5 May 2020, the Italian Communications Authority (AGCOM) marked a landmark in the enforcement of copyright on digital works. AGCOM's decision specifically concerns the legitimacy of press reviews. At the end of proceedings commenced upon a complaint filed by the leading Italian newspaper *Il Sole 24 Ore*, AGCOM ordered the website operated by *L'Eco della Stampa* to take down the infringing content available therein, pursuant to the regulation on copyright enforcement (Resolution No. 680/13/CONS).

In the context of the provision of press reviews, the website, in a special section accessible to users upon logging in using their username and password, hosted reproductions of editorial works, including articles posted by *Il Sole 24 Ore*. The service provider, *L'Eco della Stampa*, claimed that the pieces of content and the news and information included therein were available under a copyright exception and did not constitute an infringement.

AGCOM noted that, even if there is no regulation governing press reviews, newspaper articles do fall within the literary works protected under the Italian Copyright Law; accordingly, publishers have an exclusive right of economic exploitation over the same in the forms of reproduction and communication to the public. Pursuant to Article 65 of the Italian Copyright Law, in fact, articles of economic, political and religious content published by newspapers and magazines or disseminated to the public can be freely reproduced in other newspapers or magazines only if the rightsholder has not expressly reserved the use or the reproduction of the same. In any case, the said acts of reproduction and communication to the public are allowed provided that they indicate the source, the date of publication and the name of the author, where available. Accordingly, in the view of AGCOM, and also in accordance with Italian case law, press reviews are prohibited when made available despite the existence of a reservation made by the rightsholder.

The press reviews made available by *L'Eco della Stampa* were thus found to violate both Article 13 and Article 16 of the Italian Copyright Law, governing, respectively, the exclusive rights of reproduction and communication to the public.

In the view of AGCOM, the dissemination of a press review such as that operated by *L'Eco della Stampa* constitutes an act of communication to the public. Although

L'Eco della Stampa provides its service to a limited number of clients which does not correspond to the general public, the recipients of such a service could easily amount to an indefinite number of individuals and companies. According to AGCOM, the fact that *L'Eco della Stampa* provides such a service under terms and conditions which require an exclusively personal use of the press reviews does not, in fact, suffice to prevent the relevant copyright infringements: since the technical measures implemented by the website did not ensure that users could download only one copy of the works during the login phase and that the same could no longer be used nor disseminated after the expiration of the relevant session, the number of potential recipients of the same work is significant. Furthermore, AGCOM noted that the relevant audiences may overlap, as the same consumers interested in purchasing the newspaper could receive the press review in their capacity as subscribers of the service operated by *L'Eco della Stampa*.

In order to require the removal of the infringing content, AGCOM resorted to the legal qualification of *L'Eco della Stampa* as an active Internet service provider according to the latest developments in Italian case law. On this ground, it ordered *L'Eco della Stampa*, in its capacity as an information society service provider, to remove the digital works of an editorial nature corresponding to the articles published by *Il Sole 24 Ore* featuring the reservation of rights from the pool of content available in its press reviews.

Delibera n. 169/20/CONS - Provvedimento ai sensi degli articoli 8, comma 3, e 9, comma 1, lett. D), del regolamento in materia di tutela del diritto d'autore sulle reti di comunicazione elettronica e procedure attuative ai sensi del decreto legislativo 9 aprile 2003, n. 70, di cui alla delibera n. 680/13/cons (proc. N. 1179/dda/bt - https://new.ecostampa.net)

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=18609017&_101_INSTANCE_FnOw5lVOIXoE_type=document

Resolution No 169/20/CONS - Measure pursuant to Articles 8(3) and 9(1)(D) of the regulation on the protection of copyright on electronic communications networks and implementation procedures pursuant to Legislative Decree No 70 of 9 April 2003, referred to in Resolution No 680/13/cons (proc. No 1179/dda/bt - https://new.ecostampa.net)

NETHERLANDS

[NL] COVID-19 Protocol for film and audiovisual sector

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On 18 May 2020, the Dutch Audiovisual Producers Alliance (*Nederlandse Audiovisuele Producenten Alliantie,* NAPA) and Dutch Content Producers (Nederlandse Content Producenten*,* NCP*)*, which are associations for independent professional producers, presented a Protocol for different audiovisual productions during the COVID-19 crisis. The Netherlands Film Fund (Nederlands Filmfonds), the national agency responsible for supporting film production and film-related activities in the Netherlands, will ensure the correct use of the Protocol. On 29 May 2020, the second version of the Protocol and corresponding toolkit were published.

