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EDITORIAL

According to Article 2 of the Audiovisual Media Services Directive, as amended in 2018, "Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 19 September 2020." Now that this deadline has just passed, it is evident that not all EU member states have met it. As you can see from the table that the European Audiovisual Observatory has published on its website, most countries are still working on the transposition of the new AVMSD. Certainly, the COVID-19 crisis has delayed the work of many legislative bodies, however it can be expected that the transposition of the amended Directive into the national legislative frameworks of the remaining member states will continue to take place in the coming months. Needless to say, we will keep you informed of further developments on these electronic pages.

One of the most salient aspects of the amended Directive is certainly the introduction of new rules concerning video-sharing platforms (VSPs). In order to help provide some clarity on this issue, the European Audiovisual Observatory is organising an online Focus Session on the topic of "Regulation and Responsibility of Video-Sharing Platforms". This online event, which is part of the digital conference series "Pluralism and Responsibility. Media in the Digital Society!" organised by the German Presidency of the European Union, will take place on 24 September 2020 from 11.00 a.m. to 12.30 p.m. You will find more information on this event and ways to connect to it here.

Other than that, the present newsletter provides, as usual, an interesting read!

Stay safe and enjoy your read!

Maja Cappello, editor

European Audiovisual Observatory

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WTO: Panel Report on sports piracy in Saudi Arabia

Francisco Javier Cabrera Blázquez
European Audiovisual Observatory

On 16 June 2020, a World Trade Organization (WTO) panel recommended that Saudi Arabia bring its measures into conformity with its obligations under the TRIPS Agreement (Trade-Related Aspects of Intellectual Property Rights) concerning the simulcasting of Qatar-based beIN sports channels by beoutQ, a Saudi Arabian pay-TV broadcaster.

According to the Panel Report, in August 2017, beoutQ began the unauthorised distribution and streaming of media content that was created by or licensed to beIN, replacing beIN's logo with that of beoutQ, providing access to 10 beIN sports channels (both live and pre-recorded by beoutQ) and creating unauthorised reproductions of those broadcasts for later replay as reruns; it further expanded to the retail sale of beoutQ-branded set-top boxes (STBs) throughout Saudi Arabia and other countries, which received satellite broadcasts of pirated content and provided access to Internet Protocol Television (IPTV) applications offering thousands of pirated movies, TV shows and TV channels around the globe. In addition to generating revenue through the sales of STBs and subscriptions, beoutQ allegedly sold advertising slots on its ten pirated channels and promoted its pirated streams on a variety of social media platforms, including Facebook, Instagram and Twitter. On top of that, beoutQ expanded to cover the most popular movies and television programming in the world. In addition to illegally providing access to beIN channels 1-10, the beoutQ STBs come pre-loaded with IPTV applications and portals that lead to other pirated content.

On 1 October 2018, Qatar requested consultations with Saudi Arabia concerning Saudi Arabia's alleged failure to provide adequate protection for intellectual property rights held or applied for by entities based in Qatar in respect of Articles 3.1, 4, 9, 14.3, 16.1, 41.1, 42 and 61 of the TRIPS Agreement.

In its report, the WTO panel found that Saudi Arabia had taken measures that, directly or indirectly, had the result of preventing beIN from obtaining Saudi legal counsel to enforce its IP rights through civil enforcement procedures before Saudi courts and tribunals. These measures were inconsistent with Article 42 and Article 41.1 of the TRIPS Agreement. Furthermore, the panel found that Saudi Arabia had not provided for criminal procedures and penalties to be applied to beoutQ despite the evidence establishing prima facie that beoutQ was operated by individuals or entities under the jurisdiction of Saudi Arabia, acting inconsistently with Article 61 of the TRIPS Agreement.

The Panel Report is currently under appeal.

Saudi Arabia - measures concerning the protection of intellectual property rights - report of the panel, WT/DS567/R, 16 June 2020

https://www.wto.org/english/tratop_e/dispu_e/567r_e.pdf

COUNCIL OF EUROPE

ICELAND

ECtHR: *Carl Jóhann Lilliendahl v. Iceland*

Dirk Voorhoof
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In a highly topical decision on hate speech, the European Court of Human Rights (ECtHR) found that the right to freedom of expression and information as guaranteed by Article 10 of the European Convention on Human Rights (ECHR) can be limited when it is necessary to protect the right of homosexual persons to enjoy human rights to exactly the same extent as others, irrespective of their sexual orientation (see also *Beizaras and Levickas v. Lithuania*, IRIS 2020-3/21). It found that a criminal conviction in Iceland for hate speech against homosexuals, expressed via the Internet, had not violated Article 10 ECHR.

In reaction to an online news article about LGBT-education and counselling in elementary and secondary schools, the applicant in this case, Carl Jóhann Lilliendahl, expressed a series of negative statements about homosexuals and homosexuality, referring to "sexual deviation" and copulation by animals. He qualified the plan of introducing education and counselling on homosexuality in schools as "disgusting". Lilliendahl was prosecuted for publicly threatening, mocking, defaming and denigrating a group of persons on the basis of their sexual orientation and gender identity, in violation of Article 233 (a) of the General Penal Code. After first having been acquitted by the District Court of Reykjavík, Lilliendahl was convicted by the Supreme Court of Iceland. The Supreme Court reasoned that the limitation established by Article 233 (a) was clearly necessary in order to safeguard the rights of social groups that had historically been subjected to discrimination. Furthermore, the protection afforded to such groups by Article 233 (a) was compatible with the national democratic tradition, reflected in the Icelandic Constitution, of not discriminating against persons based on their personal characteristics or elements of their personal lives, and it was in line with international legal instruments and declarations to protect such groups against discrimination by way of penalisation. According to the Supreme Court, Lilliendahl's public statements constituted the "prejudicial slander and disparagement" of homosexuals. Lilliendahl was sentenced to a fine of ISK 100 000 (EUR 800), having also taken into consideration his age and clean criminal record.

Lilliendahl complained under Article 10 ECHR that his conviction had violated his right to freedom of expression. Furthermore, he complained under the non-discrimination provision of Article 14 ECHR in conjunction with Article 10 ECHR that he did not enjoy freedom of expression to the same extent as persons with other opinions. At the outset, the ECtHR was called upon to examine whether the

so-called abuse clause of Article 17 ECHR was applicable. This article provides that “[n]othing in [the] Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention.” If applicable, the effect of Article 17 would be to negate the exercise of the Convention right that Lilliendahl sought to vindicate in the proceedings before the ECtHR. As the Grand Chamber of the ECtHR held in *Perinçek v. Switzerland* (IRIS 2016-1/1), Article 17 is only applicable on an exceptional basis and in extreme cases. In cases concerning Article 10 of the Convention, it should only be resorted to "if it is immediately clear that the impugned statements sought to deflect this Article from its real purpose by employing the right to freedom of expression for ends clearly contrary to the values of the Convention." The ECtHR found the statements at issue highly prejudicial, but considered that it was not immediately clear that they aimed at inciting violence and hatred or destroying the rights and freedoms protected by the ECHR. Therefore, Lilliendahl was not barred from invoking his right to freedom of expression in this instance. What remained to be decided was whether his conviction complied with Article 10 ECHR, and in particular, whether it could be justified as being necessary in a democratic society.

The ECtHR reiterated its standard principle with regard to Article 10 ECHR, holding that "freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual’s self-fulfilment. Subject to paragraph 2 of Article 10, it is applicable not only to “information” or “ideas” that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Such are the demands of pluralism, tolerance and broadmindedness without which there is no “democratic society”. However, the ECtHR considered Lilliendahl's statements as a form of hate speech, as this not only includes speech which explicitly calls for violence or other criminal acts, but it can also include attacks on persons committed by insulting, holding up to ridicule or slandering specific groups of the population (see also *Féret v. Belgium*, IRIS 2009-8/1; *Vejdeland v. Sweden,* IRIS 2012-5/2 and *Beizaras and Levickas v. Lithuania*, IRIS 2020-3/21). Although Lilliendahl's comments had not been expressed on a prominent Internet platform and were not specifically directed at vulnerable groups or persons, the ECtHR accepted the finding of the Icelandic Supreme Court that they were "serious, severely hurtful and prejudicial", also recalling that discrimination based on sexual orientation is as serious as discrimination based on race, origin or colour. The ECtHR referred to the 2010 Recommendation of the Committee of Ministers and the Resolution of the Parliamentary Assembly of the Council of Europe on discrimination on the basis of sexual orientation and gender identity, calling for the protection of gender and sexual minorities from hateful and discriminatory speech, and citing the marginalisation and victimisation to which they have historically been, and continue to be, subjected. Taking into account the prejudicial and intolerant nature of Lilliendahl’s comments, the ECtHR found that the Icelandic Supreme Court had given relevant and sufficient reasons for his conviction: the Supreme Court had taken into account the criteria set out in

the case law of the ECtHR and had acted within its margin of appreciation. Furthermore, the ECtHR noted that Lilliendahl had not been sentenced to imprisonment, although the crime of which he was convicted carries a penalty of up to two years imprisonment. It did not find the fine of EUR 800 excessive, given the circumstances. The ECtHR concluded that the Supreme Court's assessment of the nature and severity of Lilliendahl's comments were not manifestly unreasonable and that it had adequately balanced his personal interests and his right to freedom of expression against the more general public interest in the case encompassing the rights of gender and sexual minorities. Therefore, the ECtHR found Lilliendahl's complaint under Article 10, also in combination with Article 14 ECHR, manifestly ill-founded. The ECtHR decided, unanimously, to reject the complaint as inadmissible.

Decision by the European Court of Human Rights, Second Section, in the case of Carl Jóhann Lilliendahl v. Iceland, Application No. 29297/18, 11 June 2020

https://hudoc.echr.coe.int/eng?i=001-203199

POLAND

ECtHR: *Jezior v. Poland*

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In a case concerning Internet liability for third-party comments, the European Court of Human Rights (ECtHR) again delivered an interesting judgment in support of the right to freedom of expression on the Internet. In the case of *Jezior v. Poland*, the ECtHR found that holding the administrator of a local website liable for defamatory third-party comments, which upon notice had been immediately removed, amounted to a violation of the right to freedom of expression under Article 10 of the European Convention on Human Rights (ECHR). As in the case of *Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt v. Hungary* (IRIS 2016-3/2), the ECtHR emphasised that holding the administrator of a website liable merely for allowing unfiltered comments that might be in breach of the law would require excessive and impracticable forethought capable of undermining freedom of the right to impart information on the Internet.

The applicant in this case, Andrzej Jezior, at the material time, kept a website with news about the town in which he lived. The blog on his website focused on the political campaign surrounding the local elections for the municipal board; Jezior himself was also a candidate. The website was open to comments by users, without registering. It explicitly requested users to only post thoughtful, truthful and non-offensive comments. Users were also invited to subscribe their comments with their real identity, instead of posting them anonymously. Furthermore, the website had a content notification system, but in practice, notifications were rarely monitored. Occasionally, Jezior carried out the surveillance of users' comments and deleted what he considered to be offensive to others. Two weeks before the date of the local elections, an anonymous comment was published on Jezior's website targeting B.K., the sitting mayor and candidate for re-election. The comment was highly defamatory and risked damaging B.K.'s reputation, as it associated him and his family with various criminal acts and illegal activities. Jezior immediately removed this comment from his website, and each time it was reposted, Jezior succeeded in promptly deleting the offensive comments about B.K. Jezior subsequently activated an access control function with a mandatory registration system requiring the users' email address. However, B.K. brought proceedings against Jezior, based on Section 72 of the Polish Law on Local Elections, giving competence to the regional court, in case of the publication of false data or untrue information about the local elections or the candidates, to order the content to be removed and to order an apology and the payment of damages (see also *Brzeziński v. Poland*, Iris 2019-8 :1/1). The regional court allowed B.K.'s action: it prohibited Jezior from continuing to publish the comment at issue and ordered him to apologise to B.K. by posting a

statement on his website. The court further ordered Jezior to pay PLN 5 000 (EUR 1 250) to a charitable organisation and to reimburse B.K. for legal costs. In essence, the court held that the comments at issue constituted electoral propaganda material, that their content was not proven and that they were detrimental to B.K.'s reputation as a candidate in the elections. It held Jezior responsible for the comments generated by Internet users. The Krakow court of appeal dismissed Jezior's appeal, holding that Jezior was indeed responsible for the comments that third parties had filed on his website, since he had not prevented them from being posted online. The disclaimer on his website was considered insufficient to exonerate Jezior from liability for third-party comments. The appeal court also found that Jezior could not rely on being exempted from liability as a hosting provider.