In cooperation with various trade and professional associations, a Protocol and a concrete toolkit have been formulated for film and audiovisual media. The Protocol contains rules of conduct and guidelines relating to hygiene as well as precautionary and protective measures. By adopting the Protocol, productions can start in a safe and responsible manner.

The Protocol is in line with the (changing) guidelines provided by the Dutch Government and the National Institute for Public Health and Environment (Rijksinstituut voor Volksgezondheid en Milieu*,* RIVM*),* which have been translated into general measures to be taken in various risk situations, subdivided into low, medium and high risk. Part of the Protocol is an indicative risk analysis table in which the guidelines are specified for the various phases in an audiovisual production per discipline/department and associated functions. For example, in case of necessary site visits, the number of participants shall be kept to a minimum. It is also recommended to work as much as possible in permanent teams. A list of frequently asked questions has also been added to the Protocol.

The Protocol provides guidelines for starting and resuming productions – indoors or outdoors, at home or in the office. In addition, the Dutch Academy for Film (DAFF) has developed a toolkit containing practical advice relevant to the workplace. These documents will continue to be updated on the basis of insight gained. Still, it remains necessary to consider each individual production, and to examine whether and under what conditions it may be justified to run productions in the current situation.

Nederlands Filmfonds, COVID-19: Corona-protocol Film en AV-Sector vandaag presenteerd, 18 mei 2020

https://www.filmfonds.nl/page/8735/corona-protocol-film-en-av-sector-vandaag-gepresenteerd

Netherlands Film Fund, COVID-19 outbreak: Corona-protocol Film and AV-sector represent today, 18 May 2020

Corona-protocol Film en AV-sector vandaag gepresenteerd, Filmfonds

https://www.filmfonds.nl/page/8735/corona-protocol-film-en-av-sector-vandaag-gepresenteerd

Corona Protocol Film and AV sector presented today, Filmfonds

Nederlandse Audiovisueal Producenten Alliantie en Nederlandse Content Producenten, Toolkit COVID-19 audiovisual sector, 29 mei 2020

https://www.producentenalliantie.nl/siteAssets/images/0/TOOLKIT_COVID_19_audiovisuele_sector_versie_2.1.pdf

Dutch Audiovisual producers and Alliance Dutch Content Produceres, Toolkit COVID-19 audiovisual sector, version 2.0, 29 May 2020

https://www.producentenalliantie.nl/siteAssets/images/0/TOOLKIT_COVID_19_audiovisuele_sector_versie_2.0_ENGELS.pdf

Nederlandse audiovisueal Producenten Alliantie en Nederlandse Content Producenten, COVID-19 Protocol Audiovisuele sector.

https://www.producentenalliantie.nl/siteAssets/images/0/2._20200529_COVID_19_Protocol_AV_sector_v2.0_PROTOCOL_NL_def.pdf

Dutch Audiovisual producers and Alliance Dutch Content Produceres, COVID-19 Protocol audiovisual sector, version 2.0.

https://www.producentenalliantie.nl/siteAssets/images/0/2._20200529_COVID_19_Protocol_AV_sector_v2.0_PROTOCOL_ENG_def.pdf

[NL] Court rules ISP must provide user data to foreign rightsholders

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On 30 April 2020, the District Court of The Hague (Rechtbank Den Haag*)* ruled that a US television provider is entitled to the names and addresses of Internet subscribers or users using an IP address from which it was presumed that an unlawful exchange of files containing protected works had taken place. The judgment was made against WorldStream, which is a Dutch-based Internet hosting provider.

The case revolved around Dish Network, which is a provider of paid television in the United States, and Internet hosting provider WorldStream. Dish Network has concluded licence agreements with the owners of several television channels and has exclusive rights to several channels and broadcasted programmes (the "protected content"). Pursuant to applicable US copyright law, Dish Network is also the copyright owner of the protected content, at least for the United States. Since access to the protected content via the television subscription is achieved on an authentication server with an IP address hosted by WorldStream, it was claimed that the copyrights of Dish Network were being infringed.

The court ruled that on a balance of interests, WorldStream is required to provide the data as requested by Dish Network. According to the court, WorldStream has a legal obligation to provide personal data to Dish Network if (i) there is a legitimate interest, (ii) the processing is necessary and (iii) the interests of Dish Network should prevail over the interests of the WorldStream customers concerned, referring to an earlier judgment of the Court of Appeal of Arnhem-Leeuwarden in *Dutch Film Works v. Ziggo* (see IRIS 2020-1/18). Dish Network's rights prevailed, since Dish Network had sufficiently demonstrated that the WorldStream customers behind the specific IP address were infringing Dish Network copyrights.

Notably, Dish Network is a foreign organisation within the meaning of Chapter V of the General Data Protection Regulation (GDPR). This Chapter provides that transfers of personal data to third countries or foreign organisations (outside the European Union) are in principle only allowed under the conditions laid down in Articles 44 to 47 GDPR. The conditions of Chapter V GDPR are not met, but according to the court, Dish Network can invoke the exception under Article 49(1)(e) GDPR. Where the transfer is necessary for the establishment, exercise or defence of legal claims, it may also take place without an adequacy decision or appropriate safeguards. Dish Network needs the data for further legal actions. Even though there is no close link between the data transmission and a specific procedure relating to the situation in question, as required by the European Data Protection Board Guidelines 2/2018, in the specific circumstances of the present case, this provision is applicable according to the court. Additionally, it is of

decisive importance that (i) the data transfer is necessary to be able to initiate a (future) case against the infringers and (ii) Dish Network has little to no other means at its disposal to bring the infringers to justice.

The court ordered WorldStream to provide Dish Network with the requested information about the customer(s) and to pay the costs of the proceedings.

Rechtbank Den Haag, 30 april 2020, ECLI:NL:RBDHA:2020:3980 (District Court The Hague, 30 April 2020, ECLI:NL:RBDHA:2020:3980)

https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBDHA:2020:3980

District Court The Hague, 30 April 2020, ECLI:NL:RBDHA:2020:3980

European Data Protection Board, Guidelines 2/2018 on derogations of Article 49 under Regulation 2016/679, 25 May 2018

https://edpb.europa.eu/our-work-tools/our-documents/smjernice/guidelines-22018-derogations-article-49-under-regulation_en

NORWAY

[NO] Norwegian Media Authority is given competence to take action against advertising for gambling without a licence in Norway

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Norwegian Media Authority

In May 2020, the *kringkastingsloven* (Broadcasting Act) was amended in order to give *Medietilsynet* (Norwegian Media Authority, NMA) competence to take measures against illegal advertising for gambling. The amendment enters into force on 1 January 2021.

Gambling and lotteries are strictly regulated in Norway. There is an absolute ban on advertising, with the exception of a few companies. Lotteritilsynet (Norwegian Gaming Authority) is responsible for supervising the ban. However, there has been a massive, and until last year, increasing volume of advertising for gambling on TV channels under foreign jurisdiction operated by companies without a licence in Norway. The advertisements are directed towards a Norwegian audience using the Norwegian language, Norwegian celebrities and other Norwegian references.

The new sections 4-7 of the Broadcasting Act give the NMA competence to take measures to prevent or hinder access to commercial communications for gambling schemes and lotteries on TV and on-demand audiovisual media services. The order can be given to Norwegian network providers distributing audiovisual media services. The order cannot prevent or hinder access to an audiovisual media service as such, just the actual unlawful commercial communication. The provision applies to all providers of networks, regardless of the technology used to distribute the audiovisual media services, including providers of DTT networks, satellite, cable, fibre, broadband, etc.