Jezior lodged an application before the ECtHR, complaining that the court orders against him amounted to an unjustified interference with his right to freedom of expression. The ECtHR observed that the disputed comments were published on Jezior's website during a pre-election period and that they were targeting the sitting mayor, who was a candidate for re-election. The national courts qualified these comments as electoral propaganda material which, according to them, contained unproven information about B.K., with allegations that were detrimental to his reputation as a candidate in the elections. Jezior could have foreseen, in principle, that his responsibility for the posting of the comments on his website could be engaged under Article 72 of the Law on Local Elections, combined with Articles 23 and 24 of the Civil Code on the protection of reputation and personality rights. As the interference with Jezior's right to freedom of expression was prescribed by law and had a legitimate aim, namely the protection of the reputation of others, and more particularly that of B.K. as a candidate in local elections, it remained to be determined whether the interference at issue was "necessary in a democratic society."

First, the ECtHR reiterated that owing to its accessibility and capacity to store and communicate vast amounts of information, the Internet had become one of the principal means by which individuals exercise their right to freedom of expression and information and that websites greatly enhance the public's access to news on current events and facilitate the dissemination of information in general (see also *Ahmet Yildirim v. Turkey*, Iris 2013-2:1/1). However, at the same time, the ECtHR evoked the risk of harm to the exercise and enjoyment of human rights and freedoms posed by content and communications on the Internet, particularly the right to respect for private life. It also recalled that in carrying out the assessment of balancing the right to freedom of expression against the right to have one's reputation protected, applied in cases of user-generated content and the role and responsibilities of Internet intermediaries, a certain number of relevant factors need to be taken into account. These factors are: the context in which the online comments were made public; the measures adopted by the publication medium to prevent or remove defamatory comments; the question of whether it is the responsibility of the author of the comment that should be retained rather than that of the intermediary; as well as the consequences of the court orders for the publication medium (see also *Delfi AS v. Estonia*, Iris 2015-7:1/1).

Applying these factors to the case at issue, the ECtHR saw no reason to depart from the conclusion reached by the national courts in finding the comments about B.K. defamatory, damaging his reputation as a candidate in local elections. The ECtHR then observed that the website on which the disputed comments were posted was administered by Jezior, free of charge and with a limited local scope. It also noted that Jezior had chosen to allow Internet users to submit comments without registering beforehand, but that he had put in place certain measures, including a notification system, with a view to detecting potentially illegal content. Jezior had also published a message for Internet users on his website, inviting them to comply with the rules of good conduct and to respect the rights of others. Furthermore, Jezior had immediately withdrawn the disputed comments as soon as he had been aware or notified of their presence, and, in addition, he had temporarily established access control and the obligation to register users in advance by means of their email address. The ECtHR disagreed with the finding of the Polish courts that Jezior had not taken sufficiently effective measures to prevent the comments from being posted online. According to the ECtHR, imposing such an obligation of pre-monitoring "would require excessive and impracticable forethought capable of undermining freedom of the right to impart information on the Internet." Furthermore, B.K. has never undertaken any steps to take action against the author of the comments. The ECtHR found that the cumulative measures against Jezior (order to remove the comments from his website, apology, statement on website, order to pay damages amounting to EUR 1 250 and to pay B.K.'s legal costs) risked having a chilling effect on Jezior and the comment environment of an Internet platform dedicated to topics of importance for the community. The ECtHR concluded that the Polish courts had not struck a fair balance between Jezior's right to freedom of expression and B.K.'s right to have his reputation as a candidate in local elections respected. The interference with Jezior's rights amounted to a disproportionate interference with his right to freedom of expression, and was therefore not necessary in a democratic society. The First Section of the ECtHR, sitting as a Committee composed of three judges, came to the conclusion that Article 10 had been violated.

ECtHR First Section (Committee), Jezior v. Poland, Application no. 31955/11 , 4 June 2020

https://hudoc.echr.coe.int/eng?i=001-202614

RUSSIAN FEDERATION

ECtHR: Vladimir Kharitonov v. Russia, OOO Flavus and Others v. Russia, Bulgakov v. Russia and Engels v. Russia

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In four judgments of 23 June 2020, the European Court of Human Rights (ECtHR) found that the blocking of websites and media platforms in Russia had violated the right to freedom of expression and information as guaranteed by Article 10 of the European Convention of Human Rights (ECHR). The cases concern different types of blocking measures, including collateral blocking (where the IP address that was blocked was shared with other sites), excessive blocking (where the whole website was blocked because of a single page or file) and wholesale blocking of media outlets for their news coverage. One case concerns a court order to remove a webpage with a description of tools and software for bypassing restrictions on private communications and content filters on the Internet, otherwise, the website would be blocked. The ECtHR once again highlighted the importance of the Internet as a vital tool in exercising the right to freedom of expression. It found that the provisions of Russia's Information Act, which was used to block the websites and online media outlets, had produced excessive and arbitrary effects and had not provided proper safeguards against abusive interferences by the Russian authorities. In each of the four cases, the ECtHR also found a violation of the right to an effective remedy under Article 13 ECHR: it found that the Russian courts had not carried out examinations of the substance of what had been arguable complaints of violations of the applicant's rights and that none of the remedies available to the applicants had been effective.

In the case of *Vladimir Kharitonov v. Russia,* the owner of a website lodged a court complaint, arguing that a blocking order by the Russian telecoms regulator (Roskomnadzor) against another website containing allegedly illegal content had also blocked access to his website, being hosted under the same IP address, but not containing any illegal content. The courts upheld Roskomnadzor's action as lawful without however assessing its impact on the applicant's website. In the *OOO Flavus and Others v. Russia* case, the applicants owned opposition media outlets which publish research and analysis that is critical of the Russian Government. After Roskomnadzor, on request of the Prosecutor General, blocked access to their websites because they were allegedly promoting acts of mass disorder or extremist speech, they unsuccessfully applied for a judicial review of the blocking measure. They also complained about the wholesale blocking of access to their websites, and of a lack of notice of the specific offending material, which they could therefore not remove in order to have access to their website restored. The case of *Bulgakov v. Russia* concerns the blocking of a website by a local Internet service on the basis of a court judgment. The reason for the

blocking was the availability of an electronic book in the files section of the website; a book which had been previously categorised as an extremist publication. Bulgakov deleted the e-book as soon as he found out about the court's judgment, but the Russian courts refused to lift the blocking measure on the grounds that the court had initially ordered a block on access to the entire website by its IP address, not just to the offending material. In *Engels v. Russia,* a court ordered a local Internet service provider to remove a webpage that contained information about bypassing content filters. It was argued that such information should be prohibited from dissemination in Russia as it enabled users to access extremist material on another, unrelated website. Following the court order, Roskomnadzor asked Engels to take down the offending content, otherwise the website would be blocked. Engels complied with the request, and at the same time lodged an appeal against the court order. However, Engels' complaint was rejected without addressing his main argument that providing information about tools and software for the protection of the privacy of browsing was not against any Russian law.

All the applicants complained in essence that the blocking of access to their websites or Internet platforms had been unlawful and disproportionate, and had therefore violated their rights under Article 10 ECHR. The ECtHR, in all four judgments, confirmed the importance it attaches to the right to freedom of expression on the Internet, referring to its earlier case law on the (wholesale) blocking of websites in which it took the approach "that owing to its accessibility and capacity to store and communicate vast amounts of information, the Internet has now become one of the principal means by which individuals exercise their right to freedom of expression and information. The Internet provides essential tools for participation in activities and discussions concerning political issues and issues of general interest, it enhances the public's access to news and facilitates the dissemination of information in general" (see also *Ahmet Yildirim v. Turkey*, Iris 2013-2/1). The ECtHR also recalled that the blocking of websites by rendering large quantities of information inaccessible substantially restricted the rights of Internet users and had a significant collateral effect. It added that the wholesale blocking of access to a website is an extreme measure which has been compared to banning a newspaper or television station. In all four cases, the ECtHR found a violation of Article 10 also in combination with Article 13.

In the case of *Vladimir Kharitonov v. Russia,* the ECtHR came to the conclusion that it was incompatible with the rule of law if a legal framework failed to establish safeguards capable of protecting individuals from the excessive and arbitrary effects of blocking measures, such as those imposed on the basis of section 15.1 of the Russian Information Act. When exceptional circumstances justify the blocking of illegal content, the state agency making the blocking order must ensure that the measure strictly targets the illegal content and has no arbitrary or excessive effects, irrespective of the manner of its implementation. Any indiscriminate blocking measure which interferes with lawful content or websites as a collateral effect of a measure aimed at illegal content or websites amounts to arbitrary interference with the rights of the owners of such websites. The ECtHR found that the blocking order did not satisfy the foreseeability

requirement under the ECHR and did not afford the applicant the degree of protection from abuse to which he was entitled by the rule of law in a democratic society.

In *OOO Flavus and Others v. Russia*, the ECtHR found that the decision by the Prosecutor General to qualify the content of the media outlets at issue as extremist speech had no basis in fact and was therefore arbitrary and manifestly unreasonable. The ECtHR held that targeting online media or websites with blocking measures because they are critical of the government or the political system can never be considered a necessary restriction on freedom of expression, and it also found that the blocking orders had no legitimate aim and were not necessary in a democratic society. Furthermore, it came to the conclusion that Russian legislation did not afford the applicants the degree of protection from abuse to which they were entitled by the rule of law in a democratic society, taking into consideration the fact that the ECtHR also found in other cases against Russia that is was difficult, if not impossible, to challenge a blocking measure on judicial review (see also *Kablis v. Russia*, IRIS 2019-7/1).

In *Bulgakov v. Russia,* the ECtHR emphasised that blocking access to a website's IP address has the practical effect of extending the scope of the blocking order far beyond the illegal content which had originally been targeted. Apart from having no legal basis, the Court also found that there were no sufficient procedural safeguards to protect individuals from the excessive and arbitrary effects of blocking measures, such as in the case at issue. The Russian courts also neglected to consider whether the same result could be achieved with less intrusive means or to carry out an impact assessment of the blocking measure to ensure that it strictly targets the illegal content and has no arbitrary or excessive effects, including those resulting from the method chosen to implement it.

In *Engels v. Russia*, the ECtHR found that the legal provision of the Information Act on which the blocking order was based was too vague and overly broad to satisfy the foreseeability requirement. The ECtHR also noted that the utility of filter-bypassing technologies cannot be reduced to a tool for malevolently seeking to obtain extremist content. Even though the use of any information technology can be subverted to carry out activities which are incompatible with the principles of a democratic society, filter-bypassing technologies primarily serve a multitude of legitimate purposes, such as enabling secure links to remote servers; channelling data through faster servers to reduce page-loading time on slow connections; and providing a quick and free online translation. None of these legitimate uses were considered by the Russian court before issuing the blocking order; it merely focused on the possibility that filter-bypassing software could give access to extremist content. The ECtHR clarified that information technologies are content-neutral and that they are a means of storing and accessing: "Just as a printing press can be used to print anything from a school textbook to an extremist pamphlet, the Internet preserves and makes available a wealth of information, some portions of which may be proscribed for a variety of reasons particular to specific jurisdictions. Suppressing information about the technologies for accessing information online on the grounds they may incidentally facilitate access to extremist material is no different from seeking to restrict access to

printers and photocopiers because they can be used for reproducing such material. The blocking of information about such technologies interferes with access to all content which might be accessed using those technologies." In the absence of a specific legal basis in domestic law, the ECtHR found that the "sweeping measure" in the case of Engels was not only excessive, but also arbitrary. Furthermore, during the subsequent procedures, Engels was not afforded the degree of protection from abuse to which he was entitled by the rule of law in a democratic society.

Judgment by the European Court of Human Rights, Third Section, in the case of Vladimir Kharitonov v. Russia, Application no. 10795/14

https://hudoc.echr.coe.int/eng?i=001-203177

Judgment by the European Court of Human Rights, Third Section, in the case of OOO Flavus and Others v. Russia, Applications nos. 12468/15, 23489/15, and 19074/16

https://hudoc.echr.coe.int/eng?i=001-203178

Judgment by the European Court of Human Rights, Third Section, in the case of Bulgakov v. Russia, Application no. 20159/15

https://hudoc.echr.coe.int/eng?i=001-203181

Judgment by the European Court of Human Rights, Third Section, in the case of Engels v. Russia, Application no. 61919/16

https://hudoc.echr.coe.int/eng?i=001-203180

EUROPEAN UNION

Guidelines on video-sharing platforms and European works under revised AVMSD

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On 2 July 2020, the European Commission published two important sets of guidelines pursuant to the revised Audiovisual Media Services Directive (AVMSD) which extends audiovisual rules to what are termed video-sharing platforms (see IRIS 2019-1/1). The first set of guidelines concerns the application of the "essential functionality" criterion of the definition of a video-sharing platform under the AVMSD; while the second set of guidelines relates to the calculation of the share of European works in on-demand catalogues.

First, under Article 28b(1) of the AVMSD, member states are required to ensure that video-sharing platform providers under their jurisdiction take appropriate measures to protect minors from certain harmful content, and the general public from certain illegal content. Crucially, a lengthy definition of a video-sharing platform service is contained in Article 1(aa), which includes where an "essential functionality" of a service is devoted to providing programmes, user-generated videos, or both, to the general public. Recital 5 of the AVMSD provides that the European Commission should issue guidelines on the practical application of the essential functionality criterion. In the first set of seven-page guidelines released, the Commission identifies relevant indicators that national authorities should consider when applying the essential functionality criterion, including (a) the relationship between the audiovisual content and the main economic activity or activities of the service; (b) the quantitative and qualitative relevance of the audiovisual content for the activities of the service; (c) the monetisation of, or revenue generation from the audiovisual content; and (d) the availability of tools aimed at enhancing the visibility or attractiveness of the audiovisual content. Finally, although guidelines are not binding, it is stated that cooperation between national authorities "could be desirable especially in order to gather the relevant data or information and to limit the risks of divergent interpretations" of the indicators.

Secondly, Article 13(1) of the AVMSD provides that member states must ensure that media service providers of on-demand audiovisual media services under their jurisdiction secure at least a 30% share of European works in their catalogues and ensure the prominence of those works. Furthermore, Article 13(2) provides that where member states require media service providers under their jurisdiction to contribute financially to the production of European works, they may also require media service providers targeting audiences in their territories but established in

other member states to make such financial contributions. However, Article 13(6) provides that the 30% obligation imposed under Article 13(1) and the financial contribution requirements under Article 13(2) shall not apply to media service providers with a "low turnover or a low audience". Notably, the Commission is required to issue guidelines on the calculation of the share of European works, and on the definition of "low audience" and "low turnover". As such, in the second set of seven-page guidelines, the Commission considers that it is appropriate to calculate the 30% share of European works in on-demand catalogues based on the total number of titles in the catalogue, and explains what constitutes a title, how to calculate in cases where VOD providers have multiple national catalogues, and where catalogues may vary on a day-to-day basis. The Commission also gives guidance on interpreting low audience and turnover. Importantly, the Commission notes that while the implementation of Article 13 AVMSD lies with the national authorities, "they are encouraged to cooperate actively with their counterparts in other Member States in the areas covered by the present guidelines."

Finally, it should be noted that member states are required to transpose the revised AVMSD into national law by 19 September 2020.

European Commission, Guidelines on the practical application of the essential functionality criterion of the definition of a 'video-sharing platform service' under the Audiovisual Media Services Directive (2020/C 223/02), 7 July 2020.

https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52020XC0707(02)&from=EN

European Commission, Guidelines pursuant to Article 13(7) of the Audiovisual Media Services Directive on the calculation of the share of European works in on-demand catalogues and on the definition of low audience and low turnover, 7 July 2020.

https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52020XC0707(03)&from=EN

NATIONAL

CZECHIA

[CZ] Broadcasting Council punished unfair commercial practice

Jan Fučík
Česká televize

The Council for Radio and Television Broadcasting of the Czech Republic, as the central regulatory authority, imposed a fine on Emporia Style Kft. on 5 May 2020 for deceptive advertising on a teleshopping channel. The company was found guilty in accordance with the provisions of Article 8a, paragraph 2b of Act No. 40/1995 Coll. of a violation of the provisions of Article 2, paragraph 1b of Act No. 40/1995 Coll. for commissioning broadcasting slots for the *Gallery* programme of teleshopping broadcaster Klenot TV on 16 July 2019. Under the provisions of section 4, paragraph 3 of Act No. 634/1992 Coll. on consumer protection, in section p) of its Annex 1, business practices are always considered deceptive if the seller falsely declares that the product or service can cure a disease, disorder or disability. In this programme, the moderator, in connection with the promotion of a silver pendant and earrings with a sapphire and white topaz, stated that the jewellery "suppresses depression". Depression is a serious mental disorder that must first be professionally diagnosed and then treated pharmacologically, or with the help of professional psychotherapeutic methods and procedures. Thus, jewellery can certainly not suppress the "strength" of a disease. However, the moderator's statement implied that the healing and preventive effects of this jewellery may have led consumers to make a decision to purchase goods which they would not normally have purchased. Under the influence of the quoted statement, viewers may fail to take proper care of their health and rely on the promoted goods to treat potential psychological problems. This can result in a threat to consumers' health. The Broadcasting Council imposed a fine of CZK 50 000 (approximately EUR 2 000) for the offence.

Rozhodnutí Rady pro rozhlasové a televizní vysílání č. RRTV/2019/780.

https://www.rrtv.cz/files/Pokuty/85b1e38e-b5ce-4865-a19e-3f2ac51e79ae.pdf

Decision of the Broadcasting Council No. RRTV / 2019/780.

GERMANY

[DE] Constitutional Court strengthens press freedom in two judgments

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The *Bundesverfassungsgericht* (Federal Constitutional Court – BVerfG) strengthened the freedom of the press in two judgments issued on 23 June 2020. Although the cases dealt with very different issues, in both decisions the BVerfG highlighted the importance of protecting a free press in the context of democratic opinion-forming.

In the first case (no. 1 BvR 1716/17), a constitutional complaint had been filed against a criminal conviction imposed after an unpixelated image of a dark-skinned patient in a university hospital waiting room was forwarded to a newspaper. The photographer had ignored requests from the person pictured and hospital staff to delete the image, which had been published in unpixelated form in the online edition of a major German daily newspaper with a report documenting the hospital's inadequate safety precautions when dealing with suspected Ebola patients – a subject that had drawn a high level of public attention at the time. The photographer was fined by the relevant criminal courts for disseminating an image without permission under Articles 33 and 22 *et seq*. of the *Kunsturhebergesetz* (Artistic Copyright Act – KUG). The courts held that, although the image illustrated a newsworthy event, it should have been modified and the patient's identity disguised because the way it had been presented, together with the newspaper's high circulation figure, meant its publication was likely to leave the patient open to significant public abuse. The photographer was held responsible for the publication of the unpixelated image because he had initiated the report himself. He therefore should have ensured that the patient's identity was suitably disguised. However, the BVerfG ruled that this judgment infringed the freedom of the press and upheld the photographer's constitutional complaint. It was true that press photographers and journalists had a certain duty of care and could face criminal penalties if they breached it. They should also not try to hide from newspaper editors the circumstances in which the photographs had been taken. Nevertheless, the BVerfG thought that the criminal courts had not taken sufficient account of fundamental rights. In particular, the need to distinguish between the forwarding and the publication of images had not been met, while the working and accountability structures of the press and preparatory research had not been sufficiently taken into account. The images had not, therefore, been carelessly forwarded in a way that infringed the patient's rights, which would have been unlawful. The photographer's failure to pixelate the images before forwarding them to the newspaper could not be considered a breach of his duty of care. Press photographers and journalists should be able to send unpixelated images to newspaper editors without fear of punishment. The

situation would only be different if the person forwarding the images had deliberately concealed circumstances that would be significant for the editor's decision on whether to disguise the person pictured. However, in this case, the criminal courts had not found this to be the case.

The second case (no. 1 BvR 1240/14) concerned the admissibility of a report about indiscretions committed by public figures in the distant past. The dispute focused on an article, published in mid-2011, about the chief executive of a well-known company, which not only reported on the company and its staff, development and liquidity from an economic perspective, but also described its chief executive's attempt to cheat in his first state law examination and a criminal trial relating to the bribery of an expert. At the chief executive's request, the civil courts ruled that the attempt to cheat should not be mentioned in the report. Although people should generally accept the reporting of true facts about their social life, the chief executive had been portrayed as a dishonest person. Since there had been no real reason to bring up his attempt to cheat, he should not have been pilloried for a misdemeanour committed many years previously. However, the BVerfG disagreed and upheld the newspaper publisher's constitutional complaint against these rulings. The chief executive should accept truthful reporting about his social and professional life. The "right to be forgotten", which was guaranteed by the *Grundgesetz* (Basic Law), should not limit the right of the press to refer to past transgressions in its reporting. The right to report did not automatically lapse over time, but should be judged according to the individual case. Such an evaluation was largely the responsibility of the press itself, in particular the assessment of which circumstances and details were significant enough to be reported. The BVerfG thought this also applied to reports published on the Internet.

BVerfG, Beschluss der 2. Kammer des Ersten Senats vom 23. Juni 2020 - 1 BvR 1716/17 -

https://www.bverfg.de/e/rk20200623_1bvr171617.html

Federal Constitutional Court, decision of the 2nd chamber of the First Senate, 23 June 2020, 1 BvR 1716/17

BVerfG, Beschluss der 2. Kammer des Ersten Senats vom 23. Juni 2020, - 1 BvR 1240/14.

https://www.bverfg.de/e/rk20200623_1bvr124014.html

Federal Constitutional Court, decision of the 2nd chamber of the First Senate, 23 June 2020, 1 BvR 1240/14.

[DE] Draft bill to implement EU Copyright Directive

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On 24 June 2020, the German *Bundesministerium der Justiz und für Verbraucherschutz* (Federal Ministry of Justice and Consumer Protection – BMJV) published a discussion draft for a "Second Act to adapt copyright law to the requirements of the Digital Single Market". The draft contains proposals for the implementation of several provisions of the Directive on Copyright in the Digital Single Market (EU) 2019/790 (DSM Directive), which entered into force last year. Among other things, it introduces two new legal instruments into German copyright law with provisions on the liability of platforms which allow users to upload content and rules on extended collective licences. The ministry had published a first discussion draft in January containing proposals on the implementation of the new EU copyright and related rights for press publishers. The recently published draft is designed to implement the remaining provisions of the Directive.