The decision by the NMA shall be based on an assessment carried out by the Norwegian Gaming Authority on whether the commercial communication is in violation of legislation regulating gambling in Norway, namely, the *pengespilloven* (Gambling Scheme Act), section 2; the *lotteriloven* (Lottery Act), section 11; or regulations issued pursuant to the *totalisatorloven* (Totalizator Act). The starting point should be that orders are given in cases where there is no doubt that a commercial communication for gambling or lotteries has been disseminated by a company that is not licensed in Norway. The NMA will then have to carry out a concrete assessment, including whether such an order would be disproportionate.

Individual decisions taken by the NMA can be appealed to Medieklagenemnda (Media Appeals Board) or taken to the courts.

The aim of the existing and the new provisions is to reduce the negative consequences of gambling and to protect people with gambling problems.

Lov om endringer i kringkastingsloven mv. (tiltak mot markedsføring av pengespill som ikke har tillatelse i Norge).

https://lovdata.no/dokument/NL/lov/2020-05-20-43?q=kringkasting

Act on amendments to the Broadcasting Act, etc. (Measures against marketing gambling not authorized in Norway).

Lov om pengespill m.v. (pengespilloven)

https://lovdata.no/dokument/NL/lov/1992-08-28-103?q=pengespill

Gaming Scheme Act

https://lottstift.no/wp-content/uploads/2015/11/Gaming-schemes-act.pdf

PORTUGAL

[PT] State takes exceptional measures for media and culture during COVID-19 crisis

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On 19 May 2020, the Council of Ministers of Portugal approved a Resolution (*Resolução do Conselho de Ministros nº 38-B/2020*) establishing an exceptional and temporary measure involving the acquisition of advertising space for the diffusion of institutional actions, within the scope of the COVID-19 pandemic.

According to the Council of Ministers, the current pandemic has significantly increased the state's need for institutional advertising, namely in respect of hygiene and containment measures - that citizens are expected to follow. The need for institutional communication, according to the authorities, will continue during 2020, not only to promote pandemic prevention measures but also to address social issues and to boost the restart of economic and cultural activities.

The Council of Ministers highlighted the irreplaceable role of the media in society in providing information, training and entertaining citizens and scrutinising public authorities. Based on this rationale, the state has decided to allocate EUR 15 million in advertising to legacy media through the pre-acquisition of space and/or time for the dissemination of institutional messages (75% of which will go to national media and 25% to regional and local media).

The acquisition processes concerning the EUR 15 million earmarked for institutional advertising will be managed by different ministries and state structures and agencies: the General Secretariat of the Presidency of the Council of Ministers (EUR 500 000); the Agency for Integrated Management of Rural Fires (EUR 500 000); the national tourism agency *Turismo de Portugal* (EUR 1.5 million); the Ministry of the Interior (EUR 1.5 million); the Ministry of Education and Science (EUR 500 000); the Ministry of Labour, Solidarity and Social Security (EUR 1.5 million); the Directorate-General of Health (EUR 7 million); the Ministry of Environment and Energy Transition (EUR 1.5 million); and the Planning, Policy and General Administration Office (EUR 500 000).

The Resolution of the Council of Ministers of Portugal has a list (Annex 2) of media groups and companies which will benefit from the pre-payment of institutional advertising. Groups such as Media Capital (integrating the national television Channel TVI) and Impresa (integrating the national television Channel SIC) are expected to receive more than EUR 3 million each. Public media are not being considered for exceptional support measures during the pandemic crisis. The absence of open and published criteria for the allocation of state resources to private media has been discussed in the public sphere.

In addition to the exceptional support afforded to media groups, on 22 May 2020, Prime Minster António Costa publicly announced the creation of a special fund of EUR 30 million for cultural programming at municipality level.

The Prime Minister has stated that this financial fund will have an impact on the revival of the cultural sector, "one of the hardest hit during this crisis". António Costa recalled that festivals are not allowed during the summer, but considered that "municipalities can safely organise indoor and outdoor shows."

Municípios com 30 milhões para programação cultural que atraia turistas portugueses

https://www.portugal.gov.pt/pt/gc22/comunicacao/noticia?i=municipios-com-30-milhoes-para-programacao-cultural-que-atraia-turistas-portugueses

30 million for municipalities' cultural programming that attracts Portuguese tourists.