In concrete terms, the draft makes provision for the implementation of Article 17 of the DSM Directive as part of a new German *Urheberrechts-Diensteanbieter-Gesetz* (Copyright Service Provider Act – UrhDaG), which is meant to regulate the copyright liability and due diligence obligations of platforms in relation to content uploaded by their users. It includes the obligation to apply for certain licences for the communication to the public of protected works for limited minor use, such as for user-generated content. Users should also be able to label additional authorised uses as such, while platforms may be obliged to prevent unlicensed and unlawful uses. For disputes between rightsholders, platforms and users, a complaints procedure and an out-of-court dispute settlement procedure should be provided.

The draft also contains a new statutory exception for caricatures, parodies and pastiches to be added to German copyright law. Previous provisions on out-of-print works will be changed and public domain works made more accessible.

As regards copyright contract law, the draft contains changes on matters including reasonable remuneration, the author's further participation, licence chains and the right of revocation for non-exercise.

The ministry has invited interested parties and associations to submit their opinions via a document which can be downloaded from the ministry's website.

Diskussionsentwurf sowie weitere Informationen des BMJV zum Gesetzgebungsverfahren

https://www.bmjv.de/SharedDocs/Gesetzgebungsverfahren/DE/Gesetz_II_Anpassung-Urheberrecht-dig-Binnenmarkt.html

Discussion draft and further information from the Federal Ministry of Justice and Consumer Protection about the legislative process

[DE] Federal Administrative Court ends longstanding dispute over SAT.1 licence switch

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In a ruling of 15 July 2020 (Case no. BVerwG 6 C 25.19), the German *Bundesverwaltungsgericht* (Federal Administrative Court – BVerwG) ended a longstanding dispute over a change of licence for German TV broadcaster SAT.1 by rejecting a complaint by two German regulators against another German regulator as inadmissible. It ruled that a regional media authority did not have legal standing to revoke a licence granted by another regional media authority to a private broadcaster for a national television channel. The licence granted to Sat.1 was therefore lawful.

Private broadcasters in Germany are monitored by whichever of the 14 German media authorities, which act as regulatory bodies for the *Bundesländer*, they apply to for a licence. In 2008, the licence to broadcast national television channel SAT.1 was awarded by the *Landeszentrale für Medien und Kommunikation Rheinland-Pfalz* (Rhineland-Palatinate media and communication authority – LMK). On weekdays, regional window programmes for the *Länder* of Rhineland-Palatinate and Hessen are also broadcast on the main SAT.1 channel, as required under the German *Rundfunkstaatsvertrag* (Inter-State Broadcasting Agreement). To this end, the LMK and the *Hessische Landesanstalt für privaten Rundfunk und neue Medien* (Hessian commercial broadcasting and new media authority - LPR Hessen) also granted a licence to a regional window programme provider. In 2012, while the licence granted by the LMK was still valid, the broadcaster SAT.1 applied to the *Medienanstalt Hamburg/Schleswig-Holstein* (Hamburg/Schleswig-Holstein media authority – MA HSH) for another licence to broadcast its full window programme, SAT.1. In accordance with a decision by the *Kommission für Zulassung und Aufsicht* (Media Licensing and Monitoring Commission – ZAK) – the joint licensing body of the 14 German regulatory authorities which deals with the licensing and monitoring of commercial channels that are broadcast throughout the country – the MA HSH granted the licence. However, the licence was only valid if regional window programmes existed or were organised. The LMK and LPR Hessen had disputed this decision by the MA HSH, but their appeal was dismissed by the competent administrative court and administrative appeal court (IRIS 2019-2:1/5). The BVerwG, which is the country's highest administrative court, has now finally rejected the complaint as inadmissible.

The BVerwG ruled that the LMK and the LPR Hessen did not have the legal standing required under German law to bring proceedings under Article 42(2) of the *Verwaltungsgerichtsordnung* (Code of Administrative Court Procedure). Such standing could not be derived either from the fundamental right to broadcasting freedom (Article 5(1)(2) of the *Grundgesetz* (Basic Law)) or from the notion that they were ultimately responsible for the legality of channels broadcast in their transmission area. Since the entry into force of the revised Rundfunkstaatsvertrag in 2008, the ZAK has had sole responsibility for taking final decisions relating to

the licensing of commercial channels that are broadcast throughout the country. The role of the relevant regional media authority has therefore been limited to carrying out the ZAK's decisions. The fact that the ZAK now bore ultimate responsibility did not threaten broadcasting freedom because the ZAK's decisions were based on the majority principle, it acted independently and it had a duty of confidentiality. The fact that this meant that the regional media authorities' pluralistically structured decision-making bodies were considerably less important than before was compatible with the *Grundgesetz* because the ZAK's independence from the state and its limited scope for decision-making took sufficient account of fundamental rights. It was irrelevant that the LMK and LPR Hessen remained responsible for monitoring the regional windows.

Pressemitteilung Nr. 44/2020 des BVerwG.

https://www.bverwg.de/pm/2020/44

Federal Administrative Court press release no. 44/2020.

[DE] Supreme Court issues Google “right to be forgotten” rulings

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On 27 July 2020, the German *Bundesgerichtshof* (Federal Supreme Court – BGH) issued two decisions on the “right to be forgotten”, which gives people the right to have their personal information deleted by data processors such as search engine operators after a certain period of time. However, the right does not apply without restriction, but depends on a series of factors that need to be weighed up. This is demonstrated by both BGH decisions, in which one claim was rejected while the other was submitted to the Court of Justice of the European Union (CJEU).

The first procedure (no. VI ZR 405/18) concerned the managing director of a charity’s regional association. In 2011, the local daily press had reported that the organisation was around EUR 1 million in debt and that its managing director, whose name was specifically mentioned, had recently been signed off sick. These press articles can still be found by typing the former managing director’s name into Google’s Internet search engine. His request that the press reports should no longer be associated with his name in the search results had been rejected, initially by Google and subsequently by two courts. The BGH has now also rejected his claim, which was based on Article 17(1) of the General Data Protection Regulation (GDPR). It ruled that the claim, which required a comprehensive weighing up of fundamental rights, that is, the basic right to protection of personal data and informational self-determination on the one hand, and the public’s right to information and the interests of information providers on the other, was unfounded. In particular, on the provider side, it was necessary to take into account not only the largely economic interests of Google, but also the freedom of expression of the relevant content providers (in this case, the regional daily press). This applied, according to the BGH, even though the claim had not been made directly against the content providers themselves. Therefore, although when purely economic interests were weighed against personality rights, the latter usually took precedence, the fundamental rights relevant to this case should initially be considered equally important. However, in this particular case, the court decided that the interests of the public and the press took priority. In this context, it is interesting to note that the BGH did not expressly adhere to its pre-GDPR case law, but ruled that the requirement for an equally balanced weighing up process meant that search engine operators did not need to act if they became aware that a person’s rights had been breached in a clear and obvious way.

Meanwhile, the second case (no. VI ZR 476/18) concerned the deletion of an article published on a US company’s website from Google’s search results. A complaint had been lodged by a married couple who held senior positions in the financial services sector and who had been named and pictured in several critical reports on investment models published on the aforementioned website. The

plaintiffs claimed, *inter alia*, that the website had offered to delete the reports in return for a protection payment. Google refused to remove the articles from its search results, largely on the grounds that it was impossible to prove whether they were truthful or not. After the couple's initial complaint and subsequent appeal were both dismissed, the BGH has now referred the case to the CJEU for clarification. In a preliminary ruling, the CJEU will explain whether it is compatible with the right to privacy and protection of personal data, when carrying out the weighing up process required under Article 17(3)(a) GDPR, if the content to be deleted contains factual claims whose accuracy is disputed by the person concerned and which are crucial to the claim, to consider it a decisive factor whether the person concerned could reasonably – for example, through a temporary injunction – obtain legal protection against the content provider and thereby have the question of truthfulness at least provisionally clarified. Secondly, the BGH has asked whether, if a request is made to delete thumbnail photos that appear when entering a name into a search engine, the original context of the publication by the third-party content provider should be taken into account if a link is provided to the third-party website when the thumbnail is displayed by the search engine, but the website is not actually named and the resulting context is not displayed by the search engine.

Pressemitteilung des BGH Nr. 095/2020

https://www.bundesgerichtshof.de/SharedDocs/Pressemitteilungen/DE/2020/2020095.html?nn=10690868

Federal Supreme Court press release no. 095/2020

[DE] Supreme Court rules in cartel authority's favour in Facebook dispute

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In a decision of 23 June 2020, the German *Bundesgerichtshof* (Federal Supreme Court – BGH), the highest civil court in Germany, provisionally upheld the charge that Facebook had abused a dominant market position. The *Bundeskartellamt* (Federal Cartels Office), which is responsible for competition-related matters in Germany, had previously prohibited social media provider Facebook from processing data captured during Internet use outside the Facebook platform without the users' specific consent. Under the BGH's decision, the prohibition notice can now be enforced.

The case concerns Facebook's use and processing of personal data collected from other services owned by the Facebook group, such as Instagram, and users' other Internet activities outside facebook.com. Users of the social network, which is financed through advertising, must accept Facebook's terms and conditions, which state that their data may be used in this way. Thanks to Facebook Analytics, companies and advertising partners can access the aggregated data and see how users interact with the Facebook group's services via different devices, platforms and websites.

The *Bundeskartellamt* thought that the use of the terms and conditions and the resulting aggregation of data from various sources breached Article 19(1) of the German *Gesetz gegen Wettbewerbsbeschränkungen* (Act against restraints of competition), which prohibits abuse of a dominant market position. In particular, it accused Facebook of abusing its dominant position in the national market by combining user- and device-related data generated outside facebook.com without the users' specific consent. In a decision of 6 February 2019, the Bundeskartellamt prohibited Facebook and other Facebook companies from using these terms and conditions and processing personal data in this way. Facebook then appealed to the *Oberlandesgericht Düsseldorf* (Düsseldorf Higher Regional Court), which initially lifted the order because it had serious doubts over its legality. However, the *Bundesgerichtshof* has now overturned this decision after concluding that Facebook's dominant position in the German social network market and its abuse thereof were not in any serious doubt.

The question of whether the processing and use of personal data were compatible with the provisions of the General Data Protection Regulation was irrelevant to the Supreme Court's decision. Rather, the key factor was whether private Facebook users had any choice over the personalisation of the user experience. In addition, as a network operator with a dominant market position, Facebook had a particular responsibility to maintain current competition in the social network market.

Pressemitteilung des BGH zum Beschluss vom 23.6.2020 - KVR 69/19

https://www.bundesgerichtshof.de/SharedDocs/Pressemitteilungen/DE/2020/2020080.html

Federal Supreme Court press release on its decision of 23 June 2020 - KVR 69/19

FRANCE

[FR] Constitutional Council blocks online hate law

Amélie Blocman
Légipresse

The so-called 'Avia law' (named after the MP who tabled the bill), which aims to combat hate speech on the Internet, has been blocked. Having finally been adopted as France came out of lockdown on 13 May 2020 after a difficult legislative process lasting almost 18 months, the law, which had been criticised by numerous bodies and institutions, was rejected by the Constitutional Council on 18 June. The text, which would have seen criminal sanctions imposed by the CSA (the French audiovisual regulator) against platforms that failed to remove terrorist material or child pornography within one hour and manifestly illegal hate speech within 24 hours, was deemed harmful to freedom of expression. Almost all the other provisions of the law were therefore also rejected.