Resolução do Conselho de Ministros n.º 38-B/2020.

https://dre.pt/web/guest/pesquisa/-/search/134021996/details/maximized

Resolution of the Council of Ministers no. 38-B / 2020.

ROMANIA

[RO] Money for COVID-19 information campaigns

Eugen Cojocariu
Radio Romania International

On 27 May 2020, the Senate (upper Chamber of the Romanian Parliament) approved Government Emergency Ordinance (GEO) No. 63 of 7 May 2020 for organising and conducting public information campaigns in the context of the epidemiological situation caused by the spread of COVID-19 (see also IRIS 2020-4/6).

Through GEO No. 63/2020, the government, for a fee, and in the conditions of the current COVID-19 epidemiological situation, carries out information campaigns on all types of registered, licensed, professional media channels: TV, radio, print, online and outdoor advertising. Article 6 shows that the radio and TV public services are not included in the scheme and that they will broadcast the information campaigns for free.

According to Article 1 (1), the campaign shall run after the cessation of the state of emergency and the state of alert decreed in Romania for a period of 120 days from the date of concluding the service contracts, but not later than October 31, 2020. Specifically, there are public information campaigns on measures to prevent and limit the spread of the new coronavirus, as well as public information campaigns on how to resume economic and social activities after the end of the state of emergency.

According to paragraph (2), the public information campaigns shall be conducted by the government and managed by the General Secretariat of the Government and the Authority for the Digitization of Romania. Article 1 (3) provides that the public information campaigns shall not be included in the legal duration allocated to commercial advertising. Article 1 (4) stipulates that the total budget allocated to the aforementioned campaigns shall not exceed RON 200 million (approximately EUR 41.2 million), including VAT. According to paragraph (5), the duration of the campaigns may be extended, depending on public information needs in the context of the epidemiological situation, and within the total budget allocated.

According to Article 2 (2), media providers owned and financed by Romanian or foreign public authorities or religious institutions shall be excluded from receiving payment for messages broadcast during the campaign. Article 3 provides that the budget shall be distributed as follows: a) 55% for television programme services (8% for TV programmes with local and regional audiovisual licences and 47% for nationally licensed services); b) 23% for online media providers (at least 5% for online media providers with local content and 18% for online media providers with national content); c) 12% for radio programme services (8% for radio

broadcasters with a nationally measured audience and 4% for local or regional radio broadcasters); d) 5% for printed newspapers, magazines and periodicals with weekly, bimonthly or monthly publication, with up to 8 issues per year; e) 4% for outdoor advertising, by placing advertising media in localities; f) 1% for the creation and production of materials that will be disseminated during public information campaigns.

Article 5 provides that the messages in the campaign will have an exclusively informative, non-commercial character, and that they will be placed within appropriate content, as follows: a) broadcasting: in news bulletins; news programmes; economic and financial information programmes; programmes devoted to health/medicine, personal care, education, family and children, science, technology and sports; as well as in other programmes which are broadcast between 6 a.m. and midnight; b) newspapers, magazines and periodicals: national or local generalist dailies; popular dailies; economic-financial publications; business publications; and health/medicine, science, technology, culture and sports publications or supplements of such publications; c) web portals with content from the following categories: news and analysis; national or local, general news; financial economics; health and personal care; education; family and children; science; technology; and sports; d) in localities - the placement of advertising means will be done in areas with high visibility, while avoiding clustering in the same area.

Article 7 (8) establishes that the General Secretariat of the Government shall pay for the services in monthly installments, with advance payment for the first month of the campaign. If, following the monitoring by the Romanian Digitization Agency, there are differences compared to the dissemination conditions initially assumed by the campaign participants, the next monthly installment shall be adjusted to cover the difference in the level of services actually provided and measured.

Some practical aspects of GEO No. 63/2020 have been corrected through the new Government Emergency Ordinance No. 86 of 27 May 2020.The Romanian Government said it had registered about 1 000 requests from media companies to participate in these information campaigns.

Ordonanţă de Urgenţă nr. 63 din 7 mai 2020 pentru organizarea și desfășurarea unor campanii de informare publică în contextul situației epidemiologice determinate de răspândirea COVID-19

http://legislatie.just.ro/Public/DetaliiDocument/225485

Emergency Ordinance no. 63 of May 7, 2020 for the organization and conduct of public information campaigns in the context of the epidemiological situation caused by the spread of COVID-19

Ordonanţa de Urgenţă nr. 86 din 27 mai 2020 privind modificarea și completarea Ordonanței de urgență a Guvernului nr. 63/2020 pentru

organizarea și desfășurarea unor campanii de informare publică în contextul situației epidemiologice determinate de răspândirea COVID-19

http://legislatie.just.ro/Public/DetaliiDocumentAfis/226137

Emergency Ordinance no. 86 of 27 May 2020 on amending and supplementing Government Emergency Ordinance no. 63/2020 for the organization and conduct of public information campaigns in the context of the epidemiological situation caused by the spread of COVID-19

[RO] Rules to resume film production and screening

Eugen Cojocariu
Radio Romania International

On 29 May 2020, the joint Order of the Minister of Culture and Minister of Health on the measures to be taken to prevent contamination with the new coronavirus and to conduct safe sanitary activities in museums and art galleries, libraries, bookstores, film and audiovisual production, outdoor activities and drive-ins (see i *nter alia* IRIS 2020-5/30) was published in the Official Gazette of Romania No. 460.

The measures are being applied during the state of alert, in the conditions of the gradual lifting of the restrictions, in connection with the need to ensure the development in conditions of sanitary safety of the activity of cultural institutions and economic operators in the cultural field.

Film production activities are considered as having a medium to high potential for the spread of the SARS-CoV-2 virus infection. The special precautions taken include: avoiding the prolonged presence of actors belonging to at-risk groups when filming (for example, aged over 65 and/or suffering from associated chronic diseases); make-up and hairstyling will be performed in compliance with universal precautions: maintaining physical distance, limiting close contact, sanitising hands and disinfecting surfaces before and after the make-up/hairdressing session; separate make-up and locker rooms for actors and extras.

Foreign citizens arriving in Romania who are members of film crews will be granted a special derogation from the 14-day home isolation/quarantine measure. They must test negative upon arrival in the country and a second test will be performed in Romania within 2 to 5 days of their arrival, or immediately, if they show symptoms of the respiratory disease.

With regard to cultural events/actions organised in the open air, including cinematographic projections, the organisation of the space must be done in such a way as to maintain a physical distance of two metres between people, with no more than 500 participants; if the location is organised using mobile chairs, the organiser will position the chairs two metres apart; if the location has steps, the organiser will mark the available places on them, with a space of two metres between them; if the location does not have chairs or steps and is an open area (grass, earth, slag, etc.), and the public comes with their own blankets or pillows, the organiser will mark the ground so as to create spaces that respect social distancing for each person, as well as larger spaces for families and/or groups of up to three people. Only persons with a maximum temperature of 37.3 °C will be allowed to attend the event.

The measures are similar for drive-in events. Access is exclusively by car; the parking lot will be arranged in such a way that there is always a distance of two metres between two vehicules, and during the drive-in event, spectators should

not leave their cars, unless they want to go to the toilet.

The National Authority for Management and Regulation in Communications (ANCOM) decided to issue licences for low-power frequency usage in the FM band, which will help ensure the soundtrack of drive-in events (cinema and live concerts), so that the audience can fully enjoy the show safely from their cars using the car stereo. In order to maintain the strict delimitation of the low-power frequency from the audiovisual media services, respectively from the broadcasting programme services, the National Audiovisual Council offered ANCOM the following minimum requirements: low-power frequency usage shall be granted only during the event, and for not more than 30 days; it is intended to cover the area immediately adjacent to the venue of the event (for example, a radiant power of not more than 50 MW); a maximum of two such licences per year shall be granted to the same applicant so as not to harm the interests of local broadcasters; the event should not be organised or funded by political parties or local public authorities or by NGOs for purposes other than those for which they were established; the frequency usage should not be promoted as radio services, nor should it contain audiovisual commercial communications, other than for the promotion of the event.