First of all, the Constitutional Council pointed out that, in view of the widespread growth of online public communication services and their importance for participation in democratic life and the expression of ideas and opinions, the right to freedom of expression included the freedom to access these services and to use them to express opinions. Although the legislature was free to take measures designed to prevent abuses of freedom of expression and communication that were harmful to public order and the rights of third parties, any attempt to restrict such freedom should be necessary, adapted and proportionate to the stated aim.

Opposition MPs had asked the Council firstly to examine section I of Article 1 of the law, which amended Article 6-1 of Law No. 2004-575 of 21 June 2004 on trust in the digital economy (LCEN) by requiring online communication service providers and website hosts to remove terrorist content or child pornography within one hour of being notified by the administrative authority, or risk a one-year prison sentence and a EUR 250 000 fine.

The Constitutional Court ruled, for the first time, that the dissemination of pornographic images depicting minors and the provocation and glorification of terrorist acts constituted abuses of freedom of expression and communication that seriously harmed public order and the rights of third parties. However, it noted, firstly, that the illegal nature of such content did not depend on whether it was manifest, and that this was something that only the administration should determine. Secondly, an appeal against such a removal order did not have staying effect and the one-hour deadline set for the provider or platform operator to remove or block the disputed content was not long enough to obtain a judge's decision before having to remove it. Finally, a platform operator or service provider who failed to meet the request before the deadline could be sent to prison for one year and fined EUR 250 000. The court therefore ruled that the legislature had undermined freedom of expression and communication in a way

that was not adapted, necessary and proportionate to the stated aim.

The Constitutional Court had also been asked to consider section II of Article 1, which had added an Article 6-2 to the LCEN, obliging online platform operators to remove or block illegal hate speech and unlawful sexual content within 24 hours of it being reported by a user, or risk a EUR 250 000 fine.

The court began by highlighting the difficulties faced by operators when assessing, within a very short timeframe, whether or not reported content was manifestly illegal, especially as their assessment needed to cover more than just the reason for which it was reported. Furthermore, criminal sanctions were imposed for a first offence and for every failure to remove reported content, with no consideration given to their repeated nature.

In view of the above, the Council concluded that the disputed provisions could only encourage operators to remove reported content whether it was manifestly illegal or not. They therefore undermined freedom of expression and communication in a way that was not necessary, adapted and proportionate.

As a consequence of these two decisions, the other provisions of the law that were linked to the obligation to remove unlawful content were also rejected. The only parts that were upheld concerned the creation of an online hate observatory under the auspices of the CSA (Article 16) and a specialist public prosecution authority (Article 10), and a simplification of the procedure for reporting illegal content described in Article 6-1-5 of the LCEN (Article 2).

Noting the decision, the Minister of Justice said: “In a context in which the fight against hate, especially online, is a high social and societal priority, the government will consider the possibility of reworking this piece of legislation in consultation with the stakeholders concerned and taking the Constitutional Council’s decision into account.”

Conseil constitutionnel, Décision n° 2020-801 DC du 18 juin 2020

https://www.conseil-constitutionnel.fr/decision/2020/2020801DC.htm

Constitutional Council Decision No. 2020-801 DC of 18 June 2020

[FR] More films to be broadcast on television with fewer constraints

Amélie Blocman
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Announced several months ago as part of audiovisual reforms designed to ease the regulatory constraints on broadcasters struggling to compete with online platforms, Decree No. 2020-984 of 5 August 2020 has relaxed the rules on programme schedules as well as on the annual limits on the broadcasting of cinematographic works on television, as enshrined in Decree No. 90-66 of 17 January 1990. The changes particularly reflect the fact that the rules, which had been unaltered for more than ten years, had become obsolete as a result of the emergence of numerous delinearised methods of accessing films (especially film channel catch-up services) that are not subject to any such programming restrictions. According to the decree's explanatory memorandum, although the rules were originally designed to protect cinemas, delinearised access to films "has not led to a fall in cinema attendances." The decree of 17 January 1990 lays down certain quotas for the television broadcasting of cinematographic works. The total number of feature-length films that can be broadcast or rebroadcast each year is fixed, with the requirement that 60% of them be European works and 40% original French-language works (Article 7). As part of these obligations, channels that are not film or pay-per-view services will be able to broadcast 244 works per year instead of 192. The number of annual prime-time broadcasts, that is, between 8.30 p.m. and 10.30 p.m., will increase from 144 to 196 (Article 8 of the amended decree of 17 January 1990). Meanwhile, dedicated film channels will see their annual quota rise from 500 to 800 feature-length films, none of which may be broadcast more than seven times in a three-week period, apart from multiple programming services (Article 9 of the amended decree of 17 January 1990).

The other major change concerns the abolition of rules restricting the days on which films may be shown on television. Under Articles 10 and 11 of the amended decree of 17 January 1990, services other than film and pay-per-view services can now broadcast films on Wednesday and Friday evenings as well as during the day on Saturdays and Sundays. The ban will nevertheless remain in place on Saturday evenings from 8.30 p.m., except for films funded by the channel concerned and artistic and experimental films.

The restrictions for dedicated film channels have been relaxed even further, mainly because of their significant investment in film production. On Saturday evenings, for example, as well as the quotas applicable to non-specialist channels, film channels can now broadcast films that have been watched by fewer than 2 million people in French cinemas (and 15 films that have exceeded this threshold) and films released more than 30 years previously. The *Conseil supérieur de l'audiovisuel* (the French audiovisual regulator – CSA) will publish a report on the effect of these changes no later than 18 months after their entry into force.

The next stage of the audiovisual reform process, which has become fragmented as a result of the health crisis and a full parliamentary agenda, will include the adoption of a bill authorising the government to transpose the Audiovisual Media Services Directive into French law by means of an ordinance. The text, which was adopted by the Senate on 8 July, is yet to be examined by the National Assembly. The directive's transposition will maintain the momentum of these regulatory reforms, in particular by imposing on large foreign platforms the same obligations to finance production and comply with audiovisual regulations that apply to traditional broadcasters.

Décret n° 2020-984 du 5 août 2020 portant modification du régime de diffusion des œuvres cinématographiques sur les services de télévision

https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000042211247&categorieLien=id

Decree No. 2020-984 of 5 August 2020 amending the rules on television broadcasting of cinematographic works

[FR] Targeted advertising and cinema ads to be allowed on television

Amélie Blocman
Légipresse

Having been anticipated for several months but repeatedly delayed by the health crisis and the postponement of the audiovisual reforms, Decree No. 2020-983 of 5 August 2020 has brought with it a two-fold relaxation of the television advertising rules enshrined in Decree No. 92-280 of 27 March 1992 defining the obligations of service providers in relation to advertising, sponsorship and teleshopping.

Firstly, the decree allows television broadcasters to use targeted advertising under supervision. Targeted advertising, which enables broadcasters to show different advertisements in different broadcast areas, is one of a list of methods mentioned in an opinion published by the French Competition Authority in February 2019 designed to enable broadcasters to compete on equal terms with digital platforms.

The decree describes the conditions under which targeted advertising can be broadcast: it is not allowed before, during or after children's programmes and must be "appropriately identified as such" when it is broadcast. Adverts mentioning the advertiser's address or explicit location will only be permitted on channels that are obliged to show local or regional programmes (for example, the regional programmes of France Télévisions). Other targeted advertisements may not include the advertiser's address. Their maximum duration is "a daily average of one or two minutes per hour" depending on the service provider, and "six minutes in any one-hour period" (Article 15 of the amended 1992 decree).

The government will publish a report assessing the impact of the implementation of these provisions on radio services, the written press and local television stations within 24 months.

Under the decree's other main innovation, advertising for the cinema sector, which was previously prohibited, will be allowed for an 18-month period. Article 8 of the Decree of 27 March 1992 prohibits television advertising for certain economic sectors: alcoholic beverages, publishing, distribution and cinema. By way of derogation, Article 3 of the Decree of 5 August 2020 authorises, for 18 months, advertising for the cinema sector, which was previously only permitted on pay-TV film channels and on-demand audiovisual media services (Article 15-1 of the decree). As well as harmonising the regulation of traditional forms of broadcasting and delinearised services, this experimental measure is designed to encourage the public to return to cinemas that have been deserted as a result of the health crisis.

In order to decide whether to continue with this provision beyond the experimental period, the government is required to publish a report within the next 15 months, evaluating its impact on film distribution and cinema attendance,

as well as on other media (radio, the written press, billboard advertisers). The decree entered into force the day after it was published.

Décret n° 2020-983 du 5 août 2020 portant modification du régime de publicité télévisée

https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000042211231&dateTexte=20200901

Decree No. 2020-983 of 5 August 2020 amending television advertising rules

UNITED KINGDOM

[GB] CGTN breached Ofcom’s impartiality rules over its coverage of the Hong Kong protests

Julian Wilkins
Wordley Partnership

Chinese news service CGTN was held by Ofcom to have breached rules 5.1, 5.11 and 5.12 relating to impartiality in respect of the Hong Kong protests in response to the Hong Kong Government’s Extradition Law Amendment Bill. The bill would allow criminal suspects in Hong Kong to be sent to mainland China for trial. Ofcom deemed that various CGTN news items about the Hong Kong protests had not been duly impartial on a matter of major political controversy and relating to current public policy. Ofcom considers that these breaches merit the imposition of a statutory sanction.

CGTN is the international English-language news channel of China Media Group, China’s public service television and radio broadcaster; in the United Kingdom, the programme is broadcast via satellite.The licence for the CGTN service is held by Star China Media Limited.

The CGTN programmes held to have been in breach were *The World Today*, 11 August 2019, 17:00; *The World Today*, 26 August 2019, 08:00; *The World Today*, 31 August 2019, 07:00; *The World Today*, 2 September 2019, 16:00; and *China 24* , 21 November 2019, 12:15.

Section 319 of the Communications Act 2003 requires that news in television and radio services be presented with due impartiality, whilst Section 320 sets out special impartiality requirements, which include the preservation in the case of every television service of due impartiality on matters of political or industrial controversy and matters relating to current public policy.

Ofcom’s Code of Conduct on impartiality includes Rule 5.1., which establishes that “[n]ews, in whatever form, must be reported with due accuracy and presented with due impartiality”; Rule 5.11, which states that “[d]ue impartiality must be preserved on matters of major political and industrial controversy and major matters relating to current public policy”; and Rule 5.12, which states that “[i]n dealing with matters of major political and industrial controversy and major matters relating to current public policy an appropriately wide range of significant views must be included and given due weight in each programme or in clearly linked and timely programmes. Views and facts must not be misrepresented.”

Ofcom’s criticism of CGTN’s coverage was that it failed to give alternative views or an explanation regarding the protesters, but instead presented a one-sided perspective on the violence and other issues currently facing Hong Kong. There

was no attempt to acknowledge or explore any alternative view at any point during the items, for example that the Hong Kong police may have played a part in escalating tensions between themselves and the protestors or that violence may have occurred on both sides. Furthermore, Ofcom was critical of the fact that CGTN's coverage had asserted that non-Chinese news broadcasters were not reporting matters accurately or fairly.

CGTN's response to the complaints included the argument that whilst they acknowledged the requirements of due impartiality, their audiences expected them to present the news items from a Chinese perspective and deal with matters unreported by international media outlets. Also, the complaints against CGTN were initiated by Ofcom's monitoring rather than by viewers. CGTN asserted that those who viewed their broadcasts did not expect the same level of impartiality as offered by other broadcasters.