On the other hand, on 27 May 2020, the Romanian Prime Minister Ludovic Orban spoke with representatives of the film industry severely affected by the COVID-19 pandemic about measures to support the film sector in the medium and long term, including rethinking the Ministry of Economy's state aid scheme, investing in local productions, and identifying tax concessions for cinematographic cultural products. On 11 May, more than 230 film production and services companies, 35 Romanian directors and almost 20 cinematography associations requested the support of the President of Romania, Klaus Iohannis, and of the Prime Minister, Ludovic Orban, regarding the government's implementation of the proposals for relaunching activity in the field of cinematography and the establishment of a so-called "Cultural Emergency".

În atenția organizatorilor de evenimente drive-in, CNA

http://www.cna.ro/In-aten-ia-organizatorilor-de.html

For the attention of drive-in event organizers, CNA

Premierul Orban - întânire cu reprezentanţii industriei cinematografice, în perspectiva reluării activităţii; discuţii privind măsuri de sprijin, AGERPRES

https://www.agerpres.ro/politica/2020/05/27/premierul-orban-intanire-cu-reprezentantii-industriei-cinematografice-in-perspectiva-reluarii-activitatii-discutii-privind-masuri-de-sprijin--513340

Prime Minister Orban - meeting with the representatives of the film industry, in preparation of resuming activities; discussions on support measures, AGERPRES

Cineaştii îi cer preşedintelui şi premierului instituirea Stării de Urgenţă Culturală

https://www.agerpres.ro/cultura/2020/05/13/cineastii-ii-cer-presedintelui-si-premierului-instituirea-starii-de-urgenta-culturala--504453

Filmmakers ask the president and the prime minister to establish the State of Cultural Emergency

Ordinul comun privind măsurile care trebuie luate pentru prevenirea contaminării cu noul coronavirus SARS-CoV-2 și pentru asigurarea desfășurării activităților în condiții de siguranță sanitară în domeniul culturii – Anexă

http://www.cultura.ro/conditii-de-functionare-pe-timpul-starii-de-alerta-pentru-muzee-si-galerii-de-arta-biblioteci-0

Joint Order on measures to be taken to prevent contamination with the new SARS-CoV-2 coronavirus and to ensure safe health activities in the field of culture - Annex

ANCOM licențiază temporar transmisiile pentru evenimente de tip drive-in

https://www.ancom.ro/ancom-issues-temporary-transmission-licences-for-drive-in-events_6267

ANCOM issues temporary transmission licences for drive-in events

https://www.ancom.ro/en/ancom-issues-temporary-transmission-licences-for-drive-in-events_6267

RUSSIAN FEDERATION

[RU] State Duma adopts draft law on the blocking of infringing content in mobile apps

Ekaterina Semenova
Confederation of Rightholders societies of Europe and Asia

On 27 May 2020, the State Duma adopted amendments on blocking mobile apps that violate copyright and related rights.

The bill was introduced in the State Duma in 2018 by a group of deputies. According to the bill, Roskomnadzor (Federal Service for Supervision of Communications, Information Technology and Mass Media) shall determine the owner of the information resource where the infringing app is located within three working days after receiving a corresponding request from the rightsholder.

Roscomnadzor shall then submit an electronic notification of copyright infringement to the owner of the information resource where the app is hosted, requiring them to take measures to restrict access to the information.

The owner of the information resource has one working day from the moment of receipt of the notification from Roskomnadzor to inform the owner of the software application and to notify him or her of the need to immediately restrict access to objects of copyright or related rights.

According to the draft law, the app owner must restrict access to objects of copyright and related rights within one working day after receiving a notification from the owner of the information resource. If the user fails to do this, the owner of the information resource hosting the software application must restrict access to the application in question. If the owner of the information resource has not restricted access to the application, information is sent to the communication operators to take measures to restrict access to the application.

The law is expected to come into force on 1 October 2020.

Госдума одобрила запрет приложений с пиратским контентом

https://ria.ru/20200527/1572067064.html

The State Duma approved the prohibition of applications with pirated content

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