Ofcom's Guidance to the Code makes clear that the broadcasting of comments either criticising or supporting the policies and actions of any political organisation or elected politician is not, in itself, a breach of the due impartiality rules. Any broadcaster may do this, provided it complies with the Code. However, depending on the specific circumstances of each case, it may be necessary to reflect alternative viewpoints or provide context in an appropriate way in order to ensure compliance with Section Five of the Code.

The Code makes clear that the approach to due impartiality may vary according to the nature of the subject, the type of programme and channel, the likely expectation of the audience and the extent to which the content and approach is signalled to the audience. In addition, context, as set out in Section Two (Harm and Offence) of the Code, is important in preserving due impartiality. Context includes factors such as the editorial content of the programme, the service on which the material is broadcast, and audience expectations.

Ofcom considered that, overall, CGTN coverage had not provided due impartiality nor placed the subjects covered in context. Therefore, it considered the five breaches in respect of the news programmes broadcast in the period from 11 August 2019 to 21 November 2019, taken together, to be a serious failure of compliance and is minded to impose a statutory sanction. Before doing so, CGTN was invited to submit its representations.

Issue 403 of Ofcom's Broadcast and On Demand Bulletin

https://www.ofcom.org.uk/_data/assets/pdf_file/0031/195781/The-World-Today-and China-24,-CGTN.pdf

ITALY

[IT] Parliament strengthens parental control and filtering in electronic communications

Ernesto Apa& Marco Bassini
Portolano Cavallo

By way of Law No. 70 of 25 June 2020, the Italian Parliament has introduced a new provision, namely Article 7-bis, into Law Decree No. 28/2020. The Italian Government adopted the aforesaid decree (also known as the 'Justice Decree', '*Decreto Giustizia*') with a view to providing urgent measures concerning, among others, civil, criminal and administrative proceedings as well as the national contact tracing system, both related to the COVID-19 emergency.

The introduction of Article 7-bis, entitled 'Systems for the protection of minors from the risks of cyberspace', triggered a significant debate, as it provides new obligations for electronic communication service providers with respect to the filtering of explicit content delivered via their services.

The provision aims at reducing the negative consequences of minors' exposure to violent contents and pornography as well as to content which is harmful to the development of a minor's personality.

In particular, paragraph 1 of the provision establishes an obligation for electronic communication service providers (regulated under the so-called 'Code of Electronic Communications', '*Codice delle Comunicazioni Elettroniche',* that is, Legislative Decree No. 259/2003) to incorporate within the terms and conditions of the relevant agreements the operation, as pre-activated services, of parental control measures or measures for the filtering of contents inappropriate for minors or for blocking contents intended for adults only. Pursuant to paragraph 2, these services must be provided free of charge and can be disabled at any time upon request of the consumer, who is the subscriber of the agreement.

Additionally, paragraph 3 establishes that providers of telephone, television network and electronic communication services shall promote consumers' awareness of the pre-activated services in question in order to make sure that consumers make duly-informed decisions in this respect.

In case of failure to comply with the above obligations, the Italian Communications Authority shall order the relevant provider to bring to an end the violation and to return any cost unduly charged to consumers. Compliance with such orders is required within a term of no more than 60 days.

This provision comes into play at a moment when the Italian Parliament will soon have to discuss the so-called European Law ('*legge di delegazine europea*'), which would mean delegating to the Executive branch the power to adopt legislative

decrees for the transposition of some key EU law in the field of digital media, namely the Copyright DSM Directive and the revision of the AMVS Directive, which, among other things, also include important measures to be adopted by video-sharing platforms for the protection of consumers, including minors, from inappropriate content.

Decreto legge 30 aprile 2020, n. 28, convertito con modificazioni dalla Legge 25 giugno 2020, n. 70.

https://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:decreto.legge:2020-04-30;28!vig=

Law Decree 30 April 2020, No. 28, changed with amendments by Law 25 June 2020, No. 70.

NETHERLANDS

[NL] ISPs ordered to block The Pirate Bay

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On 2 June 2020, the Gerechtshof Amsterdam (Amsterdam Court of Appeal) delivered an important judgment in the case between Internet service providers (ISPs) Ziggo and XS4ALL against Stichting Brein, following years of litigation. Stichting Brein is a foundation formed by rightsholders to act against copyright piracy. Stichting Brein requested a dynamic blocking injunction against the two ISPs at the Court of The Hague in 2014 for not blocking access to The Pirate Bay (see IRIS 2014-3/37). The case made its way to the Netherlands Supreme Court (*Hoge Raad der Nederlanden*), who asked the Court of Justice of the European Union (CJEU) some preliminary questions (see IRIS 2016-1/22). The CJEU held, in short, that the activities of The Pirate Bay amounted to copyright infringement. The Pirate Bay does not offer unlawful content directly on its website, but provides an indexed and continuously updated catalogue of links to sources (see IRIS 2017-7/4). The CJEU found that The Pirate Bay played an essential role in making works available to the public, while being aware of the infringing nature of its activities. After the CJEU ruling, the Supreme Court held that The Pirate Bay itself indeed infringed copyright and that the case needed to be decided along the lines of the CJEU's UPC/Telekabel Wien judgment (see IRIS 2014-5/2). The case was referred back to the Amsterdam Court of Appeal for a final ruling on the merits (see IRIS 2017-7/4, IRIS 2018-3/26, IRIS 2018-5/24).

The Amsterdam Court of Appeal applied the CJEU's UPC/Telekabel Wien judgment, balancing the users' right to freedom of information, the intellectual property rights of the rightsholders and the freedom of ISPs to conduct business. The court distilled four requirements from Telekabel Wien. First, that the addressee of the injunction can ascertain that the measures chosen are the measures required to prevent the imposition of a penalty. Secondly, that Internet users can assert theirs rights before the courts to ensure that the chosen measures affecting their right to information are justifiable, considering their ability to lawfully access information, and amount to ending the copyright infringement, after the ISP has chosen the measures.

The Amsterdam Court of Appeal pointed out that in the Telekabel Wien case, the requested injunction did not specify which measures had to be taken to achieve the required result. Stichting Brein, however, did provide a clear list of 154 (sub)domain names it wanted blocked in order to end the infringement. The court therefore concluded that the first requirement had been met, as the parties' interests were considered in the procedure at hand. Furthermore, if circumstances were to change, Dutch law enables parties to protect their rights accordingly. The third requirement is that Internet users not be unnecessarily deprived of the possibility to lawfully access available information. The court held that the amount

of illegal content on the website justified the injunction, given the severity of the copyright infringements and the evasion of other means of enforcement. The injunction affects a small portion of lawful content but does not limit access to a specific category of information that otherwise would not be accessible anymore. Fourthly, that the measures have the effect of preventing unauthorised access to protected subject matter or, at least, make it difficult to access protected subject matter. The court explained that some Internet users would stop visiting the website altogether, whilst others might try to circumvent the blocking measures. In both cases, this would satisfy the requirement. Given the dynamic nature of the injunction and Stichting Brein's continuous efforts to request blocking injunctions for other websites, it is to be expected that it will become more and more difficult over time for Internet users to access the unlawful subject matter. The court held that the measures either prevent or hamper access to the unlawful content and discourage Internet users from attempting to access the website.

Finally, the Amsterdam Court of Appeal ruled that the domain names and IP addresses of The Pirate Bay websites would have to be blocked by the ISPs, including new domain names that provide access to the same infringing website. A breach of this obligation is subject to penalty payments.

Gerechtshof Amsterdam, 2 juni 2020, ECLI:NL:GHAMS:2020:1421.

https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:GHAMS:2020:1421

Amsterdam Court of Appeal, 2 June 2020, ECLI:NL:GHAMS:2020:1421.

[NL] Illegal content posted during public broadcaster's Facebook Livestream

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On 7 July 2020, the Rechtbank Amsterdam (District Court of Amsterdam) delivered a notable judgment on illegal content posted during a public broadcaster's Facebook Live event. The content was held to fall under Article 137c of the Dutch Criminal Code, which forbids the public insult of a group of people based on their race, religion, sexual orientation, etc.

The facts of this case concern the comment of a 49-year-old man which he posted in the comment section of the public broadcaster NOS's livestream of the *Keti Koti* festival, broadcast on Facebook Live. This is an annual festival which celebrates the abolition of slavery. In response to the livestream in which, at that moment, garlands were being laid in memory of slavery, he wrote: *De slaven mogen de krans slepen* (the slaves may drag the wreath). The broadcast was viewed by a large number of people, including people with a Surinamese background. This act led to criminal proceedings against the man, in which he argued before the court that it had not been his intention to insult a group of people, and that he was shocked at his own behaviour. For that reason, he apologised to the court and the injured parties.

To impose criminal liability, the court must examine whether the comment falls within the requirements of Article 137c of the Dutch Criminal Code. This can be done by the court on the basis of assessment criteria developed in previous European Court of Human Rights (ECtHR) case law under Article 10 of the European Convention on Human Rights (ECHR). In short, the court must examine (1) whether the expression is aimed at insulting a group of people on account of their race, religion, beliefs, sexual orientation or physical or mental disability; (2) whether the expression was used in a particular context that possibly removes its offensive character because of the right to free expression under Article 10 ECHR; and (3) whether the statement should be regarded as unnecessarily hurtful.

As regards these assessment criteria, the court stated that the use of the word '*slaven*' (slaves) was intended to hurt people of colour, given the fact that their ancestors were forced into slavery. The man had also used a smiling emoticon, which enhanced the malicious character of the comment. Furthermore, the ECtHR had ruled in its earlier rulings that the offensive character of a statement may be justified when it contributes to the public debate. Since the man pointed out that he had not intended to discuss a specific topic, the comment did not contribute to the public debate. Moreover, the court viewed the comment as 'very serious and unnecessarily offensive', which contributed to the man's conviction. The court did take into account the man's lack of a criminal record, and the fact that he had apologised for his mistakes. Thus, the court imposed a conviction for group insult, and sentenced him to a fine of EUR 300, half of which is conditional.

Rechtbank Amsterdam 7 juli 2020, ECLI:NL:RBAMS:2020:3315

https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBAMS:2020:3315

Amsterdam District Court 7 July 2020, ECLI:NL:RBAMS:2020:3315

[NL] Investigative documentary using hidden-camera footage not unlawful

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On 9 June 2020, the *Gerechtshof Amsterdam* (Amsterdam Court of Appeal) issued an important ruling on the use of hidden-camera footage as part of a commercial broadcaster's investigative programme. The case arose on 9 October 2016, when the Dutch broadcaster SBS6 broadcast an episode for the television series *Undercover in the Netherlands*, addressing the performance of illegal polygamous wedding ceremonies by imams. The show used hidden cameras attached to witnesses of a ceremony in order to document it. The claimant, the Imam who was secretly filmed for this episode, initiated legal proceedings against SBS6, challenging the lawfulness of the hidden-camera footage.

The claimant submitted five claims to demonstrate that SBS6 had acted unlawfully towards him. The claimant argued that (1) SBS6 did not lawfully broadcast the footage taken of him, (2) this footage was manipulated and therefore did not portray the ceremony accurately, (3) his right to private life under Article 8 of the European Convention on Human Rights (ECHR) had been violated as he was recognisable in the footage, (4) his reputation was damaged as a result of the broadcast, (5) there was a direct causal relationship between the broadcast and his dismissal from his job and SBS6 was therefore required to compensate him, and (6) the broadcast made it impossible for the claimant to find future employment. Throughout his argument, the claimant stated that he had not been aware of the polygamous nature of the arrangement and that the Nikah (Islamic wedding ceremony) was not official as certain steps still needed to be taken by the parties involved. SBS6 responded to these claims by arguing that the footage did not portray the claimant inaccurately and that, more importantly, SBS6 has the right to freedom of expression when making its documentaries (Article 10 ECHR), particularly in relation to matters of public interest.

In its judgment of 9 June 2020, the Court of Amsterdam dismissed the Imam's claims and ruled that the episode using hidden-camera footage was not unlawful. The court came to its decision on the basis of an evaluation of the footage and an assessment of the freedom of expression. Contrary to the argument advanced by the claimant, the court argued that both the raw and edited footage illustrate that the claimant was aware of the polygamous nature of the wedding and therefore did not portray him inaccurately. The footage shows the claimant acknowledging the polygamous nature of the wedding ceremony and declaring that he had no objections to performing it. The court further argued that the fact that the ceremony was not completed, given the pending commitments of the parties, did not lead to a different assessment. Furthermore, the court justified the use of hidden cameras by emphasising the importance of documenting and reporting illegal polygamous wedding ceremonies. The court supported SBS6's argument that the broadcaster has a certain role to play in documenting social wrongdoing,

as is the objective of *Undercover in the Netherlands,* and should have the freedom to do so.

Gerechtshof Amsterdam, 9 juni 2020, IEF 19309, C/13/635267

http://ie-forum.nl/documents/ecli/5f04593b-6ee4-4a80-823f-6127c35ff8c2.pdf

Amsterdam Court of Appeal, 9 June 2020, IEF 19309, C/13/635267

NORWAY

[NO] Media Liability Act enters into force

Gudbrand Guthus
Norwegian Media Authority

In May 2020, the *Storting* (Norwegian Parliament) unanimously passed the Act relating to editorial independence and liability of editor-controlled journalistic media, *medieansvarsloven* (Media Liability Act). The act entered into force on 1 July 2020. It updates and gathers special rules on liability in the media field and introduces new legislative provisions. The former *mediefridomslova* (Editorial Independence Act) is repealed from the entry into force of the new act.

The legislative process followed up on the report of the *Medieansvarsutvalget* (Media Liability Commission) on freedom of expression and liability in a new media reality, released in 2011.

The purpose of the act is to facilitate open, informed public discourse by ensuring editorial independence and establishing clear liability regulation for content published in editor-controlled journalistic media. This is in line with the so-called infrastructure requirement *(infrastrukturkravet*)in Article 100 of the Norwegian Constitution, which establishes that conditions should be created to facilitate open and enlightened public discussion.

The act is technology neutral and applies to media engaged in regular journalistic production and the dissemination of news, current affairs and issues of debate to the public. The act does not apply to media whose primary activities are advertising or marketing. Nor does it apply to news agencies. However, while adopting the act, the parliament requested a report from the government regarding a possible extension of the scope to cover news agencies disseminating quality-controlled content.

The act states that the medium's owner or publisher shall appoint an editor, who shall lead the medium’s editorial activities and make editorial decisions within the framework of the medium’s stated values and purpose. However, the owner or publisher may not issue instructions relating to that editor’s decisions and may not demand the right to review or preview material prior to general publication.

The editor shall ensure that user-generated content is clearly separated from editorial content in the medium and is clearly identified. When the medium has rules applicable to user-generated content, the editor shall provide information on the rules and how they are enforced. The editor shall facilitate the notification of unlawful content.

Lov om redaksjonell uavhengighet og ansvar i redaktørstyrte journalistiske medier (medieansvarsloven).

https://lovdata.no/dokument/NL/lov/2020-05-29-59?q=medieansvarslov

Act on editorial independence and responsibility in editor-controlled journalistic media (Media Liability Act).

POLAND

[PL] New VOD-related fees in Poland

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As of 1 July 2020, on-demand audiovisual media service providers in Poland are subject to a new fee: the so-called “Netflix tax”. The fee is to be paid by on-demand audiovisual media service providers to the Polish Film Institute (PISF) and amounts to 1.5% of the revenue received from fees for access to audiovisual media services made available to the public on demand or from commercial communications, whichever is higher.

The new VOD-related fee has been introduced by the Polish Government as a response to the COVID-19 pandemic. The fees collected by the PISF will be allocated to cinematographic projects, that is, film production, the organisation of festivals and other film events, and are aimed at helping the Polish film industry recover from the crisis. The justification for the project lies in the estimation that the tax will bring the institution revenue of approximately PLN 15 million by the end of 2020 and at least PLN 20 million per year in subsequent years.

An on-demand audiovisual media service provider established in another member state of the European Union shall make the payment of 1.5% of the revenue received from fees for access to audiovisual media services made available to the public on demand, determined on the basis of the revenue received on the territory of the Republic of Poland. However, the amended law provides for exceptions to the payment obligations: micro-enterprises and on-demand audiovisual media service providers that did not have more than 1% of subscribers of data transmission services providing broadband Internet access during the previous year. The payment is to be made on a quarterly basis, within 30 days after each quarter.

The right to impose obligations on on-demand audiovisual media service providers for the development of national cinematography is not fully harmonised at EU level, and member states have a degree of freedom in this respect. Directive 2018/1808 on audiovisual media services indicates that member states have the right to impose such obligations on service providers under their jurisdiction. In addition, it indicates that if member states decide to impose such obligations on national providers, they may also impose it on providers from other member states who provide services on their territory. The provisions of Directive 2018/1808 are being implemented in all member states. The deadline for its implementation is 20 September 2020. Prior to 1 July 2020, a similar fee to the newly introduced one was paid only by broadcasters, cinema theatres and distributors, that is, entities which derive income from the exploitation of the legacy of Polish cinematography. However, as the Polish law on cinematography was first introduced in 2005 when on-demand audiovisual media services did not

exist, the lack of provisions imposing fees on on-demand audiovisual service providers led to a degree of inequality - for example, television broadcasters who provide on-demand audiovisual services used to pay a fee on part of their television advertising revenue, yet did not have to pay anything on the advertising revenue generated from on-demand audiovisual services.

Platformy VoD zapłacą na polskie kino. Jest decyzja Sejmu, Business Insider.

https://businessinsider.com.pl/media/internet/skladka-na-polskie-kino-od-platform-vod/qk51h8b?utm_source=businessinsider.com.pl_viasg_businessinsider&utm_medium=referal&utm_campaign=leo_automatic&srcc=ucs&utm_v=2

VOD platforms will pay for Polish cinema. There is a decision of the Sejm [Lower house of Parliament], Business Insider.

Ustawa z dnia 30 czerwca 2005r. o kinematografii.

http://isap.sejm.gov.pl/isap.nsf/download.xsp/WDU20051321111/U/D20051111Lj.pdf

Polish Cinematography Act of 30 June 2005.

ROMANIA

[RO] Aid for the Romanian cinema industry

Eugen Cojocariu
Radio Romania International

On 19 August 2020, the Romanian Government adopted the Decision on amending and supplementing Government Decision No. 421/2018 for the establishment of a state aid scheme to support the film industry (see, *inter alia,* IRIS 2011-2/5, IRIS 2018-8/37, IRIS 2019-2/22, IRIS 2019-4/28, IRIS 2020-5/30, IRIS 2020-6/4 and IRIS 2020-7/12).

The Minister of Culture, Bogdan Gheorghiu, announced that the film and audiovisual industry, through the Ministry of Economy, Energy and Business Environment, would soon be able to benefit from non-reimbursable financial support to the amount of up to 45% of the project budget. The amendments brought by this Government Decision aim at extending the term of validity of the state aid scheme until 31 December 2023, and organising the financial allocations and their payment, the benficiary obligations and the Selection Commission (Romanian Film Commission).

The film industry will receive an additional EUR 150 million in the next three years, the maximum budget of the state aid scheme, thus reaching RON 1.2 billion (EUR 250 million), the Ministry of Economy announced. The amount is divided into commitment appropriations for the issuance of financing agreements for the period 2018-2023 and budgetary appropriations for the payment of state aid for the period 2018-2025.

Non-reimbursable financial allocations will amount to 35% of the total eligible expenses; these refer to the acquisition, rental and manufacture of goods and/or services induced by the development of film projects and film production in Romania, as well as fees, salaries and other payments made to individuals related to the implementation of the project. The allocation is granted on the condition that at least 20% of the total budget is spent in Romania.

Another objective of the state aid scheme is the promotion of Romania as a tourist destination. Thus, an additional 10% will be allocated over and above the 35% allocation if geographical areas, tourist destinations or cities within the country are explicitely shown for promotional purposes and when the country's language, traditions and values are highlighted.

The verification of the eligible projects, processed on a "first come, first served" basis, will be performed by the Romanian Film Commission, and will be carried out by scholars, representatives of the cultural and artistic fields, cinema practitioners, people with experience in business, law, economy, finance or accounting and auditors with at least three years of experience in the field of

state aid.

The state aid scheme for supporting the film industry has a multi-annual character and will run until 31 December 2023, with the possibility of extension. Until this date, financing agreements can be concluded on the basis of this scheme, in compliance with the state aid legislation, within the limit of the commitment credits approved annually by the state budget law for this programme.

Hotărârea de Guvern privind modificarea şi completarea Hotărârii Guvernului nr. 421/2018 pentru instituirea Schemei de ajutor de stat privind sprijinirea industriei cinematografice – proiect.

http://e-consultare.gov.ro/w/proiect-de-hotarare-a-guvernului-privind-modificarea-si-completarea-hotararii-guvernului-nr-421-2018-pentru-instituirea-unei-scheme-de-ajutor-de-stat-privind-sprijinirea-industriei-cinematografice/

Government Decision on amending and supplementing Government Decision No. 421/2018 for the establishment of the State aid scheme regarding the support of the film industry - project.

Schema de ajutor de stat privind sprijinirea industriei cinematografice a fost prelungită până în 2023 - comunicat de presă.

https://www.economie.gov.ro/schema-de-ajutor-de-stat-privind-sprijinirea-industriei-cinematografice-a-fost-prelungita-pana-in-2023

State aid scheme to support the film industry has been extended until 2023 - press release.

[RO] Most popular torrent site in Romania seized by prosecutors

Eugen Cojocariu
Radio Romania International

Filelist.ro, the most popular and used torrent site in Romania, which has been operating for the last 12 years, was seized by the prosecutors of the Prosecutor's Office attached to the High Court of Cassation and Justice. The prosecutor's office announced that this domain name had been seized in accordance with the provisions of Article 249 of the Code of Criminal Procedure (General conditions for taking precautionary measures), the domain name being the subject of a criminal case.

On the site, users could find links to torrents in order to download copyrighted video games, movies and series, music, and software for applications, free of charge. The downloads were not made directly from the site, but with the help of a torrent programme.

The anonymous representatives of the torrent site stated that the protection systems of the site prevented the identification of users. Filelist stated that they cared very much about the security and anonymity of their users, and that no personal data was stored on their server anyway. Moreover, they argued that no accusations had been brought to their attention and said that they would continue to fight for the right of their users to freedom of expression and communication.

Just a few days after the seizure, the website was back online, but on the .io domain, dedicated to the British Indian Ocean Territory.

At the end of 2018, following a court ruling, eight international film production companies (Twentieth Century Fox Film Corporation; Universal City Studios Productions; Universal Cable Productions; Warner Bros. Entertainment; Paramount Pictures Corporation; Disney Enterprises; Columbia Pictures Industries; and Sony Pictures Television) obtained the permanent blocking of access to sites whose content violates the legislation on copyrights by the clients of the main local Internet providers. The unprecedented decision in Romania concerned two online streaming sites, *www.filmehd.net* and *www.filmeonline2013.biz*, as well as the portal *www.thepiratebay.org*, which uses torrent technology. The tribunal explained that the decision is not opposable to the actual operators of the pirate websites, only to the Internet operators, in their capacity as intermediaries.

The sentence was based on Romanian Law No. 8/1996 on Copyright and Related Rights. As the plaintiffs were American companies, the provisions of the Berne Convention for the Protection of Literary and Artistic Works were also applied, however reference was also made to two European Union directives governing copyrights: Directive 2001/29/EC and Directive 2004/48/EC.

Cel mai mare site de torrente din România a înviat după 3 zile. Cum păcăleşte Filelist sechestrul pus de Justiţie – Agenţia Mediafax

https://www.mediafax.ro/justitie/cel-mai-mare-site-de-torrente-din-romania-a-inviat-dupa-3-zile-cum-pacaleste-filelist-sechestrul-pus-de-justitie-19113553

The largest torrent site in Romania revived after 3 days. How Filelist tricks the seizure made by Justice - Mediafax Agency

Sentinţa judecătorească prin care marii operatori de Internet din România sunt obligaţi să blocheze site-urile cu filme piratate, ziare.com.

https://ziare.com/internet-si-tehnologie/acces-internet/sentinta-judecatoreasca-prin-care-marii-operatori-de-internet-din-romania-sunt-obligati-sa-blocheze-site-urile-cu-filme-piratate-1565942

Judgement by which the major Internet operators in Romania are forced to block sites with pirated movies, ziare.com.

[RO] Rules for the 2020 local elections campaign coverage

Eugen Cojocariu
Radio Romania International

On 18 August 2020, the *Consiliul Naţional al Audiovizualului* (National Audiovisual Council, CNA) adopted Decision No. 475/2020 on the rules governing the audiovisual campaign for the local elections in 2020. The local elections in Romania are scheduled for 27 September 2020; they were postponed from May-June 2020 due to the COVID-19 pandemic (see, *inter alia,* IRIS 2008-10/27, IRIS 2009-1/29, IRIS 2009-10/24, IRIS 2011-3/29, IRIS 2011-9/31, IRIS 2012-6/30, IRIS 2014-5/27, IRIS 2014-10/30, IRIS 2016-10/25, IRIS 2019-5/23, IRIS 2019-6/21 and IRIS 2019-9/22).

Article 2 foresees that the candidates have free access to radio and television stations, both public and private. According to Article 3, public and private broadcasters are required to ensure a fair and balanced campaign for all election candidates, respecting the following principles: a) fairness - all candidates must be able to make themselves known to the electorate; b) balance in the presentation of the candidates' campaign activities ; c) fairness - all election candidates must be treated in an objective and equitable manner. Article 4(3) provides that in litigious situations regarding the allocation of airtime, the stations will have to prove that they have offered all election candidates appropriate access under the conditions of Law No. 115/2015 of the local elections.

Article 5 stipulates that in order to cover the election campaign, broadcasters may produce and broadcast only the following types of election programmes: a) informative programmes, in which information on the electoral system, voting technique and the campaign activities of candidates can be broadcast; for this purpose, the scheduled duration of the news programme may be increased by a maximum of 15 minutes. Election news programmes can be broadcast from Monday to Sunday; b) electoral programmes, in which the candidates running for election can present their political programmes and election campaign activities; in the case of the live broadcasting of campaign activities, the duration of these broadcasts will be included in the airtime granted to each opponent. In the case of radio stations, the programmes will be identified as such at the beginning of the programme, and in the case of television, this will be indicated by visibly displaying 'election programme' on the screen throughout the broadcast; political broadcasts can be shown from Monday to Friday; c) electoral debates, in which the broadcasters discuss the electoral programmes and the topics of public interest related to the election campaign, with the participation of at least two candidates or their representatives; in case of non-participation of a candidate/representative thereof, this fact is mentioned. Election debate shows can be broadcast from Monday to Sunday.

Article 6 states that (1) during the election campaign, the candidates and the representatives of election opponents have access only to those programmes provided for in Article 5 (1) b) and c) broadcast by radio and television stations, public and private, including cable, involved in the election campaign; (2) during the election campaign, broadcasters may not broadcast programmes produced, conducted or moderated by candidates and declared representatives of election opponents.

According to Article 7, (1) the informative broadcasts are subject to the obligation of objectivity, equity and the provision of accurate information to the public; (2) in the informative programmes, the presentation of the campaign activities will be made exclusively by broadcasters. It is forbidden to broadcast contents related to campaign activities conducted or made available to broadcasters by election candidates or to broadcast interviews given by candidates or representatives of election opponents; (3) candidates holding public office may appear in news programmes only when they concern problems related to the exercise of their function; in these situations, broadcasters have the obligation to ensure the equity and pluralism of opinions.

Article 8 provides, *inter alia*, that (1) broadcasters must ensure that all election candidates are given fair conditions regarding freedom of expression, the pluralism of opinions and equal treatment and that (3) broadcasters are obliged to specify the capacity in which the persons invited on the programmes express themselves, such as that of candidate or his/her representative.

Article 13 is another important article of the Decision: from 48 hours before the start of voting until the end of voting, it is prohibited: a) to present opinion polls, televotes or street surveys; b) broadcast party political broadcasts; c) invite or present candidates and/or representatives of election opponents on radio and television programmes, including cable television, except for situations related to the broadcasting of rectifications and replies linked to programmes broadcast on the last day of the campaign; d) comment on the conduct of the campaign, as well as on candidates and election opponents.

Finally, Article 14 stipulates that on voting day, the following are prohibited: a) the activities provided for in Article 13; b) the presentation of polls conducted at the exit of polling stations before the end of voting time; c) comments regarding the election candidates before the end of the voting time; d) exhortations to vote or not to vote for a candidate or the candidacies submitted by the election opponents.

Decizie nr. 475 din 18 august 2020 privind regulile de desfășurare în audiovizual a campaniei electorale pentru alegerile locale din anul 2020

https://www.cna.ro/DECIZIE-nr-475-din-18-august-2020.html

Decision No. 475 of 18 August 2020 on the rules for the audiovisual campaign for the local elections in 2020

SLOVENIA

[SI] The government proposes changes to a range of media legislation

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COMMSOL

On 9 July 2020, the Slovenian Ministry of Culture published draft amendments to three pieces of legislation: the Slovenia Radio and Television Act, the Mass Media Act and the Slovenia Press Agency Act. These draft laws need to be considered as a package as they are connected in terms of some of the changes to clauses. The drafts were published for consultation and the time allowed was five days (to 15 July), which led to widespread criticism, as this did not follow the normal legal procedure as regards the time allowed for consultation. A statement criticising the limits to public consultation was also issued by the Council of Europe Commissioner for Human Rights. The public consultation was extended to 5 September 2020. Concerns have been expressed both nationally and in the international community regarding the proposed laws and their impact on the media landscape. In particular, there will be a major impact on the finances of the public service broadcaster. There is also concern regarding the independence of the national press agency, the STA.

The previous government published a draft Media Law in June 2019 (see IRIS 2019-10:1/24), but this did not move forward due to the resignation of the government in February 2020. Two of the major changes in the new (2020) draft concern the sources of funding of special interest and public interest content, and changes to media ownership transparency.

Under the current law, the finances for supporting public interest media are provided from the state budget. The new draft law has deleted this provision. Also, in the existing law, the state provides funding to support: the plurality and democracy of press media providing news and information; the plurality and democracy of radio, television and electronic publications; the development and co-funding of radio and television programmes produced by the local, regional, student and non-profit channels of special importance.

For the local, regional, student and non-profit channels, state funding (calculated as being equivalent to 3% of the RTV Slovenia licence fee) was provided. The draft law of 2019 proposed another 3% in state financing to fund the plurality of the press, and for the plurality of radio, TV and electronic publications. The new draft law replaces the former state budget funding with the use of 5% of the actual revenue generated by the RTV Slovenia licence fee. This financial support is for: producing and distributing programmes of special importance; supporting the production of original media content; creating content and distributing programmes for people with disabilities; funding activities to improve the quality and professionalism of journalism; supporting media literacy; promoting the

recognition of fake news and misleading information, etc.

As regards the criteria for the allocation of these funds in the calls for tender, these are no longer outlined in the law. The conditions for granting funds will be defined in a by-law issued by the Ministry of Culture. After selecting the recipient for funding, an executive decision by the Ministry will be binding on RTV Slovenia regarding the provision of funding.

The draft law of 2019 introduced a “public interest test” in relation to media concentration and media mergers. This initiative has been removed from the 2020 draft law. The draft law of 2019 proposed removing cross-media owner articles, the rationale for which was to better reflect the reality of pay-tv and distribution companies now operating TV channels. This amendment has been retained. The new draft has also reduced the obligations regarding the transparency of media ownership, whereby it is no longer necessary to include ownership shares or the media shares of foreigners when publishing information on media companies in the official gazette.

A new fund for Slovenian television production has been introduced. Distribution operators have to contribute EUR 3.50 per subscriber to the fund, which will be used for the production of: TV films and serials; documentaries; news; culture; and entertainment. The eligible TV media are those with the status of non-profit channels of special importance that reach at least 0.3% of the monthly viewing rate or are accessible via a digital terrestrial network.

The Slovenia Radio and Television Act concerns the Slovenian public broadcaster RTV Slovenia. The proposed amendments here include a change in the financing of public interest media (noted above), which will now be sourced from the amount of 5% of the licence fee collected by RTV Slovenia in the previous year. In addition, a further 3% of the RTV Slovenia licence fee will be used to finance the Slovenian Press Agency (STA).

A further proposal of the law is to separate the transmission company Oddajniki in zveze d.o.o. (currently owned and operated by RTV Slovenia) within six months of entry into force of the law, and to establish a separate state company to operate this business (the broadcast and transmission infrastructure for radio and television, including the digital terrestrial system).

The draft Law on the Slovenian Press Agency (*Slovenska Tiskovna Agencija*, STA) proposes changes regarding the appointment of the members of the Supervisory Board of the STA. Under the current law, the National Assembly of the Republic of Slovenia appoints four members of the Supervisory Board following the proposal of a list of experts by the government, choosing one media expert, one economic and financial expert, one legal expert and one IT expert. A further member is elected by the Workers' Council in accordance with the law governing the participation of employees in management.

Under the new proposals, four members of the Supervisory Board will be appointed by the Government of the Republic of Slovenia on the proposal of the Minister of Culture. As noted above, the financing of the STA will now come from

the licence fee of the public service broadcaster.

There was a strong national critical response from Slovenian stakeholders, journalists and experts concerning the three laws. In addition, there has been a strong reaction from the international community. The European Alliance of News Agencies (EANA) expressed particular concern regarding the independence of the STA. A joint statement from the European Broadcasting Union (EBU), the European Federation of Journalists (EFJ), and the South East Europe Media Organisation (SEEMO) expressed deep concern regarding the proposed changes to the funding of RTV Slovenia, which "will jeopardize and greatly challenge the fulfilment of public service media's remit which, as defined by the Law, has to serve all segments of society to inform, educate and entertain."

Zakon o spremembah in dopolnitvah Zakona o Slovenski tiskovni agenciji.

https://e-uprava.gov.si/drzava-in-druzba/e-demokracija/predlogi-predpisov/predlog-predpisa.html?id=11494

Law amending the Slovenian Press Agency Act.

Zakon o spremembah in dopolnitvah Zakona o medijih.

https://e-uprava.gov.si/drzava-in-druzba/e-demokracija/predlogi-predpisov/predlog-predpisa.html?id=10493

Slovenian Ministry of Culture: Draft Media Laws under consultation.

Zakon o spremembah in dopolnitvah Zakona o Radioteleviziji Slovenija.

https://e-uprava.gov.si/drzava-in-druzba/e-demokracija/predlogi-predpisov/predlog-predpisa.html?id=11493

Law amending the RTV Slovenia Act (draft.

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